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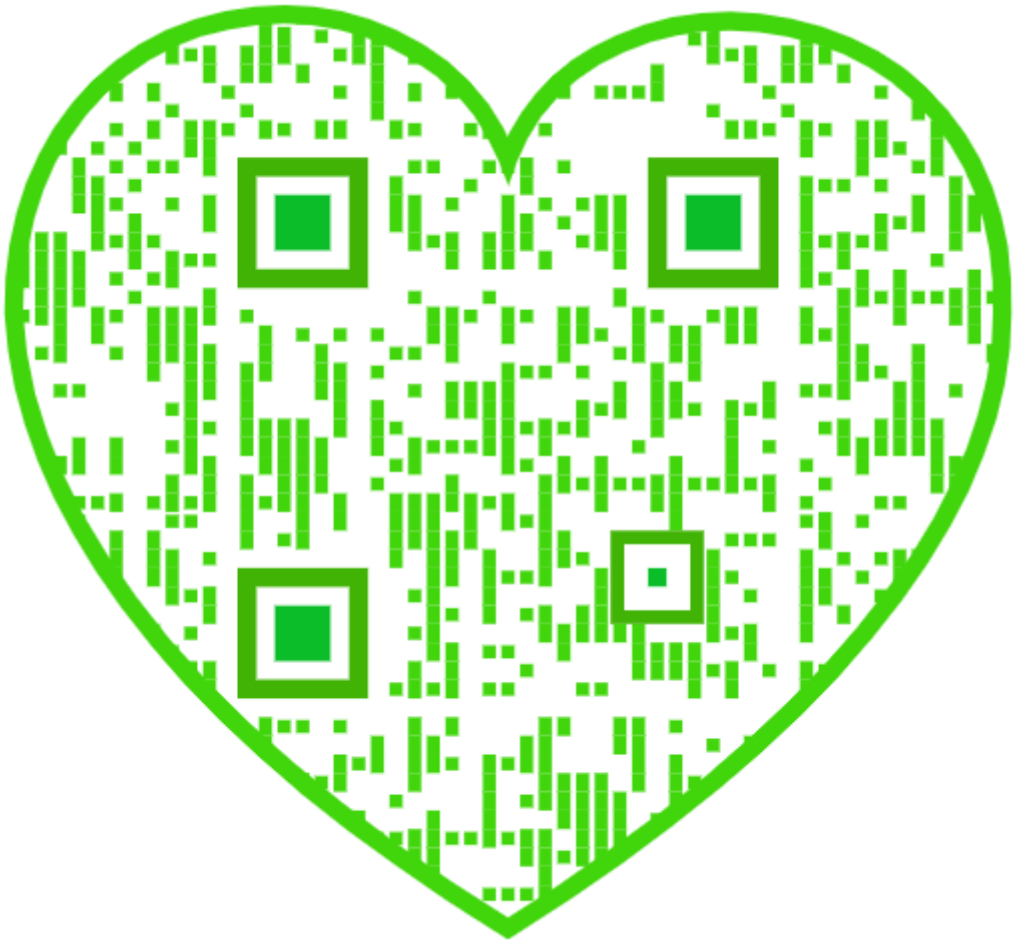

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Supplementary Proceedings, see EXECUTIONS.
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I. DEFINITION.

A creditors' bill has been defined to be a bill by which a creditor seeks to satisfy his debt out of some equitable estate of the debtor which is not liable to levy and sale under execution at law,[1] or out of some property which has been put beyond the reach of the ordinary process.[2]

II. WHEN MAINTAINABLE.

A. Generally — 1. When Remedy at Law. A cardinal rule of equity jurisprudence particularly applicable in this class of cases is that a court of equity will not aid a complainant where there is an adequate remedy at law.[3] Where the property sought to be subjected by a creditors' bill to the payment of the owner's debts can be reached by the process of courts of law the bill will not be

1. Newman *v.* Willets, 52 Ill. 98.

Other definitions are : "A bill for the discovery of assets, debts owing by third persons and the like." Feldenheimer *v.* Tressel, 6 Dak. 265, 43 N. W. 94.

"A bill filed for an account of decedent's assets and a settlement of the estate or a bill filed against a fraudulent conveyance." Yates *v.* Seitz, 7 D. C. 11, 27.

"A proceeding to enforce the security of a judgment-creditor against the property and interest of his debtor." Huneke *v.* Dold, 7 N. M. 5, 15, 32 Pac. 45.

2. Bakewell *v.* Keller, 11 Wkly. Notes Cas. (Pa.) 300.

In their most comprehensive sense they are bills in equity by creditors to enforce payment of debts out of the property of debtors, under circumstances which impede or render impossible the collection of the debts by the ordinary process of execution. Huntington *v.* Jones, 72 Conn. 45, 43 Atl. 564; Houghton *v.* Axelsson, 64 Kan. 274, 67 Pac. 825.

They are in the nature of proceedings in rem rather than *in personam*, and are in their nature ancillary and not original proceedings. Houghton *v.* Axelsson, 64 Kan. 274, 67 Pac. 825.

3. *California.*— Mesmer *v.* Jenkins, 61 Cal. 151; Lupton *v.* Lupton, 3 Cal. 120.

Colorado.— Goddard *v.* Fishel-Schlichton Importing Co., 9 Colo. App. 306, 48 Pac. 279.

Florida.— Coogler *v.* Mayo, 21 Fla. 126.

Georgia.— Pease *v.* Scranton, 11 Ga. 33.

Illinois.— Huening *v.* Buckley, 87 Ill. App. 648.

Maine.— Shaw *v.* Monson Maine Slate Co., 96 Me. 41, 51 Atl. 285.

Nebraska.—Glover *v.* Hargadine-McKittrick Dry-Goods Co., 62 Nebr. 872, 87 N. W. 170.

North Carolina.— Bridges *v.* Moye, 45 N. C. 170.

Ohio.— Under the statute a creditors' bill can only be filed when the judgment debtor has no personal or real property subject to levy on execution. Lee *v.* Harback, 2 Ohio Dec. (Reprint) 361, 2 West. L. Month. 527.

Pennsylvania.— Suplee *v.* Callaghan, 200 Pa. St. 146, 49 Atl. 950; People's Nat. Bank *v.* Kern, 193 Pa. St. 59, 44 Atl. 331.

Rhode Island.—Shreveport First Nat. Bank *v.* Randall, 20 R. I. 319, 38 Atl. 1055, 78 Am. St. Rep. 867; Godding *v.* Pierce, 13 R. I. 532.

Texas.— Meier *v.* Waco State Bank, (Civ. App. 1894) 27 S. W. 881; White Sewing Mach. Co. *v.* Atkeson, 75 Tex. 330, 12 S. W. 812.

Wisconsin.— Almy *v.* Platt, 16 Wis. 169.

United States.— Knox *v.* Smith, 4 How. 298, 11 L. ed. 983; Dahlman *v.* Jacobs, 15 Fed. 863, 5 McCrary 130.

See 14 Cent. Dig. tit. "Creditors' Suit," § 5.

Remedy at law must be ineffectual.— The jurisdiction over a creditors' bill is only exercised when the remedy afforded at law is ineffectual to reach the debtor's property, or when the enforcement of the legal remedy is obstructed by some encumbrance or by a transfer which has been made to defeat the creditors' rights. Goddard *v.* Fishel-Schlichton Importing Co., 9 Colo. App. 306, 48 Pac. 279.

Where an attachment creditor obtained a judgment in a court of law, his right to have the property attached applied to the satisfaction of his debt is amply protected at law against junior execution liens, and a court of equity will not entertain a bill filed by such creditor to enforce his prior lien. Chittenden *v.* Rogers, 42 Ill. 95.

Under Indian Terr. Ann. St. (1899) § 2199, after execution directed to the county in which judgment was rendered, or to the county of the defendant's residence, returned unsatisfied in whole or in part, the plaintiff in an execution may institute an action by equitable proceedings in the court from which the execution issued or in the court of any county in which the defendant resides or is summoned for discovery of any money, chose in action, equitable or legal interest, and all other property which the defendant is entitled to, and for subjecting the same to the satisfaction of the judgment, and in such action persons indebted to the defendant or holding the money or property in which he has an interest, or holding the evidences or securities for the same, may be also made defendants. Daugherty *v.* Bogy, 3 Indian Terr. 197, 53 S. W. 542.

entertained.[4] It must appear that a court of law is incompetent to reach the property of defendant on execution, either by reason of its peculiar character or by inability to discover it.[5] Where, however, the remedy of a creditor at law is incomplete or inadequate, it is no bar to a resort to a court of equity.[6]

2. Exclusiveness of Proceedings Authorized by Statute. Statutes in many of the states now provide creditors with different methods of obtaining satisfaction of their judgments by way of proceedings supplemental to execution. Proceedings under these statutes have in some states been held to be exclusive and to preclude the resort to a creditors' bill in equity,[7] although in most states such proceedings have been held to be cumulative merely and not to take away the remedy by way of a creditors' bill.[8]

B. Exhausting Remedies at Law — 1. General Rule. A general rule established by the cases is that before a creditor seeking to subject his debtor's

4. *Alabama.*— Mendenhall *v.* Random, 3 Stew. & P. 251.

District of Columbia.— Hess *v.* Horton, 2 App. Cas. 81.

Georgia.— Stephens *v.* Whitehead, 75 Ga. 294; Lanson *v.* Grubbs, 44 Ga. 466.

Indiana.— Latham *v.* Barlow, 6 Blackf. 97; West *v.* McCarty, 4 Blackf. 244.

Missouri.— Humphreys *v.* Atlantic Milling Co., 98 Mo. 542, 10 S. W. 140.

Nebraska.— Stoll *v.* Gregg, 23 Nebr. 228, 36 N. W. 495; Rosenfield *v.* Chada, 12 Nebr. 25, 10 N. W. 465.

Pennsylvania.— Suplee *v.* Callaghan, 200 Pa. St. 146, 49 Atl. 950.

United States.— Merchants' Nat. Bank *v.* Sabin, 34 Fed. 492.

See 14 Cent. Dig. tit. "Creditors' Suit," § 5.

5. Durand *v.* Gray, 129 Ill. 9, 21 N. E. 610; Gore *v.* Kramer, 117 Ill. 176, 7 N. E. 504; Chittenden *v.* Rogers, 42 Ill. 95; Greenway *v.* Thomas, 14 Ill. 271; Wren *v.* Dooley, 97 Ill. App. 88; Hughes *v.* Link Belt Machinery Co., 95 Ill. App. 323 [*affirmed* in 105 Ill. 413, 63 N. E. 186, 59 L. R. A. 673]; Huening *v.* Buckley, 87 Ill. App. 648; Fifield *v.* Gorton, 15 Ill. App. 458.

6. *Georgia.*— Ernest *v.* Merritt, 107 Ga. 61, 32 S. E. 898; Orton *v.* Madden, 75 Ga. 83; Bowling *v.* Amis, 58 Ga. 400; Pope *v.* Solomons, 36 Ga. 541; Phillips *v.* Wesson, 16 Ga. 137.

Idaho.— Gordon *v.* Lemp, 7 Ida. 677, 65 Pac. 444.

Kansas.— Ludes *v.* Hood, 29 Kan. 49.

Mississippi.— Folkes *v.* Hayden, 29 Miss. 123.

Texas.— Galveston, etc., R. Co. *v.* McDonald, 53 Tex. 510.

United States.— Burton *v.* Smith, 13 Pet. 464, 10 L. ed. 248.

See 14 Cent. Dig. tit. "Creditors' Suit," § 5.

Where the remedy at law is inadequate the converse of the rules stated is true. Benedict *v.* Land, etc., Co., (Nebr. 1902) 92 N. W. 210; Glover *v.* Hargadine-McKittrick Dry-Goods Co., 62 Nebr. 483, 87 N. W. 107; Thompson *v.* La Rue, 59 Nebr. 614, 81 N. W. 612. See also Wren *v.* Dooly, 97 Ill. App. 88. Thus when proceedings supplementary to execution, as provided in Ida. Rev. St. tit. 2, c. 2, will not result in the application of the judgment debtor's property or money in the payment of the judgment a creditors' bill will lie in favor of the judgment creditor, since in such cases those proceedings are not adequate and cannot accomplish the purpose of a creditors' bill. Gordon *v.* Lemp, 7 Ida. 677, 65 Pac. 444.

7. Rand *v.* Rand, 78 N. C. 12; Seymour *v.* Briggs, 11 Wis. 196; Graham *v.* La Crosse, etc., R. Co., 10 Wis. 459. But see Wisconsin decisions cited *infra*, note 8.

8. *Illinois.*— McNab *v.* Heald, 41 Ill. 326.

Kansas.— Ludes *v.* Hood, 29 Kan. 49.

Montana.— Remedy by a creditors' bill is not merely superseded by proceedings supplemental to execution. Ryan *v.* Maxey, 14 Mont. 81, 35 Pac. 515.

New York.— Koechl *v.* Leibinger, etc., Brewing Co., 26 N. Y. App. Div. 573, 50 N. Y. Suppl. 568; Hart *v.* Albright, 18 N. Y. Suppl. 718, 28 Abb. N. Cas. 74; Skinner *v.* Stuart, 13 Abb. Pr. 442; Catlin *v.* Doughty, 12 How. Pr. 457; Goodyear *v.* Betts, 7 How. Pr. 187. Code Civ. Proc. §§ 1871–1879, which provides for particular creditors' actions does not prevent a creditors' bill in equity, where such bills were cognizable prior to the enactment of the code provisions. Stetson *v.* Hopper, 60 N. Y. App. Div. 277, 70 N. Y. Suppl. 170.

Oregon.— Matlock *v.* Babb, 31 Oreg. 516, 49 Pac. 873; Sabin *v.* Anderson, 31 Oreg. 487, 49 Pac. 870.

Utah.— Enright *v.* Grant, 5 Utah 400, 16 Pac. 595, 5 Utah 334, 5 Pac. 268.

Wisconsin.— By the act of 1860 the effect of decisions in Seymour *v.* Briggs, 11 Wis. 196, and Graham *v.* La Crosse, etc., R. Co., 10 Wis. 459, is taken away and the former remedy of a creditors' bill restored. Williams *v.* Sexton, 19 Wis. 42; Winslow *v.* Dousman, 18 Wis. 456.

United States.— Chancery jurisdiction of a federal court is not superseded by the fact that laws of the state give creditors a remedy at law to sue the debtor of a debtor. U. S. *v.* Howland, 4 Wheat. 108, 4 L. ed. 526. See also Smith *v.* Ft. Scott, etc., R. Co., 99 U. S. 398, 25 L. ed. 437.

The fact that one has made a general assignment is no bar to a creditors' bill to reach assets fraudulently transferred prior to the assignment, although the code permits the

property to the payment of his debt will be assisted in equity he must have exhausted the remedies afforded him by courts of law.[9] The reasons on which

assignee to sue to set aside the transfer, if in fact the assignee has not instituted such suit. Leonard *v.* Clinton, 26 Hun (N. Y.) 288.

9. *Alabama.*— Construing a statute. Turrentine *v.* Koopman, 124 Ala. 211, 27 So. 522. Except in cases where it is sought to subject property fraudulently conveyed. Guyton *v.* Terrell, 132 Ala. 66, 31 So. 83; Turrentine *v.* Koopman, 124 Ala. 211, 27 So. 522; Henderson *v.* Farley Nat. Bank, 123 Ala. 547, 26 So. 226, 82 Am. St. Rep. 140; Rice *v.* Eiseman, 122 Ala. 343, 25 So. 214; Birmingham Shoe Co. *v.* Torrey, 121 Ala. 29, 25 So. 763.

Arkansas.— Branch *v.* Horner, 27 Ark. 341.

California.— Mesmer *v.* Jenkins, 61 Cal. 151.

District of Columbia.— Clark *v.* Walter T. Bradley Coal, etc., Co., 6 App. Cas. 437; Hess *v.* Horton, 2 App. Cas. 81.

Illinois.— Durand *v.* Gray, 129 Ill. 9, 21 N. E. 610; Gore *v.* Kramer, 117 Ill. 176, 7 N. E. 504; Miller *v.* Davidson, 8 Ill. 518, 44 Am. Dec. 715; Crawford *v.* Cook, 55 Ill. App. 351; Harrison *v.* Hill, 37 Ill. App. 30.

Indiana.— Towns *v.* Smith, 115 Ind. 480, 16 N. E. 811.

Iowa.— Peterson *v.* Gittings, 107 Iowa 306, 77 N. W. 1056; Ware *v.* Delahaye, 95 Iowa 667, 64 N. W. 640; Clark *v.* Raymond, 84 Iowa 251, 50 N. W. 1068; Gwyer *v.* Figgins, 37 Iowa 517.

Kentucky.— Weatherford *v.* Myers, 2 Duv. 91; Anderson *v.* Bradford, 5 J. J. Marsh. 69; Scott *v.* Wallace, 4 J. J. Marsh. 654; Halbert *v.* Grant, 4 T. B. Mon. 580.

Maine.— Baxter *v.* Moses, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783; Howe *v.* Whitney, 66 Me. 17; Griffin *v.* Nichter, 57 Me. 270; Corey *v.* Greene, 51 Me. 114; Webster *v.* Clark, 25 Me. 313.

Maryland.— Clagett *v.* Worthington, 3 Gill 83.

Michigan.— Smith *v.* Thompson, Walk. 1; Eldred *v.* Camp, 1 Harr. 162.

Minnesota.— Moffatt *v.* Tuttle, 35 Minn. 301, 28 N. W. 509; Wadsworth *v.* Schisselbauer, 32 Minn. 84, 19 N. W. 390.

Mississippi.— Fleming *v.* Grafton, 54 Miss. 79; Hamilton *v.* Mississippi College, 52 Miss. 65; Pulliam *v.* Taylor, 50 Miss. 551; Vasser *v.* Henderson, 40 Miss. 519, 90 Am. Dec. 351; Prewett *v.* Laud, 36 Miss. 495; Scott *v.* McFarland, 34 Miss. 363; Brown *v.* State Bank, 31 Miss. 454; Echols *v.* Hammond, 30 Miss. 177; Coleman *v.* Rives, 24 Miss. 634; Farned *v.* Harris, 11 Sm. & M. 366; Freeman *v.* Finnall, Sm. & M. Ch. 623; Wright *v.* Petrie, Sm. & M. Ch. 282; Parish *v.* Lewis, Freem. 299.

Missouri.— Humphreys *v.* Atlantic Milling Co., 98 Mo. 542, 10 S. W. 140; Alnutt *v.* Leper, 48 Mo. 319; Burnham *v.* Smith, 82 Mo. App. 35; Carp *v.* Chipley, 73 Mo. App. 22. Or legal remedies shown to be inadequate. Wilkinson *v.* Goodin, 71 Mo. App. 394. But under the statute an exception is made in favor of an attaching creditor, who may maintain a suit to set aside fraudulent conveyances. Mansur, etc., Implement Co. *v.* Jones, 143 Mo. 253, 45 S. W. 41.

Montana.— Wilson *v.* Harris, 21 Mont. 374, 54 Pac. 46; Twell *v.* Twell, 6 Mont. 19, 9 Pac. 537.

Nebraska.— Weaver *v.* Cressman, 21 Nebr. 675, 33 N. W. 478.

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United States.— Terry *v.* Anderson, 95 U. S. 628, 24 L. ed. 365; Virginia Bd. of Public Works *v.* Columbia College, 17 Wall. 521, 21 L. ed. 687; Childs *v.* N. B. Carlston Co., 76 Fed. 86; Brown *v.* John V. Farwell Co., 74 Fed. 764; Goff *v.* Kelly, 74 Fed. 327; Streight *v.* Junk, 59 Fed. 321, 8 C. C. A. 137; Chicago, etc., Bridge Co. *v.* Anglo-American Packing, etc., Co., 46 Fed. 584; Merchants' Nat. Bank *v.* Sabin, 34 Fed. 492; Mann *v.* Appel, 31 Fed. 378; Walser *v.* Seligman, 13 Fed. 415, 21 Blatchf. 130.

See 14 Cent. Dig. tit. "Creditors' Suit," § 67.

Contra in Georgia.—Since the uniform procedure act of 1897, abolishing courts of equity and investing the superior courts with ju-

the rule is based are: (1) That a judgment and execution returned unsatisfied are the best evidences of the debt; (2) that legal tribunals should adjudicate legal claims.[10] A creditor need not, however, enforce his claim against property of the debtor in another state before proceeding against the fraudulent grantees of his debtor to subject land in the county where his judgment was obtained to the payment of the judgment.[11] And it has been held that where it has been established by one of the parties to a creditors' bill by a judgment and return *nulla bona* of execution thereon that the debtor is insolvent, and that for that reason there is no adequate remedy at law, then all creditors, whether having judgments or not, should be allowed to come in by intervening petition.[12] So the exhaustion of the remedy at law against an indorser on an instrument merged into judgment, and who was not a party to the judgment proceedings, is not essential to the maintenance of an equitable action in the nature of a creditors' bill against the judgment debtors.[13] It has been held that where a creditor has security for his debt he must first exhaust such security in order to obtain relief by a creditors'

risdiction of all causes legal and equitable, it is held that the rule requiring a creditor to first exhaust his remedies at law is no longer applicable and that a creditor might in one suit establish his claim and subject equitable interests of his debtor to its payment. De Lacy *v.* Hurst, 83 Ga. 223, 9 S. E. 1052. For the former rule see Stinson *v.* Williams, 35 Ga. 170; Pease *v.* Scranton, 11 Ga. 33; Field *v.* Jones, 10 Ga. 229; Stephens *v.* Beal, 4 Ga. 219; Thurmond *v.* Reese, 3 Ga. 449, 46 Am. Dec. 440; McGough *v.* Columbia Ins. Bank, 2 Ga. 151, 46 Am. Dec. 382.

Necessity of supplementary proceedings.— A creditors' bill to enforce a judgment lien against property claimed by the defendant under a judicial sale need not be preceded by proceedings supplemental to execution, as such summary process is applicable to the discovery of property subject to execution, concealed or withheld by the debtor, or others in collusion with him without pretense of substantial right, and not to cases where the attitude of the parties to the property in controversy is fully understood. Ryan *v.* Maxey, 14 Mont. 81, 35 Pac. 515.

Applications of rule.— General creditors of a society cannot file a bill to enjoin the foreclosing of a mortgage made by the society on the ground that it was unauthorized. Howell *v.* Cooper, 37 Barb. (N. Y.) 582. So where a judgment was obtained against three defendants and a new suit was brought on the judgment, but process therein was served on only one of the defendants in the judgment and execution against the joint property of all defendants and against the separate property of the one served with process, it is not sufficient to authorize a creditors' bill. The creditor had not exhausted all legal remedies. Recovery of a second judgment did not prevent the creditor from suing out execution on the first judgment. Howard *v.* Sheldon, 11 Paige (N. Y.) 558. And it has been held that judgment and execution returned *nulla bona* are necessary prerequisites to the filing of a creditors' bill, although the demand sought to be enforced be one for taxes and the collector has made a return that the defendant had no visible property on which the taxes could be levied. Durant *v.* Albany County, 26 Wend. (N. Y.) 66 [*reversing* 9 Paige 182].

What is a sufficient exhaustion of remedies at law.— Where a suit was instituted to set aside a fraudulent conveyance of land in New York by a debtor who resided in Connecticut and was insolvent and the plaintiff sued him on his debt in Connecticut, pending which suit he died, and the plaintiff sought to revive against the administrator, but the court directed the action to be discontinued and thereafter the probate court appointed commissioners in insolvency who settled and fixed plaintiff's claim on presentation, and the assets of the estate were found insufficient to pay preferred claims and costs, it was held that plaintiff had sufficiently exhausted his remedies at law. National Tradesmen's Bank *v.* Wetmore, 124 N. Y. 241, 26 N. E. 548.

10. Merchants' Nat. Bank *v.* Paine, 13 R. I. 592.

11. O'Brien *v.* Stambach, 101 Iowa 40, 69 N. W. 1133, 63 Am. St. Rep. 368.

12. A. G. Edwards, etc., Brokerage Co. *v.* Rosenheim, 74 Mo. App. 621; Carp *v.* Chipley, 73 Mo. App. 22, where one count is based upon a claim established in the manner required, a second count may be based on a claim not so established. Whether creditors can come in after judgment unless executions upon their judgments were returned unsatisfied before the filing of a creditors' bill *quære?* Mattison *v.* Demarest, 19 Abb. Pr. (N. Y.) 356.

Bill filed by one creditor in behalf of all.— Where a court of equity has under a creditors' bill filed by a judgment creditor for the benefit of himself and all other creditors assumed charge of a debtor's property for distribution among creditors, a creditor who has no judgment can come in. Comstock-Castle Stove Co. *v.* Baldwin, 169 Ill. 636, 48 N. E. 723; Pennell *v.* Lamar Ins. Co., 73 Ill. 303. To the same effect see State *v.* Foot, 27 S. C. 340, 3 S. E. 536.

13. Thompson *v.* La Rue, 59 Nebr. 614, 81 N. W. 612.

bill in equity.[14] Where a judgment debtor is taken in custody under a capias ad satisfaciendum it is presumed to be a satisfaction of the judgment, and so long as the debtor remains in custody no creditors' bill can be brought against him by the plaintiff in the execution.[15] However, a creditor need not have the body of the debtor taken into custody, although the law permits it, where the plaintiff has had execution issued against the property of the debtor.[16]

2. Of Particular Requisites — a. Judgment — (i) *Necessity For* — (a) *General Rule.* One of the first requisites to the maintaining of a creditors' bill is that the creditor has established his claim or debt by a judgment at law. A general creditor with a mere legal demand cannot come into equity.[17] The fact

14. Preston *v.* Colby, 117 Ill. 477, 4 N. E. 375; Barret *v.* Reed, Wright (Ohio) 700. See Johnson *v.* Miller, 50 Ill. App. 60. But *compare* Palmer *v.* Foote, 7 Paige (N. Y.) 437, in which it was held that the owner of a bond and mortgage who had recovered a judgment on the bond and had execution issued and returned *nulla bona* need not foreclose the mortgage before proceeding by way of a creditors' bill to subject the debtor's personal property interests to the payment of the judgment.

Under a statute of Massachusetts a creditor may maintain a bill to reach equitable assets, although his debt is secured by mortgage. Tucker *v.* McDonald, 105 Mass. 423.

15. Tappan *v.* Evans, 11 N. H. 311; Stilwell *v.* Van Epps, 1 Paige (N. Y.) 615; Stuart *v.* Hamilton, 8 Leigh (Va.) 503.

16. Hough *v.* Cress, 57 N. C. 295.

17. *Alabama.*— Brown *v.* Henderson, 123 Ala. 623, 26 So. 199; Marble City Land, etc., Co. *v.* Golden, 110 Ala. 376, 17 So. 935; Lehman *v.* Meyer, 67 Ala. 396; Moses *v.* St. Paul, 67 Ala. 168.

California.— Castle *v.* Bader, 23 Cal. 75.

Colorado.— Hood *v.* Saunders, 11 Colo. 106, 17 Pac. 102; Neuman *v.* Dreifurst, 9 Colo. 228, 11 Pac. 98.

District of Columbia.— Hess *v.* Horton, 2 App. Cas. 81; Morrison *v.* Shuster, 1 Mackey 190.

Florida.— Post *v.* Roach, 26 Fla. 442, 7 So. 854; Barrow *v.* Bailey, 5 Fla. 9.

Georgia.— Albany, etc., Iron, etc., Co. *v.* Southern Agricultural Works, 76 Ga. 135, 2 Am. St. Rep. 26.

Illinois.— Ladd *v.* Judson, 174 Ill. 344, 51 N. E. 838, 66 Am. St. Rep. 267; Dormueil *v.* Ward, 108 Ill. 216; Newman *v.* Willetts, 52 Ill. 98; McConnel *v.* Dickson, 43 Ill. 99; Heacock *v.* Durand, 42 Ill. 230; Bigelow *v.* Andress, 31 Ill. 322; Getzler *v.* Saroni, 18 Ill. 511; Greenway *v.* Thomas, 14 Ill. 271; Ishmael *v.* Parker, 13 Ill. 324; Stone *v.* Manning, 3 Ill. 530, 35 Am. Dec. 119; Cotes *v.* Bennett, 84 Ill. App. 33 [*affirmed* in 183 Ill. 82, 55 N. E. 661].

Iowa.— Ware *v.* Delahaye, 95 Iowa 667, 64 N. W. 640; Clark *v.* Raymond, 84 Iowa 251, 50 N. W. 1068.

Kansas.— Chase State Bank *v.* Chatten, 59 Kan. 303, 52 Pac. 893.

Kentucky.— Robinson *v.* West, 14 B. Mon. 3; Anderson *v.* Bradford, 5 J. J. Marsh. 69; Scott *v.* Wallace, 4 J. J. Marsh. 654; Halbert *v.* Grant, 4 T. B. Mon. 580; Scott *v.* McMillen, 1 Litt. 302, 13 Am. Dec. 239.

Maine.— Griffin *v.* Nichter, 57 Me. 570.

Massachusetts.— Willard *v.* Briggs, 161 Mass. 58, 36 N. E. 687; Geer *v.* Horton, 159 Mass. 259, 34 N. E. 269; Weil *v.* Raymond, 142 Mass. 206, 7 N. E. 860; Carver *v.* Peck, 131 Mass. 291; Phœnix Ins. Co. *v.* Abbott, 127 Mass. 558; Thornton *v.* Marginal Freight R. Co., 123 Mass. 32; Marlborough *v.* Framingham, 13 Metc. 328.

Michigan.— Jenks *v.* Horton, 114 Mich. 48, 72 N. W. 20.

Mississippi.— Echols *v.* Hammond, 30 Miss. 177; Berryman *v.* Sullivan, 13 Sm. & M. 65; Mizell *v.* Herbert, 12 Sm. & M. 547; Comstock *v.* Rayford, 1 Sm. & M. 423, 40 Am. Dec. 102; Freeman *v.* Finnall, Sm. & M. Ch. 623.

Missouri.— Spitz *v.* Kerfoot, 42 Mo. App. 77 (although the debtor may be insolvent); McCoy *v.* Connecticut F. Ins. Co., 87 Mo. App. 73; Kent *v.* Curtis, 4 Mo. App. 121.

Montana.— Wilson *v.* Harris, 21 Mont. 374, 54 Pac. 46.

Nebraska.— Moore *v.* Omaha L. Ins. Assoc., 62 Nebr. 497, 87 N. W. 321; Fairbanks *v.* Welshans, 55 Nebr. 362, 75 N. W. 865; Johnson *v.* Parrotte, 46 Nebr. 51, 64 N. W. 363; Crowell *v.* Horacek, 12 Nebr. 622, 12 N. W. 90; Weinland *v.* Cochran, 9 Nebr. 480, 4 N. W. 67; Weil *v.* Lankins, 3 Nebr. 384.

New Jersey.— Haston *v.* Castner, 31 N. J. Eq. 697; Claflin *v.* French, 28 N. J. Eq. 383; United New Jersey R., etc., Co. *v.* Hoppock, 28 N. J. Eq. 261; Bigelow Blue Stone Co. *v.* Magee, 27 N. J. Eq. 392; Haggerty *v.* Nixon, 26 N. J. Eq. 42.

New York.— Cornell *v.* Savage, 49 N. Y. App. Div. 429, 63 N. Y. Suppl. 540; Burnett *v.* Gould, 27 Hun 366; Brooks *v.* Stone, 11 Abb. Pr. 220, 19 How. Pr. 395; Sloan *v.* Waring, 55 How. Pr. 62; Alger *v.* Scoville, 6 How. Pr. 131; Wiltshire *v.* Marfleet, 1 Edw. 654.

North Carolina.— Brittain *v.* Quiet, 54 N. C. 328, 62 Am. Dec. 202; Bridges *v.* Moye, 45 N. C. 170; Wheeler *v.* Taylor, 41 N. C. 225; Bethell *v.* Wilson, 21 N. C. 610; Donaldson *v.* State Bank, 16 N. C. 103, 18 Am. Dec. 577; Harrison *v.* Battle, 16 N. C. 537.

Ohio.— Clark *v.* Strong, 16 Ohio 317; Simpson *v.* Hook, 6 Ohio Cir. Ct. 27; Marion Deposit Bank *v.* McWilliams, 2 Ohio Dec. (Reprint) 142, 1 West. L. Month. 571; Males *v.* Murray, 10 Ohio S. & C. Pl. Dec. 373, 7 Ohio N. P. 614.

Rhode Island.— Gardner *v.* Gardner, 17 R. I. 751, 22 Atl. 785; Ginn *v.* Brown, 14 R. I. 524.

that an action is pending at law which might result in judgment and execution does not alter the rule.[18] Nor can a defendant file a cross bill in the nature of a creditors' bill based on a general claim.[19] Where a judgment creditor files a bill in respect of a judgment as to which he is entitled to relief by reason of having complied with conditions precedent to relief in equity, he cannot join in his bill and obtain relief in respect of a claim not reduced to judgment.[20]

(B) *Exceptions and Limitations of Rule* — (1) WHERE DEBTOR DECEASED. A line of cases hold that where the debtor is dead a creditor may file a bill to reach equitable assets of the deceased debtor without having procured a judgment at law;[21] but other courts hold that a court of equity will not ordinarily take jurisdiction of proceedings to enforce a claim against a deceased debtor until it has been exhibited and allowed against his estate.[22] Some of them, however, make an exception to this doctrine where an estate of a decedent is insolvent.[23]

(2) WHERE DEBTOR INSOLVENT. The insolvency of the debtor will not relieve a creditor of the necessity of first having his claim established by judgment.[24] In several of the states, however, it is held that the procuring of a

Virginia.— Armstrong *v.* Pitts, 13 Gratt. 235; Rhodes *v.* Cousins, 6 Rand. 188, 18 Am. Dec. 715.

West Virginia.— Johnson *v.* Riley, 41 W. Va. 140, 23 S. E. 698.

United States.— Smith *v.* Ft. Scott, etc., R. Co., 99 U. S. 398, 25 L. ed. 437; Brown *v.* John V. Farwell Co., 74 Fed. 764; Goff *v.* Kelly, 74 Fed. 327; Putney *v.* Whitmire, 66 Fed. 385; Pullman *v.* Stebbins, 51 Fed. 10; Mann *v.* Appel, 31 Fed. 378; Fink *v.* Patterson, 21 Fed. 602; Dahlman *v.* Jacobs, 15 Fed. 863, 5 McCrary 130; Walser *v.* Seligman, 13 Fed. 415, 21 Blatchf. 130; Claflin *v.* McDermott, 12 Fed. 375, 20 Blatchf. 522; Stewart *v.* Fagan, 23 Fed. Cas. No. 13,426, 2 Woods 15; Vint *v.* King, 28 Fed. Cas. No. 16,950. Although a statute of the state authorized proceedings by a creditor on a general claim. Harrison *v.* New York Farmers' L. & T. Co., 94 Fed. 228, 36 C. C. A. 443. See Lilienthal *v.* Drucklieb, 92 Fed. 753, 34 C. C. A. 657, 80 Fed. 562.

See 14 Cent. Dig. tit. "Creditors' Suit," § 46.

Contra.— In Connecticut it is not necessary for a creditor to obtain a judgment before he maintains a creditors' bill, since he can in the same suit have judgment for his debt and the necessary aid to obtain payment out of any of the debtor's property. Huntington *v.* Jones, 72 Conn. 45, 43 Atl. 564; Vail *v.* Hammond, 60 Conn. 374, 22 Atl. 954, 25 Am. St. Rep. 330.

In all cases where a court of equity interferes to aid the enforcement of a remedy at law there must be first, an acknowledged debt, or one established by a judgment rendered; second, an interest of the creditor in the property, or a lien thereon created by contract or by some distinct legal proceeding and giving a right to have it appropriated to pay the debt, although the bill is filed in behalf of all creditors and the debtor is an insolvent corporation. D. A. Tompkins Co. *v.* Catawba Mills, 82 Fed. 780.

A person who owns a county order is a mere creditor at large, and until he obtains a judgment thereon and has execution issued and returned *nulla bona* he cannot by injunction or otherwise disturb the county in the exercise of its general right to dispose of its property. Montague *v.* Horton, 12 Wis. 599.

A receiver appointed in a creditor's proceeding need not first obtain a judgment and have execution issued before filing a bill in equity to collect money alleged to be held in trust for the debtor. Terhune *v.* Bell, (N. J. Ch. 1887) 9 Atl. 111.

Where a corporation had been dissolved and no action could be brought at law against it, a creditors' bill might be maintained to reach assets of the corporation in the hands of third persons without a judgment having first been obtained. Pullman *v.* Stebbins, 51 Fed. 10.

18. Post *v.* Roach, 26 Fla. 442, 7 So. 854.

19. Goff *v.* Kelly, 74 Fed. 327.

20. Claflin *v.* French, 28 N. J. Eq. 383. But see Comstock-Castle Stove Co. *v.* Baldwin, 169 Ill. 636, 48 N. E. 723, holding that when a court of equity has under a creditors' bill filed by a judgment creditor for the benefit of himself and all other creditors assumed charge of a debtor's property for distribution among creditors, a creditor who has no judgment might come in.

21. Shaw *v.* Aveline, 5 Ind. 380; Whitney *v.* Kimball, 4 Ind. 546, 58 Am. Dec. 638; Martin *v.* Densford, 3 Blackf. (Ind.) 295; O'Brien *v.* Coulter, 2 Blackf. (Ind.) 421; Kipper *v.* Glancey, 2 Blackf. (Ind.) 356; Gardner *v.* Gardner, 17 R. I. 751, 24 Atl. 785; Ætna Nat. Bank *v.* Manhattan Ins. Co., 24 Fed. 769. And see Asbury Park First Nat. Bank *v.* White, 60 N. J. Eq. 487, 46 Atl. 1092.

Where the debtor is dead and the debt admitted by his representatives a bill will lie. Merchants', etc., Transp. Co. *v.* Borland, 53 N. J. Eq. 282, 31 Atl. 272.

22. Mesmer *v.* Jenkins, 61 Cal. 151; Winslow *v.* Leland, 128 Ill. 304, 21 N. E. 588; Blanchard *v.* Williamson, 70 Ill. 647; Harris *v.* Douglas, 64 Ill. 466.

23. Steere *v.* Hoagland, 39 Ill. 264; Lyons *v.* Murray, 95 Mo. 23, 8 S. W. 170, 6 Am. St. Rep. 17.

Contra, Estes *v.* Wilcox, 67 N. Y. 264.

24. *Missouri.*— McCoy *v.* Connecticut F. Ins. Co., 87 Mo. App. 73; Kent *v.* Curtis, 4 Mo. App. 121.

judgment and the issuance of execution thereon and its return unsatisfied is but one form of proof of the creditors' want of remedy at law, and that the insolvency of the debtor may be established by other means, and that where it is shown that judgment and execution would be fruitless and involve useless and unnecessary expense a creditor might maintain a creditors' bill to reach equitable interests of his debtor without first obtaining a judgment at law.[25] So it has been held that where the fund sought to be reached is beyond legal process, the debtor is insolvent, and the claim of the complainant is undisputed, a creditors' bill might be maintained, although no judgment was first had establishing the debt.[26]

(3) Absconding or Non-Resident Debtors. Where the debtor has absconded, removed from the state, or is a non-resident, so that personal service cannot be had on him or judgment obtained against him, and there is no property of his within the state subject to attachment, a creditors' bill to subject the equitable interests of the debtor within the state may be maintained without a judgment at law having been first obtained establishing the debt.[27] But non-residence alone will not authorize the filing of a creditors' bill in the first instance to enforce a

New Mexico.— Stanton *v.* Catron, 8 N. M. 355, 45 Pac. 884.

New York.— Adee *v.* Bigler, 81 N. Y. 349. Although debtor is deceased. Estes *v.* Wilcox, 67 N. Y. 264.

Ohio.— Hay *v.* New Baltimore, etc., Turnpike, etc., Co., 1 Handy 281, 12 Ohio Dec. (Reprint) 142.

Rhode Island.— Ginn *v.* Brown, 14 R. I. 524.

Tennessee.— McKeldin *v.* Gouldy, 91 Tenn. 677, 20 S. W. 231.

Texas.— Taylor *v.* Gillean, 23 Tex. 508.

See 14 Cent. Dig. tit. "Creditors' Suit," § 49.

Limitation of rule.— Where the debtors are insolvent and their only property consists of an equity of redemption of certain chattels in the hands of a mortgagee, which cannot be reached by attachment, execution, or garnishment, and the creditors' claim is in effect undisputed, although not reduced to judgment, a court of equity will entertain a creditors' bill to subject the surplus in the mortgagee's hands to the payment of the debt on equitable principles. Burnham *v.* Smith, 82 Mo. App. 35.

25. Kempton *v.* Hallowell, 24 Ga. 52, 71 Am. Dec. 112; Lawson *v.* Virgin, 21 Ga. 356; O'Brien *v.* Stambach, 101 Iowa 40, 69 N. W. 1133, 63 Am. St. Rep. 368; Gordon *v.* Worthley, 48 Iowa 429; Miller *v.* Dayton, 47 Iowa 312; Gwyer *v.* Figgins, 37 Iowa 517; Postlewait *v.* Howes, 3 Iowa 365.

Especially does this rule apply where it appears that defendants were fraudulently wasting the estate of the debtor so that it would probably be entirely dissipated before a final judgment and the return of execution thereon could be had. Livingston *v.* Swofford Bros. Dry Goods Co., 12 Colo. App. 320, 56 Pac. 351; Albany, etc., Iron, etc., Co. *v.* Southern Agricultural Works, 76 Ga. 135, 2 Am. St. Rep. 26 [*citing* Cohen *v.* Morris, 70 Ga. 313; Cohen *v.* Meyers, 42 Ga. 46]. See also Supplee Hardware Co. *v.* Driggs, 13 App. Cas. (D. C.) 272.

In Arkansas it is specially provided by statute that no judgment shall be necessary where the defendant is insolvent. Riggin *v.* Hillard, 56 Ark. 476, 20 S. W. 402, 35 Am. St. Rep. 113.

26. Burnham *v.* Smith, 82 Mo. App. 35; Nieters *v.* Brockman, 11 Mo. App. 600; Beal *v.* McVicker, 3 Mo. App. 592; Luthy *v.* Woods, 1 Mo. App. 167; Mott *v.* Dunn, 10 How. Pr. (N. Y.) 225. But see Luthy *v.* Woods, 6 Mo. App. 67.

27. *District of Columbia.*— Supplee Hardware Co. *v.* Driggs, 13 App. Cas. 272; Droop *v.* Ridenour, 9 App. Cas. 95.

Georgia.— Pope *v.* Solomons, 36 Ga. 541.

Illinois.— Getzler *v.* Saroni, 18 Ill. 511; Greenway *v.* Thomas, 14 Ill. 271. But see Ladd *v.* Judson, 174 Ill. 344, 51 N. E. 838, 66 Am. St. Rep. 267.

Indiana.— Shaw *v.* Aveline, 5 Ind. 380; Kipper *v.* Glancey, 2 Blackf. 356.

Kentucky.— Anderson *v.* Bradford, 5 J. J. Marsh. 69; Curd *v.* Letcher, 3 J. J. Marsh. 443; Scott *v.* McMillen, 1 Litt. 302, 311, 13 Am. Dec. 239.

Michigan.— Earle *v.* Grove, 92 Mich. 285, 52 N. W. 615.

Minnesota.—Overmire *v.* Haworth, 48 Minn. 372, 51 N. W. 121, 31 Am. St. Rep. 660.

Mississippi.— Trotter *v.* Wright, 10 Sm. & M. 607. Under statute. Comstock *v.* Rayford, 1 Sm. & M. 423, 40 Am. Dec. 102.

Missouri.— Pendleton *v.* Perkins, 49 Mo. 595; Webb *v.* Midway Lumber Co., 68 Mo. App. 546; Lackland *v.* Smith, 5 Mo. App. 153.

Nebraska.— Weaver *v.* Cressman, 21 Nebr. 675, 33 N. W. 478.

New York.— National Tradesmen's Bank *v.* Wetmore, 124 N. Y. 241, 26 N. E. 548; McCartney *v.* Bostwick, 32 N. Y. 53; Patchen *v.* Rofkar, 12 N. Y. App. Div. 475, 42 N. Y. Suppl. 35. *Contra,* Ballou *v.* Jones, 13 Hun 629.

North Carolina.— Evans *v.* Monot, 57 N. C. 227, under statute.

Ohio.— Marion Deposit Bank *v.* McWilliams, 2 Ohio Dec. (Reprint) 142, 1 West. L. Month. 571.

Rhode Island.— Ginn *v.* Brown, 14 R. I. 524.

purely legal demand, where the debtor has visible property in the jurisdiction that may be reached by attachment.[28]

(4) Where Creditor Restrained. It is no excuse for the failure to procure a judgment, or to have execution issued and returned *nulla bona*, that the prosecution of a suit brought by the complainant was restrained by an order of court,[29] or that the enforcement of an execution was restrained by a military order,[30] it not appearing that the restraining order was made without the consent of complainant nor that such order was contested or valid.

(5) Where Creditor's Demand Is of an Equitable Nature. However, where the demand of the complainant is of an equitable nature and one that can only be established in a court of equity, he is not obliged to first establish his demand in an independent suit, but may establish it in the creditors' suit to reach the equitable assets of the debtor.[31]

(6) Bill to Subject Trust Fund For Debts or to Enforce Lien. So where the fund sought to be subjected to the payment of its owner's debts is a trust fund for the payment of debts,[32] or the complainant has a lien on the fund or property,[33] the complainant creditor need not first establish his claim by judgment at law. According to the weight of authority partnership assets are not trust funds for partnership creditors in the sense that such creditors have a lien

South Carolina.— Carlton *v.* Felder, 6 Rich. Eq. 58.

Virginia.— Peay *v.* Morrison, 10 Gratt. 149. *Compare* Gibson *v.* White, 3 Munf. 94.

See 14 Cent. Dig. tit. "Creditors' Suit," § 49.

Effect of entry of appearance by debtor.— If there is an action pending at law in which no process has been served on the debtor and the debtor will enter an appearance therein, proceedings in equity will be stayed to await the result of the action at law. Droop *v.* Ridenour, 9 App. Cas. (D. C.) 95.

Partnership equitable funds are subject to a creditors' bill in the hands of personal representatives of a deceased partner, where the surviving partner had absconded, without first obtaining a judgment at law. Lucas *v.* Atwood, 2 Stew. (Ala.) 378.

28. Smith *v.* Moore, 35 Ala. 76; Sanders *v.* Watson, 14 Ala. 198; Reese *v.* Bradford, 13 Ala. 837; Dodd *v.* Levy, 10 Mo. App. 121.

It must be made to appear that the debtor has no attachable property within the state. Weaver *v.* Cressman, 21 Nebr. 675, 33 N. W. 438.

Character of property or title involved.— In Alabama a creditor may file his bill in equity to have the property of his debtor, who is a non-resident, attached, whether such property be real or personal, or his title legal or equitable. Jones *v.* Smith, 92 Ala. 455, 9 So. 179.

29. Brown *v.* Barker, 68 N. Y. App. Div. 592, 74 N. Y. Suppl. 43.

30. Mixon *v.* Dunklin, 48 Ala. 455.

31. Lehman *v.* Meyer, 67 Ala. 396; Moses *v.* St. Paul, 67 Ala. 168; Kirkman *v.* Vanlier, 7 Ala. 217; Cotes *v.* Bennett, 183 Ill. 82, 55 N. E. 661; Ladd *v.* Judson, 174 Ill. 344, 51 N. E. 838, 66 Am. St. Rep. 267; Prewett *v.* Laud, 36 Miss. 495.

32. *Alabama.*— St. Marys Bank *v.* St. John, 25 Ala. 566; Toulmin *v.* Hamilton, 7 Ala. 362.

Illinois.— Miller *v.* Davidson, 8 Ill. 518, 44 Am. Dec. 715.

Missouri.— Kankakee Woolen Mills Co. *v.* Kampe, 38 Mo. App. 229.

New Mexico.— Early Times Distillery Co. *v.* Zeigler, 9 N. M. 31, 49 Pac. 723.

New York.— Whitcomb *v.* Fowle, 7 Abb. N. Cas. 295; Fassett *v.* Tallmadge, 18 Abb. Pr. 48; Dillon *v.* Horn, 5 How. Pr. 35.

Ohio.— Marion Deposit Bank *v.* McWilliams, 2 Ohio Dec. (Reprint) 142, 1 West. L. Month. 571.

Pennsylvania.— Fowler's Appeal, 87 Pa. St. 449; Mifflin County Nat. Bank *v.* Fourth St. Nat. Bank, 8 Pa. Dist. 477, 22 Pa. Co. Ct. 495.

United States.— Case *v.* Beauregard, 101 U. S. 688, 25 L. ed. 1004; Russell *v.* Clark, 7 Cranch 69, 3 L. ed. 271; Merchants' Nat. Bank *v.* Chattanooga Constr. Co., 53 Fed. 314; Consolidated Tank-Line Co. *v.* Kansas City Varnish Co., 45 Fed. 7.

33. Lehman *v.* Meyer, 67 Ala. 396; Moses *v.* St. Paul, 67 Ala. 168; Roper *v.* McCook, 7 Ala. 318; Orton *v.* Madden, 75 Ga. 83; Cornell *v.* Savage, 49 N. Y. App. Div. 429, 63 N. Y. Suppl. 540; Case *v.* Beauregard, 101 U. S. 688, 25 L. ed. 1004.

Lien for unpaid price of personal property. — A creditor has no lien for the unpaid purchase-price of personal property enforceable in equity. Spitz *v.* Kerfoot, 42 Mo. App. 77; Woolfolk *v.* Kemper, 31 Mo. App. 421.

Under a statute of New Jersey debts of decedents become liens on their real estate, and creditors at large may file bills to subject such land as has been fraudulently conveyed by deceased to the payment of their debts. Asbury Park First Nat. Bank *v.* White, 60 N. J. Eq. 487, 46 Atl. 1092; Haston *v.* Castner, 31 N. J. Eq. 697; Fowler's Appeal, 87 Pa. St. 449.

Under statute in West Virginia courts of equity have power to enforce judgment liens against land of a judgment debtor at any

thereon which will dispense with the necessity of their reducing their debts to judgment before proceeding by a bill in equity to subject assets of the partnership to the payment of their debts,[34] whether the firm be solvent or insolvent.[35] An inchoate or unperfected lien acquired under an attachment has been held not to support a creditors' bill.[36]

(7) BILL TO SET ASIDE FRAUDULENT CONVEYANCE. In the absence of statute providing otherwise, a judgment at law is a prerequisite to a bill brought by a creditor to set aside a fraudulent conveyance of the debtor's property.[37] In many jurisdictions, however, this rule has been expressly abrogated by statute, and it is no longer necessary to obtain a judgment before bringing a bill to set aside a fraudulent conveyance of the debtor's property.[38] Statutes of this charac-

time without reference to whether the judgment might be made by process of execution or not. Marling *v.* Robrecht, 13 W. Va. 440; Pecks *v.* Chambers, 8 W. Va. 210.

34. Fairbanks *v.* Welshans, 55 Nebr. 362, 75 N. W. 865; Young *v.* Frier, 9 N. J. Eq. 465; Dunlevy *v.* Tallmadge, 32 N. Y. 457, 29 How. Pr. 397; Crippen *v.* Hudson, 13 N. Y. 161; Greenwood *v.* Brodhead, 8 Barb. (N. Y.) 593; Kirby *v.* Shoonmaker, 3 Barb. Ch. (N. Y.) 46; Robb *v.* Stevens, Clarke (N. Y.) 191; Case *v.* Beauregard, 99 U. S. 119, 25 L. ed. 370; Fink *v.* Patterson, 21 Fed. 602. But see *contra*, Whitcomb *v.* Fowle, 7 Abb. N. Cas. (N. Y.) 295; Fassett *v.* Tallmadge, 18 Abb. Pr. (N. Y.) 48; Dillon *v.* Horn, 5 How. Pr. (N. Y.) 35. And see Innes *v.* Lansing, 7 Paige (N. Y.) 583, holding under a special statutory provision that the assets of a limited partnership which is insolvent are trust funds for the benefit of creditors and that any creditor, without a judgment, may file a bill in behalf of himself and all other creditors to procure a ratable distribution of the funds.

35. Fairbanks *v.* Welshans, 55 Nebr. 362, 75 N. W. 865.

36. Morton *v.* Grafflin, 68 Md. 545, 13 Atl. 341, 15 Atl. 298.

37. *Colorado.*— Barnes *v.* Beighly, 9 Colo. 475, 12 Pac. 906; Arnett *v.* Coffey, 1 Colo. App. 34, 27 Pac. 614.

District of Columbia.— Hess *v.* Horton, 2 App. Cas. 81.

Illinois.— Heacock *v.* Durand, 42 Ill. 230.

Iowa.— See Smith *v.* Sioux City Nursery, etc., Co., 109 Iowa 51, 79 N. W. 457.

Maine.— Hartshorn *v.* Eames, 31 Me. 93; Webster *v.* Withey, 25 Me. 326; Webster *v.* Clarke, 25 Me. 213.

Michigan.—Eames *v.* Manley, 121 Mich. 300, 80 N. W. 15; Griswold *v.* Fuller, 33 Mich. 268; McKibben *v.* Barton, 1 Mich. 213.

New Jersey.— Dunham *v.* Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460; Young *v.* Frier, 9 N. J. Eq. 465.

New York.— Wilson *v.* Forsyth, 24 Barb. 105.

United States.— Putney *v.* Whitmire, 66 Fed. 385.

38. *Alabama.*— Alabama Iron, etc., Co. *v.* McKeever, 112 Ala. 134, 20 So. 84; Alabama Nat. Bank *v.* Mary Lee Coal, etc., Co., 108 Ala. 288, 19 So. 404; Gay *v.* Brierfield Coal, etc., Co., 94 Ala. 303, 11 So. 353, 33 Am. St. Rep. 122, 16 L. R. A. 564; Gibson *v.* Trowbridge Furniture Co., 93 Ala. 579, 9 So. 370; McGhee *v.* Importers', etc., Nat. Bank, 93 Ala. 192, 9 So. 734; Cartwright *v.* Bamberger, 90 Ala. 405, 8 So. 264; Tower Mfg. Co. *v.* Thompson, 90 Ala. 129, 7 So. 530.

Indiana.—Barnes *v.* Sammons, 128 Ind. 596, 27 N. E. 747; Phelps *v.* Smith, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156; Townes *v.* Smith, 115 Ind. 480, 16 N. E. 811; Field *v.* Holzman, 93 Ind. 205; Carr *v.* Huette, 73 Ind. 378; Alford *v.* Baker, 53 Ind. 279; Lindley *v.* Cross, 31 Ind. 106, 99 Am. Dec. 610; Frank *v.* Kessler, 30 Ind. 8; Love *v.* Mikals, 11 Ind. 227.

Kentucky.— Milward *v.* Cochran, 7 B. Mon. 344.

Maryland.— Balls *v.* Balls, 69 Md. 388, 16 Atl. 18; Morton *v.* Grafflin, 68 Md. 545, 13 Atl. 341, 15 Atl. 298. For rule prior to statute see Wanamaker *v.* Bowes, 36 Md. 42; Griffith *v.* Frederick County Bank, 6 Gill & J. 424; Birely *v.* Staley, 5 Gill & J. 432, 25 Am. Dec. 303; Swan *v.* Dent, 2 Md. Ch. 111.

Massachusetts.— Stratton *v.* Hernon, 154 Mass. 310, 28 N. E. 269.

Mississippi.— Citizens' Ins. Co. *v.* Ligon, 59 Miss. 305. And see Browne *v.* Hernsheim, 71 Miss. 574, 14 So. 36. For rule before enactment of statute see Fleming *v.* Grafton, 54 Miss. 79; Partee *v.* Mathews, 53 Miss. 140; Brown *v.* Mississippi Bank, 31 Miss. 454.

North Carolina.— Dawson Bank *v.* Harris, 84 N. C. 206; Carr *v.* Fearington, 63 N. C. 560. In two recent North Carolina decisions (Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 11 L. R. A. 466; Dawson Bank *v.* Harris, 84 N. C. 206) it was held that a complaint for two causes of action — one to establish a debt and another to set aside fraudulent conveyances would lie, and that no judgment at law was necessary to authorize its maintenance. These decisions make no reference to the statute expressly authorizing this procedure in case of fraudulent conveyances, but seem to be based on the ground that under the code the court has power to administer both equitable and legal relief, and that therefore all relief should be given in one action. For former rule holding judgment necessary see Clark *v.* Banner, 21 N. C. 608; Donaldson *v.* State Bank, 16 N. C. 103, 18 Am. Dec. 577.

ter have no application, however, where the thing complained of has not been executed but rests merely in contemplation or intention;[39] nor to a case where the debt has not matured.[40] So it has been held that these statutes are not operative where the bill is filed in a federal court,[41] since such legislation cannot affect the jurisdiction of the federal court.[42] So it has been held that these statutes are not intended to change the established mode of settling the estate of a deceased person, and that accordingly a creditor of such person cannot maintain a bill, to reach and apply, in payment of his debt, land fraudulently conveyed by such person in his lifetime.[43]

(8) In Case of Award. A party may maintain a creditors' bill in equity upon an award for a specific sum without first reducing the demand to judgment.[44]

(9) Other Exceptions. In Arkansas it has been held that a suit in equity to subject the debt of a third person to the extinguishment of the plaintiff's demand against his debtor is an equitable garnishment.[45]

In Louisiana, since the adoption of the code of practice, a judgment against the original debtor is no longer necessary to support an action of mortgage, even when the *via executica* is resorted to.[46]

Under the statutes of Massachusetts a debt need not be reduced to judgment in order to maintain a bill in equity to reach and apply to the payment of the debt property of the defendant which cannot be attached or taken on execution at law.[47] This remedy is not taken away or limited by the subsequent legislative grant to the court of general equity powers;[48] and the statutes have been held to apply even though the debt is secured by mortgage.[49] Nevertheless to authorize the maintenance of such a bill the debt must have matured,[50] and where it appears

Tennessee.— McBee *v.* Bearden, 7 Lea 731; Armstrong *v.* Croft, 3 Lea 191.

Virginia.— Price *v.* Thrash, 30 Gratt. 515; Wallace *v.* Treakle, 27 Gratt. 479. For rule before enactment of statute see Taylor *v.* Spindle, 2 Gratt. 44; Mutual Assur. Soc. *v.* Stanard, 4 Munf. 539.

West Virginia.— Tuft *v.* Pickering, 28 W. Va. 330; Watkins *v.* Wortman, 19 W. Va. 78.

See 14 Cent. Dig. tit. "Creditors' Suit," § 46 *et seq.*

39. Balls *v.* Balls, 69 Md. 388, 16 Atl. 18; Hubbard *v.* Hubbard, 14 Md. 356; Uhl *v.* Dillon, 10 Md. 500, 69 Am. Dec. 172.

40. Gibson *v.* Trowbridge Furniture Co., 93 Ala. 579, 9 So. 370; Freider *v.* Lienkauff, 92 Ala. 469, 8 So. 758; Bragg *v.* Patterson, 85 Ala. 233, 4 So. 716; Browne *v.* Hernsheim, 71 Miss. 574, 14 So. 36.

Relief as to a debt not due cannot be obtained by joining it with a debt past due. Freider *v.* Lienkauff, 92 Ala. 469, 8 So. 758.

41. Scott *v.* Neely, 140 U. S. 106, 11 S. Ct. 712, 35 L. ed. 358. *Contra*, Johnston *v.* Straus, 26 Fed. 57.

42. D. A. Tompkins Co. *v.* Catawba Mills, 82 Fed. 780.

43. Putney *v.* Fletcher, 148 Mass. 247, 19 N. E. 370.

44. The award if regularly made being as conclusive of the demand both in respect to its validity and amount as a judgment would be. Sanborn *v.* Maxwell, 18 App. Cas. (D. C.) 245.

45. So held to be within a statute providing that in suits to obtain equitable garnishment it is not necessary for the plaintiff to obtain a judgment at law in order to prove insolvency, but that insolvency may be proved by any competent testimony, so that only one suit shall be necessary in order to obtain proper relief. Riggin *v.* Hillard, 56 Ark. 476, 20 S. W. 402, 35 Am. St. Rep. 113.

46. The only requisite in such case is an amicable demand from the debtor or his heirs, thirty days before filing the petition. Gomez *v.* Courcelle, 8 La. Ann. 304; Robatham *v.* Tete, 8 La. Ann. 73.

47. Sandford *v.* Wright, 164 Mass. 85, 41 N. E. 120; Bresnihan *v.* Sheehan, 125 Mass. 11; Tucker *v.* McDonald, 105 Mass. 423; Barry *v.* Abbot, 100 Mass. 396; Sanger *v.* Bancroft, 12 Gray (Mass.) 365; Silloway *v.* Columbia Ins. Co., 8 Gray (Mass.) 199.

Proceedings of this character are regarded as in the nature of an equitable trustee process, as distinguished from a creditors' bill, and can only be maintained where some person other than the plaintiff's debtor has been made a defendant, as being holder of the property sought to be reached, and as being under some obligation in some way to account for it to the plaintiff's debtor. Vantine *v.* Morse, 104 Mass. 275.

Equitable defenses.— Where a creditor files a bill to establish his debt and obtain equitable relief out of the trust fund the defendant may set up an equitable defense. Rau *v.* Von Zedlitz, 132 Mass. 164.

48. Tucker *v.* McDonald, 105 Mass. 423; Sanger *v.* Bancroft, 12 Gray (Mass.) 365.

49. Tucker *v.* McDonald, 105 Mass. 423.

50. Willard *v.* Briggs, 161 Mass. 58, 36 N. E. 687.

that the property sought to be reached can be attached at law the bill of course cannot be maintained.[51]

(II) *Character of Judgment*—(A) *Personal Judgment.* It has been held that the judgment must be a personal one.[52]

(B) *Decree in Equity.* A money decree in equity answers the same purpose as a judgment at law.[53]

(C) *Dormant Judgment.* The judgment must be one still in force. A dormant judgment will not furnish sufficient basis for a creditors' bill.[54] But the fact that after filing his bill and before decree complainant's judgment at law became dormant will not preclude his maintaining his bill, nor is it necessary in such case for him to have his judgment revived and execution again issued thereon in order to entitle him to a decree.[55]

(D) *Where Obtained.* Ordinarily it is held that the judgment forming the basis for a creditors' bill must be one rendered in the jurisdiction where the bill is filed[56] or facts stated in the bill showing the impossibility of obtaining such a judgment.[57] A judgment rendered in one state is not sufficient to support a

51. Phœnix Ins. Co. *v.* Abbott, 127 Mass. 558.

52. Jenks *v.* Horton, 114 Mich. 48, 72 N. W. 20; Thomas *v.* Merchants' Bank, 9 Paige (N. Y.) 216.

A judgment in an attachment against a non-resident defendant where the defendant did not appear and no property was in fact attached was held not sufficient as a foundation for a creditors' bill. Capital City Bank *v.* Parent, 134 N. Y. 527, 31 N. E. 976, 18 L. R. A. 240 [*affirming* 12 N. Y. Suppl. 234, 20 N. Y. Civ. Proc. 38]. See also Corey *v.* Cornelius, 1 Barb. Ch. (N. Y.) 571. But *compare* Kimbro *v.* Clark, 17 Nebr. 403, 22 N. W. 788, holding that where a creditor levies an attachment on property alleged to belong to a non-resident defendant, but held in the name of another, he acquires a lien on the same which after judgment, although on publication and not on personal service, a court of equity will enforce on a creditors' bill.

53. Clement *v.* Oceana Cir. Judge, 119 Mich. 605, 78 N. W. 666; Jenks *v.* Horton, 114 Mich. 48, 72 N. W. 20; Twell *v.* Twell, 6 Mont. 19, 9 Pac. 537; Speiglemyer *v.* Crawford, 6 Paige (N. Y.) 254; Clarkson *v.* De Peyster, 3 Paige (N. Y.) 320.

A deficiency decree in a foreclosure suit, on which execution has been issued and returned *nulla bona*, may be the basis of proceedings in the nature of a creditors' bill. Clement *v.* Oceana Cir. Judge, 119 Mich. 605, 78 N. W. 666. It has been held, however, that the deficiency decree does not create a lien before the deficiency is ascertained so as to sustain a creditors' bill. Cotes *v.* Bennett, 84 Ill. App. 33.

A wife with a judgment for alimony may bring a bill in equity to set aside fraudulent conveyances of her husband. Kamp *v.* Kamp, 46 How. Pr. (N. Y.) 143.

54. Partee *v.* Mathews, 53 Miss. 140; Mellier *v.* Bartlett, 106 Mo. 381, 17 S. W. 295; Lakenan *v.* Robards, 9 Mo. App. 179; Corning *v.* Stebbins, 1 Barb. Ch. (N. Y.) 589; Hegler *v.* Grove, 63 Ohio St. 404, 59 N. E. 162; Simpson *v.* Hook, 6 Ohio Cir. Ct. 27. In Gould *v.* Tryon, Walk. (Mich.) 353, it was held that execution on the judgment must have been issued within a reasonable time before the filing of the bill, and that where the statute required special application after two years after the rendition of judgment to obtain the issuing of an execution, the plaintiff could not maintain a creditors' bill on a judgment nine years old without having made such application and had execution again issued and returned, although the judgment under the statute remained in force for ten years. But in Postlewait *v.* Howes, 3 Iowa 365, it was held that the fact that in order to get an execution on the judgment a scire facias must be obtained did not make the judgment dormant, where the statute made it a lien for ten years and the statute of limitations on judgments was twenty years, and for all practical purposes the judgment was still alive, and a creditor might maintain a bill on such judgment. In Dunton *v.* McCook, 93 Iowa 258, 61 N. W. 977, it was held that a creditor might maintain a bill, although the lien of the judgment had expired.

A scire facias to revive a judgment at law is not necessary before proceeding by a bill in equity against the heirs of a deceased debtor to subject the equitable interest of the deceased in lands which descended to the heirs. Ferguson *v.* Crowson, 25 Miss. 430.

55. Cincinnati *v.* Hafer, 49 Ohio St. 60, 30 N. E. 197. *Contra*, Miller *v.* Melone, 11 Okla. 381, 67 Pac. 479 [*citing* Newell *v.* Dart, 28 Minn. 248, 9 N. W. 732].

56. Ladd *v.* Judson, 174 Ill. 344, 51 N. E. 838, 66 Am. St. Rep. 267 [*affirming* 71 Ill. App. 283]; Detroit Copper, etc., Rolling Mills *v.* Ledwidge, 162 Ill. 305, 44 N. E. 751 [*affirming* 58 Ill. App. 351]; Farned *v.* Harris, 11 Sm. & M. (Miss.) 366; Dick *v.* Truly, Sm. & M. Ch. (Miss.) 557.

57. Albright *v.* Texas, etc., R. Co., 8 N. M. 422, 46 Pac. 448; National Tube Works Co. *v.* Ballou, 146 U. S. 517, 13 S. Ct. 165, 36 L. ed. 1070 [*affirming* 42 Fed. 749].

creditors' bill filed in another state.[58] So in some jurisdictions it is held that the judgment of a federal court cannot be made the basis of a decree in a state court,[59] even though such federal court be of the district in which the creditors' bill is filed,[60] such court being deemed a court of another jurisdiction. In several of the states, however, it has been held that judgments of federal courts within the state are domestic judgments and will support creditors' bills.[61] In the federal courts it has been held in some cases[62] and denied in others[63] that a judgment rendered in a court of another state than the one in which the bill is filed is an insufficient basis for a creditors' bill. It has also been held that the judgment of a federal court of one district will not support a creditors' bill filed in the federal court of another district.[64] But the federal courts will take jurisdiction of a creditors' bill founded on a judgment rendered in a state court within the district over which the jurisdiction of the federal court in which such bill is filed extends.[65]

b. Execution — (I) *NECESSITY FOR* — (A) *In General.* In addition to obtaining a judgment, the creditor is generally required to have execution issued and returned unsatisfied in whole or in part before a court of equity will entertain a creditors' bill.[66] A money decree in equity stands on the same footing as a judg-

58. *Florida.*— Carter *v.* Bennett, 6 Fla. 214.

Illinois.— Ladd *v.* Judson, 174 Ill. 344, 51 N. E. 838, 66 Am. St. Rep. 267 [*affirming* 71 Ill. App. 283]; Shufeldt *v.* Boehm, 96 Ill. 560.

Michigan.— Earle *v.* Grove, 92 Mich. 285, 52 N. W. 615, *quære.*

Mississippi.— Farned *v.* Harris, 11 Sm. & M. 366; Dick *v.* Truly, Sm. & M. Ch. 557.

Nebraska.— Weaver *v.* Cressman, 21 Nebr. 675, 33 N. W. 478.

New Jersey.— Davis *v.* Dean, 26 N. J. Eq. 436.

New York.— McCartney *v.* Bostwick, 31 Barb. 390.

Ohio.— Carver *v.* Williams, 6 Ohio Dec. (Reprint) 1084, 10 Am. L. Rec. 310, 6 Cinc. L. Bul. 672.

Rhode Island.— See Shreveport First Nat. Bank *v.* Randall, 20 R. I. 319, 38 Atl. 1055, 78 Am. St. Rep. 867.

See 14 Cent. Dig. tit. "Creditors' Suit," § 56.

59. Dilworth *v.* Curts, 139 Ill. 508, 29 N. E. 861 [*affirming* 38 Ill. App. 93]; Winslow *v.* Leland, 128 Ill. 304, 21 N. E. 588; Steere *v.* Hoagland, 39 Ill. 264; Carver *v.* Williams, 6 Ohio Dec. (Reprint) 1084, 10 Am. L. Rec. 310, 6 Cinc. L. Bul. 672.

Status of decree.— A decree founded on such a judgment is not void for want of jurisdiction, but is merely a decree founded on insufficient evidence. Dilworth *v.* Curts, 139 Ill. 508, 29 N. E. 861.

60. Davis *v.* Bruns, 23 Hun (N. Y.) 648; Tarbell *v.* Griggs, 3 Paige (N. Y.) 207, 23 Am. Dec. 790.

61. Chicago First Nat. Bank *v.* Sloman, 42 Nebr. 350, 60 N. W. 589, 47 Am. St. Rep. 707; Vanderveer *v.* Stryker, 8 N. J. Eq. 175. To the same effect see Chicago, etc., Bridge Co. *v.* Fowler, 55 Kan. 17, 39 Pac. 727.

62. Walser *v.* Seligman, 13 Fed. 415, 21 Blatchf. 130; Claflin *v.* McDermott, 12 Fed. 375, 20 Blatchf. 522.

63. Merchants' Nat. Bank *v.* Chattanooga Constr. Co., 53 Fed. 314.

64. Union Trust Co. *v.* Boker, 89 Fed. 6.

65. Bidwell *v.* Huff, 103 Fed. 362; Alkire Grocery Co. *v.* Richesin, 91 Fed. 79; Buckeye Engine Co. *v.* Donau Brewing Co., 47 Fed. 6; Gorrell *v.* Dickson, 26 Fed. 454; Wilkinson *v.* Yale, 29 Fed. Cas. No. 17,678, 6 McLean 16; Wilson *v.* City Bank, 30 Fed. Cas. No. 17,797, 3 Sumn. 422.

66. *Alabama.*— Scott *v.* Ware, 64 Ala. 174; Bevans *v.* Henry, 49 Ala. 123; Roper *v.* McCook, 7 Ala. 318; Morgan *v.* Crabb, 3 Port. 470.

Arkansas.— Branch *v.* Horner, 28 Ark. 341.

District of Columbia.— Clark *v.* Bradley Co., 6 App. Cas. 437.

Florida.— Neubert *v.* Massman, 37 Fla. 91, 19 So. 625; Richardson *v.* Gilbert, 21 Fla. 544; Robinson *v.* Springfield Co., 21 Fla. 203.

Illinois.— Ladd *v.* Judson, 174 Ill. 344, 51 N. E. 838, 66 Am. St. Rep. 267 [*affirming* 71 Ill. App. 283]; Russell *v.* Chicago Trust, etc., Bank, 139 Ill. 538, 29 N. E. 37, 17 L. R. A. 345; Durand *v.* Gray, 129 Ill. 9, 21 N. E. 610; Winslow *v.* Leland, 128 Ill. 304, 21 N. E. 588; Dormueil *v.* Ward, 108 Ill. 216; Hickling *v.* Wilson, 104 Ill. 54; Scripps *v.* King, 103 Ill. 469; Mann *v.* Ruby, 102 Ill. 348; Chicago, etc., R. Co. *v.* St. Anne, 101 Ill. 151; Shufeldt *v.* Boehm, 96 Ill. 560; Moshier *v.* Meek, 80 Ill. 79; Dewey *v.* Eckert, 62 Ill. 218; Mugge *v.* Ewing, 54 Ill. 236; McConnel *v.* Dickson, 43 Ill. 99; Heacock *v.* Durand, 42 Ill. 230; Steere *v.* Hoagland, 39 Ill. 264; Bay *v.* Cook, 31 Ill. 336; Bigelow *v.* Andress, 31 Ill. 322; Greenway *v.* Thomas, 14 Ill. 271; Ishmael *v.* Parker, 13 Ill. 324; McDowell *v.* Cochran, 11 Ill. 31; Manchester *v.* McKee, 9 Ill. 511; Miller *v.* Davidson, 8 Ill. 518, 44 Am. Dec. 715; Link Belt Machinery Co. *v.* Hughes, 95 Ill. App. 323 [*affirmed* in 195 Ill. 413, 63 N. E. 186, 59 L. R. A. 673].

Iowa.— Smith *v.* Sioux City Nursery, etc., Co., 109 Iowa 51, 79 N. W. 457.

Kentucky.— Howland Coal, etc., Works *v.*

ment at law and execution must be issued thereon and returned *nulla bona* in order that it may be a proper foundation for a creditors' bill.[67] A creditors' bill may be filed on a judgment at law after return of execution thereon *nulla bona*,

Brown, 13 Bush 681; Rhodes *v.* Cobb, 4 Dana 23; Wooley *v.* Stone, 7 J. J. Marsh. 302; Scott *v.* Wallace, 4 J. J. Marsh. 654; Halbert *v.* Grant, 4 T. B. Mon. 580.

Maine.— Baxter *v.* Moses, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783; Howe *v.* Whitney, 66 Me. 17; Griffin *v.* Nitcher, 57 Me. 270; Corey *v.* Greene, 51 Me. 114; Webster *v.* Clark, 25 Me. 313.

Michigan.— Eames *v.* Manley, 121 Mich. 300, 80 N. W. 15; Jenks *v.* Horton, 114 Mich. 48, 72 N. W. 20; Grenell *v.* Ferry, 110 Mich. 262, 68 N. W. 144; Mauch Chunk Second Nat. Bank *v.* Dwight, 83 Mich. 192, 47 N. W. 111; Mauch Chunk First Nat. Bank *v.* Dwight, 83 Mich. 189, 47 N. W. 111; Brock *v.* Rich, 76 Mich. 644, 43 N. W. 580; Vanderpool *v.* Notley, 71 Mich. 422, 39 N. W. 574; Maynard *v.* Hoskins, 9 Mich. 485; Williams *v.* Hubbard, Walk. 28; Smith *v.* Thompson, Walk. 1.

Minnesota.— Moffatt *v.* Tuttle, 35 Minn. 301, 28 N. W. 509.

Mississippi.— Fleming *v.* Grafton, 54 Miss. 79; Hamilton *v.* Mississippi College, 52 Miss. 65; Pulliam *v.* Taylor, 50 Miss. 251; Vasser *v.* Henderson, 40 Miss. 519, 90 Am. Dec. 351; Prewett *v.* Land, 36 Miss. 495; Scott *v.* McFarland, 34 Miss. 363; Brown *v.* State Bank, 31 Miss. 454; Farned *v.* Harris, 11 Sm. & M. 366; Freeman *v.* Finnall, Sm. & M. Ch. 623; Wright *v.* Petrie, Sm. & M. Ch. 282; Parish *v.* Lewis, Freem. 299.

New York.— Wright *v.* Nostrand, 94 N. Y. 31; Adee *v.* Bigler, 81 N. Y. 349; Allyn *v.* Thurston, 53 N. Y. 622; Kerr *v.* Dildine, 6 N. Y. St. 163; Beardsley Scythe Co. *v.* Foster, 34 How. Pr. 97; Parshall *v.* Tillou, 13 How. Pr. 7; Wright *v.* Strong, 3 How. Pr. 112; Hendricks *v.* Robinson, 2 Johns. Ch. 283.

North Carolina.—Hook *v.* Fentress, 62 N. C. 229; Wheeler *v.* Taylor, 41 N. C. 225; Kirkpatrick *v.* Means, 40 N. C. 220; Frost *v.* Reynolds, 39 N. C. 494; Rambaut *v.* Mayfield, 8 N. C. 85.

Ohio.— Hay *v.* New Baltimore, etc., Turnpike, etc., Co., 1 Handy 281, 12 Ohio Dec. (Reprint) 142; Marion Deposit Bank *v.* McWilliams, 2 Ohio Dec. (Reprint) 142, 1 West. L. Month. 571.

Rhode Island.—Shreveport First Nat. Bank *v.* Randall, 20 R. I. 319, 38 Atl. 1055, 78 Am. St. Rep. 867; Stone *v.* Westcott, 18 R. I. 517, 28 Atl. 662; Gardner *v.* Gardner, 17 R. I. 751, 24 Atl. 785; Smith *v.* Millett, 12 R. I. 59.

Vermont.— Rice *v.* Barnard, 20 Vt. 479, 50 Am. Dec. 54.

Virginia.— To subject real estate the creditor must have a judgment and take his elegit; to subject personalty he must have judgment and execution. Rhodes *v.* Cousins, 6 Rand. 188, 18 Am. Dec. 715.

Wisconsin.—Krouskop *v.* Krouskop, 95 Wis. 296, 70 N. W. 475; Hughes *v.* Hunner, 91 Wis. 116, 64 N. W. 887; Ahlhauser *v.* Doud, 74 Wis. 400, 43 N. W. 169.

[2]

United States.— Case *v.* Beauregard, 101 U. S. 688, 25 L. ed. 1004, 99 U. S. 119, 25 L. ed. 370; Jones *v.* Green, 1 Wall. 330, 17 L. ed. 553; Bickford *v.* McComb, 88 Fed. 428; U. S. *v.* Eisenbeis, 88 Fed. 4; Childs *v.* N. B. Carlstein Co., 76 Fed. 86; Streight *v.* Junk, 59 Fed. 321, 8 C. C. A. 137; Cleveland Rolling-Mill Co. *v.* Joliet Enterprise Co., 53 Fed. 683; Chicago, etc., Bridge Co. *v.* Anglo-American Packing, etc., Co., 46 Fed. 584.

See 14 Cent. Dig. tit. "Creditors' Suit," § 73.

Contra under statute see Riggin *v.* Hillard, 56 Ark. 476, 20 S. W. 402, 35 Am. St. Rep. 113; Gomez *v.* Courcelle, 8 La. Ann. 304; Hutchinson *v.* Maxwell, 100 Va. 169, 40 S. E. 655, 93 Am. St. Rep. 944; Moore *v.* Bruce, 85 Va. 139, 7 S. E. 195; Stovall *v.* Border Grange Bank, 78 Va. 188.

Under the statutes of Michigan, in a suit in aid of execution, it is not necessary that the bill should show an execution returned unsatisfied. Wilson *v.* Addison, 127 Mich. 680, 87 N. W. 109; Vanderpool *v.* Notley, 71 Mich. 422, 39 N. W. 574.

Reason for rule.— The purpose of requiring the issue and return of an execution as a foundation for a creditors' bill is to make it appear that a court of law is incompetent to reach the property of the defendant; and, when such execution has been returned unsatisfied for some reason other than the officer's inability to find property on which to levy, such return will be insufficient as a foundation of a creditors' bill. Hughes *v.* Link Belt Machinery Co., 95 Ill. App. 323 [*affirmed* in 195 Ill. 413, 63 N. E. 186, 59 L. R. A. 673].

Inadequate legal remedy.— Where the debtor's property is so connected with equities or trusts, or involves a variety of interests so that adequate remedy at law cannot be had, a judgment creditor may bring a creditors' bill to reach such property before the issuance of execution. Piatt *v.* St. Clair, 6 Ohio 227.

A statute authorizing proceedings by "a judgment creditor" means a judgment creditor who has exhausted his legal remedies of execution on the judgment. Baxter *v.* Moses, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783.

The execution must have been issued in conformity to the statutory requirements, and where such requirements are not complied with the failure to do so may be taken advantage of in proceedings on a creditors' bill based on such execution. Manning *v.* Merritt, Clarke (N. Y.) 98. But see Rider *v.* Mason, 4 Sandf. Ch. (N. Y.) 351, holding that the regularity of the execution will not be considered on a creditors' bill, but that the party attacking it must move to set it aside in the court whence the execution issued.

67. Winslow *v.* Leland, 128 Ill. 304, 21 N. E. 588; Miller *v.* Miller, 7 Hun (N. Y.) 208; Clarkson *v.* De Peyster, 3 Paige (N. Y.)

although the complainant has filed suit on the judgment and recovered a new judgment in the same state[68] or in another state,[69] and it is no objection to a creditors' bill that an alias execution has been taken out on the judgment and not yet returned,[70] unless it appears that the sheriff has levied or can levy the execution on property sufficient to satisfy the judgment.[71] An assignee of a judgment need not take out a new execution prior to filing a creditors' bill founded on the judgment, where his assignor had caused execution to be issued which was returned *nulla bona*.[72]

(B) *Where There Are Several Defendants.* Where there are several defendants in the judgment complainant must show the issuance and return unsatisfied of execution against all the defendants,[73] unless one of the defendants is in the position of a surety toward the others,[74] and the bill is brought with his consent and for his benefit.[75]

(C) *Where Debtor Is Insolvent.* There is a diversity of opinion as to whether the insolvency of the debtor excuses the want of an execution. While some of the cases hold that it does not,[76] the view is also strongly maintained by many cases that the purpose of suing out execution and having it returned is to establish the insolvency of the debtor and the want of remedy at law, and that where the debtor is shown to be insolvent by other evidence, and that the issuance of execution would be a mere idle ceremony and of no practical utility, it may be dispensed with.[77]

(D) *Where Debtor Is Dead.* Where the debtor is dead, so that execution

320. *Contra*, White *v.* Geraerdt, 1 Edw. (N. Y.) 336.

68. Bates *v.* Lyons, 7 Paige (N. Y.) 85.

69. Wells *v.* Schuster-Hax Nat. Bank, 23 Colo. 534, 48 Pac. 809.

70. Clark *v.* Davis, Harr. (Mich.) 227; Thomas *v.* McEwen, 11 Paige (N. Y.) 131. As where the sheriff had levied the execution but the property levied on was insufficient to satisfy the execution. Storm *v.* Badger, 8 Paige (N. Y.) 130.

71. Thomas *v.* McEwen, 11 Paige (N. Y.) 131; Storm *v.* Badger, 8 Paige (N. Y.) 130.

72. Strange *v.* Longley, 3 Barb. Ch. (N. Y.) 650; Gleason *v.* Gage, 7 Paige (N. Y.) 121 [*overruling* Wakeman *v.* Russel, 1 Edw. 509]; Hastings *v.* Palmer, Clarke (N. Y.) 52. But see Fitch *v.* Baldwin, Clarke (N. Y.) 106.

73. Kyle *v.* Frost, 29 Ind. 382; Parish *v.* Lewis, Freem. (Miss.) 299; Voorhees *v.* Howard, 4 Abb. Dec. (N. Y.) 503; Field *v.* Chapman, 15 Abb. Pr. (N. Y.) 434, 24 How. Pr. (N. Y.) 463 [*affirming* 13 Abb. Pr. 320, 22 How. Pr. 329]; Billhofer *v.* Heubach, 15 Abb. Pr. (N. Y.) 143; Field *v.* Chapman, 14 Abb. Pr. (N. Y.) 133; Howard *v.* Sheldon, 11 Paige (N. Y.) 558; Child *v.* Brace, 4 Paige (N. Y.) 309. But see Hiler *v.* Hetterick, 5 Daly (N. Y.) 33.

Execution against joint property of firm. — In Produce Bank *v.* Morton, 67 N. Y. 199 [*disapproving* Produce Bank *v.* Morton, 40 N. Y. Super. Ct. 328], it was held that where execution had been issued against the joint property of three partners on a judgment against two of the partners and returned unsatisfied, it was sufficient to form the basis of a suit in equity to reach the joint property of the partners.

Judgment and execution against one partner.—A firm creditor who has recovered judgment against one member thereof upon a guaranty of a firm debt and had an execution issued thereon which was returned unsatisfied cannot maintain an action thereon in the nature of a creditors' bill to reach equitable assets of the firm. Lewisohn *v.* Drew, 15 Hun (N. Y.) 467; Paton *v.* Wright, 15 How. Pr. (N. Y.) 481.

74. Parish *v.* Lewis, Freem. (Miss.) 299; Speiglemeyer *v.* Crawford, 6 Paige (N. Y.) 254.

75. Child *v.* Brace, 4 Paige (N. Y.) 309.

76. Parish *v.* Lewis, Freem. (Miss.) 299; McKeldin *v.* Gouldy, 91 Tenn. 677, 20 S. W. 231; Taylor *v.* Gillean, 23 Tex. 508. See also Stone *v.* Westcott, 18 R. I. 517, 28 Atl. 662.

77. *District of Columbia.*— Doubtful whether execution is necessary. Mehler *v.* Cornwell, 3 App. Cas. 92. But see Shea *v.* Dulin, 3 MacArthur 339.

Iowa.— Smalley *v.* Mass, 72 Iowa 171, 33 N. W. 619; Postlewait *v.* Howes, 3 Iowa 365.

Missouri.— Lyons *v.* Murray, 95 Mo. 23, 8 S. W. 170, 6 Am. St. Rep. 17; Turner *v.* Adams, 46 Mo. 95; Merry *v.* Fremon, 44 Mo. 518; Burnham *v.* Smith, 82 Mo. App. 35; Nieters *v.* Brockman, 11 Mo. App. 600; Beal *v.* McVicker, 3 Mo. App. 592; Luthy *v.* Woods, 1 Mo. App. 167. But see Luthy *v.* Woods, 6 Mo. App. 67.

Montana.— Ryan *v.* Speith, 18 Mont. 45, 44 Pac. 403; Merchants' Nat. Bank *v.* Greenhood, 16 Mont. 395, 41 Pac. 250, 851.

New Mexico.—Early Times Distillery Co. *v.* Zeiger, 9 N. M. 31, 49 Pac. 723.

New York.— Where it appeared that all the debtor's property was real estate and that it had been fraudulently conveyed as against the judgment creditor. Payne *v.* Sheldon, 63 Barb. 169.

North Carolina.— Rountree *v.* McKay, 59 N. C. 87; Tabb *v.* Williams, 57 N. C. 352. Where it appeared that all the debtor's prop-

cannot issue and his estate is insolvent, a judgment creditor may bring a bill in equity without further steps.[78]

(E) *In Case of Fraudulent Conveyances or Obstructions* — (1) IN GENERAL. There are two classes of cases where a creditor is permitted to come into equity for relief after he has obtained a judgment at law: The one class where his judgment or execution has given him a lien, but he is compelled to come into equity to have removed some obstruction or conveyance fraudulently or inequitably interposed which prevents or embarrasses a sale under execution;[79] the other class where he comes into equity to obtain satisfaction of his debt out of property of the debtor which cannot be reached at law. In the latter case, as already shown,[80] the relief depends on the creditor having exhausted his remedies at law by having execution issued and returned unsatisfied. In the former the creditor can come into equity to have the fraudulent obstruction removed as soon as he obtains a lien by judgment or execution,[81] and is not obliged to show

erty had been placed beyond the reach of final process. Harrison *v.* Battle, 16 N. C. 537.

Ohio.— Bomberger *v.* Turner, 13 Ohio St. 263, 82 Am. Dec. 438; Piatt *v.* St. Clair, 6 Ohio 227; Gilmore *v.* Miami Exporting Co., 2 Ohio 294; Hays *v.* New Baltimore, etc., Turnpike, etc., Co., 1 Handy 281, 12 Ohio Dec. (Reprint) 142.

Utah.— Enright *v.* Grant, 5 Utah 334, 15 Pac. 268, 5 Utah 400, 16 Pac. 595.

United States.— Sage *v.* Memphis, etc., R. Co., 125 U. S. 361, 8 S. Ct. 887, 31 L. ed. 694. See Case *v.* Beauregard, 101 U. S. 688, 25 L. ed. 1004.

See 14 Cent. Dig. tit. "Creditors' Suit," § 77.

A bill in equity by a non-resident creditor against a non-resident debtor to set aside a fraudulent conveyance and to subject the property conveyed to the payment of his debt is not maintainable where the bill merely alleged that defendant had no property in the jurisdiction in which the suit was brought which could be reached at law. Such allegation was held not to exclude the possibility of his having property in another jurisdiction where he resided. Hess *v.* Horton, 2 App. Cas. (D. C.) 81.

78. Postlewait *v.* Howes, 3 Iowa 365; Lyons *v.* Murray, 95 Mo. 23, 8 S. W. 170, 6 Am. St. Rep. 17. See also Le Fevre *v.* Phillips, 81 Hun (N. Y.) 232, 30 N. Y. Suppl. 709. *Contra*, Adsit *v.* Butler, 87 N. Y. 585.

79. *Alabama.*— Chardavoyne *v.* Galbraith, 81 Ala. 521, 1 So. 771; Dargan *v.* Waring, 11 Ala. 988, 46 Am. Dec. 234.

Mississippi.— Hamilton *v.* Mississippi College, 52 Miss. 65; Snodgrass *v.* Andrews, 30 Miss. 472, 64 Am. Dec. 169.

Nebraska.— Plattsmouth First Nat. Bank *v.* Gibson, 60 Nebr. 767, 84 N. W. 259; Millard *v.* Parsell, 57 Nebr. 178, 77 N. W. 390.

New York.— Wilson *v.* Forsyth, 24 Barb. 105.

Tennessee.— Long *v.* Page, 10 Humphr. 541.

80. See *supra*, II, B, 2, b, (I), (A).

81. *California.*— Hager *v.* Shindler, 29 Cal. 47.

Colorado.—Stock-Growers' Bank *v.* Newton, 13 Colo. 245, 22 Pac. 444.

Florida.— Robinson *v.* Springfield Co., 21 Fla. 203.

Georgia.— Thurmond *v.* Reese, 3 Ga. 449, 46 Am. Dec. 440.

Illinois.— Andrews *v.* Donnerstag, 171 Ill. 329, 49 N. E. 558 [*affirming* 70 Ill. App. 236]; Dillman *v.* Nadelhoffer, 162 Ill. 625, 45 N. E. 680 [*affirming* 56 Ill. App. 517]; Wisconsin Granite Co. *v.* Gerrity, 144 Ill. 77, 33 N. E. 31; Bennett *v.* Stout, 98 Ill. 47; Amick *v.* Young, 69 Ill. 542; Newman *v.* Willets, 52 Ill. 98; Beach *v.* Bestor, 45 Ill. 341; Weightman *v.* Hatch, 17 Ill. 281; Greenway *v.* Thomas, 14 Ill. 271; Miller *v.* Davidson, 8 Ill. 518, 44 Am. Dec. 715; Stone *v.* Manning, 3 Ill. 530, 35 Am. Dec. 119; French *v.* Commercial Nat. Bank, 79 Ill. App. 110; Lapeer First Nat. Bank *v.* Chapman, 77 Ill. App. 105; Lane *v.* Union Nat. Bank, 75 Ill. App. 299; Fusze *v.* Stern, 17 Ill. App. 429.

Indiana.— Towns *v.* Smith, 115 Ind. 480, 16 N. E. 811.

Iowa.— See Falker *v.* Lineban, 88 Iowa 641, 55 N. W. 503.

Louisiana.— Dabezies *v.* Banthe, 104 La. 781, 29 So. 346.

Michigan.— Campbell *v.* Western Electric Co., 113 Mich. 333, 337, 71 N. W. 644, 1117; Hodge *v.* Gray, 110 Mich. 654, 68 N. W. 979; Gibbons *v.* Pemberton, 101 Mich. 397, 59 N. W. 663, 45 Am. St. Rep. 417; Vanderpool *v.* Notley, 71 Mich. 422, 39 N. W. 574; Griswold *v.* Fuller, 33 Mich. 268; McKibben *v.* Barton, 1 Mich. 213; Williams *v.* Hubbard, Walk. 28. *Compare* Pierce *v.* Rich, 76 Mich. 648, 43 N. W. 582; Brook *v.* Rich, 76 Mich. 644, 43 N. W. 580.

Minnesota.— Moffatt *v.* Tuttle, 35 Minn. 301, 28 N. W. 509.

Mississippi.— Fleming *v.* Grafton, 54 Miss. 79. See also Hamilton *v.* Mississippi College, 52 Miss. 65; Snodgrass *v.* Andrews, 30 Miss. 472, 64 Am. Dec. 169. That a judgment is no longer necessary in this jurisdiction see *supra*, note 38.

New Hampshire.— Tappan *v.* Evans, 11 N. H. 311.

New Jersey.— Dunham *v.* Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460.

New Mexico.— Stanton *v.* Catron, 8 N. M. 355, 45 Pac. 884.

New York.— Chautauque County Bank *v.* White, 6 N. Y. 236, 57 Am. Dec. 442; Skinner *v.* Stuart, 39 Barb. 206; Buswell *v.* Lincks, 8

that he has exhausted his legal remedy of execution;[82] and under special statutory provisions in a number of jurisdictions it is not even necessary that the creditor should have obtained a judgment.[83] Nevertheless to entitle a creditor to the aid of a court of equity to remove fraudulent obstructions to a satisfaction of

Daly 518; Skinner *v.* Stuart, 13 Abb. Pr. 442; Parshall *v.* Tillou, 13 How. Pr. 7; Cooper *v.* Clason, 2 Edm. Sel. Cas. 320; McElwain *v.* Willis, 9 Wend. 548; Clarkson *v.* De Peyster, 3 Paige 320; Beck *v.* Burdett, 1 Paige 305, 19 Am. Dec. 436. *Contra*, Payne *v.* Sheldon, 43 How. Pr. 1. And see Adsit *v.* Butler, 87 N. Y. 585.

Oregon.— Matlock *v.* Babb, 31 Oreg. 516, 49 Pac. 873.

Rhode Island.— McKenna *v.* Crowley, 16 R. I. 364, 17 Atl. 354. And see Shreveport First Nat. Bank *v.* Randall, 20 R. I. 319, 38 Atl. 1055, 78 Am. St. Rep. 867.

Virginia.— Taylor *v.* Spindle, 2 Gratt. 44. That a judgment is no longer necessary in this jurisdiction see *supra*, note 38.

Wisconsin.—Galloway *v.* Hamilton, 68 Wis. 651, 32 N. W. 636; Cornell *v.* Radway, 22 Wis. 260. But *compare* Gilbert *v.* Stockman, 81 Wis. 602, 51 N. W. 1076, 52 N. W. 1045, 29 Am. St. Rep. 922, holding (two judges dissenting) that an action by a judgment creditor to set aside a conveyance of land made by the judgment debtor before the docketing of the judgment cannot be maintained unless an execution on the judgment has been issued and returned unsatisfied in whole or in part.

United States.— Case *v.* Beauregard, 101 U. S. 688, 25 L. ed. 1004; Jones *v.* Green, 1 Wall. 330, 17 L. ed. 553; Schofield *v.* Ute Coal, etc., Co., 92 Fed. 269, 34 C. C. A. 334; Kittel *v.* Augusta, etc., R. Co., 65 Fed. 859; McCalmont *v.* Lawrence, 15 Fed. Cas. No. 8,676, 1 Blatchf. 232.

Contra.— In South Carolina the legal remedy must be exhausted by obtaining a return of *nulla bona* on the execution before a creditor can obtain a bill to set aside fraudulent conveyances of the debtor's property. Suber *v.* Chandler, 18 S. C. 526; Verner *v.* Downs, 13 S. C. 449. These cases must be distinguished from State *v.* Foot, 27 S. C. 340, 3 S. E. 546, and Burch *v.* Brantley, 20 S. C. 503, where the court, while recognizing the correctness of the foregoing decisions, reached the peculiar conclusion that the complaint need not allege that the execution had been returned unsatisfied.

"The general principle, deducible from the authorities applicable to this case, is, that where property is subject to execution, and a creditor seeks to have a fraudulent conveyance or obstruction to a levy or sale removed, he may file bill as soon as he has obtained a specific lien upon the property, whether the lien be obtained by attachment, judgment, or the issuing of an execution. But if the property is not subject to levy or sale, or if the creditor has obtained no lien, he must show his remedy at law exhausted, by an actual return upon his execution that no goods or estate can be found, (which is pursuing his remedy at law to every available extent) before he can file a bill to reach the equitable property of the debtor." Tappan *v.* Evans, 11 N. H. 311, 327.

82. Campbell *v.* Western Electric Co., 113 Mich. 333, 337, 71 N. W. 644, 1117; Hodge *v.* Gray, 110 Mich. 654, 68 N. W. 979; Gibbons *v.* Pemberton, 101 Mich. 397, 59 N. W. 663, 45 Am. St. Rep. 417; Wadsworth *v.* Schisselbauer, 32 Minn. 84, 19 N. W. 390; Schofield *v.* Ute Coal, etc., Co., 92 Fed. 269, 34 C. C. A. 334; Chicago, etc., Bridge Co. *v.* Anglo-American Packing, etc., Co., 46 Fed. 584.

Basis on which court of equity acts.— A court of equity aids a creditor in case of fraudulent conveyance because, although it may be void at law and the property be sold on execution, yet the fraudulent obstruction has the effect to place a cloud on the title which may be derived through a sale of the property on execution and thus prevents a fair sale of the property and the obtaining of a full price therefor. Fleming *v.* Grafton, 54 Miss. 79; Partee *v.* Mathews, 53 Miss. 140; Pulliam *v.* Taylor, 50 Miss. 551; Carlisle *v.* Tindall, 49 Miss. 229; Vasser *v.* Henderson, 40 Miss. 519, 90 Am. Dec. 351; Snodgrass *v.* Andrews, 30 Miss. 472, 64 Am. Dec. 169; Fowler *v.* McCartney, 27 Miss. 509; Berryman *v.* Sullivan, 13 Sm. & M. (Miss.) 65; Hilzheim *v.* Drane, 10 Sm. & M. (Miss.) 556; Parish *v.* Lewis, Freem. (Miss.) 299; Gullickson *v.* Madsen, 87 Wis. 19, 57 N. W. 965; Gates *v.* Boomer, 17 Wis. 455.

Property held in trust.—According to some decisions, where the legal title to property in question has never been in the debtor but has been placed in another person who held it on a secret trust for the debtor, this property is not liable to levy and sale on execution, but can only be reached by a creditors' bill after issuance and return of execution *nulla bona*. Robinson *v.* Springfield Co., 21 Fla. 203; Maynard *v.* Hoskins, 9 Mich. 485. Other decisions hold that where the debtor has paid for land but taken title thereto in his wife's name, a creditor seeking to subject the land to the payment of his judgment need not first have a levy made on the land. Call *v.* Perkins, 65 Me. 439; Griffin *v.* Nitcher, 57 Me. 270; Des Brisay *v.* Hogan, 53 Me. 554; Corey *v.* Greene, 51 Me. 114; Brown *v.* Edmonds, 9 S. D. 273, 68 N. W. 734.

It is the settled practice in Virginia to entertain suits by judgment creditors for relief in equity when the debtor has, subsequent to judgment, conveyed his land in trust for the payment of debts, or on other trusts authorizing a sale of the land, and in such a case the court will decree a sale to satisfy the judgment. And in such a case the judgment creditor need not have had an elegit issued before coming into equity. Taylor *v.* Spindle, 2 Gratt. (Va.) 44.

83. See *supra*, II, B, 2, a, (I), (B), (7).

his debt out of the property of the debtor, the creditor, in the absence of statutory provision to the contrary, must have a judgment establishing his debt,[84] and a lien on the property in question either by judgment or levy or be in a situation to perfect a lien thereon and subject it to sale upon the removal of the obstruction.[85] Such lien is usually acquired on real estate by judgment and on personalty by execution.[86]

(2) WHERE LIENS HAVE BEEN OBTAINED BY ATTACHMENT. In the courts of some states bills filed by attachment creditors to set aside fraudulent conveyances or to remove fraudulent encumbrances from property on which liens have been obtained by attachment are entertained.[87]

(F) *In Proceedings to Reach Trust Property.* Where the proceedings are to reach trust property held for the benefit of creditors of the defendant, execution need not be issued and returned *nulla bona.*[88]

(G) *In Proceedings to Reach Equitable Interest in Land.* In some jurisdictions to reach a debtor's equitable interest in land no execution is necessary, but a judgment will be sufficient.[89]

(H) *AGAINST WHAT PROPERTY ISSUED.* An execution directed against the personalty of the defendant merely is not sufficient. It must be one that might be levied on the real estate of the defendant.[90]

84. Hess *v.* Horton, 2 App. Cas. (D. C.) 81; Smith *v.* Sioux City Nursery, etc., Co., 109 Iowa 51, 79 N. W. 457; Putney *v.* Whitmire, 66 Fed. 385.

85. *California.*— Castle *v.* Bader, 23 Cal. 76, or allege the return of execution *nulla bona.*

Colorado.— Barnes *v.* Beighly, 9 Colo. 475, 12 Pac. 906; Arnett *v.* Coffey, 1 Colo. App. 34, 27 Pac. 614.

District of Columbia.— Hess *v.* Horton, 2 App. Cas. 81.

Illinois.— Heacock *v.* Durand, 42 Ill. 230.

Iowa.— Smith *v.* Sioux City Nursery, etc., Co., 109 Iowa 51, 79 N. W. 457.

Maine.— Hartshorn *v.* Eames, 31 Me. 93; Webster *v.* Withey, 25 Me. 326; Webster *v.* Clark, 25 Me. 313.

Michigan.— Griswold *v.* Fuller, 33 Mich. 268; McKibben *v.* Barton, 1 Mich. 213.

Mississippi.— Fleming *v.* Grafton, 54 Miss. 79; Partee *v.* Mathews, 53 Miss. 140.

Montana.— Wilson *v.* Harris, 21 Mont. 374, 54 Pac. 46.

New Jersey.— Green *v.* Tantum, 19 N. J. Eq. 105; Dunham *v.* Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460; Young *v.* Frier, 9 N. J. Eq. 465.

New York.— Wilson *v.* Forsyth, 24 Barb. 105.

North Carolina.— Clark *v.* Banner, 21 N. C. 608; Donaldson *v.* State Bank, 16 N. C. 103, 18 Am. Dec. 577.

Virginia.— Mutual Assur. Soc. *v.* Stanard, 4 Munf. 539.

A judgment creditor suing before the return of execution to set aside a fraudulent transfer is only entitled to relief as to transfers of property situated in the county where the suit is instituted. Home Bank *v.* Brewster, 15 N. Y. App. Div. 338, 44 N. Y. Suppl. 54.

86. *Montana.*— Wilson *v.* Harris, 21 Mont. 374, 54 Pac. 46.

New Jersey.— Dunham *v.* Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460; Young *v.* Frier, 9 N. J. Eq. 465.

North Carolina.— Clark *v.* Banner, 21 N. C. 608.

Virginia.— Mutual Assur. Soc. *v.* Stanard, 4 Munf. 539.

United States.— Schofield *v.* Ute Coal, etc., Co., 92 Fed. 269, 34 C. C. A. 334.

87. *Montana.*—Montana Nat. Bank *v.* Merchants' Nat. Bank, 19 Mont. 586, 49 Pac. 149, 61 Am. St. Rep. 532.

New Jersey.—Francis *v.* Lawrence, 48 N. J. Eq. 508, 22 Atl. 259; Williams *v.* Michenor, 11 N. J. Eq. 520.

New York.— Greenleaf *v.* Mumford, 19 Abb. Pr. 469, 30 How. Pr. 30; Falconer *v.* Freeman, 4 Sandf. Ch. 565.

Oregon.— Matlock *v.* Babb, 31 Oreg. 516, 49 Pac. 873; Dawson *v.* Sims, 14 Oreg. 561, 13 Pac. 506.

United States.— Lant *v.* Manley, 75 Fed. 627, 21 C. C. A. 457; Hahn *v.* Salmon, 20 Fed. 801.

See also Shreveport First Nat. Bank *v.* Randall, 20 R. I. 319, 38 Atl. 1055, 78 Am. St. Rep. 867; McKenna *v.* Crowley, 16 R. I. 364, 17 Atl. 354.

Contra.— Crowell *v.* Horacek, 12 Nebr. 622, 12 N. W. 99; Weinland *v.* Cochran, 9 Nebr. 482, 4 N. W. 67; Weil *v.* Lankins, 3 Nebr. 384. See Mechanics', etc., Bank *v.* Dakin, 51 N. Y. 519; Bowe *v.* Arnold, 31 Hun (N. Y.) 256.

88. Beach *v.* Bestor, 45 Ill. 341; Miller *v.* Davidson, 8 Ill. 518, 44 Am. Dec. 715.

89. Carr *v.* Huette, 73 Ind. 378; Armstrong *v.* Keifer, 39 Ind. 225; West *v.* McCarty, 4 Blackf. (Ind.) 244; O'Brien *v.* Coulter, 2 Blackf. (Ind.) 421; Kipper *v.* Glancey, 2 Blackf. (Ind.) 356; Vanderveer *v.* Stryker, 8 N. J. Eq. 175.

90. For this reason an execution issued by a justice of the peace returned *nulla bona* will not support a creditors' bill. Wilson *v.* Dale, 5 Ind. 163; Peterson *v.* Gittings, 107 Iowa 306, 77 N. W. 1056; Clements *v.* Waters, 90 Ky. 96, 13 S. W. 431, 11 Ky. L. Rep. 880; Crippen *v.* Hudson, 13 N. Y. 161; Coe *v.* Whitbeck, 11 Paige (N. Y.) 42; Dix *v.*

(III) *Where Directed.* Ordinarily the execution should be issued to the county of the debtor's residence.[91] This, however, has been held unnecessary where a debtor has no real or personal property in the county where he resides, liable to levy and sale on execution.[92] And it has been said that if the plaintiff knows that the defendant in the execution has property in a particular county execution should be sent there.[93]

(IV) *Levy.* A creditors' bill to subject equitable interests of a debtor to the payment of a judgment may be maintained without showing a levy of an execution on the property sought to be reached.[94]

(V) *Return* — (A) *Necessity For* — (1) In General. The issuance of execution on the creditor's judgment alone is insufficient; it must be returned[95] unsatisfied in whole or in part prior to the filing of the bill.[96]

Briggs, 9 Paige (N. Y.) 595. See also Weatherford *v.* Myers, 2 Duv. (Ky.) 91; Newdigate *v.* Jacobs, 9 Dana (Ky.) 17.

Such justice of the peace judgment should be docketed in the clerk's office of the proper court and execution issued against the real estate of the defendant and returned *nulla bona.* Peterson *v.* Gittings, 107 Iowa 306, 77 N. W. 1056; Crippen *v.* Hudson, 13 N. Y. 161; Coe *v.* Whitbeck, 11 Paige (N. Y.) 42; Dix *v.* Briggs, 9 Paige (N. Y.) 595.

91. *Alabama.*—Nix *v.* Winter, 35 Ala. 309; Brown *v.* Bates, 10 Ala. 432.

Illinois.— Or where he resided when suit brought. Durand *v.* Gray, 129 Ill. 9, 21 N. E. 610.

Kentucky.— Nashville, etc., R. Co. *v.* Mattingly, 101 Ky. 219, 40 S. W. 673, 19 Ky. L. Rep. 373, 374. Under statute, either to the county of the debtor's residence or where judgment was rendered, where it does not appear that the debtor resided elsewhere. Rhodes *v.* Cobb, 4 Dana 23.

Michigan.— Preston *v.* Wilcox, 38 Mich. 578; Freeman *v.* Michigan State Bank, Walk. 62.

Minnesota.—Wadsworth *v.* Schisselbauer, 32 Minn. 84, 19 N. W. 390.

New York.— Payne *v.* Sheldon, 43 How. Pr. 1; Strange *v.* Longley, 3 Barb. Ch. 650; Merchants', etc., Bank *v.* Griffith, 10 Paige 519; Child *v.* Brace, 4 Paige 309; Wilbur *v.* Collier, Clarke 315. Or if defendant is a nonresident of the state to the sheriff of the county where the judgment-roll is filed. Campbell *v.* Foster, 16 How. Pr. 275.

See 14 Cent. Dig. tit. "Creditors' Suit," § 84.

The bill must allege that the debtor at the time the execution issued resided in the county where the judgment was recovered, or that the judgment had been docketed and execution issued to some other county where defendant resided, or must show that for some other cause the remedy at law has been exhausted by issuing the execution in the county where the judgment was recovered (Wheeler *v.* Heermans, 3 Sandf. Ch. (N. Y.) 597); or show some legal excuse for not issuing execution to such county (Merchants', etc., Bank *v.* Griffith, 10 Paige (N. Y.) 519).

Where a creditor had a judgment and the debtor's land was encumbered by a prior judgment lien of record, but alleged in the bill to have been satisfied, it was held not necessary to show the issuance of execution to the county where the land lay, but sufficient to show execution returned unsatisfied in the county of the debtor's residence showing want of personal property. Shaw *v.* Dwight, 27 N. Y. 244, 84 Am. Dec. 575.

92. Sayre *v.* Thompson, 18 Nebr. 33, 24 N. W. 383, holding that the return of execution issued to another county will be sufficient to authorize a bill. And see Miller *v.* Shaw, 4 How. Pr. (N. Y.) 137, holding that the docketing of execution in the county of the residence of one of the debtors is not necessary if it does not appear that he had real estate in that county.

93. Nix *v.* Winter, 35 Ala. 309; Brown *v.* Bates, 10 Ala. 432; Durand *v.* Gray, 129 Ill. 9, 21 N. E. 610; Freeman *v.* Michigan State Bank, Walk. (Mich.) 62.

94. Call *v.* Perkins, 65 Me. 439; Griffin *v.* Nitcher, 57 Me. 270; Des Brisay *v.* Hogan, 53 Me. 554; Corey *v.* Greene, 51 Me. 114; Nichols *v.* Hubert, 150 Mo. 620, 51 S. W. 1031; McGregor-Noe Hardware Co. *v.* Horn, 146 Mo. 129, 47 S. W. 957; Central Nat. Bank *v.* Doran, 109 Mo. 40, 18 S. W. 836; Woodard *v.* Mastin, 106 Mo. 324, 17 S. W. 308; Bigelow Blue Stone Co. *v.* Magee, 27 N. J. Eq. 392; Robert *v.* Hodges, 16 N. J. Eq. 299; Dunham *v.* Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460; Brown *v.* Edmonds, 9 S. D. 273, 68 N. W. 734.

95. The actual return of the execution is required, and the fact that it should have been returned is not sufficient where it was not returned. Cassidy *v.* Meacham, 3 Paige (N. Y.) 311.

The return must be on the execution issued on the judgment sought to be enforced by the creditors' bill. Bardstown, etc., River Turnpike Road Co. *v.* Caldwell, 8 B. Mon. (Ky.) 36.

96. McElwain *v.* Willis, 3 Paige (N. Y.) 505; Clarkson *v.* De Peyster, 3 Paige (N. Y.) 320; Cassidy *v.* Meacham, 3 Paige (N. Y.) 311; Beck *v.* Burdett, 1 Paige (N. Y.) 305, 19 Am. Dec. 436; Cleveland Rolling-Mill Co. *v.* Joliet Enterprise Co., 53 Fed. 683.

Return to court from which execution issued.— Under the New York statutes where judgment is recovered in the superior court or court of common pleas and docketed in another county a creditors' bill cannot be sustained upon return of the execution to the

(2) On Second Execution Issued. Where an execution was issued to the proper county and returned *nulla bona*, it is no defense to a creditors' bill founded thereon that an execution had been issued to another county and not returned.[97]

(B) *Time of Making.* A return of the execution on the return-day named therein is a good one,[98] and quite a number of authorities hold that the officer in charge of an execution may take the responsibility of making a return of the execution before the return-day therein named.[99] But the creditor may not file his bill before the return-day named in the execution, although the execution has been actually returned before that day.[1]

(C) *Form and Requisites.* The object of requiring the issuance and return unsatisfied of execution being to show that the complainant has no remedy at law, the return of the execution unsatisfied must be made in good faith and because the defendant has no property out of which to make it, and a return for any other reason will not be sufficient.[2] And the execution and its return must be broad enough to show that defendant has no real property as well as no per-

clerk's office of the county in which the judgment is so docketed; execution must have been duly returned and filed with the clerk of the court from which the execution issued. Winslow *v.* Pitkin, 1 Barb. Ch. (N. Y.) 402.

Supplemental bill.— Where a creditors' bill was filed on a judgment and return of execution *nulla bona*, and afterward a supplemental bill on a second judgment on which execution had not been returned was filed, it was held that the supplemental bill was subject to demurrer. McElwain *v.* Willis, 3 Paige (N. Y.) 505.

97. Cuyler *v.* Moreland, 6 Paige (N. Y.) 273. See also cases cited *supra*, notes 70, 71. But in Willis *v.* Moore, Clarke (N. Y.) 150, where there were two executions issued, one to the county of defendant's residence and the other to another county, it was held that a creditors' bill was not maintainable except upon an allegation of the return of both executions unsatisfied, unless it was also alleged that some fraudulent obstruction to the collection of the second execution was interposed, or that the property of the defendant in such county would in any event be insufficient to pay the judgment.

98. Williams *v.* Hubbard, 1 Mich. 446.

Suit brought on the day of the return of the execution nulla bona, although the process was not filed by the officer until the following day, was sustained in Iselin *v.* Henlein, 16 Abb. N. Cas. (N. Y.) 73, 2 How. Pr. N. S. (N. Y.) 211.

99. If he satisfies himself that the defendant has no property out of which to make the execution and returns the execution *nulla bona* before the return-day thereof, such a return will support a creditors' bill.

District of Columbia.— Barth *v.* Heider, 7 D. C. 71; Clark *v.* Walter T. Bradley Coal, etc., Co., 6 App. Cas. 437; Mehler *v.* Cornwell, 3 App. Cas. 92.

Illinois.— Lewis *v.* Lanphere, 79 Ill. 187; Bowen *v.* Parkhurst, 24 Ill. 257; Howe *v.* Babcock, 72 Ill. App. 68; Illinois Malleable Iron Co. *v.* Graham, 55 Ill. App. 266.

Kentucky.— Dana *v.* Banks, 6 J. J. Marsh. 219.

Mississippi.— Ward *v.* Whitfield, 64 Miss. 754, 2 So. 493.

New York.— Livingston *v.* Cleaveland, 5 How. Pr. 396, Code Rep. N. S. 54; Platt *v.* Cadwell, 9 Paige 386; Williams *v.* Hogeboom, 8 Paige 469. Unless it appear that plaintiff had the sheriff return the execution *nulla bona* without any attempt in good faith to satisfy the same. Renaud *v.* O'Brien, 35 N. Y. 99; Forbes *v.* Waller, 25 N. Y. 430.

West Virginia.—Newlon *v.* Wade, 43 W. Va. 283, 27 S. E. 244.

United States.— Bassett *v.* Orr, 2 Fed. Cas. No. 1,095, 7 Biss. 296. Under Michigan statute see Howe *v.* Cobb, 12 Fed. Cas. No. 6,767, 3 McLean 270. Where bill was not filed until after the return-day see Suydam *v.* Beals, 23 Fed. Cas. No. 13,653, 4 McLean 12.

See 14 Cent. Dig. tit. "Creditors' Suit," § 85.

Contra.— Mauch Chunk Second Nat. Bank *v.* Dwight, 83 Mich. 192, 47 N. W. 111; Mauch Chunk First Nat. Bank *v.* Dwight, 83 Mich. 189, 47 N. W. 111; Smith *v.* Thompson, Walk. (Mich.) 1.

Although the return was made but two days after demand made on the defendant and the statute of exemption allows a defendant ten days thereafter in which to schedule property, such return will support a creditors' bill. Howe *v.* Babcock, 72 Ill. App. 68.

1. Mauch Chunk Second Nat. Bank *v.* Dwight, 83 Mich. 192, 47 N. W. 111; Mauch Chunk First Nat. Bank *v.* Dwight, 83 Mich. 189, 47 N. W. 111; Field *v.* Chapman, 13 Abb. Pr. (N. Y.) 320, 22 How. Pr. (N. Y.) 329; Renaud *v.* O'Brien, 25 How. Pr. (N. Y.) 67; Cassidy *v.* Meacham, 3 Paige (N. Y.) 311.

Contra.— Barth *v.* Heider, 7 D. C. 71; Mehler *v.* Cornwell, 3 App. Cas. 92; Bassett *v.* Orr, 2 Fed. Cas. No. 1,095, 7 Biss. 296; Howe *v.* Cobb, 12 Fed. Cas. No. 6,767, 3 McLean 270.

2. Hughes *v.* Link Belt Machinery Co., 95 Ill. App. 323 [*affirmed* in 195 Ill. 413, 63 N. E. 186, 59 L. R. A. 673]; Storm *v.* Badger, 8 Paige (N. Y.) 130; Buckeye Engine Co. *v.* Donau Brewing Co., 47 Fed. 6; Bassett *v.* Orr, 2 Fed. Cas. No. 1,095, 7 Biss. 296.

sonalty.[3] The return of an execution unsatisfied by direction of the plaintiff in the execution,[4] without any effort made by the officer to collect the execution or find property on which to levy it, is insufficient.[5] The fact that the plaintiff in the execution did not direct the sheriff to levy the execution on certain property which plaintiff knew of belonging to the defendant is held to be no defense.[6] A return of an execution against three defendants stating that they had no property out of which the execution could be collected, without particularly stating that neither of them had such property, is sufficient to show that the execution could not be made out of joint or separate property of the defendants.[7] A personal demand on the defendant in the execution for payment thereof, or of property out of which to make it, is not essential to the validity of the return.[8]

(D) *Operation and Effect.* The return by the officer of an execution *nulla bona* is *prima facie* and sufficient evidence that the defendant has no property subject to levy at that time, so as to authorize a creditors' bill based on the judgment on which the execution issued,[9] and dispenses with proof that the debtor is

An execution "returned not executed" is insufficient to form the basis for a creditors' bill. Richardson *v.* Gilbert, 21 Fla. 544.

3. State Bank *v.* Oliver, 1 Disn. (Ohio) 159, 12 Ohio Dec. (Reprint) 548; *In re* Remington, 7 Wis. 643; Kittel *v.* Augusta, etc., R. Co., 65 Fed. 859.

A return on the execution unsatisfied because the defendant had no "goods and chattels whereof to make" the execution is insufficient, since the defendant might have real property. State Bank *v.* Oliver, 1 Disn. (Ohio) 159, 12 Ohio Dec. (Reprint) 548.

4. Wharton *v.* Fitch, Walk. (Mich.) 143; Williams *v.* Hubbard, Walk. (Mich.) 28. See also Gauler *v.* Wohlers, 12 Ill. App. 594, holding that where it appeared that the sheriff had levied an execution on considerable personal property of a defendant and all that was shown in regard to it was a statement in the return that the property had been taken from him on replevin, and that under direction of the plaintiff's attorney he had returned the execution unsatisfied, and the sheriff did not say that he demanded any property from the defendant, the complainant should have shown that without any fault of the sheriff or himself or by some instrumentality of the defendant the property so levied on could not have been made available on the execution.

5. Scheubert *v.* Honel, 152 Ill. 313, 38 N. E. 913 [*affirming* 50 Ill. App. 297]; Hartley *v.* Atkins, 64 Ill. App. 502; Pecos Irr., etc., Co. *v.* Olson, 63 Ill. App. 313; Illinois Malleable Iron Co. *v.* Graham, 55 Ill. App. 266; Dunderdale *v.* Westinghouse Electric, etc., Co., 51 Ill. App. 407; *In re* Remington, 7 Wis. 643. Thus where plaintiff's attorney instructed the sheriff not to levy on the real estate of defendant, on a plea of defendant in the creditors' bill stating that fact and that defendant had offered to point out real estate to be levied on when the officer called on him, an injunction granted on the bill was dissolved. Wharton *v.* Fitch, Walk. (Mich.) 143.

But where the officer makes a demand of the defendant and is unable after effort to find property of defendant whereon to levy the execution, the fact that he returns the execution unsatisfied by direction from plaintiff does not invalidate the return, although the execution is returned before the return-day. Howe *v.* Babcock, 72 Ill. App. 68; Illinois Malleable Iron Co. *v.* Graham, 55 Ill. App. 266.

6. Albany City Bank *v.* Dorr, Walk. (Mich.) 317.

Where an execution was returned nulla bona, proof of the existence of personal property of the debtor does not affect the plaintiff's right to maintain the action, unless he intentionally omitted to seize it. Meyer *v.* Mohr, 1 Rob. (N. Y.) 333, 19 Abb. Pr. (N. Y.) 299.

7. Williams *v.* Hubbard, 1 Mich. 446; Winchester *v.* Crandall, Clarke (N. Y.) 371. See also Austin *v.* Figueira, 7 Paige (N. Y.) 56.

8. Thompson *v.* Marsh, 61 Ill. App. 269.

9. *District of Columbia.*— Clark *v.* Walter T. Bradley Coal, etc., Co., 6 App. Cas. 437.

Illinois.— Highley *v.* American Exch. Nat. Bank, 185 Ill. 565, 57 N. E. 436; Lewis *v.* Lanphere, 79 Ill. 187; Thompson *v.* Marsh, 61 Ill. App. 269.

Iowa.—McCormick Harvesting-Mach. Co. *v.* Gates, 75 Iowa 343, 39 N. W. 657, under statute.

Kentucky.— Clements *v.* Waters, 90 Ky. 96, 13 S. W. 431, 11 Ky. L. Rep. 880.

Mississippi.— Wright *v.* Petrie, Sm. & M. Ch. 282.

Montana.— Whiteside *v.* Hoskins, 20 Mont. 361, 51 Pac. 739.

New York.— Stoors *v.* Kelsey, 2 Paige 418.

Rhode Island.—Shreveport First Nat. Bank *v.* Randall, 20 R. I. 319, 38 Atl. 1055, 78 Am. St. Rep. 867; Stone *v.* Westcott, 18 R. I. 517, 28 Atl. 662, the return is the best evidence of the exhaustion of legal remedies.

South Dakota.— Minneapolis Threshing Mach. Co. *v.* Hanrahan, 9 S. D. 520, 70 N. W. 656; Brown *v.* Edmonds, 9 S. D. 273, 68 N. W. 734.

Wisconsin.— Oppenheimer *v.* Collins, 115 Wis. 283, 91 N. W. 690, 60 L. R. A. 406; Daskam *v.* Neff, 79 Wis. 161, 47 N. W. 1132.

Effect of second return.— Where an execution was returned *nulla bona* and another

without property other than that which the creditor seeks to reach by his bill.[10] Such a return has been held to be conclusive evidence of the exhaustion of legal remedies and the necessity for resort to a court of equity, when it is good on its face and not made collusively,[11] and proof that the debtor had property on which the execution might have been levied will not prevent the creditor from maintaining his bill,[12] unless such property be brought within the jurisdiction of the court by cross bill.[13]

3. Exhausting Remedies at Law After Suit Brought. The exhaustion of remedies at law by judgment and the issuance of execution thereon and its return unsatisfied are essential to give jurisdiction to a court of equity to entertain a creditors' bill, and where such jurisdiction does not exist at the time of the filing of the bill because of the want of such judgment or execution, the defect cannot be cured by the subsequent recovery of a judgment or the issuance and return unsatisfied of execution thereon and the setting up of such facts in a supplemental bill.[14] So where a bill was properly filed on one judgment it has been held that the complainant could not bring in and obtain relief in respect of another judgment obtained since the filing of the original bill.[15]

III. Property and Rights Subject to Creditors' Bills.

A. In General. Any beneficial interest of a debtor in real estate or personal property which cannot be reached by regular process of law,[16] and only such

execution was issued and return thereon showed a levy on property greatly below the amount of the judgment, the first return was not disproved by the second and the necessity for resort to equity was sufficiently shown. Helm *v.* Hardin, 2 B. Mon. (Ky.) 231.

10. Goddard *v.* Fishel-Schlichten Importing Co., 9 Colo. App. 306, 48 Pac. 279.

11. *Michigan.*— Rankin *v.* Rothschild, 78 Mich. 10, 43 N. W. 1077; Albany City Bank *v.* Dorr, Walk. 317.

Nebraska.— Nebraska Nat. Bank *v.* Hollowell, 63 Nebr. 309, 88 N. W. 556; Thompson *v.* La Rue, 59 Nebr. 614, 81 N. W. 612.

New Mexico.— Early Times Distillery Co. *v.* Zeiger, 9 N. M. 31, 49 Pac. 723.

Oregon.— Wyatt *v.* Wyatt, 31 Oreg. 531, 49 Pac. 855; Page *v.* Grant, 9 Oreg. 116.

United States.— Bidwell *v.* Huff, 103 Fed. 362.

False return.— The creditor may bring a creditors' bill on the strength of the officer's return, although the return is false. Clements *v.* Waters, 90 Ky. 96, 13 S. W. 431, 11 Ky. L. Rep. 880.

12. Leonard *v.* Forcheimer, 49 Ala. 145. *Contra,* where defendant shows that he has property subject to execution, plaintiff cannot maintain a creditors' bill under the statute. Lee *v.* Harhack, 2 Ohio Dec. (Reprint) 361, 2 West. L. Month. 527.

Return based on debtor's statement.— Where an officer returns an execution *nulla bona* on the statement of the defendant that he has no property or money, the defendant cannot afterward contradict the return by showing that he had property. Lewis *v.* Lanpherc, 79 Ill. 187; Gillett *v.* Staples, 16 Hun (N. Y.) 587.

13. Leonard *v.* Forcheimer, 49 Ala. 145.

14. Rives *v.* Walthall, 38 Ala. 329; Morrison *v.* Shuster, 1 Mackey (D. C.) 190; Brown *v.* State Bank, 31 Miss. 454; McElwain *v.* Willis, 3 Paige (N. Y.) 505.

Where the statute authorized equitable proceedings by a creditor after judgment to discover and subject property of the defendant to its satisfaction, and gave a lien on the service of process, it was held that where a creditor brought such proceedings before he had obtained a judgment and a third person was served with process and afterward a supplemental petition was filed setting up the subsequent recovery of a judgment by the plaintiff, the plaintiff obtained no lien on the property sought to be reached, although the third person appeared to the original process. Ware *v.* Delahaye, 95 Iowa 667, 64 N. W. 640.

15. National State Bank *v.* McCormick, (N. J. Ch. 1899) 44 Atl. 706.

16. *Georgia.*— Cruger *v.* Coleman, 75 Ga. 695; Merchants', etc., Nat. Bank *v.* Masonic Hall, 65 Ga. 603; Woodward *v.* Solomon, 7 Ga. 246.

Illinois.— Durand *v.* Gray, 129 Ill. 9, 21 N. E. 610; Wren *v.* Dooley, 97 Ill. App. 88; Petefish *v.* Buck, 56 Ill. App. 149.

Indiana.— Whitney *v.* Kimball, 4 Ind. 546, 58 Am. Dec. 638.

Iowa.— Hirsh *v.* Israel, 106 Iowa 498, 76 N. W. 811, under statute.

Kansas.— Ludes *v.* Hood, 29 Kan. 49; Clark *v.* Bert, 2 Kan. App. 407, 42 Pac. 733.

Maine.— Hartshorn *v.* Eames, 31 Me. 93.

Massachusetts.— Bresnihan *v.* Sheehan, 125 Mass. 11, under statute.

Mississippi.— Hargrove *v.* Baskin, 50 Miss. 194; Dick *v.* Truly, Sm. & M. Ch. 557.

Missouri.— McIlvaine *v.* Smith, 42 Mo. 45, 97 Am. Dec. 295.

New Jersey.— Halsted *v.* Davison, 10 N. J. Eq. 290; Vanderveer *v.* Stryker, 8 N. J. Eq. 175.

interest, may be reached by a creditors' bill and subjected to the payment or satisfaction of the debt.[17]

B. Particular Rights or Interests — 1. Interest In, or Connected With, Real Estate[18] — a. Resulting Trusts. The equitable title of one who pays the purchase-money of land, the title to which is taken in the name of another, may be reached by a creditors' bill,[19] provided payment was made at the time the title was taken.[20]

b. Unassigned Dower Interest. An unassigned dower interest may be reached by a creditors' bill.[21]

New York.— Ogden *v.* Wood, 51 How. Pr. 375; Farnham *v.* Campbell, 10 Paige 598.

West Virginia.— Weeden *v.* Bright, 3 W. Va. 548.

See 14 Cent. Dig. tit. "Creditors' Suit," § 12 *et seq.*

Contra.— Hexter *v.* Clifford, 5 Colo. 168, under statute.

17. Venable *v.* Rickenberg, 152 Mass. 65, 24 N. E. 1083, 8 L. R. A. 623; Weil *v.* Raymond, 142 Mass. 206, 7 N. E. 860; Schlesinger *v.* Sherman, 127 Mass. 206; Folkes *v.* Hayden, 29 Miss. 123; Coleman *v.* Rives, 24 Miss. 634; Chautauque County Bank *v.* White, 6 Barb. (N. Y.) 589.

Contra.— Clements *v.* Waters, 90 Ky. 96, 13 S. W. 431, 11 Ky. L. Rep. 880.

Rings and jewelry are not wearing apparel and are liable for debts; but as it may be out of the power of the sheriff to levy on or take possession of them, being usually worn on the person, a receiver will be appointed and an order made for delivery to him. Frazier *v.* Barnum, 19 N. J. Eq. 316, 97 Am. Dec. 666.

18. **Land platted into lots and dedicated as a public cemetery** and appropriated and used exclusively for burial purposes is exempt from execution and cannot be reached by a creditors' bill, where a statute expressly declares that where land is thus appropriated it shall not be subject to sale on execution under any judgment. Pawnee City First Nat. Bank *v.* Hazels, 63 Nebr. 844, 89 N. W. 378, 56 L. R. A. 765. See also Cemeteries, 6 Cyc. 718.

Where a deed of land was made by a father to a son, but was never acknowledged, and the latter takes timber to the full value of the amount which was paid as part of the consideration and the contract is subsequently rescinded, he has no interest legal or equitable which can be reached by a creditors' bill. Miller *v.* Winton, (Tenn. Ch. App. 1900) 56 S. W. 1049.

19. *Delaware.*—Newells *v.* Morgan, 2 Harr. 225.

Georgia.— Field *v.* Jones, 10 Ga. 229.

Indiana.— Deemaree *v.* Driskill, 3 Blackf. 115.

Kentucky.— Matthews *v.* Arbritton, 83 Ky. 32; Doyle *v.* Sleeper, 1 Dana 531.

Maine.— Augusta Sav. Bank *v.* Crossman, (1886) 7 Atl. 396; Gray *v.* Chase, 57 Me. 558.

Maryland.— Trego *v.* Skinner, 42 Md. 426.

Massachusetts.— Bresnihan *v.* Sheehan, 125 Mass. 11; Mill River Loan Fund Assoc. *v.* Claflin, 9 Allen 101.

Nebraska.— Cochran *v.* Cochran, 62 Nebr. 450, 87 N. W. 152.

New Jersey.— Haggerty *v.* Nixon, 26 N. J. Eq. 42.

New York.— McCartney *v.* Bostwick, 31 Barb. 390; Hiler *v.* Hetterick, 5 Daly 33; Donovan *v.* Sheridan, 37 N. Y. Super. Ct. 256.

North Carolina.— Gentry *v.* Harper, 55 N. C. 177.

South Carolina.— Godbold *v.* Lambert, 8 Rich. Eq. 155, 70 Am. Dec. 192.

Vermont.— Corey *v.* Morrill, 71 Vt. 51, 42 Atl. 976; Waterman *v.* Cochran, 12 Vt. 699.

See 14 Cent. Dig. tit. "Creditors' Suit," § 40.

An interest in a bond for the conveyance of land, when purchase-money is paid by the debtor and the bond is taken in the name of another, is subject to a creditors' bill. Woods *v.* Scott, 14 Vt. 518.

Between husband and wife.— Where real estate is paid for by the husband and title is taken in the name of the wife, it cannot be reached by a creditors' bill if the husband is solvent at the time of the transaction and is not rendered insolvent by the transaction. Fox *v.* Lipe, 14 Colo. App. 258, 59 Pac. 850; Lockhard *v.* Beckley, 10 W. Va. 87.

20. Niser *v.* Crane, 98 N. Y. 40.

21. *District of Columbia.*— Davison *v.* Whittlesey, 1 MacArthur 163.

Illinois.— Thompson *v.* Marsh, 61 Ill. App. 269; Petefish *v.* Buck, 56 Ill. App. 149.

Massachusetts.— McMahon *v.* Gray, 150 Mass. 289, 22 N. E. 923, 15 Am. St. Rep. 202, 5 L. R. A. 748, under statute.

New York.—Payne *v.* Becker, 87 N. Y. 153; Kenney *v.* Morse, 71 N. Y. App. Div. 104, 75 N. Y. Suppl. 728; Stewart *v.* McMartin, 5 Barb. 438. *Contra,* Tompkins *v.* Fonda, 4 Paige 448.

Ohio.— Boltz *v.* Stoltz, 41 Ohio St. 540 [*affirming* 8 Ohio Dec. (Reprint) 61, 5 Cinc. L. Bul. 410].

United States.— Muir *v.* Hodges, 116 Fed. 912.

See 14 Cent. Dig. tit. "Creditors' Suit," § 35.

Contra.—Harper *v.* Clayton, 84 Md. 346, 35 Atl. 1083, 57 Am. St. Rep. 407, 35 L. R. A. 211. A creditors' bill will not lie although it alleges that the widow when contracting the debt assured the creditor that she would pay it out of the dower estate and that the widow fraudulently colluding with the heirs occupied the lands without having the dower assigned. Maxon *v.* Gray, 15 R. I. 475, 8 Atl. 696.

c. Vendor's Lien. A vendor's lien for the unpaid purchase-price of real estate is subject to a creditors' bill.[22]

d. Purchaser's Rights Under Contract For Purchase of Land. An interest of a purchaser arising out of a contract he has for the purchase of land is subject to a creditors' bill.[23]

e. Improvements on Land of Others. The interest of a husband in improvements made by him upon real estate of his wife[24] or of a father in improvements made on the land of his infant son of whom he is the guardian is subject to a creditors' bill.[25] So where a debtor uses his personal property upon land of another with his knowledge and consent, so that the personal property becomes part of the realty, for the purpose of defrauding creditors, they may subject the premises to the extent of their enhancement in value by such use of such personal property to the payment of their judgments.[26]

f. Crops. Crops belonging to a debtor raised on a plantation carried on in the name of another are subject to a creditors' bill.[27]

g. Rents. Rents are not subject to a creditors' bill.[28]

h. Licenses. A license, although for life, cannot be reached by a creditors' bill.[29]

i. Contingent Remainders. A contingent remainder cannot be sold for the benefit of the creditors of a possible remainder-man.[30]

2. Choses in Action. There is a conflict of authority as to whether, in the absence of statutory authorization, choses in action of a debtor can be subjected in equity to the payment of his debts. In one jurisdiction, where the question has never been decided, the court has expressed a doubt that choses in action can be so subjected to the payment of debts.[31] In others it has been denied that they can be subjected to the payment of debts without express and positive statutory authority therefor.[32] In some jurisdictions the contrary view is

22. Edwards *v.* Edwards, 24 Ohio St. 402; Withers *v.* Carter, 4 Gratt. (Va.) 407, 50 Am. Dec. 78.

23. McNab *v.* Heald, 41 Ill. 326; Figg *v.* Snook, 9 Ind. 202 (under statute); Williams *v.* Michenor, 11 N. J. Eq. 520; Mead *v.* Gregg, 12 Barb. (N. Y.) 653; Watson *v.* Le Row, 6 Barb. (N. Y.) 481; Ellsworth *v.* Cuyler, 9 Paige (N. Y.) 418. But see Sweezy *v.* Jones, 65 Iowa 272, 21 N. W. 603, holding that an option to purchase land cannot be reached by a creditors' bill.

Rescission of contract after part payment. — Where parties to a contract for the purchase of real estate after part payment rescind the contract, so that an alleged interest in the land cannot be reached by a creditors' bill, the part of the purchase-money actually paid may be subjected to the payment of the judgment. Alexander *v.* Tams, 13 Ill. 221.

Where a right to a conveyance has been forfeited by laches of the person with whom the agreement was made, a bill will not lie in behalf of his creditor to compel the sale of the land and the application of the proceeds to the payment of his debts. Fuller *v.* Hovey, 2 Allen (Mass.) 324, 79 Am. Dec. 782.

24. Ware *v.* Seasongood, 92 Ala. 152, 9 So. 138; Ware *v.* Hamilton Brown Shoe Co., 92 Ala. 145, 9 So. 136; Kirby *v.* Bruns, 45 Mo. 234, 100 Am. Dec. 376. *Contra,* Lockhard *v.* Beckley, 10 W. Va. 87. And see Beam *v.* Scroggin, 12 Ill. App. 321, holding that the right of a cotenant to reimbursement from his cotenants for improvements made on land held in cotenancy cannot be reached by a creditors' bill, at least not in advance of partition proceedings.

25. Athey *v.* Knotts, 6 B. Mon. (Ky.) 24.

26. Dietz *v.* Atwood, 19 Ill. App. 96; People's Nat. Bank *v.* Loeffert, 184 Pa. St. 164, 38 Atl. 996.

27. Micou *v.* Moses, 72 Ala. 439. Under statute in Kentucky the growing crop of a debtor may be subjected in equity before October 1, the statute forbidding a levy on the crop before October 1. Farmers' Bank *v.* Morris, 79 Ky. 157.

Rights of third parties.— Where a judgment debtor and a third person contracted to rent certain land and to raise a crop thereon, one half of the crop to belong to the landlord, and the balance to be divided equally between the debtor and such third party, and the agreement was carried out in good faith, each party thereto performing half the labor of raising the crops, such third party is entitled to a one-fourth share of the crop as against the creditor of the judgment debtor. Bourne *v.* Darden, (Tenn. Ch. App. 1901) 61 S. W. 1078.

28. Schlesinger *v.* Sherman, 127 Mass. 206.

29. Waggoner *v.* Speck, 3 Ohio 292.

30. Howbert *v.* Cauthorn, 100 Va. 649, 42 S. E. 683.

31. White Sewing-Mach. Co. *v.* Atkeson, 75 Tex. 330, 12 S. W. 812; Taylor *v.* Gillean, 23 Tex. 508; Price *v.* Brady, 21 Tex. 614.

32. *Alabama.*—Henderson *v.* Hall, 134 Ala. 455, 32 So. 84.

taken,[33] and in others there are statutes making choses in action reachable in equity for the payment of debts.[34]

3. **Debts Due a Debtor of the Debtor.** A debt due a debtor of the debtor cannot be reached by a creditors' bill.[35]

4. **Debts Due From Public Corporations.** There is a conflict of opinion as to whether money owing to a debtor by a public corporation for work done under a contract or on a salary basis can be subjected by creditors to the payment of debts, and decisions even in the same state are not always harmonious.[36] In some juris-

Indiana.— Scott *v.* Indianapolis Wagon Works, 48 Ind. 75; Keightley *v.* Walls, 27 Ind. 384; Williams *v.* Reynolds, 7 Ind. 622; Peoples *v.* Stanley, 6 Ind. 410; Stewart *v.* English, 6 Ind. 176; Totten *v.* McManus, 5 Ind. 407; Shaw *v.* Aveline, 5 Ind. 380. See also Mitchell *v.* Jones, 2 Ind. 38.

Kentucky.— Buford *v.* Buford, 1 Bibb 305.

Maryland.— Harper *v.* Clayton, 84 Md. 346, 35 Atl. 1083, 57 Am. St. Rep. 407, 35 L. R. A. 211.

New Jersey.— Disborough *v.* Outcalt, 1 N. J. Eq. 298.

Rhode Island.— Greene *v.* Keene, 14 R. I. 388, 51 Am. Rep. 400.

South Carolina.— Verdier *v.* Foster, 4 Rich. Eq. 227; Durr *v.* Bowyer, 2 McCord Eq. 368.

Tennessee.— Erwin *v.* Oldham, 6 Yerg. 185, 27 Am. Dec. 458.

England.— Grogan *v.* Cooke, 2 Ball & B. 234; McCarthy *v.* Goold, 1 Ball & B. 387; Dundas *v.* Dutens, 2 Cox Ch. 235, 1 Ves. Jr. 196, 1 Rev. Rep. 112, 30 Eng. Reprint 109, 298. *Contra,* Horn *v.* Horn, Ambl. 79, 27 Eng. Reprint 49.

See 14 Cent. Dig. tit. "Creditors' Suit," § 22.

33. *Georgia.*—Lightfoot *v.* Planters' Banking Co., 58 Ga. 136.

Illinois.— Hitt *v.* Ormsbee, 14 Ill. 233.

Mississippi.— Cohen *v.* Carroll, 5 Sm. & M. 545, 45 Am. Dec. 267; Wright *v.* Petrie, Sm. & M. Ch. 282.

New York.— Hadden *v.* Spader, 20 Johns. 554; Hudson *v.* Plets, 11 Paige 180; Egberts *v.* Pemberton, 7 Johns. Ch. 208; White *v.* Geraerdt, 1 Edw. 336. *Contra,* Donovan *v.* Finn, Hopk. 59, 14 Am. Dec. 531.

North Carolina.—Powell *v.* Howell, 63 N. C. 283; Hook *v.* Fentress, 62 N. C. 229; Brown *v.* Long, 22 N. C. 138.

See 14 Cent. Dig. tit. "Creditors' Suit," § 22.

Choses in action arising out of a tort to the person cannot be reached by a creditors' bill. Bennett *v.* Sweet, 171 Mass. 600, 51 N. E. 183; Hudson *v.* Plets, 11 Paige (N. Y.) 180.

Choses in action arising out of a tort to property may be reached by a creditors' bill. Hudson *v.* Plets, 11 Paige (N. Y.) 180; Cincinnati *v.* Hafer, 49 Ohio St. 60, 30 N. E. 197; Denning *v.* Nelson, 1 Ohio Dec. (Reprint) 503, 10 West. L. J. 215.

Demands reduced to judgment may be reached by a creditors' bill. Egberts *v.* Pemberton, 7 Johns. Ch. (N. Y.) 208.

34. *Kentucky.*— Doyle *v.* Sleeper, 1 Dana 531. And see Merriwether *v.* Bell, 58 S. W. 987, 22 Ky. L. Rep. 844.

Massachusetts.— Lord *v.* Harte, 118 Mass. 271; Silloway *v.* Columbia Ins. Co., 8 Gray 199.

New Jersey.— Green *v.* Tantum, 19 N. J. Eq. 105; Whitney *v.* Robbins, 17 N. J. Eq. 360.

Ohio.— Cincinnati *v.* Hafer, 49 Ohio St. 60, 30 N. E. 197; Douglass *v.* Huston, 6 Ohio 156; Denning *v.* Nelson, 1 Ohio Dec. (Reprint) 503, 10 West. L. J. 215.

Tennessee.— Turley *v.* Massengill, 7 Lea 353; Chalfant *v.* Grant, 3 Lea 118; Miller *v.* Lancaster, 5 Coldw. 514; Ewing *v.* Cantrell, Meigs 364; Brightwell *v.* Mallory, 10 Yerg. 196.

Wisconsin.— Bragg *v.* Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161.

See 14 Cent. Dig. tit. "Creditors' Suit," § 22.

35. Jones *v.* Huntington, 9 Mo. 249.

36. In Arkansas it was held in one case that a creditors' bill would not lie to subject a debt due from a public corporation for work done for the corporation. Boone County *v.* Keck, 31 Ark. 387. But in another decision it was held that in a proceeding against the debtor alone when no injury could result to the public corporation thereby, a claim made against such corporation for work completed might be subjected to the payment of his debts by sale or compulsory assignment of the claim. Riggin *v.* Hillard, 56 Ark. 476, 20 S. W. 402, 35 Am. St. Rep. 113.

In Kentucky, although a creditor may not have a decree against the state for money due an insolvent debtor who is an officer of the state (Divine *v.* Harvie, 7 T. B. Mon. 439, 18 Am. Dec. 194), yet such decree may be rendered against a town or city corporation which may be sued for money actually due to a town or city officer for services at the filing of this bill (Speed *v.* Brown, 10 B. Mon. 108).

In Missouri it has been held that where a judgment has been obtained against a resident of the state who is employed in a municipal office, and execution issues and is returned *nulla bona,* neither by a suit against said officer and the city, nor by statutory garnishment, can the city be compelled to pay the salary due such officer to such judgment creditor. Geist *v.* St. Louis, 156 Mo. 643, 648, 57 S. W. 766, 79 Am. St. Rep. 545. On the other hand it has been held that "where a debtor has absconded so that judgment cannot be obtained against him, and has no property in the State subject to attachment, but has money in the city treasury belonging to him, it may be reached by bill in equity, in the first instance, without a previous judg-

dictions it is well settled that a creditor may obtain discovery and relief by a creditors' bill in respect to the salary of his debtor as a public officer.[37] In other jurisdictions a bill will not lie.[38]

5. Equities Between Husband and Wife. A debt due a husband by his wife may be reached by a creditors' bill,[39] but a debt due the wife before the marriage and never reduced to possession by the husband cannot be reached by a creditors' bill against the husband, as the wife's equity is superior to the equity of creditors;[40] nor can the marital property rights of the husband in an estate descended to the wife be so subjected before suitable provision is made by him for her maintenance.[41]

6. Funds In Custodia Legis. Money paid into court, in which money the debtor has an interest, although it is paid into court for his benefit, cannot be reached by a creditors' bill.[42] But money in court in the hands of a receiver may be reached at the suit of one who is a creditor of all the parties litigant.[43]

7. Interests in Insurance Policies. The interest of a debtor in a life-insurance policy may be reached by a creditors' bill,[44] whether such interest arises by the terms of the policy or by reason of premiums paid in fraud of creditors.[45]

8. Interests in Trust Estates. Ordinarily, a creditors' bill will lie to subject

ment at law, and without showing fraud or any other recognized ground of equitable jurisdiction; and the fact that cities are not liable under the statutory garnishment will not protect them from such proceeding in equity." Pendleton *v.* Perkins, 49 Mo. 565. So it has been held that a debt due by a municipal coporation for work done under contract may by a creditors' bill be subjected to the satisfaction of judgment against the latter. Furlong *v.* Thomssen, 19 Mo. App. 364.

37. Browning *v.* Bettis, 8 Paige (N. Y.) 568; McCoun *v.* Dorsheimer, Clarke (N. Y.) 144; Smith *v.* ——, 4 Edw. (N. Y.) 653; Thompson *v.* Nixon, 3 Edw. (N. Y.) 457; Newark *v.* Funk, 15 Ohio St. 462 (under special statutory authorization. The contrary rule prevailed before the enactment of the statute. Boalt *v.* Williams County Com'rs, 18 Ohio 13); Hinsdale-Doyle Granite Co. v. Tilley, 10 Fed. 799, 10 Biss. 572.

County warrants.— It has been held that a creditors' bill will lie, to subject to payment of a judgment county warrants payable to the debtor through the hands of a county clerk for work done. Clark *v.* Bert, 2 Kan. App. 407, 42 Pac. 733.

Where a public officer earns his fees by the piece or job as the work is done, they can be reached by a judgment creditor, even though the day of payment had not arrived when the bill was filed. Thompson *v.* Nixon, 3 Edw. (N. Y.) 457. But salary to be earned cannot. Thompson *v.* Nixon, 3 Edw. (N. Y.) 457.

38. Morgan *v.* Rust, 100 Ga. 346, 28 S. E. 419; Addyston Pipe, etc., Co. *v.* Chicago, 170 Ill. 580, 48 N. E. 967, 44 L. R. A. 405 [*affirming* 58 Ill. App. 273, and *overruling* without mention Wren *v.* Dooley, 97 Ill. App. 88; Singer, etc., Stone Co. *v.* Wheeler, 6 Ill. App. 225]; Philadelphia Granite, etc., Co. *v.* Douglass, 3 Pa. Dist. 133, 14 Pa. Co. Ct. 234.

39. Robinson *v.* Trofitter, 109 Mass. 478; Kingman *v.* Frank, 33 Hun (N. Y.) 471 [*reversing* 64 How. Pr. 520].

40. Smith *v.* Kane, 2 Paige (N. Y.) 303.

41. Athey *v.* Knotts, 6 B. Mon. (Ky.) 24.

42. Tuck *v.* Manning, 150 Mass. 211, 22 N. E. 1001, 5 L. R. A. 666; Com. *v.* Hide, etc., Ins. Co., 119 Mass. 155; Anheuser-Busch Brewing Assoc. *v.* Hier, 52 Nebr. 424, 72 N. W. 588 [*disapproving* Weaver *v.* Cressman, 21 Nebr. 675, 33 N. W. 478]; U. S. *v.* Eisenbeis, 88 Fed. 4. *Contra,* Ward *v.* Whitfield, 64 Miss. 754, 2 So. 493; Cohen *v.* Carroll, 5 Sm. & M. (Miss.) 545, 45 Am. Dec. 267. But see Helm *v.* Philbrick, 28 Miss. 210.

43. Wade *v.* Ringo, 62 Mo. App. 414; Van Wezel *v.* Wyckoff, 3 Sandf. Ch. (N. Y.) 528.

44. Fearn *v.* Ward, 80 Ala. 555, 2 So. 114; Leonard *v.* Clinton, 26 Hun (N. Y.) 288. Under statute see Anthracite Ins. Co. *v.* Sears, 109 Mass. 383.

45. Central Nat. Bank *v.* Hume, 3 Mackey (D. C.) 360, 51 Am. Rep. 780; Asbury Park First Nat. Bank *v.* White, 60 N. J. Eq. 487, 46 Atl. 1092; Merchants', etc., Transp. Co. *v.* Borland, 53 N. J. Eq. 282, 31 Atl. 272.

Policy for benefit of debtor's wife.— The interest of a debtor in an insurance policy carried by him on his life for the benefit of his wife, by reason of payment of premiums in excess of five hundred dollars per annum, may be declared by a court of equity and impressed upon the contract in an action brought during the life of the husband, wherein the company issuing the policy and all of the parties interested therein are made parties. The nature and extent of the creditor's right and the manner and condition upon which it is to be continued and preserved may be adjudged, and the husband and wife may be enjoined from transferring the policy except in subordination of the rights of the creditor. Stokes *v.* Amerman, 121 N. Y. 337, 24 N. E. 819 [*affirming* 55 Hun 178, 8 N. Y. Suppl. 150]. The interest of a wife in a policy of insurance on the life of her husband payable to her in case she survives him, if not, then to his children, the premiums being paid by her husband, is not such a property right as may be reached by a creditors' bill against the wife upon the death of the husband, the wife

the interest of a *cestui que trust* in a trust fund to the payment of his debts.[46] Some decisions apply this rule, although such interest was created by a third person for the benefit of the *cestui que trust*,[47] unless the donor's intention to withdraw the gift from the donee's creditors is expressed in or necessarily implied from the terms of the instrument creating the trust fund.[48] In some of the states, however, there are statutory provisions exempting the interest of a *cestui que trust* in a trust fund created by a third person for his benefit from seizure for his debts. These statutes have been construed to prevent the seizure of the income of such trust fund,[49] although by the terms of the trust the *cestui que trust* has power to require the trustee to pay over the whole or a part of the fund to him,[50] unless the interest is such an one as is alienable by the *cestui que trust*, in which case it may be reached.[51] But the surplus income above an amount sufficient for the proper support and maintenance of the *cestui que trust*, considering his habits and condition in life, can be subjected to the payment of his debts.[52]

surviving but having assigned the policy in his lifetime. Leonard *v.* Clinton, 26 Hun (N. Y.) 288; Smillie *v.* Quinn, 25 Hun (N. Y.) 332.

46. *Alabama.*— Burke *v.* Morris, 121 Ala. 126, 25 So. 759; Dickinson *v.* Conniff, 65 Ala. 581; Taylor *v.* Harwell, 65 Ala. 1; Smith *v.* Moore, 37 Ala. 327; Rugely *v.* Robinson, 10 Ala. 702.

District of Columbia.— May *v.* Bryan, 17 App. Cas. 392, 16 App. Cas. 556.

Georgia.— Cruger *v.* Coleman, 75 Ga. 695; Kempton *v.* Hallowell, 24 Ga. 52, 71 Am. Dec. 112.

Kentucky.— Marshall *v.* Rash, 87 Ky. 116, 7 S. W. 879, 9 Ky. L. Rep. 963, 12 Am. St. Rep. 467.

Massachusetts.— Ricketson *v.* Merrill, 148 Mass. 76, 19 N. E. 11; Jackson *v.* Von Zedlitz, 136 Mass. 342; Pacific Nat. Bank *v.* Windram, 133 Mass. 175.

Nebraska.— Cochran *v.* Cochran, 62 Nebr. 450, 87 N. W. 152.

New York.— Hazard *v.* McFarland, Seld. Notes 248; Cowing *v.* Greene, 45 Barb. 585; Parker *v.* Harrison, 42 N. Y. Super. Ct. 150.

South Carolina.— Heath *v.* Bishop, 4 Rich. Eq. 46, 55 Am. Dec. 654.

See 14 Cent. Dig. tit. "Creditors' Suit," § 37 *et seq.*

Discretion of trustee as to application of fund — Effect.—Where under a trust the beneficiary has the right to insist on the application of the income to his use the same may be reached on a creditors' bill, otherwise where it is discretionary with the trustee to apply the same. Huntington *v.* Jones, 72 Conn. 45, 43 Atl. 564.

47. Hough *v.* Cress, 57 N. C. 295; Hutchinson *v.* Maxwell, 100 Va. 169, 40 S. E. 655, 93 Am. St. Rep. 944; Nichol *v.* Levy, 5 Wall. (U. S.) 433, 18 L. ed. 596.

48. Pickens *v.* Dorris, 20 Mo. App. 1; Wallace *v.* Smith, 2 Handy (Ohio) 78, 12 Ohio Dec. (Reprint) 339.

49. Binns *v.* La Forge, 191 Ill. 598, 61 N. E. 382; Hardenburgh *v.* Blair, 30 N. J. Eq. 645; Frazier *v.* Barnum, 19 N. J. Eq. 316, 97 Am. Dec. 666; Tolles *v.* Wood, 99 N. Y. 616, 1 N. E. 251, 16 Abb. N. Cas. (N. Y.) 1; Graff *v.* Bonnett, 31 N. Y. 9, 88 Am. Dec. 236; Bramhall *v.* Ferris, 14 N. Y. 41, 67 Am. Dec. 113; Locke *v.* Mabbett, 3 Abb. Dec. (N. Y.) 68, 2 Keyes (N. Y.) 457; Brown *v.* Barker, 68 N. Y. App. Div. 592, 74 N. Y. Suppl. 43; McEwen *v.* Brewster, 17 Hun (N. Y.) 223; Scott *v.* Nevius, 6 Duer (N. Y.) 672; Miller *v.* Miller, 1 Abb. N. Cas. (N. Y.) 30; Sillick *v.* Mason, 2 Barb. Ch. (N. Y.) 79 [*modifying* 4 Sandf. Ch. 351]; Bryan *v.* Knickerbacker, 1 Barb. Ch. (N. Y.) 409; Craig *v.* Hone, 2 Edw. (N. Y.) 554. But see Wells *v.* Ely, 11 N. J. Eq. 172.

50. Lippincott *v.* Evens, 35 N. J. Eq. 553.

51. Havens *v.* Healy, 15 Barb. (N. Y.) 296; Hallett *v.* Thompson, 5 Paige (N. Y.) 583.

52. Hardenburgh *v.* Blair, 30 N. J. Eq. 645; Frazier *v.* Barnum, 19 N. J. Eq. 316, 97 Am. Dec. 666; Tolles *v.* Wood, 99 N. Y. 616, 1 N. E. 251, 16 Abb. N. Cas. (N. Y.) 1; Wetmore *v.* Truslow, 51 N. Y. 338; Graff *v.* Bonnett, 31 N. Y. 9, 88 Am. Dec. 236; Bramhall *v.* Ferris, 14 N. Y. 41, 67 Am. Dec. 113; Locke *v.* Mabbett, 3 Abb. Dec. (N. Y.) 68, 2 Keyes (N. Y.) 457; Brown *v.* Barker, 68 N. Y. App. Div. 592, 74 N. Y. Suppl. 43; McEwen *v.* Brewster, 17 Hun (N. Y.) 223; Scott *v.* Nevius, 6 Duer (N. Y.) 672; Miller *v.* Miller, 1 Abb. N. Cas. (N. Y.) 30; Sillick *v.* Mason, 2 Barb. Ch. (N. Y.) 79 [*modifying* 4 Sandf. Ch. 351]; Bryan *v.* Knickerbacker, 1 Barb. Ch. (N. Y.) 409; Craig *v.* Hone, 2 Edw. (N. Y.) 554. But see Campbell *v.* Foster, 35 N. Y. 361. The remedy is not confined to surplus which has accrued and accumulated in the hands of the trustee. Provision may be made in the judgment determining what would be a reasonable allowance for the *cestui que trust* and directing the application toward the payment of the judgment of any further surplus until the same is fully paid. Williams *v.* Thorn, 70 N. Y. 270; McEvoy *v.* Appleby, 27 Hun (N. Y.) 44; Howard *v.* Leonard, 3 N. Y. App. Div. 277, 38 N. Y. Suppl. 363. But see Hann *v.* Van Voorhis, 15 Abb. Pr. N. S. (N. Y.) 79, where it was decided that surplus could not be reached by an action instituted before the surplus accumulated, and that an injunction does not lie to

9. Money. A creditors' bill will not lie to reach and compel a debtor to appropriate money that he has obtained by mortgage and which he has in his possession to the payment of his debt.[53]

10. Partnership Interests. The interest of a partner in a debt due a partnership may be subjected to the payment of judgments of creditors of the individual partner,[54] although such debt has been fraudulently released by the firm.[55] So the proceeds of a sale of partnership property of an insolvent firm may be reached by a creditors' bill against the partnership, although the proceeds have been divided among the partners.[56]

11. Patents and Royalties. The interest of a debtor in letters patent may be reached by proper proceedings in equity and subjected to the payment of his debts;[57] not so, however, in the case of an unpatented invention.[58] Likewise royalties under contract may be reached by a creditors' bill.[59]

12. Pension Money and Annuities. Pension money, after it reaches the debtor, is not exempt, and land purchased therewith, the title to which is fraudulently taken in the name of the pensioner's wife, may be reached by a creditors' bill.[60] So too annuities may be subject to creditors' bills.[61]

13. Possibilities. Mere possibilities of a right are not subject to creditors' bills.[62]

prevent the trustee from expending more than is necessary for the support of the *cestui que trust*.

Effect of ability of beneficiary to support himself.— Where the interest of a *cestui que trust* in a trust fund, created by a third party, is inalienable and the income thereof is not more than sufficient for the support and maintenance of the beneficiary, it cannot be reached by a creditors' bill, although the *cestui que trust* is able to and might support himself by his own labor and exertion. Clute *v.* Bool, 8 Paige (N. Y.) 83.

In determining what sum is necessary for the support of the cestui que trust, it is proper to take into consideration his station in life, and the manner in which he has been reared and educated, his habits and whether he has other means. He is entitled to be supported in his accustomed manner of living and need not contribute to his support by his labor or otherwise. Kilroy *v.* Wood, 4 N. Y. St. 443; Moulton *v.* De MaCarty, 6 Rob. (N. Y.) 533. But the beneficiary is not entitled to support an able-bodied husband as a necessity of living. Howard *v.* Leonard, 3 N. Y. App. Div. 277, 38 N. Y. Suppl. 363.

53. Webb *v.* Jones, 13 Lea (Tenn.) 200.

54. A. G. Edwards, etc., Brokerage Co. *v.* Rosenheim, 74 Mo. App. 621.

55. Brownell *v.* Curtis, 10 Paige (N. Y.) 210.

56. Burtus *v.* Tisdall, 4 Barb. (N. Y.) 571.

57. *California.*— Pacific Bank *v.* Robinson, 57 Cal. 520, 40 Am. Rep. 120.

Connecticut.— Vail *v.* Hammond, 60 Conn. 374, 22 Atl. 954, 25 Am. St. Rep. 330.

Massachusetts.— Wilson *v.* Martin-Wilson Automatic Fire Alarm Co., 149 Mass. 24, 20 N. E. 318, 151 Mass. 515, 24 N. E. 784, 8 L. R. A. 309. But see Carver *v.* Peck, 131 Mass. 291.

New York.— Gillett *v.* Bate, 86 N. Y. 87, 10 Abb. N. Cas. 88; Barnes *v.* Morgan, 3 Hun 703.

United States.— Ager *v.* Murray, 105 U. S. 126, 26 L. ed. 942; Gorrell *v.* Dickson, 26 Fed. 454.

See 14 Cent. Dig. tit. "Creditors' Suit," § 16.

A license to use a patented invention may by a bill in equity be subjected to sale for the payment of a judgment debt. Matthews *v.* Green, 19 Fed. 649.

Where a patentee transfers his patent with intent to defraud his creditors and a corporation is organized on the basis of the patent and shares of stock are issued to the assignee of the patent, such shares of stock are subject to the claims of creditors as they represent the thing transferred. Beidler *v.* Crane, 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349.

58. Gillett *v.* Bate, 86 N. Y. 87, 10 Abb. N. Cas. (N. Y.) 88.

59. Lord *v.* Harte, 118 Mass. 271, under statute.

60. Johnson *v.* Elkins, 90 Ky. 163, 13 S. W. 448, 11 Ky. L. Rep. 967, 8 L. R. A. 552.

61. See Annuities, 2 Cyc. 471.

An annuity, in lieu of dower, made a charge by will upon real and personal property of a testator, is subject to a creditors' bill. Degraw *v.* Clason, 11 Paige (N. Y.) 136. But see Stewart *v.* McMartin, 5 Barb. (N. Y.) 438, holding that an annuity created for a debtor by a third person, the debtor having no control over the fund, is not subject to a creditors' bill, although alienable, it appearing that the annuity was not more than sufficient for the support of the debtor.

Reservation of an annuity from an assignment in trust for the benefit of creditors may be reached by a judgment creditor of the assignor by a suit in equity to establish the judgment as a lien on the same. De Hierapolis *v.* Lawrence, 99 Fed. 321.

62. As for instance the possibility of earning wages. Browning *v.* Bettis, 8 Paige (N. Y.) 568.

14. Property Exempted From Execution. Property expressly exempted at law from execution cannot be reached by a creditors' bill.[63]

15. Property Fraudulently Conveyed. The interest of a debtor in property conveyed by him in fraud of his creditors may be reached by a creditors' bill.[64]

16. Redemption Rights. The right of a mortgagor of real or personal property to redeem the same upon the payment of the mortgage debt can be reached by a creditors' bill.[65] The right of an execution debtor to redeem within one

The contingent right which a person has in the estate of another, arising from the chance that he may be entitled to share in such estate as one of the next of kin of the owner thereof, should he outlive him, is only a bare possibility unaccompanied by any interest during the life of such owner and it cannot be reached by a creditors' bill. Smith *v.* Kearney, 2 Barb. Ch. (N. Y.) 533.

Unissued bonds of a manufacturing company in the hands of a trust company to be sold and delivered on orders from the manufacturing company, and on which no advances have been made by the trust company, are not assets of the manufacturing company in the hands of the trust company which can be reached by a creditors' bill. Eastern Electric Cable Co. *v.* Great Western Mfg. Co., 164 Mass. 274, 41 N. E. 295.

63. Gale *v.* Hammond, 45 Mich. 147, 7 N. W. 761; Ryan *v.* Lee, 14 Mo. App. 599; Pawnee City First Nat. Bank *v.* Hazels, 63 Nebr. 844, 89 N. W. 378; Hudson *v.* Plets, 11 Paige (N. Y.) 180. But see Farmers' Bank *v.* Morris, 79 Ky. 157, where it was held that, although under the statute a levy on crops before October 1 in any year was forbidden, such crops might be subjected to the payment of debts in equity before October 1.

64. *California.*—Rapp *v.* Whittier, 113 Cal. 429, 45 Pac. 703.

Dakota.— Feldenheimer *v.* Tressel, 6 Dak. 265, 43 N. W. 94.

Illinois.— Mann *v.* Ruby, 102 Ill. 348.

Indiana.— Bruner *v.* Manville, 2 Blackf. 485.

Nebraska.— Rogers *v.* Jones, 1 Nebr. 417.

New York.— Weed *v.* Pierce, 9 Cow. 722.

See, generally, Fraudulent Conveyances.

Contra.— Suplee *v.* Callaghan, 200 Pa. St. 146, 49 Atl. 950; People's Nat. Bank *v.* Kern, 193 Pa. St. 59, 88, 44 Atl. 331, 1103; Girard Nat. Bank's Appeal, 13 Wkly. Notes Cas. (Pa.) 101; Taylor *v.* Jones, 2 Atk. 600.

But where the remedy at law is inadequate, as where the debtor is deceased, an action will lie to enforce an execution lien on land fraudulently conveyed by the debtor in his lifetime. Houseman *v.* Grossman, 177 Pa. St. 453, 35 Atl. 736; Foster's Appeal, 87 Pa. St. 449.

Money deposited in name of debtor's wife. — Under statute a creditor may maintain a bill to reach moneys of his debtor deposited in a bank in his wife's name. Gullickson *v.* Madsen, 87 Wis. 19, 57 N. W. 965.

Necessity for proceedings in equity.—Where land is paid for by a debtor, but the title is taken in his wife's name, and thereafter the land is levied on under an execution issued on a judgment against the husband, in order that the judgment creditor or purchaser at the execution sale may hold the land against the holder of the legal title he must bring proceedings in equity. The rule that fraudulent conveyances are void and leave the title in the debtor only applies to fraudulent conveyances by him and not to cases where the legal title was never in him. Call *v.* Perkins, 65 Me. 439; Warner *v.* Moran, 60 Me. 227; Webster *v.* Folsom, 58 Me. 230; Low *v.* Marco, 53 Me. 45.

Proceeds in grantee's hands.—Where a judgment debtor had transferred book-accounts and other personal property and his fraudulent grantee had collected and appropriated to his own use moneys upon said accounts and from a sale of part of the personal property, a judgment creditor after execution returned *nulla bona* could under Wis. Rev. St. § 3029, maintain an equitable action to subject the proceeds in the grantee's hands, even though part of the property still remained in the possession of the grantee and might be levied on. Pierstoff *v.* Jorges, 86 Wis. 128, 56 N. W. 735, 39 Am. St. Rep. 881.

Where a husband carries on a mercantile business as agent for his wife and is aided by his minor sons, and the business is profitable and property is accumulated from the profits, the husband has such an interest in the property as may be subjected by creditors to the payment of his debts. Penn *v.* Whiteheads, 12 Gratt. (Va.) 74.

65. *Indiana.*—Lewis *v.* Matlock, 3 Ind. 120.

Iowa.— Hirsch *v.* Israel, 106 Iowa 498, 76 N. W. 811; Dunton *v.* McCook, 93 Iowa 258, 61 N. W. 977; Allen *v.* Kemp, 29 Iowa 452.

Maryland.— Rose *v.* Bevan, 10 Md. 466, 69 Am. Dec. 170; Harris *v.* Alcock, 10 Gill & J. 226, 32 Am. Dec. 158.

Massachusetts.— Wiggins *v.* Heywood, 118 Mass. 514.

Mississippi.—Uhler *v.* Adams, 73 Miss. 332, 18 So. 654; Barkwell *v.* Swan, 69 Miss. 907, 13 So. 809.

North Carolina.— Harrison *v.* Battle, 16 N. C. 537.

Ohio.— Anderson *v.* Lanterman, 27 Ohio St. 104; Mattocks *v.* Humphrey, 17 Ohio 336.

Tennessee.— Wessel *v.* Brown, 10 Lea 685; Stark *v.* Cheathem, 2 Tenn. Ch. 300.

Virginia.— Hale *v.* Horne, 21 Gratt. 112.

West Virginia.— Wise *v.* Taylor, 44 W. Va. 492, 29 S. E. 1003; Laidley *v.* Hinchman, 3 W. Va. 423.

England.— Rex *v.* Marisal, 3 Atk. 192.

But *compare* Turrentine *v.* Koopman, 124 Ala. 211, 21 So. 522, which seems to maintain the contrary doctrine.

year land sold on execution against him is also proper subject-matter for a creditors' bill,[66] as is also the right of a debtor to redeem property, the legal title to which is in another, upon complying with certain conditions.[67]

17. Seats in Merchants' Exchanges. According to some decisions a seat in an exchange, which seat has a money value and is transferable subject to the purchaser procuring himself to be elected a member, is property subject to a creditors' bill.[68] Other decisions maintain the contrary view.[69]

18. Undivided Interests. An undivided interest is equally subject to a creditors' bill with one in severalty.[70]

IV. Persons By and Against Whom Relief May Be Obtained.

A. Persons by Whom Relief May Be Obtained. Under a statute authorizing a decree on foreclosure for any balance due complainant above the proceeds of the sale a decree that defendant is personally liable, and not requiring him to pay any deficiency after confirmation of the sale, does not render complainant a decree creditor, so as to enable him to maintain a creditors' bill against defendant.[71] Where a party has conveyed his property to a trustee to pay his debts, not specifying them, the trustee to avoid a multiplicity of suits may file a bill like a creditors' bill to ascertain all liens.[72] Where a purchaser under a void decree has upon disaffirmance of the sale been substituted to the rights of the creditor he may maintain a bill to enforce such right and, as incident to the relief sought, make his bill a creditors' bill.[73] The pendency of other creditors' bills against an obligor does not preclude the pledgee from maintaining an original bill to determine and enforce his interest against a future pledgee of the same property after it had been wrongfully taken from the first pledgee's possession instead of intervening under the other bills, although the second pledgee was a party to such other bills.[74] No change of the ownership or form of a debt affects the right to attack a fraudulent conveyance by the debtor.[75] Any one holding the demand of a creditor defrauded by a conveyance, no matter when the right of the holder accrued, may assert against the conveyance all the rights of him who held such claim when the fraudulent conveyance was made.[76] The assignee of a judgment may maintain a creditors' bill.[77] So a bill in which a creditors' bill is united with a bill to set aside a fraudulent conveyance of an assignment by the debtor may

See 14 Cent. Dig. tit. "Creditors' Suit," § 31.

In proceedings to reach such interest the entire land may be sold and the surplus after payment of the mortgage debt may be applied to the satisfaction of complainant's debt. Lewis *v.* Matlock, 3 Ind. 120; Rose *v.* Bevan, 10 Md. 466, 69 Am. Dec. 170; Harris *v.* Alcock, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158; Uhler *v.* Adams, 73 Miss. 332, 18 So. 654; Laidley *v.* Hinchman, 3 W. Va. 423. *Contra*, Kelly *v.* Longshore, 78 Ala. 203.

66. Judge *v.* Herbert, 124 Mass. 330.

67. Rankin *v.* Wilsey, 17 Iowa 463. And where the holder of the legal title had disposed of the property and applied the proceeds thereof to his own use, it was held that such proceeds could be reached by a creditors' bill. Bowery Nat. Bank *v.* Duncan, 12 Hun (N. Y.) 405.

68. Eliot *v.* Merchants' Exch., 14 Mo. App. 234; Ritterband *v.* Baggett, 4 Abb. N. Cas. (N. Y.) 67; Hyde *v.* Woods, 94 U. S. 523, 24 L. ed. 264; *In re* Gallagher, 9 Fed. Cas. No. 5,192, 16 Blatchf. 410, license to occupy stalls in a market.

69. Pancoast *v.* Gowen, 93 Pa. St. 66; Thompson *v.* Adams, 93 Pa. St. 55; *In re* Sutherland, 23 Fed. Cas. No. 13,637, 6 Biss. 526; Barclay *v.* Smith, 16 Cent. L. J. 437.

70. Martin *v.* Carter, 90 Ala. 96, 7 So. 510.

71. Cotes *v.* Bennett, 183 Ill. 82, 55 N. E. 661.

72. Ambler *v.* Leach, 15 W. Va. 677.

A receiver appointed in a creditors' suit may maintain actions for the recovery of the debtor's property and such other actions as are necessary to the execution of the duties for which he was appointed. See also *infra*, V, E, 4.

73. Hull *v.* Hull, 35 W. Va. 155, 13 S. E. 49, 29 Am. St. Rep. 800.

74. American Pig Iron Storage Warrant Co. *v.* German, 126 Ala. 194, 28 So. 603, 85 Am. St. Rep. 21.

75. Cook *v.* Ligon, 54 Miss. 652; Wehrman *v.* Conklin, 155 U. S. 314, 15 S. Ct. 129, 39 L. ed. 167.

76. Cook *v.* Ligon, 54 Miss. 652.

77. Crawford *v.* Logan, 97 Ill. 396; Strange *v.* Longley, 3 Barb. Ch. (N. Y.) 650. See also Cobb *v.* Thompson, 1 A. K. Marsh. (Ky.) 507.

be filed by an assignee of the person who sued out the execution on which the bill is founded.[78] It is also held that the judgment creditor himself may maintain a creditors' suit, although he had assigned the judgment before commencing suit, where the assignee agreed that he might prosecute it.[79]

B. Persons Against Whom Relief May Be Obtained.[80] It has been held that a creditors' bill will lie against a non-resident debtor to subject lands within the state to the satisfaction of claims against him;[81] against a foreign corporation to reach the latter's patent owned by it for the purpose of having it applied to the payment of plaintiff's claim;[82] and against one in whose favor the judgment debtor has fraudulently confessed judgment and who has bought in the property at a sale on execution under such judgment to set aside the fraudulent judgment, execution, and sale, and to subject the property so sold to the satisfaction of complainant's claims.[83] A statute giving a right to proceed by a creditors' bill in case any corporation, not municipal, or any trader or any firm of traders who shall fail to pay their debts, applies to all corporations not municipal, as well as traders only.[84] A creditors' bill cannot be maintained against executors to reach property *in custodia legis*,[85] nor against one having funds of the debtor in his hands when he has a set-off upon a claim against the debtor to the full amount.[86] So it has been held that a bill against the debtor of the judgment debtor will not lie for satisfaction of the claim.[87]

V. PLEADING AND PRACTICE.

A. Jurisdiction.[88] Two or more creditors who have obtained judgments upon which executions have been returned *nulla bona* may join in a creditors' suit for the purpose of giving the court jurisdiction, where the aggregate of their debts exceeds the minimum jurisdictional amount, although their individual claims are less than such amount.[89] Where the property sought to be subjected is within the jurisdiction of the court, it is immaterial whether the defendants are resident within the jurisdiction.[90] A creditors' bill brought in the county where the judgment was rendered must be brought in the court out of which the execution issued, but when brought in another county may be brought in any court of general jurisdiction.[91] Where a federal court has acquired jurisdiction by reason of diversity of citizenship, such jurisdiction will not be ousted by the admission as co-complainant of a citizen of the state in which the district where the suit is instituted lies.[92]

B. Process. The judgment debtors must be made parties by service of proc-

That it does not appear that the whole judgment was assigned, but only the obligations upon which judgment was recovered, is immaterial. Strange *v.* Longley, 3 Barb. Ch. (N. Y.) 650.

78. Hastings *v.* Palmer, Clarke (N. Y.) 52.

79. Hathaway *v.* Scott, 11 Paige (N. Y.) 173.

Nevertheless the fact that the assignee refuses to bring suit will not authorize the assignor to do so, except under circumstances calculated to prejudice his right. Andrews *v.* Kibbee, 12 Mich. 94, 82 Am. Dec. 766.

80. **Against a municipal or other public corporation** see *supra*, III, B, 4.

81. Zecharie *v.* Bowers, 3 Sm. & M. (Miss.) 641.

82. Wilson *v.* Martin-Wilson Automatic Fire Alarm Co., 149 Mass. 24, 20 N. E. 318.

83. Bruner *v.* Manville, 2 Blackf. (Ind.) 485.

84. Augusta Nat. Bank *v.* Richmond Factory, 91 Ga. 284, 18 S. E. 160.

85. Williams *v.* Smith, (Wis. 1903) 93 N. W. 464.

86. Bonte *v.* Cooper, 90 Ill. 440.

87. Durr *v.* Bowyer, 2 McCord Eq. (S. C.) 368. *Compare* McCrae *v.* West Tennessee Bank, 6 Coldw. (Tenn.) 474. See also *supra*, III, B, 3.

88. See, generally, COURTS.

89. Bailey *v.* Burton, 8 Wend. (N. Y.) 339; Sizer *v.* Miller, 9 Paige (N. Y.) 605; Dix *v.* Briggs, 9 Paige (N. Y.) 595; Van Cleef *v.* Sickels, 2 Edw. (N. Y.) 392; Bidwell *v.* Huff, 103 Fed. 362. *Contra*, Putney *v.* Whitmire, 66 Fed. 385 [*citing* Shields *v.* Thomas, 17 How. (U. S.) 4, 15 L. ed. 93].

90. Moody *v.* Gay, 15 Gray (Mass.) 457; Zecharie *v.* Bowers, 1 Sm. & M. (Miss.) 584, 40 Am. Dec. 111; Comstock *v.* Rayford, 1 Sm. & M. (Miss.) 423, 40 Am. Dec. 102; De Hierapolis *v.* Lawrence, 99 Fed. 321.

91. Bohon *v.* Smith, 11 Bush (Ky.) 32.

92. Belmont Nail Co. *v.* Columbia Iron, etc., Co., 46 Fed. 336.

ess before hearing.[93] On a creditors' bill to subject the claims of an absent debtor to the claims of his creditors notice should be given all the creditors in order that they may present their claims.[94] A non-resident debtor of a judgment debtor may be brought in without personal service.[95] Where a statute provides that in every suit to enforce judgment liens, all persons having liens on the land to be subjected shall be made parties, it is not sufficient in a creditors' bill to reach lands encumbered by trust deeds to make the trustees formal parties by publication.[96] Want of service is waived by appearance.[97]

C. Parties[98] **— 1. In General.** All parties whose rights may be affected by a decree to be made in a creditors' suit are necessary parties to the suit;[99] but

93. Monroe *v.* Galveston, etc., R. Co., 19 Abb. Pr. (N. Y.) 90.

A bill to subject a claim due a non-resident debtor to the payment of a judgment against him cannot be sustained where he has been made a party only by publication and not by actual service on his person. Love *v.* Bowen, 55 N. C. 49; Yarbrough *v.* Arrington, 40 N. C. 291.

On a creditors' bill brought upon a judgment against joint debtors, the joint property of all may be reached, although only part of them were served with summons; otherwise, however, as respects the separate property of those not served. Billhofer *v.* Heubach, 15 Abb. Pr. (N. Y.) 143.

94. Farrar *v.* Haselden, 9 Rich. Eq. (S. C.) 331.

95. McCrae *v.* West Tennessee Bank, 6 Coldw. (Tenn.) 474.

96. McMillan *v.* Hickman, 35 W. Va. 705, 14 S. E. 227.

Indorsing character of action on summons. — Under a statute providing that in an action to discover property of defendant in an execution returned unsatisfied and to subject it to the satisfaction of the judgment a lien shall be created on the property "by the service of the summons with the object of the action endorsed thereon, on the person holding or controlling the property"; if the land sought to be subjected is fully described in the petition, it is not indispensable to make the indorsement on the summons in order to give the court jurisdiction. Bryant *v.* Bryant, 20 S. W. 270, 14 Ky. L. Rep. 358.

97. Bank of Rome *v.* Haselton, 15 Lea (Tenn.) 216; Barger *v.* Buckland, 28 Gratt. (Va.) 850.

98. See, generally, Parties.

99. *Illinois.*— Gudgel *v.* Kitterman, 108 Ill. 50; McNab *v.* Heald, 41 Ill. 326; Ballentine *v.* Beall, 4 Ill. 203.

Kansas.— Shanks *v.* Simon, 57 Kan. 385, 46 Pac. 774.

Kentucky.—Helm *v.* Hardin, 2 B. Mon. 231.

Nebraska.—Smith *v.* Schaffer, 29 Nebr. 656, 45 N. W. 936.

New York.— Gray *v.* Schenck, 4 N. Y. 460; Skinner *v.* Stuart, 13 Abb. Pr. 442.

North Carolina.— Rountree *v.* McKay, 59 N. C. 87; Fisher *v.* Worth, 45 N. C. 63.

Ohio.— Gildersleeve *v.* Burrows, 24 Ohio St. 204; Barret *v.* Reed, Wright 700.

Virginia.— Stovall *v.* Border Grange Bank, 78 Va. 188.

West Virginia.— Marshall *v.* Hall, 42 W. Va. 641, 26 S. E. 300; McMillan *v.* Hickman, 35 W. Va. 705, 14 S. E. 227; Pappenheimer *v.* Roberts, 24 W. Va. 702; Grove *v.* Judy, 24 W. Va. 294; Bilmyer *v.* Sherman, 23 W. Va. 656; Shenandoah Valley Nat. Bank *v.* Bates, 20 W. Va. 210; Norris *v.* Bean, 17 W. Va. 655; Neely *v.* Jones, 16 W. Va. 625, 37 Am. Rep. 794; Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390; Hoffman *v.* Shields, 4 W. Va. 490; Laidley *v.* Hinchman, 3 W. Va. 423.

See 14 Cent. Dig. tit. "Creditors' Suit," § 100 *et seq.*

Purchasers of property sought to be subjected, who purchase pendente lite, are not necessary parties. Shumate *v.* Crockett, 43 W. Va. 491, 27 S. E. 240.

A corporation and all its stock-holders are necessary parties defendant to a creditors' suit for the appointment of a receiver, for an accounting, and to enforce personal liability of stock-holders, and if the corporation cannot be brought in the suit must be dismissed. Elkhart Nat. Bank *v.* Northwestern Guaranty Loan Co., 87 Fed. 252, 30 C. C. A. 632.

A judgment creditor and his immediate assignee are necessary parties to a bill by a subsequent assignee. Cooper *v.* Gunn, 4 B. Mon. (Ky.) 594. But see Andrews *v.* Kibbee, 12 Mich. 94, 83 Am. Dec. 766, where it was held that where the judgment plaintiff had assigned the claim on which the judgment was rendered to secure a debt of an equal amount, the assignee was the proper party plaintiff in the creditors' bill, and that the assignor could not sue unless the bill contained an allegation that the assignee neglected or refused to sue under circumstances calculated to prejudice the rights of the assignor.

A mortgagee is not a necessary party to a bill to subject the equity of redemption to the payment of a judgment debt, but the better practice is to make him a party and fix the amount of the mortgage debt. Wessel *v.* Brown, 10 Lea (Tenn.) 685.

Persons claiming interest in property.— If the answer shows that persons not before the court claim the property in the debtor's possession which the creditor attempts to reach, such persons or their representatives must be made parties before a decree can be had. Taylor *v.* Mills, 2 Edw. (N. Y.) 318.

The accommodation accepter of a bill of exchange is not a necessary party to a bill filed by a judgment creditor of a subpurchaser of

parties jointly interested with the defendant in property sought to be reached by a creditors' bill are not necessary parties, if the bill does not seek to affect their interests.[1]

2. PARTIES PLAINTIFF. A creditor may prosecute a suit for himself alone,[2] or for himself and all other creditors who may come in and join in the prosecution thereof,[3] provided the suit is in its nature one for the benefit of all creditors;[4] for otherwise other creditors are not entitled to share.[5] So it is necessary that all other creditors stand on the same footing and have judgment and execution returned unsatisfied where that is a prerequisite.[6] All creditors having demands cognizable in equity of equal standing upon a common fund or estate out of which they claim to be paid may unite in an action in behalf of all, and a complaint filed by one in behalf of all is not multifarious.[7] And it has been said

land for which the bill was given in payment after payment of the balance of the purchase-price. Nix *v.* Winter, 35 Ala. 309.

Where a bill seeks discovery of parties interested a demurrer for want of such parties will not lie. Burke *v.* Morris, 121 Ala. 126, 25 So. 759.

If necessary parties are given an opportunity to come in and prove under the decree, a decree will not be reversed for failure to make them parties in the original bill. Arnold *v.* Casner, 22 W. Va. 444; Livesay *v.* Feamster, 21 W. Va. 83; Norris *v.* Bean, 17 W. Va. 653.

1. *Alabama.*— Burke *v.* Morris, 121 Ala. 126, 25 So. 759.

District of Columbia.— Bryan *v.* May, 9 App. Cas. 383.

Illinois.— Johnson *v.* Huber, 34 Ill. App. 527.

Maryland.— Trego *v.* Skinner, 42 Md. 426.

Minnesota.— Gale *v.* Battin, 16 Minn. 148.

See 14 Cent. Dig. tit. "Creditors' Suit," § 100 *et seq.*

2. *Alabama.*— Rugely *v.* Robinson, 19 Ala. 404.

California.— Seymour *v.* McAvoy, 121 Cal. 438, 53 Pac. 946, 41 L. R. A. 544.

Illinois.— Mann *v.* Ruby, 102 Ill. 348.

Massachusetts.— Under statute other creditors have no right to come in. Rau *v.* Von Zedlitz, 132 Mass. 164; Phœnix Ins. Co. *v.* Abbott, 127 Mass. 558; Bresnihan *v.* Sheehan, 125 Mass. 11; Tucker *v.* McDonald, 105 Mass. 423; Barry *v.* Abbot, 100 Mass. 396; Sanger *v.* Bancroft, 12 Gray 365; Silloway *v.* Columbia Ins. Co., 8 Gray 199.

Missouri.— Williams *v.* Jones, 23 Mo. App. 132.

New York.— Edmeston *v.* Lyde, 1 Paige 637, 19 Am. Dec. 454.

See 14 Cent. Dig. tit. "Creditors' Suit," § 100 *et seq.*

A bill is not demurrable because brought by one creditor for himself, although it mentions other creditors, but contains no invitation for them to come in. Morrison *v.* Blue Star Nav. Co., 26 Wash. 541, 67 Pac. 344.

A bill to marshal assets should be on behalf of plaintiff and all other creditors, but if not so brought the bill will not be dismissed but plaintiff will be given leave to amend. Stephenson *v.* Taverners, 9 Gratt. (Va.) 398.

Where property has been assigned for the benefit of all creditors and the assignee refuses to take the steps necessary to recover the property for the trust, a creditors' bill will lie to enforce the assignee to take steps, or for his removal, but an individual creditor cannot acquire a separate right to such property, but must work his right out through the assignment. Crouse *v.* Frothingham, 97 N. Y. 105.

Where unpaid creditors are numerous, a creditors' bill to recover assets brought on behalf of complainant and all other creditors is not demurrable for failure to join all such creditors as parties who had a common interest. Dobbins *v.* Coles, (N. J. Ch. 1898) 45 Atl. 442.

3. *California.*—Tatum *v.* Rosenthal, 95 Cal. 129, 30 Pac. 136, 29 Am. St. Rep. 97.

Georgia.— McDougald *v.* Dougherty, 11 Ga. 570.

Illinois.— Ballentine *v.* Beall, 4 Ill. 203.

Indiana.— Butler *v.* Jaffray, 12 Ind. 504; Whitney *v.* Kimball, 4 Ind. 546, 58 Am. Dec. 638.

Massachusetts.— Libby *v.* Norris, 142 Mass. 246, 7 N. E. 919.

New York.— Hammond *v.* Hudson River Iron, etc., Co., 20 Barb. 378; Wakeman *v.* Grover, 4 Paige 23; Hendricks *v.* Robinson, 2 Johns. Ch. 283.

See 14 Cent. Dig. tit. "Creditors' Suit," § 100 *et seq.*

Under a statute providing for creditors' bills by unsecured creditors of corporations, not municipal, or firms or traders under certain circumstances representing one third in amount of the unsecured debts of such corporations, traders, or firms, an original bill filed by parties representing less than one third of such debts in amount should be dismissed, and the defect cannot be cured by admitting new parties. Maddox *v.* Lanier, 107 Ga. 291, 33 S. E. 58.

4. Iauch *v.* De Socarras, 56 N. J. Eq. 524, 39 Atl. 381.

5. Whitney *v.* Robbins, 17 N. J. Eq. 360.

6. Annin *v.* Annin, 24 N. J. Eq. 184; Lore *v.* Getsinger, 7 N. J. Eq. 191 [*reversed* in 7 N. J. Eq. 639]; Parmelee *v.* Egan, 7 Paige (N. Y.) 610; Edmeston *v.* Lyde, 1 Paige (N. Y.) 637, 19 Am. Dec. 454.

7. *Alabama.*—Brown *v.* Bates, 10 Ala. 432; Toulmin *v.* Hamilton, 7 Ala. 362.

that a creditor with a judgment and a simple contract creditor may join as plaintiffs.[8]

3. Parties Defendant — a. Judgment Debtors. The judgment debtor is a necessary party defendant in an action to subject his equitable interests to the payment of a judgment,[9] even though he be a non-resident,[10] and where there are several judgment debtors, all of them are necessary parties defendant,[11] unless it is shown by the bill that the persons not made parties were mere sureties,[12] were not legally or morally liable to contribute toward the satisfaction of the debt,[13] or were insolvent[14] or out of the jurisdiction of the court.[15] And where the object of a creditors' bill is to set aside a conveyance made by one judgment debtor, another judgment debtor not a party to the conveyance is not a necessary party to the suit.[16] Judgment debtors are not necessary parties to suits to set aside obstructions in the way of satisfying executions.[17]

b. Persons in Possession of Debtor's Property. All persons who are charged

Indiana.— Kipper *v.* Glancy, 2 Blackf. 356.

Iowa.— Gorrell *v.* Gates, 79 Iowa 632, 44 N. W. 905.

Kentucky.— Bullet *v.* Stewart, 3 B. Mon. 115.

Michigan.— St. Johns First Nat. Bank *v.* Tyler, 55 Mich. 297, 21 N. W. 353.

Mississippi.— Comstock *v.* Rayford, 1 Sm. & M. 423, 40 Am. Dec. 102.

New Jersey.— Morehouse *v.* Kissam, 58 N. J. Eq. 364, 43 Atl. 891 [*affirmed* in 60 N. J. Eq. 443, 45 Atl. 966]; Williams *v.* Michenor, 11 N. J. Eq. 520.

New York.— Petree *v.* Lansing, 66 Barb. 357; Conro *v.* Port Henry Iron Co., 12 Barb. 27; Murray *v.* Hay, 1 Barb. Ch. 59, 43 Am. Dec. 773; Clarkson *v.* De Peyster, 3 Paige 320; Brinkerhoff *v.* Brown, 6 Johns. Ch. 139; Lentilhon *v.* Moffat, 1 Edw. 451.

South Carolina.— Sheppard *v.* Green, 48 S. C. 165, 26 S. E. 224; Williams *v.* Neel, 10 Rich. Eq. 338, 73 Am. Dec. 94.

Wisconsin.— Gates *v.* Boomer, 17 Wis. 455.

See 14 Cent. Dig. tit. "Creditors' Suit," § 100 *et seq.*

Uniting claims against different debtors.— Several creditors, some with judgments against A and others with judgments against A and B, may unite in one suit against A and B and their fraudulent transferees. Blackett *v.* Laimbeer, 1 Sandf. (N. Y.) 366.

Whether where a bill is filed by several and one fails to prove his judgment the bill will be dismissed as to all *quære.* Lentilhon *v.* Moffat, 1 Edw. (N. Y.) 451. That it should not see Colgin *v.* Redman, 20 Ala. 650.

Under the Alabama statute permitting simple contract creditors without liens to bring actions in equity for the discovery of assets two or more such creditors cannot jointly maintain an action, even though two or more judgment creditors might jointly maintain the same. Montgomery, etc., R. Co. *v.* McKenzie, 85 Ala. 546, 5 So. 322.

8. Steiner *v.* Parker, 108 Ala. 357, 19 So. 386, under statute. But see Parmelee *v.* Egan, 7 Paige (N. Y.) 610.

9. *Arkansas.*— Boone County *v.* Keck, 31 Ark. 387.

Georgia.— Stephens *v.* Whitehead, 75 Ga. 294.

Iowa.— Administrator in case of death of debtor. Postlewait *v.* Howes, 3 Iowa 365. But see Falker *v.* Linehan, 88 Iowa 641, 55 N. W. 503.

Nebraska.— Weaver *v.* Cressman, 21 Nebr. 675, 33 N. W. 478.

New York.— Miller *v.* Hall, 70 N. Y. 250; Ferguson *v.* Ann Arbor R. Co., 17 N. Y. App. Div. 336, 45 N. Y. Suppl. 172; Monroe *v.* Galveston, etc., R. Co., 19 Abb. Pr. 90; Brewster *v.* Power, 10 Paige 562; Commercial Bank *v.* Meach, 7 Paige 448.

North Carolina.— Love *v.* Bowen, 55 N. C. 49; Yarbrough *v.* Arrington, 40 N. C. 291.

West Virginia.— Norris *v.* Bean, 17 W. Va. 655.

United States.—U. S. *v.* Howland, 4 Wheat. 108, 4 L. ed. 526; Wilson *v.* City Bank, 30 Fed. Cas. No. 17,797, 3 Sumn. 422.

See 14 Cent. Dig. tit. "Creditors' Suit," § 100 *et seq.*

The fact that the debtor is not made a party is not fatal, but the court will order him to be notified with the privilege to come in. Phillips *v.* Wesson, 16 Ga. 137.

Where property transferred.—A creditor of A sued A and B, alleging that the latter had come into possession of A's property. Decree was given against B. Subsequently suit was brought against B to set aside a transfer of the property to his wife. It was held that A was a necessary party, as the debt had to be established against him. Brown Co. *v.* Henderson, 123 Ala. 623, 26 So. 199.

10. Yarbrough *v.* Arrington, 40 N. C. 291.

11. Commercial Bank *v.* Meach, 7 Paige (N. Y.) 448.

12. Commercial Bank *v.* Meach, 7 Paige (N. Y.) 448.

13. Commercial Bank *v.* Meach, 7 Paige (N. Y.) 448.

14. Williams *v.* Hubbard, 1 Mich. 446; Commercial Bank *v.* Meach, 7 Paige (N. Y.) 448; Van Cleef *v.* Sickels, 2 Edw. (N. Y.) 392.

15. Commercial Bank *v.* Meach, 7 Paige (N. Y.) 448.

16. Quinn *v.* People, 45 Ill. App. 547; Hodge *v.* Gray, 110 Mich. 654, 68 N. W. 979; Fox *v.* Moyer, 54 N. Y. 125.

17. Skinner *v.* Stuart, 13 Abb. Pr. (N. Y.) 442; Cornell *v.* Radway, 22 Wis. 260.

by the bill to be in possession of the property of the debtor sought to be reached by the bill are necessary parties to the suit.[18]

c. Parties to Conveyances Sought to Be Set Aside. Where a conveyance is sought to be set aside, all the parties to the conveyance are necessary parties to the suit.[19]

d. Assignees or Transferees. Where assignments of the property have been made by parties to the conveyance the assignees of such parties are necessary parties to the suit.[20] But where the bill seeks to set aside transfers to several parties and an accounting from the transferees, it is not necessary that the ultimate transferees be made parties, if no accounting is sought from them or any relief prayed against them.[21]

e. Trustees and Cestuis Que Trustent. In creditors' bills brought to subject equitable interests of debtors to the satisfaction of their debts, where the legal title to the property is held by trustees, such trustees are necessary parties defendant,[22] as are also all *cestuis que trustent* where their interests are sought to be affected,[23] particularly if the *cestuis que trustent* are limited in number.[24]

f. Guardian and Ward. In a suit to subject to the payment of the debts of the insured the proceeds of insurance policies assigned by him to his wife and minor children, the suit cannot be brought against the curator of the minors, but must be brought against him directly. The title to an infant's estate is in the infant and not in the curator.[25]

D. Pleading and Defenses[26] — **1. The Bill — a. The Allegations** — (I) *In General.* The bill must allege that plaintiff is a creditor of the defendant debtor.[27] It must show definitely that the complainants are creditors so as to inform the defendants when, in what manner, and by what contracts the indebtedness claimed arose.[28] If the debt is in judgment, the ownership of the judgment by plaintiff must be alleged, and it is not sufficient to allege an ownership of the execution issued on the judgment;[29] so the bill must state facts showing

18. Manchester *v.* McKee, 9 Ill. 511; Trego *v.* Skinner, 42 Md. 426; Hammond *v.* Hudson River Iron, etc., Co., 20 Barb. (N. Y.) 378; Green *v.* Hicks, 1 Barb. Ch. (N. Y.) 309.

19. Ward *v.* Hollins, 14 Md. 158; Huneke *v.* Dold, 7 N. M. 5, 32 Pac. 45.

Contra.— Vendor in a fraudulent conveyance is a proper but not a necessary party, where he has retained no lien or interest. Glover *v.* Hargadine-McKittrick Dry-Goods Co., 62 Nebr. 483, 87 N. W. 170.

Loan of money with intent to defraud.— A bill by a judgment creditor having alleged that the debtor with intent to hinder complainant loaned money to divers persons who severally executed notes to the debtor's wife, such persons were properly made parties. Guyton *v.* Terrell, 132 Ala. 66, 31 So. 83.

20. Winchester *v.* Crandall, Clarke (N. Y.) 371.

But intermediate grantees are not necessary parties. Pullman *v.* Stebbins, 51 Fed. 10.

21. Arnot *v.* Birch, 29 N. Y. App. Div. 356, 51 N. Y. Suppl. 491.

Where several transferees are sued the want of an ultimate transferee as a party cannot be raised by a transferee who did not again transfer. Arnot *v.* Birch, 29 N. Y. App. Div. 356, 51 N. Y. Suppl. 491.

22. Ogle *v.* Clough, 2 Duv. (Ky.) 145; Dobbins *v.* Coles, (N. J. Ch. 1898) 45 Atl. 442; Bilmyer *v.* Sherman, 23 W. Va. 656; Norris *v.* Bean, 17 W. Va. 655. *Contra,* Russell *v.* Burke, 180 Mass. 543, 62 N. E. 963.

23. Helm *v.* Hardin, 2 B. Mon. (Ky.) 231; Cronin *v.* Gay, 20 Tex. 460; Carnahan *v.* Ashworth, (Va. 1898) 31 S. E. 65; Norris *v.* Bean, 17 W. Va. 655. *Contra,* Winslow *v.* Minnesota, etc., R. Co., 4 Minn. 313, 77 Am. Dec. 519.

Where a bill is filed to carry out an assignment by a debtor other creditors mentioned in the assignment should be made parties, or the bill should be filed on behalf of complainant and all such other creditors who may come in. But where complainant acts in hostility to the assignment, it is not necessary to make creditors in the assignment parties. Wakeman *v.* Grover, 4 Paige (N. Y.) 23.

24. Norris *v.* Bean, 17 W. Va. 655.

25. Judson *v.* Walker, 155 Mo. 166, 55 S. W. 1083.

26. See, generally, Equity; Pleading.

27. Walthall *v.* Rives, 34 Ala. 91; Elwell *v.* Johnson, 3 Hun (N. Y.) 558.

28. Elwell *v.* Johnson, 3 Hun (N. Y.) 558; Gray *v.* Kendall, 10 Abb. Pr. (N. Y.) 66; Zell Guano Co. *v.* Heatherly, 38 W. Va. 409, 18 S. E. 611.

A creditors' bill by the assignee of a judgment, alleging that the assignment was by deed, imports a sufficient consideration to support the assignment. Gleason *v.* Gage, 7 Paige (N. Y.) 121. To entitle the assignee of a judgment to maintain a creditors' bill, it need not be alleged that the assignment was in writing. Jones *v.* Smith, 92 Ala. 455, 9 So. 179.

29. Richardson *v.* Gilbert, 21 Fla. 544.

What allegation of ownership sufficient.—

that relief cannot be had at law.[30] If the bill seeks to subject to the payment of a claim land transferred by the debtor, it must allege that the debtor was insolvent at the time he made the transfer or that the transfer tended to create insolvency.[31]

(II) *As to Persons in Whose Behalf Brought.* A creditors' bill need not state that it is in behalf of all the creditors,[32] although it shows that there are other creditors beside plaintiff.[33]

(III) *Showing Valid Judgment.* So the judgment must be pleaded with sufficient particularity to show a valid judgment.[34]

(IV) *Exhaustion of Legal Remedies.* The bill should allege the issuing of execution, time when returnable, and actual return of sheriff thereon,[35] and that the execution was returned *nulla bona* or satisfied in part only.[36] Where

Where it appeared that one of the judgments described in the bill was obtained in the name of one of the complainants for the use of a third party, but the bill alleged said judgment was the property of such complainant, it was held a sufficient averment to show that such complainant was the party in interest, and that the suit was properly brought in his name. Postlewait *v.* Howes, 3 Iowa 365.

30. Sherman *v.* Tucker, 60 N. Y. App. Div. 127, 69 N. Y. Suppl. 850.

31. Fox *v.* Lipe, 14 Colo. App. 258, 59 Pac. 850.

32. **A bill alleging that it is in behalf of all** creditors "who may be entitled to become parties to the suit" is not objectionable in not being limited to all lien creditors, as only such creditors are entitled to become parties. People's Nat. Bank *v.* Kern, 193 Pa. St. 59, 44 Atl. 331.

33. Morrison *v.* Blue Star Nav. Co., 26 Wash. 541, 67 Pac. 244. See also Nebraska Nat. Bank *v.* Hallowell, 63 Nebr. 309, 88 N. W. 556, holding that in a creditors' suit, where no receiver has been appointed or asked for, it is not necessary to allege that the suit is brought on behalf of all creditors who desire to join and contribute to the expense.

34. Carver *v.* Williams, 6 Ohio Dec. (Reprint) 1084, 10 Am. L. Rec. 310, 6 Cinc. L. Bul. 672. *Compare* Kilham *v.* Western Bank, etc., Co., 30 Colo. 365, 70 Pac. 409, holding that in an action by a judgment creditor to subject lands standing in the name of the debtor's father to payment of the debt, the complaint was not objectionable for failure to allege jurisdictional facts necessary to the rendition of the judgment and sustaining the attachment in the original suit; such jurisdiction, in the absence of a plea denying it, being presumed.

Stay of judgment.— A petition to subject land to a lien need not allege that the judgment was not appealed or stayed, as this is merely a matter of defense. Aylord *v.* Kipp, 4 Ohio Dec. (Reprint) 87, 1 Clev. L. Rep. 14.

35. Crawford *v.* Cook, 55 Ill. App. 351; Albright *v.* Herzog, 12 Ill. App. 557; Cassidy *v.* Meacham, 3 Paige (N. Y.) 311. If the statute makes the execution returnable at a fixed time the pleading need not show when returnable. Strange *v.* Longley, 3 Barb. Ch. (N. Y.) 650.

A bill of a judgment creditor to enforce a judgment obtained against a partnership, not showing in what county the place of business of such partnership was, or where the domicile or residence of any of the members was at any time, thus giving no information showing that execution was issued either to the county where the firm was seated or where any member resided, or not showing the time of the return of the execution, was held to be bad. All necessary data should be given to show a proper exhaustion of legal remedies. Preston *v.* Wilcox, 38 Mich. 578.

Right to amend.— Where a bill was held defective on demurrer for failure to allege the recovery of a judgment and the issuance of execution thereon and its return *nulla bona*, and thereafter the creditor suggested that he had such judgment and had had execution issued thereon and the same returned *nulla bona*, it was held that the defect in the bill could not be cured, since the right of complainant to file a bill was to be determined as of the time of filing the original bill. Scott *v.* McFarland, 34 Miss. 363.

The return of the sheriff in hæc verba need not be pleaded. Daskam *v.* Neff, 79 Wis. 161, 47 N. W. 1132.

Issuance to county of defendant's residence. — The bill need not allege that execution was issued to the county in which defendant resides. Nix *v.* Winter, 35 Ala. 309; Brown *v.* Bates, 10 Ala. 432.

Where the law was changed subsequent to the obtaining of judgment and issue of execution thereon and return of such execution, the bill should show that the execution was returned under the old law. Satterlee *v.* True, 3 Edw. (N. Y.) 423.

If the execution was returned in six days by the defendant's request, it is not necessary that the bill should set out the legal effect, force, and form of such consent, but his consent may be stated generally. Millard *v.* Shaw, 4 How. Pr. (N. Y.) 137.

36. Mixon *v.* Dunklin, 48 Ala. 455; Shea *v.* Dulin, 3 MacArthur (D. C.) 339; Manchester *v.* McKee, 9 Ill. 511; Preston *v.* Wilcox, 38 Mich. 578; Smith *v.* Thompson, Walk. (Mich.) 1. *Contra*, Hutchinson *v.* Maxwell, 100 Va. 169, 40 S. E. 655, 93 Am. St. Rep. 944.

Must allege the return of execution nulla bona, or that no execution was issued on the

the insolvency of a judgment debtor dispenses with the necessity of a return of an execution, an allegation that the judgment debtor is insolvent,[37] or that he has no property left subject to execution,[38] or any allegation equivalent thereto is sufficient.[39]

(v) *Description of Property and Debtors Interested.* The property sought to be reached by a creditors' bill should be described with certainty,[40] unless it is unknown to complainant, in which case he is not required to point out the property sought to be reached.[41] And the bill should allege particularly the interest of the debtor sought to be reached; it is not sufficient to state generally that the debtor has an interest in land or personal property subject to the payment of his debts.[42]

(vi) *Absence of Collusion.* It is sometimes required that the bill should state that it is not filed by collusion and that the defendant has property not subject to execution to the value of one hundred dollars.[43]

b. Prayer For Relief. Although the prayer for relief is defective, the complainant will be awarded such relief as is consistent with the case made by his complaint and within the issues,[44] even though the bill be taken *pro con-*

judgment for two years. Dunfee *v.* Childs, 45 W. Va. 155, 30 S. E. 102.

What allegation sufficient.— An allegation that the sheriff returned said writ of execution to this court, the said return stating in effect that the said sheriff had been unable to satisfy said writ of execution and was unable to find any property in Cook county on which to levy the writ, and he, said sheriff, therefore returned the same no property found and no part satisfied, as by said writ of execution and the return of the sheriff indorsed thereon as aforesaid now on file in the office of said superior court will more fully appear, and to which or to a copy whereof your orator prays leave to refer, is a sufficient allegation of the return of the writ *nulla bona* to give the court jurisdiction to entertain a creditors' bill. French *v.* Commercial Nat. Bank, 79 Ill. App. 110. Where the allegation in the bill relates to a joint judgment and states that the sheriff returned that M and S had no property, it was held a sufficient averment to show want of individual as well as joint property. Conant *v.* Sparks, 3 Edw. (N. Y.) 104.

What allegation insufficient.—It is not sufficient to allege an execution returned "no goods." The bill should show that defendant had no property real or personal subject to execution. State Bank *v.* Oliver, 1 Disn. (Ohio) 159, 12 Ohio Dec. (Reprint) 548.

37. Armstrong *v.* Keifer, 39 Ind. 225.

38. Vansickle *v.* Shenk, 150 Ind. 413, 50 N. E. 381; Alford *v.* Baker, 53 Ind. 279.

39. Moyer *v.* Riggs, 8 Kan. App. 234, 55 Pac. 494; Whitehouse *v.* Point Defiance, etc., R. Co., 9 Wash. 558, 38 Pac. 152.

40. Coquillard *v.* Suydam, 8 Blackf. (Ind.) 24; Miller *v.* Sherry, 2 Wall. (U. S.) 237, 17 L. ed. 827.

A creditor sufficiently describes property to be reached where the defendant will probably understand what is meant. Muir *v.* Hodges, 116 Fed. 912.

41. Dutton *v.* Thomas, 97 Mich. 93, 56 N. W. 229. Thus a bill alleging that defendant has property subject to the payment of his debts, but that its kind, description, and manner of holding are concealed from and unknown to complainant asking a discovery is sufficient. Sweetzer *v.* Buchanan, 94 Ala. 574, 10 So. 552.

42. *Indiana.*— Reid *v.* Wilson, 2 Ind. 181.

Kentucky.— Talbott *v.* Tarlton, 5 J. J. Marsh. 641.

Nebraska.— Rosenfield *v.* Chada, 12 Nebr. 25, 10 N. W. 465.

Rhode Island.— Ginn *v.* Brown, 14 R. I. 524.

South Carolina.— Verdier *v.* Foster, 4 Rich. Eq. 227.

Tennessee.— Taylor *v.* Badoux, (Ch. App. 1899) 58 S. W. 919.

Contra.— Bay State Iron Co. *v.* Goodall, 39 N. H. 223, 75 Am. Dec. 219.

Insufficient description of interest.— An allegation that defendant "possessed of equitable estate of one undivided half of a certain tract or lot of land" — describing the half lot — is defective for insufficient description and renders the bill demurrable. Reid *v.* Wilson, 2 Ind. 181.

43. Batterson *v.* Ferguson, 1 Barb. (N. Y.) 490.

44. Rice *v.* Eiseman, 122 Ala. 343, 25 So. 214; Treadwell *v.* Brown, 44 N. H. 551; Annin *v.* Annin, 24 N. J. Eq. 184; Murtha *v.* Curley, 90 N. Y. 372, 12 Abb. N. Cas. (N. Y.) 12; Durand *v.* Hankerson, 39 N. Y. 287; Webb *v.* Staves, 1 N. Y. App. Div. 145, 37 N. Y. Suppl. 414; Sloan *v.* Birdsall, 58 Hun (N. Y.) 317, 11 N. Y. Suppl. 814; Redmond *v.* Dana, 3 Bosw. (N. Y.) 615; Donovan *v.* Sheridan, 37 N. Y. Super. Ct. 256.

A defendant to a creditors' bill, although he does not in his answer distinctly allege himself to be a creditor and although he asks in his answer to be dismissed with costs, may still after decree come in upon the fund as a creditor. Gibbs *v.* Cunningham, 4 Md. Ch. 322.

Under a prayer for general relief a sale of property not attached may be decreed, where

fesso,[45] and although such relief is inconsistent with the specific relief prayed for in the bill.[46]

c. Verification. A bill which seeks discovery of legal assets belonging to the defendant is insufficient unless verified by oath;[47] but when discovery is merely incidental to the relief sought in matters of ordinary equitable cognizance, the bill need not be verified by oath.[48] Where verification is required it is sufficient for the complainant to swear to the obtaining of the judgment and return of the execution *nulla bona* on information of his attorney.[49] The verification may be by the attorney or his clerk who had charge of the collection of the debt, conducted the proceedings at law, and had personal knowledge of the facts stated in the bill.[50] Verification according to the affiant's best belief and recollection is insufficient.[51]

d. Amendments. A bill may be amended,[52] even though the bill as originally filed shows on its face that the remedy at law has not been exhausted.[53] And an amendment is not a departure because it adds as parties to the bill some who were not made parties in the original bill.[54]

e. Supplemental Bill. A supplemental bill cannot be filed where a cause of action did not exist at the time of the filing of the original bill, as where at that time an execution had not been issued and returned *nulla bona*,[55] or where the cause of action on which the original bill was filed subsequently abates, as where the judgment on which the original bill was founded is set aside pending the suit.[56] But where the bill is maintainable on some other ground, a creditor may file a supplemental bill setting up that he has obtained a judgment and had execution issued thereon and that such execution had been returned *nulla bona* since the filing of the original bill.[57] A supplemental bill may be filed to subject to the payment of a judgment obtained subsequently to the institution of the original bill, and upon which execution has been issued and been returned *nulla bona*, property acquired subsequently to the filing of the original bill as well as property sought to be reached by the original bill.[58]

f. Multifariousness. If the object of the bill is single and for the subjection of the debtor's property to the satisfaction of complainant's judgment, and the relief if granted must be the same as to any portion of such property, whether held by the debtor or in trust for him by another or by several, the bill is not

the facts entitling the party to such sale are alleged and proved, although the petition asks specifically only for a sale of the attached property. Columbia Nat. Bank *v.* Baldwin, 64 Nebr. 732, 90 N. W. 890.

45. Hendrickson *v.* Winne, 3 How. Pr. (N. Y.) 127.

46. Bailey *v.* Burton, 8 Wend. (N. Y.) 339.

47. Sweetzer *v.* Buchanan, 94 Ala. 574, 10 So. 552; Lawson *v.* Warren, 89 Ala. 584, 8 So. 141, under statute.

48. Plaster *v.* Throne-Franklin Shoe Co., 123 Ala. 360, 26 So. 225; Henderson *v.* Farley Nat. Bank, 123 Ala. 547, 26 So. 226, 82 Am. St. Rep. 140; Burke *v.* Morris, 121 Ala. 126, 25 So. 759.

49. Hamersley *v.* Wyckoff, 8 Paige (N. Y.) 72.

50. Sizer *v.* Miller, 9 Paige (N. Y.) 605; Wooster Bank *v.* Spencer, Clarke (N. Y.) 386.

51. McKissack *v.* Voorhees, 119 Ala. 101, 24 So. 523. But see Guyton *v.* Terrell, 132 Ala. 66, 31 So. 83, where a complaint stated some matters positively and others on information and belief, and an affidavit by complainant's attorney stating that the affiant "of his own knowledge . . . knows that the facts are true as therein stated" in the complaint was held sufficient.

52. Merchants', etc., Nat. Bank *v.* Masonic Hall, 65 Ga. 603; Corning *v.* Stebbins, 1 Barb. Ch. (N. Y.) 589.

53. Ward *v.* Whitfield, 64 Miss. 754, 2 So. 493; Baggott *v.* Eagleson, Hoffm. (N. Y.) 377.

54. Sage *v.* Mosher, 28 Barb. (N. Y.) 287; Ewing *v.* Ferguson, 33 Gratt. (Va.) 548.

55. Neubert *v.* Massman, 37 Fla. 91, 19 So. 625; Grenell *v.* Ferry, 110 Mich. 262, 68 N. W. 144; Brown *v.* State Bank, 31 Miss. 454.

56. Butchers, etc., Bank *v.* Willis, 1 Edw. (N. Y.) 645.

57. Edgar *v.* Clevenger, 3 N. J. Eq. 258; Candler *v.* Pettit, 1 Paige (N. Y.) 168, 19 Am. Dec. 399.

58. Thomas *v.* McEwen, 11 Paige (N. Y.) 131, also holding that the surplus of the property sought to be reached by the original bill may be subjected by supplemental bill, even if there is no other property acquired by the debtor since the filing of the original bill.

multifarious, although the property is held by different persons under separate conveyances or the relief is sought on different theories,[59] and although different defendants acquired different portions of the debtor's property at different times.[60] A bill is not multifarious, although it is brought as well to reach equitable interests as to set aside an obstruction to the levy of an execution at law,[61] and although it prays discovery as well as relief.[62]

g. Framing Bill With Double Aspect. The bill may be framed with a double aspect.[63]

h. Bills For Discovery. A bill may be filed for discovery of the debtor's property, as well as for relief;[64] and discovery may be had as well of property

59. *Alabama.*— Guyton *v.* Terrell, 132 Ala. 66, 31 So. 83; Burke *v.* Morris, 121 Ala. 126, 25 So. 759; Lehman *v.* Meyer, 67 Ala. 396.

Florida.— Hayden *v.* Thrasher, 18 Fla. 795.

Michigan.— Hulbert *v.* Detroit Cycle Co., 107 Mich. 81, 64 N. W. 950.

Mississippi.— Snodgrass *v.* Andrews, 30 Miss. 472, 64 Am. Dec. 169.

New Hampshire.— Chase *v.* Searles, 45 N. H. 511.

New Jersey.— New Jersey Lumber Co. *v.* Ryan, 57 N. J. Eq. 330, 41 Atl. 839; Way *v.* Bragaw, 16 N. J. Eq. 213, 84 Am. Dec. 147; Burne *v.* O'Shaughnessy, (Ch. 1897) 38 Atl. 963.

New York.—Dixon *v.* Coleman, 28 Misc. 64, 59 N. Y. Suppl. 806; Brinkerhoff *v.* Brown, 6 Johns. Ch. 139.

South Carolina.— Sheppard *v.* Green, 48 S. C. 165, 26 S. E. 224.

Wisconsin.—Winslow *v.* Dousman, 18 Wis. 456.

United States.— Pullman *v.* Stebbins, 51 Fed. 10.

Contra.—Stephens *v.* Whitehead, 75 Ga. 294.

A bill may be filed against several debtors to reach their interests as legatees under the same will. Bradner *v.* Holland, 33 Hun (N. Y.) 288.

Prospective causes not joined.— Although legal and equitable causes may be joined under the practice act, the same must be existing and not prospective, and a creditor cannot in a petition on a general claim add a count in equity to have a fraudulent conveyance of real estate of the debtor set aside. Weinland *v.* Cochran, 9 Nebr. 480, 4 N. W. 67.

60. Henderson *v.* Farley Nat. Bank, 123 Ala. 547, 26 So. 226, 82 Am. St. Rep. 140.

61. Vanderpool *v.* Notley, 71 Mich. 422, 39 N. W. 574; Beam *v.* Bennett, 51 Mich. 148, 16 N. W. 316; Williams *v.* Hubbard, Walk. (Mich.) 28; Clark *v.* Davis, Harr. (Mich.) 227; Way *v.* Bragaw, 16 N. J. Eq. 213, 84 Am. Dec. 147; Cuyler *v.* Moreland, 6 Paige (N. Y.) 273. Thus a bill is not multifarious where it seeks to enforce a mechanic's lien in favor of complainant, to set aside a deed of trust executed by the defendant, to have another deed of trust declared to inure to the benefit of all creditors, and to convene defendant's creditors and wind up its affairs. Haskin Wood Vulcanizing Co. *v.* Cleveland Ship Bldg. Co., 94 Va. 439, 26 S. E. 878.

62. Guyton *v.* Terrell, 132 Ala. 66, 31 So. 83; Whitney *v.* Robbins, 17 N. J. Eq. 360.

63. Wilson *v.* Addison, 127 Mich. 680, 87 N. W. 109; Barger *v.* Buckland, 28 Gratt. (Va.) 850; Winslow *v.* Dousman, 18 Wis. 456; Zell Guano Co. *v.* Heatherly, 38 W. Va. 409, 18 S. E. 611. Thus a creditor may file his bill with a double aspect, asking to have a mortgage executed by his debtor declared fraudulent and void, or, if not fraudulent, foreclosed for his benefit, but he cannot have a foreclosure when he alleges in his bill that the mortgage has been satisfied and discharged. Walthall *v.* Rives, 34 Ala. 91. A creditors' bill averring in one aspect that a conveyance is fraudulent, and in another that it is a general assignment cannot be maintained. Beddow *v.* Sheppard, 118 Ala. 474, 23 So. 662.

64. *Alabama.*— Pollak *v.* Billings, 131 Ala. 519, 32 So. 639; Burke *v.* Morris, 121 Ala. 126, 25 So. 759, under statute.

Delaware.— Newell *v.* Morgan, 2 Harr. 225.

Maine.— Baxter *v.* Moses, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783; Webster *v.* Clark, 25 Me. 313; Gordon *v.* Lowell, 21 Me. 251.

Michigan.— Dutton *v.* Thomas, 97 Mich. 93, 56 N. W. 229.

New Hampshire.—Chase *v.* Searles, 45 N. H. 511; Treadwell *v.* Brown, 44 N. H. 551; Bay State Iron Co. *v.* Goodall, 39 N. H. 222, 75 Am. Dec. 219.

New Jersey.— Fuller *v.* Taylor, 6 N. J. Eq. 301, under statute.

New York.— Scoville *v.* Shed, 36 Hun 165; Le Roy *v.* Rogers, 3 Paige 234; Congden *v.* Lee, 3 Edw. 304.

Tennessee.— Cresswell *v.* Smith, 8 Lea 688.

See 14 Cent. Dig. tit. "Creditors' Suit," § 127.

Contra.— Cargill *v.* Kountze, 86 Tex. 386, 22 S. W. 1015, 25 S. W. 13, 40 Am. St. Rep. 853, 24 L. R. A. 183 [*reversing* (Civ. App. 1893) 22 S. W. 227].

A bill will not lie against a debtor to discover the names and addresses of persons indebted to him, as in such case the debtor is a mere witness and his answer would not be evidence against any other person. Detroit Copper, etc., Rolling Mills *v.* Ledwidge, 162 Ill. 305, 44 N. E. 751 [*affirming* 58 Ill. App. 351].

Under the Alabama code a bill for discovery by a judgment creditor with execution returned *nulla bona* is sufficient, if after alleging judgment and return of execution it charges that the debtor has no visible means subject to legal process of value sufficient to

without the jurisdiction of the court as of that within the jurisdiction.[65] But the defendant cannot be compelled to discover property to a later date than that of the filing of the bill, a supplemental bill being required to reach after-acquired property.[66] Where a bill seeking satisfaction of complainant's judgment out of property of the debtor fraudulently conveyed and concealed avers that the property fraudulently conveyed is not of sufficient value to pay plaintiff's judgment, it sufficiently appears that the discovery sought is necessary.[67] A defendant in a creditors' suit, from whom discovery is prayed in respect to his indebtedness to the judgment debtor, cannot object to the making of such discovery because the bill waives answer under oath.[68] Objection to entertaining a bill filed for discovery as a creditors' bill is not too late, although made after the report of the master, intention to treat it as a creditors' bill not being disclosed till after the answer and the taking of the testimony.[69]

2. ANSWER.[70] Where the bill alleges that the defendant has property, it is not sufficient for the answer to deny that he has, but the answer must disclose whether the defendant had any property at the time of the filing of the bill;[71] and where the defendant denies that he has property, except such as he claims is exempt from seizure for the payment of his debts, it must show the amount and value of such property so that the court may determine whether the same is exempt or not.[72] The facts stated in an answer to a bill for discovery will not conclude complainant from showing such facts to be otherwise than as stated.[73]

3. DEFENSES — a. Statute of Limitations[74] and Laches.[75] The defense of the statute of limitations may be set up by any party to the proceeding.[76] The right to file a creditors' bill does not accrue until the execution has been returned *nulla bona*, and the statute of limitations begins to run only from that time.[77] According to some decisions, although a creditors' bill is filed by one creditor for himself and all others who may come in and share the burden of the litigation, the statute runs against the demands of creditors, other than the plaintiff, until such time as they come in;[78] other decisions, however, do not seem to sustain this

pay the judgment, but that he has property, or an interest in property, real or personal, money or effects, or choses in action, subject to the payment of such judgment; but that the kind and description of the property and how the same is held is kept concealed and hidden and is unknown to the complainant, and that discovery is necessary to enable the complainant to reach it and subject it to the satisfaction of his demand. Pollak *v.* Billings, 131 Ala. 519, 32 So. 639; Moore *v.* Alabama Nat. Bank, 120 Ala. 89, 23 So. 831; Drennen *v.* Alabama Nat. Bank, 117 Ala. 320, 23 So. 71.

65. Le Roy *v.* Rogers, 3 Paige (N. Y.) 234.

66. Hope *v.* Brinckerhoff, 4 Edw. (N. Y.) 348; Gregory *v.* Valentine, 4 Edw. (N. Y.) 283.

67. Guyton *v.* Terrell, 132 Ala. 66, 31 So. 83.

68. Hudson *v.* Wood, 119 Fed. 764. And see Pollak *v.* Billings, 131 Ala. 519, 32 So. 639.

69. Hutchinson *v.* Maxwell, 100 Va. 169, 43 S. E. 655, 93 Am. St. Rep. 944.

70. Interplea.— In a creditors' suit to enforce a judgment against land owned by defendant, an answer filed by one not a party to the action, setting up an oral agreement by defendant to convey the land to him in consideration of the payment of a certain judgment against the land, but praying for no relief, should be dismissed, as such answer is not a proper interplea. Sturm *v.* McGuffin, 48 W. Va. 595, 37 S. E. 561.

71. Trotter *v.* Bunce, 1 Edw. (N. Y.) 573.

An averment that since the recovery of plaintiff's judgment defendant has not been interested in any property of any kind, and that no person had held any property or interest therein in trust for him or for his benefit, in possession or otherwise, sufficiently meets the prayer for discovery in plaintiff's bill. Wendell *v.* Shaw, 1 Barb. (N. Y.) 462.

72. Brown *v.* Morgan, 3 Edw. (N. Y.) 278.

73. Harbert *v.* Mershon, 169 Ill. 52, 47 N. E. 450.

74. See, generally, LIMITATIONS OF ACTIONS.

75. See, generally, EQUITY.

76. Hall *v.* Ridgely, 33 Md. 308; Williamson *v.* Wilson, 1 Bland (Md.) 418; Strike's Case, 1 Bland (Md.) 57.

At any time before the master makes his report, and even thereafter on exceptions, unless he has done some act or stands by and permits some act to be done which necessarily implies a waiver of that defense on his part, the statute may be set up. Hall *v.* Ridgely, 33 Md. 308.

77. Eyre *v.* Beebe, 28 How. Pr. (N. Y.) 333.

78. Hall *v.* Ridgely, 33 Md. 308; Post *v.* Mackall, 3 Bland (Md.) 486; Welch *v.* Stewart, 2 Bland (Md.) 37; McDowell *v.* Goldsmith, 2 Md. Ch. 370.

view.[79] Where the plaintiff is guilty of gross laches he will be precluded from maintaining a creditors' suit,[80] and equity will decline to interfere under a bill for discovery as under a bill for relief.[81]

b. Irregularities in Proceedings at Law Which Form the Basis of Creditors' Bill. The validity of the judgment upon which the creditors' bill is based cannot be questioned in the proceedings on the bill.[82] The fact that the execution was not issued and returned in conformity with statutory requirements cannot be taken advantage of in proceedings on the creditors' bill founded on such execution.[83]

Calculation of statutory period.— Where a creditor of an insolvent corporation files a bill for a receiver for a sale of the company's property, and that stock-holders be compelled to pay their unpaid subscriptions for the benefit of creditors, another creditor, subsequently making himself a party and proving his claim, is entitled by relation to the benefit of the suit as a party plaintiff from the beginning, and the time that elapses from the commencement of the suit to his becoming a party is not to be construed as a part of the time limited for the commencement of an action on his claim. Dunne *v.* Portland St. R. Co., 40 Oreg. 292, 65 Pac. 1052.

Claims filed subsequent to plea.—A plea of the statute of limitations has no effect on claims coming in subsequently thereto. Williams *v.* Banks, 11 Md. 198.

Where the original bill is filed on behalf of an individual creditor and afterward amended to state that it is filed on behalf of all creditors who may come in, a creditor whose claim is barred at the time of the amendment cannot come in under the bill. Cunningham *v.* Pell, 6 Paige (N. Y.) 655.

79. Taber *v.* Royal Ins. Co., 124 Ala. 681, 26 So. 252 (where it was held that the filing of a creditors' bill and decree thereon stops the running of the statute of limitations as to creditors who come in under the decree); Dobson *v.* Simonton, 93 N. C. 268 (holding that an action brought by one creditor in behalf of himself and all other creditors stops the statute from running against any creditor who comes in and proves his debt under the decree from the date of the beginning of the action); Laidley *v.* Kline, 23 W. Va. 565 (holding that where a bill by a creditor to subject the debtor's land is converted into a creditors' suit, the running of the statute as against all the creditors is arrested from that time).

80. Fox *v.* Lipe, 14 Colo. App. 258, 59 Pac. 850.

Nine years after return of execution is not a reasonable time within which to bring a creditors' suit. Gould *v.* Tryon, Walk. (Mich.) 353.

What is sufficient excuse for delay. Where plaintiff's execution against defendant was returned unsatisfied and he filed a creditors' bill, which could not be served for eight years because of defendant's absence from the state, and on defendant's return plaintiff filed a supplemental bill, alleging that defendant had acquired a large interest in a partnership since the filing of the original bill, such delay being without plaintiff's fault, did not preclude him from obtaining discovery of defendant's property thereunder, although it appeared that he had no adequate remedy at law. Newlove *v.* Pennock, 123 Mich. 260, 82 N. W. 54.

81. Fosdick *v.* Lowell Mach. Shop, 58 Fed. 817.

82. The judgment is presumed to have been regularly obtained on due proof of every allegation necessary to entitle plaintiff to recover.

Georgia.—Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121.

Illinois.— McMannomy *v.* Chicago, etc., R. Co., 167 Ill. 497, 47 N. E. 712; Sawyer *v.* Moyer, 109 Ill. 461.

Michigan.— Griffin *v.* McGavin, 117 Mich. 372, 75 N. W. 1061, 72 Am. St. Rep. 572; Williams *v.* Hubbard, 1 Mich. 446.

Nebraska.— Millard *v.* Parsell, 57 Nebr. 178, 77 N. W. 390.

New Jersey.— Conover *v.* Jeffrey, 26 N. J. Eq. 36; Brantingham *v.* Brantingham, 12 N. J. Eq. 160.

New York.— Jones *v.* Blum, 145 N. Y. 333, 39 N. E. 954; Barnard *v.* Darling, 1 Barb. Ch. 218; Hone *v.* Woolsey, 2 Edw. 289; Storm *v.* Waddell, 2 Sandf. Ch. 494. *Contra*, Smith *v.* Crocheron, 2 Edw. 501.

Ohio.— Wooster Bank *v.* Stevens, 1 Ohio St. 233, 59 Am. Dec. 619.

West Virginia.—Newlon *v.* Wade, 43 W. Va. 283, 27 S. E. 244.

Wisconsin.— Faber *v.* Matz, 86 Wis. 370, 57 N. W. 39.

United States.— Mattingly *v.* Nye, 8 Wall. 370, 19 L. ed. 380; New Orleans *v.* Fisher, 91 Fed. 574, 34 C. C. A. 15; Alkire Grocery Co. *v.* Richesin, 91 Fed. 79; Suydam *v.* Beals, 23 Fed. Cas. No. 13,653, 4 McLean 12.

See 14 Cent. Dig. tit. "Creditors' Suit," § 95.

83. Clark *v.* Dakin, 2 Barb. Ch. (N. Y.) 36; Cary *v.* Clark, 3 Edw. (N. Y.) 274; Rider *v.* Mason, 4 Sandf. Ch. (N. Y.) 351; Green *v.* Burnham, 3 Sandf. Ch. (N. Y.) 110; Bradford *v.* Read, 2 Sandf. Ch. (N. Y.) 163. *Contra*, Manning *v.* Merritt, 1 Clarke (N. Y.) 98.

Upon motion for a receiver, if it does not distinctly appear from the bill that the judgment and execution at law were regular and there is reason to suspect that there was irregularity in either judgment or execution, the motion will be denied, with liberty to renew the same, after the defendant shall have had an opportunity to move the court

c. Want of Proper Parties. The want of proper parties should be raised by demurrer,[84] and if the demurrer is sustained the complainant should have leave to amend.[85]

d. Pendency of Proceedings Supplemental to Execution. The pendency of proceedings supplemental to execution is no bar to a creditors' bill to reach equitable assets of the debtor.[86]

e. Another Action Pending.[87] A pending creditors' bill, filed by claimant therein for himself and all other creditors who may join therein, is no bar, before decree rendered to another bill subsequently filed by a creditor of the same debtor who is not a party to the first proceedings;[88] nor is the appointment of a receiver in the first suit a bar.[89] But where several suits are pending, the court will order proceedings in all suits but one stayed and will require the parties to come in under the decree in that suit.[90]

f. Bankruptcy or Insolveney of Debtor. Where a creditors' bill is filed before the debtor is declared a bankrupt, his discharge in bankruptcy is no bar to the suit;[91] and a creditor who has taken out a capias ad satisfaciendum and caused the arrest of the debtor thereon may, although the debtor has applied for the benefit of the insolvent debtor's act, join other judgment creditors in a creditors' bill for the purpose of enlarging the fund for the payment of their claims and excluding a fraudulent creditor from any share.[92]

g. Assignment of Equitable Interest Before Suit. Where a creditor seeks to subject to the satisfaction of his debt an equitable interest of his debtor, the assignment of such interest before the filing of the bill *bona fide* and for a valuable consideration will bar the creditor.[93]

h. Subrogation.[94] Where a bank which is a party to a creditors' bill against a depositor pays the deposit to the latter it is subrogated to the rights of the depositor and may avail itself of any defense existing in her behalf.[95]

E. Practice — 1. Intervention — a. Who May Come in. Where funds of a debtor are in the hands of a court of equity a judgment creditor may file an intervening petition to have such funds applied to his judgment[96] and is not

of law to set aside the process or judgment for irregularity. Wooster Bank *v.* Spencer, Clarke (N. Y.) 386.

84. Colgin *v.* Redman, 20 Ala. 650; Toulmin *v.* Hamilton, 7 Ala. 362; Williams *v.* Jones, 23 Mo. App. 132. *Contra*, Pappenheimer *v.* Roberts, 24 W. Va. 702.

Where a creditor assigns all interest in a judgment to a third party prior to the filing of the bill the defense must be made by plea or answer, and defendant cannot afterward have the bill dismissed if the complainant within a limited time files a supplemental bill to bring the assignee before the court. But where the suit is properly commenced and thereafter the complainant assigns his judgment either in whole or in part the defendant may apply to the court to have the bill dismissed unless the assignee be brought in by a supplemental bill within a specified time fixed by the court. Hathaway *v.* Scott, 11 Paige (N. Y.) 173.

85. Pappenheimer *v.* Roberts, 24 W. Va. 702.

86. Faber *v.* Matz, 86 Wis. 370, 57 N. W. 39.

87. See, generally, Abatement and Revival, 1 Cyc. 31; Actions, 1 Cyc. 754.

88. American Pig Iron Storage Warrant Co. *v.* German, 126 Ala. 194, 28 So. 603; Alabama Iron, etc., Co. *v.* McKeever, 112 Ala. 134, 20 So. 84; Hall *v.* Alabama Terminal, etc., Co., 104 Ala. 577, 16 So. 439, 53 Am. St. Rep. 87; La Claise *v.* Lord, 10 How. Pr. (N. Y.) 461; See *v.* Rogers, 31 W. Va. 473, 7 S. E. 436.

89. Alabama Iron, etc., Co. *v.* McKeever, 112 Ala. 134, 20 So. 84; Citizens' Bank *v.* Hubbard, 70 Ga. 140.

90. Stephenson *v.* Taverners, 9 Gratt. (Va.) 398.

A second creditors' bill cannot be maintained where one has been prosecuted to a general decree in favor of complainant and all who may come in (Kerr *v.* Blodgett, 48 N. Y. 62; Brooks *v.* Gibbons, 4 Paige (N. Y.) 374; Stephenson *v.* Taverners, 9 Gratt. (Va.) 398; Bilmyer *v.* Sherman, 23 W. Va. 656), unless the creditor could not come in under such decree, or would be entitled to more extended relief, in which case he should file a supplemental bill (Brooks *v.* Gibbons, 4 Paige (N. Y.) 374).

91. Phillips *v.* Wesson, 16 Ga. 137; Lowry *v.* Morrison, 11 Paige (N. Y.) 327; Smith *v.* ——, 4 Edw. 653; Sively *v.* Campbell, 23 Gratt. (Va.) 893.

92. Brandon *v.* Gowing, 6 Rich. Eq. (S. C.) 5.

93. Frost *v.* Reynolds, 39 N. C. 494.

94. See, generally, Subrogation.

95. A. T. Albro Co. *v.* Fountain, 162 N. Y. 498, 57 N. E. 72 [*reversing* 15 N. Y. App. Div. 351, 44 N. Y. Suppl. 150].

96. Phillips *v.* Blatchford, 26 Ill. App. 606.

bound to resort to independent proceedings in equity.[97] A bill may be a creditors' bill without being brought for plaintiff and all other creditors who may join.[98] If the complainant fails so to sue, the court should afford all judgment creditors an opportunity to have their judgments audited before commissioners by directing publication to be made calling upon them to present their claims for audit.[99] In general creditors' bills judgment creditors other than the complainant may intervene for the protection of their rights,[1] although their judgments were obtained after the creditors' bill was filed.[2] But where there are several creditors' bills which have not been consolidated, complainants in one cannot on motion be permitted to intervene in the others to assail the decree.[3] The original creditor after decree cannot bring in any new or additional claim.[4] In some jurisdictions the rule is that simple contract creditors can intervene.[5]

b. Status of Parties Intervening. The creditors whose claims have been recognized or established in any of the modes pointed out by the decree become quasi-parties to the litigation,[6] and may resist the allowance of any claim of equal or greater dignity than their own,[7] and are entitled to notice of applications to be made in the cause.[8] Creditors who intervene are bound by the decree as if made parties and served with process.[9]

c. Pleadings by Interveners. Intervening petitions are not required to conform to the technical rules applicable to pleadings between the principal parties and need not name other parties or contain prayer for process.[10]

d. Time For Coming in. It is usual to permit creditors to come in at any time before distribution of the fund.[11] Where creditors are required to establish

97. He may resort to independent proceedings if he prefers to do so. Talladega Mercantile Co. *v.* Jenifer Iron Co., 102 Ala. 259, 14 So. 743.

98. Hurn *v.* Keller, 79 Va. 415.

99. Strike *v.* McDonald, 2 Harr. & G. (Md.) 191; Ewing *v.* Ferguson, 33 Gratt. (Va.) 548; Dunfee *v.* Childs, 45 W. Va. 155, 30 S. E. 102; Neely *v.* Jones, 16 W. Va. 625, 37 Am. Rep. 794.

Contra.— Iauch *v.* De Socarras, 56 N. J. Eq. 524, 39 Atl. 381.

Appeal from order refusing intervention.— A judgment creditor who is not made a party to a suit to subject the debtor's interest in lands to the payment of his debts may at any time before final decree file a petition for intervention and if the court refuses to permit him to intervene he has the right to appeal. Pappenheimer *v.* Roberts, 24 W. Va. 702.

1. Kuhl *v.* Martin, 26 N. J. Eq. 60; Wilson *v.* Carrico, 50 W. Va. 336, 40 S. E. 439; Smith *v.* Parsons, 33 W. Va. 644, 11 S. E. 68; Johnson *v.* Waters, 111 U. S. 640, 4 S. Ct. 619, 28 L. ed. 547; Myers *v.* Fenn. 5 Wall. (U. S.) 205, 18 L. ed. 604; George *v.* St. Louis Cable, etc., R. Co., 44 Fed. 117. And see Campau *v.* Detroit Driving Club, 130 Mich. 417, 90 N. W. 49. Where a lien creditor files a bill to ascertain property of the debtor and to establish the liens and priorities against the same, a creditor defendant may file in such suit an answer in the nature of a cross bill attacking any of the liens involved therein as fraudulent preferences. Castro *v.* Greer, 44 W. Va. 332, 30 S. E. 100.

2. Marling *v.* Robrecht, 13 W. Va. 440.

3. Jones *v.* Fayerweather, 46 N. J. Eq. 237, 19 Atl. 22.

Where a deed fraudulently conveying property of a debtor is set aside at the suit of antecedent creditors suing for the benefit of all creditors, subsequent creditors cannot be let in to participate in the distribution where the deed is unaffected by fraud in fact, but they may where there was fraud in fact. Ward *v.* Hollins, 14 Md. 158; Williams *v.* Banks, 11 Md. 198.

4. Welch *v.* Stewart, 2 Bland (Md.) 37; Strike's Case, 1 Bland (Md.) 57.

5. Comstock-Castle Stove Co. *v.* Baldwin, 169 Ill. 636, 48 N. E. 723; Edwards, etc., Brokerage Co. *v.* Rosenheim, 74 Mo. App. 621; Carp *v.* Chipley, 73 Mo. App. 22.

6. Fagan *v.* Boyle Ice Mach. Co., 65 Tex. 324.

7. Fagan *v.* Boyle Ice Mach. Co., 65 Tex. 324.

8. Anonymous, 18 Abb. Pr. (N. Y.) 87.

9. Bilmyer *v.* Sherman, 23 W. Va. 656; Arnold *v.* Casner, 22 W. Va. 444.

10. American Pig Iron Storage Warrant Co. *v.* Gorman, 126 Ala. 194, 28 So. 603, 85 Am. St. Rep. 21; Taber *v.* Royal Ins. Co., 124 Ala. 681, 26 So. 252; Wilson *v.* Carrico, 50 W. Va. 336, 40 S. E. 439.

Second petition.— Where interveners in a creditors' suit have presented a petition for the discharge of the receiver and for an accounting by him, a denial of it is not a bar to a second petition in intervention to declare execution sales illegal and void because made when the property was in the receiver's possession and control. Campau *v.* Detroit Driving Club, 130 Mich. 417, 90 N. W. 49.

11. State Bank *v.* Dugan, 2 Bland (Md.) 254; Jones *v.* Fayerweather, 46 N. J. Eq. 237, 19 Atl. 22.

their claims in the time limited by the decree, they are not strictly holden to the time unless injustice would thereby be done to other parties.[12] A creditor coming in under a general order must present the particulars of his claim to the master.[13]

2. CONTROL OF SUIT. The general rule seems to be that a creditor who commences suit for himself and all other creditors who may join may discontinue the same without the consent of the other creditors before any decree is made.[14] So it has been held that one complainant can only dismiss the suit as to himself where there are several complainants or where other creditors have intervened,[15] and in at least one jurisdiction, it is held that the payment of complainant's debt after order of reference does not abate the suit, but some other creditor should be substituted.[16] It has also been held that where the complainant assigns his individual claim pending the action, the suit may be continued in his name on behalf of the other creditors, until such time as his assignee may be substituted for him.[17] Where the original complainant unduly delays the prosecution, the conduct of the cause may be committed by the court to some other creditor.[18] In a suit in aid of execution, a demurring defendant is not entitled to object to the joinder of other defendants necessary to secure a lien on sufficient property of the judgment debtor to satisfy the complainant's claim.[19]

A creditor may come in after answer and before decree, but cannot have his claim so put in issue as to be adjudicated on by the decree, but such creditor may be heard on appointment of trustee to make sale. Watkins *v.* Worthington, 2 Bland (Md.) 509.

Coming in after decree.—Under special circumstances, new parties to a creditors' suit may come in after decree if they can show an interest in the common fund. Seaver *v.* Bigelows, 5 Wall. (U. S.) 208, 18 L. ed. 595. But a creditor cannot split up causes of action and bring in an additional claim after decree. Strike's Case, 1 Bland (Md.) 57.

12. Pratt *v.* Rathbun, 7 Paige (N. Y.) 269; Brooks *v.* Gibbons, 4 Paige (N. Y.) 374; Wilder *v.* Keeler, 3 Paige (N. Y.) 164, 23 Am. Dec. 781.

Contra.— Mann *v.* Poole, 48 S. C. 154, 26 S. E. 229.

But a creditor who thus comes in after the time limit has expired must give notice to other creditors who have proved, provided their appearance is entered with the proper officer and notice thereof served on the complainant's solicitor. Pratt *v.* Rathbun, 7 Paige (N. Y.) 269; Wilder *v.* Keeler, 3 Paige (N. Y.) 164, 23 Am. Dec. 781.

13. Morris *v.* Mowatt, 4 Paige (N. Y.) 142.

14. *Georgia.*— Stinson *v.* Williams, 35 Ga. 170; McDougald *v.* Dougherty, 11 Ga. 570.

New Jersey.— Thompson *v.* Fisler, 33 N. J. Eq. 480.

New York.— Salisbury *v.* Binghamton Pub. Co., 85 Hun 99, 32 N. Y. Suppl. 652; Tremain *v.* Guardian Mut. L. Ins. Co., 11 Hun 286; Mattison *v.* Demarest, 1 Rob. 717, 19 Abb. Pr. 356; Innes *v.* Lansing, 7 Paige 583.

Virginia.— Piedmont, etc., L. Ins. Co. *v.* Maury, 75 Va. 508; Duerson *v.* Alsop, 27 Gratt. 229.

England.— Pemberton *v.* Topham, 1 Beav. 316, 2 Jur. 1009, 17 Eng. Ch. 316; Handford *v.* Storie, 3 L. J. Ch. O. S. 110, 2 Sim. & St. 196, 1 Eng. Ch. 196.

But after decree he cannot deprive the other creditors of the same class of the benefit thereof, if they think fit to prosecute the suit. Salisbury *v.* Binghamton Pub. Co., 85 Hun (N. Y.) 99, 32 N. Y. Suppl. 652; Johnson *v.* Miller, 96 Fed. 271, 37 C. C. A. 471; Handford *v.* Storie, 3 L. J. Ch. O. S. 110, 2 Sim. & St. 196, 1 Eng. Ch. 196. The reason of the distinction is "that, before decree, no other person of the class is bound to rely upon the diligence of him who has first instituted his suit, but may file a bill of his own; and that, after a decree, no second suit is permitted." 1 Daniel Ch. Pr. (4th Am. ed.) 794.

On a bill filed by trustees for the benefit of creditors requiring them to come in and prove their claims, one trustee cannot after decree establishing the creditors' claims and directing payment, dismiss the bill, if his cotrustees and creditors object. Muldrow *v.* Du Bose, 2 Hill Eq. (S. C.) 375.

15. La Tourette *v.* Fletcher, 6 App. Cas. (D. C.) 324; Nix *v.* Dukes, 58 Tex. 96; Piedmont, etc., L. Ins. Co. *v.* Maury, 75 Va. 508; Simmons *v.* Lyles, 27 Gratt. (Va.) 922; Belmont Nail Co. *v.* Columbia Iron, etc., Co., 46 Fed. 336. See also Lindsey *v.* McGannon, 9 W. Va. 154.

Intervention of other creditors after notice of dismissal.— The defendant in a creditors' bill brought by one creditor in behalf of himself and all others may on settling the complainant's claim and giving notice of motion to dismiss the bill, have the same dismissed, although after the giving of such notice other creditors may have been admitted as complainants. Schlagenhauf *v.* Craven, 61 N. J. Eq. 232, 47 Atl. 804.

16. Shumate *v.* Crockett, 43 W. Va. 491, 27 S. E. 240; Lewis *v.* Laidley, 39 W. Va. 422, 19 S. E. 378.

17. Hirshfeld *v.* Bopp, 27 N. Y. App. Div. 180, 50 N. Y. Suppl. 676.

18. Thompson *v.* Fisler, 33 N. J. Eq. 480; Patterson *v.* Scott, 4 Grant Ch. (U. C.) 145.

19. Wilson *v.* Addison, 127 Mich. 680, 87 N. W. 109.

3. INJUNCTION[20] IN AID OF CREDITORS' BILLS — a. In General. An injunction is often granted in aid of a creditors' bill.[21] An injunction should be granted where it is made to appear that the debtor will or is taking steps to place his property beyond the reach of his creditors;[22] and a decree may be granted enjoining a debtor from disposing of his property where the creditors' bill is taken *pro confesso* and that too although fraud is not alleged.[23] The doctrine that equity will not, upon the filing of a general creditors' bill, restrain a particular creditor who has obtained an absolute judgment against an administrator from proceeding against the latter and his sureties has no application to a case where such judgment creditor is the one to file the bill, thereby submitting his claim to the control and disposition of the court.[24] The fact that another action, whether prior or subsequent to the creditors' bill, is pending on behalf of all creditors who may come in constitutes no objection to the granting of an injunction.[25] If it is sought to enjoin the defendant from proceeding to obtain a discharge under the insolvent laws, special cause must be shown for the injunction.[26] The injunction should not be general, but should be directed to a specific debt or trust pointed out in the bill and proved by oath to exist.[27]

b. Operation and Effect. An injunction issued to persons not parties to the suit is inoperative as to them, except as notice.[28] An order restraining creditors from bringing suit and requiring them to prove their claims does not affect a decree of the same court establishing a claim in another cause which could have been proved under such order.[29] An order of injunction in a creditors' suit will not prevent a judgment creditor, not a party therein, from levying on the debtor's property that is subject to sale under execution before defendant's title is equitably divested by an order of sequestration or the appointment of a receiver.[30] The usual restraining order under a creditors' bill does not operate to prevent a particular creditor from establishing his claim by judgment, such judgment not to entitle him to preference over other creditors.[31] An injunction restraining the defendant in a creditors' suit from in any way disposing of or intermeddling with the debtor's property, whether in his possession or not, does not prevent him from taking care of and protecting from tort-feasors the property in his possession.[32]

c. Violation of Injunction. An injunction against a judgment creditor in a creditors' suit is violated by his applying money previously earned or in his possession at the time of the service of the injunction to the payment of other debts.[33] On the other hand after service of the ordinary injunction in a creditors'

20. See, generally, INJUNCTIONS.

21. Eliot *v.* Merchants' Exch., 14 Mo. App. 234; Candler *v.* Pettit, 1 Paige (N. Y.) 168, 19 Am. Dec. 399.

22. Mahaney *v.* Lazier, 16 Md. 69; Ætna Nat. Bank *v.* Manhattan L. Ins. Co., 24 Fed. 769. And see Roberts *v.* Lewald, 107 N. C. 305, 12 S. E. 279.

It should not issue unless it appear that the defendant has disposed of his property or has done or is about to do something to prevent the enforcement of the judgment. Clark *v.* Herbert Booth King, etc., Pub. Co., 40 N. Y. App. Div. 405, 57 N. Y. Suppl. 975.

So where a creditors' bill shows presumptively that there is a surplus accumulated under a trust created for the maintenance of the debtor, an injunction should issue either without qualification or limited so as to restrain the debtor from using more than a specified proportion. Rider *v.* Mason, 4 Sandf. Ch. (N. Y.) 351.

23. Runals *v.* Harding, 83 Ill. 75.

Creditors' bills are not dependent alone upon discovery, although discovery may be had under them; and an injunction may issue on a bill containing the usual general averments, taken *pro confesso*, restraining the judgment debtor from disposing of his equitable interests, credits, and choses in action, although no discovery has been obtained. Schroetter *v.* Brown, 59 Ill. App. 24.

24. Walton *v.* Pearson, 85 N. C. 34.

25. Cliaise *v.* Lord, 10 How. Pr. (N. Y.) 461.

26. Schanck *v.* Sniffen, 1 Barb. (N. Y.) 32.

27. Barr *v.* Voorhees, 55 N. J. Eq. 561, 37 Atl. 134.

28. Sage *v.* Quay, Clarke (N. Y.) 347.

29. Reynolds *v.* Timmons, 7 S. C. 486.

30. Lansing *v.* Easton, 7 Paige (N. Y.) 364.

31. Van Wyck *v.* Norris, 6 S. C. 305.

32. McQueen *v.* Babcock, 3 Abb. Dec. (N. Y.) 129.

33. Taggard *v.* Talcott, 2 Edw. (N. Y.) 628.

suit, the defendant is not guilty of contempt by proceeding to judgment in a suit previously commenced.[34] And where, before proceedings are instituted by a creditors' bill and injunction to reach a month's salary, defendant has procured a third person to advance the amount thereof to him and given a draft on his employer to pay it when due, the fact that he makes a necessary indorsement on the check for the amount of the salary after the issuance of the injunction is no violation thereof.[35]

d. Dissolution. The injunction should not be dissolved upon affidavit of the defendant that certain necessary preliminaries to the granting thereof charged in the bill to have been taken had in fact not been taken,[36] nor upon the denial of defendant in his answer that he has any property or choses in action or any interest in property,[37] or that he has not property to the amount sought to be recovered.[38] So an injunction should not be dissolved on a denial of the full equity of the bill, if there is good reason for retaining the property in the receiver's hands.[39] Failure of a creditor, who has obtained an order enjoining the debtor from collecting his debts and disposing of perishable property, to apply for the appointment of a receiver is ground to dissolve an injunction.[40] So an injunction against a corporation will be dissolved where one creditor cannot be injured thereby, and its continuance would defeat the plans of a reorganization of the corporation entered into by the creditors and would be inconsistent with previous orders in the case.[41]

4. Receivers[42] — a. Power to Appoint and Grounds For Appointment. It is a well-established practice to appoint a receiver of the defendant's property in aid of a creditors' bill.[43] Such appointment is discretionary with the court,[44] and is usually made as a matter of course where the property is in danger of waste.[45] Where at the time of filing a petition in aid of execution plaintiff had a right to sell for the purpose of paying a debt due him all the property described in his

So where the injunction prohibits any transfer of the debtor's property, it is a violation thereof for the debtor to inform a creditor, not a party to the suit, that he has property applicable to the payment of his claims and to procure an agent to obtain execution and deliver property to a sheriff holding execution. Lansing *v.* Easton, 7 Paige (N. Y.) 364.

34. Parker *v.* Wakeman, 10 Paige (N. Y.) 485.

35. Ireland *v.* Smith, 1 Barb. (N. Y.) 419, 3 How. Pr. (N. Y.) 244.

36. Strange *v.* Longley, 3 Barb. Ch. (N. Y.) 650.

The want of an indorsement on the back of an injunction affords no ground for dissolution. Sizer *v.* Miller, 9 Paige (N. Y.) 605.

37. New *v.* Bame, 10 Paige (N. Y.) 502.

38. Sage *v.* Quay, Clarke (N. Y.) 347.

39. Monroe Bank *v.* Schermerhorn, Clarke (N. Y.) 303.

40. Osborn *v.* Heyer, 2 Paige (N. Y.) 342.

41. Washington City, etc., R. Co. *v.* Southern Maryland R. Co., 55 Md. 153.

42. See, generally, Receivers.

43. McCullough *v.* Jones, 91 Ala. 186, 8 So. 696; Augusta Nat. Bank *v.* Richmond Factory, 91 Ga. 284, 18 S. E. 160; Gerson *v.* De Turck, 82 Ill. App. 125; Webb *v.* Obermann, 6 Abb. Pr. (N. Y.) 92; McArthur *v.* Hoysradt, 11 Paige (N. Y.) 495.

44. Gage *v.* Smith, 79 Ill. 219; Lutt *v.* Grimont, 17 Ill. App. 308.

45. *District of Columbia.*— Davison *v.* Whittlesey, 1 MacArthur 163.

Georgia.— Albany, etc., Iron, etc., Co. *v.* Southern Agricultural Works, 76 Ga. 135, 2 Am. St. Rep. 26.

Illinois.— Runals *v.* Harding, 83 Ill. 75; Gage *v.* Smith, 79 Ill. 219; Schroetter *v.* Brown, 59 Ill. App. 24.

Iowa.— Hirsch *v.* Israel, 106 Iowa 498, 76 N. W. 811.

New Jersey.— Kuhl *v.* Martin, 26 N. J. Eq. 60.

New York.— Lent *v.* McQueen, 15 How. Pr. 313; Hendrickson *v.* Winne, 3 How. Pr. 127.

Virginia.—Smith *v.* Butcher, 28 Gratt. 144.

West Virginia.— Grantham *v.* Lucas, 15 W. Va. 425.

Wisconsin.—Ahlhauser *v.* Doud, 74 Wis. 400, 43 N. W. 169.

See 14 Cent. Dig. tit. "Creditors' Suit," § 133.

It is error to appoint a receiver for land on a creditors' bill pending determination of a separate suit to determine the judgment debtor's interest therein, where it does not appear that the liens were in excess of the value of the land or that the debtor was insolvent. Banner *v.* Dingus, (Va. 1899) 33 S. E. 530.

Where the judgment debt may be satisfied within a reasonable time by means of sequestration of a debtor's portion of the revenues of a trust estate, such means should be resorted to before selling out the debtor, where

security deed, the court did not abuse its discretion in granting an injunction and appointing a receiver.[46]

b. Application, Notice, and Hearing. The appointment of a receiver may be made without notice of the application, where the equity of the bill is not denied,[47] but a copy of the bill should be served before moving for a receiver.[48] A receiver may be appointed even before it appears that there is any property of the debtor to be administered by him.[49] It is no objection to a motion for a receiver that the bill waives answer on oath,[50] or that a motion for leave to amend a creditors' bill is pending, provided the defect in the bill is not fatal or does not render the bill demurrable.[51] The appointment of a receiver may be opposed by showing that the judgments of the creditors were obtained by fraud.[52] When a receiver has once been appointed the death of the judgment debtor will not terminate the receivership.[53] The appointment of a receiver cannot be collaterally attacked on the ground that the judgment, which was the basis of the appointment, was invalid,[54] nor on the ground that the creditor at whose instance the appointment was made had not first obtained judgment at law.[55]

c. Assignment and Delivery of Property to Receivers. The appointment of the receiver and the giving of a bond by him vests in him the personal estate of the debtor as of the date of the order, without execution of any transfer or assignment.[56] As respects the debtor's real property the rule is different. A

the latter might result in sacrifice. Bryan *v.* May, 9 App. Cas. (D. C.) 383.

46. Fisher *v.* Graham, 113 Ga. 851, 39 S. E. 305.

47. Maxwell *v.* Peters Shoe Co., 109 Ala. 371, 19 So. 412; Micou *v.* Moses, 72 Ala. 439; Starr *v.* Rathbone, 1 Barb. (N. Y.) 70; Bloodgood *v.* Clark, 4 Paige (N. Y.) 574. *Contra*, Austin *v.* Figueira, 7 Paige (N. Y.) 56; Sanford *v.* Sinclair, 3 Edw. (N. Y.) 393. And see Meridian News, etc., Co. *v.* Diem, etc., Paper Co., 70 Miss. 695, 12 So. 702, holding that on a bill filed by an execution creditor against a debtor and certain claimants of the property levied on, alleging that the claims were interposed for the purpose of defrauding complainant of his debt, and asking the appointment of a receiver, such receiver will not be appointed before service of process, and without notice to the debtor, injunction being sufficient to prevent any transfer of the property.

A court has authority to appoint a receiver on the filing of a creditors' bill pendente lite and is not compelled to wait until other claimants to the property in dispute have either demurred, pleaded, or answered to the bill of complaint. Railton *v.* People, 83 Ill. App. 396.

48. Hart *v.* Tims, 3 Edw. (N. Y.) 226.

49. Dutton *v.* Thomas, 97 Mich. 93, 56 N. W. 229; Rankin *v.* Rothschild, 78 Mich. 10, 43 N. W. 1077; Fuller *v.* Taylor, 6 N. J. Eq. 301; Browning *v.* Bettis, 8 Paige (N. Y.) 568; Chipman *v.* Sabbaton, 7 Paige (N. Y.) 47.

Contra.— Whitney *v.* Robbins, 17 N. J. Eq. 360.

The statutes of New Jersey do not authorize a chancellor upon preliminary examination of judgment debtor and witnesses to adjudge that any particular property or thing in action held by a defendant to whom it is alleged to have been fraudulently conveyed belongs to or is held in trust for the judgment debtor and to compel its transfer and delivery to a receiver. New Jersey Lumber Co. *v.* Ryan, 57 N. J. Eq. 330, 41 Atl. 839.

50. Root *v.* Safford, 2 Barb. Ch. (N. Y.) 33.

51. Barnard *v.* Darling, 1 Barb. Ch. (N. Y.) 76.

52. Whitehouse *v.* Point Defiance, etc., R. Co., 9 Wash. 558, 38 Pac. 152. But *compare* Lent *v.* McQueen, 15 How. Pr. (N. Y.) 313, holding that the application for appointment of a receiver in a creditors' suit cannot be resisted on the ground that the judgment was confessed to secure a contingent liability not yet matured. It was said that on such an application the court cannot go behind the judgment and execution.

53. Nicoll *v.* Boyd, 90 N. Y. 516.

54. Jones *v.* Blun, 145 N. Y. 333, 39 N. E. 954.

55. Whitney *v.* Hanover Nat. Bank, 71 Miss. 1009, 15 So. 33, 23 L. R. A. 531.

56. Chautauque County Bank *v.* Risley, 19 N. Y. 369, 75 Am. Dec. 347; Wilson *v.* Allen, 6 Barb. (N. Y.) 542; Eldred *v.* Hall, 9 Paige (N. Y.) 640; Albany City Bank *v.* Schermerhorn, Clarke (N. Y.) 297; Storm *v.* Waddell, 2 Sandf. Ch. (N. Y.) 494. The court may duly enforce and protect the receiver's rights to property ordered into his custody, and where a receiver in a creditors' suit became entitled to the possession of personal property of the debtor and rents and profits of his real estate and the defendant neglected to make an assignment to the receiver, the court on a bill filed by the receiver will interfere to protect his rights as against sheriffs and others who have seized upon the property to prevent his obtaining possession thereof, but would not do so by summary process as against those not parties to the suit. Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 372, 38 Am. Dec. 551.

conveyance by the debtor to the receiver is necessary, and such conveyance, the court appointing a receiver, has power to order.[57] So the appointment of a receiver will not *per se* vest a title in the receiver to the trust income of the debtor, although the income may have already accrued and be in the hands of the trustee.[58] Where the defendant in a creditors' bill admits that he has certain property but denies that he has any other, the order for the delivering of his property to the receiver must be general.[59] An assignment to a receiver does not pass a right of action in the debtor for an injury to property exempt from execution,[60] nor for a mere personal tort.[61] The assignment executed by the debtor should contain an exception of property exempt by law, notwithstanding the general order of reference,[62] and notwithstanding the fact that a fraudulent assignment of all the debtor's property has been set aside.[63]

d. Possession and Control of Property. The court will restrain any persons within its jurisdiction from taking steps which will prevent the receiver from getting the property of the debtor in his hands,[64] and a receiver appointed by a domestic court on a creditors' bill to enforce a domestic judgment may hold the debtor's assets against a domestic attaching creditor, although the bill was filed by a citizen of another state.[65] Where a debtor's tenants have attorned to the receiver they will not be permitted to question his rights as receiver by disturbing his possession.[66] The receiver holds the debtor's choses in action in preference to one who purchased the same of the debtor after notice of the filing of the bill.[67] The rents and profits of real estate of a debtor during the time allowed for redemption from sale go to the receiver immediately.[68] A sale by a sheriff under execution of land in the possession of the receiver and subject to the lien

As to a creditor who is not a party to the suit, the title of the receiver to the property of the debtor does not relate to the time of the filing of the bill, but only to the time when the assignment to the receiver is made. Watson *v.* New York Cent. R. Co., 6 Abb. Pr. N. S. (N. Y.) 91.

In Illinois the appointing of a receiver and his qualification as such does not of itself vest title to the debtor's property in him (Thomas *v.* Van Meter, 164 Ill. 304, 45 N. E. 405 [*reversing* 62 Ill. App. 309]; Heffron *v.* Gage, 149 Ill. 182, 36 N. E. 569. But *compare* Heise *v.* Starr, 44 Ill. App. 406); but the court has power to order an assignment of the debtor's property to the receiver (Philadelphia F. Ins. Co. *v.* Central Nat. Bank, 1 Ill. App. 344).

57. Cole *v.* Tyler, 65 N. Y. 73; Chautauque County Bank *v.* Risley, 19 N. Y. 369, 75 Am. Dec. 347. See also Bowe *v.* Arnold, 31 Hun (N. Y.) 256.

A debtor's affidavit that he has no property will not excuse him from executing a formal assignment of all his property to a receiver, as the assignment will enable the receiver to sue to recover property fraudulently conveyed by the debtor. Chipman *v.* Sabbaton, 7 Paige (N. Y.) 47.

Land situated in another state.— The court may compel the debtor to execute a conveyance of land situated in another state to the receiver. Bailey *v.* Ryder, 10 N. Y. 363.

The filing of a petition in bankruptcy between the filing of the creditors' suit and the order to transfer property does not release him of his duty to obey the order. Watkins *v.* Pinkney, 3 Edw. (N. Y.) 533.

58. Genet *v.* Foster, 18 How. Pr. (N. Y.) 50.

59. Browning *v.* Bettis, 8 Paige (N. Y.) 568.

60. Hudson *v.* Plets, 11 Paige (N. Y.) 180.

Otherwise, however, as to a right of action for an injury to the property to which the complainant has a right to resort to satisfy his claim. Hudson *v.* Plets, 11 Paige (N. Y.) 180.

61. Hudson *v.* Plets, 11 Paige (N. Y.) 180.

62. Cagger *v.* Howard, 1 Barb. Ch. (N. Y.) 368.

It need not, however, contain a reservation of property which the debtor holds merely in the character of trustee for others and in which he has no beneficial interest. Cagger *v.* Howard, 1 Barb. Ch. (N. Y.) 368.

63. Sheldon *v.* Weeks, 7 N. Y. Leg. Obs. 57.

64. Sercomb *v.* Catlin, 128 Ill. 556, 21 N. E. 606, 15 Am. St. Rep. 147 [*affirming* 30 Ill. App. 258]. But see Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 372, 38 Am. Dec. 551.

A creditor cannot sue out execution and cause it to be levied on property to which the receiver is entitled. Gouverneur *v.* Warner, 2 Sandf. (N. Y.) 624.

65. Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324 [*affirming* 50 Ill. App. 547].

66. Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 372, 38 Am. Dec. 551.

67. Weed *v.* Smull, 3 Sandf. Ch. (N. Y.) 273.

68. Farnham *v.* Campbell, 10 Paige (N. Y.) 598.

of a judgment does not disturb the receiver's possession.[69] If the receiver takes possession of goods apparently in the debtor's possession, but which are claimed by a third person, he will be ordered to restore them on the claimant's undertaking to hold them subject to the order of the court, to be made after title is settled.[70] Where a demurrer to a creditors' bill to reach property in the hands of a third person is sustained, the functions of a receiver appointed to collect and hold rents and profits cease *inter partes*, but his amenability to the court as an officer thereof continues and the fund itself is subject to the court's order.[71]

e. Actions by Receiver. Where a receiver of a debtor's property is appointed in a creditors' suit he may sue for the recovery of the debtor's property[72] without exhausting his legal remedies by judgment and execution;[73] and may file a bill in chancery[74] to collect money which he claims is held in trust for the debtor, although he may have a concurrent remedy at law.[75] He may pursue by suit in his own name funds of the debtor which have been fraudulently transferred,[76] even though the creditor by amending his bill might impeach the same fraudulent transaction,[77] and may maintain a suit for usurious premiums paid by the judgment debtor for whom he is receiver.[78] A receiver appointed in a creditors' suit in one state cannot maintain suit in another state to set aside a fraudulent conveyance of the debtor.[79]

5. Evidence[80] — a. Burden of Proof and Presumptions. Where not admitted by the answer the allegations of the bill of recovery of a judgment, issuance of execution, and return thereof *nulla bona* must be proved.[81] If any party interested denies the validity of a claim it must be proved.[82] If the bill seeks to charge an equitable asset on the ground of the debtor's insolvency, such insolvency must be proved.[83] So if it is sought to subject the land of non-residents to payment of a debt complainant must prove non-residence.[84] The burden of proof is on the creditor to show that assets which he seeks to subject to the payment of his claim are the property of the judgment debtor.[85] In an action by a creditor of a husband to subject land taken in the name of the wife, the burden is on her to show that she paid for the land with funds not furnished by the husband.[86] Where a bill is brought to reach property not subject to execution and defendant admits that the return of *nulla bona* is *prima facie* evidence of

69. Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 372, 38 Am. Dec. 551.

70. Dickerson *v.* Van Tine, 1 Sandf. (N. Y.) 724.

71. Field *v.* Jones, 11 Ga. 413.

72. Trover.— Where the joint property of three of the debtors has been assigned by individual assignment by two of the three, he may maintain trover for the property without an assignment by the other debtor. Wilson *v.* Allen, 6 Barb. (N. Y.) 542.

73. Terhune *v.* Bell, (N. J. Ch. 1887) 9 Atl. 111.

74. A receiver appointed to collect rents on the debtor's land may maintain a bill to protect his rights against others who have taken possession of the land, where the debtor neglects to make an assignment giving the receiver the legal title. Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 372, 38 Am. Dec. 551.

A receiver of the property of a cestui que trust may avoid the trustee's purchase of the trust property. Iddings *v.* Bruen, 4 Sandf. Ch. (N. Y.) 223.

75. Terhune *v.* Bell, (N. J. Ch. 1887) 9 Atl. 111.

76. Miller *v.* Mackenzie, 29 N. J. Eq. 291; Green *v.* Bostwick, 1 Sandf. Ch. (N. Y.) 185.

77. Green *v.* Bostwick, 1 Sandf. Ch. (N. Y.) 185.

78. Palen *v.* Bushnell, 18 Abb. Pr. (N. Y.) 301.

79. Filkins *v.* Nunnemacher, 81 Wis. 91, 51 N. W. 79.

80. See, generally, Evidence.

81. Russell *v.* Chicago Trust, etc., Bank, 139 Ill. 538, 29 N. E. 37, 17 L. R. A. 345; Beidler *v.* Douglas, 35 Ill. App. 124; Gauler *v.* Wohlers, 12 Ill. App. 594.

Where creditors sue to subject to their claims the debtor's interest in the estate of an intestate, the burden is on them to show that there is no property of the value of the claim which can be reached by execution. Opperheimer *v.* Collins, 115 Wis. 283, 91 N. W. 690, 60 L. R. A. 406.

82. Dorsey *v.* Hammond, 1 Bland (Md.) 463.

83. Greenman *v.* Greenman, 107 Ill. 404.

84. Calk *v.* Chiles, 9 Dana (Ky.) 265.

85. Kit Carter Cattle Co. *v.* McGillin, 10 Ohio S. & C. Pl. Dec. 146, 7 Ohio N. P. 575.

86. Stockdale *v.* Harris, 23 W. Va. 499.

the fact, the burden is on him to show that he has property subject to execution.[87] Allegations required to be made by rule of court need not be proved.[88] Where an execution was returned on the day the complaint was sworn to and summons dated, the presumption is that it was returned before the commencement of the action.[89] In the absence of proof of the value of the assets of the debtor that could be reached by process at law, it appearing that there were such assets, it will be presumed that they were of sufficient value to satisfy complainant's debt.[90] Where a bill is brought to subject the land of non-residents to the payment of debts, the presumption from lapse of time must be rebutted.[91]

b. Weight and Sufficiency of Evidence. The mere filing of the bill furnishes no proof of the truth of its contents.[92] In order to prove the judgment it is not necessary to introduce the entire record of the case.[93] The previous issue and return of the execution is sufficiently proved by producing the execution with the sheriff's return and date of filing indorsed thereon and testimony of a witness that he had seen it on file in the clerk's office.[94] A judgment against the debtor is in the absence of fraud conclusive evidence between creditors in relation to the property of the debtor, of the indebtedness and the amount thereof.[95] Return of an execution unsatisfied and the appointment of a receiver are *prima facie* evidence of want of assets.[96] It is sufficient proof of insolvency to show that the debtor is a non-resident of the state and that a person who resides in his home town and has known him thirty years knew him to have a homestead, a cow and the equitable assets only which is sought to be reached by the creditors' bill.[97]

c. Variance. To authorize a recovery on a creditors' bill, the pleadings and proof must correspond;[98] but this doctrine will not be extended to prevent a recovery in case of an immaterial variance.[99]

6. Trial or Hearing and Reference[1] **— a. In General.** Creditors' suits being of a purely equitable character must be tried according to the modes of procedure known to courts of equity.[2] It is erroneous to try them as common-law

87. Turley *v.* Taylor, 3 Lea (Tenn.) 171.

88. Batterson *v.* Ferguson, 1 Barb. (N. Y.) 490.

89. Murtha *v.* Curley, 3 N. Y. Civ. Proc. 1.

90. Ward *v.* Wood, 32 Ill. App. 289.

91. Calk *v.* Chiles, 9 Dana (Ky.) 265.

92. Bodine *v.* Simmons, 38 Mich. 682.

93. Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390.

Proof by admission in answer.— Where the nominal plaintiff in a judgment at law is joined with the defendant therein as a party to a bill in equity by the real owner of the judgment, the admission of the nominal plaintiff in his answer is sufficient to establish the ownership of the judgment. Nix *v.* Winter, 35 Ala. 309.

94. Meyer *v.* Mohr, 1 Rob. (N. Y.) 333, 19 Abb. Pr. (N. Y.) 299.

95. Candee *v.* Lord, 2 N. Y. 269, 51 Am. Dec. 294; Swihart *v.* Shaum, 24 Ohio St. 432. And see Kedey *v.* Petty, 153 Ind. 179, 54 N. E. 798.

If a claim is prima facie fair and no objection is made to its allowance it may be allowed without full proof. Dorsey *v.* Hammond, 1 Bland (Md.) 463.

A claim is sufficiently established where a creditor obtained judgment against the executor of his debtor and instituted a creditors' suit setting forth his judgment in the complaint, in which an injunction was issued, and the answer did not deny the indebtedness and the judgment was proved at the hearing. Crane *v.* Moses, 13 S. C. 561.

A short copy of a judgment in favor of the creditor against the grantor is sufficient proof *prima facie* of indebtedness to give the creditor standing in court. Mayfield *v.* Kilgour, 31 Md. 240.

96. Hope Mut. Ins. Co. *v.* Perkins, 38 N. Y. 404, 2 Abb. Dec. (N. Y.) 383. And see Newlove *v.* Pennock, 123 Mich. 260, 82 N. W. 54; Oppenheimer *v.* Collins, 115 Wis. 283, 91 N. W. 690, 60 L. R. A. 406.

97. Tittman *v.* Thornton, 107 Mo. 500, 17 S. W. 979, 16 L. R. A. 410.

98. Detroit Stove Works *v.* Koch, 30 Ill. App. 328; Merchants', etc., Bank *v.* Griffith, 10 Paige (N. Y.) 519.

99. Humphreys *v.* Atlantic Milling Co., 98 Mo. 542, 10 S. W. 140; Baggott *v.* Eagleson, Hoffm. Ch. (N. Y.) 377, as for instance where the averment in respect to which the evidence constitutes a variance is superfluous.

1. See, generally, EQUITY; REFERENCES; TRIAL.

2. Dunphy *v.* Kleinschmidt, 11 Wall. (U. S.) 610, 30 L. ed. 233.

Effect of sworn answers.— One who has a right to file a creditors' bill is not concluded by the sworn answers of the defendant, but may put in his proof and have a hearing. Edwards *v.* Rodgers, 41 Ill. App. 405.

Findings.— A finding that execution was duly issued out of the proper court directed

cases.[3] Where on the trial no assets either legal or equitable are discovered, the bill should be dismissed.[4] It has been held that a bill will be dismissed without prejudice, where there is nothing on which the decree could operate if granted.[5]

b. Reference. The fact that defendant's answer on oath is waived is no objection to an order for his examination on oath before a master.[6] The order of reference should direct that complainant have leave to examine the defendant or any other person on oath before the master for any of the purposes of the reference, and to compel the production of such books and papers as the master may deem necessary.[7] A reference should not be made to a commission or master who is a creditor and a party to the suit.[8] A decree or order of reference suspends all other pending suits for the administration of the debtor's assets.[9]

c. Examination Before Master or Commissioner. The examination should proceed with reasonable diligence and the master cannot adjourn it indefinitely without defendant's consent.[10] As respects the extent and scope of the examination, it is erroneous to direct defendant to be examined in relation to any matters other than those charged in the bill, except where an examination is intended as a substitute for an answer in cases where the defendant has given a stipulation to that effect.[11] Although defendant has filed a full answer, he must reply to interrogatories in regard to his property.[12] A defendant's evidence may be properly received by the master in reference to the true value, quantity, and condition of the property,[13] and he should be given an opportunity to show payment or set-offs to which he may be entitled.[14] He cannot be examined as to the title of property assigned and delivered to the receiver and sold by him.[15] Where a debtor has once gone through an examination he cannot be compelled to submit to another.[16] A refusal to allow the judgment debtor to examine the witnesses produced renders their evidence inadmissible against him.[17] Where a bill is referred to a commissioner to ascertain the liens and their priorities, any creditor may present his claim and if it is allowed he has the right to have the same passed on by the court without formal pleadings.[18] Upon a hearing before a commissioner the creditors may appear and contest each other's claims.[19]

to the sheriff, and against the proper defendant in execution, and that the execution was returned unsatisfied is a sufficient finding that defendant had no property subject to execution. Cochran *v.* Cochran, 62 Nebr. 450, 87 N. W. 152.

In accordance with the doctrine, that complainant will be required to abide by the case made by his bill he will not be permitted on the hearing to insist that a judgment treated by the bill as only *prima facie* evidence is conclusive on defendants. Helm *v.* Cantrell, 59 Ill. 524.

The rule which requires a dismissal of the whole bill if any one or more of several co-complainants fails to make out his or their case is not applied with stringency to creditors' suits, and unless a misjoinder of such complainants will affect the propriety of the decree, the objection will not be allowed to prevail in any case when taken for the first time at the hearing. Colgin *v.* Redman, 20 Ala. 650.

3. Dunphy *v.* Kleinschmidt, 11 Wall. (U. S.) 610, 30 L. ed. 233.

4. Pond *v.* Harwood, 139 N. Y. 111, 34 N. E. 768.

5. Paul *v.* Rogers, 5 T. B. Mon. (Ky.) 164.

6. Root *v.* Safford, 2 Barb. Ch. (N. Y.) 33.

7. Green *v.* Hicks, 1 Barb. Ch. (N. Y.) 309.

8. Dillard *v.* Krise, 86 Va. 410, 10 S. E. 430.

9. Bilmyer *v.* Sherman, 23 W. Va. 656.

10. Hudson *v.* Plets, 11 Paige (N. Y.) 180.

11. Copous *v.* Kauffman, 8 Paige (N. Y.) 583.

The examination is not confined to defendant's property or effects, but extends to any matter which he would be required to disclose by answer, and authorizes the examination of witnesses on any matter charged in the bill and not admitted by the defendant on his examination before the master. Howard *v.* Palmer, Walk. (Mich.) 391.

12. Austin *v.* Dicky, 3 Edw. (N. Y.) 378.

13. Morse *v.* Slason, 16 Vt. 319.

14. Kendrick *v.* Whitney, 28 Gratt. (Va.) 646.

15. Hudson *v.* Plets, 11 Paige (N. Y.) 180.

16. Hudson *v.* Plets, 11 Paige (N. Y.) 180; Starr *v.* Morange, 3 Edw. (N. Y.) 345.

If any further questions are to be asked they should be referred in writing to the master who will issue summons for further examination on these interrogatories. Starr *v.* Morange, 3 Edw. (N. Y.) 345.

17. Lee *v.* Huntoon, Hoffm. (N. Y.) 447.

18. Wilson *v.* Carrico, 50 W. Va. 336, 40 S. E. 439.

19. Woodyard *v.* Polsly, 14 W. Va. 211.

d. Report. On the filing of a report and after the usual time for excepting,[20] it may be submitted for ratification, and when ratified all parties are concluded thereby and the litigation is at an end.[21]

7. Abatement.[22] A creditors' suit in aid of an execution does not abate by the expiration of the time for returning the execution,[23] nor by plaintiff's death, if there is another creditor who will prosecute the suit.[24] But such a suit will abate on the death of the debtor, except where the execution has been levied, or the property taken in charge by the court,[25] and on the death of a defendant heir or devisee, although there are no surplus proceeds of sale to be returned to them.[26]

8. Judgment or Decree[27] **— a. In General.** The decree should settle all questions involved even to the adjustment of merely legal rights.[28] In an action commenced by a creditors' bill, it is not error to enter judgment for the full amount or value of the judgment debtors' property found to be in defendant's hands;[29] but the court has no power to decree to the creditor his specific portion of his debtor's property.[30] A decree may be rendered in favor of a receiver rather than the complainant, as it vests no title in him but keeps the property in the custody of the law.[31] A decree directing satisfaction of a judgment out of a sale of property to be discovered is not prejudicial to the defendant, as there can be no satisfaction of the judgment until something is discovered.[32] Where an audit is confirmed by a court of equity, the approved practice is also to pass an order to pay the claims which were thereby allowed; but the judgment of the court is effectually pronounced on a claim by confirming the auditor's report, if no steps are taken to revoke or overrule it.[33]

b. Decrees For Sale of Property — (i) *Propriety and Necessity of Sale.* No sale should be ordered, where there is an adequate legal remedy,[34] and before decreeing the sale the rents and profits of the land in the hands of the receiver should be accounted for and applied on the debts.[35] So under the statutes of one state the court has no power to order a sale of real estate, unless it be made to appear that the rents and profits therefrom for a period of five years will be insufficient to satisfy the claims;[36] but if this fact is shown the court will decree a sale.[37] So it has been held that a decree to rent land made in a creditors' pro-

20. A report as to the priority of the various liens is conclusive except as to the parts properly excepted to before the hearing. Hutton *v.* Lockridge, 22 W. Va. 159.

21. Dixon *v.* Dixon, 1 Md. Ch. 271.

22. See, generally, Abatement and Revival, 1 Cyc. 10; and particularly Abatement and Revival, 1 Cyc. 31, 40 note 99, 58.

23. Schwarzschild *v.* Mathews, 39 N. Y. App. Div. 477, 57 N. Y. Suppl. 338; Home Bank *v.* Brewster, 15 N. Y. App. Div. 338, 44 N. Y. Suppl. 54.

24. Austin *v.* Cochran, 3 Bland (Md.) 337.

25. Beith *v.* Porter, 119 Mich. 365, 78 N. W. 336, 75 Am. St. Rep. 402; German-American Seminary *v.* Saenger, 66 Mich. 249, 33 N. W. 301.

26. Austin *v.* Cochran, 3 Bland (Md.) 337.

27. See, generally, Equity; Judgments.

28. Panton *v.* Collar, 12 Ill. App. 160; Lackland *v.* Smith, 5 Mo. App. 153.

But it should not seek to adjust the rights of the debtor and third persons further than is necessary to the preservation of the rights of creditors interested in the litigation. McKissack *v.* Voorhees, 119 Ala. 101, 24 So. 523; Kennedy *v.* Barandon, 4 Hun (N. Y.) 642; Seymour *v.* Browning, 17 Ohio 362.

29. Gordon *v.* Lemp, 7 Ida. 677, 65 Pac. 444.

30. Auld *v.* Alexander, 6 Rand. (Va.) 98.

31. Harman *v.* McMullin, 85 Va. 187, 7 S. E. 349.

32. Gage *v.* Smith, 79 Ill. 219.

33. Lee *v.* Boteler, 12 Gill & J. (Md.) 323.

34. Weatherford *v.* Myers, 2 Duv. (Ky.) 91; Hendrickson *v.* Winne, 3 How. Pr. (N. Y.) 127.

35. Strayer *v.* Long, 83 Va. 715, 3 S. E. 372.

36. Price *v.* Thrash, 30 Gratt. (Va.) 515; Horton *v.* Bond, 28 Gratt. (Va.) 815.

37. Preston *v.* Aston, 85 Va. 104, 7 S. E. 344.

What showing sufficient.— A decree of sale will be made where the bill charges that the rents and profits for a period of five years will be insufficient to satisfy a judgment and is taken *pro confesso*. Barr *v.* White, 30 Gratt. (Va.) 531. So if the bill alleges this fact and the answer says nothing on the subject and no application is made for an inquiry, a decree of sale may be made without inquiry. Ewart *v.* Saunders, 25 Gratt. (Va.) 203. It has also been held that where a master reported that the rents and profits will not pay the liens on the land in five years, and bases his opinion on the testimony of four witnesses, the average of whose estimates of the amount which a five-years' lease

ceeding is no objection to a subsequent decree of sale in a suit to enforce a prior lien, the creditors to the former suit being parties.[38] Before making the decree it is not necessary to ascertain the value of the land.[39] If after a decree or sale is entered other liens are directed to be audited and reference made for that purpose, such order or audit and reference suspends a decree of sale.[40]

(II) *Requisites of Decree of Sale*— (A) *In General.* In decreeing a sale the court should ascertain and protect the rights of all the parties,[41] and also the rights of a tenant in possession under a lease executed before the judgment.[42] If a creditors' bill is filed in behalf of complainant only, and it does not appear that there are other creditors, the decree should direct a sale for the payment only of plaintiff's claim, and it is error to direct that the surplus of the sale be brought into court.[43] Where the bill and proceedings specify the land, a decree for the sale of the land in the bill and proceedings mentioned, or so much as may satisfy the purposes of the decree, is sufficiently certain.[44]

(B) *Ascertainment of Amount of Liens and Priorities.* A decree subjecting property to the satisfaction of a judgment and ordering a sale thereof must ascertain and state the precise amount for which it is liable,[45] and should also determine the priority of the liens.[46]

(C) *As to Amount or Interest Sold.* Where property in the hands of a receiver is more than sufficient to pay all debts he will be restrained from

would realize being two hundred and forty-six dollars, and the debts amounting to two thousand five hundred dollars, a decree directing the sale is proper. Cooper *v.* Daugherty, 85 Va. 343, 7 S. E. 387.

Ineffectual attempt to rent.— Where a commissioner reports that the rents and profits for five years will be sufficient to satisfy the judgment, and an ineffectual attempt to rent in compliance with decree to that effect is made, but at a distance from the land and at a time of the year when it is very difficult to rent land, it is error to direct a sale. Mustain *v.* Pannill, 86 Va. 33, 9 S. E. 419.

In order to ascertain whether rents of land will pay the debts in five years, the decree should provide that the commissioner offer the same for rent, first for one year, then for two years, etc. Compton *v.* Tabor, 32 Gratt. (Va.) 121.

In West Virginia the rule was formerly the same as in Virginia, but the statute has been repealed and a court of equity may sell lands of a judgment debtor to pay his judgment debts whether the rents and profits of the lands of the debtor will pay the debt in five years or not. Pecks *v.* Chambers, 8 W. Va. 210; Rose *v.* Brown, 11 W. Va. 122. The present rule is that the court is not bound and ought not to decree such sale if the rents and profits of the land will satisfy the liens charged upon it in a reasonable time, unless consent to such sale is made. What is a reasonable time is a matter of discretion with the court, reviewable on appeal. Rose *v.* Brown, 11 W. Va. 122.

38. Kane *v.* Mann, 93 Va. 239, 24 S. E. 938; Preston *v.* Aston, 85 Va. 104, 7 S. E. 344.

39. Sively *v.* Campbell, 23 Gratt. (Va.) 893; Grantham *v.* Lucas, 24 W. Va. 231.

40. Harris *v.* Jones, 96 Va. 658, 32 S. E. 455.

41. Murdock *v.* Welles, 9 W. Va. 552.

42. Moore *v.* Bruce, 85 Va. 139, 7 S. E. 195.

43. Kennedy *v.* Barandon, 67 Barb. (N. Y.) 209.

44. Barger *v.* Buckland, 28 Gratt. (Va.) 850.

45. *Illinois.*— Ganler *v.* Wohlers, 12 Ill. App. 594.

Mississippi.— Cohen *v.* Carroll, 5 Sm. & M. 545, 45 Am. Dec. 267.

Ohio.— Warner *v.* Bente, 4 Ohio Dec. (Reprint) 531, 2 Clev. L. Rep. 322.

Virginia.— Carnahan *v.* Ashworth, (1898) 31 S. E. 65; Tinsley *v.* Anderson, 3 Call 329.

West Virginia.— Kanawha Valley Nat. Bank *v.* Wilson, 25 W. Va. 242; Beaty *v.* Veon, 18 W. Va. 291; Scott *v.* Ludington, 14 W. Va. 387; Marling *v.* Robrecht, 13 W. Va. 440; Anderson *v.* Nagle, 12 W. Va. 98.

See 14 Cent. Dig. tit. "Creditors' Suit," § 207.

46. Carnahan *v.* Ashworth, (Va. 1898) 31 S. E. 65; Kendrick *v.* Whitney, 28 Gratt. (Va.) 646; Cole *v.* McRae, 6 Rand. (Va.) 644; Tinsley *v.* Anderson, 3 Call (Va.) 329; Zell Guano Co. *v.* Heatherly, 38 W. Va. 409, 18 S. E. 611; Kanawha Valley Bank *v.* Wilson, 25 W. Va. 242; Beaty *v.* Veon, 18 W. Va. 291; Scott *v.* Ludington, 14 W. Va. 387; Anderson *v.* Nagle, 12 W. Va. 98.

To ascertain the amount of liens and priorities the cause should be referred to commissioners, and if their report fails to show the debts, their priority, and amount, the cause should be recommitted so that this may be done. Dillard *v.* Krise, 86 Va. 410, 10 S. E. 430.

In West Virginia a decree should refer the cause to commissioners to ascertain whether the defendant has made any payments or has any set-offs. Marling *v.* Robrecht, 13 W. Va. 440.

selling the whole.[47] So on a bill to subject contingent interests of a debtor in land to the claims of judgment creditors, if the debts are small, the debtor's interest should be protected by directing the commissioner to first offer for sale a fraction of the debtor's contingent interest in each lot.[48] It has also been held that on a bill against a debtor who has escaped, and the debtor' alienee, to subject lands devised to the debtor after his escape and conveyed by him while at large, equity will decree a sale of so much of the land as is liable to an elegit lien, if it appear that the profits are insufficient to keep down the interest of the debt, but will not decree a sale of the whole of the lands.[49] If it does not appear with reasonable certainty that the land first liable will be sufficient to discharge the lien, the decree may direct a sale of all the land in the order in which it is liable until enough is realized to pay off the judgment and costs.[50] Where two decrees are rendered in favor of two creditors against a debtor on the same day subjecting his land, the whole of the land should be directed to be sold.[51] If the bill merely seeks to subject an equity of redemption to sale, the creditor is only entitled to a sale of the equity of redemption and not the entire property.[52]

c. **Personal Decree or Judgment.** A court of equity may adapt its relief to the exigencies of the case and may, when that is all the relief needed, order a sum of money to be paid plaintiff and give him a personal judgment therefor.[53]

d. **Decree Declaring Judgment a Mortgage.** The owner of a judgment against the grantor in a deed absolute on its face, but in reality a mortgage, may in an action in aid of his execution have the deed declared a mortgage.[54]

e. **Decrees For Accounting.**[55] A judgment creditor of a mortgagor in a proper case for equitable relief has the same right to an account for rents and profits as the mortgagor, where the mortgagee used and occupied the premises.[56]

f. **Effect of Decree**[57] — (i) *As Establishing Claims.* Except where not sus-

47. Wardell *v.* Leavenworth, 3 Edw. (N. Y.) 244.

Construction of decree as to amount sold. — Where a creditors' bill sought to subject equitable interests of A and B in land, and the decree ordered the sale of the property and directed the master to convey to the purchasers all the right conveyed by A by certain deeds set forth in the bill, it was held that the direction did not render the decree one for the sale of A's interest only, but conveyed the interest of B also. Mason *v.* Patterson, 74 Ill. 191.

48. Jacob *v.* Howard, 22 S. W. 332, 15 Ky. L. Rep. 133.

49. Stuart *v.* Hamilton, 8 Leigh (Va.) 503.

50. Handly *v.* Sydenstricker, 4 W. Va. 605.

51. Coleman *v.* Cocke, 6 Rand. (Va.) 618, 18 Am. Dec. 757.

52. Stark *v.* Cheathem, 2 Tenn. Ch. 300.

Where a bill is filed by a creditor not secured in a trust deed to subject the surplus of the property so conveyed to the payment of his debts, and the clerk reports that such property was sufficient to pay all debts including plaintiff's, a decree that the trustee should pay plaintiff his debt is erroneous. It should direct that the trustee sell enough of the property to satisfy the judgment. Bobbitt *v.* Brownlow, 62 N. C. 252.

53. Murtha *v.* Curley, 90 N. Y. 372; Brown *v.* Story, 4 Metc. (Ky.) 316.

Where one defendant is an absentee.—Where on a creditors' bill against two defendants, one of whom is an absentee, it appears that the one within the jurisdiction of the court is not indebted to the absentee but has received property from him subject to his debts, a personal decree should not be rendered against the defendant within the jurisdiction, except for so much of the property as he may have consumed or appropriated to his own use, so that it cannot be forthcoming or for the profits which he may have received. Gibson *v.* White, 3 Munf. (Va.) 94.

54. Macauley *v.* Smith, 132 N. Y. 524, 30 N. E. 997 [*reversing* 57 Hun 585, 10 N. Y. Suppl. 578].

55. See, generally, Accounts and Accounting.

56. Anderson *v.* Lanterman, 27 Ohio St. 104.

So where judgment creditors of a bankrupt debtor file a bill against the administrator and heirs of the debtor's surety to subject the surety's land to the payment of the debts, and other creditors are admitted by petition, the plaintiffs are entitled to a decree for an account of debts. Ewing *v.* Ferguson, 33 Gratt. (Va.) 548.

57. **A decree in one creditors' suit for an account operates to suspend all other pending suits** of creditors who come in under the decree. Stephenson *v.* Taverners, 9 Gratt. (Va.) 398.

For whose benefit presumed.— A decree for the sale of property in a general creditors' suit, in which all claims have been audited, is presumed to be for the benefit of all creditors, and not for complainant's benefit alone. Haskin Wood Vulcanizing Co. *v.* Cleveland Ship-Building Co., 94 Va. 439, 26 S. E. 878.

tained by proof,[58] a decree of sale on a creditors' bill establishes the complainant's claim as legal and valid,[59] unless it is otherwise declared in the decree,[60] and prevents the running of the statute of limitations against a claim as a simple contract debt.[61] The claim is established as valid, not only as against the debtor, but as against all creditors coming in to claim distribution.[62]

(II) *WHO ARE BOUND BY DECREE.* All creditors coming in after the institution of a creditors' suit are bound by the decree.[63]

9. CLAIMS OF CREDITORS UNDER JUDGMENT OR DECREE. A creditors' bill inures to the benefit of all creditors who present and prove their claims, although not made formal parties to the bill;[64] but this does not enable them to question the rights of any other creditors after settlement on an issue between the proper parties; their rights remain undisturbed except in so far as a proportionate abatement is concerned by reason of the additional claim.[65] If the defendant is insolvent, the insolvent schedule or his voluntary admission is sufficient proof of the debt of a creditor who afterward comes in to participate in the fund.[66] If a creditor comes in under a decree and seeks to prove a claim not set up in the pleadings or proof of the cause, he must present particulars of the claim to the master supported by affidavit that the amount claimed is justly due, and that neither he nor any one for his use has received payment or security or satisfaction therefor.[67]

10. EXECUTION AND ENFORCEMENT OF JUDGMENT OR DECREE[68] — a. Sales and Conveyances Under Order of Court. A receiver in a creditors' suit[69] may under

58. Ward *v.* Hollins, 14 Md. 158.

59. Rhodes *v.* Amsinck, 38 Md. 345; Griffith *v.* Reigart, 6 Gill (Md.) 445; Simmons *v.* Tongue, 3 Bland (Md.) 341; Welch *v.* Stewart, 2 Bland (Md.) 37.

60. Rhodes *v.* Amsinck, 38 Md. 345; Welch *v.* Stewart, 2 Bland (Md.) 37.

61. Griffith *v.* Reigart, 6 Gill (Md.) 445.

62. Rhodes *v.* Amsinck, 38 Md. 345.

63. Post *v.* Mackall, 3 Bland (Md.) 486; Chesnut *v.* Fire, etc., Ins. Co., 2 Hill Eq. (S. C.) 72. See also Samples *v.* Augusta City Bank, 21 Fed. Cas. No. 12,278, 1 Woods 523, holding that under the laws of Georgia all creditors notified of the bill according to law are parties and are bound by the decree.

So where an order or decree for an accounting is made under which all creditors are authorized to come in, it operates as an interlocutory judgment in favor of each and every creditor of the fund whether he actually comes in or not, and if he fails to come in and prove his claim before the final decree for distribution, his claim will be barred. Kerr *v.* Blodgett, 48 N. Y. 62.

But if a creditor who files a bill to reach the real estate of his debtor fails to state that there are any other liens thereon and makes only the debtor a party defendant, although the court directs a commissioner to ascertain all liens and their priorities, the court cannot, upon the report of the commissioner that a prior deed of trust had been satisfied, decree that the debt secured by it had been paid and order its release. Such a decree is not binding on the trustee or *cestui que trust* because neither was a party to the suit. McCoy *v.* Allen, 16 W. Va. 724.

64. Pennell *v.* Lamar Ins. Co., 73 Ill. 303; Strike *v.* McDonald, 2 Harr. & G. (Md.) 191; Strike's Case, 1 Bland (Md.) 57; Mattison *v.* Demarest, 19 Abb. Pr. (N. Y.) 356; Morgan *v.* New York, etc., R. Co., 10 Paige (N. Y.) 290, 40 Am. Dec. 244.

If a creditor does not come in until the auditor has made a statement, the restatement will be made only at the cost of the creditor asking it. Strike's Case, 1 Bland (Md.) 57.

Notice.— Before distribution on a creditors' bill, all the creditors should be called in by publication or some appropriate notice. Clark *v.* Shelton, 16 Ark. 474; Williamson *v.* Wilson, 1 Bland (Md.) 418. See also Anonymous, 18 Abb. Pr. (N. Y.) 87; Kinney *v.* Harvey, 2 Leigh (Va.) 70, 21 Am. Dec. 597.

Where several bills are instituted by different creditors, and all are stayed but one, all the creditors should be allowed to come in under the decree in that suit. Hallett *v.* Hallett, 2 Paige (N. Y.) 15; Floyd *v.* Neel, 10 Rich. Eq. (S. C.) 338, 73 Am. Dec. 94.

65. Trayhern *v.* National Mechanics' Bank, 57 Md. 590; *In re* Cape Sable Co.'s Case, 3 Bland (Md.) 606.

66. Strike *v.* McDonald, 2 Harr. & G. (Md.) 191.

Where other creditors come in after the decree in a creditors' suit to subject defendant's property to the payment of debts, if the insolvent denies the debt, or if there is a discrepancy between the claim and his admissions, full proof is required. Strike *v.* McDonald, 2 Harr. & G. (Md.) 191.

Where a creditor had neglected to prove before the master his right to be treated as a preferred creditor, he was allowed to prove the facts after the time for proving claims had expired, on condition of being placed on equal footing with the unpreferred creditors in case there should be a surplus after paying the preferred class. Pratt *v.* Rathbun, 7 Paige (N. Y.) 269.

67. Morris *v.* Mowatt, 4 Paige (N. Y.) 142.

68. See, generally, EQUITY; EXECUTIONS.

69. Where a suit is brought in behalf of complainant and other creditors who may come in, and a receiver appointed to collect

order of court sell equitable interests of a judgment debtor which have come into his possession.[70] Where the plaintiff in a creditors' suit is successful, a sale of the property may be directed to be made by the sheriff.[71] A sale ordered by the court in a creditors' suit is not vitiated by the fact that the creditor instituting the same parted with his interest during the progress of his suit.[72] So a sale entered under a valid judgment before appointment of a receiver is valid, although made after the receiver is appointed.[73] An order confirming a commissioner's sale in a creditors' suit will be reversed where there is great inadequacy in the price received,[74] and where one who bids at a sale is unable to comply with the terms of sale, and by parol it is agreed that another shall stand in his stead and the sale is confirmed, the confirmation may properly be set aside, as it is not enforceable in a court of equity.[75] A sale of a debtor's property for cash for the amount of complainant's claim absolves the debtor from further liability and precludes a recovery of interest after the day of the sale.[76] Where parties to a creditors' bill unwarrantably occasion a loss to the funds arising from the sale of property by pretended bids, the amounts otherwise due them on the general distribution will be mulcted by the court to protect other creditors from loss on account of their conduct.[77]

b. Distribution. Where land is sold in a creditors' suit, the taxes due from the debtor must be first satisfied from the proceeds.[78] So all expenses of the sale are to be first paid from the proceeds thereof, and the balance only ratably distributed among the creditors, who are in that way made to contribute in due proportion to defraying the expenses of the suit.[79] Where realty is reached by creditors' suit, the proceeds are to be distributed among the creditors in the same order as the personalty is distributed by the executor and administrator.[80] Where an attorney obtains a judgment in the capacity of executor, and is at the same time attorney for other parties in a suit against the same defendant, and a few days later obtains a judgment for them, the court in applying the proceeds of an equity of redemption will recognize no priority but make distribution *pari passu*.[81] Where a sale of land for an inadequate consideration is set aside, the grantee who has paid certain debts of the grantor is entitled to take the place of the creditors as to such debts and to share in the proceeds of the sale.[82]

11. Costs[83]— a. In General. If a defendant is charged as a trustee and denies the trust, and the court finds that the trust exists, the defendant is not entitled to

the assets and apply them to the payment of the various creditors, he alone can enforce the judgment. Rigney *v.* Tallmadge, 19 Abb. Pr. (N. Y.) 16.

In appointing a trustee to sell the property, while the recommendation of a creditor coming in by petition is entitled to consideration, yet if the amount claimed does not appear in the petition, the recommendation of the original complainant will have most weight. Watkins *v.* Worthington, 2 Bland (Md.) 509.

Where after a decree of sale the debtor executes a second deed of trust and dies, and on a revival of the cause the trustee and *cestui que trust* in the second deed are made parties the trustee has no right to sell and bring the money into court, as he has nothing to sell except the equity of redemption. The sale should be made by the court through its commissioner. Bock *v.* Bock, 24 W. Va. 586.

70. Watson *v.* Le Row, 6 Barb. (N. Y.) 481.

71. Kennedy *v.* Barandon, 67 Barb. (N. Y.) 209.

72. Karn *v.* Rorer Iron Co., 86 Va. 754, 11 S. E. 431.

73. Wilkinson *v.* Paddock, 57 Hun (N. Y.) 191, 11 N. Y. Suppl. 442; Matter of Loos, 50 Hun (N. Y.) 67, 3 N. Y. Suppl. 383.

74. Beaty *v.* Veon, 18 W. Va. 291.

75. Kingwood Nat. Bank *v.* Jarvis, 28 W. Va. 805.

76. Ellicott *v.* Ellicott, 6 Gill & J. (Md.) 35.

77. Jaffrey *v.* Brown, 29 Fed. 476.

78. Tuck *v.* Calvert, 33 Md. 209; Dorsey *v.* Hammond, 1 Bland (Md.) 463.

79. Dorsey *v.* Hammond, 1 Bland (Md.) 463; Hare *v.* Rose, 2 Ves. 558.

80. Dorsey *v.* Hammond, 1 Bland (Md.) 463.

Where judgment creditors consent to a consolidation of their various suits no order being at the time made or requested determining their respective priorities, and all sharing the prosecution and expense of a consolidated suit, it cannot be said that it affirmatively appears that the trial court erred in requiring them to pro rate in the proceeds of the suit. Nebraska Nat. Bank *v.* Hallowell, 63 Nebr. 309, 88 N. W. 556.

81. Poole *v.* Daly, 1 Mackey (D. C.) 460.

82. Robinson *v.* Stewart, 10 N. Y. 189.

83. See, generally, Costs.

costs out of the fund but is liable personally for the costs.[84] Parties voluntarily coming into a creditors' suit before any costs have accrued except such as were necessary to the institution and preparation of the suit are liable for all costs,[85] and creditors who intervene and have their claims properly proved are entitled to have their necessary costs taxed against the fund sought to be subjected.[86] If the complainant fails to find property on his bill he is liable for costs.[87] So also is a creditor who with knowledge that a decree has been entered in one creditors' suit brings a separate suit.[88] A defendant debtor of the debtor who admits his liability and is willing to pay the debt is entitled to his costs out of the fund;[89] and so is a person who is made a party to a bill on account of a supposed interest in a fund sought to be reached if he promptly disclaims such interest.[90] So a person made a party to a creditors' bill filed to administer an insolvent estate, but who has no interest in the estate and can derive no benefit from its administration, and who promptly disclaims interest therein, is entitled to his costs.[91] The expenses of a receiver in caring for property are a charge upon it, although it belongs to a person other than the judgment debtor.[92]

b. Costs of Referenee. Upon a reference to determine the priorities of the creditors, costs of the parties in attending the reference will not be allowed out of the fund.[93] The fees of the referee are taxable as costs and payable out of the funds derived from the litigation before distribution.[94]

c. Attorney's Fees. A plaintiff in a general creditors' bill is entitled to have his attorney's fees taxed.[95] So a creditor who collects funds of a debtor for the joint benefit of himself and other creditors should be allowed reasonable compensation for the services of his attorney,[96] at least to the extent that they are beneficial.[97]

84. Waterman *v.* Cochran, 12 Vt. 699.

85. Davis *v.* Sharron, 15 B. Mon. (Ky.) 64.

86. Mason *v.* Codwise, 6 Johns. Ch. (N. Y.) 297.

A party who successfully intervenes for the purpose of asserting a superior lien on the property sought to be subjected by the bill is entitled to have his lien satisfied out of the funds realized on a sale of the property prior to the application of any part of the fund to the payment of the costs of the proceeding. Bradford *v.* Cooledge, 103 Ga. 753, 30 S. E. 579.

Liability of intervener for costs.— Where to a petition in the nature of a creditors' bill praying for the appointment of a receiver of the assets of a debtor, a corporation holding mortgages against the debtor was made a party plaintiff on its own application, it thereby recognized the necessity for the bill and ratified it. If the mortgages were sufficient to cover the whole of the assets and it should thus appear that there was no necessity for the appointment of a receiver, but the corporation instead of objecting to such appointment joins as plaintiff in the proceeding, it is chargeable with its proportion of expenses up to the time it became a party and a like proportion to the end of the litigation. Lowry Banking Co. *v.* Abbott, 87 Ga. 134, 13 S. E. 204. Where a creditor files a bill in behalf of himself and other creditors who would come in and contribute to the expense of the litigation to recover property fraudulently transferred, and an order requiring the creditors to come in and prove their claims is made, and certain creditors came in and proved their claims, it was held proper, where there were no funds to discharge the expense of the litigation unless recovery was had in the suit, to make an order requiring all parties who had proved their claims to contribute to the expense necessary to carry on the suit or that their claims so proved should be stricken out and not be permitted to share in any recovery. Chick *v.* Northwestern Shoe Co., 118 Fed. 933.

87. Raymond *v.* Redfield, 2 Edw. (N. Y.) 196; Parkhurst, etc., Co. *v.* Ætna Coal Co., (Tenn. Ch. App. 1899) 54 S. W. 58.

88. Stephenson *v.* Taverners, 9 Gratt. (Va.) 398.

89. Stafford *v.* Mott, 3 Paige (N. Y.) 100.

90. Malcomson *v.* Wappoo Mills, 97 Fed. 225.

91. Malcomson *v.* Wappoo Mills, 97 Fed. 225.

92. Heise *v.* Starr, 44 Ill. App. 406.

93. Burrell *v.* Leslie, 6 Paige (N. Y.) 445.

94. Mason *v.* Codwise, 6 Johns. Ch. (N. Y.) 297; Timmonds *v.* Wheeler, 12 Ohio Cir. Ct. 19.

95. *Ex p.* Kenmore Shoe Co., 50 S. C. 140, 27 S. E. 682; Lawton *v.* Perry, 45 S. C. 319, 23 S. E. 53. And see Lowry Banking Co. *v.* Abbott, 87 Ga. 134, 13 S. E. 204.

96. Georgia Cent. R., etc., Co. *v.* Pettus, 113 U. S. 116, 5 S. Ct. 387, 28 L. ed. 915; Fechheimer *v.* Baum, 43 Fed. 719, 2 L. R. A. 153. See also Whitsett *v.* City Bldg., etc., Assoc., 3 Tenn. Ch. 526.

97. Price *v.* Cults, 29 Ga. 142, 74 Am. Dec. 52.

Allowance held sufficient.— Where a general creditors' bill was brought and the complainant's claim was not allowed because the com-

12. APPEAL. The principles of law governing appeals in civil cases generally obtain in creditors' suits.[98]

VI. STATUTORY ENACTMENT RELATING TO CREDITORS' BILLS.

In some of the states statutes have been enacted which materially enlarge the kinds of property of debtors that may be reached without resort to equitable proceedings, or which materially enlarge the chancery jurisdiction.[99]

VII. LIENS AND PRIORITIES.

A. In General. The principle is well established that where a creditor by his superior diligence discovers and uncovers property which could not be seized on execution at law, and properly files a creditors' bill to subject such property of the debtor to the satisfaction of his judgment, he acquires a lien on such property[1] and becomes entitled to the satisfaction of his judgment out of such prop-

plainant was a member of an illegal combination prohibited by statute, but the defendant corporation was found insolvent, and the bill was sustained as to other creditors, an allowance to plaintiff's attorney of two hundred and fifty dollars for services rendered for all creditors was not inadequate when only a small portion of all the service performed, which was of a much greater value, was in the interest of such other creditors. American Handle Co. *v.* Standard Handle Co., (Tenn. Ch. App. 1900) 59 S. W. 709.

Where services not beneficial.— Where the majority of the creditors of an insolvent corporation which had made an assignment formed a scheme to organize a new corporation to preserve the assets, but before the completion of the plan plaintiffs as creditors filed a general creditors' bill to wind up the corporation and for distribution, and such suit neither disclosed new assets, nor had any beneficial effect on the assigned property, plaintiffs were not entitled to payment of counsel fees from the general fund arising from the sale of the assets. Parkhurst, etc., Co. *v.* Ætna Coal Co., (Tenn. Ch. App. 1899) 54 S. W. 58.

98. See, generally, APPEAL AND ERROR, 2 Cyc. 474 *et seq.*; and particularly APPEAL AND ERROR, 2 Cyc. 513, 570 note 88, 594, 640 note 10.

Amount in dispute for the purpose of determining the question of appellate jurisdiction is the amount of the judgment plaintiff seeks to enforce, although the fund sought to be reached is greater in amount. Payne *v.* Becker, 87 N. Y. 153; Seaver *v.* Bigelow, 5 Wall. (U. S.) 208, 18 L. ed. 595.

Conclusiveness of record.— A decree dismissing a creditors' bill will be affirmed, notwithstanding it is claimed that facts were admitted at the hearing authorizing a recovery where the record shows no such admissions. Beidler *v.* Douglas, 35 Ill. App. 124.

Finality of decree.— The fact that a creditors' bill has by consent been irregularly converted into a proceeding for a sale for the purpose of distribution among the persons entitled to the price of the land in litigation cannot be taken advantage of on appeal. Ware *v.* Richardson, 3 Md. 505, 56 Am. Dec. 762.

Remanding instead of dismissing.— The reviewing court may, in order to obviate an objection made for the first time on appeal that necessary parties were omitted, refuse to dismiss the bill and remand it so that it may be amended as to parties. Rountree *v.* Macay, 59 N. C. 87.

Remanding instead of reversing.— If the property sought to be subjected to a creditors' bill is adjudged not liable to attachment and the complainants appeal without establishing their debt or attempting to do so, the court on reversing the decree will remand the cause in order that the debt may be established. Comstock *v.* Rayford, 12 Sm. & M. (Miss.) 369.

99. *Alabama.*— McGee *v.* Importers', etc., Nat. Bank, 93 Ala. 192, 9 So. 734; Jones *v.* Smith, 92 Ala. 455, 9 So. 179; Ware *v.* Seasongood, 92 Ala. 152, 9 So. 138; Floyd *v.* Floyd, 77 Ala. 353; Smith *v.* Moore, 35 Ala. 76.

Illinois.— Bouton *v.* Smith, 113 Ill. 481; Gage *v.* Smith, 79 Ill. 219; McNab *v.* Heald, 41 Ill. 326; Schroetter *v.* Brown, 59 Ill. App. 24; Edwards *v.* Rodgers, 41 Ill. App. 405; Lutt *v.* Grimont, 17 Ill. App. 308; U. S. Insurance Co. *v.* Central Nat. Bank, 7 Ill. App. 426.

Kansas.— Gerety *v.* Donahue, 8 Kan. App. 175, 55 Pac. 476.

Kentucky.— Crozier *v.* Young, 3 T. B. Mon. 157.

Massachusetts.— Amy *v.* Manning, 149 Mass. 487, 21 N. E. 943.

Mississippi.— Ann. Code (1892) § 486.

New Hampshire.—Alden *v.* Gibson, 63 N. H. 12.

Ohio.— Bates Ann. Rev. St. § 5464.

1. *Alabama.*— Mathews *v.* Mobile Mut. Ins. Co., 75 Ala. 85; Dargan *v.* Waring, 11 Ala. 988, 46 Am. Dec. 234; Lucas *v.* Atwood, 2 Stew. 378.

California.— Seymour *v.* McAvoy, 121 Cal. 438, 53 Pac. 946, 41 L. R. A. 544.

Delaware.— Newell *v.* Morgan, 2 Harr. 225.

Illinois.— Russell *v.* Chicago Trust, etc., Bank, 139 Ill. 538, 29 N. E. 37, 17 L. R. A. 345; Talcott *v.* Grant Wire, etc., Co., 131 Ill. 248, 23 N. E. 403; Hallorn *v.* Trum, 125 Ill. 247, 17 N. E. 823; Cole *v.* Marple, 98 Ill. 58,

erty in preference to other creditors,[2] even though other creditors have judgments

38 Am. Rep. 83; Rappleye *v.* International Bank, 93 Ill. 396; Ballentine *v.* Beall, 4 Ill. 203; Reis *v.* Ravens, 68 Ill. App. 53; Young *v.* Clapp, 40 Ill. App. 312; Gooding *v.* King, 30 Ill. App. 169 [*affirmed* in 130 Ill. 102, 22 N. E. 533, 17 Am. St. Rep. 277].

Iowa.— Ware *v.* Delahaye, 95 Iowa 667, 64 N. W. 640; Bridgman *v.* McKissick, 15 Iowa 260.

Kentucky.— Clements *v.* Waters, 90 Ky. 96, 13 S. W. 431, 11 Ky. L. Rep. 880; Ward *v.* Robinson, 1 Bush 294; Parsons *v.* Meyburg, 1 Duv. 206; Newdigate *v.* Jacobs, 9 Dana 17; Scott *v.* McMillen, 1 Litt. 302, 311, 13 Am. Dec. 239.

Maine.— Hartshorn *v.* Eames, 31 Me. 93; Gordon *v.* Lowell, 21 Me. 251.

Nebraska.— Nebraska Nat. Bank *v.* Hollowell, 63 Nebr. 309, 88 N. W. 556; Merchants' Nat. Bank *v.* McDonald, 63 Nebr. 363, 88 N. W. 492, 89 N. W. 770.

New Jersey.— Green *v.* Tantum, 19 N. J. Eq. 105.

New York.— Lynch *v.* Johnson, 48 N. Y. 27; Ocean Nat. Bank *v.* Olcott, 46 N. Y. 12; Metcalf *v.* Del Valle, 64 Hun 245, 19 N. Y. Suppl. 16; Roberts *v.* Albany, etc., R. Co., 25 Barb. 662; Tallmadge *v.* Sill, 21 Barb. 34; Farnham *v.* Campbell, 10 Paige 598; Hayden *v.* Bucklin, 9 Paige 512; Corning *v.* White, 2 Paige 567, 22 Am. Dec. 659; Beck *v.* Burdett, 1 Paige 305, 19 Am. Dec. 436; Spader *v.* Davis, 5 Johns. Ch. 280; Storm *v.* Waddell, 2 Sandf. Ch. 494.

North Carolina.— Battery Park Bank *v.* Western Carolina Bank, 127 N. C. 432, 37 S. E. 461; Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 11 L. R. A. 466.

Ohio.— Cincinnati *v.* Hafer, 49 Ohio St. 60, 30 N. E. 197; Bowry *v.* Odell, 4 Ohio St. 623; Miers *v.* Zanesville, etc., Turnpike Co., 13 Ohio 197; Repplier *v.* Orrick, 7 Ohio 246, pt. II; Muskingum Bank *v.* Carpenter, 7 Ohio 21, 28 Am. Dec. 616; Douglass *v.* Huston, 6 Ohio 156; Barret *v.* Reed, Wright 700.

Rhode Island.— Smith *v.* Millett, 12 R. I. 59.

Tennessee.— Barnett *v.* East Tennessee, etc., R. Co., (Ch. App. 1898) 48 S. W. 817; Stahlman *v.* Watson, (Ch. App. 1897) 39 S. W. 1055.

Virginia.— Wallace *v.* Treakle, 27 Gratt. 479.

United States.— Miller *v.* Sherry, 2 Wall. 237, 17 L. ed. 827; George *v.* St. Louis Cable, etc., R. Co., 44 Fed. 117.

See 14 Cent. Dig. tit. "Creditors' Suit," § 146.

As to intangible assets the rule is, first in diligence first in lien; as to tangible assets the law affords the creditor a remedy by execution which equity does not supersede or exclude. Amsterdam First Nat. Bank *v.* Shuler, 89 Hun (N. Y.) 303, 35 N. Y. Suppl. 171; Lansing *v.* Easton, 7 Paige (N. Y.) 364.

Judgments are not in equity liens on equitable assets of the debtor prior to the filing of a bill to subject them. Hogan *v.* Burnett, 37 Miss. 617; McKay *v.* Williams, 21 N. C. 398; Douglass *v.* Huston, 6 Ohio 156.

Necessity of notice to individual debtors.— A creditors' bill to reach book-accounts of a debtor is effective as a lien without notice to each individual debtor. Boorum, etc., Co. *v.* Armstrong, (Tenn. Ch. App. 1896) 37 S. W. 1095.

2. *Alabama.*— Lucas *v.* Atwood, 2 Stew. 378.

Arkansas.— Senter *v.* Williams, 61 Ark. 189, 32 S. W. 490, 54 Am. St. Rep. 200; Jones *v.* Arkansas Mechanical, etc., Co., 38 Ark. 17.

Illinois.— Russell *v.* Chicago Trust, etc., Bank, 139 Ill. 538, 29 N. E. 3, 17 L. R. A. 345; Hallorn *v.* Trum, 125 Ill. 247, 17 N. E. 823; Cole *v.* Marple, 98 Ill. 58, 38 Am. St. Rep. 83; Rappleye *v.* International Bank, 93 Ill. 396; Lyons *v.* Robbins, 46 Ill. 276; Ballentine *v.* Beall, 4 Ill. 203.

Indiana.— Carr *v.* Huette, 73 Ind. 378; Butler *v.* Jaffray, 12 Ind. 504; U. S. Bank *v.* Burke, 4 Blackf. 141.

Iowa.— Bridgman *v.* McKissick, 15 Iowa 260.

Missouri.— George *v.* Williamson, 26 Mo. 190, 72 Am. Dec. 203. *Contra*, Burnham *v.* Smith, 82 Mo. App. 35; Heiman *v.* Fisher, 11 Mo. App. 275.

Nebraska.— Nebraska Nat. Bank *v.* Hallowell, 63 Nebr. 309, 88 N. W. 556.

New York.— Mandeville *v.* Campbell, 45 N. Y. App. Div. 512, 61 N. Y. Suppl. 443.

North Carolina.— Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 11 L. R. A. 466; Carr *v.* Fearington, 63 N. C. 560; Tabb *v.* Williams, 57 N. C. 352; McRary *v.* Fries, 57 N. C. 233.

United States.— George *v.* St. Louis Cable, etc., R. Co., 44 Fed. 117.

See 14 Cent. Dig. tit. "Creditors' Suit," § 146 *et seq.*

Contra.— Beith *v.* Porter, 119 Mich. 365, 78 N. W. 336, 75 Am. St. Rep. 402; German-American Seminary *v.* Saenger, 66 Mich. 249, 33 N. W. 301; Haleys *v.* Williams, 1 Leigh (Va.) 140, 19 Am. Dec. 743.

Bill filed in behalf of all creditors.— Where certain creditors of an insolvent corporation in order to procure the aid of its officers in obtaining judgments and satisfaction of their claims agreed with the company and with other creditors to file a creditors' bill for the benefit of all creditors, and under such agreement they are facilitated in obtaining judgments and return of execution *nulla bona*, and are thereby enabled to file their bill, such creditors will not be allowed priority over others having no judgments. Their diligence is the diligence of all other creditors as well. Talcott *v.* Grant Wire, etc., Co., 131 Ill. 248, 23 N. E. 422.

Bill filed for sole purpose of removing obstacle to execution.— A creditors' bill to reach equitable assets operates as an equitable levy and entitles the creditor filing the same to priority, except where the bill is merely filed for the purpose of removing an obstacle

obtained prior to the time when the complaining creditor obtained his;[3] and to the fastening or preservation of such a lien no injunction[4] or attachment or levy on the property[5] is necessary. Nevertheless the filing of a general creditors' bill by plaintiff, after execution in favor of it against a firm had been returned *nulla bona*, does not entitle plaintiff to priority over previous executions where plaintiff's bill did not discover assets nor aver facts which had not been sought to be taken advantage of by other parties previous to the filing of the bill.[6] Where a judgment creditor resorts to equity to reach a supposed equitable interest of the judgment debtor in the proceeds of the sale of real estate and he seeks to reach an interest not of record, he is subject to prior assignments of such interest, although not disclosed by record.[7] It has also been held that where a later creditor files a bill and gets the first execution set aside, the next execution thereto, if levied before equity acquired jurisdiction, will be paid in its proper order;[8] also that a bill filed in aid of an execution outstanding in the hands of the sheriff does not create an equitable lien as against prior valid execution liens which have previously attached to the same property. In such cases the complainant must finally get his payment by virtue of his execution and can only get what his execution will in its due legal order bring him.[9]

B. Where Fund in Court. Where, however, a fund is in court no one judgment creditor can obtain any preference over others by first filing a bill.[10]

C. Where Fund Is a Trust Fund For All Creditors. Where the property or fund is recognized in equity as a trust fund for all creditors, no one creditor can by filing a bill to obtain satisfaction of his debt out of it obtain a preference of payment out of such fund over other creditors, but the fund is to be distributed *pari passu* among all creditors.[11]

from the way of selling the debtor's property on execution at a fair price. Mathews *v.* Mobile Mut. Ins. Co., 75 Ala. 85.

Distribution pari passu.—Between plaintiffs in five suits begun at the same term of court to reach assets not subject to be reached by process at law, distribution of such assets should be made *pari passu*. Judson *v.* Walker, 155 Mo. 166, 55 S. W. 1083.

Where no new property discovered.—Where real estate which was included in a deed of assignment was offered for sale by the assignee without result and subsequently sold for taxes to a person to whom the purchase-money was paid by the debtor and who held the land for him, on proceedings by a creditors' bill by a judgment creditor setting aside the tax-sale, it was held that the creditor filing the bill was not entitled to a preference over other creditors, as he had shown no superior diligence and no new property had been discovered. Reis *v.* Ravens, 68 Ill. App. 53.

Under the New York code declaring conveyances to one, where the consideration is paid by another, presumptively fraudulent as against creditors of the person paying the consideration and that where a fraudulent intent is not disproved a trust shall result in favor of all such creditors, all creditors are not entitled to share in the property without regard to proceedings taken; nor does the creditor have priority who first has judgment against such debtor and execution unsatisfied, but he has priority who first acquires a lien by suit in the nature of a creditors' suit. Mandeville *v.* Campbell, 45 N. Y. App. Div. 512, 61 N. Y. Suppl. 443.

3. Hallorn *v.* Trum, 125 Ill. 247, 17 N. E. 823; Cole *v.* Marple, 98 Ill. 58, 38 Am. Rep. 83; Lane *v.* Union Nat. Bank, 75 Ill. App. 299.

4. Scott *v.* McMillen, 1 Litt. (Ky.) 302, 311, 13 Am. Dec. 239.

5. Milward *v.* Cochran, 7 B. Mon. (Ky.) 344.

6. Royston *v.* John Spry Lumber Co., 85 Ill. App. 223 [*affirmed* in 184 Ill. 539, 56 N. E. 794].

7. Gilliam *v.* Waterhouse, 93 Ill. App. 595.

8. Legal rights and preferences, which are acquired before equity takes jurisdiction, will be respected in the distribution of assets. Royston *v.* John Spry Lumber Co., 85 Ill. App. 223 [*affirmed* in 184 Ill. 539, 53 N. E. 794].

9. Royston *v.* John Spry Lumber Co., 85 Ill. App. 223 [*affirmed* in 184 Ill. 539, 56 N. E. 794].

10. Binns *v.* La Forge, 191 Ill. 598, 61 N. E. 382. In such case the custody of the fund by a court will not prevent another creditor from obtaining a subordinate lien to that of the bill already filed, but superior to other creditors. Russell *v.* Chicago Trust, etc., Bank, 139 Ill. 538, 29 N. E. 37, 17 L. R. A. 345.

11. *Arkansas.*—Senter *v.* Williams, 61 Ark. 189, 32 S. W. 490, 54 Am. St. Rep. 200; Clark *v.* Shelton, 16 Ark. 474.

Georgia.— Elmore *v.* Spear, 27 Ga. 193, 73 Am. Dec. 729; Robinson *v.* Darien Bank, 18 Ga. 65.

Indiana.— Carr *v.* Huette, 73 Ind. 378; Kimball *v.* Whitney, 15 Ind. 280; Butler *v.* Jaffray, 12 Ind. 504; McNaughtin *v.* Lamb, 2

D. Where Bill Brought in Behalf of Creditors. Where a bill is brought by a creditor on behalf of all other creditors who may come in, the property will be administered so as to be distributed proportionately among all the creditors who may come in,[12] without, however, displacing the legal lien of any creditor.[13]

E. Requisites of Bill. In order that a lien may be acquired by the filing of a creditors' bill, the bill must point out specific property of the debtor sought to be reached.[14]

F. Time When Lien Attaches. The lien obtained on the equitable assets of a debtor by a creditors' suit attaches thereto from the time of service of process,[15] or as stated in some of the cases on the filing of the bill[16] and suing out of process.[17] The lien does not relate back to the date of the judgment sought to be enforced, so as to affect assignments between the date of the judgment and

Ind. 642; Barton *v.* Bryant, 2 Ind. 189 [*overruling* U. S. Bank *v.* Burke, 4 Blackf. 141].

Missouri.— St. Louis *v.* O'Neil Lumber Co., 114 Mo. 74, 21 S. W. 484.

New York.— National Trademen's Bank *v.* Wetmore, 124 N. Y. 241, 26 N. E. 548; Robinson *v.* Stewart, 10 N. Y. 189; Wilkinson *v.* Paddock, 57 Hun 191, 11 N. Y. Suppl. 442; Morgan *v.* New York, etc., R. Co., 10 Paige 290, 40 Am. Dec. 244.

South Carolina.— Heath *v.* Bishop, 4 Rich. Eq. 46, 55 Am. Dec. 654.

In cases of implied trusts for creditors, if a creditor comes into equity to enforce the execution of the trust, the court will act on the principle that equality is equity, except in cases where such creditor by superior diligence has acquired a specific lien or where he is entitled to legal preference. Egberts *v.* Wood, 3 Paige (N. Y.) 517, 24 Am. Dec. 236.

Effect of declaring lien void.— A creditor is not debarred from participation in property because he has taken a preferential lien which is declared void. Casto *v.* Greer, 44 W. Va. 332, 30 S. E. 100.

12. Purdy *v.* Doyle, 1 Paige (N. Y.) 558; Goldberg *v.* Cohen, 119 N. C. 68, 25 S. E. 714 [*distinguishing* Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 11 L. R. A. 466]; Younger *v.* Massey, 39 S. C. 115, 17 S. E. 711. See also Hume *v.* Daly, 1 Mackey (D. C.) 460. *Contra*, Yates *v.* Seitz, 7 D. C. 11.

Status of creditor's coming in after decree. — Where a bill is filed by a creditor for the benefit of all creditors who come in, those who come in only after decree do not stand on a parity with those who file the bill or come in before trial, but the latter have priority. Senter *v.* Williams, 61 Ark. 189, 32 S. W. 490, 54 Am. St. Rep. 200; Gibbons *v.* Germantown, etc., Cross-roads Turnpike Road Co., 14 Bush (Ky.) 389.

13. Tuck *v.* Calvert, 33 Md. 209; Purdy *v.* Doyle, 1 Paige (N. Y.) 588.

14. Ward *v.* Robinson, 1 Bush (Ky.) 294; McCauley *v.* Rodes, 7 B. Mon. (Ky.) 462; Chase *v.* Searles, 45 N. H. 511; Miller *v.* Sherry, 2 Wall. (U. S.) 237, 17 L. ed. 827.

Necessity of notice to individual debtor.— A creditors' bill to reach book-accounts fixes a lien thereon without notice to each individual debtor; but is insufficient to do so where it merely describes the property in general terms, as "all book accounts, bills receivable, etc." Boorum, etc., Co. *v.* Armstrong, (Tenn. Ch. App. 1896) 37 S. W. 1095.

15. *Alabama.*— Hines *v.* Duncan, 79 Ala. 112, 58 Am. Rep. 580.

Arkansas.—Senter *v.* Williams, 61 Ark. 189, 32 S. W. 490, 54 Am. St. Rep. 200; Jones *v.* Arkansas Mechanical, etc., Co., 38 Ark. 17.

District of Columbia.— Fulton *v.* Fletcher, 12 App. Cas. 1; Weightman *v.* Washington Critic Co., 4 App. Cas. 136; Young *v.* Kelly, 3 App. Cas. 296.

Illinois.— Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324; King *v.* Goodwin, 130 Ill. 102, 22 N. E. 533, 17 Am. St. Rep. 277; Hallorn *v.* Trum, 125 Ill. 247, 17 N. E. 823; Sioux City First Nat. Bank *v.* Gage, 93 Ill. 172; Lane *v.* Union Nat. Bank, 75 Ill. App. 299.

Iowa.— Ware *v.* Delahaye, 95 Iowa 667, 64 N. W. 640.

Kentucky.— Bullet *v.* Stewart, 3 B. Mon. 115; Newdigate *v.* Jacobs, 9 Dana 17.

New York.— Myrick *v.* Seldon, 36 Barb. 15; Fitch *v.* Smith, 10 Paige 9; Boynton *v.* Rawson, Clarke 584; Weed *v.* Smull, 3 Sandf. Ch. 273.

United States.— Miller *v.* Sherry, 2 Wall. 237, 17 L. ed. 827.

See 14 Cent. Dig. tit. "Creditors' Suit," § 148.

An intervener in a creditors' suit is entitled to a lien on the fund sought to be reached from the date of the intervention. Merchants' Nat. Bank *v.* McDonald, 63 Nebr. 368, 88 N. W. 492, 89 N. W. 770.

16. *California.*— Seymour *v.* McAvoy, 121 Cal. 438, 53 Pac. 946, 41 L. R. A. 544.

District of Columbia.— May *v.* Bryan, 17 App. Cas. 392; Babbington *v.* Washington Brewery Co., 13 App. Cas. 527.

Kentucky.— Clements *v.* Waters, 90 Ky. 96, 13 S. W. 431, 11 Ky. L. Rep. 880.

Nebraska.— Merchants' Nat. Bank *v.* McDonald, 63 Nebr. 363, 88 N. W. 492, 89 N. W. 770.

New York.— Field *v.* Sands, 8 Bosw. 685; Weed *v.* Pierce, 9 Cow. 722; Edmeston *v.* Lyde, 1 Paige 637, 19 Am. Dec. 454.

Rhode Island.— Smith *v.* Millett, 12 R. I. 59.

Contra.—Stewart *v.* Isidor, 5 Abb. Pr. N. S. (N. Y.) 68.

17. Hayden *v.* Bucklin, 9 Paige (N. Y.) 512. But in order to affect a *bona fide* as-

the time of the filing of the bill;[18] nor does the lien relate back to proceedings supplemental to execution.[19] Where an original creditors' bill is insufficient to fix a lien on the debtor's property, an amendment supplying the defect would only establish the lien from the date thereof, and would not relate back to the date of the original bill.[20]

G. To What Property Lien Attaches. The lien of a creditor obtained by the filing of the bill attaches only to property of the debtor owned at the time of the commencement of the suit.[21] It does not attach to property of the debtor which is subject to execution.[22] And it is in all cases subject to prior legal or equitable liens or equities of others on the property.[23]

H. Duration of Lien. The lien thus acquired is not lost by the expiration of the lien of the judgment on which the bill is based,[24] nor by laches in the prosecution of the bill.[25] It is not affected by any subsequent transfer or assignment made by the debtor.[26] The lien is not disturbed by the bankruptcy of the debtor,[27] nor by his death.[28]

CREED. Confession or ARTICLES OF FAITH, *q. v.*; a covenant; what a man believes; the common belief of a sect.[1] (See CONGREGATIONALISM; CONGREGATIONAL PERSUASION; UNITARIANS; and, generally, RELIGIOUS SOCIETIES.)

signee, there must have been service of process, either personal, by publication, or by leaving at his usual place of abode. Hayden *v.* Bucklin, 9 Paige (N. Y.) 512.

18. Grosvenor *v.* Allen, 9 Paige (N. Y.) 74.

Where a creditor has been first in point of time in pursuing legal means to obtain payment of his debt, his lien in equity will extend back to the time when his legal remedy failed. Eaton *v.* Patterson, 2 Stew. & P. (Ala.) 9.

19. Edmonston *v.* McLoud, 16 N. Y. 543; Ballou *v.* Boland, 14 Hun (N. Y.) 355.

20. Boorum, etc., Co. *v.* Armstrong, (Tenn. Ch. App. 1896) 37 S. W. 1095.

21. Sioux City First Nat. Bank *v.* Gage, 93 Ill. 172; Eagar *v.* Price, 2 Paige (N. Y.) 333.

The commencement of a creditors' suit creates a lien upon the choses in action and equitable assets of the debtor (May *v.* Bryan, 17 App. Cas. (D. C.) 392; Battery Park Bank *v.* Western Carolina Bank, 127 N. C. 432, 37 S. E. 461), but not upon his tangible personal property or realty (Battery Park Bank *v.* Western Carolina Bank, 127 N. C. 432, 37 S. E. 461).

22. Bowry *v.* Odell, 4 Ohio St. 623.

23. *Illinois.*— Atwater *v.* American Exch. Nat. Bank, 152 Ill. 605, 38 N. E. 1017; Alexander *v.* Tams, 13 Ill. 221; Gilliam *v.* Waterhause, 93 Ill. App. 595; Royston *v.* John Spry Lumber Co., 85 Ill. App. 223 [*affirmed* in 184 Ill. 539, 56 N. E. 794]; Chandler *v.* Louisville Banking Co., 69 Ill. App. 604.

Iowa.— Applegate *v.* Applegate, 107 Iowa 312, 78 N. W. 34.

Kentucky.— Paul *v.* Rogers, 5 T. B. Mon. 164.

Maryland.— Tuck *v.* Calvert, 33 Md. 209.

New Jersey.— Elizabeth State Bank *v.* Marsh, 1 N. J. Eq. 288.

New York.— Chautauque County Bank *v.* Risley, 19 N. Y. 369, 75 Am. Dec. 347.

North Carolina.— Wilson Cotton Mills *v.* C. C. Randleman Cotton Mills, 116 N. C. 647, 21 S. E. 431.

Ohio.— Hemminway *v.* Davis, 24 Ohio St. 150; Butler *v.* Birkey, 13 Ohio St. 514.

See 14 Cent. Dig. tit. "Creditors' Suit, § 152.

24. Young *v.* Kelly, 3 App. Cas. (D. C.) 296.

25. Young *v.* Kelly, 3 App. Cas. (D. C.) 296.

26. May *v.* Bryan, 17 App. Cas. (D. C.) 392; Babbington *v.* Washington Brewery Co., 13 App. Cas. (D. C.) 527; Fulton *v.* Fletcher, 12 App. Cas. (D. C.) 1; Weightman *v.* Washington Critic Co., 4 App. Cas. (D. C.) 136; Utica Ins. Co. *v.* Power, 3 Paige (N. Y.) 365; McDermutt *v.* Strong, 4 Johns. Ch. (N. Y.) 687; Carr *v.* Fearington, 63 N. C. 560; Tabb *v.* Williams, 57 N. C. 352; McRary *v.* Fries, 57 N. C. 233; Tischler *v.* Tischler, 21 Ohio Cir. Ct. 166, 11 Ohio Cir. Dec. 370.

27. Roberts *v.* Albany, etc., R. Co., 25 Barb. (N. Y.) 662; Macy *v.* Jordan, 2 Den. (N. Y.) 570; Storm *v.* Waddell, 2 Sandf. Ch. (N. Y.) 494; Dixon *v.* Dixon, 81 N. C. 323; Carr *v.* Fearington, 63 N. C. 560; Barr *v.* White, 30 Gratt. (Va.) 531; Kimberling *v.* Hartly, 1 Fed. 571, 1 McCrary 136.

28. Sioux City First Nat. Bank *v.* Gage, 93 Ill. 172; Gooding *v.* King, 30 Ill. App. 169 [*affirmed* in 130 Ill. 102, 32 N. E. 533, 17 Am. St. Rep. 277]; Brown *v.* Nichols, 42 N. Y. 26, 9 Abb. Pr. N. S. (N. Y.) 1; Reynolds *v.* Ætna L. Ins. Co., 28 N. Y. App. Div. 591, 51 N. Y. Suppl. 446 [*affirmed* in 160 N. Y. 635, 55 N. E. 305].

1. Hale *v.* Everett, 53 N. H. 9, 92, 16 Am. Rep. 82, where it is said: "Trinitarians believe in the trinity or the tri-unity of God. That, so far, is their creed. Unitarians believe in the unity of God. That, so far, is their creed. Each has a creed which necessarily excludes the other. Different creeds

CREEK.[2] A small bay, inlet, or cove, and more generally in this country, a small river;[3] a recess, COVE, *q. v.*, BAY, *q. v.*, or inlet in the shore of a river, and not a separate or independent stream, though sometimes used in the latter meaning;[4] a part of the haven where anything is landed from the sea; a landing place; a small landing place, or "arrival";[5] an inlet from the sea, or a narrow passage from the shore on each side of it, which gives no harbor to ships, and is endowed with no privilege.[6] (See, generally, WATERS.)

CREEK CLAIM. A tract of one hundred yards square, one side of which abuts on the creek, or rather extends to the middle thread of it.[7] (See, generally, MINES AND MINERALS.)

CREMATION. The act or practice of reducing a corpse to ashes by means of fire.[8]

CREOLE. As applied to a female may include a negress or mulatto.[9] (See COLORED PERSONS; and, generally, MARRIAGE; MISCEGENATION.)

CREOSOTE OIL. A dead oil; the "product of coal tar" by fractional distillation.[10] (See, generally, CUSTOMS DUTIES.)

CREPARE OCULUM. To put out an eye.[11] (See, generally, CRIMINAL LAW.)

CREPUSCULUM. In old English law, daylight or twilight; the light which continues after the setting, or precedes the rising of the sun.[12]

CRESCENTE MALITIA, CRESCERE DEBET ET PŒNA. A maxim meaning "Vice increasing, punishment ought also to increase."[13]

CRESCITE, ET MULTIPLICAMINI. Grow, or increase and multiply.[14]

CREST. The devices set over a coat of arms.[15]

CRESYLIC. A word descriptive of the nature and quality of a compound made of soap and cresylic acid.[16] (See COMPOUND.)

CRESYLIC ACID. A product of coal tar.[17]

constitute the different 'sects.' Each sect has a particular name, and that makes it a 'denomination.' A creed may have one article of belief, or many. What makes it a creed is the fact that it is the common belief of a sect,—not its length, or its brevity. It would be impossible to have a sect, or denomination, unless there were at least some one ground on which they agreed; and, so far as there was a common belief, just so far they would have a creed, or a covenant. And the case is not changed, whether the creed contains one article of faith, or thirty-nine."

2. Lord Hale makes a distinction between creeks of the sea and creeks of ports. Burrill L. Dict. [*citing* Hale de Jur. Mar. par. 2, c. 2].

3. Webster Dict. [*quoted* in French *v.* Carhart, 1 N. Y. 96, 107].

"Down the creek," etc., used in describing a boundary, see McCullock *v.* Aten, 2 Ohio 307, 309.

4. Schermerhorn *v.* Hudson River R. Co., 38 N. Y. 103, 104.

"Any river, haven, creek, basin, or bay" as used in a statute relative to the admiralty jurisdiction of the United States see *Ex p.* Byers, 32 Fed. 404, 409.

Land bounded on the "lake and creek" see Fletcher *v.* Phelps, 28 Vt. 257, 261.

5. Burrill L. Dict.

6. 1 Bouvier Inst. 173, No. 437 [*citing* Comyns Dig. tit. "Navigation"].

7. Chapman *v.* Toy Long, 5 Fed. Cas. No. 2,610, 4 Sawy. 28, where the court distinguishes a "creek claim" from a "bank claim."

8. Bouvier L. Dict. See Reg. *v.* Price, 12 Q. B. D. 247, 255, 15 Cox C. C. 389, 53 L. J. M. C. 51, 33 Wkly. Rep. 45 note, where it is said: "Sir Thomas Browne finishes his famous essay on Urn Burial with a quotation from Lucan, which, in eight words, seems to sum up the matter: 'Tabesne cadavera solvat an rogus haud refert.' Whether decay or fire consumes corpses matters not. The difference between the two processes is only that one is quick, the other slow." And see 43 Alb. L. J. 140.

9. Parker *v.* State, 118 Ala. 655, 656, 23 So. 664.

10. *In re* Southern Pac. Co., 82 Fed. 311, 312, 313, where it is said: "In the tariff act . . . congress made a decided distinction between 'dead oils,' which term is applied to 'creosote,' and 'distilled oils'; thereby indicating and recognizing a difference between the two classes of oils, and precluding the inference that the term 'distilled oil' might include 'creosote,' or a 'dead oil.'"

11. Which had a pecuniary punishment of 60*s.* annexed to it. Jacob L. Dict.

12. Burrill L. Dict. [*citing* 4 Bl. Comm. 224].

13. Black L. Dict. [*citing* 2 Inst. 479].

14. The motto of the state of Maryland. Adams Gloss.

15. A term used in heraldry. Black L. Dict.

16. Carbolic Soap Co. *v.* Thompson, 25 Fed. 625, 626.

17. Carbolic Soap Co. *v.* Thompson, 25 Fed. 625, 626, holding that it is so known in commerce and in manufactures.

CRETINUS or **CRETENA.** A sudden stream or torrent.[18]

CRETIO. In the civil law, a certain number of days allowed an heir to deliberate whether he would take the inheritance or not.[19]

CREVICE. A mineral-bearing vein;[20] a lode, vein, or range.[21] (See, generally, MINES AND MINERALS.)

CREW.[22] In its general and popular sense, COMPANY,[23] *q. v.*; a company of people associated for any purpose.[24] In maritime law, and in a general sense, the ship's company, which embraces all the officers, as well as the common seamen;[25] in a stricter sense, the officers and common seamen of a vessel, excluding the master.[26] (See, generally, ADMIRALTY; SEAMEN; SHIPPING.)

CREW LIST. In maritime law, a list of the crew of a vessel; one of a ship's papers.[27] (See CREW; and, generally, ADMIRALTY; SEAMEN; SHIPPING.)

CRIB.[28] The manger of a stable, a bin, a frame for a child's bed, a small habitation;[29] a small building, raised on posts, for storing Indian corn; a granary.[30] (See BUILDING; CORN-CRIB; CRIB OF CORN.)

CRIB OF CORN. An expression used to indicate an indefinite quantity of corn, but not necessarily a crib full.[31] (See BUILDING; CORN; CORN-CRIB; CRIB.)

CRIER. As a noun an officer of a court, who makes proclamations;[32] an auctioneer.[33] As a verb, to proclaim; to make proclamation; to read or recite aloud.[34]

18. Jacob L. Dict.

19. Black L. Dict. [*citing* Calvin Lex.].

20. Beals *v.* Cone, 27 Colo. 473, 500, 62 Pac. 948, 83 Am. St. Rep. 92; Bryan *v.* McCaig, 10 Colo. 309, 313, 15 Pac. 413; Van Zandt *v.* Argentine Min. Co., 8 Fed. 725, 727, 2 McCrary 159. And see Terrible Min. Co. *v.* Argentine Min. Co., 89 Fed. 583; Cheesman *v.* Shreeve, 40 Fed. 787, 788 [*affirmed* in 116 U. S. 529, 6 S. Ct. 481, 29 L. ed. 712].

21. Raisbeck *v.* Anthony, 73 Wis. 572, 586, 41 N. W. 72 [*quoting* Iron Silver Min. Co. *v.* Cheesman, 116 U. S. 529, 6 S. Ct. 481, 29 L. ed. 712].

22. The word has several well-known significations. U. S. *v.* Winn, 28 Fed. Cas. No. 16,740, 3 Sumn. 209.

23. U. S. *v.* Winn, 28 Fed. Cas. No. 16,740, 3 Sumn. 209.

24. Johnson Dict. [*quoted* in U. S. *v.* Winn, 28 Fed. Cas. No. 16,740, 3 Sumn. 209, where the court said: "And the same learned lexicographer adds, that, when spoken with reference to a ship, the crew of a ship, or ship's crew, means 'the company of a ship,' illustrating it by a verse from Dryden's translation of the Æneid: 'The anchor dropped, his crew the vessel moor'"].

25. The Marie, 49 Fed. 286, 287; U. S. *v.* Winn, 28 Fed. Cas. No. 16,740, 3 Sumn. 209. And see Frazer *v.* Hatton, 2 C. B. N. S. 512, 526, 3 Jur. N. S. 694, 26 L. J. C. P. 226, 89 E. C. L. 512.

"Master and crew" may embrace ship's company. U. S. *v.* Winn, 28 Fed. Cas. No. 16,740, 3 Sumn. 209.

As used in the French service "'the crew of a ship ("Equipage," French) comprehends the officers, sailors, seamen, marines, ordinary men, servants, and boys' . . . 'but exclusive of the captains and lieutenants in the French service.'" Falconer Marine Dict. [*quoted* in U. S. *v.* Winn, 28 Fed. Cas. No. 16,740, 3 Sumn. 209].

26. The Marie, 49 Fed. 286, 287 [*quoting* Rapalje & L. L. Dict.]. And see Millaudon *v.* Martin, 6 Rob. (La.) 534, 538; U. S. *v.* Huff, 13 Fed. 630, 634; U. S. *v.* Winn, 28 Fed. Cas. No. 16,740, 3 Sumn. 209; Baily *v.* Grant, 1 Ld. Raym. 632.

"Any one of the crew of an American vessel" used in a statute punishing revolt see U. S. *v.* Huff, 13 Fed. 630, 632.

27. This instrument is required by act of congress, and sometimes by treaties. Black L. Dict. See 5 U. S. St. at L. 370; 2 U. S. St. at L. 809; 19 U. S. St. at L. 252 [U. S. Comp. St. (1901) pp. 3102, 3103].

28. The word "cribs" means in the meat trade clear ribs. Pepper *v.* Western Union Tel. Co., 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660.

29. And is used in the latter sense by Shakespeare:

"Why rather, sleep, liest thou in smoky cribs
Than in the perfumed chambers of the great?"

Wood *v.* State, 18 Fla. 967, 969, where it is said: "No where else do we find it used in the sense of a building."

30. Webster Dict. [*quoted* in State *v.* Laughlin, 53 N. C. 455, 458].

"Ninety-two cribs of pine boards," as used in an action of replevin see Lewis *v.* Clagett, Smith (N. H.) 187, 188.

31. Masterson *v.* Goodlett, 46 Tex. 402, 406, where it is said: "Corn, or cotton in a pen, would naturally be described as a pen of corn or cotton, whether the pen were full or not."

32. His principal duties are to announce the opening of the court and its adjournment and the fact that certain special matters are about to be transacted, to announce the admission of persons to the bar, to call the names of jurors, witnesses, and parties, to announce that a witness has been sworn, to proclaim silence when so directed, and generally to make such proclamations of a public nature as the judges order. Black L. Dict.

33. Burrill L. Dict.

34. Burrill L. Dict.

CRIEZ LA PEEZ. Rehearse the concord, or peace.[35]

CRIM. CON.[36] An abbreviation for "criminal conversation."[37] (See, generally, Husband and Wife.)

CRIME. See Criminal Law.

CRIME AGAINST NATURE. See Sodomy.

CRIMEN EX POST FACTO NON DILUITUR. A maxim meaning "A crime cannot be expiated by after acts."[38]

CRIMEN FALSI. See Criminal Law.

CRIMEN FELONIÆ IMPOSUIT. Made a charge of felony.[39] (See, generally, Criminal Law.)

CRIMEN FLAGRANS. A crime in its very heat; during the commission of a crime.[40] (See, generally, Criminal Law.)

CRIMEN FURTI. The crime of theft.[41] (See, generally, Larceny.)

CRIMEN INCENDII. The crime of burning.[42] (See, generally, Arson.)

CRIMEN INNOMINATUM. The nameless crime; buggery.[43] (See, generally, Sodomy.)

CRIMEN LÆSÆ MAJESTATIS. The crime of injured majesty; treason.[44] In Roman law, high treason.[45] (See, generally, Treason.)

CRIMEN LÆSÆ MAJESTATIS OMNIA ALIA CRIMINA EXCEDIT QUOAD PŒNAM. A maxim meaning "The crime of treason exceeds all other crimes in its punishment."[46]

CRIMEN OMNIA EX SE NATÂ VITIAT. A maxim meaning "A crime vitiates all things proceeding from it."[47]

CRIMEN PARIS GRADUS. A crime of equal grade.[48] (See, generally, Criminal Law.)

CRIMEN RAPTUS. The offense of rape.[49] (See, generally, Rape.)

CRIMEN REPETUNDARUM. The crime of taking money unjustly for an unjust purpose when in office.[50] (See, generally, Bribery; Officers.)

CRIMEN ROBERIÆ. The offense of robbery.[51] (See, generally, Robbery.)

CRIMEN STELLIONATUS. The crime of imposition, Cozenage, *q. v.*, trickery, cheating.[52] (See Cheat.)

CRIMEN TRAHIT PERSONAM. The crime carries the person.[53]

CRIMEN VEL PŒNA PATERNA NULLAM MASCULAM FILIO INFLIGERE POTEST. The crime or punishment of a father inflicts no stain upon his son.[54]

35. A phrase used in the ancient proceedings for levying fines. It was the form of words by which the justice before whom the parties appeared directed the serjeant or countor in attendance to recite or read aloud the concord or agreement between the parties, as to the lands intended to be conveyed. Black L. Dict. [*citing* 2 Reeve Eng. L. 224, 225].

36. These words have of themselves acquired a fixed and universal signification. Gibson *v.* Cincinnati Enquirer, 10 Fed. Cas. No. 5,392, 2 Flipp. 121.

37. Gibson *v.* Cincinnati Enquirer, 10 Fed. Cas. No. 5,392, 2 Flipp. 121.

38. Adams Gloss. [*citing* Halkerston 32].

39. Davis *v.* Noake, 6 M. & S. 29, 1 Stark. 377, 382, 18 Rev. Rep. 290, 2 E. C. L. 146, where it is said: "The words . . . have often been translated, 'imputed the crime of felony;' but they mean, 'made a charge of felony,' and it has been held that they are not supported by proof of mere words without going before a magistrate, and preferring *crimen*, i. e. a charge of felony, without reference to the precise mode."

40. English L. Dict.

41. English L. Dict.

42. It included arson, also the burning of a man, beast or other chattel. English L. Dict.

43. English L. Dict.

44. Wharton L. Lex.

45. English L. Dict.

46. Wharton L. Lex. [*citing* 3 Inst. 210].

47. Morgan Leg. Max. See also Henry *v.* Salina Bank, 5 Hill (N. Y.) 523, 531, where the court said: "'A little leaven leaveneth the whole lump.' Even a little poison infused into the mass is sufficient to corrupt the whole."

48. Adams Gloss. [*citing* Bacon Max. reg. 15].

49. Black L. Dict.

50. Trayner Leg. Max.

51. Black L. Dict.

52. Adams Gloss.

53. That is, the commission of a crime gives the courts of the place where it is committed jurisdiction over the person of the offender. Black L. Dict.

Applied in People *v.* Adams, 3 Den. (N. Y.) 190, 210, 45 Am. Dec. 468.

54. Adams Gloss. [*citing* Bracton iii, c. 6, fol. 105].

CRIME OF DRUNKENNESS. Drunkenness by the voluntary use of intoxicating liquor.[55] (See, generally, DRUNKARDS.)

CRIMES. See CRIMINAL LAW.

CRIMINAL. As a noun, a person who has committed a crime; one who is guilty of a felony or misdemeanor.[56] As an adjective, that which pertains to or is connected with the law of crimes, or the administration of penal justice, or which relates to or has the character of a crime.[57] When used in reference to judicial proceedings, opposed to "civil," and in its most comprehensive meaning, the term may be regarded as including all cases for the violation of the penal law.[58] As defined by statute, the word may mean felonious.[59] (See, generally, CRIMINAL LAW.)

CRIMINAL ACTION. An action prosecuted by the people of the state against a person charged with a public offence for the punishment thereof.[60] (See CIVIL ACTION; CIVIL CAUSE; and, generally, ACTIONS; CRIMINAL LAW.)

CRIMINAL BUSINESS. Criminal acts constituting the crime.[61] (See CIVIL BUSINESS; and, generally, CRIMINAL LAW.)

CRIMINAL CONSPIRACY. See CONSPIRACY.

CRIMINAL CONTEMPT. See CONTEMPT.

CRIMINAL CONVERSATION. See HUSBAND AND WIFE.

CRIMINAL INFORMATION. See CRIMINAL LAW; INDICTMENTS AND INFORMATIONS.

CRIMINALITER. Criminally.[62] (See CIVILITER; and, generally, CRIMINAL LAW.)

CRIMINAL JURISDICTION. That which exists for the punishment of crimes.[63] (See CIVIL JURISDICTION; and, generally, Courts; CRIMINAL LAW.)

55. Mass. Gen. St. (1876) c. 165, § 25 [*quoted* in Com. *v.* Coughlin, 123 Mass. 436, 437].

56. Black L. Dict.

57. Black L. Dict.

58. Applegate *v.* Com., 7 B. Mon. (Ky.) 12, 13.

As applied to courts.— Where a recognizance provided that an accused "shall personally be and appear before the criminal court of said county," etc., the court said: "The word 'criminal' therefore, must have been used in that connection to describe the court, rather than to designate it by its supposed name, the word having reference to the character of the business,— that is, criminal business,— to be transacted at the term of the court to which the accused was required to appear." Petty *v.* People, 118 Ill. 148, 156, 8 N. E. 304.

59. Mich. Comp. Laws (1897), § 11792.

60. N. Y. Code Civ. Proc. § 3336 [*quoted* in Gadsden *v.* Woodward, 38 Hun 548, 551].

Distinguished from "civil action" see 1 Cyc. 732.

61. Condon *v.* Leipsiger, 17 Utah 498, 501, 55 Pac. 82.

62. This term is used in distinction or opposition to the word "*civiliter*," civilly, to distinguish a criminal liability or prosecution from a civil one. Black L. Dict.

63. Landers *v.* Staten Island R. Co., 53 N. Y. 450, 457.

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By H. C. Underhill,* Assisted by Wm. Lawrence Clark†

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I. DEFINITION.

Criminal law is that branch or division of law which defines crimes, treats of their nature, and provides for their punishment.[1]

II. NATURE AND ELEMENTS OF CRIME, AND DEFENSES.

A. In General — 1. DEFINITION. A crime is an act or omission which is prohibited by law as injurious to the public and punished by the state in a proceeding in its own name or in the name of the people or the sovereign.[2] In California,

1. Abbott L. Dict.; Black L. Dict.; Bouvier L. Dict.

"The term 'criminal,' when used in reference to judicial proceedings, is opposed to 'civil,' and in its most comprehensive meaning, may be regarded as including all cases for the violation of the penal law." Applegate *v.* Com., 7 B. Mon. (Ky.) 12. See also Montee *v.* Com., 3 J. J. Marsh. (Ky.) 132, 142.

2. *In re* Bergin, 31 Wis. 383 [*citing* 1 Bishop Crim. L. § 32; 4 Bl. Comm. 5], where it was held that any wrong against the public, whether a felony or merely a misdemeanor, of which the law takes cognizance as injurious to the public, and punishes in what is called a criminal proceeding, prosecuted by the state in its own name, or in the name of the people or the sovereign, is a crime within the meaning of a constitutional prohibition against involuntary servitude except as a punishment for a crime. See also Patterson *v.* Natural Premium Mut. L. Ins. Co., 100 Wis. 118, 75 N. W. 980, 69 Am. St. Rep. 899, 42 L. R. A. 253.

Blackstone says: "A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms; though in common usage, the word 'crimes' is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanors' only." 4 Bl. Comm. 5. This definition has been followed and approved in a number of cases:

Connecticut.— State *v.* Bishop, 7 Conn. 181, 185.

Illinois.— Van Meter *v.* People, 60 Ill. 168, 170.

Michigan.— Slaughter *v.* People, 2 Dougl. 334, 335 note.

Minnesota.— State *v.* Sauer, 42 Minn. 258, 44 N. W. 115.

Missouri.—State *v.* Blitz, 171 Mo. 530, 540, 71 S. W. 1027.

Montana.— Helena *v.* Gray, 7 Mont. 486, 17 Pac. 564.

Ohio.— State *v.* Brazier, 37 Ohio St. 78.

Pennsylvania.— Lehigh County *v.* Schock, 113 Pa. St. 373, 7 Atl. 52.

Vermont.— State *v.* Peterson, 41 Vt. 504, 511.

Wisconsin.— *In re* Bergin, 31 Wis. 383.

"Crime" includes misdemeanors.—Although the word "crime" has sometimes been used to designate a gross violation of law as distinguished from a mere misdemeanor, in its broadest sense it applies to any violation of law which is punished by the state in a criminal prosecution, and therefore includes misdemeanors.

Illinois.— Van Meter *v.* People, 60 Ill. 168, holding that the term "crime" in a statute in reference to accessaries before the fact applied to misdemeanors.

Indiana.— Morton *v.* Skinner, 48 Ind. 123, holding that misdemeanors were included in the word "crime" in the provision of the constitution of the United States as to the surrender of fugitives from justice.

Michigan.— People *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751.

Minnesota.— State *v.* Sauer, 42 Minn. 258, 44 N. W. 115, holding that misdemeanors were included in the word "crime" in a statute allowing conviction of a crime to be proved to affect the credibility of a witness.

Nebraska.— Lord *v.* State, 17 Nebr. 526, 23 N. W. 507.

New York.— People *v.* French, 102 N. Y. 583, 7 N. E. 913, holding that a conviction in the police court of the offense of intoxication was a conviction of a "crime" within the meaning of a statute disqualifying a person convicted of a crime from serving on the police force.

Vermont.— State *v.* Peterson, 41 Vt. 504, holding that a misdemeanor was a crime within a constitutional provision relating to trial by jury.

Wisconsin.— *In re* Bergin, 31 Wis. 383, holding that a misdemeanor was a crime within a constitutional provision forbidding involuntary servitude except as a punishment for a crime.

See also EXTRADITION; INDICTMENTS AND INFORMATIONS; WITNESSES.

Petty offenses punishable summarily by a magistrate, such as disturbing public worship, are not included in the term "crime" in the New York code of criminal procedure. Steinert *v.* Sobey, 14 N. Y. App. Div. 505, 44 N. Y. Suppl. 146.

The "offense of intoxication," created by the New York excise law of 1857, as amended by N. Y. Laws (1869), c. 856, was held to be a "crime" within the meaning of the New York Consolidation Act (N. Y. Laws (1882), c. 410, § 268), providing that no person shall be appointed to membership in the police

Illinois, New York, and some of the other states the term "crime" is expressly defined by statute.[3]

2. DISTINCTION BETWEEN TORTS AND CRIMES. It has been said that the distinction between a tort and a crime is this: A tort or private wrong is "an infringement or privation of the civil rights which belong to individuals, considered merely as individuals,"[4] while a crime or public wrong is a "breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity."[5] An offense, however, which is punishable as a

force or permitted to hold membership therein, or be appointed a patrolman, "who shall have been convicted of any crime." People *v.* French, 102 N. Y. 583, 587, 7 N. E. 913, where it was said: "It certainly has all the elements of a crime. Public intoxication is offensive to public decency, and dangerous to the good order and well-being of society. The officers charged with the arrest of other criminals are empowered to arrest persons guilty of this offense, and they are required to be tried as criminals and punished as criminals. Public intoxication is declared to be an offense, and, in the statutes, ordinarily the words 'offense' and 'crime' are synonymous. Various violations of the Excise Act are made crimes punishable as misdemeanors, and yet in the act they are called offenses."

"High crimes and misdemeanors."— Under a statute which gives the court jurisdiction of "high crimes and misdemeanors," it has been held that an offense to be cognizable by it must be allied and equal in guilt to the crimes which were felonies and capital at common law, such as murder, arson, rape, burglary, robbery, forgery, perjury, etc., and that a nuisance created on a highway by erecting an obstruction thereon is not within the statute. State *v.* Knapp, 6 Conn. 415, 417, 16 Am. Dec. 68 [*quoting* with approval 1 Russell Crimes 61, where it is said that "high crimes and misdemeanors are such immoral and unlawful acts as are nearly allied and equal in guilt to felony, yet owing to some technical circumstance, do not fall within the definition of felony"].

Violation of a valid municipal ordinance for which one may be prosecuted and punished is in most jurisdictions held to be a "crime." People *v.* Hanrahan, 75 Mich. 611, 620, 42 N. W. 1124, 4 L. R. A. 751. See also State *v.* West, 42 Minn. 147, 148, 43 N. W. 845, holding that violations of municipal ordinances, punishable by fine or imprisonment, are "criminal offenses" within the meaning of a constitutional provision that "no person shall be held to answer for a criminal offence unless on the presentment or indictment of a grand jury, except . . . in cases cognizable by justices of the peace." And see, generally, MUNICIPAL CORPORATIONS.

3. See Cal. Pen. Code, § 15, declaring that a crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: First, death; second, imprisonment; third, fine; fourth, removal from office; or, fifth, disqualification to hold and enjoy any office of honor, trust, or profit in this state. See also N. Y. Pen. Code, § 3. In Illinois it is declared by statute that "a criminal offense consists in a violation of a public law, in the commission of which there shall be a union or joint operation of act and intention, or criminal negligence." See Story *v.* People, 79 Ill. App. 562, 565.

4. 4 Bl. Comm. 5. See TORTS.

5. 4 Bl. Comm. 5. And see State *v.* Close, 35 Iowa 570; State *v.* Rankin, 3 S. C. 438, 16 Am. Rep. 737; Rex *v.* Higgins, 2 East 5, 6 Rev. Rep. 358. See also *In re* Yost, 14 York Leg. Rec. (Pa.) 25.

Injury to single individual generally no crime.— In State *v.* Schuerman, 52 Mo. 164, 165, it was charged that the defendant "did wilfully disturb the peace" of the prosecutrix, by using to her certain loud and abusive language. The court said: "There is neither assault, battery or affray charged in this complaint nor any other legal offense. The conduct of the defendant in using the language he did and in the manner indicated, was very immoral and reprehensible. It was not however such an offense as is denounced by the law as criminal and which would under our statute subject the offender to a criminal prosecution. He no doubt would be liable to a civil action for slander but I know of no statute rendering such conduct criminal. There is a statute against disturbing the peace of families or neighborhoods but none against disturbing the peace of a single individual by the use merely of loud and abusive language."

Private fraud.— At common law a mere private fraud, not injuriously affecting the public, is not a crime. In Rex *v.* Wheatly, 2 Burr. 1125, 1127, 1 W. Bl. 273, it was charged that defendant "falsely, fraudulently, and deceitfully, did sell and deliver" to the prosecuting witness sixteen gallons of malted liquor "for and as 18 gallons." Lord Mansfield said: "That the fact here charged should not be considered as an indictable offence, but left to a civil remedy by an action, is reasonable and right in the nature of the thing: because it is only an inconvenience and injury to a private person. . . . The offence that is indictable must be such a one as affects the public. As if a man uses false weights and measures, and sells by them to all or to many of his customers, or uses them in the general course of his dealing: so, if a man defrauds another, under false tokens. For these are deceptions that common care and prudence are not sufficient to

crime may also cause special injury to individuals, and give rise to a civil action if they can show that the injury suffered by them is distinct from that suffered by the general public,[6] as in the case of an affray and assault and battery,[7] a nuisance,[8] and many other offenses. So the real distinction between a tort and a crime lies in the method in which the remedy for the wrong is pursued.[9]

3. MALA IN SE AND MALA PROHIBITA. Crimes have been divided according to their nature into crimes *mala in se* and crimes *mala prohibita*. The former class comprises those acts which are immoral or wrong in themselves, such as murder, rape, arson, burglary, and larceny, breach of the peace, forgery, and the like, while the latter class comprises those acts to which, in the absence of statute, no moral turpitude attaches, and which are crimes only because they have been prohibited by statute.[10]

4. TREASON, FELONIES, AND MISDEMEANORS — a. In General. At common law crimes were divided into treason, felonies, and misdemeanors, and this classification is still recognized, although the tests for distinguishing felonies and misdemeanors are no longer the same.[11]

b. Treason. High treason at common law consisted in compassing or imagining the death of the sovereign, levying war against him, adhering to his enemies, giving them aid and comfort, and certain other acts against the sovereign;[12] and petit treason consisted in the murder of a superior by an inferior, as of a husband by his wife, a master by his servant, or a lord or ordinary by an ecclesiastic.[13] In the United States treason consists only in levying war against the United States or the individual states, or in adhering to their enemies, giving them aid and comfort.[14]

c. Felonies and Misdemeanors. The distinction between felonies and misdemeanors is very important. A felony at common law was any offense punishable by the forfeiture of either lands or goods, or both. Capital punishment was added when the crime was one of great enormity, such as murder, man-

guard against. So, if there be a conspiracy to cheat: for ordinary care and caution is no guard against this. Those cases are much more than mere private injuries: they are public offences. But here, it is a mere private imposition or deception: no false weights or measures are used; no false tokens given; no conspiracy; only an imposition upon the person he was dealing with, in delivering him a less quantity instead of a greater; which the other carelessly accepted." See also Com. *v.* Warren, 6 Mass. 72; People *v.* Babcock, 7 Johns. (N. Y.) 201, 5 Am. Dec. 256; Rex *v.* Lara, 2 East P. C. 819, 2 Leach C. C. 652, 6 T. R. 565. And see, generally, FALSE PRETENSES.

Private trespass and nuisance.— So there can be no indictment for a mere civil trespass not involving a breach of the public peace (Kilpatrick *v.* People, 5 Den. (N. Y.) 277; Rex *v.* Turner, 13 East 228); nor for a nuisance injuriously affecting only one individual (Com. *v.* Webb, 6 Rand. (Va.) 726). See NUISANCES; TRESPASS.

Damage to many without public injury.— There may be a case where, although many individuals are injured by the same act, no indictment will lie for a wrong to the public. Rex *v.* Richards, 8 T. R. 634, 5 Rev. Rep. 489.

6. Corley *v.* Lancaster, 81 Ky. 171.

7. See AFFRAY, 2 Cyc. 40; ASSAULT AND BATTERY, 3 Cyc. 1014.

8. See NUISANCES.

It is no objection that several suffer by the same injury.— Although "many persons receive a private injury by a public nuisance, every one shall have his action." Holt, C. J., in Ashby *v.* White, 2 Ld. Raym. 938 [*citing* Williams' Case, 5 Coke 72*b*; Westbury *v.* Powell, Coke Litt. 50*a*]. See NUISANCES.

9. "An offense which is pursued at the discretion of the injured party or his representative is a civil injury. An offense which is pursued by the sovereign, or by the subordinate of the sovereign, is a crime." Austin Jurispr. § 17. See also 1 Bishop New Cr. L. § 230 *et seq.*; Cooley Torts 94, 95, 96. And see, generally, TORTS.

10. 4 Bl. Comm. 8; 1 Bl. Comm. 57, 58; Anderson L. Dict.; Black L. Dict.; Bouvier L. Dict. See Com. *v.* Adams, 114 Mass. 323, 19 Am. Rep. 362; U. S. *v.* O'Connor, 31 Fed. 449.

"**An offence is regarded as strictly malum prohibitum** only when, without the prohibition of a statute, the commission or omission of it would in a moral point of view be regarded as indifferent. The criminality of the act or omission consists not in the simple perpetration of the act, or the neglect to perform it, but in its being a violation of a positive law." Bouvier L. Dict.

11. See *infra*, II, A, 4, c.

12. 4 Bl. Comm. 76 *et seq.* See TREASON.

13. 4 Bl. Comm. 75.

14. U. S. Const. art. 3, § 3, cl. 1; U. S. Rev. Stat. (1878) § 5331 [U. S. Comp. Stat.

slaughter, burglary, rape, larceny, robbery, and arson.[15] All crimes not amounting to felonies were misdemeanors.[16] Forfeiture for felony has been abolished both in England and in the United States, so that the term "felony" no longer has its original meaning; but in most states all crimes which were felonies at common law are still felonies,[17] and other crimes have been made felonies by statute.[18] In many states by statute all crimes which are punishable in the state prison or penitentiary, with or without hard labor, are felonies.[19] A crime is a felony

(1901) p. 3623]; and various state constitutions. See also TREASON.

15. 4 Bl. Comm. 94 *et seq.* And see Bouvier L. Dict.; Burrill L. Dict.; Coke Litt. 391; 1 Hawkins P. C. c. 37; 1 Russell Crimes 42; Adams *v.* Barrett, 5 Ga. 404; Com. *v.* Schall, 12 Pa. Co. Ct. 554; State *v.* Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550.

Derivation of term.— The word "felony" is said to be derived from the word "fee," which signifies the fief, feud, or beneficiary estate, and "*lon*," which signifies price or value, as being a crime punishable by the loss of the fee or feud which the feudal tenant held of his lord. 4 Bl. Comm. 95.

16. See 4 Bl. Comm. 1, 5; Adams *v.* Barrett, 5 Ga. 404, 411; Com. *v.* Callaghan, 2 Va. Cas. 460.

That a misdemeanor is a "crime" see *supra*, II, A, 1, note 2.

"Specially declared by law."— Where a statute (Wis. Rev. Stat. § 3294) provides that acts or omissions shall be deemed to be misdemeanors, within the meaning of the statute, when "specially declared by law" to be such, it is the statute law of the state, and not the common law, that is meant. State *v.* Grove, 77 Wis. 448, 46 N. W. 532.

17. *Georgia.*—Adams *v.* Barrett, 5 Ga. 404.

Massachusetts.— Com. *v.* Newell, 7 Mass. 245.

New York.— Carpenter *v.* Mills, 29 How. Pr. 473.

North Carolina.— State *v.* Dewer, 65 N. C. 572.

Rhode Island.— State *v.* Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550.

United States.— Bannon *v.* U. S., 156 U. S. 464, 15 S. Ct. 467, 39 L. ed. 494.

Compare, however, State *v.* Felch, 58 N. H. 1.

See 14 Cent. Dig. tit. "Criminal Law," § 29 *et seq.*

When a statute substitutes imprisonment for life or a term of years as the punishment for a felony previously punished capitally, such felony is not thereby reduced to the grade of a misdemeanor. State *v.* Dewer, 65 N. C. 572.

Crimes not felonies.— In most of the states no crime is a felony unless it was so at common law or has been made so by statute.

New Mexico.— U. S. *v.* Vigil, 7 N. M. 296, 34 Pac. 530.

North Carolina.— State *v.* Hill, 91 N. C. 561.

Pennsylvania.— Com. *v.* Schall, 12 Pa. Co. Ct. 554.

Rhode Island,— State *v.* Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550.

United States.— Bannon *v.* U. S., 156 U. S. 464, 15 S. Ct. 467, 39 L. ed. 494; Considine *v.* U. S., 112 Fed. 342, 50 C. C. A. 272; U. S. *v.* Coppersmith, 4 Fed. 198, 2 Flipp. 546.

But see State *v.* Felch, 58 N. H. 1.

18. See Rafferty *v.* State, 91 Tenn. 655, 16 S. W. 728.

Construction of statutes.— See Com. *v.* Barlow, 4 Mass. 439, where a court said that "in the construction of a penal statute, a misdemeanor could not be considered as made a felony, but by express words, or by necessary implication."

Accessaries.—If a statute punishing an act provides for the punishment of accessaries, it thereby makes the act a felony, for there can be accessaries in felonies only. Com. *v.* Barlow, 4 Mass. 439; Com. *v.* Macomber, 3 Mass. 254. See *infra*, V, A.

Use of the word "felonious" in a statute does not necessarily show an intention on the part of the legislature to make a misdemeanor a felony. Com. *v.* Barlow, 4 Mass. 439. And see Com. *v.* Newell, 7 Mass. 245.

Change of punishment.— Where a statute declares an offense (forgery) to be a felony, and punishable with death, a later statute which merely abolishes the punishment of death and substitutes whipping, imprisonment, and fine does not reduce the crime to a misdemeanor. State *v.* Rowe, 8 Rich. (S. C.) 17.

19. *Alabama.*— Clifton *v.* State, 73 Ala. 473; Cook *v.* State, 60 Ala. 39, 31 Am. Rep. 31.

Arkansas.— State *v.* Waller, 43 Ark. 381.

California.— People *v.* War, 20 Cal. 117.

Georgia.— A. *v.* B., R. M. Charlt. 228.

Illinois.— Lamkin *v.* People, 94 Ill. 501.

Indiana.— State *v.* Smith, 8 Blackf. 489.

Kansas.— *In re* Stevens, 52 Kan. 56, 34 Pac. 459.

Kentucky.— Tharp *v.* Com., 3 Metc. 411; Buford *v.* Com., 14 B. Mon. 24.

Louisiana.— State *v.* Charlot, 8 Rob. 529.

Massachusetts.— Com. *v.* Ray, 3 Gray 441.

Michigan.— Firestone *v.* Rice, 71 Mich. 377, 38 N. W. 885, 15 Am. St. Rep. 266.

Missouri.— State *v.* Melton, 117 Mo. 618, 23 S. W. 889; Nathan *v.* State, 8 Mo. 631; State *v.* Lehr, 16 Mo. App. 491.

New York.— People *v.* Hughes, 137 N. Y. 29, 32 N. E. 1105; People *v.* Lyon, 99 N. Y. 210, 1 N. E. 673; People *v.* Park, 41 N. Y. 21; Shay *v.* People, 22 N. Y. 317; People *v.* Van Steenburgh, 1 Park. Crim. 39.

North Carolina.— State *v.* Mallett, 125 N. C. 718, 34 S. E. 651 (construing Code, § 1097, and Act (1891), c. 205, defining felonies); State *v.* Pierce, 123 N. C. 745, 31 S. E. 847; State *v.* Addington, 121 N. C. 538,

under such a statute, if it may be punished by imprisonment in a penitentiary or state's prison, although the court or jury may in its discretion reduce the punishment to imprisonment in jail or fine,[20] and although such punishment is in fact imposed.[21]

5. Merger of Offenses. The merger of one offense in another occurs when the same criminal act constitutes both a felony and a misdemeanor. In such a case, at common law, the misdemeanor is merged in the felony, and the latter only is punishable.[22] This doctrine applies only where the same criminal act

27 S. E. 988; State *v.* Bloodworth, 94 N. C. 918. *Compare* State *v.* Hill, 91 N. C. 561.

Ohio.— State *v.* Rouch, 47 Ohio St. 478, 25 N. E. 59.

Rhode Island.— State *v.* Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550.

Tennessee.—Rafferty *v.* State, 91 Tenn. 655, 16 S. W. 728.

Texas.— Welsh *v.* State, 3 Tex. App. 114.

Vermont.— Corbett *v.* Sullivan, 54 Vt. 619; State *v.* Scott, 24 Vt. 127.

Virginia.— Benton *v.* Com., 89 Va. 570, 16 S. E. 725.

West Virginia.— State *v.* Harr, 38 W. Va. 58, 17 S. E. 794.

United States.— U. S. *v.* Staats, 8 How. 41, 12 L. ed. 979.

Compare Wilson *v.* State, 1 Wis. 184.

See 14 Cent. Dig. tit. "Criminal Law," § 31.

In Michigan a statute (Comp. L. § 5954) providing that the term "felony," when used therein, or in any other statute, should mean an offense punishable by death, or by imprisonment in the state prison, was held to apply only to those provisions where neither the particular offense nor its grade was otherwise indicated than by the term "felony," and not to extend to those provisions of the statute which in defining the offense expressly designated it as a felony and made it punishable in the state prison, in which case no such general definition was required. Drennan *v.* People, 10 Mich. 169.

A statute providing that "the term 'felony,' when used in any statute, shall be construed to mean an offense for which the offender, on conviction, shall be liable by law, to be punished by death or by imprisonment in a state prison,"•does not necessarily make an offense a felony, which before the statute was a mere misdemeanor, but establishes a rule of construction in all cases where the word "felony" is met with in a statute. Wilson *v.* State, 1 Wis. 184, 188. And see Nichols *v.* State, 35 Wis. 308.

Personal exemption from responsibility.— A definition of felony as an offense for which the offender shall be liable to be punished by death or imprisonment must be construed as relating to the punishment prescribed for the crime, without reference to any personal exemption of the criminal, as on account of his age. People *v.* Park, 41 N. Y. 21.

20. *Arkansas.*— State *v.* Waller, 43 Ark. 381.

California.— People *v.* War, 20 Cal. 117; People *v.* Cornell, 16 Cal. 187.

Maine.— State *v.* Mayberry, 48 Me. 218; State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578.

Missouri.— State *v.* Melton, 117 Mo. 618, 23 S. W. 889; State *v.* Clayton, 100 Mo. 516, 13 S. W. 819, 18 Am. St. Rep. 565; State *v.* Green, 66 Mo. 631; State *v.* Deffenbacher, 51 Mo. 26; Ingram *v.* State, 7 Mo. 293; Johnston *v.* State, 7 Mo. 183; State *v.* Gilmore, 28 Mo. App. 561; State *v.* Lehr, 16 Mo. App. 491.

New York.— People *v.* Hughes, 137 N. Y. 29, 32 N. E. 1105; People *v.* Lyon, 99 N. Y. 210, 1 N. E. 673; People *v.* Borges, 6 Abb. Pr. 132; People *v.* Van Steenburgh, 1 Park. Crim. 39.

Ohio.— State *v.* Hamilton, 2 Ohio Cir. Dec. 6.

Virginia.— Benton *v.* Com., 89 Va. 570, 16 S. E. 725; Randall *v.* Com., 24 Gratt. 644.

West Virginia.— State *v.* Harr, 38 W. Va. 58, 17 S. E. 794.

See 14 Cent. Dig. tit. "Criminal Law," § 31.

In Illinois a construction to the contrary has been put upon the statute. Baits *v.* People, 123 Ill. 428, 16 N. E. 483; Lamkin *v.* People, 94 Ill. 501.

21. People *v.* Hughes, 137 N. Y. 29, 32 N. E. 1105; Benton *v.* Com., 89 Va. 570, 16 S. E. 725.

22. *Indiana.*— Hamilton *v.* State, 36 Ind. 280, 10 Am. Rep. 22.

Kentucky.— Com. *v.* Blackburn, 1 Duv. 4.

Maine.— State *v.* Mayberry, 48 Me. 218.

Massachusetts.— Com. *v.* Roby, 12 Pick. 496; Com. *v.* Kingsbury, 5 Mass. 106; Com. *v.* Macomber, 3 Mass. 254.

Michigan.— People *v.* Richards, 1 Mich. 216, 51 Am. Dec. 75.

New Jersey.— Johnson *v.* State, 26 N. J. L. 313; State *v.* Cooper, 13 N. J. L. 361, 25 Am. Dec. 490.

New York.— People *v.* Thorn, 21 Misc. 130, 47 N. Y. Suppl. 46; People *v.* McKane, 7 Misc. 478, 28 N. Y. Suppl. 397; Elkin *v.* People, 24 How. Pr. 272; People *v.* Bruno, 6 Park. Crim. 657.

North Carolina.— State *v.* Durham, 72 N. C. 447; State *v.* Addington, 7 N. C. 571.

Pennsylvania.— Com. *v.* Parr, 5 Watts & S. 345.

England.— Isaac's Case, 2 East P. C. 1031; Harmwood's Case, 1 East P. C. 411, where, upon an indictment for an assault with intent to commit a rape, the prosecution proved a rape actually committed.

See 14 Cent. Dig. tit. "Criminal Law," §§ 32, 33.

Conviction of minor offense included in the indictment see Indictments and Informations.

constitutes both offenses,[23] and where the offenses are of different grades. It does not apply where both offenses are felonies or misdemeanors.[24] The modern tendency has been to reject the doctrine of merger of offenses altogether,[25] and in England and some of the United States it has been abolished by statute.[26]

A conspiracy to commit a felony being only a misdemeanor, merges in the overt felonious act when fully consummated.

Kentucky.— Com. *v.* Blackburn, 1 Duv. 4.

Maine.— State *v.* Mayberry, 48 Me. 218; State *v.* Murray, 15 Me. 100.

Massachusetts.— Com. *v.* O'Brien, 12 Cush. 84; Com. *v.* Kingsbury, 5 Mass. 106.

Michigan.—People *v.* Richards, 1 Mich. 216, 51 Am. Dec. 75.

New York.— People *v.* Thorn, 21 Misc. 130, 47 N. Y. Suppl. 46; People *v.* McKane, 7 Misc. 478, 28 N. Y. Suppl. 397; People *v.* Mather, 4 Wend. 229, 21 Am. Dec. 122.

Pennsylvania.— Com. *v.* Delany, 1 Grant 224.

Vermont.— State *v.* Noyes, 25 Vt. 415.

See CONSPIRACY, 8 Cyc. 643.

An assault and battery with intent to commit murder, when it is a felony (State *v.* Hattabough, 66 Ind. 223), or an assault and battery which actually results in death (Wright *v.* State, 5 Ind. 527; State *v.* Littlefield, 70 Me. 452, 35 Am. Rep. 335), no longer remains, at common law, to be punished as a mere assault and battery. And on an indictment for rape the accused cannot be convicted of an assault. People *v.* Saunders, 4 Park. Crim. (N. Y.) 196; State *v.* Durham, 72 N. C. 447; Reg. *v.* Catherall, 13 Cox C. C. 109 [*distinguishing* Reg. *v.* Guthrie, 11 Cox C. C. 522, where the indictment charged an offense which by statute was a misdemeanor only]. See HOMICIDE; RAPE.

Both offenses must be committed in same state.— It is only when the misdemeanor and the felony are committed in the same state that the former offense is merged in the latter. Regent *v.* People, 96 Ill. App. 189, where a conspiracy was entered into in Illinois to commit a felony in Kansas.

23. State *v.* Livesay, 30 Mo. App. 633; Johnson *v.* State, 29 N. J. L. 453 (where the indictment charged that the defendants at one time were guilty of conspiracy, and at another time were guilty of subornation of perjury, and it was held that there was no merger); People *v.* Petersen, 60 N. Y. App. Div. 118, 69 N. Y. Suppl. 941 (where it was held that the offense of conspiring falsely to maintain an action was not merged in the crime of subornation of perjury in procuring the verification of a complaint).

24. *Illinois.*— Orr *v.* People, 63 Ill. App. 305.

Indiana.— Hamilton *v.* State, 36 Ind. 280, 10 Am. Rep. 22.

Kentucky.— Com. *v.* Blackburn, 1 Duv. 4.

Maine.— State *v.* Mayberry, 48 Me. 218; State *v.* Murray, 15 Me. 100.

Massachusetts.— Com. *v.* O'Brien, 12 Cush. 84.

Michigan.— People *v.* Bristol, 23 Mich. 118.

Missouri.— Lorton *v.* State, 7 Mo. 55, 37 Am. Dec. 179.

New York.— People *v.* Mather, 4 Wend. 229, 21 Am. Dec. 122.

United States.— Berkowitz *v.* U. S., 93 Fed. 452, 35 C. C. A. 379.

Conspiracy to commit a misdemeanor is not merged in the misdemeanor.

Alabama.— State *v.* Murphy, 6 Ala. 765, 41 Am. Dec. 79.

Connecticut.— State *v.* Setter, 57 Conn. 461, 18 Atl. 782, 14 Am. St. Rep. 121, conspiracy to commit petit larceny.

Maine.— State *v.* Mayberry, 48 Me. 218 (conspiracy to cheat by false pretenses); State *v.* Murray, 15 Me. 100.

Michigan.— People *v.* Richards, 1 Mich. 216, 51 Am. Dec. 75.

New York.— People *v.* Mather, 4 Wend. 229, 21 Am. Dec. 122.

Pennsylvania.— Com. *v.* Delany, 1 Grant 224.

Vermont.— State *v.* Noyes, 25 Vt. 415, conspiracy to impede an officer.

See CONSPIRACY, 8 Cyc. 643.

25. *Alabama.*— Bryant *v.* State, 76 Ala. 33.

Connecticut.— State *v.* Setter, 57 Conn. 461, 18 Atl. 782, 14 Am. St. Rep. 121.

Georgia.— Groves *v.* State, 76 Ga. 808.

Michigan.— People *v.* Arnold, 46 Mich. 268, 9 N. W. 406.

Minnesota.— State *v.* Vadnais, 21 Minn. 383.

Ohio.— Mitchell *v.* State, 42 Ohio St. 383.

England.— Reg. *v.* Button, 11 Q. B. 929, 3 Cox C. C. 229, 12 Jur. 1017, 18 L. J. M. C. 19, 63 E. C. L. 929 (where a conviction for a misdemeanor was sustained, although the evidence proving it proved also that it was part of a felony and that such felony had been completed); Reg. *v.* Bird, 5 Cox C. C. 20.

See INDICTMENTS AND INFORMATIONS.

26. English statute.— By the statute of 1 Vict. c. 85, § 11, it became lawful upon an indictment for felony to convict of a misdemeanor. By that statute it was provided that on a trial for felony, where the crime charged should include an assault against the person, it should be lawful for the jury to acquit of the felony and find a verdict of guilty of assault against the person indicted if the evidence should warrant such finding.

American statutes.— In some states it is provided that "if, upon the trial of any person for a misdemeanor, the facts given in evidence amount in law to a felony, he shall not, by reason thereof, be entitled to an acquittal of such misdemeanor." People *v.* Arnold, 46 Mich. 268, 274, 9 N. W. 406, construing Mich. Comp. Laws, § 7919. It is also provided in effect in some states that on indictment for a felony the defendant may be

6. INFAMOUS CRIMES. An "infamous" crime is one which works infamy in the person who commits it.[27] At common law it was one which involved moral turpitude and which rendered the party convicted thereof incompetent as a witness.[28] The old test, which was the character of the crime rather than the nature of the punishment inflicted,[29] has been adopted to some extent in the United States.[30] The better modern view, however, is that the question is determined by the nature of the punishment, and not by the character of the crime, and that any crime is infamous that is punishable by death or by imprisonment, with or without hard labor, in a state prison.[31]

acquitted of the felony and convicted of a misdemeanor included in the charge.

Arkansas.— Pratt *v.* State, 51 Ark. 167, 10 S. W. 233.

Iowa.— State *v.* Kyne, 86 Iowa 616, 53 N. W. 420.

Massachusetts.— Com. *v.* Dean, 109 Mass. 349; Com. *v.* Walker, 108 Mass. 309.

Virginia.— Glover *v.* Com., 86 Va. 382, 10 S. E. 420.

Wisconsin.— State *v.* Mueller, 85 Wis. 203, 55 N. W. 165.

See INDICTMENTS AND INFORMATIONS.

27. Butler *v.* Wentworth, 84 Me. 25, 24 Atl. 456, 17 L. R. A. 764.

28. King *v.* State, 17 Fla. 183; Butler *v.* Wentworth, 84 Me. 25, 24 Atl. 456, 17 L. R. A. 764; People *v.* Whipple, 9 Cow. (N. Y.) 707.

29. *Massachusetts.*—Com. *v.* Dame, 8 Cush. 384.

New Hampshire.—Little *v.* Gibson, 39 N. H. 505.

New York.— People *v.* Whipple, 9 Cow. 707.

Pennsylvania.— Com. *v.* Shaver, 3 Watts & S. 338.

Vermont.— State *v.* Keyes, 8 Vt. 57, 30 Am. Dec. 450.

England.— Rex *v.* Davis, 5 Mod. 74, and note; Rex *v.* Ford, 2 Salk. 690; Pendock *v.* Mackinder, Willes C. P. 665.

Particular crimes.— At common law there was considerable difficulty in determining precisely what crimes rendered the perpetrator infamous and incompetent to testify. The English judges did not attempt to give an exhaustive list of such crimes but dealt with each case as it arose. See State *v.* Henson, 66 N. J. L. 601, 50 Atl. 468, 616. Persons were incompetent as witnesses who had been convicted of treason, felony, and any offense tending to pervert the administration of justice by falsehood or fraud, and which came within the general scope of *crimen falsi*, such as perjury, subornation of perjury, cheating, etc.

Alabama.— Harrison *v.* State, 55 Ala. 239.

Maine.— Butler *v.* Wentworth, 84 Me. 25, 24 Atl. 456, 17 L. R. A. 764.

New York.— Barker *v.* People, 20 Johns. 457.

Pennsylvania.— Bailey *v.* Bailey, 26 Pa. Co. Ct. 553.

Virginia.— Barbour *v.* Com., 80 Va. 287.

England.— Bushel *v.* Barrett, R. & M. 434, 21 E. C. L. 790. And see Reg. *v.* Webb, 11 Cox C. C. 133; 7 Comyns Dig. 447.

See *infra*, II, A, 7.

30. People *v.* Whipple, 9 Cow. (N. Y.) 707; Schuylkill County *v.* Copley, 67 Pa. St. 386, 5 Am. Rep. 441 (where it was held that a conviction of embezzlement as a public officer did not render the convict incompetent to testify); Wheeler *v.* Wheeler, 2 Pa. Dist. 567 (where an assault with intent to rape was held not to be an infamous crime, so as to furnish ground for a divorce); Bailey *v.* Bailey, 26 Pa. Co. Ct. 553 [*criticizing* Hess *v.* Hess, 8 Pa. Dist. 451, which gave the term a broad construction and held burglary to be included in it]; Nevergold *v.* Nevergold, 20 Pa. Co. Ct. 108 (holding larceny from the person not an infamous crime furnishing ground for divorce); U. S. *v.* Reilley, 20 Fed. 46 (embezzlement under federal statute); U. S. *v.* Wynn, 9 Fed. 886, 3 McCrary 266; U. S. *v.* Yates, 6 Fed. 861 (passing counterfeit money); U. S. *v.* Block 121, 24 Fed. Cas. No. 14,609, 4 Sawy. 211 (fraudulently omitting to schedule certain assets of a bankrupt).

31. Mackin *v.* U. S., 117 U. S. 348, 6 S. Ct. 777, 29 L. ed. 909; *Ex p.* Wilson, 114 U. S. 417, 5 S. Ct. 935, 29 L. ed. 89. These cases define the term "infamous crime" as used in the fifth amendment to the United States constitution, which prohibits prosecution for "a capital or otherwise infamous crime," unless upon a presentment or an indictment of a grand jury. See also the following cases:

Arizona.—Territory *v.* Blomberg, (1886) 11 Pac. 671.

Maine.— Butler *v.* Wentworth, 84 Me. 25, 24 Atl. 456, 17 L. R. A. 764, construing a similar provision of the Maine constitution.

Massachusetts.— Jones *v.* Robbins, 8 Gray 329.

Michigan.— People *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751.

New York.— People *v.* Parr, 4 N. Y. Crim. 545, decided under a statute declaring an infamous crime to be any offense punishable with death or by imprisonment in the state prison.

North Carolina.— Gudger *v.* Penland, 108 N. C. 593, 13 S. E. 168, 23 Am. St. Rep. 73; McKee *v.* Wilson, 87 N. C. 300.

Rhode Island.— State *v.* Nolan, 15 R. I. 529, 10 Atl. 481.

United States.— Parkinson *v.* U. S., 121 U. S. 281, 7 S. Ct. 896, 30 L. ed. 959; *Ex p.* McClusky, 40 Fed. 71, larceny.

See INDICTMENTS AND INFORMATIONS.

Possible punishment is the test.— The decision turns, not upon the punishment actually inflicted, but upon the punishment

7. Crimen Falsi. The term *crimen falsi* in the common law is applied to crimes which disqualify a person as a witness. The term involves the element of falsehood, and includes everything which has a tendency to injuriously affect the administration of justice by the introduction of falsehood and fraud.[32]

B. Power to Define and Punish Crime — 1. Power of State Legislatures. The legislatures of the different states have the inherent power to prohibit and punish any act as a crime, provided they do not violate the restrictions of the state and federal constitutions; and the courts cannot look further into the propriety of a penal statute than to ascertain whether the legislature had the power to enact it.[33]

2. Power of Congress. Unlike the state legislatures the United States congress has no inherent powers, but derives all its powers from the federal constitution.[34] Under the powers conferred by the constitution it may define and

which the court is authorized to impose. Butler *v.* Wentworth, 84 Me. 25, 24 Atl. 456, 17 L. R. A. 764; *In re* Claasen, 140 U. S. 200, 11 S. Ct. 735, 35 L. ed. 409; *Ex p.* Wilson, 114 U. S. 417, 5 S. Ct. 935, 29 L. ed. 89. And see *supra*, II, A, 4, c, note 20.

Hard labor.— The imprisonment may be with or without hard labor. U. S. *v.* De Walt, 128 U. S. 393, 9 S. Ct. 111, 32 L. ed. 485; Mackin *v.* U. S., 117 U. S. 348, 6 S. Ct. 777, 29 L. ed. 909; U. S. *v.* Smith, 40 Fed. 755.

32. Taylor *v.* State, 62 Ala. 164 [*citing* 1 Greenleaf Ev. § 373; 1 Phillips Ev. 17].

What offenses included.— The definition affords no accurate guide to the offenses that are comprehended within the meaning of this term as has been affirmatively decided. But it includes perjury, subornation, suppression by bribery, forgery of instruments, conspiracy to charge a person falsely with the crime of perjury, since all these are crimes immediately affecting the purity of all public justice. *In re* Ville de Varsovie, 2 Dods. 174. And see Webb *v.* State, 29 Ohio St. 351; Rex *v.* Priddle, 2 Leach C. C. 496. See Witnesses.

In the Roman law this term denoted the crime of falsifying, and might be committed either by writing, as by the forgery of a will or other instrument; by words, as by bearing false witness, or by perjury; and by acts, as by counterfeiting or adulterating the public money, dealing with false weights and measures, counterfeiting seals, and other fraudulent and deceitful practices. Black L. Dict. [*citing* Dig. 48, 10; Halifax Civ. L. b. 3, c. 12, notes 56–59].

33. *Georgia.*— Rachels *v.* State, 51 Ga. 374.

Indiana.— Parker *v.* State, 132 Ind. 419, 31 N. E. 1114.

Massachusetts.— Com. *v.* Bearse, 132 Mass. 542, 42 Am. Rep. 450; Com. *v.* Evans, 132 Mass. 11; Com. *v.* Waite, 11 Allen 264, 87 Am. Dec. 711.

Missouri.— State *v.* Sattley, 131 Mo. 464, 33 S. W. 41 (holding that the legislature in defining larceny is not restricted to the acts constituting it at common law); State *v.* Addington, 77 Mo. 110.

New York.— People *v.* Most, 128 N. Y. 108, 27 N. E. 970, 26 Am. St. Rep. 458 (holding that it is competent for the legislature to create new offenses, and to extend common-law offenses so as to include acts not punishable under and not embraced within the common-law definition); Lawton *v.* Steele, 119 N. Y. 226, 23 N. E. 878, 29 N. Y. St. 581, 16 Am. St. Rep. 813, 7 L. R. A. 134 (holding that the legislature has the power to declare places or property used to the detriment of public interests or the injury of the health, morals, or welfare of the community, public nuisances, although not such at common law); People *v.* West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452; Barker *v.* People, 3 Cow. 686, 15 Am. Dec. 322 [*affirming* 20 Johns. 457].

Ohio.—Morgan *v.* Nolte, 37 Ohio St. 23, 25, 41 Am. Rep. 485, where it was said that "the only limitations to the creation of offenses by the legislative power, are the guaranties contained in the bill of rights."

Pennsylvania.— Powell *v.* Com., 114 Pa. St. 265, 7 Atl. 913, 60 Am. Rep. 350 [*affirmed* in 127 U. S. 678, 8 S. Ct. 992, 1257, 32 L. ed. 253].

Rhode Island.— State *v.* Smyth, 14 R. I. 100, 51 Am. Rep. 344.

South Carolina.— State *v.* Stephenson, 2 Bailey 334, 335, where it was said: "The supremacy of the Legislature, and its authority to prescribe a rule of conduct, and inflict a punishment, or impose a penalty for its violation, are universally conceded; and it is upon this principle that courts of justice are bound to give effect to its intention. Where that is plain and palpable, we must follow it implicitly."

United States.— Powell *v.* Pennsylvania, 127 U. S. 678, 8 S. Ct. 992, 1257, 32 L. ed. 253 [*affirming* 114 Pa. St. 265, 7 Atl. 913, 60 Am. Rep. 350].

As to constitutional limitations on the power of the legislatures to define and punish crimes see, generally, Constitutional Law, 8 Cyc. 695.

As to the police power of the legislature see Constitutional Law, 8 Cyc. 863.

34. See U. S. *v.* Arjona, 120 U. S. 479, 7 S. Ct. 628, 30 L. ed. 728; U. S. *v.* Fox, 95 U. S. 670, 24 L. ed. 538; U. S. *v.* Coombs, 12 Pet. (U. S.) 72, 9 L. ed. 1004; U. S. *v.* Hudson, 7 Cranch (U. S.) 32, 3 L. ed. 259. And see United States.

punish crimes in the District of Columbia,[35] the territories,[36] and other places within the jurisdiction of the federal government, and may punish acts relating to the post-office,[37] interstate commerce,[38] the securities and coinage of the United States,[39] federal elections,[40] civil rights of citizens of the United States and of the several states,[41] Indians,[42] and other matters within the powers conferred by the constitution.[43] It may punish piracies and felonies on the high seas and offenses against the law of nations.[44]

3. Power of Territorial Legislatures. The powers of the territorial legislatures are derived from congress. By act of congress their power extends "to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States";[45] and this includes the power to define and punish crimes.[46]

4. Concurrent and Exclusive Jurisdiction — a. State and Federal Courts. The constitutional power of congress to enact legislation to define crimes and provide for their punishment implies the power to enact that such legislation shall be exclusive of the statutes of the states, and if it does so expressly or impliedly the states cannot punish such acts as offenses against the state.[47] Where this is not done, either expressly or by necessary implication, the statute of the state is not superseded by the federal statute, and the same act may be punished as an offense against the United States and also as an offense against the state.[48] These

35. See District of Columbia.
36. See Territories.
37. See Post-Office.
38. See Commerce.
39. See Counterfeiting; Forgery.
40. See Elections.
41. See Civil Rights.
42. See Indians.
43. See, generally, United States.
44. U. S. *v.* Arjona, 120 U. S. 479, 7 S. Ct. 628, 30 L. ed. 728, holding that the United States has the power to punish the counterfeiting, within its jurisdiction, of the notes, bonds, and other securities issued by foreign governments or under their authority. See also International Law.
45. U. S. Rev. Stat. (1878) § 1851.
46. Reynolds *v.* People, 1 Colo. 179; Territory *v.* Yarberry, 2 N. M. 391. And see Territories.
47. *Arkansas.*— State *v.* Kirkpatrick, 32 Ark. 117.
California.— People *v.* Kelly, 38 Cal. 145, 99 Am. Dec. 360.
Connecticut.—State *v.* Tuller, 34 Conn. 280.
Indiana.— State *v.* Adams, 4 Blackf. 146.
Massachusetts.— Com. *v.* Barry, 116 Mass. 1; Com. *v.* Felton, 101 Mass. 204; Com. *v.* Peters, 12 Metc. 387; Com. *v.* Fuller, 8 Metc. 313, 41 Am. Dec. 509.
New Hampshire.— State *v.* Pike, 15 N. H. 83.
New York.— People *v.* Sweetman, 3 Park. Crim. 358.
South Carolina.— State *v.* Pitman, 1 Brev. 32, 2 Am. Dec. 645.
United States.— Fox *v.* Ohio, 5 How. 410, 12 L. ed. 213; *Ex p.* Bridges, 4 Fed. Cas. No. 1,862, 2 Woods 428.
See also *infra*, VI, B, 4; VI, E, 1.
A defense of a charge of crime in a state court that the accused was acting under and by authority of a federal statute when he committed the act which the statute of the state makes a crime excludes the jurisdiction of the state court, as the determination of the lawfulness of each act depends wholly upon the laws of the United States. *In re* Neagle, 135 U. S. 1, 10 S. Ct. 658, 34 L. ed. 55; Tennessee *v.* Davis, 100 U. S. 257, 25 L. ed. 648; *In re* Waite, 81 Fed. 359.
48. *Arkansas.*— State *v.* Kirkpatrick, 32 Ark. 117.
Connecticut.—State *v.* Tuller, 34 Conn. 280.
Illinois.— Eells *v.* People, 5 Ill. 498 [*affirmed* in 14 How. (U. S.) 13, 14 L. ed. 306].
Indiana.— State *v.* Moore, 6 Ind. 436; Chess *v.* State, 1 Blackf. 198.
Massachusetts.— Com. *v.* Barry, 116 Mass. 1; Com. *v.* Tenney, 97 Mass. 50; Com. *v.* Fuller, 8 Metc. 313, 41 Am. Dec. 509.
Michigan.— Harlan *v.* People, 1 Dougl. 207.
Montana.—Territory *v.* Guyott, 9 Mont. 46, 22 Pac. 134.
New Hampshire.— State *v.* Whittemore, 50 N. H. 245, 9 Am. Rep. 196.
Pennsylvania.— Rump *v.* Com., 30 Pa. St. 475; White *v.* Com., 4 Binn. 418.
South Carolina.— State *v.* Tutt, 2 Bailey 44, 21 Am. Dec. 508.
Tennessee.— Sizemore *v.* State, 3 Head 26.
Virginia.— Jett *v.* Com., 18 Gratt. 933.
Wyoming.— *In re* Murphy, 5 Wyo. 297, 40 Pac. 398.
Utah.— State *v.* Norman, 16 Utah 457, 52 Pac. 986.
United States.— Moore *v.* Illinois, 14 How. 13, 14 L. ed. 306; U. S. *v.* Marigold, 9 How. 560, 13 L. ed. 257; Fox *v.* Ohio, 5 How. 410, 12 L. ed. 213.
See also *infra*, VI, B, 4; VI, E, 1.
An indictment by a grand jury of a state charging an offense over which the state and federal courts have concurrent jurisdiction, such as counterfeiting, properly charges the offense to have been committed against the people and sovereignty of the state, and not against the sovereignty of the people of the

principles have been applied to embezzlement and larceny,[49] obtaining money or property under false pretenses,[50] bribery, and other offenses at elections,[51] perjury,[52] counterfeiting and forgery,[53] and other acts.[54] The legislatures of the states cannot legislate upon, nor can state courts assume jurisdiction of the trial and prosecution of, an offense against an act of congress, or of an action to recover a penalty for the violation of a penal law enacted by congress.[55]

United States. Harlan *v.* People, 1 Dougl. (Mich.) 207.

49. Com. *v.* Felton, 101 Mass. 204.

Larceny and embezzlement from the mails are offenses against the United States only, and cannot be punished by indictment in the state courts. Com. *v.* Feely, 1 Va. Cas. 321. See also EMBEZZLEMENT; LARCENY.

Embezzlement or larceny by national bank officers or agents of the money or property of the bank, if punished, as is now the case, by an act of congress, cannot be punished by the states as offenses against the state. State *v.* Tuller, 34 Conn. 280; Com. *v.* Felton, 101 Mass. 204; People *v.* Fonda, 62 Mich. 401, 29 N. W. 26; Com. *v.* Ketner, 92 Pa. St. 372, 37 Am. Rep. 692. *Compare*, however, Com. *v.* Barry, 116 Mass. 1, holding that the fact that a person who has stolen property belonging to a national bank is an officer of the bank and subject to punishment for embezzlement under the act of congress does not relieve him from liability to punishment in a state court for the same act as larceny at common law or under a state statute. See also EMBEZZLEMENT; LARCENY.

Embezzlement of special deposit.— But it has been held that a state may punish embezzlement by an officer of a national bank of a special deposit made by one of its customers. State *v.* Tuller, 34 Conn. 280; Com. *v.* Tenney, 97 Mass. 50.

50. Abbott *v.* People, 75 N. Y. 602, holding that an indictment would lie under a state statute for obtaining goods under false pretenses as to solvency, although they were obtained within three months before the defendant was put into bankruptcy, and although the United States Bankruptcy Act punished such an act. See *infra*, VI, E, 1, i.

51. Mason *v.* State, 55 Ark. 529, 18 S. W. 827, holding that the courts of the state had jurisdiction to punish the fraudulent destruction of ballots cast for electors of president and vice-president of the United States. See also Fitzgerald *v.* Green, 134 U. S. 377, 10 S. Ct. 586, 33 L. ed. 951. And see ELECTIONS.

52. It has been held that a state court has no jurisdiction of a prosecution for perjury in making a false oath before a clerk administering the oath under authority conferred upon him by the Homestead Act of congress (State *v.* Kirkpatrick, 32 Ark. 117); or in swearing falsely before the register of the United States land-office in a proceeding touching the public land (People *v.* Kelly, 38 Cal. 145, 99 Am. Dec. 360; State *v.* Adams, 4 Blackf. (Ind.) 146); or before a commissioner of the United States in a proceeding for violation of an act of congress (*Ex p.* Bridges, 4 Fed. Cas. No. 1,862, 2 Woods 428); or in an examination before a commissioner in bankruptcy, appointed under an act of congress (State *v.* Pike, 15 N. H. 83); or before a notary public or other officer designated by congress to take depositions in case of a contested election of a member of congress (Thomas *v.* Loney, 134 U. S. 372, 10 S. Ct. 584, 33 L. ed. 949). On the other hand it has been held that the state court may punish for perjury in taking a false oath in naturalization proceedings in a state court having jurisdiction of the proceedings under act of congress. State *v.* Whittemore, 50 N. H. 245, 9 Am. Rep. 196; Rump *v.* Com., 30 Pa. St. 475. But see People *v.* Sweetman, 3 Park. Crim. (N. Y.) 358. See *infra*, VI, E, 1. See also PERJURY.

53. A state may punish the counterfeiting within the state of the coin of the United States, uttering or passing counterfeit coin, or having possession thereof with intent to utter or pass the same.

Indiana.— Chess *v.* State, 1 Blackf. 198. And see Snoddy *v.* Howard, 51 Ind. 411, 19 Am. Rep. 738, holding that the state may punish the offense of retaining in possession apparatus made use of in counterfeiting gold or silver coin of the United States current in the state.

Massachusetts.— Com. *v.* Fuller, 8 Metc. 313, 41 Am. Dec. 509.

Michigan.—Harlan *v.* People, 1 Dougl. 207.

Tennessee.— Sizemore *v.* State, 3 Head 26.

United States.— Fox *v.* Ohio, 5 How. 410, 12 L. ed. 213, holding that a state may punish the circulating of counterfeit coin within the state.

See COUNTERFEITING, 11 Cyc. 311.

Forged bank-notes, etc.—A state may punish the passing or attempting to pass a forged note purporting to be a note of one of the national banks. Jett *v.* Com., 18 Gratt. (Va.) 933. And it has been held that a state could punish the counterfeiting of notes, bills, or checks of the old Bank of the United States, or of passing such counterfeit bills or notes, or having possession of the same with intent to pass them. White *v.* Com., 4 Binn. (Pa.) 418; State *v.* Tutt, 2 Bailey (S. C.) 44, 21 Am. Dec. 508; State *v.* Pitman, 1 Brev. (S. C.) 32, 2 Am. Dec. 645; State *v.* Randall, 2 Aik. (Vt.) 89; Hendrick *v.* Com., 5 Leigh (Va.) 707. See also FORGERY.

54. Fugitive slaves.— It has been held by the supreme court of the United States that a state had power to punish the harboring, secreting, or in any way assisting a fugitive slave. Moore *v.* Illinois, 14 How. (U. S.) 13, 14 L. ed. 406 [*affirming* 5 Ill. 498].

55. Mattison *v.* State, 3 Mo. 421; U. S. *v.* Lathrop, 17 Johns. (N. Y.) 4; State *v.* McBride, Rice (S. C.) 400; Com. *v.* Feely, 1 Va. Cas. 321. See *infra*, VI, B, 4.

b. State and Municipalities. Although the authorities are not wholly harmonious, the weight of authority is to the effect that the same act may constitute a crime both against the state and against a municipal corporation, and either may punish its commission without violating any constitutional provision.[56] Whether in any particular case the municipality has concurrent jurisdiction with the state over crimes depends wholly upon the powers conferred upon it in its charter or by general statute; and the power to punish crime concurrently with the state cannot be conferred upon it except in express terms or by clear implication.[57]

c. Territorial and Federal Courts. A territorial legislature may make an act a crime against the territorial government notwithstanding that congress has enacted that such act shall be a crime against the United States.[58]

C. How the Criminal Law Is Prescribed — 1. Prohibition by Law Is Essential. An act that is not prohibited and made punishable by law both at the time of its commission and at the time it is sought to punish therefor cannot be punished as a crime. A prohibition by the common law or by statute is essential.[59] And the prohibition must be by the laws of the state in which it

56. *Connecticut.*—State *v.* Welch, 36 Conn. 215.

Georgia.— Vason *v.* Augusta, 38 Ga. 542.

Illinois.— Seibold *v.* People, 86 Ill. 33; Amboy *v.* Sleeper, 31 Ill. 499; Petersburg *v.* Metzker, 21 Ill. 205.

Indiana.— Williams *v.* Warsaw, 60 Ind. 457.

Iowa.— Bloomfield *v.* Trimble, 54 Iowa 399, 6 N. W. 586, 37 Am. Rep. 212.

Kansas.— Rice *v.* State, 3 Kan. 141.

Kentucky.— March *v.* Com., 12 B. Mon. 25.

Minnesota.— State *v.* Charles, 16 Minn. 474.

Missouri.— St. Louis *v.* Cafferata, 24 Mo. 94; St. Louis *v.* Bentz, 11 Mo. 61; State *v.* Ledford, 3 Mo. 102. But see Jefferson City *v.* Courtmire, 9 Mo. 692.

Nebraska.— Brownsville *v.* Cook, 4 Nebr. 101.

New Jersey.—Howe *v.* Plainfield, 37 N. J. L. 145.

New York.— Brooklyn *v.* Toynbee, 31 Barb. 282.

Oregon.— State *v.* Bergman, 6 Oreg. 341.

See 14 Cent. Dig. tit. "Criminal Law," § 4; and, generally, Municipal Corporations.

Contra.—New Orleans *v.* Miller, 7 La. Ann. 651.

Punishment by both state and municipality see *infra*, VI, E, 2.

57. Reich *v.* State, 53 Ga. 73, 21 Am. Rep. 265; Savannah *v.* Hussey, 21 Ga. 80, 68 Am. Dec. 452; Mt. Pleasant *v.* Breeze, 11 Iowa 399; State *v.* McCoy, 116 N. C. 1059, 21 S. E. 690; State *v.* Langston, 88 N. C. 692; Raleigh *v.* Dougherty, 3 Humphr. (Tenn.) 11, 39 Am. Dec. 149. See Municipal Corporations.

58. Reynolds *v.* People, 1 Colo. 179; Territory *v.* Guyott, 9 Mont. 46, 22 Pac. 134 (holding that a territorial statute punishing the sale of liquor to Indians was valid as an exercise of the police power of the territorial government, although the act which it punished as a crime was also punishable under an existing act of congress, and the punishment prescribed in the territorial enactment exceeded that provided for by the federal statute); Territory *v.* Yarberry, 2 N. M. 391; State *v.* Norman, 16 Utah 457, 52 Pac. 986 (construing a territorial statute in connection with the acts of congress of March 22, 1882, and March 3, 1887, prescribing punishment for adultery in the territories, as a crime against the United States).

59. *Indiana.*— Rust *v.* State, 4 Ind. 528.

Massachusetts.— Com. *v.* Grover, 16 Gray 602; Com. *v.* Marshall, 11 Pick. 350, 22 Am. Dec. 377.

Ohio.— Smith *v.* State, 12 Ohio St. 466, 80 Am. Dec. 355.

Oregon.— State *v.* Mann, 2 Oreg. 238.

England.— Reg. *v.* Cooper, 18 L. J. M. C. 16, 3 New Sess. Cas. 346.

Canada.— Reg. *v.* McLaughlin, 8 N. Brunsw. 159.

The repeal of a law without a saving clause, even after a prosecution has been commenced for its violation, and even after a conviction, but before judgment, prevents further prosecution or punishment.

Maryland.— Keller *v.* State, 12 Md. 322, 71 Am. Dec. 596.

Massachusetts.—Com. *v.* Marshall, 11 Pick. 350, 22 Am. Dec. 377.

Mississippi.— Wheeler *v.* State, 64 Miss. 462, 1 So. 632.

North Carolina.— State *v.* Williams, 97 N. C. 455, 2 S. E. 55.

Pennsylvania.—Com. *v.* Duane, 1 Binn. 601, 2 Am. Dec. 497.

Wisconsin.— State *v.* Ingersoll, 17 Wis. 631.

See Constitutional Law, 8 Cyc. 1035; Statutes.

Reënactment of statute.— A crime committed before a statute took effect may be punished under it where the statute is simply a reënactment of a statute under which the crime was punishable when it was committed. Com. *v.* Bradley, 16 Gray (Mass.) 241.

An act which is not a crime when committed does not become such by any subsequent independent act with which it is not connected. U. S. *v.* Fox, 95 U. S. 670, 24 L. ed. 538.

is sought to punish.[60] The courts will not construe a penal statute so that a case which is apparently within the reason and mischief of it shall be punishable under it, although it is not specifically defined in the statute, merely because it is of the same character, or equally wicked with those which are included in the statute.[61] An act may be prohibited and made punishable either by the common law,[62] or by statute.[63]

2. APPLICATION AND OPERATION OF COMMON LAW — a. In General. The common law of England, as the term is here used, is that portion of the law which is based, not upon legislative enactment, but upon immemorial usage and the general consent of the people.[64] By the common law, all immoral acts tending to injure the community are offenses punishable by the courts.[65]

b. Adoption of Common Law. Crimes which were such at common law in England, aside from the numerous crimes which existed there by statute, are recognized and are punishable in many of the states, subject to the repeal or modification by statute of the common law and to the guaranties of the various state and federal constitutions.[66] In some of the states there are no common-law crimes, and nothing is punished as a crime unless it is declared a crime and made punishable by statute.[67] And there are no common-law crimes against the United States.[68]

c. Abrogation of Common Law. An express statutory repeal of the common law of crimes is rare.[69] But in all of the states the common law has been impliedly repealed to a greater or less extent. A criminal statute embracing the whole subject-matter implies an abrogation, and repeals the common law on that subject;[70]

60. See People *v.* Martin, 38 Misc. (N. Y.) 67, 70, 76 N. Y. Suppl. 953, where it was said: "A crime is essentially local, and is the creature of the law which defines or prohibits it. It is an offense against the sovereignty, and can be taken notice of and punished only by the sovereignty offended. The indictment against the defendants is in the name of The People of the State of New York. They prosecute for a crime committed against their law, not for a crime committed against the law of a foreign State. Their law is entitled 'The Penal Code of the State of New York' (Penal Code, § 1), and an act or omission forbidden by that law is declared to be a crime. Id. § 3. Therefore, if a crime has been committed against the People of the State of New York, it must have been an act or omission forbidden by their law."

61. U. S. *v.* Wiltberger, 5 Wheat. (U. S.) 76, 5 L. ed. 37; Pentlarge *v.* Kirby, 19 Fed. 501. See STATUTES.

62. See *infra*, II, B, 2.

63. See *infra*, II, B, 3.

64. See COMMON LAW, 8 Cyc. 367.

65. State *v.* Doud, 7 Conn. 384; State *v.* Williams, 7 Rob. (La.) 252, 273; State *v.* Rose, 32 Mo. 560; State *v.* Appling, 25 Mo. 315, 69 Am. Dec. 469; Reg. *v.* Quail, 4 F. & F. 1076.

66. *Alabama.*— Pierson *v.* State, 12 Ala. 149.

Illinois.— Smith *v.* People, 25 Ill. 17, 76 Am. Dec. 780.

Iowa.— Estes *v.* Carter, 10 Iowa 400; State *v.* Twogood, 7 Iowa 252.

Louisiana.— State *v.* Smith, 30 La. Ann. 846; State *v.* Davis, 22 La. Ann. 77. And see State *v.* McCoy, 8 Rob. 545, 41 Am. Dec. 301.

Minnesota.— State *v.* Pulle, 12 Minn. 164.

Montana.— Territory *v.* Ye Wan, 2 Mont. 478.

New York.— People *v.* Randolph, 2 Park. Crim. 174.

Ohio.— State *v.* Lafferty, Tapp. 113.

Texas.—State *v.* Odum, 11 Tex. 12; Grinder *v.* State, 2 Tex. 338.

See 14 Cent. Dig. tit. "Criminal Law," § 8. And see, generally, COMMON LAW, 8 Cyc. 383.

67. *Indiana.*— Jones *v.* State, 59 Ind. 229; Beal *v.* State, 15 Ind. 378; Hackney *v.* State, 8 Ind. 494; Cook *v.* State, 26 Ind. App. 278, 59 N. E. 489; State *v.* Sullivan County Agricultural Soc., 14 Ind. App. 369, 42 N. E. 963.

Iowa.— Estes *v.* Carter, 10 Iowa 400.

Louisiana.— State *v.* Williams, 7 Rob. 252.

Nebraska.— State *v.* De Wolfe, (1903) 93 N. W. 746.

Ohio.— Allen *v.* State, 10 Ohio St. 287; State *v.* Springer, 4 Ohio S. & C. Pl. Dec. 169.

See 14 Cent. Dig. tit. "Criminal Law," § 8; and COMMON LAW, 8 Cyc. 384.

68. U. S. *v.* Eaton, 144 U. S. 677, 12 S. Ct. 764, 36 L. ed. 591; Manchester *v.* Massachusetts, 139 U. S. 240, 11 S. Ct. 559, 35 L. ed. 159; U. S. *v.* Britton, 108 U. S. 199, 2 S. Ct. 531, 27 L. ed. 698; U. S. *v.* Hudson, 7 Cranch (U. S.) 32, 3 L. ed. 259; Wilkins *v.* U. S., 96 Fed. 837, 37 C. C. A. 588. See COMMON LAW, 8 Cyc. 385.

69. If the statute provides that no person shall be punished for offenses except those defined by statute a common-law offense is not indictable. Albertson *v.* State, 5 Tex. App. 89.

70. *Massachusetts.*— Jennings *v.* Com., 17 Pick. 80; Com. *v.* Cooley, 10 Pick. 37.

Minnesota.— State *v.* Pulle, 12 Minn. 164.

Missouri.— State *v.* Boogher, 71 Mo. 631.

and if the provisions of a criminal statute are so clearly repugnant to the rules of the common law as not to be reconcilable with them the common law is repealed by implication.[71] But a statute does not repeal the common law by implication, where they are not inconsistent and both can stand.[72]

d. Effect in Construction of Statutes. Where the legislature by statute adopts or creates an offense which was a crime at common law, it is proper to resort to the common law in order to ascertain the true meaning of the statute.[73] A statutory definition, when given, is to be followed, but where the statute prescribes a penalty without defining the offense the common-law definition of the crime is to be adopted.[74]

e. Reference to Common Law as to Procedure. Where a statute creating a crime does not prescribe a mode of proceeding to punish it, an indictment or other common-law remedy is proper;[75] and, subject to statutory and constitutional provisions, the whole proceeding must be conducted according to the course of the common law.[76]

3. Statutory Provisions — a. Creation and Definition of Crime in General. In the absence of provision to the contrary, a statute may punish an offense by giving it a name known to the common law, without further defining it, and the common-law definition will be applied.[77] In creating an offense which was not a crime at

Pennsylvania.— Com. *v.* McGowan, 2 Pars. Eq. Cas. 341.

United States.—U. S. *v.* Hammond, 26 Fed. Cas. No. 15,293, 1 Cranch C. C. 15.

See 14 Cent. Dig. tit. "Criminal Law," § 9; and Common Law, 8 Cyc. 376.

71. State *v.* Pulle, 12 Minn. 164. See Common Law, 8 Cyc. 376.

72. People *v.* Crowley, 23 Hun (N. Y.) 412 (holding that a statute prohibiting the disturbance of religious meetings did not take away the common-law remedy of indictment for unlawfully disturbing a religious meeting, but that the statutory remedy was merely cumulative); U. S. *v.* Hammond, 26 Fed. Cas. No. 15,293, 1 Cranch C. C. 15 (holding that the fact that the punishment of a common-law crime has been changed by a statute does not affect the jurisdiction to punish it at common law, where the statute contains no negative words by which the common-law punishment is excluded); Rex *v.* Carlile, 3 B. & Ald. 161, 5 E. C. L. 101, 1 Chit. 451, 18 E. C. L. 248 [*following* Rex *v.* Robinson, 2 Burr. 799], holding that where a statute creates a new offense by making unlawful anything which was lawful, and appoints a specific remedy against such new offense by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued, but where the offense was antecedently punishable by a common-law proceeding, and a statute prescribes a summary proceeding, either may be pursued, and the prosecutor may proceed either at common law or under the statute. See also Common Law, 8 Cyc. 376.

A municipal ordinance rendering one liable to a penalty for an act which is indictable at common law does not repeal the common law, not only because the two remedies are consistent and may be deemed cumulative, but also because the common law cannot be repealed by a municipal ordinance. State *v.* Crummey, 17 Minn. 72.

73. *Indiana.*— State *v.* Berdetta, 73 Ind. 185, 38 Am. Rep. 117; State *v.* Bertheol, 6 Blackf. 474, 39 Am. Dec. 442.

Kentucky.— Conner *v.* Com., 13 Bush 714.

Louisiana.— State *v.* Hayes, 105 La. 352, 29 So. 937; State *v.* Davis, 22 La. Ann. 77.

Texas.— Prindle *v.* State, 31 Tex. Crim. 551, 21 S. W. 360, 31 Am. Rep. 833; *Ex p.* Bergeu, 14 Tex. App. 52.

United States.— *In re* Greene, 52 Fed. 104.

See Common Law, 8 Cyc. 383, 384; and *infra*, II, C, 3, a.

74. Benson *v.* State, 5 Minn. 19; State *v.* Sattley, 131 Mo. 464, 33 S. W. 41; State *v.* De Wolfe, (Nebr. 1903) 93 N. W. 746. See Common Law, 8 Cyc. 384; and *infra*, II, C, 3, a.

75. Com. *v.* Chapman, 13 Metc. (Mass.) 68; Colburn *v.* Swett, 1 Metc. (Mass.) 232; State *v.* Parker, 91 N. C. 650; Com. *v.* Cane, 2 Pars. Eq. Cas. (Pa.) 265; U. S. *v.* Malebran, 26 Fed. Cas. No. 15,711, Brunn. Col. Cas. 426. See Common Law, 8 Cyc. 385.

76. Com. *v.* Cane, 2 Pars. Eq. Cas. (Pa.) 265.

77. *Indiana.*— Ledgerwood *v.* State, 134 Ind. 81, 33 N. E. 631; State *v.* Berdetta, 73 Ind. 185, 38 Am. Rep. 117; Ardery *v.* State, 56 Ind. 328; Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21; Cook *v.* State, 26 Ind. App. 278, 59 N. E. 489.

Iowa.— State *v.* Twogood, 7 Iowa 252.

Louisiana.— State *v.* Hayes, 105 La. 352, 29 So. 937; State *v.* Hagan, 45 La. Ann. 839, 12 So. 929.

Minnesota.—Benson *v.* State, 5 Minn. 19.

Nebraska.— State *v.* De Wolfe, (1903) 93 N. W. 746 (holding that a statute declaring all common nuisances to be criminal is to be construed as prohibiting every act which was by the common law indictable as a nuisance); Smith *v.* State, 58 Nebr. 531, 78 N. W. 1059 (where it was said that the term "assault" has an exact and well-known general import).

common law, a statute must of course be sufficiently certain to show what the legislature intended to prohibit and punish, otherwise it will be void for uncertainty.[78] But a penal statute is sufficiently certain, although it may use general terms, if the offense is so defined as to convey to a person of ordinary intelligence an adequate description of the evil intended to be prohibited.[79] It is sufficient if this intention is expressed in ordinary language without technical accuracy.[80] A statute need not use the word "unlawful" or "unlawfully" in defining an offense which it declares shall be a misdemeanor, as this is equivalent to declaring the act unlawful.[81] The providing by statute of a penalty of fine and imprisonment for the perpetration of an act is in itself sufficient, without other words, to render such an act unlawful.[82]

b. Necessity to Prescribe Penalty. It has been held in some of the cases that where an act is a crime solely by statute, and no penalty is prescribed in the statute, an indictment will be quashed, or judgment arrested.[83] Other courts

Ohio.— Baker *v.* State, 12 Ohio St. 214.

Texas.— Prindle *v.* State, 31 Tex. Crim. 551, 21 S. W. 360, 37 Am. St. Rep. 833; Cross *v.* State, 17 Tex. App. 476; *Ex p.* Bergen, 14 Tex. App. 52; Robinson *v.* State, 11 Tex. App. 309; Smith *v.* State, 7 Tex. App. 286. It was otherwise under a former statute which required all crimes to be expressly defined by statute. Frazier *v.* State, 39 Tex. 390; Fennell *v.* State, 32 Tex. 378; State *v.* Foster, 31 Tex. 578; Wolff *v.* State, 6 Tex. App. 195.

Vermont.— State *v.* Cawley, 67 Vt. 322, 31 Atl. 840.

Virginia.— Houston *v.* Com., 87 Va. 257, 12 S. E. 385.

United States.— U. S. *v.* Palmer, 3 Wheat. 610, 4 L. ed. 471; *In re* Greene, 52 Fed. 104; U. S. *v.* Jones, 26 Fed. Cas. No. 15,494, 3 Wash. 209.

See also *supra*, II, C, 2, d.

78. State *v.* Mann, 2 Oreg. 238, 241, where it was said: "It is a well settled rule of law that no one can be punished for doing an act, unless it clearly appears that the act sought to be punished comes clearly within both the spirit and letter of the law prohibiting it. The act constituting the offense should be clearly and specially described in the statute, and with sufficient certainty, at least, to enable the court to determine, from the words used in the statute, whether the act charged in the indictment comes within the prohibition of the law." See also Cook *v.* State, 26 Ind. App. 278, 59 N. E. 489; Augustine *v.* State, 41 Tex. Crim. 59, 52 S. W. 77 (holding void a statute purporting to prescribe a punishment for "murder by mob violence"); State *v.* Stuth, 11 Wash. 423, 39 Pac. 665; Foster *v.* Territory, 1 Wash. 411, 25 Pac. 459.

Definition may be gathered from several statutes.— It is no objection that a statute denouncing an act as a crime and providing a punishment therefor refers to another statute for a fuller definition and explanation of the act. State *v.* De Hart, 109 La. 570, 33 So. 605 (construing La. Rev. Civ. Code, art. 94, in connection with the act of 1884, No. 78); State *v.* Guiton, 51 La. Ann. 155, 24 So. 784.

Implied prohibition.— When, by a declaratory provision, the legislature enacts that a thing may be done which before that time was unlawful, and adds a proviso that nothing therein contained shall be so construed as to permit some matter embraced in the general provision to be done, this is an implied prohibition of such act, although before that time it was lawful. State *v.* Eskridge, 1 Swan (Tenn.) 413.

79. *California.*— People *v.* Carroll, 80 Cal. 153, 22 Pac. 129.

Indiana.— Hedderich *v.* State, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768.

Missouri.— Lowry *v.* State, 1 Mo. 722.

New York.— People *v.* Coon, 67 Hun 523, 22 N. Y. Suppl. 865.

Texas.— Evans *v.* State, (Crim. App. 1893) 22 S. W. 18.

Washington.—State *v.* Stuth, 11 Wash. 423, 39 Pac. 665; Foster *v.* Territory, 1 Wash. 411, 25 Pac. 459.

United States.— U. S. *v.* Speeden, 27 Fed. Cas. No. 16,366, 1 Cranch C. C. 535.

See STATUTES.

80. Hedderich *v.* State, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768.

81. State *v.* Mulhisen, 69 Ind. 145.

"Wilful" in title but not in body of act.— A statute cannot be construed independently of its title, and if the word "wilful" is used in the title the statute is not unconstitutional because the word does not appear in the body thereof. State *v.* Keasley, 50 La. Ann. 761, 23 So. 900.

82. Hedderich *v.* State, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768. See also People *v.* Brown, 16 Wend. (N. Y.) 561.

Not necessary to declare the act a crime.— Where a statute makes an act unlawful, or imposes a punishment for its commission, such act becomes a crime, although the statute does not declare it a crime or fix its grade. In the former case it is a misdemeanor, in the latter a felony or a misdemeanor according to the nature of the punishment prescribed. State *v.* Pierce, 123 N. C. 745, 31 S. E. 847.

83. Curry *v.* District of Columbia, 14 App. Cas. (D. C.) 423; Cribb *v.* State, 9 Fla. 409; Gibson *v.* State, 38 Ga. 571; Rosenbaum *v.* State, 4 Ind. 599.

Statutes containing several sections.— It is not necessary that each section of a statute

have held that where a statute prohibits any matter of public grievance or commands a matter of public convenience, although no penalty is prescribed for disobeying its prohibitions or commands, an indictment will be sustained and the offense punished by a fine.[84]

c. Gradation of Penalties. The gradation of penalties for offenses differing in their circumstances and surroundings is a matter wholly within the power and discretion of the legislature, which discretion, exercised within constitutional limits, is not subject to review by the courts.[85]

d. Repeal of Statutes — (i) *What Constitutes.* A statute may be repealed either expressly or by necessary implication. A statute is repealed by implication if a later statute is so repugnant to the earlier one that the two cannot stand together,[86] or if the whole subject of the earlier statute is covered by the later one having the same object, and which was clearly intended to prescribe the only rules applicable to the subject.[87] A repeal by implication, however, is not favored, and if by any reasonable construction the two can stand together in full force, or if the latter is merely affirmative or cumulative, or auxiliary and

shall contain or disclose a penalty for its infraction, but each section may refer to the closing section of the act defining the crime, and the latter mode is applicable to all the antecedent sections. U. S. *v.* Crosby, 25 Fed. Cas. No. 14,893, 1 Hughes 448.

Penalty prescribed by other sections of same code.— A criminal statute is not void for uncertainty which prescribes as a punishment for the doing of a certain act the same punishment that is prescribed for doing another named act, when the same code defines the latter act and prescribes its punishment. Davis *v.* State, 51 Nebr. 301, 70 N. W. 984, construing Crim. Code, § 93, which provides that if one shall cause the death of another by displacing the fixtures of a railway he shall be guilty of murder either in the first or second degree, or of manslaughter.

84. State *v.* Fletcher, 5 N. H. 257. See also Keller *v.* State, 11 Md. 525, 69 Am. Dec. 226; People *v.* Shea, 3 Park. Crim. (N. Y.) 562; U. S. *v.* O'Connor, 31 Fed. 449; 2 Hawkins P. C. c. 25, § 4; Russell Crimes 49. Under N. Y. Pen. Code, § 154, declaring every wilful omission to perform a duty enjoined on any public officer or on any person holding a public trust or employment punishable as a misdemeanor, where no special provision is made for punishment, a railroad company which is a common carrier is indictable for neglecting to obey an order of a court directing that it perform an act required by statute, although the statute prescribes no penalty for such neglect. People *v.* Long Island R. Co., 134 N. Y. 506, 31 N. E. 873 [*affirming* 58 Hun 412, 12 N. Y. Suppl. 41].

85. State *v.* Hogreiver, 152 Ind. 652, 53 N. E. 921, 45 L. R. A. 504.

86. *Alabama.*— Henback *v.* State, 53 Ala. 523, 25 Am. Rep. 650.

Arkansas.— Chamberlain *v.* State, 50 Ark. 132, 65 S. W. 524.

California.— People *v.* Tisdale, 57 Cal. 104.

Illinois.— Kepley *v.* People, 123 Ill. 367; Sullivan *v.* People, 15 Ill. 233.

Indiana.— Johns *v.* State, 78 Ind. 332, 41 Am. Rep. 577; Huber *v.* State, 25 Ind. 175; Wall *v.* State, 23 Ind. 150.

Iowa.— State *v.* Smith, 7 Iowa 244.

Kentucky.— Waddell *v.* Com., 84 Ky. 276, 1 S. W. 480, 8 Ky. L. Rep. 249.

Missouri.— State *v.* Green, 87 Mo. 583; State *v.* Draper, 47 Mo. 29.

Nebraska.— State *v.* Moore, 48 Nebr. 870, 67 N. W. 876.

New Jersey.— State *v.* Camden, 50 N. J. L. 87, 11 Atl. 137.

New York.— Mark *v.* State, 97 N. Y. 572; People *v.* Bull, 46 N. Y. 57, 7 Am. Rep. 302.

Ohio.— Robbins *v.* State, 8 Ohio St. 131.

Tennessee.— Roberts *v.* State, 2 Overt. 423.

United States.— Pentlarge *v.* Kirby, 19 Fed. 501.

See 14 Cent. Dig. tit. "Criminal Law," § 16; and, generally, STATUTES.

If one section of a statute fixes the penalties for the offenses therein created by providing that they shall be the same as those "prescribed in the preceding section," the latter is, as to the penalties prescribed, a part of the former, and to that extent remains in force notwithstanding an express repeal. U. S. *v.* Lackey, 99 Fed. 952, construing U. S. Rev. Stat. §§ 5506, 5507 [U. S. Comp. Stat. (1901) p. 3712], the former of which was repealed by an act of 1894.

87. *Arkansas.*— Wood *v.* State, 47 Ark. 488, 1 S. W. 709.

Kansas.— State *v.* Studt, 31 Kan. 245, 1 Pac. 635.

Massachusetts.— Com. *v.* McDonough, 13 Allen 581. See Com. *v.* Cooley, 10 Pick. 37.

New York.— People *v.* Jachne, 103 N. Y. 182, 8 N. E. 374; People *v.* Fallon, 27 Misc. 16, 57 N. Y. Suppl. 931.

Texas.— Rogers *v.* Watrous, 8 Tex. 62, 58 Am. Dec. 100.

United States.— U. S. *v.* Ranlett, 172 U. S. 133, 19 S. Ct. 114, 43 L. ed. 393; U. S. *v.* Claflin, 97 U. S. 546, 20 L. ed. 1082; U. S. *v.* Tynen, 11 Wall. 88, 20 L. ed. 153; Kent *v.* U. S., 73 Fed. 680, 19 C. C. A. 642.

See, generally, STATUTES.

not inconsistent, there is no repeal.[88] And, notwithstanding inconsistency, there is no repeal, if it clearly appears that the legislature did not intend to repeal.[89] The fundamental test in all cases is the intention of the legislature.[90]

(II) *Effect of Repeal* — (A) *In General.* If a penal statute is repealed without a saving clause, there can be no prosecution or punishment for a violation of it before the repeal.[91] If it is modified as to the penalty no judgment can be rendered exceeding the penalty left in force,[92] unless there is a statutory provision to the contrary.[93]

(B) *Effect on Pending Prosecution.* Even when an indictment has been found and a prosecution is pending under a statute at the time of its repeal, without a saving clause, there can be no conviction under the statute after the repeal.[94]

88. *Alabama.*— Iverson *v.* State, 52 Ala. 170.

Colorado.— Köllenberger *v.* People, 9 Colo. 233, 11 Pac. 101.

Illinois.— Mullen *v.* People, 31 Ill. 444.

Indiana.— State *v.* Cooper, 114 Ind. 12, 16 N. E. 518; State *v.* Smith, 59 Ind. 179.

Kentucky.— Com. *v.* Mason, 82 Ky. 256. And see Waddell *v.* Com., 84 Ky. 276, 1 S. W. 480. 8 Ky. L. Rep. 249.

Michigan.— People *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751.

Nebraska.— State *v.* Babcock, 21 Nebr. 599, 33 N. W. 247; State *v.* Wish, 15 Nebr. 448, 19 N. W. 686.

North Carolina.— State *v.* Edwards, 113 N. C. 653, 18 S. E. 387; State *v.* Massey, 103 N. C. 356, 9 S. E. 632, 4 L. R. A. 308; State *v.* Custer, 65 N. C. 339.

Pennsylvania.— Com. *v.* McGowan, 2 Pars. Eq. Cas. 341.

Rhode Island.— State *v.* Wilbor, 1 R. I. 199, 36 Am. Dec. 245.

Tennessee.— Bennett *v.* State, 2 Yerg. 472.

United States.— Babcock *v.* U. S., 34 Fed. 873.

England.— Reg. *v.* Dicken, 14 Cox C. C. 8.

See, generally, STATUTES.

Change as to penalty.— An amendatory statute, providing a new method of distributing the penalty and declaring an increased penalty for a second conviction, affects, not the former statute, but only the form of the judgment. State *v.* Wilbor, 1 R. I. 199, 36 Am. Dec. 245.

Reënactment.— Where a statute reënacts a former statute in the very words of the latter, the only difference being as to the punishment prescribed, there is no repeal. State *v.* Wish, 15 Nebr. 448, 19 N. W. 686.

89. Bennett *v.* State, 2 Yerg. (Tenn.) 472 [*citing* 6 Bacon Abr. 385]; Cain *v.* State, 20 Tex. 355; State *v.* Caldwell, 9 Wash. 336, 37 Pac. 669.

90. *Alabama.*— Iverson *v.* State, 52 Ala. 170.

Missouri.— State *v.* Severance, 55 Mo. 378.

Tennessee.— Bennett *v.* State, 2 Yerg. 472.

Texas.— Cain *v.* State, 20 Tex. 355.

United States.—Pentlarge *v.* Kirby, 19 Fed. 501.

See, generally, STATUTES.

91. *Alabama.*— Jordan *v.* State, 15 Ala. 746.

Kentucky.— Com. *v.* Jackson, 2 B. Mon. 402.

Maryland.—Keller *v.* State, 12 Md. 322, 71 Am. Dec. 596.

Massachusetts.— Com. *v.* McDonough, 13 Allen 581; Com. *v.* Marshall, 11 Pick. 350, 22 Am. Dec. 377.

Mississippi.—Teague *v.* State, 39 Miss. 516.

North Carolina.— State *v.* Long, 78 N. C. 571.

Pennsylvania.— Com. *v.* Duane, 1 Binn. 601, 2 Am. Dec. 497; Com. *v.* Dolan, 4 Pa. Co. Ct. 287.

South Carolina.—State *v.* Lewis, (1899) 33 S. E. 351; State *v.* Mansel, 52 S. C. 468, 30 S. E. 481.

Tennessee.— Roberts *v.* State, 2 Overt. 423. See also Wharton *v.* State, 5 Coldw. 1, 94 Am. Dec. 214; Bennett *v.* State, 2 Yerg. 472.

Texas.— Greer *v.* State, 22 Tex. 588; Halfin *v.* State, 5 Tex. App. 212.

Virginia.— Attoo *v.* Com., 2 Va. Cas. 382.

United States.— Anonymous, 1 Fed. Cas. No. 475, 1 Wash. 84.

England.— Rex *v.* McKenzie, R. & R. 319; 1 Hale P. C. 291.

See 14 Cent. Dig. tit. "Criminal Law," § 17 *et seq.*

92. Com. *v.* Jackson, 2 B. Mon. (Ky.) 402.

Statute making different degrees of offense.— Where at the time of indictment for an offense (murder or manslaughter for example) the statute makes no different degrees of the crime, but a statute in force at the time of the trial does so, the trial and judgment are properly had under the latter statute. Keene *v.* State, 3 Pinn. (Wis.) 99, 3 Chandl. (Wis.) 109.

93. Myers *v.* State, 8 Tex. App. 321; Simms *v.* State, 8 Tex. App. 230; Walker *v.* State, 7 Tex. App. 245, 32 Am. Rep. 595. See *infra*, II, C, 3, d, (II), (D).

94. *Alabama.*— Carlisle *v.* State, 42 Ala. 523; Griffin *v.* State, 39 Ala. 541.

Arkansas.— Mayers *v.* State, 7 Ark. 68.

California.— People *v.* Tisdale, 57 Cal. 104.

Illinois.— Day *v.* Clinton, 6 Ill. App. 476.

Indiana.—Whitehurst *v.* State, 43 Ind. 473; Howard *v.* State, 5 Ind. 183; State *v.* Loyd, 2 Ind. 659; Taylor *v.* State, 7 Blackf. 93.

Kentucky.— Com. *v.* Hoke, 14 Bush (Ky.) 668; Com. *v.* Welch, 2 Dana (Ky.) 330; Pusey *v.* Com., 8 Ky. L. Rep. 47.

Maryland.— Annapolis *v.* State, 30 Md.

(c) *Effect After Conviction or Pending Appeal.* Even when the statute is repealed after the accused has been convicted judgment must be arrested.[95] And if an appeal from a conviction is pending when the statute is repealed, the judgment of conviction must be set aside and the indictment quashed,[96] even though argument has been heard and the appeal dismissed,[97] where the repeal takes place pending the proceedings.[98] The correctness of a charge to the jury depends upon the law in force when it is given, although at the time of the hearing on appeal the law has been changed.[99]

(d) *Saving Clause.* The rule that the repeal of a penal statute bars prose-

112; Keller *v.* State, 12 Md. 322, 71 Am. Dec. 596.

Massachusetts.— Com. *v.* Marshall, 11 Pick. 350, 22 Am. Dec. 377.

Mississippi.— Josephine *v.* State, 39 Miss. 613; Teague *v.* State, 39 Miss. 516.

Missouri.— Kansas City *v.* Clark, 68 Mo. 588.

New York.— Hartung *v.* People, 22 N. Y. 95.

North Carolina.— State *v.* Long, 78 N. C. 571.

Ohio.— Calkins *v.* State, 14 Ohio St. 222; Earhart *v.* Lebanon, 5 Ohio Cir. Ct. 578.

Pennsylvania.— Genkinger *v.* Com., 32 Pa. St. 99; Com. *v.* Duane, 1 Binn. 601, 2 Am. Dec. 497; Com. *v.* Dolan, 4 Pa. Co. Ct. 287.

Rhode Island.— State *v.* Fletcher, 1 R. I. 193.

South Carolina.— State *v.* Lewis, (1899) 33 S. E. 351; State *v.* Mansel, 52 S. C. 468, 30 S. E. 481.

Texas.— Halfin *v.* State, 5 Tex. App. 212.

Virginia.— Attoo *v.* Com., 2 Va. Cas. 382.

Wisconsin.— State *v.* Ingersoll, 17 Wis. 631.

United States.— U. S. *v.* Passmore, 4 Dall. 372, 1 L. ed. 871; Anonymous, 1 Fed. Cas. No. 475, 1 Wash. 84; U. S. *v.* Finlay, 25 Fed. Cas. No. 15,099, 1 Abb. 364.

England.— Reg. *v.* Denton, 18 Q. B. 761, Dears. C. C. 3, 17 Jur. 453, 21 L. J. M. C. 207, 83 E. C. L. 761; Reg. *v.* Mawgan, 8 A. & E. 496, 7 L. J. M. C. 98, 3 N. & P. 502, 35 E. C. L. 699; Reg. *v.* Swan, 4 Cox C. C. 108; Rex *v.* McKenzie, R. & R. 319; Miller's Case, 1 W. Bl. 451, 3 Wils. Ch. 427; 1 Hale P. C. 291; 1 Hawkins P. C. c. 40, § 10.

See 14 Cent. Dig. tit. "Criminal Law," § 17.

Failure of defendant to except at the trial will not render valid a conviction for a crime after the statute creating it has been repealed. Lunning *v.* State, 9 Ind. 309.

Even on a plea of guilty there can be no judgment after repeal of the law. Whitehurst *v.* State, 43 Ind. 473.

Repeal of penal statute after sentence but before its execution.— When the prisoner in a criminal case, having been sentenced to death, is not executed on the day specified in the sentence, and is brought before the court at a subsequent term to be resentenced, as provided by statute, the repeal of the law under which he was convicted and sentenced, since the original sentence was pronounced, is a sufficient legal reason against the execution of the sentence, and requires that he should be discharged. Aaron *v.* State, 40 Ala. 307.

95. *Kentucky.*—Com. *v.* Jackson, 2 B. Mon. 402.

Massachusetts.— Com. *v.* Kimball, 21 Pick. 373; Com. *v.* Marshall, 11 Pick. 350, 22 Am. Dec. 377.

New York.— Hartung *v.* People, 22 N. Y. 95.

North Carolina.— State *v.* Long, 78 N. C. 571.

Pennsylvania.—Com. *v.* Duane, 1 Binn. 601, 2 Am. Dec. 497.

But see State *v.* Fletcher, 1 R. I. 193.

See 14 Cent. Dig. tit. "Criminal Law," § 18.

96. *Kentucky.*— Speckert *v.* Louisville, 78 Ky. 287.

Louisiana.—State *v.* Henderson, 13 La. Ann. 489; State *v.* Johnson, 12 La. 547. *Compare* State *v.* Brewer, 22 La. Ann. 273.

Maryland.— Smith *v.* State, 45 Md. 49; Keller *v.* State, 12 Md. 322, 71 Am. Dec. 596.

Massachusetts.— Com. *v.* Kimball, 21 Pick. 373; Com. *v.* Marshall, 11 Pick. 350, 22 Am. Dec. 377.

New York.— Hartung *v.* People, 22 N. Y. 95.

Pennsylvania.—Com. *v.* Duane, 1 Binn. 601, 2 Am. Dec. 497.

Texas.— Wall *v.* State, 18 Tex. 682, 70 Am. Dec. 302; Fitze *v.* State, 13 Tex. App. 372; Tuton *v.* State, 4 Tex. App. 472; Hubbard *v.* State, 2 Tex. App. 506; Sheppard *v.* State, 1 Tex. App. 522, 28 Am. Rep. 422.

Wyoming.— Mahoney *v.* State, 5 Wyo. 520, 42 Pac. 13, 63 Am. St. Rep. 64.

See 14 Cent. Dig. tit. "Criminal Law," § 18.

Repeal after judgment and affirmance.— Ordinarily the repeal of a statute after the judgment of an appellate court affirming a conviction will not arrest the execution of the sentence. People *v.* Hobson, 48 Mich. 27, 11 N. W. 771; State *v.* Addington, 2 Bailey (S. C.) 516, 23 Am. Dec. 150.

97. Keller *v.* State, 12 Md. 322, 71 Am. Dec. 596.

Repeal after reversal.— Where at the time of a reversal on appeal from a conviction the law under which the conviction was had has been repealed without a saving clause, the defendant cannot be again tried. Mullinix *v.* State, 43 Ind. 511.

98. State *v.* Henderson, 13 La. Ann. 489; Wall *v.* State, 18 Tex. 682, 70 Am. Dec. 302.

99. Jones *v.* State, 20 Tex. App. 665, where at the time of a charge in a prosecution for

cution or further prosecution for violations of the statute before the repeal is based on a presumption that the repeal was intended as a legislative pardon for past acts,[1] and it does not apply where there is a saving clause in the repealing act, or where there is a general statute providing that the repeal shall not affect prosecutions for offenses committed while the statute was in force.[2] A clause that nothing contained in a statute shall affect "any penalty or forfeiture already incurred under the provisions of any law in force prior to the passage of this act" saves from the operation of the statute any penalty incurred before it took effect, although after it was approved by the governor.[3]

(E) *Repeal of Repealing Statutes.* If a repealing statute is itself repealed, the effect is to revive the preëxisting statute,[4] unless there is a provision to the contrary in the statute or in a general law,[5] or something else in the statute to

assault with intent to commit murder the offense was a felony, and at the time of the hearing on appeal it had been made a misdemeanor.

1. State *v.* Brewer, 22 La. Ann. 273.

2. *Arkansas.*— McCuen *v.* State, 19 Ark. 634.

California.— People *v.* Gill, 7 Cal. 356.

Florida.— Raines *v.* State, 42 Fla. 141, 28 So. 57.

Georgia.— Reynolds *v.* State, 3 Ga. 53.

Indiana.—McCalment *v.* State, 77 Ind. 250; Sanders *v.* State, 77 Ind. 227.

Iowa.— State *v.* Schaffer, 21 Iowa 486.

Kansas.— State *v.* Crawford, 11 Kan. 32; State *v.* Boyle, 10 Kan. 113.

Kentucky.— Com. *v.* Duff, 87 Ky. 586, 9 S. W. 816, 10 Ky. L. Rep. 617; Acree *v.* Com., 13 Bush 353.

Massachusetts.—Com. *v.* Bennett, 108 Mass. 30, 11 Am. Rep. 304.

Mississippi.—Teague *v.* State, 39 Miss. 516.

Missouri.— State *v.* Proctor, 90 Mo. 334, 2 S. W. 472; State *v.* Ross, 49 Mo. 416; State *v.* Mathews, 14 Mo. 133.

Nebraska.— Marion *v.* State, 16 Nebr. 349, 20 N. W. 289.

New York.— Mason *v.* People, 3 Code Rep. 142.

Ohio.— Calkins *v.* State, 14 Ohio St. 222.

United States.— The Irresistible, 7 Wheat. 551, 5 L. ed. 520; U. S. *v.* Barr, 24 Fed. Cas. No. 14,527, 4 Sawy. 254; U. S. *v.* Kohnstamm, 26 Fed. Cas. No. 15,542, 5 Blatchf. 222.

See 14 Cent. Dig. tit. "Criminal Law," § 19. And see, generally, STATUTES.

A saving of "prosecutions pending or offenses heretofore committed" saves a prosecution for a crime committed before the statute was passed, although the indictment was found subsequently (Sanders *v.* State, 77 Ind. 227), but does not apply where a prosecution has terminated in conviction, and judgment and sentence have been pronounced, but the time of execution postponed *sine die* (Aaron *v.* State, 40 Ala. 307), nor does it preserve the procedure of the statute repealed (Farmer *v.* People, 77 Ill. 322).

Repeal of saving clause.— Liability to punishment under a saving clause in a repealing act ceases with the express or implied repeal of the saving clause. Jones *v.* State, 1 Iowa 395.

Repeal of act after sentence and before resentence.— A proviso to an act adopting a new penal code, which provides that nothing contained in the repealing clause "shall affect any prosecution now pending, or which may be hereafter commenced, for any public offense heretofore committed," etc., does not apply to a case in which sentence of death was legally rendered before the day on which the new penal code went into effect, and, the sentence not having been executed on the appointed day, the prisoner is brought before the court at a subsequent term, after the repeal of the law under which he was sentenced, to be resentenced. Aaron *v.* State, 40 Ala. 307.

3. Com. *v.* Bennett, 108 Mass. 30, 11 Am. Rep. 304.

4. *Dakota.*— People *v.* Wintermute, 1 Dak. 63, 46 N. W. 694.

Massachusetts.— Com. *v.* Churchill, 2 Metc. 118; Com. *v.* Mott, 21 Pick. 492; Com. *v.* Getchell, 16 Pick. 452.

Minnesota.— See State *v.* Otis, 58 Minn. 275, 59 N. W. 1015.

New York.— People *v.* Tiphaine, 3 Park. Crim. 241.

North Carolina.— State *v.* Kent, 65 N. C. 311.

United States.— U. S. *v.* Philbrick, 120 U. S. 52, 7 S. Ct. 413, 30 L. ed. 599.

See, generally, STATUTES.

Repeal of ordinance suspending general law. — When the suspension of a general law within a municipality results from a city ordinance passed in pursuance of a special charter, the repeal of the ordinance will leave the general law in force within the city. Heinssen *v.* State, 14 Colo. 228, 23 Pac. 995.

5. Heinssen *v.* State, 14 Colo. 228, 23 Pac. 995; People *v.* Wintermute, 1 Dak. 63, 46 N. W. 694 (holding, however, that the act of congress of Feb. 25, 1871, providing that "whenever an act shall be repealed which repealed a former act, such former act shall not thereby be revived," had no reference to the legislation of a territory); Sullivan *v.* People, 15 Ill. 233; State *v.* Slaughter, 70 Mo. 484; State *v.* De Bar, 58 Mo. 395; State *v.* Clarke, 54 Mo. 17, 14 Am. Rep. 471; State *v.* Stewart, 47 Mo. 382; State *v.* Huffschmidt, 47 Mo. 73. *Compare* State *v.* Otis, 58 Minn. 275, 59 N. W. 1015. See also STATUTES.

show a contrary intention on the part of the legislature.[6] The revival of the preëxisting statute, however, does not authorize prosecution for a violation of it after its repeal and before its revival.[7]

(F) *Unconstitutional Repealing Statute.* The unconstitutionality of a repealing statute renders it void, so that the general rule as to the effect of a repeal on pending prosecutions does not apply.[8] But it has been held that where the court has for a long time been divided as to the constitutionality of the repealing statute, and it is finally held unconstitutional, the statute repealed should not be held to have been in force, and the people exposed to its penalties prior to such adjudication.[9]

D. Criminal Intent and Malice — 1. Necessity For Criminal Intent — a. In General. To constitute a crime the act must, except in the case of certain statutory crimes,[10] be accompanied by a criminal intent or by such negligence or indifference to duty or consequences as is regarded by the law as equivalent to a criminal intent,[11] the maxim being, *actus non facit reum, nisi mens sit rea*, a

6. Com. *v.* Churchill, 2 Metc. (Mass.) 118; Com. *v.* Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377.

7. See Com. *v.* Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377.

8. Tims *v.* State, 26 Ala. 165; People *v.* Tiphaine, 3 Park. Crim. (N. Y.) 241; State *v.* La Crosse County Ct., 11 Wis. 50.

9. Ingersoll *v.* State, 11 Ind. 464. In this case the liquor law of Indiana of 1855 had expressly repealed that of 1853, and during three years thereafter the court was divided upon the question of the constitutionality of that part of the law of 1855 relating to the retail liquor trade, and therefore it was in force. After the election of new judges, the law of 1855 was unanimously held void. In a prosecution for violation of the law of 1853, it was held that it would be unjust and wrong, under the circumstances, to hold that the law of 1853 had always been in force, and the people exposed to its penalties, and a judgment of conviction was reversed. *Compare*, however, People *v.* Tiphaine, 3 Park. Crim. (N. Y.) 241.

10. See *infra*, II, D, 1, h.

11. *Alabama.*—Walls *v.* State, 90 Ala. 618, 8 So. 680; Gordon *v.* State, 52 Ala. 308, 23 Am. Rep. 575.

Arkansas.— Felker *v.* State, 54 Ark. 489, 16 S. W. 663; Scott *v.* State, 49 Ark. 156, 4 S. W. 750.

California.— People *v.* Gordon, 103 Cal. 568, 37 Pac. 534; People *v.* Mize, 80 Cal. 41, 22 Pac. 80; People *v.* White, 34 Cal. 183.

Connecticut.— State *v.* Weston, 9 Conn. 527, 25 Am. Dec. 46; Morse *v.* State, 6 Conn. 9.

Florida.— Myers *v.* State, 43 Fla. 500, 31 So. 275.

Georgia.— Patterson *v.* State, 85 Ga. 131, 11 S. E. 620, 21 Am. St. Rep. 152.

Iowa.— State *v.* Clark, 102 Iowa 685, 72 N. W. 296.

Kansas.— State *v.* Young, 55 Kan. 349, 40 Pac. 659.

Kentucky.— Flint *v.* Com., 81 Ky. 186, 23 S. W. 346; Evans *v.* Com., 12 S. W. 767, 11 Ky. L. Rep. 551; Head *v.* Com., 4 Ky. L. Rep. 824.

Maine.— State *v.* Neal, 37 Me. 468.

Michigan.— Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781.

Minnesota.— Bonfanti *v.* State, 2 Minn. 123.

Mississippi.— King *v.* State, 66 Miss. 502, 6 So. 188; Hairston *v.* State, 54 Miss. 689, 28 Am. Rep. 392.

Missouri.— State *v.* Fox, 136 Mo. 139, 37 S. W. 794; State *v.* Silva, 130 Mo. 440, 32 S. W. 1007; State *v.* Pitts, 58 Mo. 556; State *v.* Torphy, 78 Mo. App. 206; State *v.* Grassle, 74 Mo. App. 313.

Nebraska.— Botsch *v.* State, 43 Nebr. 501, 61 N. W. 730.

Nevada.— State *v.* Gardner, 5 Nev. 377.

New Jersey.— State *v.* Malloy, 34 N. J. L. 410.

New York.— People *v.* Cogdell, 1 Hill 94, 37 Am. Dec. 297; Wilson *v.* People, 4 Park. Crim. 619; People *v.* Westchester County, 1 Park. Crim. 659; People *v.* Cochrane, 1 Wheel. Crim. 81.

North Carolina.— State *v.* McLean, 121 N. C. 589, 28 S. E. 140, 42 L. R. A. 721; State *v.* King, 86 N. C. 603; State *v.* Negro Will, 18 N. C. 121.

Ohio.— State *v.* Carson, 2 Ohio Dec. (Reprint) 81, 1 West. L. Month. 333.

Pennsylvania.—Respublica *v.* Malin, 1 Dall. 33, 1 L. ed. 25.

South Carolina.— State *v.* Ferguson, 2 McMull. 502.

Tennessee.— Richels *v.* State, 1 Sneed 606; Duncan *v.* State, 7 Humphr. 148.

Texas.— Mullins *v.* State, 37 Tex. 337; Carter *v.* State, 28 Tex. App. 355, 13 S. W. 147; Moore *v.* State, 26 Tex. App. 322, 9 S. W. 610; Johnson *v.* State, 1 Tex. App. 609.

Virginia.— Hey *v.* Com., 32 Gratt. 946, 34 Am. Rep. 799.

United States.— *In re* Nelson, 69 Fed. 712; U. S. *v.* Thomson, 12 Fed. 245, 8 Sawy. 122; U. S. *v.* Bevans, 24 Fed. Cas. No. 14,589; U. S. *v.* Riddle, 27 Fed. Cas. No. 16,162, 4 Wash. 644.

England.— Reg. *v.* Tolson, 23 Q. B. D. 168, 16 Cox C. C. 629, 54 J. P. 4, 58 L. J. M. C. 97, 60 L. T. Rep. N. S. 899, 37 Wkly. Rep. 716. And see Reg. *v.* Thristle, 2 C. & K. 842, 3 Cox C. C. 573, 1 Den. C. C. 502, 13 Jur. 1035, 19 L. J. M. C. 66, 3 New Sess. Cas.

crime is not committed if the mind of the person doing the act be innocent.[12] Neglect in the discharge of a duty or indifference to consequences is in many cases equivalent to a criminal intent.[13]

b. Acts Prohibited by Statute. As a general rule where an act is prohibited and made punishable by statute, the statute is to be construed in the light of the common law and the existence of a criminal intent is essential.[14] The legislature, however, may forbid the doing of an act and make its commission criminal without regard to the intent of the doer, and if such an intention appears the courts must give it effect although the intention may have been innocent.[15] Whether

702, T. & M. 204, 61 E. C. L. 842; Reg. *v.* Matthews, 14 Cox C. C. 5; Reg. *v.* Gurney, 11 Cox C. C. 414; Reg. *v.* Goodbody, 8 C. & P. 665, 34 E. C. L. 951; Rex *v.* Green, 7 C. & P. 156, 32 E. C. L. 549; Reg. *v.* Riley, 6 Cox C. C. 88, Dears. C. C. 149, 17 Jur. 189, 22 L. J. M. C. 48, 14 Eng. L. & Eq. 544; Rex *v.* Charlewood, 2 East P. C. 689, 1 Leach C. C. 409, 3 Rev. Rep. 706; Rex *v.* Pear's Case, 2 East P. C. 685, 1 Leach C. C. 212, 3 Rev. Rep. 703; Rex *v.* Williams, 2 Leach C. C. 597; Rex *v.* Hughes, 2 Lew. C. C. 229.

See 14 Cent. Dig. tit. "Criminal Law," § 21 *et seq.*

Criminal intent in particular crimes see BIGAMY; BURGLARY; HOMICIDE; and like special titles.

12. 3 Inst. 107; Reg. *v.* Tolson, 23 Q. B. D. 168, 172, 16 Cox C. C. 629, 54 J. P. 4, 58 L. J. M. C. 97, 60 L. T. Rep. N. S. 899, 37 Wkly. Rep. 716; Chisholm *v.* Doulton, 22 Q. B. D. 736, 739, 16 Cox C. C. 675, 53 J. P. 550, 58 L. J. M. C. 133, 60 L. T. Rep. N. S. 966, 37 Wkly. Rep. 749. See also Duncan *v.* State, 7 Humphr. (Tenn.) 148, 150 (where it was said: "It is a sacred principle of criminal jurisprudence that the intention to commit the crime is of the essence of the crime, and to hold that a man shall be held criminally responsible for an offence of the commission of which he was ignorant at the time would be intolerable tyranny"); Gordon *v.* State, 52 Ala. 308, 309, 23 Am. Rep. 575 (where it was said: "'All crime exists, primarily in the mind.' A wrongful act and a wrongful intent must concur, to constitute what the law deems a crime").

Detective not liable.— If for the purpose of securing the arrest and conviction of others a detective joins with them in the commission of a crime, he is not punishable, although he so far coöperates as to be guilty if his intention were the same as theirs. State *v.* Torphy, 78 Mo. App. 206. See also Price *v.* People, 109 Ill. 109; Rex *v.* Donnelly, 2 Marsh. 571, R. & R. 230.

13. U. S. *v.* Thomson, 12 Fed. 245, 8 Sawy. 122. And see Sturges *v.* Maitland, Anth. N. P. (N. Y.) 208; State *v.* Neville, 2 Ohio Dec. (Reprint) 358, 2 West. L. Month. 494. See also ASSAULT AND BATTERY, 3 Cyc. 1014; HOMICIDE; and like special titles.

14. *Alabama.*— Gordon *v.* State, 52 Ala. 308, 23 Am. Rep. 575. See also Vaughan *v.* State, 83 Ala. 55, 3 So. 530; Marshall *v.* State, 49 Ala. 21.

Connecticut.— Myers *v.* State, 1 Conn. 502.

Georgia.— Stern *v.* State, 53 Ga. 229, 21 Am. Rep. 266.

Indiana.— Mulreed *v.* State, 107 Ind. 62, 7 N. E. 884; Williams *v.* State, 48 Ind. 306; Squire *v.* State, 46 Ind. 459; Goetz *v.* State, 41 Ind. 162; Brown *v.* State, 24 Ind. 113; Farbach *v.* State, 24 Ind. 77.

Michigan.— People *v.* Welch, 71 Mich. 548, 39 N. W. 747, 1 L. R. A. 385; Faulks *v.* People, 39 Mich. 200, 33 Am. Rep. 374.

Missouri.— State *v.* Snyder, 44 Mo. App. 429.

North Carolina.— State *v.* Presnell, 34 N. C. 103.

Ohio.— Crabtree *v.* State, 30 Ohio St. 382; Birney *v.* State, 8 Ohio 230.

Tennessee.— Duncan *v.* State, 7 Humphr. 148.

England.— Reg. *v.* Tolson, 23 Q. B. D. 168, 16 Cox C. C. 629, 54 J. P. 4, 58 L. J. M. C. 97, 60 L. T. Rep. N. S. 899, 37 Wkly. Rep. 716. See also Reg. *v.* Tinkler, 1 F. & F. 513.

15. *Alabama.*— Owens *v.* State, 94 Ala. 97, 10 So. 669.

Connecticut.— State *v.* Kinkerd, 57 Conn. 173, 17 Atl. 855; Barnes *v.* State, 19 Conn. 398.

Idaho.— State *v.* Keller, (1902) 70 Pac. 1051.

Illinois.— Gordon *v.* Gordon, 141 Ill. 160, 30 N. E. 446, 33 Am. St. Rep. 294, 21 L. R. A. 387; Farmer *v.* People, 77 Ill. 322; McCutcheon *v.* People, 69 Ill. 601.

Iowa.— State *v.* Thompson, 74 Iowa 119, 37 N. W. 104; State *v.* Probasco, 62 Iowa 400, 17 N. W. 607.

Kentucky.— Com. *v.* Bull, 13 Bush 656; Ulrich *v.* Com., 6 Bush 400.

Maine.— State *v.* Huff, 89 Me. 521, 36 Atl. 1000; State *v.* Goodenow, 65 Me. 30.

Massachusetts,— Com. *v.* Connelly, 163 Mass. 539, 40 N. E. 862; Com *v.* Stevens, 155 Mass. 291, 29 N. E. 508; Com. *v.* O'Kean, 152 Mass. 584, 26 N. E. 97; Com. *v.* Wentworth, 118 Mass. 441; Com. *v.* Smith, 103 Mass. 444; Com. *v.* Emmons, 98 Mass. 6; Com. *v.* Goodman, 97 Mass. 117; Com. *v.* Waite, 11 Allen 264, 87 Am. Dec. 685; Com. *v.* Farren, 9 Allen 489; Com. *v.* Boynton, 2 Allen 160; Com. *v.* Mash, 7 Metc. 472.

Michigan.— People *v.* Welch, 71 Mich. 548, 39 N. W. 747, 1 L. R. A. 385; People *v.* Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270; People *v.* Waldvogel, 49 Mich. 337, 13 N. W. 620.

Minnesota.— State *v.* Heck, 23 Minn. 549.

or not in a given case a statute is to be so construed is to be determined by the court by considering the subject-matter of the prohibition as well as the language of the statute, and thus ascertaining the intention of the legislature.[16]

2. Motive. In a criminal prosecution the state is not required to prove a motive for the crime, if without this the evidence is sufficient to show that the act was done by the accused. The existence or non-existence of motive is immaterial, where the guilt of the accused is clearly established.[17] The most laudable

Mississippi.— King *v.* State, 66 Miss. 502, 6 So. 188.

Missouri.— State *v.* Bruder, 35 Mo. App. 475.

Nevada.— State *v.* Zichfeld, 23 Nev. 304, 46 Pac. 802, 62 Am. St. Rep. 800, 34 L. R. A. 784.

New Jersey.— Halsted *v.* State, 41 N. J. L. 552, 32 Am. Rep. 247.

New York.— People *v.* Kibler, 106 N. Y. 321, 12 N. E. 795; Gardner *v.* People, 62 N. Y. 299; People *v.* Adams, 16 Hun 549; People *v.* Eddy, 12 N. Y. Supp. 628; People *v.* Zeiger, 6 Park. Crim. 355.

North Carolina.— State *v.* Southern R. Co., 122 N. C. 1052, 30 S. E. 133, 41 L. R. A. 246; State *v.* McLean, 121 N. C. 589, 28 S. E. 140, 42 L. R. A. 721; State *v.* White Oak River Corp., 111 N. C. 661, 16 S. E. 331; State *v.* Hause, 71 N. C. 518.

Ohio.— State *v.* Kelly, 54 Ohio St. 166, 42 N. E. 163.

Pennsylvania.— Com. *v.* Zelt, 138 Pa. St. 615, 21 Atl. 7, 11 L. R. A. 602; *In re* Carlson's License, 127 Pa. St. 330, 18 Atl. 8.

Rhode Island.— State *v.* Foster, 22 R. I. 163, 46 Atl. 833, 50 L. R. A. 339; State *v.* Hughes, 16 R. I. 403, 16 Atl. 911; State *v.* Smith, 10 R. I. 258.

Tennessee.— Debardelaben *v.* State, 99 Tenn. 649, 42 S. W. 684.

Texas.— Clopton *v.* State, (Crim. App. 1898) 44 S. W. 173; Steinberger *v.* State, 35 Tex. Crim. 492, 34 S. W. 617; Fox *v.* State, 3 Tex. App. 329, 30 Am. Rep. 144.

West Virginia.— State *v.* Bear, 37 W. Va. 1, 16 S. E. 368; State *v.* Farr, 34 W. Va. 84, 11 S. E. 737; State *v.* Cain, 9 W. Va. 559.

Wisconsin.— State *v.* Hartfiel, 24 Wis. 60.

United States.— U. S. *v.* Riddle, 5 Cranch 311, 3 L. ed. 110; U. S. *v.* Leathers, 26 Fed. Cas. No. 15,581, 6 Sawy. 17.

England.— Reg. *v.* Gibbons, 12 Cox C. C. 237; Rex *v.* Ogden, 6 C. & P. 631, 25 E. C. L. 611; Reg. *v.* Woodrow, 16 L. J. M. C. 122, 15 M. & W. 404.

Specific offenses.— The question generally arises in the case of statutes punishing the sale or keeping for sale of intoxicating liquors, adulterated food products, etc., the sale of liquors to minors or drunkards, or other offenses in relation to minors, and other like offenses. See Adulteration, 1 Cyc. 943; Food; Infants; Intoxicating Liquors; and like special titles. It also arises in the case of statutes punishing adultery and bigamy. See Adultery, 1 Cyc. 954; Bigamy, 5 Cyc. 694.

A statute punishing the obstructing of trains so as "to endanger their safety" does not require an intention to endanger to be proved. It is sufficient if the accused placed the obstruction on the track, although he may have done so for an entirely legal and proper purpose. People *v.* Adams, 16 Hun (N. Y.) 549.

16. *California.*— People *v.* O'Brien, 96 Cal. 171, 31 Pac. 45.

Massachusetts.— Com. *v.* Murphy, 165 Mass. 66, 42 N. E. 504, 52 Am. St. Rep. 496, 30 L. R. A. 734.

New Jersey.—Halstead *v.* State, 41 N. J. L. 552, 592, 32 Am. Rep. 247, where it was said: "As there is an undoubted competency in the law maker to declare an act criminal, irrespective of the knowledge or motive of the doer of such act, there can be, of necessity, no judicial authority having the power to require, in the enforcement of the law, such knowledge or motive to be shown. In such instances the entire function of the court is to find out the intention of the legislature, and to enforce the law in absolute conformity to such intention. And in looking over the decided cases on the subject it will be found, that in the considered adjudications, this inquiry has been the judicial guide."

Tennessee.— Duncan *v.* State, 7 Humphr. 148.

England.— Reg. *v.* Tolson, 23 Q. B. D. 168, 172, 16 Cox C. C. 629, 54 J. P. 4, 58 L. J. M. C. 97, 60 L. T. Rep. N. S. 899, 37 Wkly. Rep. 716, where it was said by Wills, J.: "Although primâ facie and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. . . . Whether an enactment is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable." And see Reg. *v.* Cohen, 8 Cox C. C. 41.

17. *Alabama.*— Stone *v.* State, 105 Ala. 60, 17 So. 114; Clifton *v.* State, 73 Ala. 473.

Delaware.— State *v.* Miller, 9 Houst. 564, 32 Atl. 137; State *v.* Dill, 9 Houst. 495, 18 Atl. 763.

District of Columbia.— Lanckton *v.* U. S., 18 App. Cas. 348.

Kentucky.— Marcum *v.* Com., 1 S. W. 727, 8 Ky. L. Rep. 418.

Massachusetts.— Com. *v.* Harley, 7 Metc. 462.

motive is no defense where the act committed is a crime in contemplation of law;[18] and on the other hand a bad motive does not make an act a crime if it is not so in law.[19] While, however, motive is never an essential element in a crime it may throw light on the intent with which the act was committed,[20] and as a matter of evidence it is frequently an important element in the case of the prosecution.[21]

3. MALICE — a. In General. The term "malice," as used with respect to certain crimes, has a peculiar meaning, as in the case of arson,[22] murder,[23] malicious mischief,[24] etc. Even in this connection, however, the term is not used in its popular sense as denoting either general malignity or ill-will toward a particular individual.[25] In its broadest legal sense the term is synonymous with criminal intention and applies to the state of mind of a person who does a wrongful act intentionally or wilfully, and without legal justification or excuse.[26] The term

Missouri.— State *v.* Crabtree, 170 Mo. 642, 71 S. W. 127.

New York.— People *v.* Feigenbaum, 148 N. Y. 636, 43 N. E. 78.

Pennsylvania.— Com. *v.* Kirkpatrick, 15 Leg. Int. 268.

South Carolina.— State *v.* Workman, 39 S. C. 151, 17 S. E. 694.

Texas.— Preston *v.* State, 8 Tex. App. 30. See 14 Cent. Dig. tit. "Criminal Law," § 23.

18. *Massachusetts.*— Com. *v.* Has, 122 Mass. 40, violation of Sunday law by Jew.

New Hampshire.— State *v.* White, 64 N. H. 48, 5 Atl. 828, holding that in a prosecution for beating a drum in a town in violation of a statute it was no defense to show that the act was done in performance of religious worship in accordance with a sense of religious duty.

New York.— People *v.* Kirby, 2 Park. Crim. 28, killing of child by mother in the belief that it will be better off.

Pennsylvania.— Specht *v.* Com., 8 Pa. St. 312, 49 Am. Dec. 518, violation of Sunday law by a member of a sect (Seventh Day Baptist) who conscientiously observes and keeps another day as the christian Sabbath.

Texas.— Phillips *v.* State, 29 Tex. 226, 236, holding that in a prosecution for removing a fence from around a graveyard in violation of a statute, it was no defense that the defendant did so with the intention of building, and that he did build, a better fence, the court saying: "It is a well settled principle of law, that when a man does the thing prohibited, with the intent which the law forbids, it will not avail him that he also intended an ultimate good; as, on an indictment for obstructing a road, that he has opened a better way."

United States.— Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244 [*affirming* 1 Utah 226], polygamy under a religious belief that it is right. See BIGAMY, 5 Cyc. 695. See also U. S. *v.* Harmon, 45 Fed. 414, sending obscene literature through the mails with a view to correcting abuses in sexual intercourse.

England.— Reg. *v.* Morbey, 8 Q. B. D. 571 (causing death of child by failure, because of religious views, to furnish medical attendance in case of sickness); Reg. *v.* Downes, 1 Q. B. D. 25, 13 Cox C. C. 111, 45 L. J. M. C. 8, 33 L. T. Rep. N. S. 675, 25 Wkly. Rep. 278 (to the same effect); Reg. *v.* Sharpe, 7 Cox C. C. 214, Dears. & B. 160, 3 Jur. N. S. 192, 26 L. J. M. C. 47, 5 Wkly. Rep. 318 (removal of mother's body from dissenters' burial-ground, from filial affection and a sense of religious duty). *Compare* Reg. *v.* Wagstaffe, 10 Cox C. C. 530.

It is no defense that a man is acting in sport if what he does is a crime. Hill *v.* State, 63 Ga. 578, 36 Am. Rep. 126, where a conviction of assault and battery was sustained, although it was committed in throwing a stone in sport.

Obstruction of highway.— Erecting an obstruction within the limits of a highway, when criminal by statute, is none the less a crime because the accused honestly believed that the obstruction was not in the highway. State *v.* Gould, 40 Iowa 372. See STREETS AND HIGHWAYS.

19. State *v.* Asher, 50 Ark. 427, 8 S. W. 177, where it was held that a person who obtained goods by making representations which he believed to be false, and which he made with intent to defraud, but which turned out to be true, was not guilty of obtaining goods by false pretenses. See also State *v.* Garris, 98 N. C. 733, 4 S. E. 633.

20. *Alabama.*— Pate *v.* State, 94 Ala. 14, 10 So. 665; Marler *v.* State, 67 Ala. 55, 42 Am. Rep. 95.

California.— People *v.* Kern, 61 Cal. 244.

Georgia.— Fraser *v.* State, 55 Ga. 325.

Nevada.— State *v.* Lackin, 11 Nev. 314.

Pennsylvania.— McLain *v.* Com., 99 Pa. St. 86. See HOMICIDE.

21. Pierson *v.* People, 79 N. Y. 424, 35 Am. Rep. 524; Lake *v.* People, 1 Park. Crim. (N. Y.) 495. See HOMICIDE.

22. See ARSON, 3 Cyc. 984.

23. See HOMICIDE.

"Malice aforethought" see HOMICIDE.

24. See MALICIOUS MISCHIEF.

25. Holland *v.* State, 12 Fla. 117; State *v.* Pike, 49 N. H. 399, 9 Am. Rep. 533; Powell *v.* State, 28 Tex. App. 393, 13 S. W. 599. See HOMICIDE; MALICIOUS; MISCHIEF.

26. *Alabama.*— Boulden *v.* State, 102 Ala. 78, 15 So. 341.

Florida.— Lovett *v.* State, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705; Holland *v.* State, 12 Fla. 117.

"malice" is more general in its signification than "wilfulness," but it implies wilfulness.[27]

b. Express and Implied Malice. Malice is either express or implied, express malice being where the party declares or manifests a positive intention to commit the crime, while implied malice is gathered, as an inference of law, from the facts and circumstances proved.[28]

4. WILFULNESS. The term "wilfulness" is vague in its meaning. "Wilful" is not necessarily used as a synonym of "voluntary."[29] It is sometimes held to be equivalent to "intentional" or "designed," and not to require a wrongful intention or malice,[30] but generally, when employed in a penal statute, it indicates a bad or corrupt purpose,[31] an evil intent without reasonable grounds to believe that the action is lawful.[32] It thus conveys the idea of legal malice in a greater or less degree.[33]

Indiana.— Dunn *v.* Hall, 1 Ind. 344.

Iowa.— State *v.* Decklotts, 19 Iowa 447.

Massachusetts.— Com. *v.* Goodwin, 122 Mass. 19; Com. *v.* Bonner, 9 Metc. 410; Com. *v.* Snelling, 15 Pick. 337.

Michigan.— Bell *v.* Fernald, 71 Mich. 267, 38 N. W. 910; People *v.* Petheram, 64 Mich. 252, 31 N. W. 188; Nye *v.* People, 35 Mich. 16.

Missouri.— Buckley *v.* Knapp, 48 Mo. 152; State *v.* Grassle, 74 Mo. App. 313.

New Hampshire.— State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533.

Pennsylvania.— Com. *v.* Green, 1 Ashm. 289.

Tennessee.— Crawford *v.* State, 15 Lea 343, 54 Am. Rep. 423, holding that where a person placed obstructions on a railroad track for the purpose of getting a job or reward for notifying the railroad company of the obstruction, and signaled the train so that it stopped before it struck the obstruction he was guilty under a statute of wilfully and "maliciously" placing an obstruction on a railroad track.

Texas.— Powell *v.* State, 28 Tex. App. 393, 13 S. W. 599; Harris *v.* State, 8 Tex. App. 90.

England.— Bromage *v.* Prosser, 4 B. & C. 247, 10 E. C. L. 563, 1 C. & P. 475, 12 E. C. L. 276, 6 D. & R. 296, 3 L. J. K. B. O. S. 203, 28 Rev. Rep. 241.

Canada.—Reg. *v.* Smith, 1 Nova Scotia Dec. 29.

27. State *v.* Robbins, 66 Me. 324.

28. Black L. Dict.; Bias *v.* U. S., 3 Indian Terr. 27, 53 S. W. 471; Herrin *v.* State, 33 Tex. 638. See HOMICIDE.

29. McManus *v.* State, 36 Ala. 285.

30. *Alabama.*— Harrison *v.* State, 37 Ala. 154.

Iowa.— State *v.* Clark, 102 Iowa 685, 72 N. W. 296; State *v.* Windahl, 95 Iowa 470, 64 N. W. 420.

Kentucky.— Clark *v.* Com., 63 S. W. 740, 23 Ky. L. Rep. 1029.

Massachusetts.— Com. *v.* Williams, 110 Mass. 401; Com. *v.* Walden, 3 Cush. 558.

New York.— Anderson *v.* How, 116 N. Y. 336, 22 N. E. 695 (construing a statute punishing the wilful severance from the freehold of another of anything attached thereto); People *v.* Brooks, 1 Den. 457, 43 Am. Dec. 704 (where the defendant was indicted for a wilful neglect of official duty).

England.— Reg. *v.* Holroyd, 2 M. & Rob. 339.

Where a crime does not involve the element of malice, as for example manslaughter, the word "wilfully" as applied to the criminal act means nothing more than "intentional," as distinguished from "accidental" or "voluntary." State *v.* Windahl, 95 Iowa 470, 64 N. W. 420.

Wilfully voting at an election.— In Com. *v.* Bradford, 9 Metc. (Mass.) 268, where the charge was that the defendant wilfully gave in his vote at an election the word "wilfully" was held to mean "designedly" or "purposely," the gist of the offense as defined in the statute being that he knew himself not to be a legal voter.

Denial of the right to vote.— On a prosecution of election officers for "wilfully" refusing a vote, it was held immaterial whether such refusal was with or without just grounds for believing it to be lawful. State *v.* Clark, 102 Iowa 685, 72 N. W. 296.

31. *Alabama.*— State *v.* Abram, 10 Ala. 928.

Massachusetts.—Com. *v.* Kneeland, 20 Pick. 206, 220. And see Hanson *v.* South Scituate, 115 Mass. 336, distinguishing "wilful desertion" from "absence without leave."

Missouri.— State *v.* Gardner, 2 Mo. 23.

New Jersey.— State *v.* Clark, 29 N. J. L. 96.

North Carolina.— State *v.* Whitener, 93 N. C. 590.

United States.— Potter *v.* U. S., 155 U. S. 438, 15 S. Ct. 144, 39 L. ed. 214; Felton *v.* U. S., 96 U. S. 699, 24 L. ed. 875; U. S. *v.* Three Railroad Cars, 28 Fed. Cas. No. 16,513, 1 Abb. 196.

32. Tufts *v.* State, 41 Fla. 663, 27 So. 218 (an indictment under a statute punishing the wilful commission of a trespass by injuring, destroying, or carrying away timber); State *v.* Grassle, 74 Mo. App. 313; State *v.* Alcorn, 78 Tex. 387, 14 S. W. 663; Mahle *v.* State, (Tex. App. 1890) 13 S. W. 999; Davis *v.* State, 22 Tex. App. 45, 2 S. W. 630; Loyd *v.* State, 19 Tex. App. 321; Owens *v.* State, 19 Tex. App. 242; Shubert *v.* State, 16 Tex. App. 645; Wood *v.* State, 16 Tex. App. 574; Lane *v.* State, 16 Tex. App. 172; Thomas *v.* State, 14 Tex. App. 200.

33. *Arkansas.*— McCoy *v.* State, 8 Ark. 451.

5. Wantonness. An act, to be criminal within the contemplation of certain statutes, must be wanton as well as wilful.[34] To make an act wanton it must be committed perversely, recklessly, and without excuse, without regard to the rights of others, with mischievous intent, and yet without settled malice.[35]

6. Specific Intent. There are certain crimes of which a specific intent to accomplish a particular purpose is an essential element, and for which there can be no conviction upon proof of mere general malice or criminal intent. In these cases it is necessary for the state to prove the specific intent by either direct or circumstantial evidence.[36] This is true for example of attempts to commit crime, where it is necessary to prove the specific intent to commit the crime intended,[37] aggravated assaults with intent to kill or to rape, where it is necessary to prove the intent to kill or rape,[38] larceny and robbery, where it is necessary to prove the specific intent to deprive the owner of his property in the goods,[39] burglary, where it is necessary to prove an intent to commit some felony,[40] arson, where it is necessary to prove an intent to burn,[41] of malicious mischief, where it is necessary to prove an intention to cause the injury,[42] etc.

7. Presumption of Intention — a. From Unlawful Act. A presumption of a criminal intention may arise from proof of the commission of an unlawful act. The general rule is that if it is proved that the accused committed the unlawful act charged it will be presumed that the act was done with a criminal intention, and it is for the accused to rebut this presumption.[43] This rule, however, does

California.— Galvin *v.* Gualala Mill Co., 98 Cal. 268, 33 Pac. 93.

Georgia.— King *v.* State, 103 Ga. 263, 30 S. E. 30 [*citing* Anderson L. Dict.; Black L. Dict.].

Indiana.— Indianapolis *v.* Consumers' Gas Trust Co., 140 Ind. 246, 39 N. E. 943.

Pennsylvania.— Chapman *v.* Com., 5 Whart. 427, 34 Am. Dec. 565.

Wisconsin.— State *v.* Preston, 34 Wis. 675.

34. As for example statutes making it a misdemeanor to "wantonly and wilfully injure the personal property of another." See N. C. Code, § 1082.

35. State *v.* Morgan, 98 N. C. 641, 3 S. E. 927; State *v.* Brigman, 94 N. C. 888; Branch *v.* State, 41 Tex. 622; Thomas *v.* State, 14 Tex. App. 200; Jones *v.* State, 3 Tex. App. 228.

36. *Alabama.*— Barber *v.* State, 78 Ala. 19; Simpson *v.* State, 59 Ala. 1, 31 Am. Rep. 1.

Arkansas.— Chrisman *v.* State, 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44; Scott *v.* State, 49 Ark. 156, 4 S. W. 750.

California.— People *v.* Mooney, 127 Cal. 339, 59 Pac. 761; People *v.* Nelson, 58 Cal. 104; People *v.* Keefer, 18 Cal. 636.

Delaware.— State *v.* Snow, 3 Pennew. 257, 51 Atl. 607.

Illinois.— Price *v.* People, 109 Ill. 109.

Michigan.— Roberts *v.* People, 19 Mich. 401; Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781.

Mississippi.— Hairston *v.* State, 54 Miss. 689, 28 Am. Rep. 392; Cunningham *v.* State, 49 Miss. 685.

Nevada.— State *v.* Ryan, 12 Nev. 401, 28 Am. Rep. 802.

New York.— McCourt *v.* People, 64 N. Y. 583.

North Carolina.— State *v.* King, 86 N. C. 603.

Ohio.— Hanson *v.* State, 43 Ohio St. 376, 1 N. E. 136; Sharp *v.* State, 19 Ohio 379.

Texas.— Reagan *v.* State, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833.

West Virginia.— State *v.* Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

England.— Reg. *v.* Lallement, 6 Cox C. C. 204; Dobb's Case, 2 East P. C. 513; Rex *v.* Boyce, 1 Moody C. C. 29.

Such intent need not be established directly but may be inferred from the facts in evidence. See *infra*, II, D, 7, a.

37. See *infra*, IV, A, 2, c.

38. See Assault and Battery, 3 Cyc. 1026 *et seq.*; Rape.

39. See Larceny; Robbery.

40. See Burglary, 6 Cyc. 195.

41. See Arson, 3 Cyc. 984.

42. See Malicious Mischief.

43. *Alabama.*— Newton *v.* State, 92 Ala. 33, 9 So. 404; Smith *v.* State, 88 Ala. 23, 7 So. 103; Mullens *v.* State, 82 Ala. 42, 2 So. 481, 60 Am. Rep. 731; Hoover *v.* State, 59 Ala. 57.

Arkansas.— Cole *v.* State, 10 Ark. 318.

Delaware.— State *v.* Sloanaker, Houst. Crim. Cas. 62.

District of Columbia.— U. S. *v.* Brooks, 3 MacArthur 315.

Georgia.— Wilson *v.* State, 69 Ga. 224.

Illinois.— Crosby *v.* People, 137 Ill. 325, 27 N. E. 49; Perry *v.* People, 14 Ill. 496.

Indiana.— Fletcher *v.* State, 49 Ind. 124, 19 Am. Rep. 673; Marmont *v.* State, 48 Ind. 21; Walker *v.* State, 8 Ind. 290.

Iowa.— State *v.* Jones, 70 Iowa 505, 30 N. W. 750.

Kentucky.— Com. *v.* Bull, 13 Bush 656.

Louisiana.— State *v.* Hahn, 38 La. Ann. 169; State *v.* Walker, 37 La. Ann. 560.

Maine.— State *v.* Goodenow, 65 Me. 30.

Massachusetts.— Com. *v.* Connelly, 163 Mass. 539, 40 N. E. 862.

not apply in the case of crimes like burglary, assault with intent to kill, or rape, etc., for which a specific intent is necessary.[44] Here the burden is on the state to prove, by either direct or circumstantial evidence, that the act was done with the requisite specific intent.[45] But it is sufficient in such cases to prove facts from which the specific intent may be inferred.[46]

b. Natural Consequences. Another general rule of frequent application is that a sane man is presumed to intend the necessary or the natural and probable consequences of his voluntary acts.[47] In some cases this presumption is

Michigan.— People *v.* Carter, 96 Mich. 583, 56 N. W. 79.

Minnesota.— State *v.* Kortgaard, 62 Minn. 7, 64 N. W. 51.

Mississippi.—Barcus *v.* State, 49 Miss. 17, 19 Am. Rep. 1; Jeff *v.* State, 39 Miss. 593; Jeff *v.* State, 37 Miss. 321; Price *v.* State, 36 Miss. 531, 72 Am. Dec. 195.

Missouri.— State *v.* Hall, 85 Mo. 669.

Nebraska.— Parrish *v.* State, 14 Nebr. 60, 15 N. W. 357; Curry *v.* State, 4 Nebr. 545.

Nevada.— State *v.* McGinnis, 6 Nev. 109.

New York.— People *v.* Fish, 125 N. Y. 136, 26 N. E. 319; People *v.* Batting, 49 How. Pr. 392; People *v.* Herrick, 13 Wend. 87; Hagerman's Case, 3 City Hall Rec. 73.

North Carolina.— State *v.* McLean, 121 N. C. 589, 28 S. E. 140, 42 L. R. A. 721; State *v.* Smith, 93 N. C. 516; State *v.* Heaton, 77 N. C. 505; State *v.* Presnell, 34 N. C. 103.

Ohio.— State *v.* Shields, 1 Ohio Dec. (Reprint) 17, 1 West. L. J. 118. And see State *v.* Neville, 2 Ohio Dec. (Reprint) 358, 2 West. L. Month. 494.

Tennessee.— Dains *v.* State, 2 Humphr. 439.

Texas.— Johnson *v.* State, 35 Tex. Crim. 271, 33 S. W. 231. By Tex. Pen. Code, art. 588, where an injury is caused by violence to the person, the intent to injure is presumed. See Griffin *v.* State, (Crim. App. 1899) 53 S. W. 848.

Wisconsin.— Cross *v.* State, 55 Wis. 261, 12 N. W. 425.

Wyoming.— Bryant *v.* State, 5 Wyo. 376, 40 Pac. 518.

United States.— U. S. *v.* Long, 30 Fed. 678; U. S. *v.* Baldridge, 11 Fed. 552; U. S. *v.* Darton, 25 Fed. Cas. No. 14,919, 6 McLean 46.

England.— Rex *v.* Howlett, 7 C. & P. 274, 32 E. C. L. 610. And see Rex *v.* Woodfall, 5 Burr. 2661, 2667, where it was said by Lord Mansfield: "Where an act in itself indifferent, if done with a particular intent becomes criminal; there the intent must be proved and found; but where the act is in itself unlawful, . . . the proof of justification or excuse lies on the defendant; and in failure thereof, the law implies a criminal intent."

See 14 Cent. Dig. tit. "Criminal Law," § 26. And see *infra*, IV, A, 2, c.

44. See *supra*, II, D, 6.

45. *Alabama.*— Ogletree *v.* State, 28 Ala. 693.

Arkansas.— Starchman *v.* State, 62 Ark. 538, 36 S. W. 940.

Delaware.— State *v.* Fisher, 1 Pennew. 303, 41 Atl. 208.

Michigan.— People *v.* Sweeney, 55 Mich. 586, 22 N. W. 50; Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781.

Nebraska.— Ashford *v.* State, 36 Nebr. 38, 53 N. W. 1036.

New York.—People *v.* Marks, 4 Park. Crim. 153.

North Carolina.— State *v.* King, 86 N. C. 603.

Texas.— Reagan *v.* State, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833.

England.— Reg. *v.* Tucker, 1 Cox C. C. 73.

See also ASSAULT AND BATTERY, 3 Cyc. 1026 *et seq.*; BURGLARY, 6 Cyc. 243; HOMICIDE; LARCENY; RAPE; and other like special titles.

46. Crosby *v.* People, 137 Ill. 325, 27 N. E. 49; Com. *v.* Hersey, 2 Allen (Mass.) 173; Roberts *v.* People, 19 Mich. 401; People *v.* Scott, 6 Mich. 287. See *infra*, IV, A, 2, c.

47. *Alabama.*— Curtis *v.* State, 118 Ala. 125, 24 So. 111.

California.— People *v.* Munn, 65 Cal. 211, 3 Pac. 650.

Connecticut.— Southworth *v.* State, 5 Conn. 325.

Delaware.— State *v.* Hand, 1 Marv. 545, 41 Atl. 192; State *v.* Sloanaker, Houst. Crim. Cas. 62.

Georgia.— Vann *v.* State, 83 Ga. 44, 9 S. E. 945.

Illinois.— Dunaway *v.* People, 110 Ill. 333, 51 Am. Rep. 686.

Indiana.— Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21; Walker *v.* State, 8 Ind. 290.

Iowa.— State *v.* Moelcher, 53 Iowa 310, 5 N. W. 186.

Maine.— State *v.* Gilman, 69 Me. 163, 31 Am. Rep. 257.

Massachusetts.— Com. *v.* Hersey, 2 Allen 173.

Michigan.— People *v.* Petheram, 64 Mich. 252, 31 N. W. 188.

Mississippi.— Barcus *v.* State, 49 Miss. 17, 19 Am. Rep. 1; Jeff *v.* State, 39 Miss. 593.

Missouri.—State *v.* Hall, 85 Mo. 669; State *v.* Banks, 10 Mo. App. 111.

Montana.— Territory *v.* Reuss, 5 Mont. 605, 5 Pac. 885.

Nebraska.— Parrish *v.* State, 14 Nebr. 60, 15 N. W. 357.

New York.—People *v.* Orcutt, 1 Park. Crim. 252.

Ohio.— State *v.* Neville, 2 Ohio Dec. (Reprint) 358, 2 West. L. Month. 494; State *v.* Cook, 2 Ohio Dec. (Reprint) 36, 1 West. L. Month. 201; State *v.* Shields, 1 Ohio Dec. (Reprint) 17, 1 West. L. J. 118; State *v.* Strothers, 8 Ohio S. & C. Pl. Dec. 357, 7 Ohio N. P. 228.

conclusive.[48] The presumption, however, does not extend to all possible consequences.[49] And it is not conclusive when a specific intent is the gist of the crime, as for example in the case of an assault with intent to kill,[50] attempt to commit a crime,[51] etc.

c. Unintended Consequences. Where a man, meaning to commit one crime, commits another of a similar or even of a diverse nature, he may be punishable for the consequences of his act, although what he intended did not follow.[52] On

Texas.— Wood *v.* State, 27 Tex. App. 393, 11 S. W. 449.

United States.— Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244; U. S. *v.* McClare, 28 Fed. Cas. No. 15,659.

England.— Reg. *v.* Monkhouse, 4 Cox C. C. 55; Reg. *v.* Nicholls, 9 C. & P. 267, 38 E. C. L. 165; Reg. *v.* Jones, 9 C. & P. 258, 38 E. C. L. 159; Reg. *v.* Cooke, 8 C. & P. 582, 34 E. C. L. 903; Reg. *v.* Hill, 8 C. & P. 274, 34 E. C. L. 730; Reg. *v.* Griffiths, 8 C. & P. 248, 2 Moody C. C. 40, 34 E. C. L. 716; Reg. *v.* Beard, 8 C. & P. 142, 34 E. C. L. 655; Rex *v.* Howlett, 7 C. & P. 274, 32 E. C. L. 610.

Canada.— Reg. *v.* Le Dante, 2 Nova Scotia Dec. 401.

See 14 Cent. Dig. tit. "Criminal Law," § 27. And see HOMICIDE.

A man who pays another a forged bill will be presumed under the rule in the text to have intended to defraud the payee (Reg. *v.* Hill, 8 C. & P. 274, 34 E. C. L. 730), provided he knew of the forgery and concealed it (Reg. *v.* Cooke, 8 C. & P. 582, 34 E. C. L. 903). See FORGERY.

Use of deadly weapon.—As illustrating the text may be cited the presumption which the law indulges in homicide, where proof of the use of a deadly weapon is presumptive although not conclusive evidence of an intention to kill. For if a party does an act with a dangerous or deadly weapon, which from its nature and the manner in which it is done may naturally, probably, or reasonably produce death, or jeopardize life, the law attributes to such an act an intention to kill. Hill *v.* People, 1 Colo. 436. See HOMICIDE.

48. *Alabama.*— Washington *v.* State, 60 Ala. 19, 31 Am. Rep. 28, where in a prosecution for murder the court in its charge erroneously disregarded the inference of a depraved mind, regardless of human life, arising from firing a pistol through the window of a lighted room toward persons sitting therein.

Illinois.— Mayes *v.* People, 106 Ill. 306, 46 Am. Rep. 698.

Massachusetts.— Com. *v.* Connelly, 163 Mass. 539, 40 N. E. 862, filing a false nomination paper.

Michigan.— People *v.* Stubenvoll, 62 Mich. 329, 28 N. W. 883, where the accused, while running after a boy to whip him, killed him with a shot from a pistol which he intended to fire in the air to scare the boy.

Minnesota.— State *v.* Welch, 21 Minn. 22, an indictment for voting more than once at the same election.

North Carolina.—State *v.* McLean, 121 N. C. 589, 28 S. E. 140, 42 L. R. A. 721 (where it was held, construing N. C. Acts (1885), c. 90, that if a person, without due process of law or proper consent, opens a grave for the purpose of removing anything interred therein, the doing of the act is conclusive as to the intent); State *v.* White Oak River Corp., 111 N. C. 661, 16 S. E. 331 (unlawfully felling timber contrary to N. C. Acts (1887), c. 72, § 1); State *v.* King, 86 N. C. 603 (where it was held that one who had used insulting and offensive language to another could not be heard to say that he did not intend to bring on a breach of the peace).

49. People *v.* Munn, 65 Cal. 211, 3 Pac. 650; People *v.* Rockwell, 39 Mich. 503, where in a dispute over the possession of a horse the defendant knocked his opponent down, and the latter was killed by being trampled upon by the horse.

50. People *v.* Sweeney, 55 Mich. 586, 22 N. W. 50. See HOMICIDE.

51. Chrisman *v.* State, 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44. See *infra*, IV, A, 2, c.

52. *Alabama.*— Clarke *v.* State, 78 Ala. 474, 56 Am. Rep. 45; Tidwell *v.* State, 70 Ala. 33.

Connecticut.— State *v.* Stanton, 37 Conn. 421.

Delaware.— State *v.* Dugan, Houst. Crim. Cas. 563.

Florida.— Pinder *v.* State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75.

Maine.— State *v.* Gilman, 69 Me. 163, 31 Am. Rep. 257.

Massachusetts.—Com. *v.* Murphy, 165 Mass. 66, 42 N. E. 504, 52 Am. St. Rep. 496, 30 L. R. A. 734.

Missouri.— State *v.* Renfrow, 111 Mo. 589, 20 S. W. 299; State *v.* Gilmore, 95 Mo. 554, 8 S. W. 359, 912.

Ohio.— Wareham *v.* State, 25 Ohio St. 601.

Oregon.— State *v.* Johnson, 7 Oreg. 210.

Pennsylvania.— Com. *v.* Breyessee, 160 Pa. St. 451, 28 Atl. 824, 40 Am. St. Rep. 729.

South Carolina.— State *v.* Smith, 2 Strobh. 77, 47 Am. Dec. 589.

England.— Reg. *v.* Latimer, 17 Q. B. D. 359, 16 Cox C. C. 70, 51 J. P. 184, 55 L. J. M. C. 135, 54 L. T. Rep. N. S. 768 (maliciously striking at one person and wounding another); Gore's Case, 9 Coke 81*a*; Reg. *v.* Saunders, Plowd. 473.

Homicide.— Thus it is well settled that where a person strikes or shoots at another intending to kill him, and contrary to his intention kills a third person, he is guilty of the murder of the latter. See HOMICIDE. And one may be guilty of murder or manslaughter according to the circumstances if he unintentionally causes another's death in doing an

the other hand an offender is not excused because all the consequences of his crime did not ensue, or because his criminal act benefited the community to some extent.[53] It seems, however, that to render one liable criminally for unintended results the act intended must be *malum in se* as distinguished from *malum prohibitum*.[54] And this rule as to unintended consequences does not apply where a specific intent is necessary to constitute a particular crime.[55]

E. Defenses — 1. Ignorance or Mistake — a. Of Law. It is a well-settled principle that every one is presumed to know the law of the land, both common law and statutory, and that one's ignorance of the law furnishes no exemption from criminal responsibility for his acts.[56] It follows that it is no defense for the

unlawful act, as in committing some other felony or an assault. See Homicide.

53. Respublica *v.* Caldwell, 1 Dall. (Pa.) 150, 1 L. ed. 77 (holding that the benefit which the public derives from the erection of a wharf on public property does not prevent its builder from being indicted for maintaining a nuisance); Rex *v.* Ward, 4 A. & E. 384, 1 Hurl. & W. 703, 5 L. J. K. B. 221, 6 N. & M. 38, 31 E. C. L. 180 (holding that it is no defense on indictment for obstructing a river that the obstruction improved its navigation). See also Com. *v.* Belding, 13 Metc. (Mass.) 10. *Compare* Rex *v.* Russell, 6 B. & C. 566, 9 D. & R. 566, 5 L. J. M. C. O. S. 80, 30 Rev. Rep. 432, 13 E. C. L. 258. See, generally, Nuisances.

54. Com. *v.* Adams, 114 Mass. 323, 19 Am. Rep. 362, where it was held that the defendant who, while driving at a speed declared excessive by an ordinance, but not recklessly, injured a pedestrian was not guilty of criminal assault and battery. *Compare*, however, State *v.* Stanton, 37 Conn. 421, where it was held that where a person is knowingly engaged in a criminal act, and commits a greater offense than the one intended, proof of an intention to commit the greater offense is not necessary to a conviction for that offense; and that the rule applies to crimes which are *mala prohibita* as well as to those which are *mala in se*.

55. Roberts *v.* People, 19 Mich. 401; Rex *v.* Boyce, 1 Moody C. C. 29, where the indictment was for feloniously cutting and maiming with intent to murder, maim, and disable, and the jury found that there was an intent to commit robbery and that the cutting and maiming was done with intent to disable the injured man till the prisoner could effect his own escape. See also *supra*, II, D, 7, a, b.

56. *Alabama.*— Hoover *v.* State, 59 Ala. 57; McConico *v.* State, 49 Ala. 6.

California.— People *v.* Kilvington, (1894) 36 Pac. 13.

Georgia.— Fraser *v.* State, 112 Ga. 13, 37 S. E. 114; Levar *v.* State, 103 Ga. 42, 29 S. E. 467.

Indiana.— Winehart *v.* State, 6 Ind. 30.

Iowa.— State *v.* Hughes, 58 Iowa 165, 11 N. W. 706; State *v.* Whitcomb, 52 Iowa 85, 2 N. W. 970, 35 Am. Rep. 258.

Kentucky.— Jellico Coal-Min. Co. *v.* Com., 96 Ky. 373, 29 S. W. 26, 16 Ky. L. Rep. 463, holding that the presumption is irrebuttable, and that the rule applies therefore even though the commonwealth admits at the trial that the accused was ignorant of the law.

Maryland.— Grumbine *v.* State, 60 Md. 355.

Massachusetts.— Com. *v.* Everson, 140 Mass. 292, 2 N. E. 839. And see Com. *v.* O'Brien, 172 Mass. 248, 52 N. E. 77; Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318.

Michigan.— People *v.* Cook, 39 Mich. 236, 33 Am. Rep. 380.

Minnesota.—Mankato *v.* Meagher, 17 Minn. 265.

Mississippi.— Whitton *v.* State, 37 Miss. 379.

Missouri.— State *v.* Wilforth, 74 Mo. 528, 41 Am. Rep. 330; State *v.* Welch, 73 Mo. 284, 39 Am. Rep. 515.

Nebraska.— Pisar *v.* State, 56 Nebr. 455, 76 N. W. 869.

New Hampshire.— State *v.* Marsh, 36 N. H. 196.

New Jersey.— State *v.* Halsted, 39 N. J. L. 402. *Compare*, however, State *v.* Cutter, 36 N. J. L. 125.

New York.— Gardner *v.* People, 62 N. Y. 299; Hamilton *v.* People, 57 Barb. 625.

North Carolina.— State *v.* Robbins, 28 N. C. 23, 44 Am. Dec. 64. See also State *v.* Boyett, 32 N. C. 336.

Pennsylvania.—Weston *v.* Com., 111 Pa. St. 251, 2 Atl. 191.

Rhode Island.— State *v.* Foster, 22 R. I. 163, 46 Atl. 833, 50 L. R. A. 339; State *v.* Watson, 20 R. I. 354, 39 Atl. 193, 78 Am. St. Rep. 871.

Tennessee.— Atkins *v.* State, 95 Tenn. 474, 32 S. W. 391. See also Debardelaben *v.* State, 99 Tenn. 649, 42 S. W. 684.

Texas.— Mendrano *v.* State, 32 Tex. Crim. 214, 22 S. W. 684, 40 Am. St. Rep. 775; Thompson *v.* State, 26 Tex. App. 94, 9 S. W. 486.

United States.— U. S. *v.* Anthony, 24 Fed. Cas. No. 14,459, 11 Blatchf. 200.

England.— Rex *v.* Bailey, R. & R. 1 (where at the time when the statute was enacted, and when the violation of it occurred, the accused was at sea and could not have known of the law); Rex *v.* Esop, 7 C. & P. 456, 32 E. C. L. 705; Matter of Barronet, Dears. C. C. 51, 1 E. & B. 1, 17 Jur. 184, 22 L. J. M. C. 25, 1 Wkly. Rep. 6, 72 E. C. L. 1; 1 Hale P. C. 42 (where it is said: "Ignorance of the municipal law of the Kingdom, or of the penalty thereby inflicted upon offenders, doth not excuse any, that is of the age of discretion and *compos mentis* from the penalty of

accused to show that he believed in good faith that the law which he violated was unconstitutional.[57] Nor will it avail the accused that he acted in good faith under the advice of counsel,[58] or that he is a foreigner and that the act with which he is charged is not a crime in his own country.[59] An exception to the general rule exists where a specific intent is essential to a crime, and ignorance of law negatives the existence of such intent, as where a person charged with larceny or robbery believed the property to be his own.[60] While ignorance of law is no defense, it is a matter which may be considered in mitigation of punishment.[61]

b. Of Fact — (1) *General Rule.* Where one in ignorance or mistake as to fact commits an act which but for such mistake would be a crime, there is an absence of the malice or criminal intention which is generally an essential element of crime, and the general rule therefore is that such ignorance or mistake of fact will exempt one from criminal responsibility.[62] This rule applies for

the breach of it; because every person of the age of discretion and *compos mentis* is bound to know the law, and presumed so to do. *Ignorantia eorum, quæ quis scire tenetur, non excusat*").

See 14 Cent. Dig. tit. "Criminal Law," § 37.

Crimes mala prohibita.— The rule that ignorance of the law is no excuse applies where the crime is *malum prohibitum* only, as well as where it is *malum in se*. State *v.* Foster, 22 R. I. 163, 46 Atl. 833, 50 L. R. A. 339.

57. Miles *v.* U. S., 103 U. S. 304, 26 L. ed. 481; Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244; U. S. *v.* Anthony, 24 Fed. Cas. No. 14,459, 11 Blatchf. 200.

58. Hoover *v.* State, 59 Ala. 57; Weston *v.* Com., 111 Pa. St. 251, 2 Atl. 191; State *v.* Foster, 22 R. I. 163, 46 Atl. 833, 50 L. R. A. 339; U. S. *v.* Anthony, 24 Fed. Cas. No. 14,459, 11 Blatchf. 200, where it was held no defense that the defendant had been advised by counsel that the law whose violation was alleged was unconstitutional.

On a prosecution for bigamy or adultery, it is no defense that the accused believed, on the advice of counsel, that he had the right to marry. State *v.* Goodenow, 65 Me. 30; People *v.* Weed, 29 Hun (N. Y.) 628; Medrano *v.* State, 32 Tex. Crim. 214, 22 S. W. 684, 40 Am. St. Rep. 775. See ADULTERY, 1 Cyc. 954; BIGAMY, 5 Cyc. 695.

59. Rex *v.* Esop, 7 C. & P. 456, 32 E. C. L. 705; Matter of Barronet, Dears. C. C. 51, 1 E. & B. 1, 17 Jur. 184, 22 L. J. M. C. 25, 1 Wkly. Rep. 6, 72 E. C. L. 1, a case of violation by a Frenchman of the English dueling laws.

60. Com. *v.* Stebbins, 8 Gray (Mass.) 492; People *v.* Husband, 36 Mich. 306; Rex *v.* Hall, 3 C. & P. 409, 14 E. C. L. 635. See LARCENY; ROBBERY.

61. Rex *v.* Esop, 7 C. & P. 456, 32 E. C. L. 705.

62. *Alabama.*— Vaughan *v.* State, 83 Ala. 55, 3 So. 530; Dotson *v.* State, 62 Ala. 141, 34 Am. Rep. 2; Morningstar *v.* State, 55 Ala. 148; McMullen *v.* State, 53 Ala. 531; Gordon *v.* State, 52 Ala. 308, 23 Am. Rep. 575; Marshall *v.* State, 49 Ala. 21.

California.— People *v.* Devine, 95 Cal. 227, 30 Pac. 378; People *v.* Gonzales, 71 Cal. 569, 12 Pac. 783.

Connecticut.— Myers *v.* State, 1 Conn. 502.

Florida.— Pinder *v.* State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75; Baker *v.* State, 17 Fla. 406.

Georgia.— Causey *v.* State, 79 Ga. 564, 5 S. E. 121, 11 Am. St. Rep. 447; Pearson *v.* State, 55 Ga. 659; Stern *v.* State, 53 Ga. 229, 21 Am. Rep. 266.

Illinois.— Steinmeyer *v.* People, 95 Ill. 383; Phelps *v.* People, 55 Ill. 334; Campbell *v.* People, 16 Ill. 17, 61 Am. Dec. 49.

Indiana.— Mulreed *v.* State, 107 Ind. 62, 7 N. E. 884; Williams *v.* State, 48 Ind. 306; Goetz *v.* State, 41 Ind. 162; Brown *v.* State, 24 Ind. 113; Farbach *v.* State, 24 Ind. 77.

Iowa.—State *v.* Barrackmore, 47 Iowa 684; State *v.* Collins, 32 Iowa 36; State *v.* Bond, 8 Iowa 540.

Kentucky.— Stanley *v.* Com., 86 Ky. 440, 6 S. W. 155, 9 Ky. L. Rep. 655, 9 Am. St. Rep. 305.

Massachusetts.— Com. *v.* Presby, 14 Gray 65; Com. *v.* Stebbins, 8 Gray 492; Com. *v.* Power, 7 Metc. 596, 41 Am. Dec. 465.

Michigan.— People *v.* Welch, 71 Mich. 548, 39 N. W. 747, 1 L. R. A. 385; People *v.* Schultz, 71 Mich. 315, 38 N. W. 868; Faulks *v.* People, 39 Mich. 200, 33 Am. Rep. 374; People *v.* Husband, 36 Mich. 306.

Missouri.— State *v.* Homes, 17 Mo. 379, 57 Am. Dec. 269; State *v.* Snyder, 44 Mo. App. 429; State *v.* McDonald, 7 Mo. App. 510.

New York.— Shorter *v.* People, 2 N. Y. 193, 51 Am. Dec. 286.

North Carolina.— State *v.* Hause, 71 N. C. 518.

Ohio.— Marts *v.* State, 26 Ohio St. 162; Birney *v.* State, 8 Ohio 230.

Pennsylvania.— Abernethy *v.* Com., 101 Pa. St. 322.

Tennessee.— Barnards *v.* State, 88 Tenn. 183, 12 S. W. 431; Duncan *v.* State, 7 Humphr. 148.

Texas.— Ivey *v.* State, 43 Tex. 425; Smith *v.* State, 42 Tex. 444; Kay *v.* State, 40 Tex. 29; Dismuke *v.* State, (Crim. App. 1892) 20 S. W. 562; Lawrence *v.* State, 11 Tex. App. 306.

Virginia.— Brown *v.* Com., 86 Va. 466, 10 S. E. 745.

West Virginia.— State *v.* Evans, 33 W. Va. 417, 10 S. E. 792.

example where one kills another in his house, believing on reasonable grounds that he is a burglar,[63] where one kills an assailant in what he reasonably believes to be necessary self-defense,[64] where one takes another's property in the honest belief that it is his own,[65] where stolen goods are received by one who does not know that they have been stolen,[66] where one utters or has possession of forged paper or counterfeit coin in ignorance of its character,[67] where one votes illegally under a mistake of fact,[68] under some statutes where a person marries believing that his former wife is dead,[69] and in many other cases. By the express terms of a statute guilty knowledge is sometimes made an essential ingredient of the offense, as where it requires the act to be done "knowingly," [70] etc.

(II) *Exceptions to the Rule.* To the general rule that ignorance or mistake of fact is a defense there are certain exceptions. As we shall see the rule does not necessarily apply to statutory offenses.[71] So also mistake of fact is not always an excuse if, considering the facts as they seemed to the accused, the intention was criminal,[72] if he was engaged in an immoral act,[73] or if he voluntarily closed his eyes to the truth or negligently failed to make inquiry.[74]

United States.— U. S. *v.* Pearce, 27 Fed. Cas. No. 16,020, 2 McLean 14.

England.— Reg. *v.* Tolson, 23 Q. B. D. 168, 16 Cox C. C. 629, 54 J. P. 4, 58 L. J. M. C. 97, 60 L. T. Rep. N. S. 899, 37 Wkly. Rep. 716; Rex *v.* Hall, 3 C. & P. 409, 14 E. C. L. 635; Levet's Case, 1 Hale P. C. 474.

63. Levet's Case, 1 Hale P. C. 474. See HOMICIDE.

64. People *v.* Gonzales, 71 Cal. 569, 12 Pac. 783; State *v.* Collins, 32 Iowa 36; Stanley *v.* Com., 86 Ky. 440, 6 S. W. 155, 9 Ky. L. Rep. 655, 9 Am. St. Rep. 305; Shorter *v.* People, 2 N. Y. 193, 51 Am. Dec. 286. See HOMICIDE.

65. Morningstar *v.* State, 55 Ala. 148; Com. *v.* Stebbins, 8 Gray (Mass.) 492; People *v.* Husband, 36 Mich. 306; Rex *v.* Hall, 3 C. & P. 409, 14 E. C. L. 635. See LARCENY; ROBBERY.

66. People *v.* Levison, 16 Cal. 98, 76 Am. Dec. 505; Huggins *v.* People, 135 Ill. 243, 25 N. E. 1002, 25 Am. St. Rep. 357; Com. *v.* Leonard, 140 Mass. 473, 4 N. E. 96, 54 Am. Rep. 485; Tolliver *v.* State, 25 Tex. App. 600, 8 S. W. 806. See RECEIVING STOLEN GOODS.

67. Com. *v.* Searle, 2 Binn. (Pa.) 332, 4 Am. Dec. 446; Sands *v.* Com., 20 Gratt. (Va.) 800. See COUNTERFEITING, 11 Cyc. 300; FORGERY.

68. Carter *v.* State, 55 Ala. 181; Gordon *v.* State, 52 Ala. 308, 23 Am. Rep. 575; McGuire *v.* State, 7 Humphr. (Tenn.) 54. See ELECTIONS.

69. Squire *v.* State, 46 Ind. 459; Reg. *v.* Tolson, 23 Q. B. D. 168, 16 Cox C. C. 629, 54 J. P. 4, 58 L. J. M. C. 97, 60 L. T. Rep. N. S. 899, 37 Wkly. Rep. 716. See ADULTERY, 1 Cyc. 954; BIGAMY, 5 Cyc. 694.

70. Smith *v.* State, 55 Ala. 1; Com. *v.* Flannelly, 15 Gray (Mass.) 195; Fielding *v.* State, (Tex. Crim. 1899) 52 S. W. 69; Teague *v.* State, 25 Tex. App. 577, 8 S. W. 667; Williams *v.* State, 23 Tex. App. 70, 3 S. W. 661.

71. See *infra*, II, E, 2, c.

72. Thus it is murder if one engaged in a robbery kills his victim (State *v.* Barrett, 40 Minn. 77, 41 N. W. 463); if one intending to commit a felonious assault causes death (Wellar *v.* People, 30 Mich. 16); if one feloniously sets fire to a dwelling-house and accidentally burns an inmate (Reg. *v.* Serné, 16 Cox C. C. 311); if one dies from poison prepared for another (Reg. *v.* Saunders, Plowd. 473); or if one intending to shoot a certain person kills a bystander (Gore's Case, 9 Coke 81*a*). And one may be guilty of manslaughter if he unintentionally causes death in doing a criminal act not amounting to a felony. State *v.* Benham, 23 Iowa 154, 92 Am. Dec. 416; Reg. *v.* Towers, 12 Cox C. C. 530. See, generally, HOMICIDE.

73. Thus a person is not the less guilty of abduction or carnal knowledge of a girl under the age fixed by statute for such crimes because he was ignorant or mistaken as to her age. People *v.* Dolan, 96 Cal. 315, 31 Pac. 107; State *v.* Ruhl, 8 Iowa 447; Com. *v.* Murphy, 165 Mass. 66, 42 N. E. 504, 52 Am. St. Rep. 496, 30 L. R. A. 734; Reg. *v.* Prince, L. R. 2 C. C. 154, 13 Cox C. C. 138, 44 L. J. M. C. 122, 32 L. T. Rep. N. S. 700, 24 Wkly. Rep. 76. See ABDUCTION, 1 Cyc. 152; RAPE. And a person is not the less guilty of adultery in having unlawful intercourse with a woman because he did not know she was married. Com. *v.* Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398; State *v.* Cody, 111 N. C. 725, 16 S. E. 408; Fox *v.* State, 3 Tex. App. 329, 30 Am. Rep. 144. See ADULTERY, 1 Cyc. 954.

74. Thus a person is guilty of manslaughter in causing another's death by using a pistol in a reckless manner, knowing it to be loaded, but believing the load too old to explode. State *v.* Hardie, 47 Iowa 647, 29 Am. Rep. 496. See HOMICIDE. A person is not the less guilty of bigamy because of a belief in the death of his or her former spouse, where there is no reasonable ground for such belief. Dotson *v.* State, 62 Ala. 141, 34 Am. Rep. 2. See BIGAMY, 5 Cyc. 694. And one who sells liquor to a minor in violation of a statute without reasonable grounds for believing him to be of age, or relying merely on his representation that he is of age, cannot escape liability on the ground that he thought he was of age. Behler *v.* State, 112 Ind. 140, 13 N. E. 272; Swigart *v.* State, 99 Ind. 111.

(III) *STATUTORY OFFENSES.* Where a statute punishes the doing under particular circumstances of an act which in the absence of such circumstances is lawful, one who does the act under *bona fide* and non-negligent ignorance or mistake as to the existence of such circumstances is not guilty, unless it appears that the legislature intended that persons doing the act should act at their peril.[75] As has been seen, however, the legislature may punish an act as a crime without regard to the intent of the party doing it,[76] and when such an intention on the part of the legislature appears, one who does the act cannot escape liability by showing ignorance or mistake of fact.[77] This principle has been applied to some

The same principle applies in prosecutions for selling liquor to a person in the habit of getting intoxicated. Crabtree *v.* State, 30 Ohio St. 382. See INTOXICATING LIQUORS.

75. *Alabama.*— Vaughan *v.* State, 83 Ala. 55, 3 So. 530; Adler *v.* State, 55 Ala. 16; Gordon *v.* State, 52 Ala. 308, 23 Am. Rep. 575 (voting by a minor under a mistake as to his age); Marshall *v.* State, 49 Ala. 21.

Connecticut.— Myers *v.* State, 1 Conn. 502, letting a carriage on Sunday under the erroneous belief that it is to be used in a work of necessity or charity.

Georgia.— Stern *v.* State, 53 Ga. 229, 21 Am. Rep. 266.

Indiana.— Mulreed *v.* State, 107 Ind. 62, 7 N. E. 884; Williams *v.* State, 48 Ind. 306; Squire *v.* State, 46 Ind. 459; Goetz *v.* State, 41 Ind. 162; Brown *v.* State, 24 Ind. 113; Farbach *v.* State, 24 Ind. 77.

Michigan.— People *v.* Welch, 71 Mich. 548, 39 N. W. 747, 1 L. R. A. 385; Faulks *v.* People, 39 Mich. 200, 33 Am. Rep. 374.

Missouri.— State *v.* Snyder, 44 Mo. App. 429.

North Carolina.— State *v.* Hause, 71 N. C. 518.

Ohio.— Farrell *v.* State, 32 Ohio St. 456, 30 Am. Rep. 614; Crabtree *v.* State, 30 Ohio St. 382; Birney *v.* State, 8 Ohio 230.

Tennessee.— Duncan *v.* State, 7 Humphr. 148.

Texas.— Mason *v.* State, 29 Tex. App. 24, 14 S. W. 71.

England.— Reg. *v.* Tolson, 23 Q. B. D. 168, 16 Cox C. C. 629, 54 J. P. 4, 58 L. J. M. C. 97, 60 L. T. Rep. N. S. 899, 37 Wkly. Rep. 716. See also Reg. *v.* Sleep, 8 Cox C. C. 472, 7 Jur. N. S. 979, 30 L. J. M. C. 170, 4 L. T. Rep. N. S. 525, L. & C. 44, 9 Wkly. Rep. 709.

See *supra*, II, D, 1.

76. See *supra*, II, D, 1, b.

77. *Alabama.*— Owens *v.* State, 94 Ala. 97, 10 So. 669.

California.— People *v.* Dolan, 96 Cal. 315, 31 Pac. 107.

Connecticut.— State *v.* Kinkead, 57 Conn. 173, 17 Atl. 855 (allowing minor to loiter on premises where liquors are kept for sale); State *v.* Stanton, 37 Conn. 421; Barnes *v.* State, 19 Conn. 398.

Illinois.— Gordon *v.* Gordon, 141 Ill. 160, 30 N. E. 446, 33 Am. St. Rep. 294, 21 L. R. A. 389; Farmer *v.* People, 77 Ill. 322; McCutcheon *v.* People, 69 Ill. 601.

Iowa.— State *v.* Thompson, 74 Iowa 119, 37 N. W. 104; State *v.* Probasco, 62 Iowa 400, 17 N. W. 607 (allowing minor to remain in billiard saloon); State *v.* Newton, 44 Iowa 45; State *v.* Ruhl, 8 Iowa 447.

Kentucky.— Ulrich *v.* Com., 6 Bush 400.

Maryland.— State *v.* Baltimore, etc., Steam Co., 13 Md. 181, carrying illegal number of passengers on a steamboat.

Massachusetts.—Com. *v.* Stevens, 155 Mass. 291, 29 N. E. 508; Com. *v.* O'Kean, 152 Mass. 584, 26 N. E. 97; Com. *v.* Savery, 145 Mass. 212, 13 N. E. 611; Com. *v.* Wentworth, 118 Mass. 441 (sale of naphtha); Com. *v.* Smith, 103 Mass. 444; Com. *v.* Emmons, 98 Mass. 6 (admitting a minor to a billiard-room); Com. *v.* Raymond, 97 Mass. 567 (sale of calf under age fixed by statute); Com. *v.* Goodman, 97 Mass. 117; Com. *v.* Waite, 11 Allen 264, 87 Am. Dec. 711; Com. *v.* Farren, 9 Allen 489; Com. *v.* Boynton, 2 Allen 160; Com. *v.* Mash, 7 Metc. 472.

Michigan.— People *v.* Worden Grocer Co., 118 Mich. 604, 77 N. W. 315; People *v.* Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270.

Minnesota.— State *v.* Heck, 23 Minn. 549.

Mississippi.— King *v.* State, 66 Miss. 502, 6 So. 188.

Missouri.— State *v.* Johnson, 115 Mo. 480, 22 S. W. 463; State *v.* Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686; State *v.* Bruder, 35 Mo. App. 475.

Nevada.— State *v.* Zichfeld, 23 Nev. 304, 46 Pac. 802, 62 Am. St. Rep. 800, 34 L. R. A. 784 [*overruling* State *v.* Gardner, 5 Nev. 377].

New Jersey.— Waterbury *v.* Newton, 50 N. J. L. 534, 14 Atl. 604 (sale of oleomargarine); Halsted *v.* State, 41 N. J. L. 552, 32 Am. Rep. 247 (disbursing, ordering, or voting for disbursement of public moneys in excess of appropriations, or incurring obligations in excess of appropriations).

New York.— People *v.* Kibler, 106 N. Y. 321, 12 N. E. 795; Gardner *v.* People, 62 N. Y. 299; People *v.* Jones, 54 Barb. 311; People *v.* Eddy, 12 N. Y. Suppl. 628; People *v.* Zeiger, 6 Park. Crim. 355.

North Carolina.— State *v.* Hause, 71 N. C. 518.

Ohio.— State *v.* Kelly, 54 Ohio St. 166, 43 N. E. 163.

Oklahoma.— Garver *v.* Territory, 5 Okla. 342, 49 Pac. 470.

Pennsylvania.— Com. *v.* Weiss, 139 Pa. St. 247, 21 Atl. 10, 23 Am. St. Rep. 182, 11 L. R. A. 530 (sale of oleomargarine); Com. *v.* Zelt, 138 Pa. St. 615, 21 Atl. 7, 11 L. R. A. 602; *In re* Carlson's License, 127 Pa. St. 330, 18 Atl. 8.

of the statutes punishing bigamy and adultery,[78] selling or keeping for sale adulterated food products,[79] etc., selling or keeping for sale intoxicating liquors,[80] selling intoxicating liquors to minors or drunkards,[81] and in many other cases.[82]

2. CUSTOM OR USAGE. A custom or usage to do that which is a crime, although known and acquiesced in by the party injured, is no defense.[83]

3. ACTING AS AGENT OR EMPLOYEE OF ANOTHER. It is no defense to a criminal prosecution to prove that the accused committed the crime in the discharge of his duty as agent or employee of another person, for the command of a master to a servant, a principal to his agent, or a parent to his child will not justify a criminal act done in pursuance thereof.[84]

4. ACTING UNDER DIRECTION OF GOVERNMENT. A crime is punishable as such when committed in our territory by a foreigner, although he shows in defense

Rhode Island.— State *v.* Foster, 22 R. I. 163, 46 Atl. 833, 50 L. R. A. 339; State *v.* Hughes, 16 R. I. 403, 16 Atl. 911; State *v.* Smith, 10 R. I. 258.

South Dakota.— State *v.* Dorman, 9 S. D. 528, 70 N. W. 848; State *v.* Sasse, 6 S. D. 212, 60 N. W. 853, 55 Am. St. Rep. 834.

Texas.— Simon *v.* State, 31 Tex. Crim. 186, 30 S. W. 399, 716, 37 Am. St. Rep. 802; Fox *v.* State, 3 Tex. App. 329, 30 Am. Rep. 144.

Vermont.— State *v.* Dana, 59 Vt. 614, 10 Atl. 727; State *v.* Wyman, 59 Vt. 527, 8 Atl. 900, 59 Am. Rep. 753.

West Virginia.— State *v.* Pennington, 41 W. Va. 599, 23 S. E. 918; State *v.* Baer, 37 W. Va. 1, 16 S. E. 368; State *v.* Farr, 34 W. Va. 84, 11 S. E. 737; State *v.* Cain, 9 W. Va. 559.

Wisconsin.— State *v.* Hartfiel, 24 Wis. 60.

England.— Reg. *v.* Bishop, 5 Q. B. D. 259, 14 Cox C. C. 404, 44 J. P. 330, 49 L. J. M. C. 45, 42 L. T. Rep. N. S. 240, 28 Wkly. Rep. 475 (taking a lunatic into an unlicensed house); Reg. *v.* Woodfall, 5 Burr. 2661; Reg. *v.* Robins, 1 C. & K. 456, 47 E. C. L. 456; Reg. *v.* Gibbons, 12 Cox C. C. 237; Reg. *v.* Booth, 12 Cox C. C. 231; Reg. *v.* Woodrow, 16 L. J. M. C. 122, 15 M. & W. 404.

See *supra*, II, D, 1, b.

78. See ADULTERY, 1 Cyc. 954; BIGAMY, 5 Cyc. 694.

79. See ADULTERATION, 1 Cyc. 943; FOOD.

80. See INTOXICATING LIQUORS.

81. See INTOXICATING LIQUORS.

82. See the cases cited *supra*, note 77.

Defendant's belief that he was honestly elected to an office is no excuse for his illegal usurpation. State *v.* Hallett, 8 Ala. 159; Duncan *v.* State, 7 Humphr. (Tenn.) 148.

The abduction or carnal knowledge of a female under a specified age is not excused by the defendant's ignorance of her age. State *v.* Newton, 44 Iowa 45; State *v.* Ruhl, 8 Iowa 447; Reg. *v.* Mycock, 12 Cox C. C. 28. See ABDUCTION, 1 Cyc. 152; RAPE.

83. *Florida.*—Hendry *v.* State, 39 Fla. 235, 22 So. 647.

Indiana.— Bankus *v.* State, 4 Ind. 114.

Kentucky.— Clark *v.* Com., 63 S. W. 740, 23 Ky. L. Rep. 1029.

Massachusetts.— Com. *v.* Doane, 1 Cush. 5, holding that the custom of officers of a ship to appropriate small portions of the cargo was no excuse.

Nebraska.— Bolln *v.* State, 51 Nebr. 581, 71 N. W. 444, where a public officer unlawfully appropriated public money, according to a common practice.

New York.— People *v.* Flechter, 44 N. Y. App. Div. 199, 60 N. Y. Suppl. 777, 14 N. Y. Crim. 328.

Texas.— Lawrence *v.* State, 20 Tex. App. 536 [*overruling* Debbs *v.* State, 43 Tex. 650].

England.— Reg. *v.* Reed, 12 Cox C. C. 1, an indictment for indecent exposure of the person while bathing in a public place, where a custom of many years' duration was set up without avail.

84. *Alabama.*— Reese *v.* State, 73 Ala. 18; Winter *v.* State, 30 Ala. 22.

California.— People *v.* Richmond, 29 Cal. 414.

District of Columbia.— Smith *v.* District of Columbia, 12 App. Cas. 33.

Indiana.— Douglass *v.* State, 18 Ind. App. 289, 48 N. E. 9.

Massachusetts.— Com. *v.* Feeney, 13 Allen 500; Com. *v.* Whalen, 16 Gray 23.

Mississippi.— Kliffield *v.* State, 4 How. 304.

Nebraska.— Allyn *v.* State, 21 Nebr. 593, 33 N. W. 212.

New York.— People *v.* Dunlap, 32 Misc. 390, 66 N. Y. Suppl. 161.

North Carolina.— State *v.* Crosset, 81 N. C. 579.

Pennsylvania.—Com. *v.* Kolb, 13 Pa. Super. Ct. 347.

Texas.—Sanders *v.* State, (Crim. App. 1894) 26 S. W. 62; Murphy *v.* State, 6 Tex. App. 420; Taylor *v.* State, 5 Tex. App. 529.

Vermont.— State *v.* Potter, 42 Vt. 495.

Since a corporation can commit no crime involving a criminal intent, its officials, who have the intent, are liable and are not protected because they act under the direction of a corporation. People *v.* Dunlap, 32 Misc. (N. Y.) 390, 66 N. Y. Suppl. 161.

Larceny.— A hired man cannot excuse his theft by a plea that he stole the goods by the orders of his employer, if he knew his employer's criminal intent. Murphy *v.* State, 6 Tex. App. 420; Taylor *v.* State, 5 Tex. App. 529. See also *infra*, II, E, 7, a.

Coercion of wife by husband see HUSBAND AND WIFE.

that the crime was committed under the direction of his own government, and negotiations in relation to the same are then pending.[85]

5. Entrapment. The fact that a detective or other person suspected that the defendant was about to commit a crime and prepared for his detection, as a result of which he was entrapped in its commission, is no excuse, if the defendant alone conceived the original criminal design.[86] If, however, the prosecutor in setting his trap waives his legal rights, as where he consents to the act, and the offense requires want of consent on his part, the prosecution will fail.[87]

6. Necessity. An act which would otherwise constitute a crime is justifiable or excusable if done under necessity.[88] It is on this ground that the law justifies

85. People *v.* McLeod, 1 Hill (N. Y.) 377, 37 Am. Dec. 328.

86. *Alabama.*—Thompson *v.* State, 106 Ala. 67, 17 So. 512.

California.— People *v.* Hanselman, 76 Cal. 460, 18 Pac. 425, 9 Am. St. Rep. 238.

Georgia.— Varner *v.* State, 72 Ga. 745; O'Halloran *v.* State, 31 Ga. 206.

Indiana.— Thompson *v.* State, 18 Ind. 386, 81 Am. Dec. 364.

Kansas.— State *v.* Stickney, 53 Kan. 308, 36 Pac. 714, 42 Am. St. Rep. 284; State *v.* Jansen, 22 Kan. 498.

Louisiana.— State *v.* Dudoussat, 47 La. Ann. 977, 17 So. 685; State *v.* Duncan, 8 Rob. 562.

Michigan.— People *v.* Liphardt, 105 Mich. 80, 62 N. W. 1022; People *v.* Curtis, 95 Mich. 212, 54 N. W. 767; People *v.* Murphy, 93 Mich. 41, 52 N. W. 1042; People *v.* McCord, 76 Mich. 200, 42 N. W. 1106.

Nebraska.— State *v.* Sneff, 22 Nebr. 481, 35 N. W. 219.

North Carolina.— State *v.* Adams, 115 N. C. 775, 20 S. E. 722.

Pennsylvania.— Com. *v.* Seybert, 4 Pa. Co. Ct. 152.

South Carolina.— State *v.* Covington, 2 Bailey 569.

Texas.— Pigg *v.* State, 43 Tex. 108; Alexander *v.* State, 12 Tex. 540; Conner *v.* State, 24 Tex. App. 245, 6 S. W. 138.

England.— Reg. *v.* Lawrence, 4 Cox C. C. 438; Rex *v.* Headge, 2 Leach C. C. 1033, R. & R. 119.

See Bribery, 5 Cyc. 1044; Burglary, 6 Cyc. 181; Larceny.

One accused of selling liquor in violation of an ordinance cannot defend upon the ground that the city furnished the person with money to buy the liquor in order to detect violations of the ordinance. Evanston *v.* Myers, 172 Ill. 266, 50 N. E. 204 [*reversing* 70 Ill. App. 205]; State *v.* Lucas, 94 Mo. App. 17, 67 S. W. 971. But see Wilcox *v.* People, (Colo. 1902) 67 Pac. 343. See also Intoxicating Liquors.

Decoy letters.— The employment of decoy letters by a government inspector is not an objection to a conviction for mailing obscene matter. Price *v.* U. S., 165 U. S. 311, 17 S. Ct. 366, 41 L. ed. 727.

87. *Alabama.*— Allen *v.* State, 40 Ala. 334, 91 Am. Dec. 476.

Colorado.— Connor *v.* People, 18 Colo. 373, 33 Pac. 159, 36 Am. St. Rep. 295, 25 L. R. A. 341.

Michigan.— People *v.* McCord, 76 Mich. 200, 42 N. W. 1106.

Texas.— Speiden *v.* State, 3 Tex. App. 156, 30 Am. Rep. 126.

England.— Rex *v.* Egginton, 2 B. & P. 508, 2 East P. C. 494, 666, 2 Leach C. C. 913, 5 Rev. Rep. 689.

Illustrations.— If one consents to the taking of his property he cannot prosecute for larceny, and if he leaves his door open in the night-time, he cannot prosecute for burglary, and if he permits himself to be robbed he cannot have the offender punished for the robbery. State *v.* Covington, 2 Bailey (S. C.) 569; Alexander *v.* State, 12 Tex. 540; Rex *v.* Egginton, 2 B. & P. 508, 2 East P. C. 494, 666, 2 Leach C. C. 913, 5 Rev. Rep. 689; Rex *v.* Macdaniel, 2 East P. C. 665, Fost. 121; Rex *v.* Fuller, R. & R. 302. Where a servant to whom a scheme of burglary has been proposed tells his master or the police, and while apparently confederating with the burglars acts with the knowledge and advice of his master and lets the thieves into the house by opening the door, there is no burglary. Allen *v.* State, 40 Ala. 334, 91 Am. Dec. 476; People *v.* Collins, 53 Cal. 185; Speiden *v.* State, 3 Tex. App. 156, 30 Am. Rep. 126; Rex *v.* Egginton, 2 B. & P. 508, 2 East P. C. 494, 666, 2 Leach C. C. 913, 5 Rev. Rep. 689; Reg. *v.* Johnson, C. & M. 218, 41 E. C. L. 123; Rex *v.* Dannelly, 2 Marsh. 571, R. & R. 310. See Burglary, 6 Cyc. 181; Larceny; Robbery.

88. Stephen Dig. Crim. L. art. 32, where it is said: "An act which would otherwise be a crime may be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him, or upon others whom he was bound to protect, inevitable and irreparable evil; that no more was done than was reasonably necessary for that purpose; and that the evil inflicted by it was not disproportionate to the evil avoided." See also Com. *v.* Knox, 6 Mass. 76; *In re* Stratton, 21 How. St. Tr. 1045, 1223 (where Lord Mansfield said: "Wherever necessity *forces* a man to do an illegal act, forces him to do it, it justifies him, because no man can be guilty of a crime without the will and intention of his mind. It must be voluntary"). See Com. *v.* Brooks, 99 Mass. 434 (holding that a person whose wagon was stopped in the street by the crowding of other vehicles did not violate a city ordinance pro-

or excuses homicide in self-defense or to save life, or the taking of another's property when it is necessary to save life.[89]

7. Duress or Compulsion — a. In General. An act which would otherwise constitute a crime may also be excused on the ground that it was done under compulsion or duress.[90] The fear which will excuse the commission of a crime must have proceeded from a reasonable apprehension of an immediate and actual danger threatening the accused with death or great bodily harm. His apprehension of loss of property or of slight or remote injury to his person is not sufficient.[91] A threat of future injury is not enough.[92] A statute sometimes requires that the party threatening shall be actually present.[1] A crime is not excused on the ground of duress because it was committed by a child, being of sufficient capacity to be responsible, by command of his or her parent,[2] by an agent or servant by command of his principal or master,[3] or by an inferior in the army, navy, or civil service, by command of his superior.[4]

b. Coercion of Wife by Husband. Except in the case of treason, murder, and certain other crimes, where a married woman commits a crime in the presence of her husband there is, in the absence of a statute, a rebuttable presumption that she acts under coercion by him, and she is not responsible unless this presumption is rebutted.[5]

8. Condonation and Settlement. The fact that the person who was injured by the commission of a crime has condoned the offense or made a settlement with the defendant or with some third person in his behalf does not relieve the defendant or bar a prosecution by the state.[6] This rule, however, does not

hibiting the owner or driver of a wagon from suffering it to stop in a street longer than a certain time); Reg. *v.* Bamber, 5 Q. B. 279, Dav. & M. 367, 8 Jur. 309, 13 L. J. M. C. 13, 48 E. C. L. 279 (holding that on an indictment for non-repair of a highway it was a good defense that the sea had encroached upon the highway, washed away the earth and soil, and rendered it impossible to repair the same); U. S. *v.* Ashton, 24 Fed. Cas. No. 14,470, 2 Sumn. 13 (holding that on an indictment for an endeavor to commit revolt on board a ship on the high seas it was a sufficient defense of the parties accused that the combination charged as an endeavor was to compel the master to return into port because of unseaworthiness of the vessel, where they acted in good faith and the vessel was actually unseaworthy).

89. See Homicide; Larceny.

90. Stephen Dig. Crim. L. art. 31. And see People *v.* Repke, 103 Mich. 459, 61 N. W. 861; Morgan *v.* State, 3 Sneed (Tenn.) 475; Paris *v.* State, 35 Tex. Crim. 82, 31 S. W. 855; Rex *v.* Crutchley, 5 C. & P. 133, 24 E. C. L. 490; MacGrowther's Case, Fost. 13, 18 How. St. Tr. 391. See also Respublica *v.* McCarty, 2 Dall. (Pa.) 86, 1 L. ed. 300.

91. Respublica *v.* McCarty, 2 Dall. (Pa.) 86, 1 L. ed. 300; U. S. *v.* Vigol, 28 Fed. Cas. No. 16,621, 2 Dall. 346. See also McCoy *v.* State, 78 Ga. 490, 3 S. E. 768; People *v.* Repke, 103 Mich. 459, 61 N. W. 861; Morgan *v.* State, 3 Sneed (Tenn.) 475; MacGrowther's Case, Fost. 13, 18 How. St. Tr. 391.

92. People *v.* Repke, 103 Mich. 459, 61 N. W. 861, holding that in a prosecution for murder proof of a threat to take the life of the accused, unless he should assist in the perpetration of the crime, made three days before the crime was committed, was no defense.

1. Under a statute providing that duress as a defense exists only where the party threatening is "actually present," he is actually present if he is in such proximity to the place of the crime as to have control over the person threatened. Paris *v.* State, 35 Tex. Crim. 82, 31 S. W. 855.

2. People *v.* Richmond, 29 Cal. 414; Carlisle *v.* State, 37 Tex. Crim. 108, 38 S. W. 991. See *supra*, II, E, 3.

3. People *v.* Richmond, 29 Cal. 414; Com. *v.* Hadley, 11 Metc. (Mass.) 66. See *supra*, II, E, 3.

4. Com. *v.* Blodgett, 12 Metc. (Mass.) 56; U. S. *v.* Carr, 25 Fed. Cas. No. 14,732, 1 Woods 480; U. S. *v.* Jones, 26 Fed. Cas. No. 15,494, 3 Wash. 209. See Homicide.

5. State *v.* Fitzgerald, 49 Iowa 260, 31 Am. Rep. 148; Com. *v.* Neal, 10 Mass. 152, 6 Am. Dec. 105; Davis *v.* State, 15 Ohio 72, 45 Am. Dec. 559; Reg. *v.* Dykes, 15 Cox C. C. 771. See Husband and Wife.

6. *Alabama.*— May *v.* State, 115 Ala. 14, 22 So. 611.

Arkansas.— Donohoe *v.* State, 59 Ark. 375, 27 S. W. 226; Fleener *v.* State, 58 Ark. 98, 23 S. W. 1.

California.— People *v.* De Lay, 80 Cal. 52, 22 Pac. 90.

Florida.— Thalheim *v.* State, 38 Fla. 169, 20 So. 938.

Georgia.— Williams *v.* State, 105 Ga. 606, 31 S. E. 546; Robson *v.* State, 83 Ga. 166, 9 S. E. 610; Statham *v.* State, 41 Ga. 507; McCoy *v.* State, 15 Ga. 205.

necessarily apply to misdemeanors. By statute in some jurisdictions, and it seems even at common law, the fact that certain misdemeanors, like assault and battery for example, have been condoned or compromised may be proved in defense.[7]

9. Discontinuance of Prosecution by Private Person. In England the fact that a private prosecutor refuses to proceed does not authorize the discharge of the accused, but the attorney-general may take the matter up, where it has been left by the private person, and try the case, or pray the court that sentence on a judgment of conviction may be pronounced.[8]

10. Defendant Furnishing State's Evidence — a. Right to Immunity or Discharge. In the absence of a statute an accomplice turning state's evidence and testifying against his co-defendants without any promise of immunity, or even under a promise of immunity made by the prosecuting attorney or committing magistrate, has no legal right to a discharge, and cannot plead the promise as a bar.[9] But in some jurisdictions there are statutory provisions to the contrary, and even in the absence of a statute it is an almost universal custom for the prosecuting attorney, with the consent of the court, to enter a *nolle prosequi* or to dismiss the charge against an accomplice who has performed his contract to testify, and such discharge is in every respect equivalent to an acquittal, and is a bar to a subsequent prosecution.[10] And it has been held that while the accused

Indiana.— Dean *v.* State, 147 Ind. 215, 46 N. E. 528; State *v.* Bain, 112 Ind. 335, 14 N. E. 232.

Louisiana.— State *v.* Frisch, 45 La. Ann. 1283, 14 So. 132; State *v.* Thompson, 32 La. Ann. 796.

Massachusetts.— Com. *v.* Brown, 167 Mass. 144, 45 N. E. 1; Com. *v.* Slattery, 147 Mass. 423, 18 N. E. 399.

Missouri.— State *v.* Tull, 119 Mo. 421, 24 S. W. 1010; State *v.* Noland, 111 Mo. 473, 19 S. W. 715; State *v.* Pratt, 98 Mo. 482, 11 S. W. 977.

Oregon.— Saxon *v.* Conger, 6 Oreg. 388.

Texas.— Countee *v.* State, (Crim. App. 1895) 33 S. W. 127; Shultz *v.* State, 5 Tex. App. 390.

Virginia.— Barker *v.* Com., 90 Va. 820, 20 S. E. 776.

Wyoming.— Ivinson *v.* Pease, 1 Wyo. 277.

United States.— U. S. *v.* George, 25 Fed. Cas. No. 15,198, 6 Blatchf. 406.

See 14 Cent. Dig. tit. "Criminal Law," § 44.

An offer to make restitution, although made before indictment, is no defense. Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 303, 35 L. R. A. 176, 54 Am. St. Rep. 447; Dean *v.* State, 147 Ind. 215, 46 N. E. 528; State *v.* Pratt, 98 Mo. 482, 11 S. W. 977; Shinn *v.* Com., 32 Gratt. (Va.) 899; U. S. *v.* Gilbert, 25 Fed. Cas. No. 15,205.

As to condonation and settlement in the case of particular crimes see Embezzlement; False Pretenses; Forgery; Larceny; Rape; Seduction; and other special titles.

7. Statham *v.* State, 41 Ga. 507; McDaniel *v.* State, 27 Ga. 197; People *v.* Bishop, 5 Wend. (N. Y.) 111 (holding that under a New York statute an assault and battery could be compromised either before or after indictment, but not after a conviction); Saxon *v.* Conger, 6 Oreg. 388; Rushworth *v.* Dwyer, 1 Phila. (Pa.) 26.

8. Rex *v.* Oldfield, 3 B. & Ad. 659 note *a*, 23 E. C. L. 291; Rex *v.* Constable, 3 B. & Ad. 659 note *a*, 23 E. C. L. 291, 7 D. & R. 663, 16 E. C. L. 312; Rex *v.* Fielder, 3 B. & Ad. 659 note *a*, 23 E. C. L. 290; Rex *v.* Wood, 3 B. & Ad. 657, 23 E. C. L. 290.

9. *Alabama.*— Long *v.* State, 86 Ala. 36, 5 So. 443.

California.—People *v.* Indian Peter, 48 Cal. 250.

Florida.— Newton *v.* State, 15 Fla. 610.

Indiana.— State *v.* Bain, 112 Ind. 335, 14 N. E. 232; Golden *v.* State, 49 Ind. 424.

Kansas.— Cummings *v.* State, 4 Kan. 225.

Massachusetts.—Com. *v.* St. John, 173 Mass. 566, 54 N. E. 254, 73 Am. St. Rep. 321; Com. *v.* Burrough, 162 Mass. 513, 39 N. E. 184; Com. *v.* Plummer, 147 Mass. 601, 18 N. E. 567; Com. *v.* Woodside, 105 Mass. 594; Com. *v.* Denehy, 103 Mass. 424 note; Com. *v.* Brown, 103 Mass. 422.

Missouri.— State *v.* Guild, 149 Mo. 370, 50 S. W. 909, 73 Am. St. Rep. 395.

Nebraska.—Whitney *v.* State, 53 Nebr. 287, 73 N. W. 696.

New Jersey.— State *v.* Graham, 41 N. J. L. 15, 32 Am. Rep. 174.

New York.— People *v.* Whipple, 9 Cow. 707.

North Carolina.— State *v.* Lyon, 81 N. C. 600, 31 Am. Rep. 518.

England.— Rex *v.* Lee, R. & R. 268.

See 14 Cent. Dig. tit. "Criminal Law," § 45 *et seq.*

10. *California.*— People *v.* Bruzzo, 24 Cal. 41.

Kansas.— Cummings *v.* State, 4 Kan. 225.

Massachusetts.— Com. *v.* St. John, 173 Mass. 566, 54 N. E. 254, 73 Am. St. Rep. 321.

New Jersey.— State *v.* Graham, 41 N. J. L. 15, 32 Am. Rep. 174.

North Carolina.— State *v.* Lyon, 81 N. C. 600, 31 Am. Rep. 518.

may not plead the promise of immunity as a bar he has an equitable title to executive pardon.[11]

b. Breach of Agreement to Testify. If the accomplice, after the promise of immunity, refuses to testify as agreed,[12] testifies falsely,[13] or makes only a partial disclosure,[14] he forfeits his equitable right to a discharge or a pardon. An accomplice who becomes a witness for the prosecution is impliedly bound to disclose all he knows of the crime and cannot remain silent as to privileged communications to his attorney.[15]

c. Testimony Before Grand Jury. Statutes exist in many jurisdictions conferring immunity on accomplices and others, where they shall disclose their criminal liability in testifying before a grand jury.[16]

11. Pendency of, or Recovery in, Civil Actions. The public and the person injured by a crime each has a distinct although concurrent remedy, as a criminal act is both a private and a public wrong, and these remedies may operate simultaneously.[17] Recovery in a civil action does not bar a criminal prosecution.[18] And therefore as a general rule the pendency of a civil action cannot be pleaded in bar.[19]

Ohio.— Evans *v.* State, 1 Ohio Dec. (Reprint) 436, 10 West. L. J. 49.

In Texas an agreement to turn state's evidence will bar a prosecution (Harris *v.* State, 15 Tex. App. 629; Hardin *v.* State, 12 Tex. App. 186; Bowden *v.* State, 1 Tex. App. 137) if carried out by the accused in good faith but apparently subject to the approval of the court. Vincent *v.* State, (Crim. App. 1900) 55 S. W. 819; Tullis *v.* State, 41 Tex. Crim. 87, 52 S. W. 83; Camron *v.* State, 32 Tex. Crim. 180, 22 S. W. 682, 40 Am. St. Rep. 763. But see Holmes *v.* State, 20 Tex. App. 509. The immunity does not extend to a crime separate and distinct from that concerning which the defendant testifies. Moseley *v.* State, 35 Tex. Crim. 210, 32 S. W. 1042; Heinzman *v.* State, 34 Tex. Crim. 76, 29 S. W. 156, 482; Kain *v.* State, 16 Tex. App. 282. An agreement by a defendant to aid state officers in detecting criminals is not within the rule protecting persons testifying against their co-defendants. Holmes *v.* State, 20 Tex. App. 509. A sheriff has no authority to promise immunity from prosecution to an informer. Moseley *v.* State, 35 Tex. Crim. 210, 32 S. W. 1042.

The federal courts are inclined to enforce agreements by prosecuting attorneys to grant immunity to a defendant turning state's evidence. U. S. *v.* Lee, 26 Fed. Cas. No. 15,588, 4 McLean 103; U. S. *v.* Roelle, 27 Fed. Cas. No. 16,186. "The government is bound in honor, under the circumstances, to carry out the understanding or arrangement, by which the witness testified, and admitted, in so doing, his own turpitude. Public policy and the great ends of justice require this of the court. If the district attorney shall fail to enter a *nolle prosequi* on the indictment . . . the court will continue the cause until an application can be made for a pardon. The court would suggest that to discontinue the prosecution is the shorter and better mode." U. S. *v.* Lee, 26 Fed. Cas. No. 15,588, 4 McLean 103.

Different crimes.— Where an accomplice is admitted to testify as to one crime under promise of immunity, he may, although he behave well, be prosecuted for another crime, the promise of immunity not extending to that. People *v.* Whipple, 9 Cow. (N. Y.) 707.

11. State *v.* Lyon, 81 N. C. 600, 31 Am. Rep. 518; U. S. *v.* Ford, 99 U. S. 594, 25 L. ed. 399; Reg. *v.* Read, 1 Cox C. C. 65.

12. Nicks *v.* State, 40 Tex. Crim. 1, 48 S. W. 186 (although he testified in habeas corpus proceedings and before the grand jury); Neeley *v.* State, 27 Tex. App. 315, 11 S. W. 376; U. S. *v.* Hinz, 35 Fed. 272 (although he has testified before the grand jury).

13. Cox *v.* State, (Tex. Crim. App. 1902) 69 S. W. 145; Heinzman *v.* State, 34 Tex. Crim. 76, 29 S. W. 156, 482.

14. Camron *v.* State, 32 Tex. Crim. 180, 22 S. W. 682, 40 Am. St. Rep. 763.

15. Hamilton *v.* People, 29 Mich. 173; Alderman *v.* People, 4 Mich. 414, 69 Am. Dec. 321; State *v.* Condry, 50 N. C. 418.

16. State *v.* Hatfield, 3 Head (Tenn.) 231; Owens *v.* State, 2 Head (Tenn.) 455; Elliott *v.* State, (Tex. App. 1892) 19 S. W. 249; People *v.* Reggel, 8 Utah 21, 28 Pac. 955. The immunity applies only to the identical offense which the accused has testified to. State *v.* Hatfield, 3 Head (Tenn.) 231; Owens *v.* State, 2 Head (Tenn.) 455; People *v.* Reggel, 8 Utah 21, 28 Pac. 955. A statute providing for the exemption of a witness from a prosecution for any offense in relation to which he has testified before the grand jury does not extend to a grand juror who communicates to his fellow-jurors his knowledge of a crime having been committed, and in doing so voluntarily implicates himself. State *v.* Hatfield, 3 Head (Tenn.) 231.

17. Foster *v.* Com., 8 Watts & S. (Pa.) 77; U. S. *v.* Buntin, 10 Fed. 730.

Effect of pending criminal prosecution on civil action see Abatement and Revival, 1 Cyc. 32.

18. Donohoe *v.* State, 59 Ark. 375, 27 S. W. 226; U. S. *v.* Buntin, 10 Fed. 730.

19. *New York.*—People *v.* Hayes, 140 N. Y. 484, 35 N. E. 951, 31 Am. St. Rep. 572, 23

12. CONVICTION OF ANOTHER FOR SAME OFFENSE. The conviction of one person for a crime does not tend to prove that another did not commit it, and hence is no bar to a prosecution of the latter.[20]

III. CAPACITY TO COMMIT, AND RESPONSIBILITY FOR, CRIME.

A. In General. Of course no one can be held responsible for a crime, or even be guilty of a crime, unless he has sufficient capacity, mentally and otherwise, to commit it. Want of capacity therefore is a complete defense and not merely a mitigating circumstance.[21] Under this title is treated responsibility, as affected by insanity[22] and drunkenness[23] only. The responsibility of aliens,[24] convicts,[25] corporations,[26] Indians,[27] infants,[28] and married women[29] is treated under other titles.

B. Insanity — 1. EFFECT AS A DEFENSE. One who is so insane as to be incapable of entertaining a criminal intent, which is one of the essential ingredients of crime, cannot be guilty of a crime or held criminally responsible for his acts.[30]

L. R. A. 830 [*affirming* 70 Hun 111, 24 N. Y. Suppl. 194]; People *v.* Judges Gen. Sess. of Peace, 13 Johns. 85.

Pennsylvania.— Foster *v.* Com., 8 Watts & S. 77.

South Carolina.— State *v.* Stein, 1 Rich. 189; State *v.* Frost, 1 Brev. 385.

United States.— U. S. *v.* Buntin, 10 Fed. 730.

England.— Rex *v.* Ashburn, 8 C. & P. 50, 34 E. C. L. 603.

See 14 Cent. Dig. tit. "Criminal Law," § 49.

Decision to the contrary.— In South Carolina it was held at an early date that if a person commences and carries on a civil action and a prosecution against the same person at the same time for the same assault, a *nolle prosequi* should be entered on the indictment until he makes his election which remedy to adopt. State *v.* Blyth, 1 Bay (S. C.) 166. The contrary was held in State *v.* Frost, 1 Brev. (S. C.) 385. And in Buckner *v.* Beck, Dudley (S. C.) 168, it was held that an indictment for an assault and battery and a civil action to recover damages would both lie, although the court would not give a severe judgment on the criminal conviction, unless the prosecutor would agree to relinquish his civil remedy. In State *v.* Stein, 1 Rich. (S. C.) 189, it was held that an indictment under a statute for harboring a slave was not barred because a civil action for the same offense was first commenced and was pending at the trial of the indictment.

Stay of proceedings.— In Com. *v.* Bliss, 1 Mass. 32, it was held that the trial of one indicted for fraud would be continued on application of the accused until after trial of a civil action pending for the same fraud. There was a decision to the contrary in People *v.* Judges Gen. Sess. of Peace, 13 Johns. (N. Y.) 85, where there was a prosecution and an action for assault and battery.

Statute providing for civil action.— Although where no method of proceeding is provided by statute for the punishment of an offense it may be prosecuted by indictment, yet where there is a statute providing for a civil action to recover a fine, penalty, or forfeiture for the offense in question a criminal prosecution will not lie. State *v.* Huffschmidt, 47 Mo. 73.

20. People *v.* Johnson, 47 Cal. 122; State *v.* Morehead, 17 Mo. App. 328.

21. Sage *v.* State, 91 Ind. 141.

22. See *infra*, III, B.

23. See *infra*, III, C.

24. See ALIENS, 2 Cyc. 106.

25. See CONVICTS, 9 Cyc. 875.

26. See CORPORATIONS, 10 Cyc. 1225.

27. See INDIANS.

28. See INFANTS.

29. See HUSBAND AND WIFE.

30. *Alabama.*— Parsons *v.* State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193; Braswell *v.* State, 1 Ky. L. Rep. 285.

Arkansas.— Smith *v.* State, 55 Ark. 259, 18 S. W. 237.

Delaware.— State *v.* Danby, Houst. Crim. Cas. 166.

Illinois.— Hopps *v.* People, 31 Ill. 385, 83 Am. Dec. 231; A. O. U. W. *v.* Holdom, 51 Ill. App. 200.

Indiana.— Sage *v.* State, 91 Ind. 141.

Iowa.— Fouts *v.* State, 4 Greene 500.

Kansas.— *In re* Kidd, 40 Kan. 644, 20 Pac. 526.

Kentucky.— Hays *v.* Com., 33 S. W. 1104, 17 Ky. L. Rep. 1147.

Massachusetts.— Com. *v.* Heath, 11 Gray 303; Com. *v.* Rogers, 7 Metc. 500, 41 Am. Dec. 458.

Michigan.— People *v.* Cummins, 47 Mich. 334, 11 N. W. 184, 186.

New Hampshire.— State *v.* Jones, 50 N. H. 369, 9 Am. Rep. 242.

New York.— Flanagan *v.* People, 52 N. Y. 467, 11 Am. Rep. 731; Krom *v.* Schoonmaker, 3 Barb. 647.

North Carolina.— State *v.* Haywood, 61 N. C. 376.

Ohio.—Blackburn *v.* State, 23 Ohio St. 146; State *v.* Summons, 1 Ohio Dec. (Reprint) 416, 9 West. L. J. 407.

Texas.— Pettigrew *v.* State, 12 Tex. App. 225.

United States.— U. S. *v.* Clarke, 25 Fed. Cas. No. 14,811, 2 Cranch C. C. 158.

England.— McNaughten's Case, 1 C. & K.

His insanity is a complete defense in all cases, and is not merely a mitigating circumstance.[31]

2. Time of Insanity. To render insanity effective as a defense it must appear that the accused was insane at the time of the commission of the act, and not merely prior or subsequent thereto.[32] Where a person becomes insane after commission of a crime, he cannot be tried while in such condition,[33] but such insanity does not exempt him from responsibility and prosecution if he afterward becomes sane again.[34] The former insanity of the accused does not excuse his crime if it appears that he recovered from it previously to the commission of the crime, but in the absence of such proof it will be presumed to be continuous to the time of the crime.[35] The law does not require that the insanity shall have existed for any definite period, but only that it shall have existed at the precise moment when the act occurred with which the accused stands charged.[36]

3. Degree of Capacity and Tests of Responsibility — a. In General. Various definitions have been given of the degree of mental capacity which will exempt one from criminal responsibility, but some of the tests have been abandoned, and in most jurisdictions the law on the subject is now well settled. No doubt all the courts agree that mere mental weakness does not exempt where there is sufficient capacity to know that the act is wrong.[37] The fact that the defendant is very

130 note *a*, 47 E. C. L. 129, 10 Cl. & F. 200, 8 Eng. Reprint 718, 8 Scott N. R. 595; 1 Hawkins P. C. c. 1, § 1.

See 14 Cent. Dig. tit. "Criminal Law," § 53 *et seq.*

The term "insanity," when used in connection with criminal law, includes imbecility and idiocy (Com. *v.* Heath, 11 Gray (Mass.) 303; Pettigrew *v.* State, 12 Tex. App. 225), and every species of mental disease (State *v.* Wilner, 40 Wis. 304). And see Dew *v.* Clark, 1 Add. Eccl. 279; Reg. *v.* Shaw, 11 Cox C. C. 109.

31. Sage *v.* State, 91 Ind. 141. See also Com. *v.* Hollinger, 190 Pa. St. 155, 42 Atl. 548; Com. *v.* Wireback, 190 Pa. St. 138, 42 Atl. 542, 70 Am. St. Rep. 625.

32. *Alabama.*— Jones *v.* State, 13 Ala. 163.

Louisiana.—State *v.* Graviotte, 22 La. Ann. 587.

New Jersey.— State *v.* Spencer, 21 N. J. L. 196.

New York.— People *v.* Russ, 2 Edm. Sel. Cas. 413; Clark's Case, 1 City Hall Rec. 176.

Pennsylvania. — Com. *v.* Winnemore, 1 Brewst. 356.

South Carolina.— State *v.* Stark, 1 Strobh. 479.

Texas.— Shultz *v.* State, 13 Tex. 401.

United States.— U. S. *v.* Sickles, 27 Fed. Cas. No. 16,287*a*, 2 Hayw. & H. 319.

England.— McNaughten's Case, 1 C. & K. 130 note *a*, 47 E. C. L. 129, 10 Cl. & F. 200, 8 Eng. Reprint 718, 8 Scott N. R. 595; Reg. *v.* Higginson, 1 C. & K. 129, 47 E. C. L. 129; Reg. *v.* Barton, 3 Cox C. C. 275; Rex *v.* Offord, 5 C. & P. 168, 24 E. C. L. 508.

See 14 Cent. Dig. tit. "Criminal Law," § 54.

33. State *v.* Peacock, 50 N. J. L. 34, 11 Atl. 270; State *v.* Pritchett, 106 N. C. 667, 11 S. E. 357; Reg. *v.* Kenny, 13 Cox C. C. 397; Reg. *v.* Dwerryhouse, 2 Cox C. C. 446; Reg. *v.* Southey, 4 F. & F. 864. See *infra*, XIV, A, 7; and, generally, Insane Persons.

34. Jones *v.* State, 13 Ala. 153.

35. State *v.* Spencer, 21 N. J. L. 196; State *v.* Wilner, 40 Wis. 304.

36. U. S. *v.* Sickles, 27 Fed. Cas. No. 16,287*a*, 2 Hayw. & H. 319.

37. *California.*— People *v.* Methever, 132 Cal. 326, 64 Pac. 481 (holding mere weakness of will power no excuse); People *v.* Best, 39 Cal. 690 (holding that an instruction that the jury must acquit the defendant if they find that he was insane at the time of the act, without regard to the degree of the insanity, is too broad); People *v.* Hurley, 8 Cal. 390.

District of Columbia.— Travers *v.* U. S., 6 App. Cas. 450.

Indiana.— Conway *v.* State, 118 Ind. 482, 21 N. E. 285; Wartena *v.* State, 105 Ind. 445, 5 N. E. 20.

Kansas.— State *v.* Flowers, 58 Kan. 702, 50 Pac. 938.

Kentucky.— Scott *v.* Com., 4 Metc. 227, 83 Am. Dec. 461; Mangrum *v.* Com., 39 S. W. 703, 19 Ky. L. Rep. 94; Fitzpatrick *v.* Com., 5 Ky. L. Rep. 363.

Missouri.— State *v.* Palmer, 161 Mo. 152, 61 S. W. 651; State *v.* Burgess, 75 Mo. 541; State *v.* Kotovsky, 74 Mo. 247.

New York.— Patterson *v.* People, 46 Barb. 625; People *v.* Barberi, 47 N. Y. Suppl. 168.

Pennsylvania.— Taylor *v.* Com., 109 Pa. St. 262, 271, where it was said: "While a slight departure from a well balanced mind may be pronounced insanity in medical science, yet such a rule cannot be recognized in the administration of the law when a person is on trial for the commission of a high crime. The just and necessary protection of society requires the recognition of a rule which demands a greater degree of insanity to exempt from punishment."

Texas.— Nelson *v.* State, 43 Tex. Crim. 553, 67 S. W. 320; Cannon *v.* State, 41 Tex. Crim. 467, 56 S. W. 351; Leache *v.* State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638. See Webb *v.* State, 5 Tex. App. 596, holding

ignorant and of a low order of intelligence cannot avail him as a defense.[38] It is not necessary, however, to exempt one from responsibility that he shall have been totally deprived of his reason.[39]

b. Power to Distinguish Between Right and Wrong. All of the courts, both in the United States and in England, agree that a man is not criminally responsible for an act if at the time of its commission he was so insane, from disease or defect of the mind, that he was incapable of understanding the nature and quality of the act, or of distinguishing between right and wrong, either generally or with respect to that particular act.[40] Some of the courts hold that this is the only test

that a higher degree of insanity must be proved to absolve one from criminal responsibility than is necessary to discharge him from a contract.

United States.— U. S. *v.* Holmes, 26 Fed. Cas. No. 15,382, 1 Cliff. 98.

Oddity or hypochondria.—An instruction in a trial for malicious shooting that "the law requires something more than occasional oddity or hypochondria to exempt the perpetrator of an offense from its punishment" is not erroneous. Hawe *v.* State, 11 Nebr. 537, 10 N. W. 452, 38 Am. Rep. 375.

Ability to "carefully weigh reasons" is not necessary to render one liable. State *v.* Swift, 57 Conn. 496, 18 Atl. 664.

38. Patterson *v.* People, 46 Barb. (N. Y.) 625.

39. In an English case a judge charged the jury that to exempt from responsibility for crime one must be "a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast." Arnold's Case, 16 How. St. Tr. 695, 765. This, however, is no longer the law in England. McNaughten's Case, 1 C. & K. 130 note *a*, 47 E. C. L. 129, 10 Cl. & F. 200, 8 Eng. Reprint 718, 8 Scott N. R. 595. Nor is it recognized as the test in the United States. State *v.* Richards, 39 Conn. 591; Leache *v.* State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; and other cases in the notes following. But see State *v.* Cole, 2 Pennew. (Del.) 344, 45 Atl. 391.

Capacity of child.— Sir Matthew Hale laid down the test whether the defendant's perception of consequences and effects is only such as is common to children of tender years, holding that if so he ought to be acquitted. He reasoned that inasmuch as children under fourteen years of age are *prima facie* incapable of crime, imbeciles ought not to be held responsible criminally, unless of capacity equal to that of ordinary children of that age. 1 Hale P. C. 30. This test was also adopted in a Connecticut case, where it was held that the accused ought to be acquitted if he had no greater natural capacity than a child of fourteen years, reared in humble life and with ordinary training. State *v.* Richards, 39 Conn. 591. This test, however, has not been generally recognized. See the cases in the notes following.

Imbecility or dementia not amounting to idiocy or lunacy may exempt where the intellect was weaker than that of a child. State *v.* Richards, 39 Conn. 591.

40. *Alabama.*— Parsons *v.* State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193.

Arkansas.— Green *v.* State, 64 Ark. 523, 43 S. W. 973; Smith *v.* State, 55 Ark. 259, 18 S. W. 237; Bolling *v.* State, 54 Ark. 588, 16 S. W. 658; Williams *v.* State, 50 Ark. 511, 9 S. W. 5.

California.— People *v.* Hoin, 62 Cal. 120, 45 Am. Rep. 651; People *v.* Hobson, 17 Cal. 424.

Connecticut.— State *v.* Swift, 57 Conn. 496, 18 Atl. 664; State *v.* Johnson, 40 Conn. 136.

Delaware.— State *v.* Kavanaugh, (1902) 53 Atl. 335; State *v.* Cole, 2 Pennew. 344, 45 Atl. 391; State *v.* Windsor, 5 Harr. 512; State *v.* Pratt, Houst. Crim. Cas. 249; State *v.* Danby, Houst. Crim. Cas. 166.

District of Columbia.— U. S. *v.* Lee, 4 Mackey 489, 54 Am. Rep. 293; Guiteau's Case, 10 Fed. 161, 1 Mackey 498, 47 Am. Rep. 247.

Florida.— Davis *v.* State, (1902) 32 So. 822.

Georgia.— Lee *v.* State, 116 Ga. 563, 42 S. E. 759; Brinkley *v.* State, 58 Ga. 296; Spann *v.* State, 47 Ga. 553; Choice *v.* State, 31 Ga. 424; Roberts *v.* State, 3 Ga. 310.

Illinois.— Hornish *v.* People, 142 Ill. 620, 32 N. E. 677, 18 L. R. A. 237; Dunn *v.* People, 109 Ill. 635.

Indiana.— Conway *v.* State, 118 Ind. 482, 21 N. E. 285; Wartena *v.* State, 105 Ind. 445, 5 N. E. 20.

Iowa.— Fouts *v.* State, 4 Greene 500.

Kansas.— State *v.* O'Neil, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555; State *v.* Nixon, 32 Kan. 205, 4 Pac. 159.

Kentucky.— Shannahan *v.* Com., 8 Bush 463, 8 Am. Rep. 465; Graham *v.* Com., 16 B. Mon. 587; Farris *v.* Com., 1 S. W. 729, 8 Ky. L. Rep. 417.

Maine.— State *v.* Knight, 95 Me. 467, 50 Atl. 276, 55 L. R. A. 323.

Maryland.— Spencer *v.* State, 69 Md. 28, 13 Atl. 809.

Massachusetts.— Com. *v.* Rogers, 7 Metc. 500, 41 Am. Dec. 458.

Minnesota.— State *v.* Gut, 13 Minn. 341; State *v.* Shippey, 10 Minn. 223, 88 Am. Dec. 70.

Mississippi.— Grissom *v.* State, 62 Miss. 167; Cunningham *v.* State, 56 Miss. 269, 21 Am. Rep. 360; Bovard *v.* State, 30 Miss. 600.

Missouri.— State *v.* Schaefer, 116 Mo. 96, 22 S. W. 447; State *v.* Pagels, 92 Mo. 300, 4 S. W. 931; State *v.* Hayes, 16 Mo. App. 560.

Nebraska.— Schwartz *v.* State, (1902) 91 N. W. 190; Hawe *v.* State, 11 Nebr. 537, 10

of responsibility, while others, as we shall see, hold that a man may be irresponsible because of insane, irresistible impulse, although he knew the act was wrong.[41]

c. Insane Delusions and Partial Insanity. Althongh one may possess sufficient capacity to distinguish between good and evil generally, yet if he is under the influence of partial insanity or an insane delusion,[42] and the effect of that delusion is to cause him to do an act which is criminal, he is not responsible, if his act would be innocent in case the facts with respect to which the delusion exists were real.[43] An insane delusion is a defense only when the act would have been inno-

N. W. 452, 38 Am. Rep. 375; Wright *v.* People, 4 Nebr. 407.

Nevada.— State *v.* Lewis, 20 Nev. 333, 23 Pac. 241.

New Jersey.— Mackin *v.* State, 59 N. J. L. 495, 36 Atl. 1040; State *v.* Spencer, 21 N. J. L. 196.

New York.— People *v.* Taylor, 138 N. Y. 398, 34 N. E. 275; Flanagan *v.* People, 52 N. Y. 467, 11 Am. Rep. 731; Willis *v.* People, 32 N. Y. 715; Wagner *v.* People, 4 Abb. Dec. 509, 2 Keyes 684; Casey *v.* People, 31 Hun 158; Walker *v.* People, 26 Hun 67; People *v.* Moett, 23 Hun 60; Freeman *v.* People, 4 Den. 9, 47 Am. Dec. 216; People *v.* Kleim, 1 Edm. Sel. Cas. 13; People *v.* Walworth, 4 N. Y. Crim. 355; People *v.* Coleman, 1 N. Y. Crim. 1; People *v.* Sprague, 2 Park. Crim. 43; Ball's Case, 2 City Hall Rec. 85; Clark's Case, 1 City Hall Rec. 176. *Compare* People *v.* Carnel, 2 Edm. Sel. Cas. 200.

North Carolina.— State *v.* Brandon, 53 N. C. 463.

Ohio.—Blackburn *v.* State, 23 Ohio St. 146; Loeffner *v.* State, 10 Ohio St. 598; State *v.* Ferrer, 1 Ohio Dec. (Reprint) 428, 9 West. L. J. 513; State *v.* Summons, 1 Ohio Dec. (Reprint) 416, 9 West. L. J. 407; State *v.* Kalb, 5 Ohio S. & C. Pl. Dec. 738; State *v.* Tyler, 5 Ohio S. & C. Pl. Dec. 588, 7 Ohio N. P. 443.

Oklahoma.— Maas *v.* Territory, 10 Okla. 714, 63 Pac. 960, 53 L. R. A. 814.

Oregon.— State *v.* Murray, 11 Oreg. 413, 5 Pac. 55.

Pennsylvania.— Brown *v.* Com., 78 Pa. St. 122; Com. *v.* Farkin, 2 Pars. Eq. Cas. 439; Com. *v.* Lutz, 10 Kulp 234; Com. *v.* Winnemore, 1 Brewst. 356; Com. *v.* Moore, 2 Pittsb. 502; Com. *v.* Freth, 5 Pa. L. J. Rep. 455; Com. *v.* Smith, 6 Am. L. Reg. O. S. 257; Com. *v.* O'Connor, 5 L. T. N. S. 83.

South Carolina.— State *v.* McIntosh, 39 S. C. 97, 17 S. E. 446; State *v.* Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879; State *v.* Bundy, 24 S. C. 439, 58 Am. Rep. 263.

Tennessee.— Dove *v.* State, 3 Heisk. 348.

Texas.— Carter *v.* State, 12 Tex. 500, 62 Am. Dec. 539; Leache *v.* State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; Clark *v.* State, 8 Tex. App. 350.

Virginia.— Dejarnette *v.* Com., 75 Va. 867.

Wisconsin.— Bennett *v.* State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26.

United States.— U. S. *v.* Faulkner, 35 Fed. 730; U. S. *v.* Ridgeway, 31 Fed. 144; U. S. *v.* Young, 25 Fed. 710; U. S. *v.* McGlue, 26 Fed. Cas. No. 15,679, 1 Curt. 1; U. S. *v.* Shults, 27 Fed. Cas. No. 16,286, 6 McLean 121.

England.— McNaughten's Case, 1 C. & K. 130 note *a*, 47 E. C. L. 129, 10 Cl. & F. 200, 8 Eng. Reprint 718, 8 Scott N. R. 595; Reg. *v.* Davies, 1 F. & F. 69. See also Reg. *v.* Townley, 3 F. & F. 839; Reg. *v.* Law, 2 F. & F. 836; Reg. *v.* Haynes, 1 F. & F. 666.

See 14 Cent. Dig. tit. "Criminal Law," § 56.

Idiocy.— Com. *v.* Heath, 11 Gray (Mass.) 303; Ortwein *v.* Com., 76 Pa. St. 414, 18 Am. Rep. 420.

Ability to comprehend ingredients of crime. —One cannot be guilty of larceny whose mind cannot comprehend all the essential ingredients of the offense and recognize their existence; and an instruction that one who knows he has been taking property that did not belong to him is sane enough to commit the offense is error. People *v.* Cummins, 47 Mich. 334, 11 N. W. 184, 186.

41. See *infra*, III, B, 3, e.

42. **Insane delusion defined.**—An insane delusion is an incorrigible belief, not the result of reasoning, in the existence of facts which are impossible, absolutely, or which are impossible under the circumstances of the case. State *v.* Lewis, 20 Nev. 333, 22 Pac. 241; Guiteau's Case, 10 Fed. 161, 1 Mackey (D. C.) 498, 47 Am. Rep. 247.

43. *Alabama.*— Boswell *v.* State, 63 Ala. 307, 35 Am. Rep. 20.

Arkansas.— Smith *v.* State, 55 Ark. 259, 18 S. W. 237; Bolling *v.* State, 54 Ark. 588, 16 S. W. 658.

California.— People *v.* Ford, 138 Cal. 140, 70 Pac. 1075; People *v.* Hubert, 119 Cal. 216, 51 Pac. 329, 63 Am. St. Rep. 72.

Delaware.— State *v.* Danby, Houst. Crim. Cas. 166.

District of Columbia.— Guiteau's Case, 10 Fed. 161, 1 Mackey 498, 47 Am. Rep. 247.

Georgia.— Flanagan *v.* State, 103 Ga. 619, 30 S. E. 550; Roberts *v.* State, 3 Ga. 310.

Indiana.— Stevens *v.* State, 31 Ind. 485, 99 Am. Dec. 634.

Iowa.— State *v.* Hockett, 70 Iowa 442, 30 N. W. 742.

Kentucky.— Fain *v.* Com., 78 Ky. 183, 39 Am. Rep. 213.

Massachusetts.— Com. *v.* Rogers, 7 Metc. 500, 41 Am. Dec. 458.

Michigan.— People *v.* Slack, 90 Mich. 448, 51 N. W. 533.

Mississippi.— Ford *v.* State, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117; Grissom *v.* State, 62 Miss. 167; Cunningham *v.* State, 56 Miss. 269, 21 Am. Rep. 360.

Missouri.— State *v.* Huting, 21 Mo. 464.

cent provided the facts with respect to which it existed had been true.[44] And there must be an immediate connection between the delusion and the act. If a person has an insane delusion upon a particular subject only, and commits a crime not connected with that particular delusion, his delusion is no defense.[45]

d. Somnambulism and Somnolentia. Somnambulism is the custom or habit on the part of the person afflicted of exercising the power of locomotion during sleep. Somnolentia is the lapping over of a profound sleep into the domain of apparent wakefulness, whereby a sort of involuntary intoxication is produced which for the time destroys moral agency.[46] Legally somnambulism and somnolentia are included under the head of insanity, and if the person afflicted with either is so far unconscious that he does not comprehend the moral character of

Nebraska. — Thurman *v.* State, 32 Nebr. 224, 49 N. W. 338.

Nevada.— State *v.* Lewis, 20 Nev. 333, 22 Pac. 241.

New Hampshire.— State *v.* Jones, 50 N. H. 369, 9 Am. Rep. 242.

New York.— People *v.* Taylor, 138 N. Y. 398, 34 N. E. 275; People *v.* Pine, 2 Barb. 566; Freeman *v.* People, 4 Den. 9, 47 Am. Dec. 216.

Pennsylvania.— Taylor *v.* Com., 109 Pa. St. 262; Lynch *v.* Com., 77 Pa. St. 205; Com. *v.* Winnemore, 1 Brewst. 356; Com. *v.* Freth, 5 Pa. L. J. Rep. 455.

Texas.— Merritt *v.* State, 39 Tex. Crim. 70, 45 S. W. 21.

England.— McNaughten's Case, 1 C. & K. 130 note *a*, 47 E. C. L. 129, 10 Cl. & F. 200, 8 Eng. Reprint 718, 8 Scott N. R. 595. And see Reg. *v.* Burton, 3 F. & F. 772; Hadfield's Case, 29 How. St. Tr. 1281.

See 14 Cent. Dig. tit. "Criminal Law," § 59.

Self-defense.— Where the defendant was under the insane delusion that the deceased and others had formed a plot to kill him, or to do him great bodily harm, that they had the immediate design to do so, and that it was necessary for him to kill the deceased to save his own life, he must be acquitted, although he was able to distinguish between right and wrong. Smith *v.* State, 55 Ark. 259, 18 S. W. 237.

44. *Alabama.*— Parsons *v.* State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193; Boswell *v.* State, 63 Ala. 307, 35 Am. Rep. 20.

Arkansas.— Bolling *v.* State, 54 Ark. 588, 16 S. W. 658, where defendant killed a man under a delusion that the deceased was trying to marry defendant's mother.

California. — People *v.* Hubert, 119 Cal. 216, 51 Pac. 329, 63 Am. St. Rep. 72, holding that the defendant was not exempt from responsibility for the murder of his wife because of an insane delusion that she had put poison in his food.

Iowa.— State *v.* Mewherter, 46 Iowa 88.

Massachusetts.— Com. *v.* Rogers, 7 Metc. 500, 41 Am. Dec. 458.

Mississippi. — Cunningham *v.* State, 56 Miss. 269, 21 Am. Rep. 360.

Nebraska. — Thurman *v.* State, 32 Nebr. 224, 49 N. W. 338.

Nevada.— State *v.* Lewis, 20 Nev. 333, 22 Pac. 241.

New York.— People *v.* Taylor, 138 N. Y. 398, 34 N. E. 275, where an insane delusion of a convict that a fellow-convict whom he killed had divulged his plan of escape to the authorities was held no defense.

Pennsylvania.— Com. *v.* Wirehack, 190 Pa. St. 138, 42 Atl. 542, 70 Am. St. Rep. 625; Com. *v.* Smith, 6 Am. L. Reg. 257.

England.— McNaughten's Case, 1 C. & K. 130 note *a*, 47 E. C. L. 129, 10 Cl. & F. 200, 8 Eng. Reprint 718, 8 Scott N. R. 595.

See 14 Cent. Dig. tit. "Criminal Law," § 61.

45. *California.*—People *v.* Coffman, 24 Cal. 230.

Delaware.— State *v.* Windsor, 5 Harr. 512; State *v.* Danby, Houst. Crim. Cas. 166.

District of Columbia.— Guiteau's Case, 10 Fed. 161, 1 Mackey 498, 47 Am. Rep. 247.

Georgia.— Taylor *v.* State, 105 Ga. 746, 31 S. E. 764; Roberts *v.* State, 3 Ga. 310.

Indiana.— Stevens *v.* State, 31 Ind. 485, 99 Am. Dec. 634.

Iowa.— State *v.* Hockett, 70 Iowa 442, 30 N. W. 742; State *v.* Geddis, 42 Iowa 264; Fouts *v.* State, 4 Greene 500.

Minnesota.— State *v.* Gut, 13 Minn. 341.

Mississippi.— Ford *v.* State, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117; Bovard *v.* State, 30 Miss. 600.

Missouri.— State *v.* Huting, 21 Mo. 464.

New Jersey.— State *v.* Spencer, 21 N. J. L. 196.

New York.— Freeman *v.* People, 4 Den. 9, 47 Am. Dec. 216.

Ohio.— State *v.* Miller, 5 Ohio S. & C. Pl. Dec. 703, 7 Ohio N. P. 458.

Tennessee.—Wilcox *v.* State, 94 Tenn. 106, 28 S. W. 312.

Texas.— See Riley *v.* State, (Crim. App. 1898) 44 S. W. 498.

Virginia.— Dejarnette *v.* Com., 75 Va. 867.

West Virginia.— State *v.* Maier, 36 W. Va. 757, 15 S. E. 991.

United States.— U. S. *v.* Ridgeway, 31 Fed. 144.

England.— McNaughten's Case, 1 C. & K. 130 note *a*, 47 E. C. L. 129, 10 Cl. & F. 200, 8 Eng. Reprint 718, 8 Scott N. R. 595.

See 14 Cent. Dig. tit. "Criminal Law," § 60.

46. Fain *v.* Com., 78 Ky. 183, 39 Am. Rep. 213 [*quoting* Ray Med. Jur. § 495, and *citing* Taylor Med. Jur. 176; Wharton & Stille Med. Jur. 149].

the act performed, or if, comprehending it, he cannot choose between right and wrong, or if his condition may be regarded as that of a person under an insane delusion, he cannot be held criminally responsible for his act.[47]

e. Irresistible Impulse. Some of the courts have held that an irresistible impulse does not exempt one from responsibility for crime, where he has a knowledge of right and wrong as to the particular act.[48] These courts limit the test of irresponsibility on the ground of insanity to the capacity to distinguish between right and wrong.[49] Other courts have held the contrary where the irresistible impulse is the outcome of a diseased mind, and the later cases show that the tendency of the courts is to adopt this view.[50]

47. Fain *v.* Com., 78 Ky. 183, 39 Am. Rep. 213.

48. *California.*— People *v.* Owens, 123 Cal. 482, 56 Pac. 251; People *v.* Hubert, 119 Cal. 216, 51 Pac. 329, 63 Am. St. Rep. 72; People *v.* Hoin, 62 Cal. 120, 45 Am. Rep. 651.

Florida.—Davis *v.* State, (1902) 32 So. 822.

Kansas.— State *v.* Mowry, 37 Kan. 369, 15 Pac. 282.

Maine.— State *v.* Lawrence, 57 Me. 574.

Maryland.— Spencer *v.* State, 69 Md. 28, 13 Atl. 809.

Minnesota.— State *v.* Scott, 41 Minn. 365, 43 N. W. 62.

Missouri.— State *v.* Soper, 148 Mo. 217, 49 S. W. 1007; State *v.* Miller, 111 Mo. 542, 20 S. W. 243; State *v.* Pagels, 92 Mo. 300, 4 S. W. 931.

Nebraska.— Hawe *v.* State, 11 Nebr. 537, 10 N. W. 452, 38 Am. Rep. 375; Wright *v.* People, 4 Nebr. 407.

Nevada.— State *v.* Lewis, 20 Nev. 333, 22 Pac. 241.

New Jersey.— Mackin *v.* State, 59 N. J. L. 495, 36 Atl. 1040; Genz *v.* State, 59 N. J. L. 488, 37 Atl. 69, 59 Am. St. Rep. 619.

New York.— People *v.* Taylor, 138 N. Y. 398, 34 N. E. 275; People *v.* Carpenter, 102 N. Y. 238, 6 N. E. 584, 4 N. Y. Crim. 177 [*affirming* 38 Hun 490]; Flanagan *v.* People, 52 N. Y. 467, 11 Am. Rep. 731; *In re* McFarland's Trial, 8 Abb. Pr. N. S. 57; People *v.* Waltz, 50 How. Pr. 204; People *v.* Walworth, 4 N. Y. Crim. 355; People *v.* Coleman, 1 N. Y. Crim. 1; Pienovi's Case, 3 City Hall Rec. 123. *Compare In re* McFarland's Trial, 8 Abb. Pr. 57; People *v.* Sprague, 2 Park. Crim. 43, where kleptomania was held a defense.

South Carolina.— State *v.* Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799; State *v.* Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879; State *v.* Bundy, 24 S. C. 439, 58 Am. Rep. 263.

Tennessee.— Wilcox *v.* State, 94 Tenn. 106, 28 S. W. 312.

Texas.— Carter *v.* State, 12 Tex. 500, 62 Am. Dec. 539; Cannon *v.* State, 41 Tex. Crim. 467, 56 S. W. 351; Leache *v.* State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; Williams *v.* State, 7 Tex. App. 163. *Compare*, however, Harris *v.* State, 18 Tex. App. 287; Looney *v.* State, 10 Tex. App. 520, 38 Am. Rep. 646.

West Virginia.— State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224.

England.— Reg. *v.* Stokes, 3 C. & K. 185; McNaughten's Case, 1 C. & K. 130 note *a*, 47 E. C. L. 129, 10 Cl. & F. 200, 8 Eng. Reprint 718, 8 Scott N. R. 595; Reg. *v.* Barton, 3 Cox C. C. 275; Reg. *v.* Haynes, 1 F. & F. 666.

See 14 Cent. Dig. tit. "Criminal Law," § 62.

Epilepsy has been held a defense. People *v.* Barber, 115 N. Y. 475, 22 N. E. 182.

49. See *supra*, III, B, 3, b.

50. *Alabama.*— Parsons *v.* State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193, a well reasoned and leading case.

Arkansas.— Green *v.* State, 64 Ark. 523, 43 S. W. 973; Bolling *v.* State, 54 Ark. 588, 16 S. W. 658; Williams *v.* State, 50 Ark. 511, 9 S. W. 5.

Connecticut.— State *v.* Johnson, 40 Conn. 136.

Delaware.— State *v.* Reidell, 3 Houst. 470, 14 Atl. 550; State *v.* Windsor, 5 Harr. 512.

Georgia.— Flanagan *v.* State, 103 Ga. 619, 30 S. E. 550. *Compare*, however, Fogarty *v.* State, 80 Ga. 450, 5 S. E. 782; Brinkley *v.* State, 58 Ga. 296; Roberts *v.* State, 3 Ga. 310.

Illinois.— See Dacey *v.* People, 116 Ill. 555, 6 N. E. 165; Dunn *v.* People, 109 Ill. 635; Hopps *v.* People, 31 Ill. 385, 83 Am. Dec. 231.

Indiana.— Plake *v.* State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408; Stevens *v.* State, 31 Ind. 485, 99 Am. Dec. 634. See also Bradley *v.* State, 31 Ind. 492.

Iowa.— State *v.* Hockett, 70 Iowa 442, 30 N. W. 742; State *v.* Mewherter, 46 Iowa 88; State *v.* Felter, 25 Iowa 67; Fouts *v.* State, 4 Greene 500.

Kentucky.— Shannahan *v.* Com., 8 Bush 463, 8 Am. Rep. 465; Smith *v.* Com., 1 Duv. 224; Scott *v.* Com., 4 Metc. 227, 83 Am. Dec. 461.

Massachusetts.— Com. *v.* Rogers, 7 Metc. 500, 41 Am. Dec. 458.

Michigan.— People *v.* Finley, 38 Mich. 482.

Mississippi.— Thomas *v.* State, 71 Miss. 345, 15 So. 237; Cunningham *v.* State, 56 Miss. 269, 21 Am. Rep. 360.

New Hampshire.— State *v.* Jones, 50 N. H. 369, 9 Am. Rep. 242; State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533.

Ohio.—Blackburn *v.* State, 23 Ohio St. 146; State *v.* Ferrer, 1 Ohio Dec. (Reprint) 428, 9 West. L. J. 513.

Pennsylvania.— Com. *v.* Wireback, 190 Pa. St. 138, 42 Atl. 542, 70 Am. St. Rep. 625; Taylor *v.* Com., 109 Pa. St. 262; Coyle *v.* Com., 100 Pa. St. 573, 45 Am. Rep. 397; Ortwein *v.* Com., 76 Pa. St. 414, 18 Am. Rep. 420; Com. *v.* Mosler, 4 Pa. St. 264; Com. *v.* Winnemore, 1 Brewst. 356; Com. *v.* Shurlock,

f. Anger and Emotional Insanity. Mere emotional insanity, or temporary frenzy or passion arising from excitement or anger, although ungovernable and producing the crime, as in homicide cases, does not exempt one from responsibility, where he is otherwise sane, and has capacity to distinguish between right and wrong.[51]

g. Moral Insanity and Mental Depravity. Although there have been some decisions to the contrary,[52] it is now well settled that mere mental depravity, or moral insanity, so-called, which results, not from any disease of mind, but from a perverted condition of the moral system, where the person is mentally sane, does not exempt one from responsibility for crimes committed under its influence.[53] Care must be taken to distinguish between mere moral insanity or mental depravity and irresistible impulse resulting from disease of the mind.[54]

C. Drunkenness — 1. General Rule. It is a well-settled general rule that voluntary drunkenness at the time a crime was committed is no defense. If a

14 Leg. Int. 33; Com. *v.* Freth, 5 Pa. L. J. Rep. 455; Com. *v.* Smith, 6 Am. L. Reg. 257. See also Com. *v.* Fritch, 9 Pa. Co. Ct. 164.

Virginia.— Dejarnette *v.* Com., 75 Va. 867. See 14 Cent. Dig. tit. "Criminal Law," § 62.

51. *Alabama.*— Parsons *v.* State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193.

Arkansas.— Smith *v.* State, 55 Ark. 259, 18 S. W. 237; Williams *v.* State, 50 Ark. 511, 9 S. W. 5.

California.— People *v.* Leary, 105 Cal. 486, 39 Pac. 24; People *v.* Kerrigan, 73 Cal. 222, 14 Pac. 849; People *v.* McDonell, 47 Cal. 134.

Connecticut.— State *v.* Johnson, 40 Conn. 136.

District of Columbia.— Guiteau's Case, 10 Fed. 161, 1 Mackey 498, 47 Am. Rep. 247.

Florida.— Copeland *v.* State, 41 Fla. 320, 26 So. 319.

Indiana.— Plake *v.* State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408; Sanders *v.* State, 94 Ind. 147; Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99.

Iowa.— State *v.* Mewherter, 46 Iowa 88; State *v.* Stickley, 41 Iowa 232; State *v.* Felter, 25 Iowa 67.

Kentucky.— Fitzpatrick *v.* Com., 5 Ky. L. Rep. 363.

Maryland.— Spencer *v.* State, 69 Md. 28, 13 Atl. 809.

Michigan.— People *v.* Mortimer, 48 Mich. 37, 11 N. W. 776; People *v.* Finley, 38 Mich. 482.

Minnesota.— State *v.* Sorenson, 32 Minn. 118, 19 N. W. 738.

Mississippi.— Cunningham *v.* State, 56 Miss. 269, 21 Am. Rep. 360.

New Hampshire.— State *v.* Jones, 50 N. H. 369, 9 Am. Rep. 242.

New York.— People *v.* Foy, 138 N. Y. 664, 34 N. E. 396.

Oregon.— State *v.* Murray, 11 Oreg. 413, 5 Pac. 55.

Pennsylvania.— Com. *v.* Wireback, 190 Pa. St. 138, 42 Atl. 542, 70 Am. St. Rep. 625; Lynch *v.* Com., 77 Pa. St. 205; Com. *v.* Winnemore, 1 Brewst. 356; Com. *v.* Lynch, 3 Pittsb. 412.

South Carolina.— State *v.* Bundy, 24 S. C. 439, 58 Am. Rep. 263.

See 14 Cent. Dig. tit. "Criminal Law," § 63.

52. Anderson *v.* State, 43 Conn. 514, 21 Am. Rep. 669; Scott *v.* Com., 4 Metc. (Ky.) 227, 83 Am. Dec. 461.

53. *Alabama.*— Parsons *v.* State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193; Boswell *v.* State, 63 Ala. 307, 35 Am. Rep. 20.

Arkansas.— Bolling *v.* State, 54 Ark. 588, 16 S. W. 658.

California.— People *v.* Kerrigan, 73 Cal. 222, 224, 14 Pac. 849, where it was said: "There is no such doctrine established or recognized as moral insanity, distinguished from mental derangement, as an excuse for crime, and as an exemption from punishment therefor. There is no such type of insanity recognized in our courts, as, for instance, that a person may steal your property, burn your dwelling, murder or attempt to murder you, and know at the time that the deed is a criminal act and wrong in itself and deserves punishment,— having the ability to correctly reason on the subject, and yet be held guiltless and not punishable on the ground solely of a perversion of the moral senses."

District of Columbia.— Guiteau's Case, 10 Fed. 161, 1 Mackey 498, 47 Am. Rep. 247.

Georgia.— Choice *v.* State, 31 Ga. 424.

Indiana.— Goodwin *v.* State, 96 Ind. 550.

Maine.— State *v.* Lawrence, 57 Me. 574.

Maryland.— Spencer *v.* State, 69 Md. 28, 13 Atl. 809.

Michigan.— People *v.* Finley, 38 Mich. 482.

New York.— Flanagan *v.* People, 52 N. Y. 467, 11 Am. Rep. 731.

North Carolina.— State *v.* Potts, 100 N. C. 457, 6 S. E. 657.

Pennsylvania.— Taylor *v.* Com., 109 Pa. St. 262; Com. *v.* Smith, 6 Am. L. Reg. 257, where it was said that nothing short of absolute dispossession of the free and natural agency of the mind will constitute such moral insanity as will justify acquittal.

Texas.— Leache *v.* State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638.

United States.— U. S. *v.* Holmes, 26 Fed. Cas. No. 15,382, 1 Cliff. 98.

See 14 Cent. Dig. tit. "Criminal Law," § 64.

54. See *supra*, III, B, 3, e. And see particularly Parsons *v.* State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193, where this distinction is drawn.

person voluntarily drinks and becomes intoxicated, and while in that condition commits an act which would be a crime if he were sober, he is fully responsible,[55]

55. *Alabama.*— Fielding *v.* State, 135 Ala. 56, 33 So. 677; Whitten *v.* State, 115 Ala. 72, 22 So. 483; Springfield *v.* State, 96 Ala. 81, 11 So. 250, 36 Am. St. Rep. 85; Fonville *v.* State, 91 Ala. 39, 8 So. 688; Englehardt *v.* State, 88 Ala. 100, 7 So. 154; Cleveland *v.* State, 86 Ala. 1, 5 So. 426; Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133; Ross *v.* State, 62 Ala. 224; Hill *v.* State, 62 Ala. 168; Beasley *v.* State, 50 Ala. 149, 20 Am. Rep. 292.

Arkansas.— Chrisman *v.* State, 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44.

California.— People *v.* Methever, 132 Cal. 326, 64 Pac. 481; People *v.* Kloss, 115 Cal. 567, 47 Pac. 459; People *v.* Travers, 88 Cal. 233, 26 Pac. 88; People *v.* Blake, 65 Cal. 275, 4 Pac. 1; People *v.* Ferris, 55 Cal. 588; People *v.* Lewis, 36 Cal. 531.

Connecticut.— State *v.* Fiske, 63 Conn. 388, 28 Atl. 572.

District of Columbia.— Lanckton *v.* U. S., 18 App. Cas. 348; Harris *v.* U. S., 8 App. Cas. 20, 36 L. R. A. 465.

Florida.— Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

Georgia.— McCook *v.* State, 91 Ga. 740, 17 S. E. 1019; Beck *v.* State, 76 Ga. 452; Hanvey *v.* State, 68 Ga. 612; Estes *v.* State, 55 Ga. 30; Choice *v.* State, 31 Ga. 424.

Illinois.— Dunn *v.* People, 109 Ill. 635; Upstone *v.* People, 109 Ill. 169; Rafferty *v.* People, 66 Ill. 118; McIntyre *v.* People, 38 Ill. 514.

Indiana.— Aszman *v.* State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33; Goodwin *v.* State, 96 Ind. 550; Sanders *v.* State, 94 Ind. 147; Smurr *v.* State, 88 Ind. 504; Cluck *v.* State, 40 Ind. 263.

Iowa.— State *v.* Sopher, 70 Iowa 494, 30 N. W. 917, holding in a prosecution for a homicide that the fact that defendant was made drunk by liquor furnished by the deceased did not make his drunkenness a defense.

Kansas.— State *v.* O'Neil, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555; State *v.* Mowry, 37 Kan. 369, 15 Pac. 282.

Kentucky.— Conley *v.* Com., 98 Ky. 125, 32 S. W. 285, 17 Ky. L. Rep. 678; Shannahan *v.* Com., 8 Bush 463, 8 Am. Rep. 465; Smith *v.* Com., 1 Duv. 224; McCarty *v.* Com., 20 S. W. 229, 14 Ky. L. Rep. 285.

Louisiana.— State *v.* Haab, 105 La. 230, 29 So. 725; State *v.* Kraemer, 49 La. Ann. 766, 22 So. 254, 62 Am. St. Rep. 664; State *v.* Mullen, 14 La. Ann. 570.

Massachusetts.— Com. *v.* Malone, 114 Mass. 295; Com. *v.* Hawkins, 3 Gray 463.

Michigan.— People *v.* Walker, 38 Mich. 156; Roberts *v.* People, 19 Mich. 401; People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

Minnesota.— State *v.* Welch, 21 Minn. 22.

Mississippi.— Kelly *v.* State, 3 Sm. & M. 518.

Missouri.— State *v.* West, 157 Mo. 309, 57 S. W. 1071; State *v.* Clevenger, 156 Mo. 190, 56 S. W. 1078; State *v.* Murphy, 118 Mo. 7, 25 S. W. 95; State *v.* Lowe, 93 Mo. 547, 5 S. W. 889; State *v.* Sneed, 88 Mo. 138; State *v.* Ramsey, 82 Mo. 133; State *v.* Harlow, 21 Mo. 446; Schaller *v.* State, 14 Mo. 502.

New Jersey.— Warner *v.* State, 56 N. J. L. 686, 29 Atl. 505, 44 Am. St. Rep. 415.

New York.— People *v.* Leonardi, 143 N. Y. 360, 38 N. E. 372; Flanigan *v.* People, 86 N. Y. 554, 40 Am. Rep. 556; Kenny *v.* People, 31 N. Y. 330; People *v.* Rogers, 18 N. Y. 9, 72 Am. Dec. 484; Lanergan *v.* People, 50 Barb. 266; People *v.* Cavanagh, 62 How. Pr. 187; People *v.* Batting, 49 How. Pr. 392; People *v.* Pearce, 2 Edm. Sel. Cas. 76; People *v.* Robinson, 2 Park. Crim. 235; People *v.* Hammill, 2 Park. Crim. 223; People *v.* Porter, 2 Park. Crim. 14.

North Carolina.— State *v.* Peterson, 129 N. C. 556, 40 S. E. 9, 85 Am. St. Rep. 756; State *v.* McDaniel, 115 N. C. 807, 20 S. E. 622; State *v.* Keath, 83 N. C. 626; State *v.* John, 30 N. C. 330, 49 Am. Dec. 396.

Ohio.— Cline *v.* State, 43 Ohio St. 332, 1 N. E. 22; State *v.* Turner, Wright 20; State *v.* Neil, Tapp. 120.

Pennsylvania.— Com. *v.* Cleary, 135 Pa. St. 64, 19 Atl. 1017, 8 L. R. A. 301; Respublica *v.* Weidle, 2 Dall. 88, 1 L. ed. 301; Com. *v.* Hart, 2 Brewst. 546; Com. *v.* Crozier, 1 Brewst. 349; Kilpatrick *v.* Com., 3 Phila. 237.

South Carolina.— State *v.* Bundy, 24 S. C. 439, 58 Am. Rep. 263.

South Dakota.— State *v.* Ford, (1902) 92 N. W. 18.

Tennessee.— Pirtle *v.* State, 9 Humphr. 663; Swan *v.* State, 4 Humphr. 136; Cornwell *v.* State, Mart. & Y. 147.

Texas.— Outlaw *v.* State, 35 Tex. 481; Carter *v.* State, 12 Tex. 500, 62 Am. Dec. 539; Evers *v.* State, 31 Tex. Crim. 318, 20 S. W. 744, 37 Am. St. Rep. 811, 18 L. R. A. 421; Houston *v.* State, 26 Tex. App. 657, 14 S. W. 352 [*distinguishing* Scott *v.* State, 12 Tex. App. 31]; Payne *v.* State, 5 Tex. App. 35; Brown *v.* State, 4 Tex. App. 275; Colbath *v.* State, 4 Tex. App. 76.

Vermont.— State *v.* Tatro, 50 Vt. 483.

Virginia.— Hite *v.* Com., 96 Va. 489, 31 S. E. 895; Willis *v.* Com., 32 Gratt. 929.

West Virginia.— State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

Wisconsin.— Terrill *v.* State, 74 Wis. 278, 42 N. W. 243.

United States.— U. S. *v.* Drew, 25 Fed. Cas. No. 14,993, 5 Mason 28; U. S. *v.* McGlue, 26 Fed. Cas. No. 15,679, 1 Curt. 1.

England.— Beverley's Case, 4 Coke 123*b*, Fitzh. N. Br. 532; Reg. *v.* Monkhouse, 4 Cox C. C. 55; Rex *v.* Thomas, 7 C. & P. 817, 32 E. C. L. 889; Rex *v.* Meakin, 7 C. & P. 297, 32 E. C. L. 622; Pearson's Case, 2 Lew. C. C. 144; Burrow's Case, 1 Lew. C. C. 75; 1 Hale P. C. 32 (where it was said: "The third sort of *dementia* is that, which is *dementia affectata*, namely drunkenness: This vice doth deprive men of the use of reason, and puts

unless his drunkenness had resulted in insanity,[56] or unless it rendered him incapable of entertaining a specific intent which is an essential ingredient of the offense.[57] It can make no difference, where no specific intent is necessary, that the defendant was so drunk as to have no capacity to distinguish between right and wrong.[58] Nor can it make any difference that his drunkenness was the result of an uncontrollable desire for drink caused by long indulgence of the appetite.[59]

2. AGGRAVATION OF OFFENSE. According to the old law voluntary drunkenness at the time of committing a crime was regarded as an aggravation of the offense,[60] but this is no longer the law.[61]

3. WHERE SPECIFIC INTENT IS NECESSARY. The rule that drunkenness is no defense does not apply to the full extent where a specific intent is an essential element of the offense charged. If at the time of the commission of such an offense the accused was by drink so entirely deprived of his reason that he did not have the mental capacity to entertain the necessary specific intent which is required to constitute the crime he must be acquitted; and in like manner the fact of the defendant's drunkenness should be considered in determining the degree of the crime.[62] This doctrine has been applied for example to larceny and

many men into a perfect, but temporary phrenzy; and therefore, according to some Civilians, such a person committing homicide shall not be punished simply for the crime of homicide, but shall suffer for his drunkenness answerable to the nature of the crime occasioned thereby; so that yet the formal cause of his punishment is rather the drunkenness, than the crime committed in it: but by the laws of England such a person shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses"); 1 Hawkins P. C. c. 1, § 6.

See 14 Cent. Dig. tit. "Criminal Law," § 65.

Self-defense.— Defendant cannot absolve himself from the results of voluntary intoxication, if, while under its influence, he entertains an exaggerated and unjustifiable belief as to the necessity of taking life. Springfield *v.* State, 96 Ala. 81, 11 So. 250, 38 Am. St. Rep. 85.

56. See *infra*, IV, A, 2, c.

57. See *infra*, IV, A, 2, c.

58. In Ross *v.* State, 62 Ala. 224, 227, the lower court had instructed the jury that "mere drunkenness is not insanity, and drunkenness will not excuse criminal conduct, except where it extends so far as to destroy the capacity to distinguish between right and wrong." On appeal the court expressed the opinion that the charges stated "with reasonable accuracy when, and when not, drunkenness may afford defense against an indictment for an assault with intent to commit murder"; but, in view of the fact that the indictment was for that offense, in which a specific intent was necessary, it cannot be that the court intended to hold that voluntary drunkenness is a defense in prosecutions for crime not requiring a specific intent, merely because it destroys the capacity to distinguish between right and wrong. Such is not the rule. See State *v.* Douglass, (Kan. Sup. 1890) 24 Pac. 1118. And see the cases cited *supra*, note 55.

59. Choice *v.* State, 31 Ga. 424; State *v.* Haab, 105 La. 230, 29 So. 725; Flanigan *v.* People, 86 N. Y. 554, 40 Am. Rep. 556; State *v.* Potts, 100 N. C. 457, 6 S. E. 657. But see *contra*, State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533.

60. Beverley's Case, 4 Coke 123*b*, 125*a*, Fitzh. N. Br. 532; 4 Bl. Comm. 25; 3 Inst. 46; 1 Inst. 247. And see to this effect State *v.* Thompson, Wright (Ohio) 617; U. S. *v.* Claypool, 14 Fed. 127.

61. McIntyre *v.* People, 38 Ill. 514. Thus drunkenness does not increase a minor crime to a higher degree, nor will it aggravate manslaughter into murder. McIntyre *v.* People, 38 Ill. 514. See HOMICIDE.

62. *Alabama.*— McLeroy *v.* State, 120 Ala. 247, 25 So. 247; Whitten *v.* State, 115 Ala. 72, 22 So. 483; White *v.* State, 103 Ala. 72, 16 So. 63; Cleveland *v.* State, 86 Ala. 1, 5 So. 426; Walker *v.* State, 85 Ala. 7, 4 So. 686, 7 Am. St. Rep. 17; Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133; Tidwell *v.* State, 70 Ala. 33; Mooney *v.* State, 33 Ala. 419.

Arkansas.—Chrisman *v.* State, 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44; Wood *v.* State, 34 Ark. 341, 36 Am. Rep. 13.

California.— People *v.* Methever, 132 Cal. 326, 64 Pac. 481; People *v.* Gilmore, (1898) 53 Pac. 806; People *v.* Young, 102 Cal. 411, 36 Pac. 770; People *v.* Lane, 100 Cal. 379, 34 Pac. 856; People *v.* Vincent, 95 Cal. 425, 30 Pac. 581; People *v.* Blake, 65 Cal. 275, 4 Pac. 1; People *v.* Ferris, 55 Cal. 588; People *v.* Williams, 43 Cal. 344; People *v.* Harris, 29 Cal. 678; People *v.* King, 27 Cal. 507, 87 Am. Dec. 95; People *v.* Belencia, 21 Cal. 544.

Connecticut.— State *v.* Johnson, 40 Conn. 136, 41 Conn. 584.

Dakota.— People *v.* Odell, 1 Dak. 197, 46 N. W. 601.

Delaware.— State *v.* Kavanaugh, (1902) 53 Atl. 335; State *v.* Snow, 3 Pennew. 259, 51 Atl. 607.

robbery,[63] burglary,[64] perjury,[65] bribery,[66] forgery,[67] uttering forged paper or counterfeit money,[68] voting twice at an election,[69] attempt to commit suicide,[70] rape,[71]

Florida.— Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

Illinois.— Schwabacher *v.* People, 165 Ill. 618, 46 N. E. 809; Crosby *v.* People, 137 Ill. 325, 27 N. E. 49.

Indiana.— Booher *v.* State, 156 Ind. 435, 60 N. E. 156, 54 L. R. A. 391; Dawson *v.* State, 16 Ind. 428, 79 Am. Dec. 439.

Iowa.— State *v.* Westfall, 49 Iowa 328.

Kansas.— State *v.* Mowry, 37 Kan. 369, 15 Pac. 282; State *v.* White, 14 Kan. 538.

Kentucky.— Keeton *v.* Com., 92 Ky. 522, 18 S. W. 359, 13 Ky. L. Rep. 748; Shannahan *v.* Com., 8 Bush 463, 8 Am. Rep. 465; Kriel *v.* Com., 5 Bush 362; Smith *v.* Com., 1 Duv. 224.

Louisiana.— State *v.* Trivas, 32 La. Ann. 1086, 36 Am. Rep. 293.

Michigan.— People *v.* Walker, 38 Mich. 156; Roberts *v.* People, 19 Mich. 401.

Minnesota.— State *v.* Welch, 21 Minn. 22; State *v.* Garvey, 11 Minn. 154.

Mississippi.— Kelly *v.* State, 3 Sm. & M. 518.

Missouri.— State *v.* Carter, 98 Mo. 176, 11 S. W. 624.

Nebraska.— Head *v.* State, 43 Nebr. 30, 61 N. W. 494; O'Grady *v.* State, 36 Nebr. 320, 54 N. W. 556; Schlencker *v.* State, 9 Nebr. 241, 1 N. W. 857.

New York.— People *v.* Eastwood, 14 N. Y. 562; Kenney *v.* People, 18 Abb. Pr. 91, 27 How. Pr. 202; Rodgers *v.* People, 15 How. Pr. 557; People *v.* Robinson, 2 Park. Crim. 235; People *v.* Hammill, 2 Park. Crim. 223.

Ohio.— Cline *v.* State, 43 Ohio St. 332, 1 N. E. 22; Lytle *v.* State, 31 Ohio St. 196; Pigman *v.* State, 14 Ohio 555, 45 Am. Dec. 558; State *v.* Powell, 1 Ohio Dec. (Reprint) 38, 1 West. L. J. 273.

Pennsylvania.— Jones *v.* Com., 75 Pa. St. 403; Com. *v.* Hart, 2 Brewst. 546; Com. *v.* Crozier, 1 Brewst. 349.

South Carolina.— State *v.* McCants, 1 Speers 384.

Tennessee.— Wilcox *v.* State, 94 Tenn. 106, 28 S. W. 312; Pirtle *v.* State, 9 Humphr. 663; Cornwell *v.* State, Mart. & Y. 147.

Texas.— Ferrell *v.* State, 43 Tex. 503; Riley *v.* State, (Crim. App. 1898) 44 S. W. 498; Wright *v.* State, 37 Tex. Crim. 627, 40 S. W. 491; Ayres *v.* State, (Crim. App. 1894) 26 S. W. 396; Lyle *v.* State, 31 Tex. Crim. 103, 19 S. W. 903; Reagan *v.* State, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833; Clove *v.* State, 26 Tex. App. 624, 10 S. W. 242; Pocket *v.* State, 5 Tex. App. 552; Payne *v.* State, 5 Tex. App. 35; McCarty *v.* State, 4 Tex. App. 461; Brown *v.* State, 4 Tex. App. 275; Colbath *v.* State, 2 Tex. App. 391, 4 Tex. App. 76; Loza *v.* State, 1 Tex. App. 488, 28 Am. Rep. 416; Wentz *v.* State, 1 Tex. App. 36.

Virginia.— Willis *v.* Com., 32 Gratt. 929.

Wyoming.— Cook *v.* Territory, 3 Wyo. 110, 4 Pac. 887.

United States.— Hopt *v.* Utah, 104 U. S. 631, 26 L. ed. 873; U. S. *v.* Meagher, 37 Fed. 875; U. S. *v.* King, 34 Fed. 302; U. S. *v.* Bowen, 24 Fed. Cas. No. 14,629, 4 Cranch C. C. 604.

England.— Reg. *v.* Moore, 3 C. & K. 319, 16 Jur. 750; Reg. *v.* Doherty, 16 Cox C. C. 306; Reg. *v.* Doody, 6 Cox C. C. 463.

Compare Com. *v.* Finn, 108 Mass. 466, receiving stolen goods.

See 14 Cent. Dig. tit. "Criminal Law," §§ 65, 67.

63. *Arkansas.*— Wood *v.* State, 34 Ark. 341, 36 Am. Rep. 13.

California.— People *v.* Gilmore, (1898) 53 Pac. 806.

Illinois.— Bartholomew *v.* People, 104 Ill. 601, 44 Am. Rep. 97.

Indiana.— Rogers *v.* State, 33 Ind. 543; Bailey *v.* State, 26 Ind. 422. But see *contra*, Dawson *v.* State, 16 Ind. 428, 79 Am. Dec. 439. And *compare* O'Herrin *v.* State, 14 Ind. 420.

Kentucky.— Keeton *v.* Com., 92 Ky. 522, 18 S. W. 359, 13 Ky. L. Rep. 748.

Michigan.— People *v.* Wilson, 55 Mich. 506, 21 N. W. 905 (taking property for fun while intoxicated); People *v.* Cummins, 47 Mich. 334, 11 N. W. 184, 186; People *v.* Walker, 38 Mich. 156.

Texas.— Loza *v.* State, 1 Tex. App. 488, 28 Am. Rep. 416.

Wisconsin.— State *v.* Schingen, 20 Wis. 74. And see Ingalls *v.* State, 48 Wis. 647, 4 N. W. 785.

See LARCENY; ROBBERY.

64. People *v.* Phelan, 93 Cal. 111, 28 Pac. 855; State *v.* Snow, 3 Pennew. (Del.) 259, 51 Atl. 607; Schwabacher *v.* People, 165 Ill. 618, 46 N. E. 809; State *v.* Bell, 29 Iowa 316. But see State *v.* Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875. See BURGLARY, 6 Cyc. 195.

65. Lytle *v.* State, 31 Ohio St. 196; Lyle *v.* State, 31 Tex. Crim. 103, 19 S. W. 903. *Contra*, Schaller *v.* State, 14 Mo. 502; People *v.* Willey, 2 Park. Crim. (N. Y.) 19. See PERJURY.

66. White *v.* State, 103 Ala. 72, 16 So. 63. See BRIBERY, 5 Cyc. 1040.

67. People *v.* Blake, 65 Cal. 275, 4 Pac. 1. See FORGERY.

68. O'Grady *v.* State, 36 Nebr. 320, 54 N. W. 556; Pigman *v.* State, 14 Ohio 555, 45 Am. Dec. 558; U. S. *v.* Roudenbush, 27 Fed. Cas. No. 16,198, Baldw. 514. See COUNTERFEITING, 11 Cyc. 300.

69. People *v.* Harris, 29 Cal. 678. *Contra*, State *v.* Welch, 21 Minn. 22. And see McCook *v.* State, 91 Ga. 740, 17 S. E. 1019. See ELECTIONS.

70. Reg. *v.* Moore, 3 C. & K. 319, 16 Jur. 750; Reg. *v.* Doody, 6 Cox C. C. 463. See SUICIDE.

71. Reagan *v.* State, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833. See RAPE.

or any other crimes,[72] assault with intent to murder,[73] to rape,[74] or to wound or do great bodily harm,[75] and to conspiracy to commit murder.[76] On a prosecution for murder at common law, for which no specific intent is necessary, the drunkenness of the accused is no defense,[77] and the same is true of murder in the second degree, where murder is divided into degrees;[78] but to prevent a conviction of murder in the first degree the defendant may show that he was so drunk that he was incapable of the deliberation and premeditation, which is necessary for that degree of murder,[79] unless he formed the intent to kill before becoming drunk.[80] Some courts allow the fact of drunkenness to be shown in homicide on the question of provocation, not to show that there was provocation, but for the purpose of determining whether the defendant acted under the provocation or not.[81] In all cases the defendant is responsible notwithstanding his drunkenness, if he was not so drunk as to be incapable of entertaining the necessary specific intent,[82] or if he formed such intent and then voluntarily became drunk and committed the crime.[83]

4. Proof of Alibi. Proof that the defendant was at or about the time of the

72. See *infra*, IV, A, 2, c.

73. *Alabama.*— Mooney *v.* State, 33 Ala. 419.

Arkansas.—Chrisman *v.* State, 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44.

Dakota.— People *v.* Odell, 1 Dak. 197, 46 N. W. 601.

Illinois.— Crosby *v.* People, 137 Ill. 325, 27 N. E. 49.

Michigan.—Roberts *v.* People, 19 Mich. 401.

Tennessee.— Lancaster *v.* State, 2 Lea 575. See Homicide.

74. Whitten *v.* State, 115 Ala. 72, 22 So. 483; State *v.* Donovan, 61 Iowa 369, 16 N. W. 206; Reagan *v.* State, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833. See Rape.

75. State *v.* Garvey, 11 Minn. 154; Cline *v.* State, 43 Ohio St. 332, 1 N. E. 22.

76. Booher *v.* State, 156 Ind. 435, 60 N. E. 156, 54 L. R. A. 391. See Homicide.

77. *Delaware.*— State *v.* Davis, 9 Houst. 407, 33 Atl. 55.

Kentucky.— Shannahan *v.* Com., 8 Bush 463, 8 Am. Rep. 465.

Michigan.— People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

New York.— People *v.* Rogers, 18 N. Y. 9, 72 Am. Dec. 484.

North Carolina.— State *v.* John, 30 N. C. 330, 49 Am. Dec. 396.

Virginia.— Willis *v.* Com., 32 Gratt. 929.

United States.— U. S. *v.* McGlue, 26 Fed. Cas. No. 15,679, 1 Curt. 1.

See Homicide.

78. Jones *v.* Com., 75 Pa. St. 403; Boswell *v.* Com., 20 Gratt. (Va.) 860; State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799. See Homicide.

79. *California.*— People *v.* Vincent, 95 Cal. 425, 30 Pac. 581.

Florida.— Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

Indiana.— Aszman *v.* State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33.

Pennsylvania.— Jones *v.* Com., 75 Pa. St. 403.

Tennessee.—Pirtle *v.* State, 9 Humphr. 663.

Virginia.—Willis *v.* Com., 32 Gratt. 929.

Wisconsin.— Bernhardt *v.* State, 82 Wis. 23, 51 N. W. 1009.

United States.— Hopt *v.* Utah, 104 U. S. 631, 26 L. ed. 873.

See 14 Cent. Dig. tit. "Criminal Law," § 67; and, generally, Homicide.

Contra.— State *v.* O'Reilly, 126 Mo. 597, 29 S. W. 577; State *v.* Cross, 27 Mo. 332.

80. See *infra*, note 83.

81. Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133; Shannahan *v.* Com., 8 Bush (Ky.) 463, 8 Am. Rep. 465; People *v.* Rogers, 18 N. Y. 9, 72 Am. Dec. 484; Rex *v.* Thomas, 7 C. & P. 817, 32 E. C. L. 889. See Homicide.

82. *Florida.*— Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

Indiana.— O'Herrin *v.* State, 14 Ind. 420.

Kansas.— State *v.* White, 14 Kan. 538.

Kentucky.— Shannahan *v.* Com., 8 Bush 463, 8 Am. Rep. 465.

Missouri.— State *v.* Alcorn, 137 Mo. 121, 38 S. W. 548, holding that in a prosecution for an attempt to commit rape evidence that defendant was drunk four or five hours before the alleged attempt was inadmissible.

Nebraska.— Smith *v.* State, 4 Nebr. 277.

New Hampshire.— State *v.* Avery, 44 N. H. 392.

New Jersey.— Warner *v.* State, 56 N. J. L. 686, 29 Atl. 505, 44 Am. St. Rep. 415.

Texas.— Reagan *v.* State, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833. And see Wright *v.* State, 37 Tex. Crim. 627, 40 S. W. 491.

Virginia.— Hite *v.* Com., 96 Va. 489, 31 S. E. 895.

United States.— U. S. *v.* Roudenbush, 27 Fed. Cas. No. 16,198, Baldw. 514.

England.— Reg. *v.* Doody, 6 Cox C. C. 463.

See 14 Cent. Dig. tit. "Criminal Law." § 67.

The presumption is that the defendant, although intoxicated, was capable of entertaining a criminal intent. O'Herrin *v.* State, 14 Ind. 420.

83. *Alabama.*—Springfield *v.* State, 96 Ala. 81, 11 So. 250, 38 Am. St. Rep. 85.

alleged offense so drunk as to render it highly improbable that he could have been at the place where it was committed is admissible to prove an alibi.[84]

5. INVOLUNTARY INTOXICATION. The rule that drunkenness does not exempt one from criminal responsibility applies to voluntary intoxication only. It does not apply where one involuntarily becomes drunk by being compelled to drink against his will, or through another's fraud or stratagem, or by taking liquor prescribed by a physician.[85] The fact that liquor was furnished the accused by or at the request of the person who was killed does not render intoxication involuntary.[86] Nor is intoxication involuntary because it results from an uncontrollable desire caused by long indulgence of the appetite.[87]

6. INSANITY FROM DRUNKENNESS. Temporary insanity, that is to say, the mental excitement or frenzy produced by immoderate drinking, does not exempt from responsibility where the accused voluntarily became intoxicated.[88] But settled insanity more or less permanent, including delirium tremens, although produced by prior voluntary habitual drunkenness, is on the same footing as insanity from any other cause, and exempts the sufferer from criminal responsibility to the same extent.[89]

7. DRINKING BY INSANE PERSON. The fact that an insane person voluntarily

Florida.— Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

Kansas.—State *v.* Douglass, (1890) 24 Pac. 1118.

Missouri.— State *v.* Carter, 98 Mo. 176, 11 S. W. 624.

West Virginia.— State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

See 14 Cent. Dig. tit. "Criminal Law," § 67.

Homicide.— If a person makes up his mind to kill another and then becomes drunk and kills him, he is guilty of murder in the first degree. State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799. See HOMICIDE.

Series of acts.— If the accused was so intoxicated as to be devoid of moral sense when he consummated a crime he is still responsible if he was sober when he started a series of acts which constitute the crime. State *v.* Douglass, (Kan. 1890) 24 Pac. 1118.

84. Ingalls *v.* State, 48 Wis. 647, 4 N. W. 785.

85. People *v.* Robinson, 2 Park. Crim. (N. Y.) 235; Pearson's Case, 2 Lew. C. C. 144; 1 Hale P. C. 32.

Statutory provision construed.— In Georgia and perhaps elsewhere statutes provide that drunkenness shall be an excuse for crime if occasioned by the fraud or contrivance of another, in order to have the crime perpetrated. Construing the statute, it has been held that if one gives intoxicating liquors to another without a purpose at the time to persuade him to commit crime, but afterward when he is so drunk that he has lost the moral sense, he procures him to commit a crime, the intoxicated person is responsible. McCook *v.* State, 91 Ga. 740, 17 S. E. 1019.

86. State *v.* Sopher, 70 Iowa 494, 30 N. W. 917.

87. Choice *v.* State, 31 Ga. 424. See *supra*, III, C, 1, note 59.

88. *Alabama.*— State *v.* Bullock, 13 Ala. 413.

California.— People *v.* Travers, 88 Cal. 233, 26 Pac. 88.

Delaware.— State *v.* Davis, 9 Houst. 407, 33 Atl. 55; State *v.* Thomas, Houst. Crim. Cas. 511.

Georgia.— Mercer *v.* State, 17 Ga. 146.

Illinois.— Upstone *v.* People, 109 Ill. 169.

Indiana.— Fisher *v.* State, 64 Ind. 435.

Kentucky.— Tyra *v.* Com., 2 Metc. 1.

Michigan.— Roberts *v.* People, 19 Mich. 401; People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

Missouri.—State *v.* Clevenger, 156 Mo. 190, 56 S. W. 1078; State *v.* Hundley, 46 Mo. 414.

Nebraska.— Schlencker *v.* State, 9 Nebr. 241, 1 N. W. 857.

Nevada.— State *v.* Thompson, 12 Nev. 140.

New York.— Flanigan *v.* People, 86 N. Y. 554, 40 Am. Rep. 556; Lanergan *v.* People, 50 Barb. 266.

South Carolina.— State *v.* Paulk, 18 S. C. 514.

Tennessee.— Cornwell *v.* State, Mart. & Y. 147; Bennett *v.* State, Mart. & Y. 133.

United States.—U. S. *v.* Drew, 25 Fed. Cas. No. 14,993, 5 Mason 28.

See 14 Cent. Dig. tit. "Criminal Law," § 70; and other cases cited *supra*, III, C, 1.

89. *Alabama.*— Beasley *v.* State, 50 Ala. 149, 20 Am. Rep. 292.

Arizona.— Territory *v.* Davis, (1886) 10 Pac. 359, holding also that the accused need not have been drunk at the time of the offense.

California.— People *v.* Blake, 65 Cal. 275, 4 Pac. 1. See People *v.* Methever, 132 Cal. 326, 64 Pac. 481.

Delaware.—State *v.* Kavanaugh, (1902) 53 Atl. 335; State *v.* Hand, 1 Marv. 545, 41 Atl. 192; State *v.* Davis, 9 Houst. 407, 33 Atl. 55; State *v.* Harrigan, 9 Houst. 369, 31 Atl. 1052; State *v.* McGonigal, 5 Harr. 510; State *v.* Dillahunt, 3 Harr. 551; State *v.* Thomas, Houst. Crim. Cas. 511; State *v.* Hurley, Houst. Crim. Cas. 28.

Idaho.— State *v.* Rigley, 7 Ida. 292, 62 Pac. 679.

Illinois.— Upstone *v.* People, 109 Ill. 169.

Indiana.—Wagner *v.* State, 116 Ind. 181, 18 N. E. 833; Goodwin *v.* State, 96 Ind. 550;

increases his infirmity by the excitement of intoxication does not deprive him of the benefit of his defense of insanity.[90]

D. Narcosis and Hypnosis — 1. Narcosis. If a person becomes temporarily insane through the voluntary immoderate use of morphine, cocaine, or other drugs, not taken as a medicine, his responsibility would seem to be the same as that of a person drunk from the voluntary use of intoxicating liquors, and so it has been held in Tennessee.[91] In Texas, however, it has been held that his responsibility is that of an insane person, and not that of a drunken person.[92]

2. Hypnosis. Proof that the accused committed the offense charged when under the influence of hypnotism, so that he did not know what he was doing or was compelled to commit the offense, would no doubt be a defense. But evidence of the effect of hypnotism is not admissible merely because the defendant testifies that another told him to commit the crime.[93]

IV. ATTEMPTS AND SOLICITATION.

A. Attempts — 1. In General. As a general rule an attempt to commit a

Fisher *v.* State, 64 Ind. 435; Bradley *v.* State, 31 Ind. 492; Bailey *v.* State, 26 Ind. 422.

Kentucky.— People *v.* Ferris, 2 Ky. L. Rep. 190.

Massachusetts.— Com. *v.* French, Thacher Crim. Cas. 163.

New York.— Flanigan *v.* People, 86 N. Y. 554, 40 Am. Rep. 556; People *v.* Rogers, 18 N. Y. 9, 78 Am. Dec. 484.

North Carolina.— State *v.* Potts, 100 N. C. 457, 6 S. E. 657.

Ohio.— Maconnehey *v.* State, 5 Ohio St. 77.

South Carolina.— State *v.* Stark, 1 Strobh. 479, holding, however, that there can be no delirium tremens sufficient to exempt from responsibility where the memory only is affected.

Tennessee.— Cornwell *v.* State, Mart. & Y. 147.

Texas.— Evers *v.* State, 31 Tex. Crim. 318, 20 S. W. 744, 37 Am. St. Rep. 811, 18 L. R. A. 421; Carter *v.* State, 12 Tex. 500, 62 Am. Dec. 539; Kelley *v.* State, 31 Tex. Crim. 216, 20 S. W. 357; Erwin *v.* State, 10 Tex. App. 700.

West Virginia.— State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

Wisconsin.— French *v.* State, 93 Wis. 325, 67 N. W. 706.

United States.— U. S. *v.* Drew, 25 Fed. Cas. No. 14,993, 5 Mason 28; U. S. *v.* Forbes, 25 Fed. Cas. No. 15,129, Crabbe 558; U. S. *v.* McGlue, 26 Fed. Cas. No. 15,679, 1 Curt. 1; U. S. *v.* Woodward, 28 Fed. Cas. No. 16,760*a*, 2 Hayw. & H. 119.

England.— Reg. *v.* Davis, 14 Cox C. C. 563; 1 Hale P. C. 32.

See 14 Cent. Dig. tit. "Criminal Law," § 70.

90. Choice *v.* State, 31 Ga. 424; State *v.* Kraemer, 49 La. Ann. 766, 22 So. 254, 62 Am. St. Rep. 664. See also People *v.* Cummins, 47 Mich. 334, 11 N. W. 184, 186; Terrill *v.* State, 74 Wis. 278, 42 N. W. 243.

91. Wilcox *v.* State, 94 Tenn. 106, 122, 28 S. W. 312, where it was said: "Parties who persist in subjecting themselves to the persistent use and habit of taking alcoholic drink, or other poisonous compounds and drugs, cannot expect the same forbearance and immunity from punishment as those bereft of reason by the act of God." It was held in this case that in a prosecution for murder, where the offense is divided into degrees, it is admissible to show defendant's immoderate use of drugs, not to excuse the crime, but to show his mental condition, with a view to ascertain his capacity to deliberate and entertain a malicious purpose, so as to be guilty of murder in the first degree, thus applying the rule in the case of drunken persons.

Effect of deprivation of a drug after habitual and excessive use of it may be shown as bearing on the capacity of the defendant to entertain the particular intent essential to the crime charged. Rogers *v.* State, 33 Ind. 543.

92. Cannon *v.* State, 41 Tex. Crim. 467, 56 S. W. 351 (holding that one who is temporarily insane from the use of drugs, except the voluntary use of ardent spirits, so that he does not know the character of his act and its consequences, and has not sufficient will power to refrain therefrom, is not criminally responsible); Edwards *v.* State, (Tex. Crim. App. 1899) 54 S. W. 589 (holding also that Tex. Pen. Code, art. 41, providing that evidence of temporary insanity produced by the recent voluntary use of intoxicating liquors is admissible in a criminal case only in mitigation of punishment, or to fix the grade of murder, does not include temporary insanity caused by the recent voluntary use of cocaine or morphine); Edwards *v.* State, 38 Tex. Crim. 386, 43 S. W. 112, 39 L. R. A. 262 (holding that one who is so insane from the recent use of cocaine and morphine that he does not understand the nature and quality of the act he is committing, and is incapable of forming an intent, cannot be guilty of an assault with an intent to murder; and holding further that where insanity is produced by other causes, such as morphine or cocaine, in conjunction with the recent use of intoxicating liquor, an act done in such a state of mind cannot be attributed solely to the use of liquor).

93. People *v.* Worthington, 105 Cal. 166, 38 Pac. 689.

crime is a misdemeanor whether the crime attempted is a felony or a misdemeanor, and whether it is an offense at common law or under a statute.[94] But it has been held that an attempt to commit a misdemeanor which is purely statutory, and not *malum in se*, is not indictable as a separate misdemeanor, unless made so by statute.[95] And there can be no attempt to commit a crime which is itself a mere attempt to do an act or to accomplish a result.[96]

2. What Constitutes an Attempt — a. Definition. An attempt to commit a crime is an act done with intent to commit it, beyond mere preparation, but falling short of its actual commission.[97]

b. Necessity and Sufficiency of Overt Act. To constitute an attempt to commit a crime, both at common law, and under the various statutes, something

94. *Alabama.*— Berdeaux *v.* Davis, 58 Ala. 611.

Arkansas.— Marv *v.* State, 24 Ark. 44, 81 Am. Dec. 60.

Massachusetts. — Com. *v.* Kingsbury, 5 Mass. 106; Com. *v.* Barlow, 4 Mass. 439.

Nevada.— State *v.* Sales, 2 Nev. 268.

North Carolina.— State *v.* Colvin, 90 N. C. 717; State *v.* Jordán, 75 N. C. 27; State *v.* Boyden, 35 N. C. 505.

Pennsylvania.— Smith *v.* Com., 54 Pa. St. 209, 93 Am. Dec. 686; Randolph *v.* Com., 6 Serg. & R. (Pa.) 398; Com. *v.* Jones, 22 Pittsb. Leg. J. 55.

Tennessee.—Rafferty *v.* State, 91 Tenn. 655, 16 S. W. 728.

Vermont.— State *v.* Keyes, 8 Vt. 57, 30 Am. Dec. 450.

Virginia.— Glover *v.* Com., 86 Va. 382, 10 S. E. 420; Givens *v.* Com., 29 Gratt. 830.

United States.— See U. S. *v.* Worrall, 28 Fed. Cas. No. 16,766, 2 Dall. 384, 1 L. ed. 426.

England.— Rex *v.* Roderick, 7 C. & P. 795, 32 E. C. L. 877 (where it was said by Baron Parke: "If this offence is made a misdemeanor by statute, it is made so for all purposes. There are many cases in which an attempt to commit a misdemeanor has been held to be a misdemeanor; and an attempt to commit a misdemeanor is a misdemeanor, whether the offence is created by statute, or was an offence at common law"); Rex *v.* Higgins, 2 East 5, 6 Rev. Rep. 358.

Canada.— Reg. *v.* Goodman, 22 U. C. C. P. 338; Reg. *v.* Goff, 9 U. C. C. P. 438.

See 14 Cent. Dig. tit. "Criminal Law," § 51.

Attempt a felony.— By statute in some states an attempt to commit a felony is a felony. See Rafferty *v.* State, 91 Tenn. 655, 16 S. W. 728.

Attempts to commit particular crimes see Arson, 3 Cyc. 993; Burglary, 6 Cyc. 198; and other special titles.

Attempt to commit suicide.— It is a misdemeanor at common law to attempt to commit suicide, as suicide is a crime at common law. Com. *v.* Mink, 123 Mass. 422, 25 Am. Rep. 109; Com. *v.* Dennis, 105 Mass. 162; Reg. *v.* Doody, 6 Cox C. C. 463. See also State *v.* Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799. In Massachusetts, however, it has been held that since all attempts are covered by statute in that state, and there is no statute punishing an attempt to commit suicide, such an attempt is not indictable. Com. *v.* Mink, 123 Mass. 422, 25 Am. Rep. 109. See Suicide.

An attempt to commit arson was held not to be indictable in Tennessee because the statute imposed the penalty for the completed offense only. Kinningham *v.* State, 120 Ind. 322, 22 N. E. 313; State *v.* Bowers, 35 S. C. 262, 14 S. E. 488, 28 Am. St. Rep. 847, 15 L. R. A. 199, attempt to commit arson.

95. Whitesides *v.* State, 11 Lea (Tenn.) 474. And see Com. *v.* Willard, 22 Pick. (Mass.) 476; Rex *v.* Bryan, 2 Str. 866; Rex *v.* Upton, 2 Str. 816.

96. Thus there can be **no attempt to** commit embracery (State *v.* Sales, 2 Nev. 268); or an assault, which is itself an attempt (Wilson *v.* State, 53 Ga. 205; White *v.* State, 22 Tex. 608).

97. Bouvier L. Dict.; Burrill L. Dict. And see the following cases:

Alabama.— Gray *v.* State, 63 Ala. 66.

Connecticut.— State *v.* Wells, 31 Conn. 210.

Illinois.— Graham *v.* People, 181 Ill. 477, 488, 55 N. E. 179, 47 L. R. A. 731 (where it was said: "All the authorities, to which we have been referred, describe an attempt to commit a crime as consisting of three clements, to wit: The intent to commit the crime; performance of some act towards the commission of the crime; and the failure to consummate its commission"); Scott *v.* People, 141 Ill. 195, 30 N. E. 329; Cox *v.* People, 82 Ill. 191.

North Carolina.— State *v.* Colvin, 90 N. C. 717.

Texas.— Lovett *v.* State, 19 Tex. 174.

Virginia.— Glover *v.* Com., 86 Va. 382, 385, 10 S. E. 420 (where it was said: "An attempt in criminal law is an apparent unfinished crime, and hence is compounded of two elements, viz: (1) The intent to commit a crime; and (2) a direct act done towards its commission, but falling short of the execution of the ultimate design. It need not, therefore, be the last proximate act to the consummation of the crime in contemplation, but is sufficient if it be an act apparently adopted to produce the result intended. It must be something more than mere preparation"); Hicks *v.* Com., 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891.

United States.— U. S. *v.* Quincy, 6 Pet. 445, 8 L. ed. 458.

more than mere preparation or planning is essential. The accused must take at least one step beyond preparation, by doing something directly moving toward and bringing him nearer the crime he intends to commit.[98] Mere intent to commit a crime, without any overt act or conspiracy, is not an indictable offense.[99] The overt act which is relied upon as an attempt need not be an act which is ordinarily a part of the criminal transaction itself, but may be one which, although somewhat remote, leads up to it.[1]

98. *Alabama.*— Jefferson *v.* State, 110 Ala. 89, 20 So. 434; Miles *v.* State, 58 Ala. 390; State *v.* Clarissa, 11 Ala. 57.

Arkansas.— Bennett *v.* State, 62 Ark. 516, 36 S. W. 947.

California.— People *v.* Stites, 75 Cal. 570, 17 Pac. 693; People *v.* Murray, 14 Cal. 159, holding that sending for a magistrate to perform an unlawful marriage and eloping was not sufficient to constitute an attempt.

Florida.— Davis *v.* State, 25 Fla. 272, 5 So. 803.

Georgia.— Groves *v.* State, 116 Ga. 516, 42 S. E. 755, 59 L. R. A. 598; Griffin *v.* State, 26 Ga. 493.

Indiana.— Voght *v.* State, 145 Ind. 12, 43 N. E. 1049.

Massachusetts.—Com. *v.* Peaslee, 177 Mass. 267, 59 N. E. 55.

Michigan.— People *v.* Webb, 127 Mich. 29, 86 N. W. 406; People *v.* Youngs, 122 Mich. 292, 81 N. W. 114, 47 L. R. A. 108, holding that one could not be convicted of an attempt to enter and break a dwelling merely because he agreed with another to do so, met him at a saloon at the appointed time with a revolver and slippers to be used in the house, and went into a drug store and purchased some chloroform to use, being arrested when he came out.

Mississippi.— Cunningham *v.* State, 49 Miss. 685.

Nevada.— State *v.* Lung, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505.

New Jersey.— Marley *v.* State, 58 N. J. L. 207, 33 Atl. 208. And see Sipple *v.* State, 46 N. J. L. 197.

New York.— People *v.* Moran, 123 N. Y. 254, 25 N. E. 412, 20 Am. St. Rep. 732, 10 L. R. A. 109; Mulligan *v.* People, 5 Park. Crim. 105.

North Dakota.—Cornwell *v.* Fraternal Acc. Assoc., 6 N. D. 201, 69 N. W. 191, 66 Am. St. Rep. 601, 40 L. R. A. 437.

Pennsylvania.— Stabler *v.* Com., 95 Pa. St. 318, 40 Am. Rep. 653.

Texas.— Lovett *v.* State, 19 Tex. 174.

Virginia.— Glover *v.* Com., 86 Va. 382, 10 S. E. 420; Hicks *v.* Com., 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891; Uhl *v.* Com., 6 Gratt. 706.

Washington.— State *v.* Butler, 8 Wash. 194, 35 Pac. 1093, 40 Am. St. Rep. 895, 35 Pac. 605.

United States.— U. S. *v.* Stephens, 12 Fed. 52, 8 Sawy. 116, holding that ar offer to purchase intoxicating liquor with intent to introduce it into Alaska was a mere preparation, and not an attempt.

England.— Reg. *v.* Cheeseman, 9 Cox C. C. 100, 8 Jur. N. S. 143, 31 L. J. M. C. 89, 5 L. T. Rep. N. S. 717, L. & C. 140, 10 Wkly. Rep. 255; Reg. *v.* Roberts, 7 Cox C. C. 39, Dears. C. C. 539, 1 Jur. N. S. 1094, 25 L. J. M. C. 17; Reg. *v.* Lewis, 9 C. & P. 523, 38 E. C. L. 308; Reg. *v.* St. George, 9 C. & P. 483, 38 E. C. L. 285; Reg. *v.* Taylor, 4 F. & F. 511.

Canada.— Reg. *v.* Goodman, 22 U. C. C. P. 338; Reg. *v.* McCann, 28 U. C. Q. B. 514; Reg. *v.* Esmonde, 26 U. C. Q B. 152.

See 14 Cent. Dig. tit. "Criminal Law," § 51.

"The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made." People *v.* Murray, 14 Cal. 159.

99. *Alabama.*— Miles *v.* State, 58 Ala. 390.

Massachusetts.— Com. *v.* Morse, 2 Mass. 138.

Mississippi.— Cunningham *v.* State, 49 Miss. 685.

New York.— People *v.* Lawton, 56 Barb. 126; Manetti's Case, 3 City Hall Rec. 60.

England.— Dugdale *v.* Reg., 1 E. & B. 435, 72 E. C. L. 435; Rex *v.* Stewart, R. & R. 270; Rex *v.* Heath, R. & R. 137.

1. *Alabama.*— Lewis *v.* State, 35 Ala. 380. And see Mullen *v.* State, 45 Ala. 43, 6 Am. Rep. 691.

Georgia.— Griffin *v.* State, 26 Ga. 493, holding that taking an impression of a lock and having a key made with intent to commit burglary was an attempt.

Hawaii.— Rex *v.* Leong Tiam, 7 Hawaii 338.

Massachusetts.—Com. *v.* Peaslee, 177 Mass. 267, 59 N. E. 55, holding that procuring and placing combustibles in a barn on which the defendant had insurance, and soliciting another with promises of reward to set fire to it was an attempt to commit arson.

Michigan.— People *v.* Youngs, 122 Mich. 292, 81 N. W. 114, 80 Am. St. Rep. 548, 47 L. R. A. 108.

Mississippi.— Cunningham *v.* State, 49 Miss. 685.

Missouri.— State *v.* Smith, 80 Mo. 516; State *v.* Hayes, 78 Mo. 307.

New Jersey.— Sipple *v.* State, 46 N. J. L. 197.

New York.— People *v.* Sullivan, 173 N. Y. 122, 65 N. E. 989; People *v.* Lawton, 56 Barb. 126; Manetti's Case, 3 City Hall Rec. 60. And see Mackesey *v.* People, 6 Park. Crim. 114; McDermott *v.* People, 5 Park. Crim. 102, attempt to commit arson.

Pennsylvania.— Stabler *v.* Com., 95 Pa. St. 318, 40 Am. Rep. 653; Smith *v.* Com., 54 Pa. St. 209, 93 Am. Dec. 686.

c. The Intention. To convict one of an attempt to commit a crime, it is necessary to show that the overt act was done with the specific intent to commit that particular crime. Such an intent is essential.[2] A man may be guilty of murder, although he may not intend to cause death,[3] but the specific intent to kill must be shown to convict one of an attempt to commit murder.[4] So also to convict one of an attempt to rape it must be shown that he intended to have connection with the woman by force and without her consent, and not merely by persuasion,[5] unless she was unconscious, insane, or of such an age that she was incapable of consenting.[6] The principle applies also in prosecutions for attempts

Virginia.— Hicks *v.* Com., 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891; Uhl *v.* Com., 6 Gratt. 706.

England.— Reg. *v.* Chapman, 2 C. & K. 846, 3 Cox C. C. 467, 1 Den. C. C. 432, 13 Jur. 885, 18 L. J. M. C. 152, T. & M. 90, 61 E. C. L. 846 (holding that taking a false oath to procure a marriage license was an attempt to marry without a license); Reg. *v.* Cheeseman, L. & C. 140 (holding that where a person set aside some of his master's property with intent to steal it he was guilty of an attempt to steal, although he was detected before he had time to remove it).

Canada.— Reg. *v.* Goodman, 22 U. C. C. P. 338.

Solicitation to commit crime as an attempt see *infra*, IV, B, 2.

2. *Alabama.*— Jones *v.* State, 90 Ala. 628, 8 So. 383, 24 Am. St. Rep. 850; Walls *v.* State, 90 Ala. 618, 8 So. 680; Lewis *v.* State, 35 Ala. 380; Morgan *v.* State, 33 Ala. 413.

Arkansas.— Scott *v.* State, 49 Ark. 156, 4 S. W. 750; Charles *v.* State, 11 Ark. 389.

California.—People *v.* Fleming, 94 Cal. 308, 29 Pac. 647; People *v.* Mize, 80 Cal. 41, 22 Pac. 80.

Georgia.— Patterson *v.* State, 85 Ga. 131, 11 S. E. 620, 21 Am. St. Rep. 152; Johnson *v.* State, 63 Ga. 355; Taylor *v.* State, 50 Ga. 79; Griffin *v.* State, 26 Ga. 493.

Illinois.— Graham *v.* People, 181 Ill. 477, 55 N. E. 179, 47 L. R. A. 731; Scott *v.* People, 141 Ill. 195, 30 N. E. 329.

Iowa.— State *v.* Kendall, 73 Iowa 255, 34 N. W. 843, 5 Am. St. Rep. 679.

Louisiana.— State *v.* Evans, 39 La. Ann. 912, 3 So. 63.

Michigan.— Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781. And see Roberts *v.* People, 19 Mich. 401.

Mississippi.— Jeff *v.* State, 37 Miss. 321. And see Cunningham *v.* State, 49 Miss. 685.

Missouri.— State *v.* Owsley, 102 Mo. 678, 15 S. W. 137; State *v.* Stewart, 29 Mo. 419.

Nebraska.— Skinner *v.* State, 28 Nebr. 814, 45 N. W. 53.

Nevada.— State *v.* Lung, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505.

New York.— Slatterly *v.* People, 58 N. Y. 354; People *v.* Quin, 50 Barb. 128; People *v.* Kirwan, 22 N. Y. Suppl. 160; People *v.* Long, 2 Edm. Sel. Cas. 129.

North Carolina.— State *v.* Massey, 86 N. C. 658, 41 Am. Rep. 478; State *v.* Brooks, 76 N. C. 1.

Ohio.— Hanson *v.* State, 43 Ohio St. 376, 1 N. E. 136.

Texas.— Carter *v.* State, 28 Tex. App. 355, 13 S. W. 147; Brown *v.* State, 27 Tex. App. 330, 11 S. W. 412; Moore *v.* State, 26 Tex. App. 322, 9 S. W. 610; Pruitt *v.* State, 20 Tex. App. 129.

Wisconsin.— Moore *v.* State, 79 Wis. 546, 48 N. W. 653.

England.— Reg. *v.* Donovan, 4 Cox C. C. 399; Reg. *v.* Ryan, 2 M. & Rob. 213. And see Reg. *v.* Lallement, 6 Cox C. C. 204.

3. See HOMICIDE.

4. *Alabama.*— Walls *v.* State, 90 Ala. 618, 8 So. 680; Simpson *v.* State, 59 Ala. 1, 31 Am. Rep. 1; Morgan *v.* State, 33 Ala. 413.

Arkansas.— Scott *v.* State, 49 Ark. 156, 4 S. W. 750.

California.— People *v.* Mize, 80 Cal. 41, 22 Pac. 80.

Georgia.— Patterson *v.* State, 85 Ga. 131, 11 S. E. 620, 21 Am. St. Rep. 152.

Louisiana.— State *v.* Evans, 39 La. Ann. 912, 3 So. 63.

Michigan.— Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781.

Texas.— Carter *v.* State, 28 Tex. App. 355, 13 S. W. 147; Pruitt *v.* State, 20 Tex. App. 129.

England.— Reg. *v.* Donovan, 4 Cox C. C. 399.

See HOMICIDE.

5. *Alabama.*— Jones *v.* State, 90 Ala. 628, 8 So. 383, 24 Am. St. Rep. 850; Lewis *v.* State, 35 Ala. 380.

Arkansas.— Charles *v.* State, 11 Ark. 389.

California.—People *v.* Fleming, 94 Cal. 308, 29 Pac. 647.

Georgia.— Johnson *v.* State, 63 Ga. 355.

Iowa.— State *v.* Kendall, 73 Iowa 255, 34 N. W. 843, 5 Am. St. Rep. 679.

Missouri.— State *v.* Owsley, 102 Mo. 678, 15 S. W. 137.

Nevada.— State *v.* Lung, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505, holding that there can be no attempt to rape by using cantharides, as that drug cannot have the effect of overcoming the woman's power of resistance.

New York.— People *v.* Quin, 50 Barb. 128.

North Carolina.—State *v.* Brooks, 76 N. C. 1.

Texas.— Brown *v.* State, 27 Tex. App. 330, 11 S. W. 412; Carroll *v.* State, 24 Tex. App. 366, 6 S. W. 190; Peterson *v.* State, 14 Tex. App. 162.

See RAPE.

6. State *v.* Grossheim, 79 Iowa 75, 44 N. W. 541; People *v.* McDonald, 9 Mich. 150; State *v.* Pickett, 11 Nev. 255, 21 Am. Rep. 754; Reg. *v.* Beale, L. R. 1 C. C. 10, 10 Cox C. C.

to commit other offenses.[7] While the specific intent is essential its existence may be inferred from the circumstances.[8] Thus an intent to commit murder may be inferred from the use of a deadly weapon or other attendant circumstances, in the absence of evidence negativing such intent;[9] and an intent to rape may be inferred from the circumstances.[10]

d. Voluntary Abandonment. The voluntary abandonment of the attempt before it is finally consummated may be urged by the accused to show his intent, but if he has proceeded beyond mere preparation his voluntary abandonment will not bar his conviction.[11]

e. Inability to Commit Intended Crime. To constitute an indictable attempt to commit a crime its consummation must be apparently possible, or in other words, there must be an apparent ability to commit it. If the means employed are so clearly unsuitable that it is obvious that the crime cannot be committed the attempt is not indictable.[12] On the other hand an apparent possibility is all that is required. If there is an apparent ability to commit the crime in the way attempted, the attempt is indictable although, unknown to the party making the attempt, the crime cannot be committed because the means employed are in fact unsuitable, or because of extrinsic facts, such as the non-existence of some essential object.[13] This principle has been applied for example to attempts to commit

157, 12 Jur. N. S. 12, 35 L. J. M. C. 60, 13 L. T. Rep. N. S. 335, 14 Wkly. Rep. 57. See RAPE.

7. Thus it applies to attempt to commit abortion (Scott *v.* People, 141 Ill. 195, 30 N. E. 329), arson (Com. *v.* Harney, 10 Metc. (Mass.) 422; People *v.* Long, 2 Edm. Sel. Cas. (N. Y.) 129), or burglary (Griffin *v.* State, 26 Ga. 493); and to attempt to obtain money by false pretenses or to commit larceny or robbery (Graham *v.* People, 181 Ill. 477, 55 N. E. 179, 47 L. R. A. 731; Hanson *v.* State, 43 Ohio St. 376, 1 N. E. 136; Hall *v.* Com., 78 Va. 678).

8. *Alabama.*— Jackson *v.* State, 94 Ala. 85, 10 So. 509.

California.— People *v.* Mize, 80 Cal. 41, 22 Pac. 80.

Georgia.— Patterson *v.* State, 85 Ga. 131, 11 S. E. 620, 21 Am. St. Rep. 152.

Illinois.— Scott *v.* People, 141 Ill. 195, 30 N. E. 329 (attempt to commit an abortion); Crosby *v.* People, 137 Ill. 325, 27 N. E. 49.

Massachusetts.— Com. *v.* Harney, 10 Metc. 422, attempt to commit arson.

Mississippi.— Jeff *v.* State, 37 Miss. 321.

New York.— People *v.* Long, 2 Edm. Sel. Cas. 129, attempt to commit arson.

9. Jackson *v.* State, 94 Ala. 85, 10 So. 509; Walls *v.* State, 90 Ala. 618, 8 So. 680; Crosby *v.* People, 137 Ill. 325, 27 N. E. 49; Jeff *v.* State, 37 Miss. 321. See HOMICIDE.

10. Carter *v.* State, 35 Ga. 263; State *v.* Grossheim, 79 Iowa 75, 44 N. W. 541; State *v.* Smith, 80 Mo. 516. See RAPE.

11. *Alabama.*— Lewis *v.* State, 35 Ala. 380.

Connecticut.— State *v.* Allen, 47 Conn. 121.

Georgia.— Taylor *v.* State, 50 Ga. 79; Pinkard *v.* State, 30 Ga. 757.

Massachusetts.—Com. *v.* Peaslee, 177 Mass. 267, 59 N. E. 55.

Missouri.— State *v.* Hayes, 78 Mo. 307.

North Carolina.— State *v.* Elick, 52 N. C. 68.

Virginia.— Glover *v.* Com., 86 Va. 382, 10 S. E. 420.

12. *Alabama.*— Tarver *v.* State, 43 Ala. 354 (holding that to constitute an assault with a pistol with intent to murder, it is necessary that the pistol shall be presented within the distance to which it may do execution); State *v.* Clarissa, 11 Ala. 57 (holding that an attempt to poison is not committed, unless the substance administered is some poisonous drug or substance calculated to destroy life).

Georgia.— Allen *v.* State, 28 Ga. 395, 73 Am. Dec. 760, assault with intent to murder or attempt to murder.

Florida.— Davis *v.* State, 25 Fla. 272, 5 So. 803.

Indiana.— Kunkle *v.* State, 32 Ind. 220.

Nevada.— State *v.* Napper, 6 Nev. 113.

New Jersey.— Sipple *v.* State, 46 N. J. L. 197, attempt to commit larceny.

New York.— People *v.* Peabody, 25 Wend. 472.

Ohio.— Henry *v.* State, 18 Ohio 32, holding that the offense of maliciously shooting at another with intent to wound is not committed by discharging a gun loaded with powder and wadding only at a person so far distant that no injury can result.

Texas.— Robinson *v.* State, 31 Tex. 170.

England.— Reg. *v.* Gamble, 10 Cox C. C. 545; Rex *v.* Edwards, 6 C. & P. 521, 25 E. C. L. 555, attempt to rob.

See HOMICIDE.

13. *Alabama.*— Mullen *v.* State, 45 Ala. 43, 6 Am. Rep. 691.

California.— People *v.* Lee Kong, 95 Cal. 666, 30 Pac. 800, 29 Am. St. Rep. 165, 17 L. R. A. 626.

Connecticut.— State *v.* Wilson, 30 Conn. 500.

Indiana.— Hamilton *v.* State, 36 Ind. 280, 10 Am. Rep. 22; Kunkle *v.* State, 32 Ind. 220 [*disapproving* State *v.* Swails, 8 Ind. 524, 65 Am. Dec. 772].

Massachusetts.— Com. *v.* Jacobs, 9 Allen 274, 275 (where it was said: "Whenever the law makes one step towards the accomplish-

larceny or robbery, where it turned out that unknown to the accused there was nothing to be stolen, as in the case of an attempt to pick an empty pocket,[14] etc.; to attempts to commit murder, where because of an impediment unknown to the accused the murder could not be accomplished;[15] to burglary, with intent to commit larceny, where the money or property which the accused intended to steal was not in the house;[16] to an attempt to commit rape where the accused unknown to him was impotent;[17] and to attempt to commit abortion where unknown to the accused the woman was not pregnant,[18] or the drug administered was harmless.[19] Where the act if accomplished would not constitute the crime intended, as a matter of law, then there is no indictable attempt.[20]

ment of an unlawful object, with the intent or purpose of accomplishing it, criminal, a person taking that step, with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance"); Com. *v.* McDonald, 5 Cush. 365.

Michigan.— People *v.* Jones, 46 Mich. 441, 9 N. W. 486.

Missouri.— State *v.* Frank, 103 Mo. 120, 15 S. W. 330.

New York.— People *v.* Gardner, 144 N. Y. 119, 38 N. E. 1003, 43 Am. St. Rep. 741, 28 L. R. A. 699 [*reversing* 73 Hun 66, 25 N. Y. Suppl. 1072]; People *v.* Moran, 123 N. Y. 254, 25 N. E. 412, 20 Am. St. Rep. 732, 10 L. R. A. 109.

Ohio.— State *v.* Beal, 37 Ohio St. 108, 41 Am. Rep. 490.

South Carolina.— State *v.* Glover, 27 S. C. 602, 4 S. E. 564.

Tennessee.— Clark *v.* State, 86 Tenn. 511, 8 S. W. 145.

England.— Reg. *v.* Brown, 24 Q. B. D. 357, 16 Cox C. C. 715, 54 J. P. 408, 59 L. J. M. C. 47, 61 L. T. Rep. N. S. 594, 38 Wkly. Rep. 95; Reg. *v.* Ring, 17 Cox C. C. 491, 56 J. P. 552, 61 L. J. M. C. 116, 66 L. T. Rep. N. S. 300; Reg. *v.* Goodall, 2 Cox C. C. 41; Rex *v.* Eldershaw, 3 C. & P. 396, 14 E. C. L. 628.

14. *Connecticut.*—State *v.* Wilson, 30 Conn. 500.

Indiana.— Hamilton *v.* State, 36 Ind. 280, 10 Am. Rep. 22, attempt to rob where the person assaulted had nothing on his person.

Massachusetts.—Com. *v.* McDonald, 5 Cush. 365.

Michigan.— People *v.* Jones, 46 Mich. 441, 9 N. W. 486.

New York.— People *v.* Moran, 123 N. Y. 254, 25 N. E. 412, 20 Am. St. Rep. 732, 10 L. R. A. 109.

Pennsylvania.—Rogers *v.* Com., 5 Serg. & R. 463.

Tennessee.— Clark *v.* State, 86 Tenn. 511, 8 S. W. 145, attempt to steal by opening empty cash-drawer.

England.— Reg. *v.* Brown, 24 Q. B. D. 357, 16 Cox C. C. 715, 54 J. P. 408, 59 L. J. M. C. 47, 61 L. T. Rep. N. S. 594, 38 Wkly. Rep. 95; Reg. *v.* Ring, 17 Cox C. C. 491, 56 J. P. 552, 61 L. J. M. C. 116, 66 L. T. Rep. N. S. 300. *Contra,* Reg. *v.* Collins, 9 Cox C. C. 497, 10 Jur. N. S. 686, L. & C. 471, 33 L. J. M. C. 177, 10 L. T. Rep. N. S. 581, 12 Wkly. Rep. 886; Reg. *v.* McPherson, 7 Cox C. C. 281, Dears. & B. 197, 3 Jur. N. S. 523, 26 L. J. M. C. 134, 5 Wkly. Rep. 525.

See LARCENY; ROBBERY.

15. Mullen *v.* State, 45 Ala. 43, 6 Am. Rep. 691 (holding that on a trial for assault with intent to murder, where the evidence tended to show that the accused presented a loaded gun and attempted three times to fire it, but there was no cap on it, a charge that the absence of the cap would not avail the defendant if he supposed it was on the gun, but that the jury must be satisfied beyond a reasonable doubt that he did not know that there was no cap on it, was correct); People *v.* Lee Kong, 95 Cal. 666, 30 Pac. 800, 29 Am. St. Rep. 155, 17 L. R. A. 626 (holding that where a policeman bored a hole in the roof of a building for the purpose of determining from observation whether or not the occupant was conducting a gambling or lottery game, and the occupant, having ascertained the fact, and believing that the policeman was on the roof at the point of contemplated observation, fired his pistol at that spot, with the intent to kill, he was guilty of an assault with intent to murder, although the officer was not at the spot when the shot was fired, but was upon another part of the roof); Kunkle *v.* State, 32 Ind. 220; State *v.* Glover, 27 S. C. 602, 4 S. E. 564 (holding that administering a harmless drug with intent to kill, believing the substance to be poison, was an attempt to kill). See HOMICIDE.

16. State *v.* Beal, 37 Ohio St. 108, 41 Am. Rep. 490. See BURGLARY, 6 Cyc. 198.

17. Territory *v.* Keyes, 5 Dak. 244, 38 N. W. 440. See RAPE.

18. Reg. *v.* Goodall, 2 Cox C. C. 41. See ABORTION, 1 Cyc. 173.

19. State *v.* Fitzgerald, 49 Iowa 260, 31 Am. Rep. 148. See ABORTION, 1 Cyc. 173.

20. State *v.* Cooper, 22 N. J. L. 52, 51 Am. Dec. 248 (holding that since to cause or procure an abortion is not a crime at common law unless the child is quick, an attempt to cause or procure an abortion before the child has quickened is not indictable); Rex *v.* Edwards, 6 C. & P. 521, 25 E. C. L. 555 (attempt to rob). *Compare,* however, People *v.* Gardner, 144 N. Y. 119, 38 N. E. 1003, 43 Am. St. Rep. 741, 28 L. R. A. 699 [*reversing* 73

B. Solicitation — 1. In General. By the weight of authority it is an indictable offense at common law to solicit another to commit a crime amounting to a felony, although the solicitation is of no effect and the crime is not in fact committed.[21] Thus it has been held a crime to solicit another to commit larceny or embezzlement,[22] arson,[23] murder,[24] sodomy,[25] adultery, where adultery is a felony,[26] or to utter counterfeit money or forged bills.[27] Some courts have held that a solicitation to commit a misdemeanor is not a crime.[28] But the weight of authority discards the test depending on the distinction between felonies and misdemeanors, and makes the decision depend on whether the crime advised or counseled is of a high and aggravated character, and such as seriously affects the public peace and economy.[29] One who solicits another to commit a felony is guilty of a misde-

Hun 66, 25 N. Y. Suppl. 1072], attempt to commit the crime of extortion.

Attempt to rape.— By the weight of authority a boy who is so young as to be incapable, as a matter of law, of committing rape, cannot be guilty of an attempt to rape. State *v.* Handy, 4 Harr. (Del.) 566; State *v.* Sam, 60 N. C. 293; Foster *v.* Com., 96 Va. 306, 31 S. E. 503, 70 Am. St. Rep. 846, 42 L. R. A. 589; Rex *v.* Eldershaw, 3 C. & P. 396, 14 E. C. L. 628. *Contra*, Com. *v.* Green, 2 Pick. (Mass.) 380. See Rape.

21. Com. *v.* Flagg, 135 Mass. 545.

22. Com. *v.* McGill, Add. (Pa.) 21; Reg. *v.* Gregory, L. R. 1 C. C. 77, 10 Cox C. C. 459, 36 L. J. M. C. 60, 16 L. T. Rep. N. S. 388, 15 Wkly. Rep. 774; Rex *v.* Higgins, 2 East 5, 6 Rev. Rep. 358; Reg. *v.* Quail, 4 F. & F. 1076; Reg. *v.* Collingwood, 6 Mod. 288; Reg. *v.* Daniell, 6 Mod. 99.

23. Com. *v.* Flagg, 135 Mass. 545; People *v.* Bush, 4 Hill (N. Y.) 133; Com. *v.* McGregor, 6 Pa. Dist. 343; Com. *v.* Hutchinson, 19 Pa. Co. Ct. 360; State *v.* Bowers, 35 S. C. 262, 14 S. E. 488, 28 Am. St. Rep. 847, 15 L. R. A. 199. See also Com. *v.* Peaslee, 177 Mass. 267, 59 N. E. 55. But see McDade *v.* People, 29 Mich. 50.

24. Com. *v.* Randolph, 146 Pa. St. 83, 23 Atl. 388, 28 Am. St. Rep. 782; Stabler *v.* Com., 95 Pa. St. 318, 40 Am. Rep. 653; Reg. *v.* Williams, 1 C. & K. 589, 1 Den. C. C. 39, 47 E. C. L. 589; Reg. *v.* Banks, 12 Cox C. C. 393. See also Begley *v.* Com., 60 S. W. 847, 22 Ky. L. Rep. 1546; People *v.* Most, 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509 [*affirming* 71 N. Y. App. Div. 160, 75 N. Y. Suppl. 591]; Damarest *v.* Haring, 6 Cow. (N. Y.) 76.

25. Rex *v.* Hickman, 1 Moody C. C. 34. And see Reg. *v.* Rowed, 3 Q. B. 180, 2 G. & D. 518, 6 Jur. 396, 11 L. J. M. C. 74, 43 E. C. L. 688; Reg. *v.* Ransford, 13 Cox C. C. 9, 31 L. T. Rep. N. S. 488.

26. State *v.* Avery, 7 Conn. 266, 18 Am. Dec. 105.

27. State *v.* Davis, Tapp. (Ohio) 171.

28. Thus where adultery is merely a misdemeanor it has been held that solicitation to commit adultery is not punishable. Smith *v.* Com., 54 Pa. St. 209, 93 Am. Dec. 686. See also Reg. *v.* Pierson, 1 Salk. 382; Lockey *v.* Dangerfield, 2 Str. 1100.

29. Com. *v.* Flagg, 135 Mass. 545; Com. *v.* Willard, 22 Pick. (Mass.) 476 (holding it not indictable to solicit the sale of intoxicating liquors in violation of a statute, Shaw, C. J., saying: "It is difficult to draw any precise line of distinction between the cases in which the law holds it a misdemeanor to counsel, entice or induce another to commit a crime, and where it does not. In general, it has been considered as applying to cases of felony, though it has been held that it does not depend upon the mere legal and technical distinction between felony and misdemeanor. One consideration, however, is manifest in all the cases, and that is, that the offence proposed to be committed, by the counsel, advice or enticement of another, is of a high and aggravated character, tending to breaches of the peace or other great disorder and violence, being what are usually considered *mala in se* or criminal in themselves, in contradistinction to *mala prohibita*, or acts otherwise indifferent than as they are restrained by positive law"); Com. *v.* McHale, 97 Pa. St. 397, 39 Am. Rep. 808; Com. *v.* McGregor, 6 Pa. Dist. 343, 346 (where it was said by Reed, P. J.: "There are many misdemeanors, which affect the public more injuriously than some felonies, and which justly merit and have attached to them a greater punishment. It would be a legal absurdity to hold that the solicitation to commit a misdemeanor of a high and aggravated character is no offence while the solicitation to commit the most trifling theft would be"); Com. *v.* Hutchinson, 19 Pa. Co. Ct. 360; Rex *v.* Higgins, 2 East 5, 6 Rev. Rep. 358.

Solicitation to commit an assault and battery has been held a crime. U. S. *v.* Lyles, 26 Fed. Cas. No. 15,646, 4 Cranch C. C. 469.

Other illustrations.— It has also been held a crime to endeavor to impede the course of justice by urging a witness to absent himself from the trial (State *v.* Carpenter, 20 Vt. 9; State *v.* Keyes, 8 Vt. 57, 30 Am. Dec. 450; State *v.* Caldwell, 2 Tyler (Vt.) 212); to solicit another to accept or give a bribe (Walsh *v.* People, 65 Ill. 58, 16 Am. Rep. 569; State *v.* Ellis, 33 N. J. L. 102, 97 Am. Dec. 707; U. S. *v.* Worrall, 28 Fed. Cas. No. 16,766, 2 Dall. 384, 1 L. ed. 426; Rex *v.* Vaughan, 4 Burr. 2494; and Bribery, 5 Cyc. 1042); to commit embracery (State *v.* Sales, 2 Nev. 268); or to fight a duel (Rex *v.* Philipps, 6 East 464, 2 Smith K. B. 550; Rex *v.* Rice, 3 East 581. See under statutes Com. *v.* Tibbs, 1 Dana (Ky.) 554; State *v.* Far-

meanor only, if the felony is not committed.[30] If the felony is committed, he is guilty as accessary before the fact, if absent, and as principal in the second degree, if present at the time of its commission.[31]

2. As an Attempt. Some of the courts have treated solicitation to commit a crime as an attempt.[32] By the weight of authority, however, it is not a sufficient overt act to be indictable as an attempt, but must be indicted as a distinct offense.[33]

V. Parties to Offenses.

A. In General. Parties to offenses are either principals in the first or second degree or accessaries before or after the fact. A principal is one who either actually perpetrates the crime or who, being actually or constructively present, aids and abets its commission,[34] while an accessary is one who procures, counsels, commands, or abets the principal, and is absent when the latter commits the crime, or who, after a crime has been committed, receives, relieves, comforts, or assists the perpetrator.[35] The distinction between principals and accessaries applies only in the case of felonies, all who participate in treason and in misdemeanors, if guilty and punishable at all, being principals and indictable as such;[36] but it applies, unless a contrary intention appears, to offenses which are

rier, 8 N. C. 487; State *v.* Taylor, 3 Brev. (S. C.) 243). And see Dueling.

30. Begley *v.* Com., 60 S. W. 847, 22 Ky. L. Rep. 1546; Com. *v.* Flagg, 135 Mass. 545; Com. *v.* Randolph, 146 Pa. St. 83, 23 Atl. 388, 28 Am. St. Rep. 782; Reg. *v.* Gregory, L. R. 1 C. C. 77, 10 Cox C. C. 459, 36 L. J. M. C. 60, 6 L. T. Rep. N. S. 388, 15 Wkly. Rep. 774.

31. Begley *v.* Com., 60 S. W. 847, 22 Ky. L. Rep. 1546. See *infra*, V.

32. Griffin *v.* State, 26 Ga. 493; People *v.* Bush, 4 Hill (N. Y.) 133; McDermott *v.* People, 5 Park. Crim. (N. Y.) 102; State *v.* Bowers, 35 S. C. 262, 14 S. E. 488, 28 Am. St. Rep. 847, 15 L. R. A. 199; Rex *v.* Higgins, 2 East 5, 6 Rev. Rep. 358.

33. *Illinois.*— Cox *v.* People, 82 Ill. 191.

Maryland.— Lamb *v.* State, 67 Md. 524, 10 Atl. 208, 298.

Michigan.— McDade *v.* People, 29 Mich. 50.

Missouri.— State *v.* Harney, 101 Mo. 470, 14 S. W. 657.

Pennsylvania.— Com. *v.* Randolph, 146 Pa. St. 83, 23 Atl. 388, 28 Am. St. Rep. 782; Stabler *v.* Com., 95 Pa. St. 318, 40 Am. Rep. 653; Smith *v.* Com., 54 Pa. St. 209, 93 Am. Dec. 686.

Virginia.— Hicks *v.* Com., 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891.

Washington.— State *v.* Butler, 8 Wash. 194, 35 Pac. 1093, 40 Am. St. Rep. 900, 25 L. R. A. 434.

West Virginia.— State *v.* Baller, 26 W. Va. 90, 53 Am. Rep. 66.

Wisconsin.—State *v.* Goodrich, 84 Wis. 359, 54 N. W. 577.

England.— Reg. *v.* Williams, 1 C. & K. 589, 1 Den. C. C. 39, 47 E. C. L. 589.

34. McLeroy *v.* State, 120 Ala. 274, 25 So. 247; Hately *v.* State, 15 Ga. 346; State *v.* Hess, 65 N. J. L. 544, 47 Atl. 806; State *v.* Cannon, 49 S. C. 550, 27 S. E. 526; and other cases cited *infra*, V, B, C. As to accomplices see *infra*, XII, I, 1.

35. Griffith *v.* State, 90 Ala. 583, 8 So. 812; Wren *v.* Com., 26 Gratt. (Va.) 952; Reg. *v.* Brown, 14 Cox C. C. 144; 4 Bl. Comm. 37; 1 Hale P. C. 618; 2 Hawkins P. C. c. 29, §§ 16, 26. See *infra*, V, D, E.

The distinction between a principal and an accessary is as follows: The acts of the accessary are only auxiliary, and they may be performed either before or after the actual commission of the crime, but a principal may not only perform an antecedent act in furtherance of the crime, but at the date and time of its actual commission he must be doing something in connection with and in furtherance of the common purpose, whether present where the main fact is to be accomplished or not. In other words an accessary either has completed his offense before the crime is committed or his liability does not attach until after it has been committed, while the principal acts his part in furtherance of and during the consummation of the crime. Bean *v.* State, 17 Tex. App. 60; Cook *v.* State, 14 Tex. App. 96.

36. *Alabama.*— Mulvey *v.* State, 43 Ala. 316, 94 Am. Dec. 684.

Arkansas.— Sanders *v.* State, 18 Ark. 198; Hubbard *v.* State, 10 Ark. 378.

Georgia.— Kinnebrew *v.* State, 80 Ga. 232, 5 S. E. 56; Faircloth *v.* State, 73 Ga. 426; Hansford *v.* State, 54 Ga. 55; Hawkins *v.* State, 13 Ga. 322, 58 Am. Dec. 517.

Illinois.— Stevens *v.* People, 67 Ill. 587; Van Meter *v.* People, 60 Ill. 168; Whitney *v.* Turner, 2 Ill. 253.

Indiana.— Stratton *v.* State, 45 Ind. 468; Lay *v.* State, 12 Ind. App. 362, 39 N. E. 768.

Kentucky.— Com. *v.* McAtee, 8 Dana 28; Com. *v.* Burns, 4 J. J. Marsh. 177; Com. *v.* Patrick, 4 Ky. L. Rep. 623.

Maine.— State *v.* Murdoch, 71 Me. 454.

Maryland.— Smith *v.* State, 6 Gill 425.

Massachusetts.— Com. *v.* Ahearn, 160 Mass.

made felonies by statute, whether at common law they were misdemeanors only or not punishable at all.[37] In some states the distinction between accessaries and principals is abrogated by statute, and all persons concerned in the commission of a crime, whether directly committing it or counseling, aiding, or abetting, are principals.[38]

B. Principals in First Degree — 1. In General. One may be a principal in the commission of a crime in two degrees. The actor or actual perpetrator of a crime is a principal in the first degree. He who is actually or constructively present aiding or abetting is a principal in the second degree.[39] One may commit a crime as principal in the first degree without being actually present, as where he places poison for another, who takes it in his absence,[40] or obtains money by false pretenses by sending a letter through the mail.[41] Where several persons are acting together with a common intent and design to commit a crime, and each performs some part of the crime, they are all guilty as principals, although all are not actually present when the offense is finally consummated. They are present in

300, 35 N. E. 853; Com. *v.* Gannett, 1 Allen 7, 79 Am. Dec. 693; Com. *v.* Ray, 3 Gray 441; Com. *v.* Barlow, 4 Mass. 439; Com. *v.* Macomber, 3 Mass. 254.

Mississippi.— Beck *v.* State, 69 Miss. 217, 13 So. 835; Williams *v.* State, 12 Sm. & M. 58.

Missouri.— State *v.* McLain, 92 Mo. App. 456.

Nebraska.— Wagner *v.* State, 43 Nebr. 1, 61 N. W. 85.

New Jersey.—Engeman *v.* State, 54 N. J. L. 247, 23 Atl. 676.

New York.— People *v.* Lyon, 99 N. Y. 210, 1 N. E. 673; Lowenstein *v.* People, 54 Barb. 299; People *v.* Erwin, 4 Den. 129; Ward *v.* People, 6 Hill 144.

North Carolina.—State *v.* De Boy, 117 N. C. 702, 23 S. E. 167; State *v.* Jones, 83 N. C. 605, 35 Am. Rep. 586; State *v.* Gaston, 73 N. C. 93, 21 Am. Rep. 459; State *v.* Cheek, 35 N. C. 114; State *v.* Barden, 12 N. C. 518.

Ohio.— State *v.* Munson, 25 Ohio St. 381; Baker *v.* State, 12 Ohio St. 214.

South Carolina.— State *v.* Westfield, 1 Bailey 132; Chanet *v.* Parker, 1 Mill 333; State *v.* Lymburn, 1 Brev. 397, 2 Am. Dec. 669; Whitaker *v.* English, 1 Bay 15.

Tennessee.— Atkins *v.* State, 95 Tenn. 474, 32 S. W. 391; Daly *v.* State, 13 Lea 228; Howlett *v.* State, 5 Yerg. 144; Curlin *v.* State, 4 Yerg. 143; State *v.* Smith, 2 Yerg. 272.

United States.— U. S. *v.* Hartwell, 26 Fed. Cas. No. 15,318, 3 Cliff. 221; U. S. *v.* White, 28 Fed. Cas. No. 16,676, 5 Cranch C. C. 73; U. S. *v.* Williams, 28 Fed. Cas. No. 16,708, 1 Cranch C. C. 174; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,250, 2 Curt. 637.

England.— Reg. *v.* Clayton, 1 C. & K. 128, 47 E. C. L. 128; Reg. *v.* Burton, 13 Cox C. C. 71, 32 L. T. Rep. N. S. 539; Reg. *v.* Greenwood, 5 Cox C. C. 521, 2 Den. C. C. 453, 16 Jur. 390, 21 L. J. M. C. 127; 4 Bl. Comm. 35; 1 Hale P. C. 233; 2 Inst. 183.

See 14 Cent. Dig. tit. "Criminal Law," §§ 73, 74.

Principals and accessaries in particular offenses see Abortion, 1 Cyc. 167; Homicide; Larceny; Rape; and other special titles.

Principals and accessaries in suicide see Suicide.

Principals and accessaries in petit larceny see Petit Larceny.

37. *Kentucky.*—Com. *v.* Carter, 94 Ky. 527, 23 S. W. 344, 15 Ky. L. Rep. 253; Frey *v.* Com., 83 Ky. 190; Bland *v.* Com., 10 Bush 622; Stamper *v.* Com., 7 Bush 612.

Louisiana.— State *v.* Hendry, 10 La. Ann. 207.

Michigan.— Meister *v.* People, 31 Mich. 99.

Tennessee.— McGowan *v.* State, 9 Yerg. 184.

Wisconsin.— Nichols *v.* State, 35 Wis. 308.

England.— Reg. *v.* Tracy, 6 Mod. 30, 32.

38. *Alabama.*— Jolly *v.* State, 94 Ala. 19, 10 So. 606; Raiford *v.* State, 59 Ala. 106.

California.— People *v.* Outeveras, 48 Cal. 19; People *v.* Bearss, 10 Cal. 68.

Iowa.— State *v.* Smith, 106 Iowa 701, 77 N. W. 499; State *v.* Rowe, 104 Iowa 323, 73 N. W. 833. And see State *v.* Smith, 100 Iowa 1, 69 N. W. 269, holding that "the effect of this provision is to make the offense of one who at common law would have been an accessory before the fact substantive and so far independent that he may be indicted, tried, and punished, and as a principal, without regard to the prosecution of the person who at common law would have been the principal."

Kansas.— State *v.* Elliott, 61 Kan. 518, 59 Pac. 1047, holding that such a statute is applicable to a felony created by statute after its passage.

Missouri.— State *v.* Fredericks, 85 Mo. 145.

New York.— People *v.* McKane, 143 N. Y. 455, 38 N. E. 950.

Oregon.— State *v.* Branton, 33 Oreg. 533, 56 Pac. 267.

Rhode Island.— State *v.* Sprague, 4 R. I. 257.

39. 4 Bl. Comm. 34; 1 Hale P. C. 615.

40. Rex *v.* Harley, 4 C. & P. 369, 19 E. C. L. 558; Foster C. L. 349; 3 Inst. 138. And see State *v.* Fulkerson, 61 N. C. 233; Blackburn *v.* State, 23 Ohio St. 146.

41. Reg. *v.* Jones, 4 Cox C. C. 198. See also People *v.* Adams, 3 Den. (N. Y.) 190, 45 Am. Dec. 468.

the eye of the law at the place of the crime where each and all in their own station coöperate to a common end.[42]

2. COMMISSION OF CRIME BY INNOCENT AGENT. One who employs an innocent agent, as a child or insane person, or an adult having no knowledge of his employer's intent, to commit a crime, is liable as a principal in the first degree, although he does nothing himself in the actual commission of the crime.[43]

C. Principals in Second Degree — 1. ACTUAL OR CONSTRUCTIVE PRESENCE. One who is actually or constructively present when the crime is committed, and is aiding, encouraging, or abetting it, is a principal in the second degree, while if not so present he is an accessary before the fact.[44] The presence at the place and time of the crime required to make one a principal may be constructive, as where

42. McCarney *v.* People, 83 N. Y. 408, 38 Am. Rep. 456; Tittle *v.* State, 35 Tex. Crim. 96, 31 S. W. 677; Blaine *v.* State, 24 Tex. App. 626, 7 S. W. 239; Watson *v.* State, 21 Tex. App. 598, 1 S. W. 451, 17 S. W. 550; Reg. *v.* Charles, 17 Cox C. C. 499; Reg. *v.* Vanderstein, 10 Cox C. C. 177, 16 Ir. C. L. 574; Reg. *v.* Howell, 9 C. & P. 437, 38 E. C. L. 259; Rex *v.* Lockett, 7 C. & P. 300, 32 E. C. L. 624; Rex *v.* Bringley, R. & R. 332 (forgery); 1 Hale P. C. 439.

43. *Alabama.*— Bishop *v.* State, 30 Ala. 34.

Georgia.— Hately *v.* State, 15 Ga. 346; Berry *v.* State, 10 Ga. 511.

Maine.— State *v.* Shurtliff, 18 Me. 368.

Massachusetts.—Com. *v.* Hill, 11 Mass. 136, passing a counterfeit bill.

New York.— Adams *v.* People, 1 N. Y. 173 [*affirming* 3 Den. 190, 45 Am. Dec. 468]; Wixson *v.* People, 5 Park. Crim. 119; People *v.* McMurray, 4 Park. Crim. 234.

Ohio.— Gregory *v.* State, 26 Ohio St. 510, 20 Am. Rep. 774.

Pennsylvania.— Com. *v.* Seybert, 4 Pa. Co. Ct. 152.

Tennessee.— Collins *v.* State, 3 Heisk. 14.

Vermont.— State *v.* Learnard, 41 Vt. 585.

England.— Reg. *v.* Mazeau, 9 C. & P. 676, 38 E. C. L. 393; Reg. *v.* Clifford, 2 C. & K. 202, 61 E. C. L. 202; Rex *v.* Giles, 1 Moody C. C. 166; Reg. *v.* Michael, 9 C. & P. 356, 2 Moody C. C. 120, 38 E. C. L. 213; Reg. *v.* Manley, 1 Cox C. C. 104; Reg. *v.* Taylor, 4 F. & F. 511; Reg. *v.* Bannen, 2 Moody C. C. 309.

See 14 Cent. Dig. tit. "Criminal Law," § 75.

Knowledge of active participant.— Whether the person employed had a knowledge of the felonious intent of his employer is a question for the jury on all the facts (People *v.* McMurray, 4 Park. Crim. (N. Y.) 234); and if they find him guilty of knowledge, he is the principal and his employer an accessary (Wixson *v.* People, 5 Park. Crim. (N. Y.) 119; Thompson *v.* State, 105 Tenn. 177, 58 S. W. 213, 80 Am. St. Rep. 875, 51 L. R. A. 883). See *infra*, V, D.

44. *Alabama.*— Jolly *v.* State, 94 Ala. 19, 10 So. 606; Amos *v.* State, 83 Ala. 1, 3 So. 749, 3 Am. St. Rep. 682.

Arkansas.— Smith *v.* State, 37 Ark. 274.

California.— People *v.* Jamarillo, 57 Cal. 111.

Delaware.— State *v.* O'Neal, Houst. Crim. Cas. 58. And see State *v.* Palmer, (1902) 53 Atl. 359.

Indiana.— Williams *v.* State, 47 Ind. 568.

Iowa.— State *v.* Wolf, 112 Iowa 458, 84 N. W. 536; State *v.* Brown, 25 Iowa 561.

Kentucky.— Able *v.* Com., 5 Bush 698.

Massachusetts.— Com. *v.* Lucas, 2 Allen 170; Com. *v.* Knapp, 9 Pick. 496, 20 Am. Dec. 491.

Nebraska.— Walrath *v.* State, 8 Nebr. 80.

New Hampshire.— State *v.* McGregor, 41 N. H. 407.

New Jersey.— State *v.* Hess, 65 N. J. L. 544, 47 Atl. 806.

New York.— Norton *v.* People, 8 Cow. 137; Wixson *v.* People, 5 Park. Crim. 129.

Texas.— Leslie *v.* State, 42 Tex. Crim. 65, 57 S. W. 659; Wright *v.* State, 40 Tex. Crim. 45, 48 S. W. 191; Tittle *v.* State, 35 Tex. Crim. 96, 31 S. W. 677.

Vermont.— State *v.* Taylor, 70 Vt. 1, 39 Atl. 447, 67 Am. St. Rep. 648, 42 L. R. A. 673; State *v.* Valwell, 66 Vt. 558, 29 Atl. 1018.

Virginia.— Mitchell *v.* Com., 33 Gratt. 845.

Washington.— State *v.* Boysen, 30 Wash. 338, 70 Pac. 740.

England.— Reg. *v.* Tuckwell, C. & M. 215, 41 E. C. L. 121; Rex *v.* Stewart, R. & R. 270; Rex *v.* Soares, R. & R. 18.

See 14 Cent. Dig. tit. "Criminal Law," § 76.

Assault and battery.— Where defendant was one of a party who beat a policeman and was present aiding and abetting, he was held guilty of assault and battery, although he did not actually strike the officer. State *v.* Hess, 65 N. J. L. 544, 47 Atl. 806.

Actual presence is dispensed with, where a statute abolishes the distinction between principals in the various degrees, and holds everyone criminally liable as a principal who participates in any manner in the crime. People *v.* Winant, 24 Misc. (N. Y.) 361, 53 N. Y. Suppl. 695.

Crimes which can be committed by but one. — Two or more persons may be charged with a crime which, from its nature, can be actually committed by but one, as in the case of rape. The others may be principals by aiding and abetting. State *v.* Comstock, 46 Iowa 265. See *infra*, V, C, 4.

one, acting with another in the pursuance of a criminal design, is so situated when the crime is committed as to be able to assist in its commission.[45]

2. Aiding and Abetting or Other Participation in Crime — a. In General. All persons who are actually or constructively present at the time and place of a crime, and who either actually aid, abet, assist, or advise its commission, or are there with that purpose in mind, to the knowledge of the party actually committing the crime, are guilty as principals in the second degree, although they did not themselves accomplish the purpose.[46] Some aiding or abetting is essen-

45. *Georgia.*— Collins *v.* State, 88 Ga. 347, 14 S. E. 474; Pinkard *v.* State, 30 Ga. 757.

Indiana.— Reed *v.* State, 147 Ind. 41, 46 N. E. 135; Doan *v.* State, 26 Ind. 495; Tate *v.* State, 6 Blackf. 110.

Louisiana.— State *v.* Poynier, 36 La. Ann. 572; State *v.* Douglass, 34 La. Ann. 523.

Massachusetts.— Com. *v.* Knapp, 9 Pick. 496, 20 Am. Dec. 491, holding that to be present, aiding and abetting the commission of a felony, the abetter must be in a situation where he may actually aid the perpetrator, and that it is not enough that he is at a place appointed, where the perpetrator erroneously supposes he might render aid. And see Com. *v.* Lucas, 2 Allen 170.

Mississippi.— Hogsett *v.* State, 40 Miss. 522; McCarty *v.* State, 26 Miss. 299, holding actual assistance unnecessary.

Missouri.— Green *v.* State, 13 Mo. 382. And see State *v.* Walker, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133.

Nevada.— State *v.* Hamilton, 13 Nev. 386; State *v.* Squaires, 2 Nev. 226.

New York.— McCarney *v.* People, 83 N. Y. 408, 38 Am. Rep. 456; People *v.* Batterson, 50 Hun 44, 2 N. Y. Suppl. 376.

North Carolina.— State *v.* Chastain, 104 N. C. 900, 10 S. E. 519.

Ohio.— Warden *v.* State, 24 Ohio St. 143; Breese *v.* State, 12 Ohio St. 146, 80 Am. Dec. 340.

Oklahoma.— Pearce *v.* Territory, 11 Okla. 438, 68 Pac. 504.

Texas.— Earp *v.* State, (App. 1890) 13 S. W. 888; Berry *v.* State, 4 Tex. App. 492.

Virginia.— Mitchell *v.* Com., 33 Gratt. 845; Dull *v.* Com., 25 Gratt. 965.

United States.—U. S. *v.* Boyd, 45 Fed. 851; U. S. *v.* Harries, 26 Fed. Cas. No. 15,309, 2 Bond 311.

England.— Reg. *v.* Whittaker, 2 C. & K. 636, 3 Cox C. C. 50, 1 Den. C. C. 310, 17 L. J. M. C. 127, 61 E. C. L. 636; Reg. *v.* Kelly, 2 C. & K. 379, 61 E. C. L. 379; Reg. *v.* Howell, 9 C. & P. 437, 38 E. C. L. 259; Rex *v.* Bingley, R. & R. 332; Rex *v.* Standley, R. & R. 226.

See 14 Cent. Dig. tit. "Criminal Law," §§ 76, 77.

Intentional absence.— If one, knowing a crime has been determined on, keeps away to facilitate it, he is a principal, although not near enough to aid. State *v.* Poynier, 36 La. Ann. 572.

One who gives a signal that an express train is approaching is constructively present at an assault with intent to rob an express company, although as a matter of fact the signal is given in another county. State *v.* Hamilton, 13 Nev. 386.

46. *Alabama.*— Jolly *v.* State, 94 Ala. 19, 10 So. 606; Amos *v.* State, 83 Ala. 1, 3 So. 749, 3 Am. St. Rep. 682. See also Alston *v.* State, 109 Ala. 51, 20 So. 81; Pierson *v.* State, 99 Ala. 148, 13 So. 550.

Connecticut.— State *v.* Wilson, 30 Conn. 500.

Georgia.— Wilkerson *v.* State, 73 Ga. 799; Lawrence *v.* State, 68 Ga. 289; Hawkins *v.* State, 13 Ga. 322, 58 Am. Dec. 517. See also Hammack *v.* State, 52 Ga. 397.

Illinois.— Brennan *v.* People, 15 Ill. 511.

Indiana.— Hank *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; Anderson *v.* State, 147 Ind. 445, 46 N. E. 901; Williams *v.* State, 47 Ind. 568.

Iowa.— State *v.* Dunn, 116 Iowa 219, 89 N. W. 984; State *v.* Wolf, 112 Iowa 458, 84 N. W. 536; State *v.* McClintock, 8 Iowa 203.

Kansas.— State *v.* Shenkle, 36 Kan. 43, 12 Pac. 309.

Kentucky.— Com. *v.* Carter, 94 Ky. 527, 23 S. W. 344, 15 Ky. L. Rep. 253; Tudor *v.* Com., 43 S. W. 187, 19 Ky. L. Rep. 1039.

Louisiana.— State *v.* Littell, 45 La. Ann. 655, 12 So. 750; State *v.* Ellis, 12 La. Ann. 390.

Massachusetts.— Com. *v.* Stevens, 10 Mass. 181.

Michigan.— People *v.* Repke, 103 Mich. 459, 61 N. W. 861.

Mississippi.— McCarty *v.* State, 26 Miss. 299.

Missouri.— State *v.* Crab, 121 Mo. 554, 26 S. W. 548; State *v.* Brown, 104 Mo. 365, 16 S. W. 406; State *v.* Miller, 100 Mo. 606, 13 S. W. 832, 1051; State *v.* Nelson, 98 Mo. 414, 11 S. W. 997; State *v.* Walker, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; State *v.* Staehlin, 16 Mo. App. 559. See also Green *v.* State, 13 Mo. 382.

Nebraska.— Hill *v.* State, 42 Nebr. 503, 60 N. W. 916.

Nevada.— State *v.* Squaires, 2 Nev. 226.

New Hampshire.— State *v.* McGregor, 41 N. H. 407.

North Carolina.— State *v.* Pearson, 119 N. C. 871, 26 S. E. 117; State *v.* Gaston, 73 N. C. 93, 21 Am. Rep. 459; State *v.* Morris, 10 N. C. 388. See also State *v.* Rawles, 65 N. C. 334.

Pennsylvania.— Com. *v.* Miller, 8 Kulp 85; Com. *v.* Hughes, 11 Phila. 430.

South Carolina.— State *v.* Fley, 2 Brev. 338, 4 Am. Dec. 583.

Tennessee.— McGowan *v.* State, 9 Yerg. 184.

tial,[47] but mere encouragement is enough.[48] Any action or gesture, or utterance of advice, or incitement by one present, in aid or encouragement of the commission of a crime, will make him a principal in the second degree.[49] One may be guilty of aiding and abetting if he is acting in general concert and carrying out a criminal transaction, although he did not actually participate in the particular criminal act;[50] but where two or more are by agreement acting for a criminal purpose, no one of them is responsible for a criminal act of another which is the outcome of the latter's sole volition and unconnected with their criminal scheme.[51]

b. Keeping Watch. Where several join to commit a crime, and one keeps watch while the others commit the crime, the one who watches is responsible as a principal in the second degree.[52]

c. Presence Without Assisting or Abetting. But the mere presence of a person at the time and place of a crime does not make him a principal in the second degree, where he does not aid or abet, although he makes no effort to prevent the

Texas.— Grimsinger *v.* State, (Crim. App. 1901) 69 S. W. 583; Bean *v.* State, 17 Tex. App. 60.

Washington.— State *v.* Klein, 19 Wash. 368, 53 Pac. 364.

United States.—U. S. *v.* Boyd, 45 Fed. 851; U. S. *v.* Hughes, 34 Fed. 732; U. S. *v.* Snyder, 14 Fed. 554, 4 McCrary 618; U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78. See also U. S. *v.* Jones, 26 Fed. Cas. No. 15,494, 3 Wash. 209.

England.— Rex *v.* Kelly, R. & R. 313. And see Reg. *v.* Swindall, 2 C. & K. 230, 2 Cox C. C. 141, 61 E. C. L. 230; Reg. *v.* Thompson, 11 Cox C. C. 362, 21 L. T. Rep. N. S. 397; Reg. *v.* Jackson, 7 Cox C. C. 357; Reg. *v.* Harrington, 5 Cox C. C. 231; Reg. *v.* Harvey, 1 Cox C. C. 21.

Canada.— Queen *v.* Campbell, 8 Quebec Q. B. 322, 2 Can. Crim. Cas. 357.

See 14 Cent. Dig. tit. "Criminal Law," § 81.

Assault and battery.— On a trial for assault and battery, where it appeared that the owner of a horse and gig, in company with defendant, whom he invited to ride with him, drove with great speed, and knocked down a person in the street, it was held that if defendant assented to the immoderate driving he was equally guilty with the driver. *In re* Jaques, 5 City Hall Rec. (N. Y.) 77.

47. Lawrence *v.* State, 68 Ga. 289; Woolweaver *v.* State, 50 Ohio St. 277, 34 N. E. 352, 40 Am. St. Rep. 667; Kemp *v.* Com., 80 Va. 443. And see the cases cited *infra*, V, C, 2, c.

48. People *v.* Woodward, 45 Cal. 293, 13 Am. Rep. 176; Kessler *v.* Com., 12 Bush (Ky.) 18; Mitchell *v.* Com., (Ky. 1890) 14 S. W. 489, 12 Ky. L. Rep. 458; People *v.* Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857; State *v.* Jones, 83 N. C. 605, 35 Am. Rep. 586.

49. *Georgia.*— Cooper *v.* State, 69 Ga. 761.

Illinois.— Brennan *v.* People, 15 Ill. 511.

Ohio.— Woolweaver *v.* State, 50 Ohio St. 277, 34 N. E. 352, 40 Am. St. Rep. 667.

Oregon.— State *v.* Carr, 28 Oreg. 389, 42 Pac. 215.

Virginia.— Dull *v.* Com., 25 Gratt. 965.

See 14 Cent. Dig. tit. "Criminal Law," § 83.

Burglary.— Where one was let into a store on pretense of making a purchase, and admitted another, who secreted himself and afterward did the stealing, both are guilty, as principals, of breaking and entering. Com. *v.* Lowrey, 158 Mass. 18, 32 N. E. 940.

"Aid," "abet," and "procure."—In a statute providing that one who aids, abets, or procures another to commit a crime may be prosecuted the same as the principal, the word "aid" means to help, assist, or strengthen; the word "abet" to encourage, counsel, induce, or assist, and the word "procure" means to persuade, induce, prevail upon, or cause. State *v.* Snell, 5 Ohio S. & C. Pl. Dec. 670.

50. Wilkerson *v.* State, 73 Ga. 799; State *v.* Maloy, 44 Iowa 104; Reg. *v.* Kelly, 2 Cox C. C. 171; Rex *v.* Green, 6 C. & P. 655, 25 E. C. L. 623; and other cases cited *infra*, V, C, 3, a.

51. Alston *v.* State, 109 Ala. 51, 20 So. 81; Frank *v.* State, 27 Ala. 37; Mercersmith *v.* State, 8 Tex. App. 211; Kemp *v.* Com., 80 Va. 443; and other cases cited *supra*, V, C, 3, a.

52. *Arkansas.*— Thomas *v.* State, 43 Ark. 149.

Indiana.— Doan *v.* State, 26 Ind. 495.

Iowa.— State *v.* Nash, 7 Iowa 347.

Michigan.—People *v.* Repke, 103 Mich. 459, 61 N. W. 861.

Ohio.— Stephens *v.* State, 42 Ohio St. 150; Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767; State *v.* Town, Wright 75.

Texas.— Selvidge *v.* State, 30 Tex. 60; Winfield *v.* State, (Crim. App. 1903) 72 S. W. 182; Earp *v.* State (App. 1890) 13 S. W. 888.

England.— Rex *v.* Passey, 7 C. & P. 282, 32 E. C. L. 614.

Burglary.— One who watches outside while another breaks and enters a house and steals is a principal in the second degree. People *v.* Boujet, 2 Park. Crim. (N. Y.) 11.

Abortion.— One who guards against intruders while another performs an operation producing an abortion is a principal. Dixon *v.* State, 46 Nebr. 298, 64 N. W. 961.

crime,[53] and even though he may mentally approve of it,[54] and be benefited by it,[55] unless he is under a legal duty to prevent it.[56]

3. Community of Unlawful Purpose — a. In General. To render one responsible for a crime as principal in the second degree there must be a community of unlawful purpose at the time the act is committed, and even when there is a common unlawful purpose, acts done by one, but not in pursuance of the arrangement, will not render the other liable.[57] But the common purpose need not be to

53. *Arkansas.*— Smith *v.* State, 37 Ark. 274.

California.— People *v.* Woodward, 45 Cal. 293, 13 Am. Rep. 176; People *v.* Ah Ping, 27 Cal. 489.

District of Columbia.— U. S. *v.* Neverson, 1 Mackey 152.

Georgia.— Lawrence *v.* State, 68 Ga. 289.

Illinois.— Jones *v.* People, 166 Ill. 264, 46 N. E. 723; White *v.* People, 81 Ill. 333.

Indiana.— Clem *v.* State, 33 Ind. 418.

Iowa.— State *v.* Wolf, 112 Iowa 458, 84 N. W. 536; State *v.* Maloy, 44 Iowa 104; State *v.* Farr, 33 Iowa 553.

Kentucky.— Plummer *v.* Com., 1 Bush 76; Butler *v.* Com., 2 Duv. 435.

Missouri.— State *v.* Cox, 65 Mo. 29.

Nebraska.— Walrath *v.* State, 8 Nebr. 80.

North Carolina.— State *v.* Hildreth, 31 N. C. 440, 51 Am. Dec. 369.

Ohio.— Goins *v.* State, 46 Ohio St. 457, 21 N. E. 476.

Texas.— Burrell *v.* State, 18 Tex. 713; Johnson *v.* State, (Crim. App. 1902) 70 S. W. 83; Bell *v.* State, 39 Tex. Crim. 677, 47 S. W. 1010; Jackson *v.* State, 20 Tex. App. 190; Golden *v.* State, 18 Tex. App. 637.

Virginia.— Kemp *v.* Com., 80 Va. 443.

Wisconsin.— Connaughty *v.* State, 1 Wis. 159, 60 Am. Dec. 370. And see Hilmes *v.* Stroebel, 59 Wis. 74, 17 N. W. 539.

United States.— U. S. *v.* Jones, 26 Fed. Cas. No. 15,494, 3 Wash. 209.

England.— Reg. *v.* Young, 8 C. & P. 644, 34 E. C. L. 939; Foster Crown L. 350, where the common-law rule was stated to be that "if A. happeneth to be present at a murder for instance, and taketh no part in it, nor endeavoreth to prevent it, nor apprehendeth the murderer, nor levyeth hue and cry after him; this strange behavior of his, though highly criminal, will not of itself render him either principal or accessary."

See 14 Cent. Dig. tit. "Criminal Law," § 86.

Failure to interfere in the perpetration of a felony, while criminal, and to be considered by the jury in determining whether the accused is an accessary, is not to be considered by them in determining whether he is a principal. State *v.* Hildreth, 31 N. C. 440, 51 Am. Dec. 369.

Presence at prize-fight.—The mere presence of persons as spectators at a prize-fight, although not doing or saying anything to encourage the fight, does not render them guilty as principals. Reg. *v.* Coney, 8 Q. B. D. 534, 15 Cox C. C. 46, 46 J. P. 404, 51 L. J. M. C. 66, 46 L. T. Rep. N. S. 307, 30 Wkly. Rep. 678 [*disapproving* Rex *v.* Murphy, 6 C. & P. 103, 25 E. C. L. 343; Rex *v.* Billingham, 2 C. & P. 234, 12 E. C. L. 545].

Assistance not rendered.— One may be guilty as principal in the second degree by aiding and abetting the offense, where he was present with the intention of giving assistance, although his assistance was not called for (Wynn *v.* State, 63 Miss. 260; State *v.* Morris, 10 N. C. 388), or if called for because his fears prevented him from rendering it (Brennan *v.* People, 15 Ill. 511; McCarty *v.* State, 26 Miss. 299).

54. White *v.* People, 81 Ill. 333; Clem *v.* State, 33 Ind. 418; True *v.* Com., 90 Ky. 651, 14 S. W. 684, 12 Ky. L. Rep. 594; State *v.* Cox, 65 Mo. 29.

55. The fact that a person who is present at the commission of a crime is benefited by it does not make him guilty as a principal in the second degree, although it may raise the presumption of participation. Com. *v.* Stevens, 10 Mass. 181.

56. A servant who stands passive and, knowing that his employer is being robbed, permits it, is guilty as principal. *In re* Sherman, 6 City Hall Rec. (N. Y.) 2.

57. *Alabama.*— McLeroy *v.* State, 120 Ala. 274, 25 So. 247; Gibson *v.* State, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96; Jordan *v.* State, 81 Ala. 20, 1 So. 577; Frank *v.* State, 27 Ala. 37.

California.— People *v.* Keefer, 65 Cal. 232, 3 Pac. 818; People *v.* Leith, 52 Cal. 251.

Florida.— Savage *v.* State, 18 Fla. 909.

Georgia.— Ferguson *v.* State, 32 Ga. 658.

Illinois.— White *v.* People, 139 Ill. 143, 28 N. E. 1083, 32 Am. St. Rep. 196; Lamb *v.* People, 96 Ill. 73.

Iowa.— State *v.* Maloy, 44 Iowa 104; State *v.* Shelledy, 8 Iowa 477.

Kentucky.— Ward *v.* Com., 14 Bush 233.

Michigan.— People *v.* Foley, 59 Mich. 553, 26 N. W. 699 (holding that where persons join to commit an assault only, one is not liable for a robbery committed by the other); People *v.* Knapp, 26 Mich. 112.

Mississippi.— Hairston *v.* State, 54 Miss. 689, 28 Am. Rep. 392.

Missouri.— State *v.* Hickam, 95 Mo. 322, 8 S. W. 252, 6 Am. St. Rep. 54.

Ohio.— Woolweaver *v.* State, 50 Ohio St. 277, 34 N. E. 352, 40 Am. St. Rep. 667.

Oregon.— State *v.* Johnson, 7 Oreg. 210.

Texas.— Burrell *v.* State, 18 Tex. 713; Miller *v.* State, 15 Tex. App. 125; Rountree *v.* State, 10 Tex. App. 110; Mercersmith *v.* State, 8 Tex. App. 211.

Virginia.— Kemp *v.* Com., 80 Va. 443.

England.— Duffey's Case, Lew. C. C. 194; Rex *v.* White, R. & R. 73.

commit the particular crime which is committed. If two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose, or as a natural or probable consequence thereof.[58] In order to show a community of unlawful purpose it is not necessary to show an express agreement or understanding between the parties.[59]

b. Time of Common Intention. The common intention need not be formed before convening at the place of the crime,[60] but it must exist at the time the crime is committed, and not merely before or after.[61]

c. Acting as Detective. One who is present at the commission of a crime simply as a spy or detective, since he has no criminal intent, is not guilty as a principal in the second degree.[62]

d. Abetting Act Not Criminal. Where an act is not a crime, as because of absence of a criminal intent in the person doing it, one does not become guilty as principal in the second degree by being present, aiding, and abetting it, although he then supposes it is a crime.[63]

4. Persons Incapable of Committing the Crime in Person. One may be guilty as principal in the second degree, or as an accessary before the fact, by aiding in, or procuring or instigating a crime, although he or she is incompetent to commit the crime in person.[64] And where by statute the distinction between accessaries

See 14 Cent. Dig. tit. "Criminal Law," § 78.

Intention not communicated to the principal in the first degree will not render one liable as principal in the second degree. White *v.* People, 139 Ill. 143, 28 N. E. 1083, 32 Am. St. Rep. 196. But see Com. *v.* Kern, 1 Brewst. (Pa.) 350.

Where a specific intent is necessary to constitute the crime with which one is charged as principal in the second degree, as in assault with intent to murder, it must be shown that the accused knew that the principal in the first degree had such an intent. Reg. *v.* Cruse, 8 C. & P. 541, 2 Moody C. C. 53, 34 E. C. L. 881. See also Savage *v.* State, 18 Fla. 909.

58. *Alabama.*— Jolly *v.* State, 94 Ala. 19, 10 So. 606; Martin *v.* State, 89 Ala. 115, 8 So. 23, 18 Am. St. Rep. 91; Amos *v.* State, 83 Ala. 1, 3 So. 749, 3 Am. St. Rep. 682; Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133; Frank *v.* State, 27 Ala. 37.

Connecticut.— State *v.* Allen, 47 Conn. 121.

Georgia.— Wilkerson *v.* State, 73 Ga. 799.

Illinois.— Hamilton *v.* People, 113 Ill. 34, 55 Am. Rep. 396; Brennan *v.* People, 15 Ill. 511.

Iowa.— State *v.* Maloy, 44 Iowa 104.

Minnesota.— State *v.* Barrett, 40 Minn. 77, 41 N. W. 463.

Mississippi.— Peden *v.* State, 61 Miss. 267, holding that if several start out to beat a man, and one of them kills him, they are all principals in the murder.

New York.— Ruloff *v.* People, 45 N. Y. 213.

North Carolina.— State *v.* Davis, 87 N. C. 514; State *v.* Morris, 10 N. C. 388.

Texas.— Miller *v.* State, 15 Tex. App. 125; Mercersmith *v.* State, 8 Tex. App. 211.

Virginia.— Mitchell *v.* Com., 33 Gratt. 845.

Wisconsin.— Miller *v.* State, 25 Wis. 384.

England.— Reg. *v.* Jackson, 7 Cox C. C. 357; Ashton's Case, 12 Mod. 256; 1 Hale P. C. 441.

See Conspiracy, 8 Cyc. 641.

Manner of committing homicide.— A person is guilty as principal who aids and abets a homicide, although the act is done in a way that he did not suggest. Griffith *v.* State, 90 Ala. 583, 8 So. 812.

59. Gibson *v.* State, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96; Howard *v.* Com., 96 Ky. 19, 27 S. W. 854.

60. Amos *v.* State, 83 Ala. 1, 3 So. 749, 3 Am. St. Rep. 682.

61. Rex *v.* Bingley, R. & R. 332. And see People *v.* Keefer, 65 Cal. 232, 3 Pac. 818.

62. Price *v.* People, 109 Ill. 109; People *v.* Noelke, 29 Hun (N. Y.) 461; Whitworth *v.* State, (Tex. Crim. App. 1902) 67 S. W. 1019; Rex *v.* Dannelly, 2 Marsh. 571, R. & R. 310. See *infra*, XII, G, 1.

63. *Alabama.*— Allen *v.* State, 40 Ala. 334, 91 Am. Dec. 476.

California.— People *v.* Collins, 53 Cal. 185.

Georgia.— Green *v.* State, 114 Ga. 918, 41 S. E. 55.

Illinois.— Love *v.* People, 160 Ill. 501, 43 N. E. 710, 32 L. R. A. 139.

Kansas.— State *v.* Douglass, 44 Kan. 618, 26 Pac. 476; State *v.* Jansen, 22 Kan. 498.

Texas.— Speiden *v.* State, 3 Tex. App. 156, 30 Am. Rep. 126.

Obstruction of railroad track.— Where for the purpose of convicting the accused a detective employed by a railroad obstructs its track, not intending to cause damage to its trains, another person is not guilty, although he is present, advising and encouraging, and believing that the act is done with a criminal intent. State *v.* Douglass, 44 Kan. 618, 26 Pac. 476.

64. *Georgia.*— Boggus *v.* State, 34 Ga. 275, holding that an unmarried man may be liable as a principal in the second degree by aid-

and principals is abolished, one procuring or assisting in the commission of a crime which he is incapable of committing in person is a principal in the first degree.[65]

D. Accessaries Before the Fact — 1. In General. An accessary before the fact is one who was absent at the time when a felony was committed, but who counseled, procured, or commanded another to commit it,[66] and he is equally guilty with the principal.[67] Absence at the time the felony is committed is essen-

ing and abetting a married man to commit bigamy, although he, being unmarried, could not be guilty of that crime as principal in the first degree.

Iowa.— State *v.* Rowe, 104 Iowa 323, 73 N. W. 833 (holding that one who is not a public officer may be guilty of aiding and abetting a public officer in committing embezzlement); State *v.* Comstock, 46 Iowa 265.

New York.— People *v.* McKane, 143 N. Y. 455, 38 N. E. 950, holding that a person who is not a member of a board of registry, but who induces or procures the members of such board to wilfully violate a provision of the election law in relation to the registration of voters, is indictable under the statute punishing members of the registry board for such violation, and a statute declaring that one who directly or indirectly counsels, commands, induces, or procures another to commit a crime is a principal.

North Carolina.— State *v.* Jones, 83 N. C. 605, 35 Am. Rep. 586.

Rhode Island.— State *v.* Sprague, 4 R. I. 257, holding that a person other than the mother of a bastard child, although he or she could not be guilty under the statute of concealing the birth of such child, might be convicted of aiding, abetting, counseling, or procuring the commission of the offense by the mother.

United States.— U. S. *v.* Snyder, 8 Fed. 805, 3 McCrary 377, 14 Fed. 554, 4 McCrary 618 (holding indictable one who aided and abetted a postmaster in making a false return, in violation of the act of congress of June 30, 1879); U. S. *v.* Bayer, 24 Fed. Cas. No. 14,547, 4 Dill. 407 (holding, it seems, that one who procures and abets a bankrupt in committing the offenses punished by the Bankrupt Act might be indicted and punished).

England.— Rex *v.* Potts, R. & R. 262 (holding that a woman might be convicted as aider and abetter under a statute punishing the personating of a seaman); 1 Hale P. C. 629; 1 Hawkins P. C. c. 41, § 10; 1 Archbold Crim. Prac. § 998.

See 14 Cent. Dig. tit. "Criminal Law," § 82.

Rape.— A woman or a boy under fourteen years of age may be a principal in the second degree or accessary before the fact to a rape. State *v.* Jones, 83 N. C. 605, 35 Am. Rep. 586; Law *v.* Com., 75 Va. 885, 40 Am. Rep. 750. And although a husband cannot rape his wife, he may be guilty as a prineipal in the second degree or accessary before the fact. State *v.* Comstock, 46 Iowa 265; People *v.* Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857; Strang *v.* People, 24 Mich. 1, 13; State *v.* Dowell, 106 N. C. 722, 11 S. E. 525, 19 Am. St. Rep. 568, 8 L. R. A. 297. See Rape.

Suicide.—One who counsels another to commit suicide and is present at the time when the self-murder is committed is guilty as a principal in the second degree. Reg. *v.* Alison, 8 C. & P. 418, 34 E. C. L. 813; Rex *v.* Dyson, R. & R. 389. See Suicide.

65. People *v.* McKane, 143 N. Y. 455, 464, 38 N. E. 950, where the court said: "The fact that he may, for some reason, be incapable of committing the same offense himself is not material so long as it can be traced to him as the moving cause, by instigating others to do what he could not do himself. This was the rule of the common law and it has been applied to offenses like this under special statutes."

66. *Alabama.*— Griffith *v.* State, 90 Ala. 583, 8 So. 812.

Georgia.— Howard *v.* State, 109 Ga. 137, 34 S. E. 330; Hately *v.* State, 15 Ga. 346.

Indiana.— Sage *v.* State, 127 Ind. 15, 26 N. E. 667.

Kentucky.— Able *v.* Com., 5 Bush 698.

Mississippi.— Unger *v.* State, 42 Miss. 642.

Nebraska.— Casey *v.* State, 49 Nebr. 403, 68 N. W. 643.

New York.— People *v.* Lyon, 99 N. Y. 210, 1 N. E. 673; People *v.* Hall, 57 How. Pr. 342; Norton *v.* People, 8 Cow. 137.

Oklahoma.— Pearce *v.* Territory, 11 Okla. 438, 68 Pac. 504.

South Carolina.— State *v.* Sims, 2 Bailey 29.

West Virginia.—State *v.* Roberts, 50 W. Va. 422, 40 S. E. 484.

United States.— U. S. *v.* White, 28 Fed. Cas. No. 16,675, 5 Cranch C. C. 38. And see Pearce *v.* Oklahoma, 118 Fed. 425, 55 C. C. A. 550.

England.— Reg. *v.* Taylor, L. R. 2 C. C. 147, 13 Cox C. C. 68, 44 L. J. M. C. 67, 32 L. T. Rep. N. S. 409, 23 Wkly. Rep. 616; Reg. *v.* Manning, 2 C. & K. 887, 4 Cox C. C. 31, 1 Den. C. C. 467, 13 Jur. 962, 19 L. J. M. C. 1, T. & M. 155, 61 E. C. L. 887; Reg. *v.* Brown, 14 Cox C. C. 144; Rex *v.* Russell, 1 Moody C. C. 356; 4 Bl. Comm. 37; 1 Hale P. C. 616.

See 14 Cent. Dig. tit. "Criminal Law," § 87 *et seq.*

No accessaries in treason or misdemeanors see *supra*, V, A.

Accessaries before the fact in statutory felonies see *supra*, V, A.

67. Minich *v.* People, 8 Colo. 440, 9 Pac. 4; State *v.* McCahill, 72 Iowa 111, 30 N. W.

tial, otherwise the party is a principal in the second degree.[68] It is also necessary that the felony shall be in fact committed,[69] and by a guilty, not an innocent, agent.[70]

2. THE PROCURING, COUNSELING, OR COMMANDING. To render one guilty as an accessary before the fact, he must have participated in or instigated the crime.[71] Bare concealment of the fact that a felony is about to be committed, or failure to endeavor to prevent it, is not enough.[72] It is not necessary, however, to show that the criminal act was specifically commanded or advised;[73] and it is only necessary, to implicate one as accessary before the fact, that his instructions shall have been substantially followed.[74] The communication between the accessary and the principal may be through a third person, and the accessary need not know who the principal is to be.[75]

3. COMMUNITY OF UNLAWFUL PURPOSE. To render one guilty as an accessary before the fact, he must have had the requisite criminal intent,[76] but he need not necessarily have intended the particular crime committed by the principal. An accessary is liable for any criminal act which, in the ordinary course of things, was the natural or probable consequence of the crime he advised or commanded, although such consequence may not have been intended by him.[77] But for crimes which are the outcome of a total or substantial departure from his directions or instructions he is not liable.[78]

553, 33 N. W. 599; People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

Distinction abolished.— The distinction between principals and accessaries before the fact is abolished in some states. Bonsell *v.* U. S., 1 Greene (Iowa) 111; Smith *v.* State, 21 Tex. App. 107, 17 S. W. 552. See *supra*, V, A.

68. Williams *v.* State, 47 Ind. 568; Norton *v.* People, 8 Cow. (N. Y.) 137; Reg. *v.* Brown, 14 Cox C. C. 144. See *supra*, V, C, 1.

69. Reg. *v.* Gregory, L. R. 1 C. C. 77, 10 Cox C. C. 459, 36 L. J. M. C. 60, 16 L. T. Rep. N. S. 388, 15 Wkly. Rep. 774. And see Ogden *v.* State, 12 Wis. 532, 78 Am. Dec. 754.

70. If the agent is innocent the adviser or instigator is a principal in the first degree, and not an accessary. See *supra*, V, B, 2.

71. People *v.* McGuire, 135 N. Y. 639, 32 N. E. 146 (holding that mere previous approval was not enough); 1 Hale P. C. 616 (where it is said: "And therefore words, that sound in bare permission, make not an accessary, as if A. say he will kill J. S. and B. say you may do your pleasure for me, this makes not B. accessary").

72. Edmonson *v.* State, 51 Ark. 115, 10 S. W. 21; State *v.* Roberts, 15 Oreg. 187, 13 Pac. 896; Alford *v.* State, 31 Tex. Crim. 299, 20 S. W. 553; Elizando *v.* State, 31 Tex. Crim. 237, 20 S. W. 560; Smith *v.* State, 23 Tex. App. 357, 5 S. W. 219, 59 Am. Rep. 773; Rucker *v.* State, 7 Tex. App. 549.

73. Sage *v.* State, 127 Ind. 15, 26 N. E. 667; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,250, 2 Curt. 637.

74. State *v.* Tazwell, 30 La. Ann. 884; U. S. *v.* Sykes, 58 Fed. 1000.

75. Rex *v.* Cooper, 5 C. & P. 535, 24 E. C. L. 694; Rex *v.* Kirkwood, 1 Moody C. C. 304.

76. One who joins a conspiracy for the purpose of robbery, in order to expose it, and honestly carries out the plan, is not an accessary before the fact, although he encourages the others to the commission of the crime, with the intent that they shall be punished. Com. *v.* Hollister, 157 Pa. St. 13, 27 Atl. 386, 25 L. R. A. 349; Backenstoe *v.* State, 19 Ohio Cir. Ct. 568, 10 Ohio Cir. Dec. 688. See also *supra*, V, C, 3, c.

If a specific intent is an essential ingredient of the crime, the accessary must have entertained such intent or known that the principal entertained it. State *v.* Hickam, 95 Mo. 322, 8 S. W. 252, 6 Am. St. Rep. 54.

77. Griffith *v.* State, 90 Ala. 583, 8 So. 812; State *v.* Davis, 87 N. C. 514 (holding that if a person procures another to commit a robbery, and the other kills the victim to conceal the robbery, the former is guilty as an accessary before the fact of the murder); 1 Hale P. C. 617. And see *supra*, V, C, 3, a.

78. *California.*— People *v.* Keefer, 65 Cal. 232, 3 Pac. 818.

Florida.— Easterlin *v.* State, 43 Fla. 565, 31 So. 350.

Iowa.—State *v.* Lucas, 55 Iowa 321, 7 N. W. 583.

Missouri.— State *v.* May, 142 Mo. 135, 43 S. W. 637.

West Virginia.— Watts *v.* State, 5 W. Va. 532.

England.—Reg. *v.* Henry, 9 C. & P. 309, 38 E. C. L. 187; Reg. *v.* Saunders, Plowd. 473; 1 Hale P. C. 617, 618. And see Foster Crown L. 372, where the test was said to be: "Did the principal commit the felony he standeth charged with under the influence of the flagitious advice; and was the event, in the ordinary course of things, a probable consequence of that felony? or did he, following the suggestion of his own wicked heart, willfully and knowingly commit a felony of another kind."

See 14 Cent. Dig. tit. "Criminal Law," § 88.

4. Repentance and Withdrawal. If one who has counseled or commanded the commission of a crime, or agreed to take part in it, repents and withdraws, to the knowledge of the other party, before the crime is committed, he will not be liable as an accessary;[79] but if he does not withdraw until it is too late, or fails to let the other party know of his withdrawal, he will be liable.[80]

5. Persons Incapable of Committing the Crime in Person. A person may be guilty as an accessary before the fact, although he is himself incapable of committing the crime as principal.[81]

E. Accessaries After the Fact — 1. In General. An accessary after the fact is one who, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon.[82] At common law one may be an accessary after the fact to an accessary before the fact.[83] It is essential to one's guilt as accessary after the fact, that the felony shall have been actually committed by the alleged principal,[84] and the aid or assistance must have been given after the felony was fully completed.[85]

2. Knowledge of Offense. To render one liable as an accessary after the fact he must have had actual knowledge at the time he relieved or assisted the principal that the latter had committed a felony.[86]

3. The Assistance or Relief. Any assistance or relief given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, makes the

If one advises another to beat a man and the latter dies as a result of the beating, it is murder, and the adviser is an accessary to the murder; but if the advice is to burn a house and the person advised breaks in and commits larceny therein, but does not burn it, the adviser is not an accessary to the burglary, for that is a distinct and separate offense. 1 Hale P. C. 617; 4 Bl. Comm. 37; Reg. *v.* Henry, 9 C. & P. 309, 38 E. C. L. 187.

Homicide.— One who merely encourages another to tie a person, is not accessary to a murder committed by the latter in doing it. People *v.* Keefer, 65 Cal. 232, 3 Pac. 818. Even if persons conspire to beat another with their fists, one is not answerable for the death of such person caused by the other's acting independently of such agreement and striking him with a club. State *v.* May, 142 Mo. 135, 43 S. W. 637.

79. Pinkard *v.* State, 30 Ga. 757.

80. State *v.* Allen, 47 Conn. 121.

81. See *supra*, V, C, 4.

82. *Illinois.*— Reynolds *v.* People, 83 Ill. 479, 25 Am. Rep. 410; White *v.* People, 81 Ill. 333.

Kentucky.— Travis *v.* Com., 96 Ky. 77, 27 S. W. 863, 16 Ky. L. Rep. 253; Tully *v.* Com., 11 Bush. 154. See Able *v.* Com., 5 Bush 698.

New York.— People *v.* Dunn, 7 N. Y. Crim. 173.

Ohio.— State *v.* Douglass, 3 Ohio Dec. (Reprint) 540.

Rhode Island.— State *v.* Davis, 14 R. I. 281.

Texas.— State *v.* Smith, 24 Tex. 285; Street *v.* State, 39 Tex. Crim. 134, 45 S. W. 577. See Peeler *v.* State, 3 Tex. App. 533.

Virginia.— Wren *v.* Com., 26 Gratt. 952.

England.—Reg. *v.* Butterfield, 1 Cox C. C. 39; Rex *v.* Greenacre, 8 C. & P. 35, 34 E. C. L. 594; Rex *v.* Lee, 6 C. & P. 536, 25 E. C. L. 563; 4 Bl. Comm. 37; 1 Hale P. C. 618; 2 Hawkins P. C. c. 29, § 26 *et seq.*

See 14 Cent. Dig. tit. "Criminal Law," § 92 *et seq.*

Three things are requisite to constitute an accessary after the fact.— (1) A felony must have been committed; (2) the accused must have a knowledge that it was committed; and (3) he must receive, relieve, comfort, or assist him. Wren *v.* Com., 26 Gratt. (Va.) 952.

83. Montague *v.* State, 17 Fla. 662; State *v.* Payne, 1 Swan (Tenn.) 383. If there be an accessary after the fact to an accessary before the fact, the latter is principal to the former, and by statute both may be punished alike. State *v.* Payne, 1 Swan (Tenn.) 383.

84. Poston *v.* State, 12 Tex. App. 408, holding it necessary to show the principal's guilt.

85. Harrel *v.* State, 39 Miss. 702, 80 Am. Dec. 95; 4 Bl. Comm. 38.

86. *Georgia.*— Loyd *v.* State, 42 Ga. 221.

Iowa.— State *v.* Empey, 79 Iowa 460, 44 N. W. 707.

Massachusetts.—Com. *v.* Filburn, 119 Mass. 297.

Mississippi.— Harrel *v.* State, 39 Miss. 702, 80 Am. Dec. 95.

Texas.— Robbins *v.* State, 33 Tex. Crim. 573, 28 S. W. 473.

Virginia.— Wren *v.* Com., 26 Gratt. 952.

Compare, however, Tully *v.* Com., 13 Bush (Ky.) 142, where it is held that if the alleged accessary had good reason to believe that the person aided by him was a felon and fleeing from justice it is enough.

See 14 Cent. Dig. tit. "Criminal Law," § 93.

Presumption of knowledge.— At common law the mere fact that one receives a felon in the county in which he is attainted, which is supposed to be matter of public notoriety, raises no presumption of knowledge that he is a felon. 1 Hale P. C. 323, 622; 4 Bl. Comm. 37; Wren *v.* Com., 26 Gratt. (Va.) 952.

person assisting or relieving an accessary after the fact.[87] This does not apply, however, to mere acts of charity which relieve or comfort a felon, but do not hinder his apprehension and conviction or aid his escape.[88] It is essential that the aid or assistance shall be given to the felon personally.[89] Mere silence as to one's knowledge of a felony, with no intent to aid the felon, does not make one an accessary after the fact.[90]

4. Persons in Family Relation. Unless the rule is changed by statute, a person is not the less guilty as an accessary after the fact because of the existence, between him and the person assisted or relieved, of the relation of parent and child, brother and brother, sister and brother, or master and servant, and even a husband is guilty if he assists or relieves his wife.[91] But a wife does not become accessary in assisting or relieving her husband, since she is presumed to act under his coercion, and since she ought not to be bound to discover him.[92]

F. Prosecution and Punishment — 1. Principals in First and Second Degree. The court may in its discretion put a principal in the second degree on his trial and he may be convicted, before the trial and conviction of the principal in the first degree,[93] and even though the principal in the first degree has escaped or died,[94] or been acquitted, provided the evidence is sufficient to show that the principal in the first degree was guilty.[95] The guilt of a principal in the first

Where a statute makes it a crime to knowingly harbor a criminal there must be knowledge of the commission of the offense and an intent to shield from the law. State *v.* Davis, 14 R. I. 281.

87. *Illinois.*— White *v.* People, 81 Ill. 333.
Iowa.— State *v.* Stanley, 48 Iowa 221.
Kentucky.— Tully *v.* Com., 11 Bush 154.
Massachusetts.—Com. *v.* Filburn, 119 Mass. 297.
Missouri.— State *v.* Reed, 85 Mo. 194.
New York.— People *v.* Dunn, 7 N. Y. Crim. 173, 6 N. Y. Suppl. 805.
Ohio.— Hallett *v.* State, 29 Ohio St. 168.
Texas.— Isaacs *v.* State, 36 Tex. Crim. 505, 38 S. W. 40; Chitister *v.* State, 33 Tex. Crim. 635, 28 S. W. 683; Blakely *v.* State, 24 Tex. App. 616, 7 S. W. 233, 5 Am. St. Rep. 912; Watson *v.* State, 21 Tex. App. 598, 1 S. W. 451, 17 S. W. 550.
Virginia.— Wren *v.* Com., 26 Gratt. 952.
England.— Reg. *v.* Chapple, 9 C. & P. 355, 38 E. C. L. 212; Rex *v.* Lee, 6 C. & P. 536, 25 E. C. L. 563.
See 14 Cent. Dig. tit. "Criminal Law," § 94.
Illustrations.— Taking care of the family of a thief while he is disposing of the stolen goods (State *v.* Stanley, 48 Iowa 221), concealing him in the house, shutting the door against his pursuers, supplying him with money or a horse or other necessaries to enable him to escape, bribing the jailer, conveying the prisoner instruments to enable him to break jail (Wren *v.* Com., 26 Gratt. (Va.) 952), or suborning witnesses (Blakely *v.* State, 24 Tex. App. 616, 7 S. W. 233, 5 Am. St. Rep. 912) makes one an accessary after the fact.

88. Wren *v.* Com., 26 Gratt. (Va.) 952; 4 Bl. Comm. 38. *Compare*, however, White *v.* People, 81 Ill. 333.

89. Loyd *v.* State, 42 Ga. 221; Wren *v.* Com., 26 Gratt. (Va.) 952.

Receiving stolen property, knowing it to be stolen, does not, aside from statute, constitute the receiver an accessary to the larceny, as he receives the goods, and not the felon. 4 Bl. Comm. 38; 1 Hale P. C. 620, 621; Loyd *v.* State, 42 Ga. 221; Street *v.* State, 39 Tex. Crim. 134, 45 S. W. 577. See Receiving Stolen Goods.

90. Carroll *v.* State, 45 Ark. 539; Melton *v.* State, 43 Ark. 367; State *v.* Hann, 40 N. J. L. 228; Noftsinger *v.* State, 7 Tex. App. 301; Wren *v.* Com., 26 Gratt. (Va.) 952. But see White *v.* People, 81 Ill. 333.

91. 4 Bl. Comm. 38; 1 Hale P. C. 621; 2 Hawkins P. C. c. 29, § 34. See Husband and Wife; Master and Servant; Parent and Child.

92. State *v.* Kelly, 74 Iowa 589, 38 N. W. 503; People *v.* Dunn, 6 N. Y. Suppl. 805, 7 N. Y. Crim. 173, 187; 4 Bl. Comm. 39; 1 Hale P. C. 621; 2 Hawkins P. C. c. 29, § 34.

93. *California.*— People *v.* Bearss, 10 Cal. 68.
Florida.— Montague *v.* State, 17 Fla. 662.
Georgia.— Williams *v.* State, 69 Ga. 11 (although he is also charged as accessary in another count); Boyd *v.* State, 17 Ga. 194.
Missouri.— State *v.* Anderson, 89 Mo. 312, 1 S. W. 135; State *v.* Ross, 29 Mo. 32.
New York.— Beyer *v.* People, 86 N. Y. 369.
United States.— U. S. *v.* Hughes, 34 Fed. 732.
England.— 1 Chitty Crim. L. § 256; 1 Hale P. C. 437, 438; 1 Hawkins P. C. c. 20, § 7.
See 14 Cent. Dig. tit. "Criminal Law," § 96 *et seq.*

94. State *v.* Fley, 2 Brev. (S. C.) 338, 4 Am. Dec. 583.

95. *California.*— People *v.* Bearss, 10 Cal. 68.
Georgia.— Jones *v.* State, 64 Ga. 697.
Missouri.— State *v.* Ross, 29 Mo. 32.
North Carolina.— State *v.* Whitt, 113 N. C. 716, 18 S. E. 715.

degree may be shown by the record of his conviction,[96] by evidence of his acts and confession,[97] including his flight after striking the fatal blow,[98] and by any other competent parol evidence.[99] An aider and abetter may be convicted of murder, although his principal was convicted of manslaughter only.[1]

2. PRINCIPALS AND ACCESSARIES. At common law an accessary cannot be tried without his consent before the conviction or outlawry of the principal, except where the principal and accessary are tried together.[2] If the principal could not be found,[3] or if he had not been indicted, had refused to plead, claimed benefit of clergy, had been pardoned, or died before attainder, the accessary could not be tried at all.[4] In many jurisdictions, however, the common-law rule has been abolished by statute.[5] Even where the conviction of the principal need not be

Ohio.— Searles *v.* State, 6 Ohio Cir. Ct. 331.

United States.— U. S. *v.* Hughes, 34 Fed. 732; U. S. *v.* Libby, 26 Fed. Cas. No. 15,597, 1 Woodb. & M. 221.

See 14 Cent. Dig. tit. "Criminal Law," § 96 *et seq.*

96. Studstill *v.* State, 7 Ga. 2; Tuttle *v.* State, (Tex. Crim. App. 1899) 49 S. W. 82.

97. Millen *v.* State, 60 Ga. 620.

98. McIntyre *v.* State, (Tex. Crim. App. 1895) 33 S. W. 347.

99. State *v.* Crank, 2 Bailey (S. C.) 66, 23 Am. Dec. 117.

1. Davis *v.* State, 152 Ind. 145, 52 N. E. 754; State *v.* Gray, 55 Kan. 135, 39 Pac. 1050; State *v.* Patterson, 52 Kan. 335, 34 Pac. 784.

This is the case under a statute which provides that one who aids may be prosecuted and punished as if he were the principal offender. Bruce *v.* State, 99 Ga. 50, 25 S. E. 760; Goins *v.* State, 46 Ohio St. 457, 21 N. E. 476; Wilson *v.* State, 1 Ohio Cir. Dec. 350 (construing Rev. St. § 6804); Red *v.* State, 39 Tex. Crim. 667, 47 S. W. 1003, 73 Am. St. Rep. 965 (construing Pen. Code, art. 75).

2. *Georgia.*— Brooks *v.* State, 103 Ga. 50, 29 S. E. 485; Groves *v.* State, 76 Ga. 808; Smith *v.* State, 46 Ga. 298.

Massachusetts.—Com. *v.* Phillips, 16 Mass. 423; Com. *v.* Andrews, 3 Mass. 126; Com. *v.* Woodward, Thach. Crim. Cas. 63.

New Hampshire.— State *v.* York, 37 N. H. 175.

New York.—Baron *v.* People, 1 Park. Crim. 246.

North Carolina.— State *v.* Groff, 5 N. C. 270.

Ohio.— Brown *v.* State, 18 Ohio St. 496, 508.

Pennsylvania.— Stoops *v.* Com., 7 Serg. & R. 491, 10 Am. Dec. 482; Com. *v.* House, 10 Pa. Super. Ct. 259.

South Carolina.— State *v.* Crank, 2 Bailey 66, 23 Am. Dec. 117; State *v.* Sims, 2 Bailey 29.

Tennessee.— State *v.* Pybass, 4 Humphr. 442; Whitehead *v.* State, 4 Humphr. 278.

Texas.— Williams *v.* State, 27 Tex. App. 466, 11 S. W. 481.

Virginia.— Com. *v.* Williamson, 2 Va. Cas. 211.

West Virginia.— See State *v.* Roberts, 50 W. Va. 422, 40 S. E. 484.

United States.— U. S. *v.* Crane, 25 Fed. Cas. No. 14,888, 4 McLean 317; U. S. *v.* New, 27 Fed. Cas. No. 15,866*a*.

England.— Reg. *v.* Ashmall, 9 C. & P. 236, 38 E. C. L. 147; Archbold Summ. 518; 4 Bl. Comm. 39, 40; 1 Chitty Crim. L. 180, 266; 1 Hale P. C. 623; 1 Hawkins P. C. c. 29, § 36.

See 14 Cent. Dig. tit. "Criminal Law," § 103. See *infra*, XIV, A, 6, f.

Accessary to several principals.— By the early common law, where one was accessary to several principals, all the latter must have been convicted before the accessary could be tried. Gitten's Case, Plowd. 98; 2 Coke Inst. 183, 184; 1 Hale P. C. 624. In more recent times, however, an accessary to a felony committed by several may be tried as accessary to those who have been convicted, and a verdict of guilty as accessary to them or any of them will stand. Com. *v.* Knapp, 10 Pick. (Mass.) 477, 20 Am. Dec. 534; Starin *v.* People, 45 N. Y. 333; Stoops *v.* Com., 7 Serg. & R. (Pa.) 491, 10 Am. Dec. 482; State *v.* Pybass, 4 Humphr. (Tenn.) 442.

Acquittal as to the principals who have been convicted will not discharge him as an accessary to the others, and when they are convicted he may be arraigned as accessary to them. 1 Hale P. C. 624. See Stoops *v.* Com., 7 Serg. & R. (Pa.) 491, 10 Am. Dec. 482.

3. State *v.* Groff, 5 N. C. 270; U. S. *v.* Crane, 25 Fed. Cas. No. 14,888, 4 McLean 317.

4. 4 Bl. Comm. 324. And see Com. *v.* Phillips, 16 Mass. 423; State *v.* McDaniel, 41 Tex. 229.

5. *California.*—People *v.* Bearss, 10 Cal. 68.

Indiana.— Ulmer *v.* State, 14 Ind. 52.

Maine.— State *v.* Ricker, 29 Me. 84.

Massachusetts.— Pettes *v.* Com., 126 Mass. 242.

Ohio.— Goins *v.* State, 46 Ohio St. 457, 21 N. E. 476; Brown *v.* State, 18 Ohio St. 496; Noland *v.* State, 19 Ohio 131.

Pennsylvania.— Buck *v.* Com., 107 Pa. St. 486; Com. *v.* Kelly, 10 Lanc. Bar 107.

Vermont.— State *v.* Butler, 17 Vt. 145.

Virginia.— Hatchett *v.* Com., 75 Va. 925.

Wisconsin.— Ogden *v.* State, 12 Wis. 532, 78 Am. Dec. 754.

United States.— Gallot *v.* U. S., 87 Fed. 446, 31 C. C. A. 44, construing U. S. Rev. St. (1878) § 5209 [U. S. Comp. St. (1901) p. 3497].

See 14 Cent. Dig. tit. "Criminal Law," § 103 *et seq.*

shown on the trial of the accessary,[6] the guilt of the principal must be proved beyond a reasonable doubt to convict the accessary.[7] The principal's guilt may be shown, on trial of the accessary, by the record of his conviction,[8] according to some of the decisions by his confessions,[9] by proof of declarations and threats made by him,[10] or any other evidence which would prove his guilt if he were on trial.[11] In the absence of a statute the acquittal of the principal prior to the trial of the accessary entitles the latter to his discharge,[12] unless, although arraigned as an accessary, he is in fact a principal in the second degree by aiding and abetting;[13] and an accessary cannot be convicted of a higher offense than the princi-

Accessary to suicide.— An accessary before the fact to a suicide was not triable at common law because the principal could not be tried, nor is he under the statute, as for a substantive felony, as that statute extends only to persons who, prior to its enactment, were liable as accessaries. Reg. *v.* Leddington, 9 C. & P. 79, 38 E. C. L. 58; Rex *v.* Russell, 1 Moody C. C. 356.

6. Edwards *v.* State, 80 Ga. 127, 4 S. E. 268; Hatchett *v.* Com., 75 Va. 925.

7. *Georgia.*— Edwards *v.* State, 80 Ga. 127, 4 S. E. 268; Simmons *v.* State, 4 Ga. 465.

Kentucky.— Tully *v.* Com., 11 Bush 154.

Pennsylvania.— Buck *v.* Com., 107 Pa. St. 486; Holmes *v.* Com., 25 Pa. St. 221.

Tennessee.— Self *v.* State, 6 Baxt. 244.

Texas.— Armstrong *v.* State, 28 Tex. App. 526, 13 S. W. 864; Poston *v.* State, 12 Tex. App. 408.

Virginia.— Hatchett *v.* Com., 75 Va. 925.

Wisconsin.— Ogden *v.* State, 12 Wis. 532, 78 Am. Dec. 754.

See 14 Cent. Dig. tit. "Criminal Law," § 107.

Contra, where the statute provides that accessaries may be indicted and tried as principals. State *v.* Jones, 7 Nev. 408.

8. Baxter *v.* People, 7 Ill. 578; U. S. *v.* Hartwell, 26 Fed. Cas. No. 15,318, 3 Cliff. 221; Rex *v.* Baldwin, 3 Campb. 265.

Effect of judgment against principal.— The record of the principal's conviction is conclusive evidence of that fact, but *prima facie* evidence only of his guilt.

California.— People *v.* Bearss, 10 Cal. 68.

Georgia.— Anderson *v.* State, 63 Ga. 675.

Kansas.— State *v.* Mosley, 31 Kan. 355, 2 Pac. 782.

Massachusetts.— Com. *v.* Knapp, 10 Pick. 477, 20 Am. Dec. 534.

Mississippi.— Keithler *v.* State, 10 Sm. & M. 192.

Montana.— State *v.* Gleim, 17 Mont. 17, 41 Pac. 998, 52 Am. St. Rep. 655, 31 L. R. A. 294.

New York.— Levy *v.* People, 80 N. Y. 327.

North Carolina.— State *v.* Duncan, 28 N. C. 236; State *v.* Chittem, 13 N. C. 49.

Pennsylvania.— Buck *v.* Com., 107 Pa. St. 486.

South Carolina.— State *v.* Crank, 2 Bailey (S. C.) 66, 23 Am. Dec. 117; State *v.* Sims, 2 Bailey (S. C.) 29.

Texas.— Dent *v.* State, 43 Tex. Crim. 126, 65 S. W. 627; West *v.* State, 27 Tex. App. 472, 11 S. W. 482.

England.— Rex *v.* Blick, 4 C. & P. 377, 19 E. C. L. 562; Rex *v.* Smith, 1 Leach C. C. 323; 4 Bl. Comm. 324.

See 14 Cent. Dig. tit. "Criminal Law," § 110.

9. *Georgia.*— Smith *v.* State, 46 Ga. 298.

Mississippi.— Lynes *v.* State, 36 Miss. 617.

New Hampshire.— State *v.* Rand, 33 N. H. 216.

New Mexico.— Territory *v.* Dwenger, 2 N. M. 73.

Texas.— Bluman *v.* State, 33 Tex. Crim. 43, 21 S. W. 1027, 26 S. W. 75; Crook *v.* State, 27 Tex. App. 198, 11 S. W. 444; Simms *v.* State, 10 Tex. App. 131.

United States.— U. S. *v.* Hartwell, 26 Fed. Cas. No. 15,318, 3 Cliff. 221.

See 14 Cent. Dig. tit. "Criminal Law," § 109.

Contra.— Vaughan *v.* State, 57 Ark. 1, 20 S. W. 588; Ogden *v.* State, 12 Wis. 532, 78 Am. Dec. 754.

Limiting effect of confession.— The better rule is that the court should expressly limit the confessions to the establishment of the guilt of the principal. Simms *v.* State, 10 Tex. App. 131.

The principal's plea of guilty may be considered by the jury on the trial of the accessary, although it is subject to being withdrawn. Groves *v.* State, 76 Ga. 808. But on the other hand it has been held that the plea *nolo contendere* is not admissible. Buck *v.* Com., 107 Pa. St. 486.

10. Self *v.* State, 6 Baxt. (Tenn.) 244.

11. Armstrong *v.* State, 33 Tex. Crim. 417, 26 S. W. 829.

12. Bowen *v.* State, 25 Fla. 645, 6 So. 459; McCarty *v.* State, 44 Ind. 214, 15 Am. Rep. 232; State *v.* Haines, 51 La. Ann. 731, 25 So. 372, 44 L. R. A. 837; 4 Bl. Comm. 323. *Contra,* People *v.* Buckland, 13 Wend. (N. Y.) 592.

A statute authorizing the trial and conviction of an accessary before the conviction of the principal offender does not modify the common-law rule that the acquittal of the principal may be proven on the trial of the accessary. Hence if at any time before judgment on conviction of the accessary the principal has been acquitted the accessary must be discharged. Bowen *v.* State, 25 Fla. 645, 6 So. 459; McCarty *v.* State, 44 Ind. 214, 15 Am. Rep. 232.

13. State *v.* Phillips, 24 Mo. 475, holding that as between principals the evidence of the

pal.[14] The common-law rule, however, has been changed in some states by statute.[15]

VI. JURISDICTION.

A. Nature and Scope of Criminal Jurisdiction — 1. DEFINITION. Criminal jurisdiction is the power and authority constitutionally conferred upon a court, judge, or magistrate to take cognizance of an offense and to pronounce the judgment or sentence provided by law, after a trial in the manner sanctioned by law as proper and sufficient.[16]

2. NECESSITY FOR. There can be no valid prosecution and conviction for crime unless the court in which the prosecution is instituted and carried on is legally created and constituted,[17] and has jurisdiction of the offense charged,[18] and of the person of the defendant.[19] Jurisdiction, except of the person, cannot be conferred by the consent of the defendant.[20] The various remedies in the case of want of jurisdiction are elsewhere treated.[21]

acquittal of one is not relevant on the trial of the other.

14. 4 Bl. Comm. 36. And see Nuthill *v.* State, 11 Humphr. (Tenn.) 247; U. S. *v.* Burr, 4 Cranch (U. S.) 469, 502 Appendix, 2 L. ed. 684, where it was said: "It is a settled principle in the law, that the accessary cannot be guilty of a greater offence than his principal. The maxim is *accessorius sequitur naturam sui principalis*; the accessory follows the nature of his principal. Hence results the necessity of establishing the guilt of the principal, before the accessory can be tried."

15. Where the statute abolishes the distinction between accessaries and principals, the accessary may be convicted of that degree of the crime shown by the evidence, and the conviction of the principal of a lower degree, or even his acquittal is immaterial on the question of his guilt. State *v.* Gray, 55 Kan. 135, 39 Pac. 1050; State *v.* Patterson, 52 Kan. 335, 34 Pac. 784 [*following* State *v.* Bogue, 52 Kan. 79, 34 Pac. 410]. See also Goins *v.* State, 46 Ohio St. 457, 21 N. E. 476; State *v.* Steeves, 29 Oreg. 85, 43 Pac. 947.

16. See Black L. Dict. And see COURTS, 11 Cyc. 659, 661.

17. *Arkansas.*— *Ex p.* Jones, 49 Ark. 110, 4 S. W. 639; Grimmett *v.* Askew, 48 Ark. 151, 2 S. W. 707; *Ex p.* Jones, 27 Ark. 349.

Illinois.— McFarlan *v.* People, 13 Ill. 9.

Indiana.— Cook *v.* State, 7 Blackf. 165.

Kansas.— *In re* Terrill, 52 Kan. 457, 34 Pac. 457, 39 Am. St. Rep. 327.

Nevada.— State *v.* Roberts, 8 Nev. 239.

Virginia.— Jackson *v.* Com., 13 Gratt. 795.

See, generally, COURTS.

De facto court.— If the defect in the creation of the constitution of a court is not such as to prevent it from being a *de facto* court, its judgments cannot be collaterally attacked.

Alabama.— Spradling *v.* State, 17 Ala. 440.

Connecticut.— State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409.

Missouri.— State *v.* Peyton, 32 Mo. App. 522.

New York.— Ostrander *v.* People, 29 Hun 513.

North Carolina.— State *v.* Davis, 111 N. C. 729, 16 S. E. 540.

Pennsylvania.— Campbell *v.* Com., 96 Pa. St. 344; Clark *v.* Com., 29 Pa. St. 129.

South Carolina.— State *v.* Anone, 2 Nott & M. 27.

Tennessee.— Blackburn *v.* State, 3 Head 690.

Wisconsin.— State *v.* Bloom, 17 Wis. 521.

See, generally, COURTS.

18. *Alabama.*— *Ex p.* Hardy, 68 Ala. 303.

Arkansas.— State *v.* Kirkpatrick, 32 Ark. 117.

Georgia.— Morris *v.* State, 84 Ga. 7, 10 S. E. 368.

Idaho.— People *v.* Du Rell, 1 Ida. 44.

Indiana.— Miller *v.* Snyder, 6 Ind. 1.

Kansas.— Rice *v.* State, 3 Kan. 141.

Massachusetts.— Herrick *v.* Smith, 1 Gray 1, 61 Am. Dec. 381; Com. *v.* Johnson, 8 Mass. 87; Com. *v.* Knowlton, 2 Mass. 530.

Missouri.— *Ex p.* Snyder, 64 Mo. 58.

North Carolina.—State *v.* Ridley, 114 N. C. 827, 19 S. E. 149; State *v.* Cooper, 104 N. C. 890, 10 S. E. 510.

South Carolina.— State *v.* Grant, 34 S. C. 109, 12 S. E. 1070.

Texas.— *Ex p.* Reynolds, 35 Tex. Crim. 437, 34 S. W. 120, 60 Am. St. Rep. 54.

Virginia.— Cropper *v.* Com., 2 Rob. 842.

Wisconsin.— *In re* Booth, 3 Wis. 157.

United States.— *Ex p.* Bain, 121 U. S. 1, 7 S. Ct. 781, 30 L. ed. 849; Forsythe *v.* U. S., 9 How. 571, 13 L. ed. 262; *Ex p.* Farley, 40 Fed. 66; U. S. *v.* Hill, 26 Fed. Cas. No. 15,364, 1 Brock. 156.

Conviction of less offense.— If a court has jurisdiction of the offense charged, its jurisdiction is not ousted by proof of a less offense of which it could not have taken jurisdiction. *Ex p.* Bell, (Cal. 1893) 34 Pac. 641; People *v.* Fahey, 64 Cal. 342, 30 Pac. 1030; Winburn *v.* State, 28 Fla. 339, 9 So. 694; People *v.* Rose, 15 N. Y. Suppl. 815; State *v.* Fesperman, 108 N. C. 770, 13 S. E. 14.

19. See *infra*, VI, G.

20. See *infra*, VI, H, 2.

21. **Motion in arrest** see *infra*, XV, B.

Plea to the jurisdiction see *infra*, XI, B, 5.

Writ of error, appeal, and certiorari see *infra*, XVII.

Writ of habeas corpus see HABEAS CORPUS.

3. Different Departments of Same Court. The fact that several departments of the same court are separately numbered does not make them separate and independent tribunals, so as to prevent the trial and conviction of the accused in one of them, where he was arraigned and pleaded in another.[22]

4. Effect of Order of Executive. As the criminal jurisdiction of the courts is conferred by statute it is not within the power of the executive to restrict or enlarge the same.[23]

5. Court First Acquiring Jurisdiction. Several courts may have concurrent jurisdiction of an offense.[24] In such a case the court first obtaining jurisdiction of the accused retains it to the exclusion of the other.[25]

B. Constitutional and Statutory Provisions — 1. Rule of Construction. Constitutional provisions and statutes establishing criminal courts and conferring jurisdiction upon them will be reasonably construed and the legislature's intention sustained, if exercised within constitutional requirements.[26]

2. Power of Legislature to Confer and Limit Jurisdiction — a. General Rule. Within constitutional limitations, the legislature has the power to create courts of criminal jurisdiction, to determine within what particular jurisdiction crimes shall be tried, and to make that jurisdiction exclusive.[27] But it has no power of course to confer or limit jurisdiction in violation of constitutional provisions.[28] Where the constitution confers general criminal jurisdiction on a superior court, an act of the legislature infringing such jurisdiction is unconstitutional and void.[29] But it has been held that the legislature may establish criminal courts in addition to those specified in the constitution and give them concurrent jurisdiction with existing criminal courts.[30] If a valid statute gives a court jurisdiction of an offense its judgment of conviction is valid, although it may have conceived that it was acting upon another statute which is unconstitutional.[31]

b. Extraterritorial Jurisdiction. Where a crime is commenced in one juris-

Demurrer and motion to quash see Indictments and Informations.

22. Crain *v.* U. S., 2 App. Cas. (D. C.) 549. *Compare*, however, People *v.* Matson, 129 Ill. 591, 22 N. E. 456. And see Courts.

23. U. S. *v.* Blaisdell, 24 Fed. Cas. No. 14,608, 3 Ben. 132; U. S. *v.* Lawrence, 26 Fed. Cas. No. 15,573, 3 Blatchf. 295. And see, generally, Courts.

24. See *infra*, VI, B, 3; VI, D, 5; VI, E.

25. *District of Columbia.*— District of Columbia *v.* Libbey, 9 App. Cas. 321.

Georgia.— Mize *v.* State, 49 Ga. 375.

Iowa.— State *v.* Spayde, 110 Iowa 726, 80 N. W. 1058; *Ex p.* Baldwin, 69 Iowa 502, 504, 29 N. W. 428, where it is said: "Authorities need not be cited to support this familiar elementary rule. But few cases are or can be cited announcing the rule, doubtless for the reason that it is rarely, if ever, disputed or doubted."

Kansas.— State *v.* Chinault, 55 Kan. 326, 40 Pac. 662.

North Carolina.— State *v.* Williford, 91 N. C. 529; State *v.* Tisdale, 19 N. C. 159.

Texas.— Burdett *v.* State, 9 Tex. 43.

United States.— U. S. *v.* Wells, 28 Fed. Cas. No. 16,665.

See, generally, Courts.

26. People *v.* Hurst, 41 Mich. 328, 1 N. W. 1027; State *v.* Ross, 34 Mo. 336, holding that an act merely establishing a court in which criminals may be tried is not strictly speaking a criminal law, and is not to be construed strictly. See, generally, Courts.

27. People *v.* Fowler, 9 Cal. 85; State *v.* Gordon, 60 Mo. 383; State *v.* Foreman, 8 Yerg. (Tenn.) 256; Harris County *v.* Stewart, 91 Tex. 133, 41 S. W. 650; Hanks *v.* State, 13 Tex. App. 289. See, generally, Courts.

Justices' courts, police courts, and recorders' courts.— *Alabama.*— Taylor *v.* State, 48 Ala. 180; Levy *v.* State, 48 Ala. 171.

California.— People *v.* Fowler, 9 Cal. 85.

Indiana.— Stevens *v.* Anderson, 145 Ind. 304, 44 N. E. 460.

Iowa.— Bryan *v.* State, 4 Iowa 349.

Michigan.— People *v.* Hurst, 41 Mich. 328, 1 N. W. 1027.

Inferior and general jurisdiction.— A general jurisdiction is that which extends to a great variety of matters, while an inferior jurisdiction is that which extends only to certain specific causes; hence where a statute limits the jurisdiction of a court to certain specific matters, it is an inferior tribunal within the meaning of a constitutional provision authorizing the legislature to create inferior tribunals. State *v.* Daniels, 66 Mo. 192. And see, generally, Courts.

28. Sanders *v.* State, 55 Ala. 42; People *v.* Toal, 85 Cal. 333, 24 Pac. 603; *Ex p.* Ah You, 82 Cal. 339, 22 Pac. 929; People *v.* Evans, 18 Ill. 361; Mott *v.* Forsyth County, 126 N. C. 866, 36 S. E. 330. And see Courts.

29. Mott *v.* Forsyth County, 126 N. C. 866, 36 S. E. 330. See *infra*, VI, B, 2, d.

30. Com. *v.* Hipple, 69 Pa. St. 9. See *infra*, VI, B, 2, d.

31. *Ex p.* Gibson, 89 Ala. 174, 7 So. 833.

diction, whether state or county, and is consummated in another, a statute providing that the criminal may be tried in either of these jurisdictions is not unconstitutional.[32] But the legislature cannot confer jurisdiction of an offense committed wholly without the limits of the state, except perhaps where it is committed by a citizen.[33]

c. Creating Local and Special Courts. In many of the states constitutional provisions require that all laws regulating the proceedings and jurisdiction of courts shall be general and of uniform operation, and statutes in violation of such provisions are void.[34]

d. Impairing or Enlarging Jurisdiction Conferred by Constitution. Exclusive criminal jurisdiction conferred upon a court by a state constitution cannot be impaired by the legislature.[35] But where the jurisdiction is not exclusive, either expressly or by necessary implication, the legislature may confer concurrent jurisdiction upon another court, if by so doing it does not deprive the existing court of any constitutional jurisdiction.[36]

e. Crimes Previously Committed. The legislature may establish new courts for trial of crimes already committed,[37] but a statute creating a court will not by

32. *Alabama.*— Green *v.* State, 66 Ala. 40, 41 Am. Rep. 744.

Kansas.— State *v.* Price, 55 Kan. 606, 40 Pac. 1000.

Kentucky.— Ferrill *v.* Com., 1 Duv. 153.

Massachusetts.— Com. *v.* Macloon, 101 Mass. 1, 100 Am. Dec. 89; Com. *v.* Parker, 2 Pick. 550.

Michigan.— People *v.* Williams, 24 Mich. 156, 9 Am. Rep. 119; Tyler *v.* People, 8 Mich. 320.

Minnesota.— State *v.* Justus, 85 Minn. 114, 88 N. W. 415.

Missouri.— Steerman *v.* State, 10 Mo. 503.

New Jersey.— Hunter *v.* State, 40 N. J. L. 495.

New York.— People *v.* Burke, 11 Wend. 129.

Texas.— Hanks *v.* State, 13 Tex. App. 289.

West Virginia.— *Ex p.* McNeeley, 36 W. Va. 84, 14 S. E. 436, 32 Am. St. Rep. 831, 15 L. R. A. 226.

See 14 Cent. Dig. tit. "Criminal Law," § 117.

A statute authorizing a prosecution for murder in the county in which the deceased was shot, although death occurred in another state, is valid. Green *v.* State, 66 Ala. 40, 41 Am. Rep. 744, which also holds that, inasmuch as the crime of murder consists in the infliction of a fatal wound with a felonious intent, the court of the county in which the fatal blow is struck has jurisdiction, because the crime was committed within its limits. See People *v.* Gill, 6 Cal. 637; Riley *v.* State, 9 Humphr. (Tenn.) 646.

33. State *v.* Carter, 27 N. J. L. 499; State *v.* Knight, 1 N. C. 44. And see Tyler *v.* People, 8 Mich. 320, 342; People *v.* Merrill, 2 Park. Crim. (N. Y.) 590. But see Hanks *v.* State, 13 Tex. App. 289. *Compare* Com. *v.* Gaines, 2 Va. Cas. 172; State *v.* Main, 16 Wis. 398.

34. *Ex p.* White, 5 Colo. 521; Clem *v.* State, 33 Ind. 418; Bocock *v.* Cochran, 32 Hun (N. Y.) 521; State *v.* Wiley, 4 Oreg. 184. See, generally, COURTS.

35. *Georgia.*— Porter *v.* State, 53 Ga. 236; State *v.* Savannah, T. U. P. Charlt. 235, 4 Am. Dec. 708.

Illinois.— Wilson *v.* People, 94 Ill. 426 [*overruling* Ferguson *v.* People, 90 Ill. 510].

Montana.— State *v.* Myers, 11 Mont. 365, 28 Pac. 650.

North Carolina.— Mott *v.* Forsyth County, 126 N. C. 866, 36 S. E. 330.

South Carolina.— State *v.* Simmons, 4 S. C. 72.

See 14 Cent. Dig. tit. "Criminal Law," § 119; and, generally, COURTS.

36. *Georgia.*— Porter *v.* State, 53 Ga. 236; Anthony *v.* State, 9 Ga. 264.

Missouri.— State *v.* Daniels, 66 Mo. 192, holding, however, that where a constitution provides that a court shall have jurisdiction over all criminal cases which shall not be otherwise provided for by law, the legislature may by subsequent enactment deprive that court of all criminal jurisdiction.

Pennsylvania.— Com. *v.* Hipple, 69 Pa. St. 9.

South Carolina.— State *v.* Fillebrown, 2 S. C. 404.

Texas.— Clepper *v.* State, 4 Tex. 242.

West Virginia.— State *v.* Strauder, 8 W. Va. 686.

See 14 Cent. Dig. tit. "Criminal Law," § 119; and, generally, COURTS.

Constitutional provision conferring similar jurisdiction.— A constitutional provision providing that a certain court shall have similar jurisdiction to that which may be given by law to others does not restrict the one but enlarges its jurisdiction to the grade of the others, and jurisdiction in cases of felony may be transferred from either to the other. Chahoon *v.* Com., 21 Gratt. (Va.) 822.

37. State *v.* Shumpert, 1 S. C. 85; Cook *v.* U. S., 138 U. S. 157, 11 S. Ct. 268, 34 L. ed. 906, holding that the act of congress of March 1, 1899 (25 U. S. St. 783, c. 33), annexing the public land strip commonly known as "No Man's Land" to the eastern district of Texas for judicial purposes, was not unconstitutional

implication be presumed to confer jurisdiction of offenses committed before its passage.[38]

3. STATUTES CONFERRING CONCURRENT JURISDICTION. Where a court has jurisdiction of a crime, a statute simply conferring the same jurisdiction on another court does not deprive the former of its jurisdiction, in the absence of an express provision or clear implication to that effect, but merely confers concurrent jurisdiction.[39] A statute conferring upon a justice of the peace jurisdiction to try a crime which is indictable in a superior court does not by implication oust the superior court of jurisdiction.[40] But where, from the terms of the statute conferring jurisdiction, it is apparent that the legislature intended the jurisdiction thus conferred to be exclusive, the first court is deprived of its jurisdiction,[41] and any criminal

because it conferred jurisdiction on the court over crimes committed before its passage, as being in violation of U. S. Const. art. 3, § 2, which provides that the trial of crimes shall be at such places as congress "may have by law directed."

38. Ryan *v.* Com., 80 Va. 385. *Compare* State *v.* Kring, 74 Mo. 612.

39. *Alabama.*— Johnson *v.* State, 69 Ala. 593.

Arkansas.— McClure *v.* State, 37 Ark. 426.

California.— *Ex p.* McCarthy, 53 Cal. 412.

Florida.— State *v.* Butt, 25 Fla. 258, 5 So. 597.

Illinois.— Berkowitz *v.* Lester, 121 Ill. 99, 11 N. E. 860.

Indiana.— Hinkle *v.* State, 127 Ind. 490, 26 N. E. 777; Lichtenstein *v.* State, 5 Ind. 162.

Iowa.— State *v.* Church, 8 Iowa 252; Orton *v.* State, 4 Greene 140.

Kansas.— State *v.* Schaefer, 44 Kan. 90, 24 Pac. 92.

Maine.— State *v.* Billington, 33 Me. 146.

Massachusetts.— Com. *v.* Hudson, 11 Gray 64.

Minnesota.— State *v.* Russell, 69 Minn. 499, 72 N. W. 837.

Mississippi.— Harlan *v.* State, 41 Miss. 566.

Montana.— Territory *v.* Flowers, 2 Mont. 531.

New York.— People *v.* Harris, 123 N. Y. 70, 25 N. E. 317 [*affirming* 7 N. Y. Suppl. 773]; People *v.* Austin, 49 Hun 396, 3 N. Y. Suppl. 578.

North Carolina.— State *v.* Roseman, 108 N. C. 765, 12 S. E. 1039.

Oregon.— State *v.* Sly, 4 Oreg. 277.

South Carolina.— State *v.* Padgett, 18 S. C. 317.

Vermont.— State *v.* Smith, Brayt. 143, holding that a statute providing that county courts shall have original and exclusive jurisdiction in civil matters, and that they shall have cognizance of criminal matters, does not prevent the supreme court from exercising original jurisdiction of criminal causes where the constitution makes the judges of that county conservators of the peace throughout the state.

Wisconsin.— State *v.* Grunke, 88 Wis. 159, 59 N. W. 452; Faust *v.* State, 45 Wis. 273.

See 14 Cent. Dig. tit. "Criminal Law," § 122; *infra*, VI, D, 5; and, generally, COURTS.

County and municipal courts.— A constitutional provision that county courts shall have exclusive original jurisdiction in all county matters, including vagrancy, and in every other case necessary to the improvement of the county, does not deprive the municipal courts of power to punish vagrancy by an ordinance enacted for enforcing good order within the city limits. Brizzolari *v.* State, 37 Ark. 364.

40. *Arkansas.*— State *v.* Devers, 34 Ark. 188; State *v.* Smith, 26 Ark. 149.

Illinois.— Fanning *v.* People, 10 Ill. App. 70.

Kentucky.— Com. *v.* Wickersham, 99 Ky. 21, 34 S. W. 707, 17 Ky. L. Rep. 1317.

Missouri.— State *v.* Bradley, 31 Mo. App. 308.

North Carolina.— State *v.* Perry, 64 N. C. 598.

Pennsylvania.— Brown *v.* Com., 73 Pa. St. 321, 13 Am. Rep. 740.

Texas.— Leatherwood *v.* State, 6 Tex. App. 244; Solon *v.* State, 5 Tex. App. 301; Woodward *v.* State, 5 Tex. App. 296.

See 14 Cent. Dig. tit. "Criminal Law," § 129.

But see State *v.* Harrison, 126 N. C. 1049, 35 S. E. 591.

41. *Illinois.*— Ferguson *v.* People, 90 Ill. 510.

Indiana.— State *v.* Henning, 33 Ind. 189; Foley *v.* State, 9 Ind. 363; Miller *v.* Snyder, 6 Ind. 1; Simington *v.* State, 5 Ind. 479; Spencer *v.* State, 5 Ind. 41.

Iowa.— State *v.* Rollet, 6 Iowa 535.

New Hampshire.— State *v.* Berritt, 17 N. H. 268; State *v.* Taylor, 16 N. H. 477.

New York.— Gardner *v.* People, 62 N. Y. 299.

North Carolina.— State *v.* Perry, 71 N. C. 522.

Rhode Island.— State *v.* Slocum, 9 R. I. 373.

Texas.— *Ex p.* Valasquez, 26 Tex. 178; Corey *v.* State, 28 Tex. App. 490, 13 S. W. 778; Long *v.* State, 1 Tex. App. 709.

See 14 Cent. Dig. tit. "Criminal Law," § 122; and, generally, COURTS.

The jurisdiction of a court over "misdemeanors not otherwise provided for" is taken away by a statute creating a court and conferring upon it jurisdiction over misdemeanors punishable by a specific fine and imprisonment. People *v.* Joselyn, 80 Cal. 544, 22 Pac. 217.

prosecution pending in the existing court when the statute goes into effect should be transferred to the new court.[42]

4. FEDERAL AND STATE COURTS. In some cases, as we have seen, the jurisdiction of the federal courts over offenses is exclusive of the jurisdiction of the state courts, while in others it is concurrent.[43] A court created by a state legislature has no jurisdiction, and by the great weight of authority congress cannot confer upon such a court jurisdiction of offenses against federal laws.[44] Nor can indictments found in a state court be tried in the federal courts.[45] The power of the state legislatures to confer upon the state courts jurisdiction to punish acts which are crimes against the United States is elsewhere treated.[46]

5. REPEAL OF STATUTE CREATING SPECIAL JURISDICTION. The repeal of a statute which created a court of special and exclusive jurisdiction revives by implication the jurisdiction of other courts which existed under the general laws when the special court was created.[47]

C. Courts Vested With Criminal Jurisdiction — 1. DERIVATION OF POWERS. The criminal courts in the several states are created by and derive their jurisdiction sometimes directly from the state constitution,[48] sometimes from statutes, and

Uniform laws.— A statute requiring that all laws relating to the powers and jurisdiction of all courts of the same grade shall be uniform takes away any exclusive jurisdiction given to a city over offenses within its limits. Hart *v.* People, 89 Ill. 407.

42. *California.*— People *v.* Colby, 54 Cal. 184.

Connecticut.— Hale *v.* State, 15 Conn. 242.

Indiana.— Sprigs *v.* State, 2 Ind. 75; Taylor *v.* State, 7 Blackf. 93.

North Carolina.— State *v.* Ramsour, 113 N. C. 642, 18 S. E. 707.

Texas.— Corey *v.* State, 28 Tex. App. 490, 13 S. W. 778.

United States.— U. S. *v.* Town-Maker, 28 Fed. Cas. No. 16,533*a*, Hempst. 299.

Contra.— Ashlock *v.* Com., 7 B. Mon. (Ky.) 44 (holding that the jurisdiction of a circuit court continued where an exclusive jurisdiction was conferred on a city court, but the statutes made no provision for the removal of cases then pending); Ryan *v.* People, 79 N. Y. 593 [*affirming* 19 Hun 188] (which was based upon a local statute conferring exclusive jurisdiction).

N. Y. Pen. Code, § 962, requiring that "all actions and proceedings theretofore commenced must be conducted in the same manner as if this Code had not been passed," merely continues the procedure, and a sentence may be imposed by a court substituted by the code for a court that tried the case. People *v.* Bork, 96 N. Y. 188 [*reversing* 31 Hun 360].

Cases "arising."— A statute conferring jurisdiction on a court over cases "arising" or which "arise," has relation to the future and confers no jurisdiction over crimes committed before its passage, nor ousts another court of jurisdiction of a case pending at the date of its enactment. State *v.* Walker, 14 Rich. (S. C.) 36.

Where the effect of a statute was to confer exclusive original jurisdiction upon justices over a crime which previously was within the jurisdiction of the county court, it was held that it did not deprive the latter of jurisdiction of a prosecution then pending before it. State *v.* Church, 8 Iowa 252.

A case is pending in a court as soon as the person is held to answer therein to an information, and the jurisdiction of such court continues, although a new court was organized before the trial. Martin *v.* State, 79 Wis. 165, 48 N. W. 119.

43. See *supra*, II, B, 4, a; *infra*, VI, E, 1.

44. *Connecticut.*— State *v.* Tuller, 34 Conn. 280; Davison *v.* Champlin, 7 Conn. 244; Ely *v.* Peck, 7 Conn. 239.

New York.— U. S. *v.* Lathrop, 17 Johns. 4; People *v.* Sweetman, 3 Park. Crim. 358. And see People *v.* Lynch, 11 Johns. 549.

Pennsylvania.— Huber *v.* Reily, 53 Pa. St. 112.

South Carolina.— State *v.* McBride, Rice 400.

Virginia.— Jackson *v.* Rose, 2 Va. Cas. 34; Com. *v.* Feely, 1 Va. Cas. 321.

United States.—Martin *v.* Hunter, 1 Wheat. 304, 4 L. ed. 97.

Compare, however, U. S. *v.* Smith, 4 N. J. L. 33; Rump *v.* Com., 30 Pa. St. 475; Buckwalter *v.* U. S., 11 Serg. & R. (Pa.) 193.

45. People *v.* Murray, 5 Park. Crim. (N. Y.) 577.

46. See *supra*, II, B, 4, a.

47. *Ex p.* Wagener, 1 Disn. (Ohio) 10, 12 Ohio Dec. (Reprint) 454; Galloway *v.* State, 23 Tex. App. 398, 5 S. W. 246. See also Stapleton *v.* Com., (Ky. 1887) 3 S. W. 793 (holding that the circuit courts, being vested by the constitution with original jurisdiction in criminal cases, can only be deprived of it by direct legislation, and where the legislation is repealed the jurisdiction immediately revives); Anderson *v.* Com., 3 S. W. 127, 8 Ky. L. Rep. 697.

48. *Illinois.*— Greene *v.* People, 182 Ill. 278, 55 N. E. 341.

Kentucky.— Com. *v.* Ramsey, 68 S. W. 1098, 24 Ky. L. Rep. 492; Anderson *v.* Com., 3 S. W. 127, 8 Ky. L. Rep. 697.

Louisiana.— State *v.* Goff, 106 La. 270, 30 So. 844.

Missouri.— Samuels *v.* State, 3 Mo. 68.

often from the combination of the two. The statutes vary greatly in their details and in the name and character of the courts which they create.[49]

2. Municipal and Other Local Courts. Municipal and other local courts have in some cases by special statute the same jurisdiction in criminal cases within the city limits that is possessed by the superior courts under general law.[50] Their jurisdiction of course is such only as the statutes confer.[51]

3. United States Courts. The federal courts have such criminal jurisdiction only as is given by act of congress,[52] except as to slave-trading, piracy, murder, and other offenses on the high seas, which are crimes under the law of nations. The federal courts, by virtue of their admiralty powers, would probably have jurisdiction over these, although not conferred by statute.[53]

D. Jurisdiction of Justices of the Peace, Police Justices, and Similar Officers — 1. In General. In the United States the jurisdiction of justices of the peace, police justices, and similar officers is wholly the creature of statutes,[54]

Montana.— State *v.* Myers, 11 Mont. 365, 28 Pac. 650.

Nebraska.— State *v.* Missouri Pac. R. Co., 64 Nebr. 679, 90 N. W. 877.

North Carolina.— State *v.* Davis, 129 N. C. 570, 40 S. E. 112; Mott *v.* Forsyth County, 126 N. C. 866, 36 S. E. 330; State *v.* Addington, 121 N. C. 538, 27 S. E. 988.

Ohio.— State *v.* Rose, 1 Ohio Dec. (Reprint) 550, 10 West. L. J. 361.

Texas.— *Ex p.* Sibley, (Crim. App. 1901) 65 S. W. 372.

49. See, generally, Courts.

50. Taylor *v.* State, 48 Ala. 180; Levy *v.* State, 48 Ala. 171; State *v.* Sinnott, 89 Me. 41, 35 Atl. 1007; Tremaine *v.* Com., 25 Gratt. (Va.) 987.

51. Zuchowski *v.* State, 3 Pennew. (Del.) 339, 51 Atl. 877; People *v.* Women's State Reformatory, 38 Misc. (N. Y.) 233, 77 N. Y. Suppl. 145; People *v.* Patterson, 38 Misc. (N. Y.) 79, 77 N. Y. Suppl. 155.

52. Barclay *v.* U. S., 11 Okla. 503, 69 Pac. 798; *In re* Booth, 3 Wis. 157; U. S. *v.* Coolidge, 1 Wheat. (U. S.) 415, 4 L. ed. 124; U. S. *v.* Hudson, 7 Cranch (U. S.) 32, 3 L. ed. 259; U. S. *v.* Maid, 116 Fed. 650; U. S. *v.* Barney, 24 Fed. Cas. No. 14,524, 5 Blatchf. 294; U. S. *v.* Hutchinson, 26 Fed. Cas. No. 15,432; U. S. *v.* New Bedford Bridge, 27 Fed. Cas. No. 15,867, 1 Woodb. & M. 401; U. S. *v.* Ramsay, 27 Fed. Cas. No. 16,115, Hempst. 481; U. S. *v.* Swett, 28 Fed. Cas. No. 16,427, 2 Hask. 310; U. S. *v.* Wilson, 28 Fed. Cas. No. 16,731, 3 Blatchf. 435; U. S. *v.* Wilson, 28 Fed. Cas. No. 16,732; U. S. *v.* Worrall, 28 Fed. Cas. No. 16,766, 2 Dall. 384, 1 L. ed. 426.

"Cases in law and equity."— The provisions of the constitution extending the judicial power of the United States to "all cases in law and equity, arising" under the constitution embrace criminal as well as civil cases. Tennessee *v.* Davis, 100 U. S. 257, 25 L. ed. 648.

Jurisdiction to fine.— The federal courts have an inherent power to sentence an offender to jail where he refuses or is unable to pay a fine imposed by a statute. U. S. *v.* Robbins, 27 Fed. Cas. No. 16,171.

53. 1 Bishop New Crim. L. §§ 200–202. And see U. S. *v.* Coolidge, 25 Fed. Cas. No. 14,857, 1 Gall. 488 (where Mr. Justice Story said: "Whatever room, therefore, may be for doubt, as to what common law offences are offences against the United States, there can be none as to admiralty offences"); U. S. *v.* New Bedford Bridge, 27 Fed. Cas. No. 15,867, 1 Woodb. & M. 401.

Law of nations.— Aside from statutes conferring jurisdiction, federal courts may punish an offense against the law of nations according to the forms of the common law. Henfield's Case, 11 Fed. Cas. No. 6,360.

The courts of the District of Columbia have jurisdiction of common-law crimes against the United States, under the act of congress passed Feb. 27, 1801, which expressly continued the laws of the state of Maryland then existing. Kendall *v.* U. S., 12 Pet. (U. S.) 524, 9 L. ed. 1181; 1 Bishop New Crim. L. § 203. See District of Columbia.

54. *California.*—*Ex p.* Dolan, 128 Cal. 460, 60 Pac. 1094; *Ex p.* Giambonini, 117 Cal. 573, 49 Pac. 732; *Ex p.* Simpson, 47 Cal. 127.

Indiana.— Stevens *v.* Anderson, 145 Ind. 304, 44 N. E. 460; Wakefield *v.* State, 5 Ind. 195; State *v.* Odell, 8 Blackf. 396.

Kentucky.— Com. *v.* Leight, 1 B. Mon. 107.

Louisiana.— State *v.* Landry, 25 La. Ann. 42; State *v.* Peter, 14 La. Ann. 521.

Maine.— *In re* Hersom, 39 Me. 476.

Minnesota.— State *v.* Kemp, 34 Minn. 61, 24 N. W. 349.

Pennsylvania.— Stroudsburg Borough *v.* Brown, 11 Pa. Co. Ct. 272.

Texas.— *Ex p.* McGrew, 40 Tex. 472; *Ex p.* Brown, 43 Tex. Crim. 45, 64 S. W. 249.

Utah.— People *v.* Douglass, 5 Utah 283, 14 Pac. 801 [*overruling* Yearian *v.* Spiers, 4 Utah 482, 10 Pac. 618].

Vermont.— State *v.* Wilson, 74 Vt. 323, 52 Atl. 419; State Treasurer *v.* Clark, 19 Vt. 129.

Wisconsin.— State *v.* Miller, 23 Wis. 634.

See 14 Cent. Dig. tit. "Criminal Law." § 130; and, generally, Justices of the Peace.

The English statutes, 1 Edw. III, c. 16, and 34 Edw. III, c. 1, regulating the powers and jurisdiction of justices of the peace, were held to have been adopted as part of the common law in Massachusetts. Com. *v.* Leach, 1 Mass. 59.

which are strictly construed. In other words the jurisdiction assumed must be clearly conferred by the statute.[55]

2. Time of Beginning Prosecution. If a statute provides that a complaint must be made to a justice of the peace within a time specified, the justice has no jurisdiction until the statute is complied with, although the superior courts have jurisdiction.[56]

3. Jurisdiction of Offense — a. In General. In England justices of the peace had no jurisdiction to hear and determine the charge of treason,[57] but might upon complaint direct the apprehension of one accused of treason, and bind him over to the court of king's bench.[58] A justice of the peace had power to hear and determine felonies where expressly authorized so to do by the terms of his commission.[59] In the United States generally a justice of the peace has ordinarily under the statutes no jurisdiction to try persons charged with felony, but his jurisdiction is limited to the trial of misdemeanors.[60]

Mayor's court.— Under constitutional provisions authorizing the legislature to vest judicial powers in such courts as it shall from time to time establish, the legislature may vest the powers of a justice of the peace in a municipal court held by the mayor to try cases without a jury, where the offense is committed within the city limits. Gray *v.* State, 2 Harr. (Del.) 76.

Police courts exist in some of the states by statute, and while they possess in general the criminal jurisdiction of justices of the peace, their jurisdiction is wholly statutory. These statutes are strictly construed. People *v.* Gooseman, 80 Mich. 611, 45 N. W. 369. Where a person is tried and convicted in a so-called police court, and the proceedings are void because this court has no legal existence on account of the unconstitutionality of the statute creating it, the fact that the police judge is also a justice of the peace and would have had jurisdiction as such of the offense does not validate his judgment as a police judge. *Ex p.* Giambonini, 117 Cal. 573, 49 Pac. 732.

Jurisdiction of grand jury.— A statute conferring original jurisdiction of certain specific offenses upon justices of the peace does not exclude the jurisdiction of the grand jury to inquire into all public offenses, where a statute declares all public offenses indictable. State *v.* Kobe, 26 Minn. 148, 1 N. W. 1054. See Grand Jury.

Disqualification by interest in penalty.— In Massachusetts it has been held that the interest of the justice of the peace in a penalty, however trivial the interest may be, deprives him of jurisdiction. Gifford *v.* White, 10 Cush. (Mass.) 494; Pearce *v.* Atwood, 13 Mass. 324.

This power to hear and determine felonies was very seldom exercised in the cases of murder or manslaughter, and in consequence of the doubt which existed as to the authority of justices to hear and determine charges of felony it was provided by St. 1 & 2 P. & M. c. 13, that in all cases of felonies they should take the examination of the prisoner, commit it to writing, accept bail if it be furnished, commit the witnesses, and refer the matter to the justices of assize. 5 Bacon Abr. 405; 2 Hawkins P. C. c. 8, § 33.

55. Wakefield *v.* State, 5 Ind. 195; *In re* Hersom, 39 Me. 476; People *v.* Gooseman, 80 Mich. 611, 45 N. W. 369; and other cases cited in the note preceding.

56. State *v.* Presly, 72 N. C. 204. See also State *v.* Porter, 101 N. C. 713, 7 S. E. 902; State *v.* Dalton, 101 N. C. 680, 8 S. E. 154; State *v.* Anderson, 80 N. C. 429.

57. 5 Bacon Abr. 204.

58. 2 Hawkins P. C. c. 8, § 34.

59. 5 Bacon Abr. 405.

60. *Arkansas.*— Armstrong *v.* State, 54 Ark. 364, 15 S. W. 1036; Watson *v.* State, 29 Ark. 299; State *v.* Smith, 26 Ark. 149.

California.— Green *v.* San Francisco Super. Ct., 78 Cal. 556, 21 Pac. 307, 541.

Florida.— Alford *v.* State, 25 Fla. 852, 6 So. 857; McLean *v.* State, 23 Fla. 281, 2 So. 5.

Indiana.— State *v.* Morgan, 62 Ind. 35; Hawkins *v.* State, 24 Ind. 288.

Massachusetts.— Com. *v.* Golding, 14 Gray 49; Com. *v.* Rowe, 14 Gray 47.

New Mexico.— Territory *v.* Valdez, 1 N. M. 548; Bray *v.* U. S., 1 N. M. 1.

New York.— People *v.* Miller, 14 Johns. 371.

North Carolina.— State *v.* Fesperman, 108 N. C. 770, 13 S. E. 14; State *v.* Wilson, 84 N. C. 777; State *v.* Craig, 82 N. C. 668; State *v.* Benthall, 82 N. C. 664; State *v.* Batchelor, 72 N. C. 468; State *v.* Vermington, 71 N. C. 264; State *v.* Davis, 65 N. C. 298.

Ohio.— Cole *v.* State, 29 Ohio St. 226.

Rhode Island.— State *v.* Nolan, 15 R. I. 529, 10 Atl. 481.

Texas.— Neil *v.* State, 43 Tex. 91; Langbein *v.* State, 37 Tex. 162.

Vermont.— State *v.* Peck, 32 Vt. 172.

See 14 Cent. Dig. tit. "Criminal Law," § 132; and, generally, Justices of the Peace.

Particular offenses.—Among the offenses which have been held to be within the jurisdiction of a justice of the peace under particular statutes are petit larceny (*Ex p.* Hixon, 41 Ala. 410; State *v.* Sipult, 17 Iowa 575; Lewis *v.* Robbins, 13 Allen (Mass.) 552); aggravated larceny (Jones *v.* Robbins, 8 Gray (Mass.) 329); assault and battery

b. Penalty Determining Jurisdiction. A justice of the peace, police judge, or other inferior magistrate has no jurisdiction to try one accused of a crime, the maximum penalty or punishment of which exceeds the power of his court to impose.[61] His power under a statute to fine or imprison does not give him juris-

(Danzey *v.* State, 68 Ala. 296; Adams *v.* Governor, 22 Ga. 417; Severin *v.* People, 37 Ill. 414), where no serious injury is inflicted on the person assaulted (Wegener *v.* People, 36 Ill. App. 164; State *v.* Stafford, 113 N. C. 635, 18 S. E. 256) and no deadly weapon is used (State *v.* Johnson, 94 N. C. 863); obstructing a highway (State *v.* Gorham, 11 Conn. 233; State *v.* Sweeney, 33 Minn. 23, 21 N. W. 847); disturbing a religious meeting (Henry *v.* Hamilton, 7 Blackf. (Ind.) 506; State *v.* Orton, 67 Iowa 554, 25 N. W. 775); violating the liquor laws (State *v.* Lawrence, 49 Ind. 515; State *v.* Crogan, 6 R. I. 40. *Contra,* State *v.* Cooper, 101 N. C. 684, 8 S. E. 134); carrying concealed weapons (Robison *v.* Judge Recorder's Ct., 69 Mich. 607, 38 N. W. 654); profane swearing (State *v.* Kirby, 5 N. C. 254); affrays (Greensboro *v.* Shields, 78 N. C. 417); keeping a disorderly house (People *v.* Cooper, 42 Hun (N. Y.) 196); driving at an illegal speed on a street (Com. *v.* Worcester, Thach. Crim. Cas. (Mass.) 100); poisoning cattle (Com. *v.* Leach, 1 Mass. 59); fraudulently disposing of mortgaged property (State *v.* Ham, 83 N. C. 590); trespass on land (State *v.* Dudley, 83 N. C. 660); obtaining goods or money by false pretenses (Dillingham *v.* State, 5 Ohio St. 280); and violation of town ordinances (State *v.* Williams, 11 S. C. 288).

The common-law distinction between high and low misdemeanors, depending upon the question whether the misdemeanor was infamous or not, is not recognized in determining the construction of a constitutional provision conferring upon justices' courts an exclusive jurisdiction over misdemeanors, as the power given to the legislature to create courts to try misdemeanors under that section is not limited to misdemeanors of any class. Green *v.* San Francisco Super. Ct., 78 Cal. 556, 21 Pac. 307, 541.

Offenses held not within the jurisdiction of justices of the peace. Selling lottery tickets (U. S. *v.* Green, 19 D. C. 230); rescuing a person from lawful custody (Com. *v.* Hyde, Thach. Crim. Cas. (Mass.) 112); assault with intent to inflict great bodily injury (State *v.* Carpenter, 23 Iowa 506) or with intent to murder (State *v.* Odell, 4 Blackf. (Ind.) 156); riot (Wakefield *v.* State, 5 Ind. 195; State *v.* Furlong, 26 Me. 69; Com. *v.* Twombly, Thach. Crim. Cas. (Mass.) 222); and aggravated assault (State *v.* Huntley, 91 N. C. 617) have been held to be crimes which are not within the jurisdiction of a justice's court to try and determine. So a justice has no jurisdiction of the offense of selling liquor to soldiers under the statute except as an examining magistrate (U. S. *v.* District of Columbia, 26 Fed. Cas. No. 15,726*b*, 2 Hayw. & H. 392).

Title to real estate in issue.— The jurisdiction of a justice of the peace in a criminal case is not ousted because the title to real estate incidentally comes in issue. Miller *v.* State, 72 Ind. 421; State *v.* Sweeney, 33 Minn. 23, 21 N. W. 847 [*overruling* State *v.* Cotton, 29 Minn. 187, 12 N. W. 529].

61. *California.*— *Ex p.* Anear, 114 Cal. 370, 46 Pac. 172; *Ex p.* Noble, 96 Cal. 362, 31 Pac. 224; *Ex p.* Neustadt, 82 Cal. 273, 23 Pac. 124; *In re* Kurtz, 68 Cal. 412, 9 Pac. 449.

District of Columbia.— U. S. *v.* Marshall, 6 Mackey 34; U. S. *v.* Buell, 1 MacArthur 502.

Illinois.— *In re* Bollig, 31 Ill. 88.

Indiana.— Nace *v.* State, 117 Ind. 114, 19 N. E. 729.

Iowa.— State *v.* Babcock, 112 Iowa 250, 83 N. W. 908.

Maine.— State *v.* Pierre, 65 Me. 293; *In re* Hersom, 39 Me. 476.

Massachusetts.— Com. *v.* Woolford, 108 Mass. 483; Com. *v.* Burns, 14 Gray 35.

Michigan.— People *v.* Mangold, 71 Mich. 335, 39 N. W. 6; *In re* Berry, 7 Mich. 467.

Mississippi.— Sloan *v.* State, 65 Miss. 490, 4 So. 550.

New Hampshire.— State *v.* Williams, 68 N. H. 449, 42 Atl. 898; State *v.* Dolby, 49 N. H. 483, 6 Am. Rep. 588.

North Carolina.— State *v.* Wiseman, 131 N. C. 795, 42 S. E. 826; State *v.* Deaton, 101 N. C. 728, 7 S. E. 895; State *v.* Edney, 80 N. C. 360; Washington *v.* Hammond, 76 N. C. 33.

South Carolina.— State *v.* Holcomb, 63 S. C. 22, 40 S. E. 1017; State *v.* Cooler, 30 S. C. 105, 8 S. E. 692, 3 L. R. A. 181.

Texas.— State *v.* Newhous, 41 Tex. 185; *Ex p.* McGrew, 40 Tex. 472; Jacobs *v.* State, 35 Tex. Crim. 410, 34 S. W. 110.

Wyoming.—Houtz *v.* Minta County, (1902) 70 Pac. 840.

See 14 Cent. Dig. tit. "Criminal Law," § 133.

Forfeiture of property, payment of costs, disfranchisement, etc.— A statute imposing forfeiture of property as a punishment for a crime ousts the justice of the peace of the jurisdiction of that crime, although the fine and imprisonment imposed in addition are such as he has jurisdiction to impose (Klyman *v.* Com., 97 Ky. 484, 30 S. W. 985, 17 Ky. L. Rep. 237); but the fact that a statute in addition to a fine and imprisonment requires a defendant to pay the costs of prosecution and recognize for his subsequent good behavior (Com. *v.* Burns, 14 Gray (Mass.) 35; Com. *v.* Carr, 11 Gray (Mass.) 463), or simply to pay the costs as the justice shall order (Faulks *v.* People, 39 Mich. 200, 33 Am. Rep. 374), or prohibits the issuance of a license for a specified period to the person convicted (State *v.* Larson, 40 Minn. 63, 41 N. W. 363), or provides that the offender shall be disfranchised (Stevens *v.* Anderson, 145 Ind. 304, 44 N. E. 460) does

diction to try a criminal case punishable by a fine and imprisonment.[62] Where the jurisdiction of a justice is limited to cases in which the fine cannot or does not exceed a certain amount, he has no jurisdiction where the fine may exceed such amount, although he imposes a fine of a less amount.[63]

4. Territorial Extent of Jurisdiction. In England each single justice, by virtue of his commission, exercised a jurisdiction to preserve the peace, and with one or more of his associates to hear and determine crimes throughout the whole county.[64] In the United States the territorial jurisdiction of justices generally extends and is confined to the counties in which they reside.[65] But conferring the powers of a justice of the peace upon a municipal court does not alone extend its territorial jurisdiction beyond the city limits,[66] nor exclude the jurisdiction of a justice for the county within the city limits, unless the intention to do so is very clear.[67]

5. Concurrent and Exclusive Jurisdiction. Inasmuch as the jurisdiction of justices is wholly statutory in the United States, the legislature may abolish or transfer such jurisdiction to other minor courts where it is not prohibited by the

not oust the justice of jurisdiction to try and determine, where the fine or imprisonment or both imposed are within his jurisdiction to impose. If the punishment imposed by the statute, which is beyond the jurisdiction of the justice to inflict, is simply incidental to that punishment, as would be the case where he imposes costs or takes recognizance (Com. *v.* Burns, 14 Gray (Mass.) 35), or where it simply involves loss of social or financial standing and reputation, which is a result of a conviction of crime in any case (State *v.* Larson, 40 Minn. 63, 41 N. W. 363), he retains jurisdiction. A justice generally has no power to inflict the punishment of exclusion from franchise and office (Johnson *v.* Com., 90 Ky. 53, 13 S. W. 520, 12 Ky. L. Rep. 20; Cheek *v.* Com., 87 Ky. 42, 7 S. W. 403, 9 Ky. L. Rep. 880), to punish by imprisonment where the statute limits his jurisdiction to punishment by fine only (Jenkins *v.* State, 78 Ind. 133; Tuttle *v.* State, 1 Tex. App. 364), or to inflict a fine or imprisonment according to the gravity of the offense, where the statute fixes no limit and leaves the amount of the fine and the term solely in the discretion of the court (State *v.* Madden, 28 S. C. 50, 4 S. E. 810. *Contra*, Foust *v.* State, 12 Lea (Tenn.) 404).

62. State *v.* Yates, 36 Nebr. 287, 54 N. W. 429.

If two punishments are by statute provided for the same offense, the justice is not deprived of jurisdiction where in the statute providing for the greater punishment it is expressly provided that it shall not be imposed where another is specifically provided for, and another is specifically provided for by another statute. State *v.* Meek, 112 Iowa 338, 84 N. W. 3, 84 Am. St. Rep. 342, 51 L. R. A. 414.

63. State *v.* Wiseman, 131 N. C. 795, 42 S. E. 826, holding that where the constitution limited the jurisdiction of justices to cases where the fine could not exceed fifty dollars, and a statute permitted a fine of as much as ten dollars for each hog permitted to run at large, a justice had no jurisdiction where the warrant charged the running at large of ten hogs, although he imposed a fine of two dollars only for each hog. And see the other cases cited *supra*, note 61.

64. 5 Bacon Abr. 409.

65. *Alabama.*— Murphy *v.* State, 68 Ala. 31.

California.—*Ex p.* Cook, (1895) 39 Pac. 16.

Florida.— Blue *v.* State, 32 Fla. 53, 13 So. 637.

Massachusetts.— Com. *v.* Gillon, 2 Allen 502; Com. *v.* Pindar, 11 Metc. 539.

Michigan.— Faulks *v.* People, 39 Mich. 200, 33 Am. Rep. 374.

Minnesota.— State *v.* Bowen, 45 Minn. 145, 47 N. W. 650; State *v.* Anderson, 25 Minn. 66, 33 Am. Rep. 455.

New Hampshire.— State *v.* Bean, 36 N. H. 122; State *v.* Ricker, 32 N. H. 179.

Texas.— Toliver *v.* State, 32 Tex. Crim. 444, 24 S. W. 286; Hart *v.* State, 15 Tex. App. 202, 49 Am. Rep. 188.

See 14 Cent. Dig. tit. "Criminal Law," § 134; and, generally, Justices of the Peace.

66. *Alabama.*— Murphy *v.* State, 68 Ala. 31.

Connecticut.— State *v.* Hanchett, 38 Conn. 35.

Illinois.— Laswell *v.* Hickox, 5 Ill. 181.

Massachusetts.— Piper *v.* Pearson, 2 Gray 120, 61 Am. Dec. 438.

Minnesota.— State *v.* Bowen, 45 Minn. 145, 47 N. W. 650.

North Carolina.— *Ex p.* McLaurine, 63 N. C. 528.

See 14 Cent. Dig. tit. "Criminal Law," § 134.

67. State *v.* Olson, 58 Minn. 431, 59 N. W. 1038, holding that the jurisdiction of justices of the peace to try offenses within their respective counties is not destroyed by a statute conferring criminal jurisdiction on the municipal court, and a justice of the peace living outside of the city has jurisdiction of a crime committed within the city. See *infra*, VI, D, 5.

state constitution from doing so.[68] A statute creating a local court, in the nature of a police court, with jurisdiction of crimes usually triable by justices of the peace, does not oust the justices' courts of jurisdiction,[69] unless the intention of the legislature to that effect is expressly stated or arises by necessary implication.[70]

E. Jurisdiction of Offenses Against Different Sovereignties — 1. Against United States and State or Territory — a. General Rule. The criminal jurisdiction of the federal courts is confined to crimes under federal statutes, except as to common-law offenses committed on the high seas or in places or districts within a state which have been ceded by the state to the United States, and which when the crime was committed were under the exclusive jurisdiction of the United States.[71] Jurisdiction to punish for a crime committed within a state belongs to the state courts, unless it clearly and conclusively appears to be within the jurisdiction of the federal court.[72] State courts have no jurisdiction of offenses against the United States,[73] but offenses which are directed against the sovereignty of a state or affect its population are within the jurisdiction of the state courts, although such offenses may also be directed against the sovereignty of the federal government, and may be thus within the jurisdiction of both the federal and state courts.[74] And where the federal courts have exclusive jurisdiction of one aspect of a crime the state court may have jurisdiction of another phase of the same crime.[75]

68. People *v.* Duffy, 49 Hun 276, 1 N. Y. Suppl. 896.

69. Com. *v.* Brady, 7 Gray (Mass.) 320; Com. *v.* Pindar, 11 Metc. (Mass.) 539; People *v.* Pond, 67 Mich. 98, 34 N. W. 647; State *v.* Olson, 58 Minn. 431, 59 N. W. 1038. And see *supra*, VI, B, 3.

70. *Massachusetts.*— Piper *v.* Pearson, 2 Gray 120, 61 Am. Dec. 438.

Minnesota.— State *v.* Russell, 69 Minn. 499, 72 N. W. 837.

New Hampshire.— Marshall *v.* State, 62 N. H. 353.

New Jersey.— Adams *v.* Nash, 51 N. J. L. 305, 17 Atl. 290; McLorinan *v.* Ryno, 49 N. J. L. 603, 10 Atl. 189; Duffy *v.* Britton, 48 N. J. L. 371, 7 Atl. 679.

New York.— People *v.* Duffy, 49 Hun 276, 1 N. Y. Suppl. 896; People *v.* McDonald, 26 Hun 156; People *v.* Whitney, 24 Misc. 264, 53 N. Y. Suppl. 570.

See 14 Cent. Dig. tit. "Criminal Law," § 136.

A statute conferring exclusive jurisdiction over criminal offenses on a police court means exclusive jurisdiction not as against all courts, but as against those of the grade of justices of the peace. State *v.* Jones, 73 Me. 280.

71. U. S. *v.* Shepherd, 27 Fed. Cas. No. 16,274, 1 Hughes 520.

Whether a crime committed within the state boundaries is an offense against the laws of the United States depends on: First, whether there has been such a cession by the state to the United States of the land on which the alleged criminal act was committed as to render it a "place or district of country under the exclusive jurisdiction of the United States," within U. S. Rev. St. (1878) § 5339 [U. S. Comp. St. (1901) p. 3627], and this is a question of law; second, if such cession was made, then it is a question of fact whether the act was committed within the territory so ceded. U. S. *v.* Lewis, 111 Fed. 630.

Ownership of land by government.— The fact that the United States government when Kansas was admitted as a state owned land in fee simple, which was occupied by a fort, was held not to give it exclusive jurisdiction over crimes committed on that land, where the legislature of the state of Kansas never consented to such jurisdiction. U. S. *v.* Stahl, 27 Fed. Cas. No. 16,373, Woolw. 192, McCahon (Kan.) 206. If the land has been ceded by the consent of the legislature of the state to the United States it is immaterial that it has not been purchased. U. S. *v.* Carter, 84 Fed. 622.

Session of state court in federal building.— The fact that a state court, with the consent and permission of the authorized agent of the federal government, holds its sessions in a building on land which has been ceded to the federal government by the state legislature for a custom-house does not prevent a state court from having jurisdiction of perjury committed while the court was in session. Exum *v.* State, 90 Tenn. 501, 17 S. W. 107, 25 Am. St. Rep. 700, 15 L. R. A. 381.

72. People *v.* Lane, 1 Edm. Sel. Cas. (N. Y.) 116; *Ex p.* Ballinger, 88 Fed. 781; U. S. *v.* Stahl, 27 Fed. Cas. No. 16,373, Woolw. 192, McCahon (Kan.) 206.

73. Ross *v.* State, 55 Ga. 192, 21 Am. Rep. 278; U. S. *v.* Campbell, Tapp. (Ohio) 61. See also *supra*, II, B, 4, a; VI, B, 4.

74. Jett *v.* Com., 18 Gratt. (Va.) 933; State *v.* Coss, 12 Wash. 673, 42 Pac. 127; U. S. *v.* Lackey, 99 Fed. 952; U. S. *v.* Wells, 28 Fed. Cas. No. 16,665. See also *supra*, II, B, 4, a; VI, B, 4.

75. People *v.* Welch, 141 N. Y. 266, 36 N. E. 328, 38 Am. St. Rep. 793, 24 L. R. A. 117. See also *supra*, II, B, 4, a; VI, B, 4.

b. Mail Service. A state court has no jurisdiction over the crime of feloniously robbing the mails, which is an offense created by United States statute.[76]

c. Distribution of Public Lands. A state court has no jurisdiction of perjury committed in a proceeding relative to the sale or preëmption of public land under federal statutes,[77] but where congress has not declared that some act done in relation to such sale or preëmption shall be a crime, it may be punished by the state courts when it is a crime under state statutes.[78]

d. Administration of Justice. A state court has no jurisdiction of perjury committed before a notary public in a contest for a seat in the federal house of representatives,[79] or on a trial in the federal court.[80]

e. Collection of Internal Revenue. A state court has no jurisdiction to try an offense created by the internal revenue laws, but a crime which in one aspect is a crime under the internal revenue laws may be tried by a state court, if in another aspect it is a crime against the state.[81]

f. National Banks. The federal courts have exclusive jurisdiction to try the crime of embezzlement of the funds of a national bank by its officers.[82]

g. Ambassadors and Consuls. The original jurisdiction conferred by the constitution on the United States supreme court in all cases affecting ambassadors, other public ministers, and consuls, is not exclusive as regards criminal proceedings.[83] The circuit courts of the United States have jurisdiction under the act of

Manslaughter by pilot.—A homicide resulting from the wilful negligence of a pilot in navigating a boat on a river within the boundaries of a state is within the jurisdiction of a state court, and such jurisdiction is not ousted by U. S. Rev. St. (1878) § 5344 [U. S. Comp. St. (1901) p. 3629], which provides that every pilot by whose misconduct, negligence, or inattention to his duty the life of any person is destroyed is guilty of manslaughter, as the offense charged in the indictment in the state court was a wilful and felonious assault and differed from that provided for by the Revised Statutes. People *v.* Welch, 141 N. Y. 266, 36 N. E. 328, 38 Am. St. Rep. 793, 24 L. R. A. 117 [*affirming* 74 Hun 474, 26 N. Y. Suppl. 694]; *In re* Welch, 57 Fed. 576.

Murder committed by derailing a mail train is punishable as such in the state courts, although the act is also an offense against the laws of the United States. Crossley *v.* California, 168 U. S. 640, 18 S. Ct. 242, 42 L. ed. 610.

76. State *v.* McBride, Rice (S. C.) 400; Com. *v.* Feely, 1 Va. Cas. 321.

But the crime of impersonating another and opening his letters for the purpose of prying into his affairs, which is an offense at common law, has been held not to be within the exclusive jurisdiction of the United States court, although by act of congress such offense is a crime. Gill's Case, 3 City Hall Rec. (N. Y.) 61.

77. State *v.* Kirkpatrick, 32 Ark. 117; People *v.* Kelly, 38 Cal. 145, 99 Am. Dec. 360; State *v.* Adams, 4 Blackf. (Ind.) 146.

78. State *v.* Glasgow, 1 N. C. 176, 2 Am. Dec. 629; Com. *v.* Schaffer, 4 Dall. (Pa.) appendix xxvi, 1 L. ed. 926.

79. Thomas *v.* Loney, 134 U. S. 372, 10 S. Ct. 584, 33 L. ed. 949 [*affirming* 38 Fed. 101]; *Ex p.* Bridges, 4 Fed. Cas. No. 1,862, 2 Woods 428.

Perjury in naturalization proceedings see *supra*, II, B, 4, a.

80. State *v.* Shelley, 11 Lea (Tenn.) 594.

Persons who conspire to deprive a prisoner in the custody of a United States marshal of his constitutional right to a speedy and public trial are offenders under U. S. Rev. St. (1878) § 508, and where under such conspiracy murder is committed by them, they are liable to be tried and punished in the federal court under U. S. Rev. St. (1878) § 5509 [U. S. Comp. St. (1901) p. 3712]. U. S. *v.* Logan, 45 Fed. 872.

81. State *v.* Harmon, 104 N. C. 792, 10 S. E. 474, holding that stealing distilled spirits from a government warehouse may be larceny, triable in the state courts, although indictable under U. S. Rev. St. (1878) § 3296 [U. S. Comp. St. (1901) p. 2136], making it an offense to remove them from such warehouse before the tax is paid.

Bribe to federal officer.— U. S. Rev. St. (1878) § 5451 [U. S. Comp. St. (1901) p. 3680], making it a crime to offer to bribe an officer of the United States with intent to influence him to do an act in violation of his duty, does not apply to the offer of a bribe to influence him to set fire to a distillery, and is not triable in a federal court. U. S. *v.* Gibson, 47 Fed. 833.

82. State *v.* Tuller, 34 Conn. 280; Com. *v.* Felton, 101 Mass. 204; People *v.* Fonda, 62 Mich. 401, 29 N. W. 26; Com. *v.* Ketner, 92 Pa. St. 372, 37 Am. Rep. 692. See *supra*, II, B, 4, a.

83. The Judiciary Act, after providing that the supreme court shall have such exclusive jurisdiction of suits or proceedings against ambassadors, public ministers, and their servants, as a court of law can have consistently with the law of nations, provides that it shall have original but not exclusive jurisdiction of all suits by ambassadors or other public ministers, or in which a consul

congress to try a person accused of an assault on a representative of a foreign government.[84]

h. Federal Elections. The United States circuit court has jurisdiction of crimes arising out of the interference with or resisting federal officials in the performance of their duty at a congressional election,[85] but the state courts have jurisdiction of the offense of fraudulent voting and other offenses at elections for presidential electors.[86]

i. Violation of Federal Bankruptcy Act. A state court has no jurisdiction to try a charge of perjury committed in testifying in a bankruptcy proceeding.[87]

2. Offenses Against State and Municipality. Where a statute confers jurisdiction on a court to try and determine offenses against the state, it will be presumed that such jurisdiction is concurrent with a municipal court enforcing an ordinance which provides for the punishment of the same criminal act;[88] but the state courts have no jurisdiction where an offense is only punishable as a breach of an ordinance[89] or where the legislature has expressly given the municipal courts exclusive jurisdiction.[90]

F. Jurisdiction as Determined by Locality of Crime — 1. General Rule. Since a state has no jurisdiction to punish crimes committed beyond its limits, the courts of one state have no jurisdiction to enforce the criminal laws of another state or to punish crimes committed in another state.[91]

or vice-consul shall be a party, and a subsequent section provides that the circuit courts shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act or some other statute provides otherwise. Under this provision it was held that a foreign consul was indictable and triable in the circuit court for sending anonymous and threatening letters with intent to extort money. U. S. *v.* Ravara, 27 Fed. Cas. No. 16,122, 2 Dall. 297; 27 Fed. Cas. No. 16,122*a*, 2 Dall. 299 note.

84. U. S. *v.* Benner, 24 Fed. Cas. No. 14,568, Baldw. 234; U. S. *v.* Liddle, 26 Fed. Cas. No. 15,598, 2 Wash. 205; U. S. *v.* Ortega, 27 Fed. Cas. No. 15,971, 4 Wash. 531 [*affirmed* on this point in 11 Wheat. (U. S.) 467, 6 L. ed. 521].

Servant of ambassador.— It was held, but with no opposition on the part of the government, that a charge against a domestic servant of a foreign minister was not within the jurisdiction of the circuit court in the District of Columbia. U. S. *v.* Lafontaine, 26 Fed. Cas. No. 15,550, 4 Cranch C. C. 173.

85. Coy's Case, 127 U. S. 731, 8 S. Ct. 1263, 32 L. ed. 274; *Ex p.* Siebold, 100 U. S. 371, 25 L. ed. 717.

86. Mason *v.* State, 55 Ark. 529, 18 S. W. 827; Fitzgerald *v.* Green, 134 U. S. 377, 10 S. Ct. 586, 33 L. ed. 951.

87. State *v.* Pike, 15 N. H. 83.

Concealment of property by a bankrupt before bankruptcy is not exclusively within the jurisdiction of the federal court, but in so far as it constitutes a fraud on creditors may be prosecuted in the state court. State *v.* Thompson, 58 N. H. 270.

False pretense.—Although the federal bankruptcy act declares that false pretense "of carrying on business and dealing in the ordinary course of trade" is a crime, the state court has jurisdiction to try a bankrupt for false pretenses, which consist in misrepresentations of the amount of capital he employed in business, as the state statute is general and the United States statute relates to but a single and specific false pretense. Abbott *v.* People, 75 N. Y. 602 [*affirming* 15 Hun 437].

88. *Georgia.*— Reich *v.* State, 53 Ga. 73, 21 Am. Rep. 265.

Illinois.— Hankins *v.* People, 106 Ill. 628; Fant *v.* People, 45 Ill. 259; Berry *v.* People, 36 Ill. 423.

Kansas.— Rice *v.* State, 3 Kan. 141.

Louisiana.— State *v.* Prats, 10 La. Ann. 785.

Missouri.— State *v.* Wister, 62 Mo. 592; State *v.* Gordon, 60 Mo. 383.

New Jersey.— State *v.* Plunkett, 18 N. J. L. 5.

See 14 Cent. Dig. tit. "Criminal Law," § 176; *supra*, II, B, 4, b; and, generally, Municipal Corporations.

89. Garland *v.* Denver, 11 Colo. 534, 19 Pac. 460.

90. State *v.* Gordon, 60 Mo. 383; State *v.* Threadgill, 76 N. C. 17; State *v.* White, 76 N. C. 15.

91. *Connecticut.*— Gilbert *v.* Steadman, 1 Root 403.

Indiana.— Johns *v.* State, 19 Ind. 421, 81 Am. Dec. 408.

Kansas.— *Ex p.* Carr, 28 Kan. 1.

Louisiana.— State *v.* Reonnals, 14 La. Ann. 278.

Michigan.— Tyler *v.* People, 8 Mich. 320.

Missouri.— State *v.* Johnson, 115 Mo. 480, 22 S. W. 463.

New York.—Manley *v.* People, 7 N. Y. 295; People *v.* Merrill, 2 Park. Crim. 590.

North Carolina.— State *v.* Hall, 114 N. C. 909, 19 S. E. 602, 41 Am. St. Rep. 822, 28 L. R. A. 59; State *v.* Mitchell, 83 N. C. 674; State *v.* Knight, 1 N. C. 44.

Pennsylvania.— Com. *v.* Kunzmann, 41 Pa. St. 429.

Virginia.— Com. *v.* Gaines, 2 Va. Cas. 172.

2. FEDERAL COURTS. So with the exception of the jurisdiction exercised over crimes on the high seas or by treaty stipulation in foreign countries the jurisdiction of the federal courts is limited to the territory of the United States.[92] Other questions as to the jurisdiction of the federal courts are treated in the sections following.

3. LOCALITY OF OFFENSES — a. In General. The locality of an offense is the place where the act or acts constituting the same are committed,[93] but it is sometimes difficult to apply this rule to particular crimes,[94] and to determine the locality of a crime where several persons participate at different places.[95]

b. Offenses by Persons Beyond State Boundaries. Where a person, being beyond the limits of a state, puts in operation a force which produces a result and constitutes a crime within those limits, he is as liable to indictment and punishment, if jurisdiction can be obtained of his person, as if he had been within the limits of the state when the crime was committed.[96] This is true of crimes committed by means of an innocent agent. Where a person outside of a state procures a crime to be committed within the state by means of an innocent agent, he is responsible in such state as a principal.[97] By the weight of authority, where a person outside of a state procures a felony to be committed in the state by a criminal agent, or conspires with others in the state to commit a crime, he is an accessary before the fact and triable as such in the state where he instigates or suggests the crime, and not in the state where the crime is committed by the principal,[98]

England.— Reg. *v.* Garrett, 2 C. L. R. 106, 6 Cox C. C. 260, Dears. C. C. 232, 17 Jur. 1060, 23 L. J. M. C. 20, 2 Wkly. Rep. 97, 22 Eng. L. & Eq. 607; Rex *v.* Munton, 1 Esp. 62; Rex *v.* Hooker, 7 Mod. 193; Musgrave *v.* Medex, 19 Ves. Jr. 652.

See 14 Cent. Dig. tit. "Criminal Law," § 177 *et seq.*

92. U. S. *v.* Smiley, 27 Fed. Cas. No. 16,317, 6 Sawy. 640.

93. Locality within the state or venue see *infra*, VII, A, 3.

94. See *infra*, VI, F, 3, d.

95. See *infra*, VI, F, 3, b, c.

96. *California.*—*Ex p.* Hedley, 31 Cal. 108.

Connecticut.—State *v.* Grady, 34 Conn. 118.

Georgia.— Simpson *v.* State, 92 Ga. 41, 17 S. E. 984, 44 Am. St. Rep. 75, 22 L. R. A. 248.

Indiana.— Johns *v.* State, 19 Ind. 421, 81 Am. Dec. 408.

Massachusetts.— Com. *v.* White, 123 Mass. 430, 25 Am. Rep. 116; Com. *v.* Smith, 11 Allen 243; Com. *v.* Blanding, 3 Pick. 304, 15 Am. Dec. 214.

New Jersey.— Noyes *v.* State, 41 N. J. L. 418.

New York.— People *v.* Adams, 3 Den. 190, 45 Am. Dec. 468 [*affirmed* in 1 N. Y. 173].

North Carolina.— State *v.* Hall, 114 N. C. 909, 19 S. E. 602, 41 Am. St. Rep. 822, 28 L. R. A. 59.

Ohio.— Lindsey *v.* State, 38 Ohio St. 507; Robbins *v.* State, 8 Ohio St. 131.

South Carolina.— State *v.* Morrow, 40 S. C. 221, 18 S. E. 853.

Texas.— Rogers *v.* State, 11 Tex. App. 608.

United States.— U. S. *v.* Davis, 25 Fed. Cas. No. 14,932, 2 Sumn. 482.

England.— Reg. *v.* Jones, 4 Cox C. C. 198; Rex *v.* Brisac, 4 East 164.

See 14 Cent. Dig. tit. "Criminal Law," § 181.

Illustrations in particular offenses see *infra*, VI, F, 3, d.

97. *Alabama.*— Bishop *v.* State, 30 Ala. 34.

Arkansas.— State *v.* Chapin, 17 Ark. 561, 65 Am. Dec. 452.

Connecticut.— State *v.* Grady, 34 Conn. 118; Barkhamsted *v.* Parson, 3 Conn. 1.

Massachusetts.— Com. *v.* White, 123 Mass. 430, 25 Am. Rep. 116; Com. *v.* Smith, 11 Allen 243; Com. *v.* Hill, 11 Mass. 136.

New Jersey.— Noyes *v.* State, 41 N. J. L. 418.

New York.— Adams *v.* People, 1 N. Y. 173 [*affirming* 3 Den. 190, 45 Am. Dec. 468]; People *v.* Wiley, 20 N. Y. Suppl. 445; People *v.* Rathbun, 21 Wend. 509.

Ohio.— Lindsey *v.* State, 38 Ohio St. 507; Norris *v.* State, 25 Ohio St. 217, 18 Am. Rep. 291.

Texas.— Rogers *v.* State, 11 Tex. App. 608.

England.— Reg. *v.* Garrett, 2 C. L. R. 106, 6 Cox C. C. 260, Dears. C. C. 232, 17 Jur. 1060, 23 L. J. M. C. 20, 2 Wkly. Rep. 97, 22 Eng. L. & Eq. 607; Rex *v.* Brisac, 4 East 164.

See 14 Cent. Dig. tit. "Criminal Law," § 181.

Particular offenses through innocent agent see *infra*, VI, F, 3, d.

98. *Arkansas.*— State *v.* Chapin, 17 Ark. 561, 65 Am. Dec. 452.

Indiana.— Johns *v.* State, 19 Ind. 421, 81 Am. Dec. 408.

New Hampshire.— State *v.* Moore, 26 N. H. 448, 59 Am. Dec. 354.

New Jersey.— State *v.* Wyckoff, 31 N. J. L. 65.

New York.— People *v.* Hall, 57 How. Pr. 342. And see People *v.* Rathbun, 21 Wend. 509.

United States.— *Ex p.* Smith, 22 Fed. Cas. No. 12,968, 3 McLean 121.

See 14 Cent. Dig. tit. "Criminal Law," § 181.

unless by express statutory provision.[99] This rule does not apply, however, to misdemeanors in which there are no accessaries, but all who take part are principals, whether present or absent.[1]

c. Offenses Committed by Use of the Mails. The jurisdiction to try an offense committed by means of the United States mail depends upon where the offense was consummated.[2] The crime of causing lottery matter to be delivered by mail is committed in the state where the letter is received, although it was mailed elsewhere.[3] The place of the mailing determines the jurisdiction in the crime of transmitting false papers to the pension office.[4] If a criminal act put in operation by use of the mail outside of the state produces a result in the state constituting a crime, the user of the mail is guilty as principal on the ground that the post-office is an innocent agent.[5]

d. Particular Offenses — (1) *Larceny.* Some courts have held, independently of statutory provision, that where goods are stolen in one state of the Union and carried into another there is a larceny in the latter, on the ground that each moment's continuance of the trespass and felony amounts to a new taking and asportation, and that the courts of the state into which the goods are brought have jurisdiction to punish as for larceny in such state.[6] Other courts have held

Contra.— State *v.* Grady, 34 Conn. 118, holding that if a felony is committed in one state by the procuration of a resident of another state, who does not himself personally come into the first state to assist in the felony, such non-resident can be punished in the state where the felony is committed, if jurisdiction can be obtained of his person, although the person actually committing the felony is a guilty agent, and the non-resident is merely an accessary before the fact.

99. In Johns *v.* State, 19 Ind. 421, 81 Am. Dec. 408, it was held that a statute providing that every person, being without the state, committing or consummating an offense by an agent or means within the state, is liable to be punished in the same manner as if he were present and had commenced and consummated the offense within the state, embraces those persons only who without the state commit a crime which in legal contemplation is to be deemed as having been committed within the state under circumstances making the person committing it a principal in the crime, and does not apply to a person who out of the state becomes accessary before the fact to a felony committed within the state.

1. Com. *v.* Eggleston, 128 Mass. 408 (sale of intoxicating liquors); Com. *v.* Smith, 11 Allen (Mass.) 243 (subornation of perjury); Com. *v.* Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214 (libel); Com. *v.* Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475 (sale of lottery tickets); Rex *v.* Brisac, 4 East 164 (forgery, uttering, and cheating). See *supra*, V, A.

2. Where the accused in one judicial district mailed a letter to a postmaster in another to induce him to violate his official duty, the offense is committed where the letter is received. *In re* Palliser, 136 U. S. 257, 10 S. Ct. 1034, 34 L. ed. 514. *Compare* U. S. *v.* Worral, 28 Fed. Cas. No. 16,766, 2 Dall. 384, 1 L. ed. 426.

Uttering forged instrument see *infra*, VI, F, 3, d, (v).

Sending libelous letter see *infra*, VI, F, 3, d, (x).

3. Where a statute makes it a crime to deliver lottery matter through the mails, distinct from depositing it in the mails, the venue of the crime is the district in which the letter is received, although the accused mailed it in another. Horner *v.* U. S., 143 U. S. 207, 12 S. Ct. 407, 36 L. ed. 126 [*affirming* 44 Fed. 677].

4. U. S. *v.* Bickford, 24 Fed. Cas. No. 14,591, 4 Blatchf. 337.

5. Bishop *v.* State, 30 Ala. 34; People *v.* Adams, 3 Den. (N. Y.) 190, 45 Am. Dec. 468 [*affirmed* in 1 N. Y. 173]; Lindsey *v.* State, 38 Ohio St. 507; State *v.* Morrow, 40 S. C. 221, 18 S. E. 853. See also Reg. *v.* Garrett, 2 C. L. R. 106, 6 Cox C. C. 260, Dears. C. C. 232, 17 Jur. 1060, 23 L. J. M. C. 20, 2 Wkly. Rep. 97, 22 Eng. L. & Eq. 607; Rex *v.* Brisac, 4 East 164. And see *supra*, VI, F, 3, b; *infra*, VI, F, 3, d, (IV), (V), (VIII).

6. *Connecticut.*— State *v.* Cummings, 33 Conn. 260, 89 Am. Dec. 208; State *v.* Ellis, 3 Conn. 185, 8 Am. Dec. 175; Rex *v.* Peas, 1 Root 69.

Illinois.— Stinson *v.* People, 43 Ill. 397; Myers *v.* People, 26 Ill. 173.

Iowa.— State *v.* Bennett, 14 Iowa 479.

Kentucky.— Ferrill *v.* Com., 1 Duv. 153.

Maine.— State *v.* Underwood, 49 Me. 181, 77 Am. Dec. 254.

Maryland.— Worthington *v.* State, 58 Md. 403, 42 Am. Rep. 338; Cummings *v.* State, 1 Harr. & J. 340.

Massachusetts.— Com. *v.* Parker, 165 Mass. 526, 43 N. E. 499; Com. *v.* Andrews, 2 Mass. 14, 3 Am. Dec. 17; Com. *v.* Cullins, 1 Mass. 116.

Mississippi.— Watson *v.* State, 36 Miss. 593.

Ohio.— Hamilton *v.* State, 11 Ohio 435. But see Stanley *v.* State, 24 Ohio St. 166, 15 Am. Rep. 604.

Oregon.— State *v.* Johnson, 2 Oreg. 115. See also State *v.* Barnett, 15 Oreg. 77, 14 Pac. 737.

the contrary.[7] There is also a conflict of opinion as to whether an indictment for larceny will lie where goods are stolen in a foreign country, as Canada for instance, and brought into one of the states.[8] In a number of the states the bringing into the state goods stolen in another state or in a foreign country is made punishable as larceny by express statutory provision, and such statutes have been sustained.[9] Where this rule obtains at common law or by statute a person outside of a state is guilty of larceny if he steals goods outside of the state and sends them into the state by an innocent agent.[10]

(II) *Receiving Stolen Goods.* In those states in which by statute or at common law it is larceny to bring into the state goods stolen in another state or a foreign country,[11] one who there receives goods with knowledge that they have been stolen in another state or country is liable to indictment for receiving stolen goods.[12] This does not apply, however, in those states in which it is held that bringing into the state goods stolen in another state or a foreign country does not constitute larceny, for the goods must have been stolen in the jurisdiction in which it is sought to punish for the receiving.[13]

(III) *Embezzlement.* The jurisdiction of the crime of embezzlement, in the absence of a statute, is in the state in which the money or property was converted, although it may have been received in another state;[14] but the legislature of a state may punish the embezzlement of property received in the state and converted in another state.[15] A person may commit embezzlement in a state while

South Carolina.— State *v.* Hill, 19 S. C. 435.

Vermont.— State *v.* Bartlett, 11 Vt. 650.

United States.— U. S. *v.* Tolson, 28 Fed. Cas. No. 16,530, 1 Cranch C. C. 269. See also U. S. *v.* Mortimer, 27 Fed. Cas. No. 15,821, 1 Hayw. & H. 215.

See 14 Cent. Dig. tit. "Criminal Law," § 178; and *infra*, VII, A, 3, d.

7. *Georgia.*— Lee *v.* State, 64 Ga. 203, 37 Am. Rep. 67.

Indiana.— Beal *v.* State, 15 Ind. 378.

Louisiana.— State *v.* Reonnals, 14 La. Ann. 278.

Nebraska.— People *v.* Loughridge, 1 Nebr. 11, 93 Am. Dec. 325.

Nevada.— State *v.* Newman, 9 Nev. 48, 16 Am. Rep. 3.

New Jersey.— State *v.* Le Blanch, 31 N. J. L. 82.

New York.— People *v.* Schenck, 2 Johns. 479; People *v.* Gardner, 2 Johns. 477; McCullough's Case, 2 City Hall Rec. 45.

North Carolina.— State *v.* Brown, 2 N. C. 100, 1 Am. Dec. 548.

Pennsylvania.— Simmons *v.* Com., 5 Binn. 617.

Tennessee.— Simpson *v.* State, 4 Humphr. 456.

Virginia.— Strouther *v.* Com., 92 Va. 789, 22 S. E. 852, 53 Am. St. Rep. 852.

See 14 Cent. Dig. tit. "Criminal Law," § 178.

8. That an indictment will lie in such a case see State *v.* Underwood, 49 Me. 181, 77 Am. Dec. 254; State *v.* Bartlett, 11 Vt. 650. And see State *v.* Williams, 35 Mo. 229. That it will not see Com. *v.* White, 123 Mass. 430, 25 Am. Rep. 116; Com. *v.* Uprichard, 3 Gray (Mass.) 434, 63 Am. Dec. 762; Stanley *v.* State, 24 Ohio St. 166, 15 Am. Rep. 604; Rex *v.* Prowes, 1 Moody C. C. 349. See also Reg. *v.* Carr, 15 Cox C. C. 131 note *a*.

9. *Alabama.*— Murray *v.* State, 18 Ala. 727; State *v.* Seay, 3 Stew. 123, 20 Am. Dec. 66.

California.— People *v.* Black, 122 Cal. 73, 54 Pac. 385; People *v.* Staples, 91 Cal. 23, 27 Pac. 523.

Kansas.— McFarland *v.* State, 4 Kan. 68.

Michigan.— People *v.* Williams, 24 Mich. 156, 9 Am. Rep. 119.

Missouri.— State *v.* Williams, 35 Mo. 229; Hemmaker *v.* State, 12 Mo. 453, 51 Am. Dec. 172.

New York.— People *v.* Burke, 11 Wend. 129.

Oregon.— State *v.* Barnett, 15 Oreg. 77, 14 Pac. 737.

Tennessee.— Henry *v.* State, 7 Coldw. 331.

Texas.— Green *v.* State, (Crim. App. 1896) 34 S. W. 283; McKenzie *v.* State, 32 Tex. Crim. 568, 25 S. W. 426, 40 Am. St. Rep. 795; Clark *v.* State, 27 Tex. App. 405, 11 S. W. 374; Sutton *v.* State, 16 Tex. App. 490.

See 14 Cent. Dig. tit. "Criminal Law," § 178.

10. Com. *v.* White, 123 Mass. 430, 25 Am. Rep. 116. See *supra*, VI, F, 3, b.

11. See *supra*, VI, F, 3, d, (I).

12. Com. *v.* White, 123 Mass. 430, 25 Am. Rep. 116; Com. *v.* Andrews, 2 Mass. 14, 3 Am. Dec. 17; U. S. *v.* Mortimer, 27 Fed. Cas. No. 15,821, 1 Hayw. & H. 215.

13. Reg. *v.* Carr, 15 Cox C. C. 131 note *a*; Reg. *v.* Debruiel, 11 Cox C. C. 207. See *supra*, VI, F, 3, d, (I).

14. Lovelace *v.* State, 12 Lea (Tenn.) 721. See People *v.* Murphy, 51 Cal. 376; State *v.* Haskell, 33 Me. 127; State *v.* New, 22 Minn. 76. And see *infra*, VII, A, 3. e.

15. State *v.* Haskell, 33 Me. 127, sustaining a prosecution under a statute making it an offense for one to receive property

he is himself in another state.[16] Where by the common law or by statute it is larceny to bring into the state property stolen in another state, and a statute makes embezzlement larceny, one who brings into the state property embezzled in another state is punishable in the former.[17]

(IV) *False Pretenses.* The crime of obtaining money or property by false pretenses is within the jurisdiction of the courts of the state in which the money or property was obtained, although the false pretenses may have been uttered elsewhere.[18] But it has been held that the courts of the state in which acceptances are obtained by false pretenses have jurisdiction, although the money was obtained on these acceptances in another jurisdiction, and that the courts of the latter have no jurisdiction.[19] If a person while in one state makes false pretenses through the post-office or other innocent agent in another, and there obtains money or property by means of such pretenses, he is indictable in the latter state.[20]

(V) *Forgery and Uttering.* The crimes of forgery and uttering forged paper are within the jurisdiction of the state in which the paper is forged or uttered.[21] Where it is sent through the mail, the offense of uttering is within the jurisdiction of the courts of the state in which it is delivered.[22] A person outside of a state is indictable in the state if he there utters a forged instrument by means of an innocent agent.[23]

(VI) *Homicide.* At common law it was held that the courts of England had no jurisdiction of a prosecution for homicide, where the injury was inflicted in a foreign country or on the high seas (not on a British vessel), and the person injured died in England, or where the injury was inflicted in England and the party died in a foreign country or on the high seas, since in the first case the courts could not take cognizance of the injury, and in the second case they could not take cognizance of the death.[24] And this doctrine has been recognized in the

within the state, to be carried for hire and delivered to a person in another state, and to fraudulently convert it to his own use out of the state before it has been delivered.

16. *Ex p.* Hedley, 31 Cal. 108, holding that an agent residing out of the state, of a principal residing in the state, committed embezzlement in the state by drawing telegraphic checks on his principal in the course of his agency, and converting the money to his own use with intent to embezzle the same.

17. Com. *v.* Parker, 165 Mass. 526, 43 N. E. 499. And see State *v.* Barnett, 15 Oreg. 77, 14 Pac. 737.

18. Stewart *v.* Jessup, 51 Ind. 413, 19 Am. Rep. 739; Com. *v.* Van Tuyl, 1 Metc. (Ky.) 1, 71 Am. Dec. 455; State *v.* Shaeffer, 89 Mo. 271, 1 S. W. 293. See also Reg. *v.* Holmes, 12 Q. B. D. 23, 15 Cox C. C. 343, 53 L. J. M. C. 37, 49 L. T. Rep. N. S. 540, 32 Wkly. 372.

19. U. S. *v.* Plympton, 27 Fed. Cas. No. 16,057, 4 Cranch C. C. 309.

20. Noyes *v.* State, 41 N. J. L. 418; People *v.* Adams, 3 Den. (N. Y.) 190, 45 Am. Dec. 468 [*affirmed* in 1 N. Y. 173]. See also Reg. *v.* Garrett, 2 C. L. R. 106, 6 Cox C. C. 260, Dears. C. C. 232, 17 Jur. 1060, 23 L. J. M. C. 20, 2 Wkly. Rep. 97, 22 Eng. L. & Eq. 607.

21. *In re* Carr, 28 Kan. 1, holding that where a person forged and uttered in Missouri a time check upon a railroad company having its treasurer and treasury in Kansas, and the check was paid off by the authorized agent of the company in Missouri, supposing it to be a valid instrument, the forgery and uttering were wholly consummated in Missouri, although the agent afterward sent the check to the treasurer of the company in Kansas and was given credit therefor on his accounts. See also Thulemeyer *v.* State, 34 Tex. Crim. 619, 31 S. W. 659; Reg. *v.* Garrett, 2 C. L. R. 106, 6 Cox C. C. 260, Dears. C. C. 232, 17 Jur. 1060, 23 L. J. M. C. 20, 2 Wkly. Rep. 97, 22 Eng. L. & Eq. 607.

Statute punishing extraterritorial forgery. — In Hanks *v.* State, 13 Tex. App. 289, the court sustained a statute (Pen. Code, art. 454) providing that persons out of the state might commit and be liable to indictment and conviction for committing any of the offenses enumerated in the chapter, not necessarily requiring in their commission a personal presence in the state, and held that it conferred jurisdiction of the offense of forging in another state an instrument affecting the title to lands in Texas.

22. Foute *v.* State, 15 Lea (Tenn.) 712.

23. Bishop *v.* State, 30 Ala. 34; Lindsey *v.* State, 38 Ohio St. 507. And see Com. *v.* Hill, 11 Mass. 136; Reg. *v.* Garrett, 2 C. L. R. 106, 6 Cox C. C. 260, Dears. C. C. 232, 17 Jur. 1060, 23 L. J. M. C. 20, 2 Wkly. Rep. 97, 22 Eng. L. & Eq. 607. See also *supra*, VI, F, 3 h.

24. 3 Inst. 48; 1 Hale P. C. 426; 2 Hale P. C. 163.

United States.[25] It has also been held in the absence of a statute that the courts of a state have no jurisdiction of a prosecution for homicide, where death resulted within its limits from an injury inflicted in another state or territory,[26] and that the courts of a state have no jurisdiction where the injury was inflicted within its limits and death resulted in another state or territory.[27] Other courts have held that an indictment will lie for the homicide in the state or territory where the injury was inflicted, on the ground that the homicide is committed there.[28] In many jurisdictions this matter is now regulated by statutes, which have been sustained as constitutional.[29] If a person, being in one state or country, mails poison, fires a gun, or does any other act which takes effect and causes the death of a person in another state or country, the homicide is committed in the latter state or country, and its courts only have jurisdiction of the prosecution therefor.[30]

(VII) *ASSAULT AND BATTERY.* If a person while in one jurisdiction intentionally puts in motion a force, as where he fires a gun, which takes effect upon or

25. See State *v.* Carter, 27 N. J. L. 499; Com. *v.* Linton, 2 Va. Cas. 205.

26. State *v.* Kelly, 76 Me. 331, 19 Am. Rep. 620 (where a mortal blow was given in a United States fort and death resulted in Maine outside of the fort); State *v.* Carter, 27 N. J. L. 499.

27. Com. *v.* Linton, 2 Va. Cas. 205; U. S. *v.* Bladen, 24 Fed. Cas. No. 14,605, 1 Cranch C. C. 548.

28. *Alabama.*— Green *v.* State, 66 Ala. 40, 41 Am. Rep. 744.

California.— People *v.* Gill, 6 Cal. 637.

District of Columbia.— U. S. *v.* Guiteau, 10 Fed. 161, 1 Mackey 498, 47 Am. Rep. 247.

Florida.— Roberson *v.* State, 42 Fla. 212, 28 So. 427.

Kansas.— State *v.* Bowen, 16 Kan. 475.

Louisiana.— State *v.* McCoy, 8 Rob. 545, 41 Am. Dec. 301.

Maryland.— Stout *v.* State, 76 Md. 317, 25 Atl. 299.

Minnesota.—State *v.* Gessert, 21 Minn. 369.

Missouri.— State *v.* Garrison, 147 Mo. 548, 49 S. W. 508.

New Jersey.— See Hunter *v.* State, 40 N. J. L. 495; State *v.* Carter, 27 N. J. L. 499.

See 14 Cent. Dig. tit. "Criminal Law," § 179.

29. *Alabama.*— Green *v.* State, 66 Ala. 40, 41 Am. Rep. 744, sustaining a statute providing that when the commission of an offense commenced within the state is consummated without the boundaries of the state the offender is liable to punishment, unless otherwise provided by law, in the county in which the offense was commenced, and holding that under such statute a prosecution would lie for homicide, where the fatal blow was given in the state, although death occurred without the state.

Florida.— Davis *v.* State, (1902) 32 So. 822; Smith *v.* State, 42 Fla. 605, 28 So. 758; Roberson *v.* State, 42 Fla. 212, 28 So. 427, all holding that a circuit court of a county in Florida in which an injury is inflicted, although the death occurs in another state, has jurisdiction of the homicide, under a statute (Rev. St. (1892) § 2360) providing that when the commission of an offense is commenced in the state and is consummated without the boundaries of the state, the offender shall be liable to punishment in the state, and the jurisdiction shall be in the county in which the offense was commenced.

Massachusetts.—Com. *v.* Macloon, 101 Mass. 1, 100 Am. Dec. 89, sustaining a statute providing for the punishment of homicide where death should result within the state from an injury inflicted or poison administered on the high seas or on land without the limits of the state.

Michigan.— Tyler *v.* People, 8 Mich. 320; People *v.* Tyler, 7 Mich. 161, 74 Am. Dec. 703, sustaining a statute punishing homicide in case of death within the state from an injury inflicted without the state.

New Jersey.— Hunter *v.* State, 40 N. J. L. 495, sustaining a statute punishing a homicide where death should result without the state from an injury inflicted or poison administered upon the sea, or at any place without the jurisdiction of the state. In State *v.* Carter, 27 N. J. L. 499, it was said that a statute punishing homicide in case of death within the state from an injury inflicted in another state would be unconstitutional and void as punishing an offense committed without the state; but this *dictum* was criticized in Hunter *v.* State, *supra.*

North Carolina.— State *v.* Caldwell, 115 N. C. 794, 20 S. E. 523.

West Virginia.—*Ex p.* McNeeley, 36 W. Va. 84, 14 S. E. 436, 32 Am. St. Rep. 831, 15 L. R. A. 226.

England.— Reg. *v.* Lewis, 7 Cox C. C. 277, Dears. & B. 182, 3 Jur. N. S. 525, 26 L. J. M. C. 104, 5 Wkly. Rep. 572, holding, however, that an English statute punishing homicide, in case of death in England from an injury inflicted or poison administered upon the sea, or at any place out of England, did not apply in the case of the death of a foreigner in England from injuries inflicted by another foreigner on board a foreign ship at sea.

30. State *v.* Hall, 114 N. C. 909, 19 S. E. 602, 41 Am. St. Rep. 822, 28 L. R. A. 59; U. S. *v.* Davis, 25 Fed. Cas. No. 14,932, 2 Sumn. 482; Rex *v.* Coombes, 1 Leach C. C. 432.

near a person in another jurisdiction, so as to constitute an assault and battery or assault, the offense is committed in the latter jurisdiction.[31]

(VIII) *ABORTION.* Where a person outside of a state delivers to a woman within the state, through the post-office or other innocent agent, a drug sent by him for the purpose of procuring an abortion, and counsels its use for such purpose, and it is so used and the abortion thereby caused, he is guilty of procuring an abortion in the state, and its courts have jurisdiction if they acquire jurisdiction of his person.[32]

(IX) *BIGAMY.* The crime of bigamy is within the jurisdiction of the courts of the state within which the bigamous marriage took place, and not of another state where the parties have afterward cohabited.[33] But under a statute punishing cohabitation after a bigamous marriage, the courts of the state where the parties cohabit have jurisdiction, although the bigamous marriage took place in another state or country.[34]

(X) *LIBEL.* The offense of defamatory, obscene, or seditious libel is committed in the jurisdiction or jurisdictions in which the libel is published.[35] It has been held that where it is sent by mail from one state to a person in another it is published and the subject of an indictment where it is mailed,[36] but this is doubtful.[37]

(XI) *NUISANCE.* It has been held that the offense of creating or maintaining a public nuisance is committed in every jurisdiction in which the act takes effect and creates a nuisance,[38] but there are decisions to the contrary.[39]

(XII) *ABANDONMENT OF CHILDREN.* As the abandonment of children consists in deserting them, the courts of a state to which a father has fled after leaving his children destitute in another state have jurisdiction, although subsequently on their removal to that state he refused to maintain them.[40]

(XIII) *CONSPIRACY.* The courts of the state in which a conspiracy is formed, and in which the conspirators have their headquarters, have jurisdiction of a prosecution for the conspiracy, although they reside elsewhere, and although the conspiracy is carried out or to be carried out elsewhere.[41] And if persons in one state or country enter into a conspiracy to commit a crime in another, and one of the parties in pursuance thereof does an overt act in the latter, all are there indictable for the conspiracy, whether they were present there or not.[42]

4. OFFENSES ON RIVERS FORMING STATE BOUNDARIES. The center of the navigable

31. Simpson *v.* State, 92 Ga. 41, 17 S. E. 984, 44 Am. St. Rep. 75, 22 L. R. A. 248. See also State *v.* Hall, 114 N. C. 909, 19 S. E. 602, 41 Am. St. Rep. 822, 28 L. R. A. 59; Robbins *v.* State, 8 Ohio St. 131, administering poison.

32. State *v.* Morrow, 40 S. C. 221, 18 S. E. 853.

33. *Arkansas.*— Scoggins *v.* State, 32 Ark. 205.

Kentucky.— Johnson *v.* Com., 86 Ky. 122, 5 S. W. 365, 9 Ky. L. Rep. 419, 9 Am. St. Rep. 269; Com. *v.* Ferrell, 3 Ky. L. Rep. 693.

Maine.— State *v.* Sweetsir, 53 Me. 438.

New York.— People *v.* Mosher, 2 Park. Cr. 195.

North Carolina.— State *v.* Barnett, 83 N. C. 615.

Pennsylvania.— Com. *v.* Huckel, 4 Pa. Co. Ct. 576; Guse *v.* Com., 33 Leg. Int. 257.

England.— 5 Bacon Abr. 62; 2 Hawkins P. C. c. 25, § 39.

See also Williams *v.* State, 44 Ala. 24.

34. Scoggins *v.* State, 32 Ark. 205; State *v.* Sloan, 55 Iowa 217, 7 N. W. 516; Com. *v.* Bradley, 2 Cush. (Mass.) 553; State *v.* Johnson, 12 Minn. 476, 93 Am. Dec. 241.

35. Com. *v.* Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214.

36. Mills *v.* State, 18 Nebr. 75, 26 N. W. 354; Com. *v.* Dorrance, 14 Phila. (Pa.) 671; Rex *v.* Burdett, 4 B. & Ald. 95, 175, 22 Rev. Rep. 539, 6 E. C. L. 404.

37. See to the contrary Rex *v.* Johnson, 7 East 65.

38. State *v.* Lord, 16 N. H. 357.

39. State *v.* Babcock, 30 N. J. L. 29; *In re* Eldred, 46 Wis. 530, 1 N. W. 175. See NUISANCES.

40. Jemmerson *v.* State, 80 Ga. 111, 5 S. E. 131.

41. Thompson *v.* State, 106 Ala. 67, 17 So. 512; Bloomer *v.* State, 48 Md. 521; *Ex p.* Rogers, 10 Tex. App. 655, 36 Am. Rep. 654; U. S. *v.* Howell, 56 Fed. 21.

42. Noyes *v.* State, 41 N. J. L. 418; Com. *v.* Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475; Rex *v.* Brisac, 4 East 164. See also People *v.* Mather, 4 Wend. (N. Y.) 229,

channel of a river, which is a boundary between states, and not the center of such river from bank to bank, determines the territorial jurisdiction of crimes committed on the waters of the river;[43] but in many cases by constitutional provision or by compact between states the criminal jurisdiction of states bordering on navigable rivers is concurrent[44] or exclusive[45] over the waters.[46]

5. Offenses on the High Seas, Arms of the Sea, Bays, Etc.— a. High Seas. In the absence of a statute the courts of a country have no jurisdiction of an offense committed on the high seas except in the case of piracy,[47] unless the offense is committed on board a ship belonging to that country.[48] It is probable that congress may confer jurisdiction upon courts of admiralty to try persons accused of crime on the high seas, without reference to their nationality or that of the vessel on which the crime was committed; but this has not been done, and the federal jurisdiction of admiralty over crimes is confined to crimes committed on American vessels, either on the high seas or in foreign or American waters.[49]

b. Three-Mile Limit. It has been said that the jurisdiction of a nation to punish offenses extends into the ocean to the distance of a cannon shot, which is estimated as one marine league from low-water mark on the shore;[50] but it is doubtful whether there is any jurisdiction to punish for offenses committed within this marine league limit, if the place of the offense is not an arm of the sea and within the body of a country, unless the jurisdiction is expressly conferred by statute.[51]

21 Am. Dec. 122; Com. *v.* Corlies, 3 Brewst. (Pa.) 575; U. S. *v.* Newton, 52 Fed. 275.

43. State *v.* Burton, 105 La. 516, 29 So. 970; Tyler *v.* People, 8 Mich. 320; State *v.* Keane, 84 Mo. App. 127; State *v.* Babcock, 30 N. J. L. 29; State *v.* Davis, 25 N. J. L. 386.

44. Carlisle *v.* State, 32 Ind. 55; McFadin *v.* State, 1 Ind. 557.

45. Com. *v.* Frazee, 2 Phila. (Pa.) 191.

46. **Mississippi river.**— The courts of Minnesota and Wisconsin have concurrent jurisdiction over the waters of the Mississippi river, where it separates these states, under the enabling act of Wisconsin (9 U. S. St. at L. p. 57, c. 89, § 3) and Minnesota (11 U. S. St. at L. p. 166, c. 60, § 2). State *v.* George, 60 Minn. 503, 63 N. W. 100. And 5 U. S. St. at L. 742, under which Iowa was admitted into the Union, provided that it should have concurrent jurisdiction over this river with other states bordering on it where the river is a common boundary. State *v.* Mullen, 35 Iowa 199.

Potomac river.— Inasmuch as under the charter to Lord Baltimore the Potomac river belongs to Maryland, this state has exclusive criminal jurisdiction over its waters, except so far as it is restricted by the compact of 1785 with the state of Virginia. Biscoe *v.* State, 68 Md. 294, 12 Atl. 25. But see Hendricks *v.* Com., 75 Va. 934, as to the jurisdiction of Virginia over crimes under this compact, construing Va. Code (1873), pp. 110, 111.

Hudson river.— Under a compact between the states of New Jersey and New York the latter has exclusive jurisdiction over the Hudson river to the low-water mark on the New Jersey shore, and over all vessels in the bay of New York and Hudson river south of Spuyten Duyvil, for general criminal purposes. State *v.* Babcock, 30 N. J. L. 29; People *v.* New Jersey Cent. R. Co., 42 N. Y. 283.

Ohio river.— The Virginia act of Dec. 18, 1789, creating the state of Kentucky, provided that the jurisdiction of the two states should be concurrent with the states which might possess the opposite banks of the Ohio river, and this statute was in effect adopted as a part of the constitution of Indiana. Carlisle *v.* State, 32 Ind. 55; State *v.* Stevens, 1 Ohio Dec. (Reprint) 82, 2 West. L. J. 66. *Compare* Com. *v.* Garner, 3 Gratt. (Va.) 655 (denying jurisdiction to Virginia above low-water mark on the Ohio shore) and State *v.* Plants, 25 W. Va. 119, 52 Am. Rep. 211 (holding that West Virginia has jurisdiction of crimes committed on the Ohio while the river is confined within its banks).

Federal jurisdiction of crimes committed in navigation of an inland river forming state boundaries see U. S. *v.* Collyer, 25 Fed. Cas. No. 14,838.

47. See Piracy.

48. U. S. *v.* Lewis, 36 Fed. 449, 13 Sawy. 532; Reg. *v.* Serva, 2 C. & K. 53, 1 Cox C. C. 292, 1 Den. C. C. 104, 61 E. C. L. 53; Reg. *v.* Keyn, 13 Cox C. C. 403, 2 Ex. D. 63, 46 L. J. M. C. 17; Reg. *v.* Lewis, 7 Cox C. C. 277, Dears. & B. 182, 3 Jur. N. S. 525, 26 L. J. M. C. 104, 5 Wkly. Rep. 572.

49. U. S. *v.* Lewis, 36 Fed. 449, 13 Sawy. 532. See also U. S. *v.* Palmer, 3 Wheat. (U. S.) 610, 4 L. ed. 471; and *infra*, VI, F, 5, e.

50. 1 Kent Comm. 29. And see Com. *v.* Manchester, 152 Mass. 230, 25 N. E. 113, 23 Am. St. Rep. 820, 9 L. R. A. 236 [*affirmed* in 139 U. S. 240, 11 S. Ct. 559, 35 L. ed. 159].

51. Reg. *v.* Keyn, 13 Cox C. C. 403, 2 Ex. D. 63, 46 L. J. M. C. 17, where a majority of the court of criminal appeal in England held that in the absence of a statute the admiralty jurisdiction of England in criminal cases which had been transferred to the central criminal court did not extend to the offense of manslaughter of an Eng-

Such jurisdiction, however, can undoubtedly be expressly conferred by statute, and such statutes have been enacted both in England and in the United States.[52]

c. Rivers, Havens, Bays, and Other Arms of the Sea. Rivers, havens, bays, and other arms of the sea extending into a state or country are within the jurisdiction of such state or country, and within the bodies of the counties thereof, and subject therefore to the common-law jurisdiction, to a line drawn between the *fauces terræ* or furthermost points of land, if they are narrow enough for a person on one shore to reasonably discern what is doing on the other.[53]

d. Vessels as Part of Territory. The high seas being common to all mankind, vessels afloat upon it are regarded as parts of the territory of the nation whose flag they fly and to which they belong, and crimes committed on such vessels on the high seas, whether by foreigners or citizens, passengers, strangers, or crew, are exclusively within the jurisdiction of that nation.[54] An exception to this rule is recognized in the case of piracy, which, although usually committed under a flag of some government wrongfully assumed, is punishable by any nation.[55] The admiralty jurisdiction of a nation extends to offenses committed on its vessels, not only while they are on the high seas, but also while they are in the ports or

lishman on an English vessel, caused by the act of the commander of a German vessel (the defendant), who was himself a German, in running into and sinking the English vessel, although at the time the vessels were within two and a half miles of the English coast.

52. Com. *v.* Manchester, 152 Mass. 230, 25 N. E. 113, 23 Am. St. Rep. 820, 9 L. R. A. 236 [*affirmed* in 139 U. S. 240, 11 S. Ct. 559, 35 L. ed. 159]. And see, in England, 41 & 42 Vict. c. 73.

53. Com. *v.* Peters, 12 Metc. (Mass.) 387; Manley *v.* People, 7 N. Y. 295; U. S. *v.* Bevans, 3 Wheat. (U. S.) 336, 4 L. ed. 404; U. S. *v.* Davis, 25 Fed. Cas. No. 14,931, 2 N. Y. Leg. Obs. 35; U. S. *v.* Grush, 26 Fed. Cas. No. 15,268, 5 Mason 290. And see *infra*, VI, F, 5, e.

54. *Hawaii.*— Rex *v.* Parish, 1 Hawaii 58.

Michigan.— Tyler *v.* People, 8 Mich. 320; People *v.* Tyler, 7 Mich. 161, 74 Am. Dec. 703.

United States.— U. S. *v.* Holmes, 5 Wheat. 412, 5 L. ed. 122; U. S. *v.* Pirates, 5 Wheat. 184, 5 L. ed. 64; U. S. *v.* Wiltberger, 5 Wheat. 76, 5 L. ed. 37; U. S. *v.* Kessler, 26 Fed. Cas. No. 15,528, Baldw. 15; U. S. *v.* Imbert, 26 Fed. Cas. No. 15,438, 4 Wash. 702.

England.— Reg. *v.* Carr, 10 Q. B. D. 76, 4 Aspin. 604, 15 Cox C. C. 129, 47 J. P. 38, 52 L. J. M. C. 12, 47 L. T. Rep. N. S. 451, 31 Wkly. Rep. 121; Reg. *v.* Anderson, L. R. 1 C. C. 161, 11 Cox C. C. 198, 38 L. J. M. C. 12, 19 L. T. Rep. N. S. 400, 17 Wkly. Rep. 208; Reg. *v.* Lesley, Bell C. C. 220, 8 Cox C. C. 269, 6 Jur. N. S. 202, 29 L. J. M. C. 97, 1 L. T. Rep. N. S. 452, 8 Wkly. Rep. 220; Reg. *v.* Serva, 2 C. & K. 53, 1 Cox C. C. 292, 1 Den. C. C. 104, 61 E. C. L. 53; Reg. *v.* Peel, 9 Cox C. C. 220, 8 Jur. N. S. 1185, L. & C. 331, 32 L. J. M. C. 65, 7 L. T. Rep. N. S. 336, 11 Wkly. Rep. 40; Reg. *v.* Lopez, 7 Cox C. C. 431, Dears. & B. 525, 4 Jur. N. S. 98, 27 L. J. M. C. 48, 6 Wkly. Rep. 227; Reg. *v.* Lewis, 7 Cox C. C. 277, Dears. & B. 182, 3 Jur. N. S. 525, 26 L. J. M. C. 104, 5 Wkly. Rep. 572.

Canada.— Reg. *v.* Kinsman, 2 Nova Scotia 62.

Proof of vessel's nationality.— The national character of the vessel upon which a crime has been committed either on the high seas or in a foreign jurisdiction must be proved, and the burden of proof as to this is on the prosecution. U. S. *v.* Imbert, 26 Fed. Cas. No. 15,438, 4 Wash. 702; Reg. *v.* Serva, 2 C. & K. 53, 1 Cox C. C. 292, 1 Den. C. C. 104, 61 E. C. L. 53. The register of the vessel, while proper evidence, is not necessarily indispensable, and the flag and ownership of the vessel may be proved by parol or any other competent evidence. U. S. *v.* Holmes, 5 Wheat. (U. S.) 412, 5 L. ed. 122; U. S. *v.* Imbert, 26 Fed. Cas. No. 15,438, 4 Wash. 702; U. S. *v.* Seagrist, 27 Fed. Cas. No. 16,245, 4 Blatchf. 420; Reg. *v.* Bjornsen, 10 Cox C. C. 74, 11 Jur. N. S. 589, L. & C. 545, 34 L. J. M. C. 180, 12 L. T. Rep. N. S. 473, 13 Wkly. Rep. 664. Where it appears that a vessel was built in the United States and belonged to American citizens, it is not enough, in order to show that she ceased to be an American vessel, to prove that she was taken abroad and there sold and transferred by those American citizens, but it must also be shown that she was sold and transferred to a foreigner. U. S. *v.* Gordon, 25 Fed. Cas. No. 15,231, 5 Blatchf. 18.

55. 1 Bishop New Crim. L. § 120; Wheaton Int. L. 185. And see The Marianna Flora, 11 Wheat. (U. S.) 1, 6 L. ed. 405; U. S. *v.* Pirates, 5 Wheat. (U. S.) 184, 5 L. ed. 64; U. S. *v.* Smith, 5 Wheat. (U. S.) 153, 5 L. ed. 57; U. S. *v.* Klintock, 5 Wheat. (U. S.) 144, 5 L. ed. 55; U. S. *v.* Palmer, 3 Wheat. (U. S.) 610, 4 L. ed. 471 (holding also that robbery on a foreign ship by a foreigner is not piracy under the act of congress of 1790, chapter 36, and is not within the jurisdiction of the United States courts); U. S. *v.* Brush, 24 Fed. Cas. No. 14,677*a*; U. S. *v.* Gilbert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19.

navigable waters of a foreign country;[56] but in such a case, unless there are treaty stipulations to the contrary, the other nation has concurrent jurisdiction.[57]

e. Admiralty Jurisdiction of Federal Courts — (1) *In General.* The constitution of the United States declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction, and it is settled that by force of this provision the civil jurisdiction of the courts of the United States in maritime cases of contract and tort embraces tide-waters within the bays, inlets of the sea, and harbors along the sea-coast of the country, and in navigable rivers.[58] "But it is a fundamental doctrine, in respect to the federal courts of inferior jurisdiction, that they cannot take cognizance of criminal offences of any grade, without the express appointment or direction of positive law. To enable them to exercise the functions bestowed by the constitution over crimes and misdemeanors, there must be a designation, by positive law, both of the offence and of the tribunal which shall take cognizance of it."[59] If an act of congress punishes an offense when committed on the "high seas," the federal courts have no jurisdiction of the offense unless it is committed on the high seas as contradistinguished from mere tide-waters flowing in ports, havens, and basins, that are land-locked in their position and subject to territorial jurisdiction.[60] The term "high seas"

56. U. S. *v.* Gordon, 25 Fed. Cas. No. 15,231, 5 Blatchf. 18; Reg. *v.* Anderson, L. R. 1 C. C. 161, 11 Cox C. C. 198, 38 L. J. M. C. 12, 19 L. T. Rep. N. S. 400, 17 Wkly. Rep. 208; Rex *v.* Allen, 7 C. & P. 664, 1 Moody C. C. 494, 32 E. C. L. 811.

57. Com. *v.* Luckness, 14 Phila. (Pa.) 363; Mali *v.* Common Jail, 120 U. S. 1, 7 S. Ct. 385, 30 L. ed. 565; The Exchange *v.* McFadden, 7 Cranch (U. S.) 116, 3 L. ed. 287; Reg. *v.* Cunningham, Bell C. C. 72, 8 Cox C. C. 104, 5 Jur. N. S. 202, 28 L. J. M. C. 66, 7 Wkly. Rep. 179; Reg. *v.* Keyn, 13 Cox C. C. 403, 2 Ex. D. 63, 46 L. J. M. C. 17.

58. See ADMIRALTY, 1 Cyc. 815 *et seq.*

59. U. S. *v.* Wilson, 28 Fed. Cas. No. 16,731, 3 Blatchf. 435 [*citing* U. S. *v.* Coolidge, 1 Wheat. (U. S.) 415, 4 L. ed. 124; U. S. *v.* Hudson, 7 Cranch (U. S.) 32, 3 L. ed. 259; *Ex p.* Bollman, 4 Cranch (U. S.) 75, 2 L. ed. 554]. See also U. S. *v.* Rogers, 46 Fed. 1.

District courts of the United States are, by U. S. Rev. St. (1878) § 563, subd. 1 [U. S. Comp. St. (1901) p. 455], given jurisdiction "of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital," except in the cases mentioned in U. S. Rev. St. (1878) § 5412. See U. S. *v.* Bevans, 3 Wheat. (U. S.) 336, 4 L. ed. 404; U. S. *v.* Coolidge, 1 Wheat. (U. S.) 415, 4 L. ed. 124; U. S. *v.* Hudson, 7 Cranch (U. S.) 32, 3 L. ed. 259; *Ex p.* Bollman, 4 Cranch (U. S.) 75, 2 L. ed. 554. Under this section there is no jurisdiction of any offense at common law, for there are no common-law offenses against the United States, but only of crimes made punishable by act of congress; and therefore there is no jurisdiction of assault on the high seas unless committed, as required by U. S. Rev. St. (1878) § 5346 [U. S. Comp. St. (1901) p. 3630], on an American vessel. U. S. *v.* Lewis, 36 Fed. 449, 13 Sawy. 532.

Circuit courts of the United States are given exclusive jurisdiction of all capital offenses against the United States, and jurisdiction concurrently with the district courts of all other offenses against the United States. U. S. Rev. St. (1878) § 629, subd. 20 [U. S. Comp. St. (1901) p. 508].

60. U. S. *v.* Pirates, 5 Wheat. (U. S.) 184, 5 L. ed. 64 (holding that the term "high seas," in acts of congress punishing piracy on the high seas, included an open roadstead in a foreign country, at the island of Bonavista, within a marine league of the shore); U. S. *v.* Wiltberger, 5 Wheat. (U. S.) 76, 5 L. ed. 37 (holding that, under an act of congress punishing manslaughter on the "high seas," the United States courts had no jurisdiction of manslaughter committed by the master upon one of the seamen on board a merchant vessel of the United States lying in the river Tigris, in the empire of China, thirty-five miles above its mouth, about one hundred yards from the shore, in four and one-half fathoms of water, and below low-water mark); U. S. *v.* Bevans, 3 Wheat. (U. S.) 336, 4 L. ed. 404; U. S. *v.* Gordon, 25 Fed. Cas. No. 15,231, 5 Blatchf. 18 (holding that under the act of congress of May 15, 1820, § 6 (U. S. Rev. St. (1878) § 5375 [U. S. Comp. St. 1901) p. 3644]) relating to the slave-trade and punishing the confining or detaining a negro on board an American vessel with intent to make him a slave, the United States courts had jurisdiction of such offense, committed in the Congo river in Africa, some distance from its mouth, but where it was several miles broad, and continued uninterruptedly until the vessel was captured in the Atlantic ocean several miles from the land); U. S. *v.* Grush, 26 Fed. Cas. No. 15,268, 5 Mason 290 (holding that the words "high seas" in the Crimes Act (1825), c. 276, meant the uninclosed waters of the ocean on the sea-coast outside of the *fauces terræ*); U. S. *v.* Robinson, 27 Fed. Cas. No. 16,176, 4 Mason 307 (holding that the "high seas" did not include Mango bay in the

has been held to include the open and uninclosed waters of the Great Lakes.[61] Congress, however, has the power to bring all waters subject to federal jurisdiction within the scope of its criminal jurisdiction, and there are acts of congress punishing crimes, and giving admiralty jurisdiction thereof, when committed elsewhere than on the high seas.[62] Thus there are statutes punishing murder and other offenses committed on board an American vessel either on the high seas or in bays, harbors, basins, or rivers, not within the jurisdiction of any state, and such offenses are triable in the federal courts, although not committed on the high seas.[63] The state courts have jurisdiction of offenses committed on arms of the sea, creeks, havens, basins, and bays, within the ebb and flow of the tide, when those places

island of Bermuda); U. S. *v.* Seagrist, 27 Fed. Cas. No. 16,245, 4 Blatchf. 420 (holding that a vessel lying in a harbor of a foreign port, fastened to the shore by cables, and communicating with the shore by her boats and not within any inclosed dock, or at any pier or wharf, was on the "high seas" outside of low-water mark on the coast, so as to give the United States admiralty jurisdiction of the offense of mutiny or revolt on such vessel); U. S. *v.* Wilson, 28 Fed. Cas. No. 16,731, 3 Blatchf. 435 (holding that the act of congress of March 26, 1804 (2 U. S. St. at L. 290, U. S. Rev. St. (1878) §§ 5365, 5366 [U. S. Comp. St. (1901) pp. 3641, 3642]) punishing the wilful destruction of a vessel on the high seas, uses the term "high seas" in its popular and natural sense, and in contradistinction to mere tide-waters flowing in ports, havens, and basins that are landlocked in their position and subject to territorial jurisdiction, and that the admiralty jurisdiction did not extend to the destruction of a vessel in the East river or western extremity of Long Island sound at a point between City island and Hart island, which was within the jurisdiction of New York).

An inclosed dock in a foreign port is not "high seas" within an act of congress conferring admiralty jurisdiction of offenses committed on the high seas. U. S. *v.* Hamilton, 26 Fed. Cas. No. 15,290, 1 Mason 152.

Long Island sound is embraced in the term "high seas" in the acts of congress conferring admiralty jurisdiction (Manley *v.* People, 7 N. Y. 295; U. S. *v.* Jackalow, 1 Black (U. S.) 484, 17 L. ed. 225), except those parts which run into the territory of New York and Connecticut and are within the *fauces terræ* (Manley *v.* People, 7 N. Y. 295), as elsewhere explained. See *supra*, VI, F, 5, c.

61. The open and uninclosed waters of the Great Lakes are "high seas" within the meaning of U. S. Rev. St. (1878) § 5346 [U. S. Comp. St. (1901) p. 3630], punishing an assault with a dangerous weapon, or with intent to commit any felony, on board an American vessel upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state; and the admiralty jurisdiction of the United States extends to such an assault on an American vessel in the Detroit river, out of the jurisdiction of any state and within the territorial limits of Canada. U. S. *v.* Rodgers, 150 U. S. 249, 14 S. Ct. 109, 37 L. ed. 1071 [*overruling* in effect *Ex p.* Byers, 32 Fed. 404, and Miller's Case, 17 Fed. Cas. No. 9,558, Brown Adm. 156, which held that the Great Lakes were not high seas]. *Compare* U. S. *v.* Peterson, 64 Fed. 145.

Statute governing offenses on Great Lakes. — The act of congress of Sept. 4, 1890, conferring upon the federal courts jurisdiction of crimes committed on vessels "enrolled or registered under the laws of the United States while on a voyage upon the waters of any of the Great Lakes or the waters connecting any of the said lakes," does not confer jurisdiction of an offense committed upon a vessel while lying in the Menominee river, half a mile from its mouth, as such river does not connect Lake Michigan with any of the other lakes, but is merely a tributary. U. S. *v.* Rogers, 46 Fed. 1.

In Canada the admiralty jurisdiction extends to offenses committed on the great inland lakes. Reg. *v.* Sharp, 5 Ont. Pr. 135.

62. U. S. *v.* Wilson, 28 Fed. Cas. No. 16,731, 3 Blatchf. 435 [*citing* U. S. *v.* Wiltberger, 5 Wheat. (U. S.) 76, 5 L. ed. 37; U. S. *v.* Bevans, 3 Wheat. (U. S.) 336, 4 L. ed. 404].

63. U. S. *v.* Bevans, 3 Wheat. (U. S.) 336, 4 L. ed. 404; U. S. *v.* Lynch, 26 Fed. Cas. No. 15,648, 2 N. Y. Leg. Obs. 51 (holding that the admiralty jurisdiction extended to the offense of endeavor to make a revolt or mutiny on an American vessel while it was lying at anchor, ready for sea, in the stream of the East river, where the tide ebbs and flows, about sixty yards from the wharf in the city of New York, under the act of congress of March 3, 1835, § 2 (U. S. Rev. St. (1878) § 5359 [U. S. Comp. St. (1901) p. 3639]) punishing such offense on an American vessel "on the high seas, or other waters within the admiralty and maritime jurisdiction of the United States"); U. S. *v.* Wilson, 28 Fed. Cas. No. 16,731, 3 Blatchf. 435.

Offense within jurisdiction of territory. — An offense committed in an arm of the sea, within the jurisdiction of a territory of the United States, but not of a state, is within the admiralty jurisdiction of the United States, under the act of congress (U. S. Rev. St. (1878) § 5339, subd. 2 [U. S. Comp. St. (1901) p. 3627]) punishing murder "upon the high seas, or in any arm of the sea, or in

are within the body of a county; and in such cases the courts of the United States have no jurisdiction under statutes giving jurisdiction over waters not within the jurisdiction of any particular state.[64] Where an arm of the sea or creek, haven, basin, or bay is so narrow that a person standing on the shore can reasonably discern by the naked eye what is doing on the opposite shore the waters are within the body of a county.[65]

(II) *American Vessels in Foreign Ports.* Under the earlier statutes, which enacted in substance that crimes committed upon the high seas or upon any arm of the sea, or in any river, haven, creek, or bay within the admiralty jurisdiction of the United States should be punishable in the federal courts, such courts had no jurisdiction to try one accused of a crime committed on an American ship in foreign waters, although where the tide ebbed and flowed.[66] But by later statutes[67] jurisdiction has been conferred upon the federal courts to punish crimes committed on American vessels in foreign ports and harbors,[68] although not to punish a crime committed on a foreign coast where an American vessel has been wrecked within the marine league.[69]

6. Territory Ceded to, or Under Exclusive Jurisdiction of, United States. The jurisdiction of the states over crime within their territorial limits is exclusive, except as to such jurisdiction "as may by cession of particular States and the acceptance of Congress, become the Seat of the Government of the United States," and as to places purchased by the consent of the legislature of the state by the federal government for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;[70] and the jurisdiction of the federal courts over land so ceded or purchased by the consent of the state legislatures is exclusive in the absence of an express reservation by the state legislatures.[71] The fact

any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State." Smith *v.* U. S., 1 Wash. Terr. 262.

Puget sound, with its inlets and bays, is an "arm of the sea," within U. S. Rev. St. (1878) § 5339, subd. 2 [U. S. Comp. St. (1901) p. 3627], punishing murder. Smith *v.* U. S., 1 Wash. Terr. 262.

American vessels in foreign ports.— The act of congress of March 3, 1825 (4 U. S. St. at L. p. 115, c. 65, § 5 [U. S. Comp. St. (1901) p. 585]), referring to crimes on board of American vessels in foreign ports, does not curtail jurisdiction of the federal courts over crimes committed at sea, but defines that jurisdiction more accurately where the crime is committed in a landlocked and foreign harbor, where the tide ebbs and flows. U. S. *v.* Roberts, 27 Fed. Cas. No. 16,173, 2 N. Y. Leg. Obs. 99; U. S. *v.* Seagrist, 27 Fed. Cas. No. 16,245, 4 Blatchf. 420.

64. Com. *v.* Peters, 12 Metc. (Mass.) 387; U. S. *v.* Davis, 25 Fed. Cas. No. 14,931, 2 N. Y. Leg. Obs. 35 (holding that there was no admiralty jurisdiction of larceny committed on board a vessel lying in the port of Savannah, Georgia); U. S. *v.* Grush, 26 Fed. Cas. No. 15,268, 5 Mason 290. See People *v.* Tyler, 7 Mich. 161, 74 Am. Dec. 703. See *supra*, VI, F, 5, c.

The county of Suffolk, Massachusetts, in which the city of Boston is included, extends to all waters between the circumjacent islands, down to the Great Brewster and Point Allerton. U. S. *v.* Grush, 26 Fed. Cas. No. 15,268, 5 Mason 290.

65. See *supra*, VI, F, 5, c.

66. People *v.* Tyler, 7 Mich. 161, 74 Am. Dec. 703; U. S. *v.* Wiltberger, 5 Wheat. (U. S.) 76, 5 L. ed. 37; U. S. *v.* Davis, 25 Fed. Cas. No. 14,932, 2 Sumn. 482; U. S. *v.* Hamilton, 26 Fed. Cas. No. 15,290, 1 Mason 152; U. S. *v.* Morel, 26 Fed. Cas. No. 15,807, Brunn. Col. Cas. 373.

67. See Act March 3, 1825, 4 U. S. St. at L. 115, § 5 [U. S. Comp. St. (1901) p. 585].

68. U. S. *v.* Beyer, 31 Fed. 35; U. S. *v.* Bennett, 24 Fed. Cas. No. 14,574, 3 Hughes 466; U. S. *v.* Carr, 25 Fed. Cas. No. 14,730, 3 Sawy. 302; U. S. *v.* Jackson, 26 Fed. Cas. No. 15,457, 2 N. Y. Leg. Obs. 3; U. S. *v.* Roberts, 27 Fed. Cas. No. 16,173, 2 N. Y. Leg. Obs. 99; U. S. *v.* Ross, 27 Fed. Cas. No. 16,196, 1 Gall. 624; U. S. *v.* Seagrist, 27 Fed. Cas. No. 16,245, 4 Blatchf. 420.

Cuban vessels.— After the joint resolution of congress of April 20, 1898 [U. S. Comp. St. (1901) p. 2790], recognizing the independence of the people of the island of Cuba, and the treaty of Paris, and the appointment by the United States of a military governor of the island, Cuba was, with respect to the United States, a foreign country, and vessels registered at Cuban ports foreign vessels, and the courts of the United States had no jurisdiction of the crime of manslaughter committed on such a vessel while in a foreign port. U. S. *v.* Assia, 118 Fed. 915.

69. U. S. *v.* Smiley, 27 Fed. Cas. No. 16,317, 6 Sawy. 640.

70. U. S. Const. art. 1, § 8, cl. 17.

71. *Colorado.*— Franklin *v.* U. S., 1 Colo. 35.

that land has been used and occupied, under purchase or otherwise, by the federal government for any constitutional purpose, does not give its courts jurisdiction where the state has not consented.[72] Nor has the constitutional provision any application to military reservations in territories, as by express terms it applies only to lands in a state.[73]

7. Jurisdiction as Between Federal Judicial Districts. Under the constitutional provision[74] that the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, the federal courts have jurisdiction only of such offenses as are committed within their respective districts,[75] except as to crimes committed on the high seas or in any place out of the jurisdiction of any particular state, which are within the jurisdiction of the courts of the district in which the offender is apprehended or into which he is first brought.[76]

District of Columbia.— U. S. *v.* Guiteau, 10 Fed. 161, 1 Mackey 498, 47 Am. Rep. 247, holding that the act of congress of April 30, 1790, section 3, providing for the punishment of murder on land under the exclusive jurisdiction of the United States, conferred jurisdiction on the courts of the District of Columbia over such crimes committed in the District, although the statute was passed before the District was ceded to the federal government.

Maine.— State *v.* Kelly, 76 Me. 331, 49 Am. Rep. 620.

Massachusetts.— Mitchell *v.* Tibbetts, 17 Pick. 298; Com. *v.* Clary, 8 Mass. 72.

Mississippi.— State *v.* Seymour, 78 Miss. 134, 28 So. 799.

Texas.— Lasher *v.* State, 30 Tex. App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922.

Wisconsin.— *In re* O'Connor, 37 Wis. 379, 19 Am. Rep. 765.

United States.— U. S. *v.* Carter, 84 Fed. 622; *In re* Kelly, 71 Fed. 545; U. S. *v.* Meagher, 37 Fed. 875; U. S. *v.* King, 34 Fed. 302; U. S. *v.* Clark, 31 Fed. 710; Kelly *v.* U. S., 27 Fed. 616; *Ex p.* Hebard, 11 Fed. Cas. No. 6,312, 4 Dill. 380; U. S. *v.* Dolan, 25 Fed. Cas. No. 14,978, 5 Blatchf. 284; U. S. *v.* Knapp, 26 Fed. Cas. No. 15,538; U. S. *v.* Shepherd, 27 Fed. Cas. No. 16,274, 1 Hughes 520, McCahon (Kan.) 206; U. S. *v.* Stahl, 27 Fed. Cas. No. 16,373, Woolw. 192; U. S. *v.* Travers, 28 Fed. Cas. No. 16,537, Brunn. Col. Cas. 467.

See 14 Cent. Dig. tit. "Criminal Law," § 189.

The jurisdiction of the state to enforce its laws in lands ceded to the federal government and punish crimes therein is not extinguished unless congress has, by further legislation, vested exclusive jurisdiction over such places in the federal courts. *In re* O'Connor, 37 Wis. 379, 19 Am. Rep. 765.

72. Clay *v.* State, 4 Kan. 49; People *v.* Godfrey, 17 Johns. (N. Y.) 225; People *v.* Lent, 2 Wheel. Crim. (N. Y.) 548; Lent's Case, 4 City Hall Rec. (N. Y.) 27; U. S. *v.* Bevans, 3 Wheat. (U. S.) 336, 4 L. ed. 404; U. S. *v.* Penn, 48 Fed. 669 (land for Arlington cemetery purchased at a tax-sale, without the consent of the state of Virginia); U. S. *v.* Stahl, 27 Fed. Cas. No. 16,373, Woolw. 192, McCahon (Kan.) 206.

73. *Colorado.*— Reynolds *v.* People, 1 Colo. 179.

Kansas.— Clay *v.* State, 4 Kan. 49.

Montana.— Territory *v.* Burgess, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808.

Wyoming.— Scott *v.* U. S., 1 Wyo. 40.

United States.— U. S. *v.* McBratney, 104 U. S. 621, 26 L. ed. 869.

But see State *v.* Kelly,, 76 Me. 331, 49 Am. Rep. 620.

See 14 Cent. Dig. tit. "Criminal Law," § 189.

74. U. S. Const. Amendm. 6.

75. Bagnall *v.* Ableman, 4 Wis. 163; U. S. *v.* Wan Lee, 44 Fed. 707; U. S. *v.* Britton, 24 Fed. Cas. No. 14,650, 2 Mason 464; U. S. *v.* Burr, 25 Fed. Cas. No. 14,694*a*; U. S. *v.* Sperry, 27 Fed. Cas. No. 16,369, U. S. *v.* Wood, 28 Fed. Cas. No. 16,757, Brunn. Col. Cas. 456.

Division of districts.— Where a federal judicial district is divided into two by a statute providing that all offenses committed in the old district shall be tried in the same manner as though no division had been made, the old federal court in that district is practically continued in existence to try offenses committed before the passage of the act. U. S. *v.* Benson, 31 Fed. 896, 12 Sawy. 477; U. S. *v.* Hackett, 29 Fed. 848.

Ascertained by law.— The provision that a district in which a trial may be had shall have been ascertained by law previous to the crime has no application to federal crimes committed outside of a state. Cook *v.* U. S., 138 U. S. 157, 11 S. Ct. 268, 34 L. ed. 906; Jones *v.* U. S., 137 U. S. 202, 11 S. Ct. 80, 34 L. ed. 691; U. S. *v.* Dawson, 15 How. (U. S.) 467, 14 L. ed. 775.

76. Cook *v.* U. S., 138 U. S. 157, 11 S. Ct. 268, 34 L. ed. 906; U. S. *v.* Arwo, 19 Wall. (U. S.) 486, 22 L. ed. 67; U. S. *v.* Jackalow, 1 Black (U. S.) 484, 17 L. ed. 225; U. S. *v.* Alberty, 24 Fed. Cas. No. 14,426, Hempst. 444; U. S. *v.* Baker, 24 Fed. Cas. No. 14,501, 5 Blatchf. 6; U. S. *v.* Bird, 24 Fed. Cas. No. 14,597, 1 Sprague 299; U. S. *v.* Thompson, 28 Fed. Cas. No. 16,492, 1 Sumn. 168. See *infra*, VII, A, 9, b.

8. TERRITORIAL JURISDICTION OF MUNICIPAL AND COUNTY COURTS. Territorial jurisdiction of municipal and county courts is usually limited to the city or county in which they are located.[77]

G. Jurisdiction of the Person — 1. IN GENERAL. In order that a court may try and punish for an offense, it is not only necessary that it shall be a legally constituted court and have jurisdiction of the offense, but it is also necessary that it shall have jurisdiction of the person of the defendant.[78] Irregularities in obtaining jurisdiction of the person of the defendant may be waived by him, and they are waived if he pleads to the indictment and raises no objection.[79]

2. ARREST AND CUSTODY — a. In General. As a general rule a court has no jurisdiction to hear and determine a charge of crime, unless the accused is in custody, has been admitted to bail, or has consented to the jurisdiction; and statutory provisions in this respect must be observed.[80]

b. Conflict of State and Federal Jurisdiction.[81] Where one has been indicted under a state law for an offense, and the sheriff has made return to the capias issued for his arrest, the state court has jurisdiction to try him, although he is also in the custody of the sheriff, as deputy of the United States marshal, for an offense against the United States, and is in the county jail under a state statute allowing the use of its jails for such purpose.[82] The removal of a prisoner charged with a crime against the state, from the custody of the state court, by a writ of habeas corpus from a federal court, does not affect the jurisdiction of the state court over him.[83]

c. Accused Illegally Arrested or Brought Within the Jurisdiction. The fact that the accused has been illegally arrested, or that he has by trickery, force, fraud, or without legal authority, or by any illegal means, been brought within the territorial jurisdiction of a state court does not oust the jurisdiction of that court, if he is legally in custody in the state.[84]

77. *Connecticut.*— State *v.* Clegg, 27 Conn. 593.

Illinois.— Bell *v.* People, 2 Ill. 397.

Massachusetts.— Com. *v.* Gay, 153 Mass. 211, 26 N. E. 571, 852.

New York.— People *v.* Bates, 38 Hun 180; People *v.* Smith, 4 Park. Crim. 255; Griswold's Case, 1 City Hall Rec. 181.

Ohio.— See State *v.* Peters, 67 Ohio St. 494, 66 N. E. 521.

Virginia.— Jordan *v.* Com., 25 Gratt. 943.

See 14 Cent. Dig. tit. "Criminal Law," § 191.

78. Armstrong *v.* State, 23 Ind. 95; Ford *v.* State, 18 Ind. 484; McCarty *v.* State, 16 Ind. 310; Carrington *v.* Com., 78 Ky. 83. And see King *v.* People, 5 Hun (N. Y.) 297.

79. See *infra*, VI, L.

80. Armstrong *v.* State, 23 Ind. 95; Ford *v.* State, 18 Ind. 484; McCarty *v.* State, 16 Ind. 310 (all holding that a court of common pleas had no jurisdiction to hear and determine any case of felony, unless it appeared affirmatively on the record that the accused party was in custody, or being on bail had voluntarily submitted to the jurisdiction as provided by a statute); Lindville *v.* State, 3 Ind. 580 (holding that the court had jurisdiction under the above statute, where the accused had been committed for want of bail after preliminary examination); Carrington *v.* Com., 78 Ky. 83 (holding that under a statute conferring on a court jurisdiction to try an indictment for misdemeanor where the defendant has been committed to jail, and where the court in which he was indicted is not in session, such court has no jurisdiction to try a defendant who merely formally surrenders himself to the jailer, and is never actually in custody); King *v.* People, 5 Hun (N. Y.) 297 (holding, under a statute providing that an indictment for bigamy might be found in the county where the prisoner should be apprehended, an actual arrest before indictment found gave jurisdiction, and that such jurisdiction was not destroyed by a subsequent escape or discharge on bail).

81. See also COURTS, 11 Cyc. 633.

82. State *v.* Townsend, Houst. Crim. Cas. (Del.) 10.

83. State *v.* Davis, 12 S. C. 528.

84. *Arkansas.*— Elmore *v.* State, 45 Ark. 243; State *v.* Chapin, 17 Ark. 561, 65 Am. Dec. 452.

Iowa.— State *v.* Day, 58 Iowa 678, 12 N. W. 733; State *v.* Ross, 21 Iowa 467.

Kansas.— State *v.* May, 57 Kan. 428, 46 Pac. 709; State *v.* Garrett, 57 Kan. 132, 45 Pac. 93 [*overruling* State *v.* Simmons, 39 Kan. 262, 18 Pac. 177].

Massachusetts.— Com. *v.* Tay, 170 Mass. 192, 48 N. E. 1086.

Minnesota.— State *v.* Fitzgerald, 51 Minn. 534, 53 N. W. 799.

New York.— Britton's Case, 2 City Hall Rec. 119.

Ohio.— *Ex p.* McKnight, 4 Ohio S. & C. Pl. Dec. 284.

3. Aliens. The state and federal courts have jurisdiction of aliens who commit crimes within their territory,[85] irrespective of the fact that the government of the alien has assumed the responsibility for the crime and is negotiating with the federal government on the subject.[86] But the rule does not apply to the diplomatic agents of foreign governments.[87]

H. Mode of Acquiring Jurisdiction — 1. In General. Jurisdiction to try and punish for a crime cannot be acquired otherwise than in the mode prescribed by law, and if it is not so acquired any judgment is a nullity.[88] A formal accusation is essential for every trial for crime. Without it the court acquires no jurisdiction to proceed, even with the consent of the parties, and where the law requires a particular form of accusation, that form of accusation is essential.[89] Jurisdiction to try offenses is ordinarily acquired by an indictment, or in some jurisdictions by

Pennsylvania.— *In re* Dows, 18 Pa. St. 37; Matter of Dows, 1 Phila. 234.

South Carolina.— State *v.* Smith, 1 Bailey 283, 19 Am. Dec. 679.

Texas.— Brookin *v.* State, 26 Tex. App. 121, 9 S. W. 735.

Vermont.— State *v.* Brewster, 7 Vt. 118.

Wisconsin.— Baker *v.* State, 88 Wis. 140, 59 N. W. 570.

Wyoming.— Kingen *v.* Kelley, 3 Wyo. 566, 28 Pac. 36, 15 L. R. A. 177.

United States.— *Ex p.* Johnson, 167 U. S. 120, 17 S. Ct. 735, 42 L. ed. 103.

See 14 Cent. Dig. tit. "Criminal Law," § 195.

Waiver of objections see State *v.* Fitzgerald, 51 Minn. 534, 53 N. W. 799. And see, *infra*, VI, L.

Fugitive from justice.—Although a fugitive from justice has been captured and brought from a foreign country without authority of law, the court which thus obtains jurisdiction will not investigate the manner of his capture. Ker *v.* People, 110 Ill. 627, 51 Am. Rep. 706 [*affirmed* in 119 U. S. 436, 7 S. Ct. 225, 30 L. ed. 421]. The fact that the accused was extradited under a requisition charging him with an extraditable crime, when the fact was that at that time he was charged with one which was not extraditable, does not deprive the court of jurisdiction to try him for the offense named. Kelly *v.* State, 13 Tex. App. 158. But it has been held that an accused person who is extradited under a treaty for a crime specified therein, and in the extradition papers, is thereby exempt from trial from any other offense until he has had an opportunity to return to the country from whence he came for the sole purpose of trial for the crime specified, and a plea to the jurisdiction of the state court based on these facts is valid. Com. *v.* Hawes, 13 Bush (Ky.) 697, 26 Am. Rep. 242; Blandford *v.* State, 10 Tex. App. 627; U. S. *v.* Rauscher, 119 U. S. 407, 7 S. Ct. 234, 30 L. ed. 425; *Ex p.* Hibbs, 26 Fed. 421; U. S. *v.* Watts, 14 Fed. 130, 8 Sawy. 370. *Compare*, however, U. S. *v.* Caldwell, 25 Fed. Cas. No. 14,708, 2 Dall. 333; U. S. *v.* Lawrence, 26 Fed. Cas. No. 15,573, 13 Blatchf. 295. See, generally, Extradition.

85. McDonald *v.* State, 80 Wis. 407, 50 N. W. 185. See Aliens, 1 Cyc. 106.

86. People *v.* McLeod, 1 Hill (N. Y.) 377, 37 Am. Dec. 328.

87. See Ambassadors and Consuls, 2 Cyc. 267.

88. *Georgia.*— Scroggins *v.* State, 55 Ga. 380.

Indiana.— State *v.* Justice, 46 Ind. 210.

Kentucky.— Neely *v.* Com., 12 Ky. L. Rep. 844.

New York.— People *v.* Campbell, 4 Park. Crim. 386.

North Carolina.— State *v.* Lachman, 98 N. C. 763, 3 S. E. 635.

Pennsylvania.— Hoffman *v.* Com., 123 Pa. St. 75, 16 Atl. 609.

See 14 Cent. Dig. tit. "Criminal Law," § 196.

89. *Kentucky.*— Com. *v.* Adams, 92 Ky. 134, 17 S. W. 276, denying the power of the court to change the charge in an indictment.

Massachusetts.— Com. *v.* Mahar, 16 Pick. 120.

New York.— People *v.* Campbell, 4 Park. Crim. 386, 387, where it was held that there was no jurisdiction of an offense for which the law required prosecution by indictment, where there was a fatal defect in the indictment, and that the defect could not be remedied by stipulation of counsel that the case should be tried as if the omitted allegation had been inserted. The court said: "The charge, as made, being a felony, the Constitution of this State requires the presentment or indictment of a grand jury as a pre-requisite to trial; and if the pleading they file with the court could be remodeled by stipulations between the counsel, the defendant would not be tried upon the presentment of the grand jury, but rather upon the consent of the counsel. This court cannot acquire jurisdiction to try an offence by consent, nor can its jurisdiction over an offence be changed by consent, so as to embrace any other than that presented by the grand jury, where the action of that body is requisite."

Texas.— Hewitt *v.* State, 25 Tex. 722.

Virginia.— Com. *v.* Barrett, 9 Leigh 665.

United States.— *Ex p.* Bain, 121 U. S. 1, 7 S. Ct. 781, 30 L. ed. 849.

England.— *Ex p.* Hopkins, 17 Cox C. C. 444, 56 J. P. 262, 61 L. J. Q. B. 240, 66 L. T. Rep. N. S. 53.

Necessity for indictment see, generally, Indictments and Informations.

an information, and where the indictment or information is invalid the court is without jurisdiction.[90] Jurisdiction is in some cases, under statutes, acquired by mere complaint or affidavit,[91] or by appeal from a conviction in a lower court.[92]

2. By Consent. Jurisdiction to take cognizance of an offense or to render a particular judgment cannot be conferred upon a court, where it has none by statute, by the consent of the accused, either direct or inferential;[93] but jurisdiction of the person of the defendant may be conferred by consent or waiver,[94] and a statute may authorize a court to try a criminal case by consent of parties.[95]

I. Transfer of Causes — 1. From State to Federal Court. Several acts of congress provide for the removal of certain classes of cases from the state to the federal courts. Thus a criminal prosecution in a state court against a federal revenue officer on account of any act done under color of his office may be removed to a federal court, where it appears that the act was done in enforcing the federal law.[96] So also it is provided by statute that where the accused cannot enforce in the state courts any rights secured to him by any law providing for the equal rights of citizens of the United States the federal courts have jurisdiction.[97]

90. Terrill *v.* Santa Clara County Super. Ct., (Cal. 1899) 60 Pac. 38, 516; People *v.* Du Rell, 1 Ida. 44; State *v.* Woods, 66 N. J. L. 458, 49 Atl. 716. See Indictments and Informations.

Certification and transmission of indictment see Webster *v.* Com., 5 Cush. (Mass.) 386. And see, generally, Indictments and Informations.

91. See *infra*, X, E.

92. See People *v.* Du Rell, 1 Ida. 44; Neely *v.* Com., 12 Ky. L. Rep. 844; State *v.* Lachman, 98 N. C. 763, 3 S. E. 635. See also *infra*, X, E, 2, c.

93. *California.*—People *v.* Granice, 50 Cal. 447.

Kentucky.— Com. *v.* Adams, 92 Ky. 134, 17 S. W. 276, 13 Ky. L. Rep. 440; Bailey *v.* Com., 64 S. W. 995, 23 Ky. L. Rep. 1223.

Massachusetts.— Com. *v.* Mahar, 16 Pick. 120.

New Hampshire.—Batchelder *v.* Currier, 45 N. H. 460.

New York.— People *v.* Kings County, 76 Hun 7, 27 N. Y. Suppl. 857; People *v.* White, 24 Wend. 520; People *v.* Campbell, 4 Park. Crim. 386.

North Carolina.— State *v.* Lachman, 98 N. C. 763, 3 S. E. 635.

Ohio.— State *v.* Turner, Wright 20.

Pennsylvania.— Mills *v.* Com., 13 Pa. St. 627; Com. *v.* Statzer, 5 Pa. Co. Ct. 256.

Wisconsin.—Hager *v.* Falk, 82 Wis. 644, 52 N. W. 432.

United States.— Indiana *v.* Chicago Tolleston Club, 53 Fed. 18.

See 14 Cent. Dig. tit. "Criminal Law," § 197.

94. See *supra*, VI, G, 1, note 79; *infra*, VI, L.

95. State *v.* Giles, 103 N. C. 391, 9 S. E. 433, holding that the voluntary entering upon a jury trial without objection was a sufficient "consent" to give jurisdiction under a statute authorizing a court to try criminal prosecutions by consent of parties.

96. U. S. Rev. St. (1878) § 643 [U. S. Comp. St. (1901) p. 521]. See State *v.* Deaver, 77 N. C. 555; State *v.* Hoskins, 77 N. C. 530; Ohio *v.* Thomas, 137 U. S. 276, 19 S. Ct. 453, 43 L. ed. 699 [*affirming* 87 Fed. 453, 31 C. C. A. 80]; State *v.* Port, 3 Fed. 117; *Ex p.* Anderson, 1 Fed. Cas. No. 349, 3 Woods 124.

Officers within the statute.— U. S. Rev. St. (1878) § 643 [U. S. Comp. St. (1901) p. 521], providing for the removal of a criminal prosecution against "any officer appointed under or acting by authority of any revenue law, . . . or against any person acting under or by authority of any such officer" protects United States marshals, their deputies, and assistants, including soldiers and all persons who lawfully assist them in the performance of their duty. Davis *v.* State, 107 U. S. 597, 2 S. Ct. 636, 27 L. ed. 574; Tennessee *v.* Davis, 100 U. S. 257, 25 L. ed. 648.

A criminal prosecution is commenced under this statute when a warrant is issued. Georgia *v.* Bolton, 11 Fed. 217; Georgia *v.* O'Grady, 10 Fed. Cas. No. 5,352, 3 Woods 496.

After removal it is the duty of the state to continue the prosecution in the United States court. Delaware *v.* Emerson, 8 Fed. 411.

97. U. S. Rev. St. (1878) § 641 [U. S. Comp. St. (1901) p. 520]. This section provides that upon the filing of the petition all proceedings in the state court shall cease, but bail or other security given in the state court shall continue in force. It is the duty of the clerk of the state court to furnish the defendant with copies of all process, pleadings, testimony, and other proceedings, and when these are filed in the circuit court on the first day of its session the case shall then proceed as though originally brought there. If the clerk refuses or neglects to furnish the papers, the petitioner may docket the case, and the federal court shall then have jurisdiction to require the plaintiff to file a declaration or complaint, and if he fails to do so the federal court may dismiss the proceedings, and such dismissal shall be a bar to any other proceedings. If the petitioner, where

2. Transfer Between Federal Courts. By an act of congress[98] when the district attorney deems it necessary,[99] the federal circuit court and the federal district court may remit indictments pending in either to the jurisdiction of the other;[1] and this, under the terms of the statute, carries with it all pleadings and proceedings, and the court to which the cause is remitted has jurisdiction as though the prosecution had originated in it.[2]

3. Transfer Between State Courts of Concurrent Jurisdiction — a. In General. In England, from the earliest times, the court of king's bench could by certiorari remove indictments to itself from courts of inferior jurisdiction;[3] and this power exists in Pennsylvania in the supreme court, which is given the powers of the court of the king's bench in criminal cases,[4] and to some extent in New Jersey.[5] In some states by statute where two courts have concurrent jurisdiction of a crime the trial may be removed from either to the other on application seasonably made.[6]

the clerk does not refuse to furnish the papers, neglects to file them, the circuit court may dismiss the petition and the state court may then proceed as if no petition had been filed. See New Hampshire *v.* Grand Trunk R. Co., 3 Fed. 887. This statute has been held constitutional (Strauder *v.* West Virginia, 100 U. S. 303, 25 L. ed. 664 [*overruling* State *v.* Strauder, 11 W. Va. 745, 27 Am. Rep. 606]), and its provisions are not confined to colored persons but extend to white persons who cannot enforce the rights secured to them by the fourteenth amendment and legislation relating thereto (U. S. *v.* Rhodes, 27 Fed. Cas. No. 16,151, 1 Abb. 28); but it does not apply to a case in a state court solely because the state law prohibits colored persons from testifying as witnesses in the courts of the state under certain circumstances, as a criminal prosecution does not affect the witnesses within the meaning of the act. Blyew *v.* U. S., 13 Wall. (U. S.) 581, 20 L. ed. 638.

Time of filing petition.— The petition for the removal to the federal court is required to be filed "before the trial or final hearing of the cause," and a petition filed after sentence is too late. Bush *v.* Com., 3 Ky. L. Rep. 740.

As to what facts the petition must show see State *v.* Smalls, 11 S. C. 262.

A violation of a state liquor law is within the exclusive jurisdiction of a state court, although the accused holds a United States license. McGuire *v.* Massachusetts, 3 Wall. (U. S.) 387, 18 L. ed. 226. Nor can it be removed to a federal court on the ground that it is a penalty incurred under an act of congress, nor on account of a right set up by the accused under an act of congress. State *v.* Elder, 54 Me. 381; Com. *v.* Casey, 12 Allen (Mass.) 214; Com. *v.* Keenan, 11 Allen (Mass.) 262.

98. U. S. Rev. St. (1878) § 1037 [U. S. Comp. St. (1901) p. 723].

99. U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 16 Blatchf. 338.

1. See U. S. *v.* Richardson, 28 Fed. 61.

2. The circuit court may amend its record after remission. Kelly *v.* U. S., 27 Fed. 616; U. S. *v.* McKee, 26 Fed. Cas. No. 15,687, 4 Dill. 1. And where the only open question in the court receiving the case is one of law, it may be decided there, although the case might be sent back where the question is one of fact. U. S. *v.* Haynes, 29 Fed. 691. After a conviction in the district court the indictment cannot be lawfully remitted to the circuit court (U. S. *v.* Haynes, 26 Fed. 857), nor can an information filed in the district court be remitted to the circuit court as the statute applies only to indictments (U. S. *v.* Tiernay, 16 Fed. 516, 3 McCrary 308), and it seems only to indictments of which both courts have concurrent jurisdiction (Campbell *v.* Kirkpatrick, 4 Fed. Cas. No. 2,363, 5 McLean 175).

Except in the case of capital crimes the jurisdiction of the circuit and the district courts is concurrent; but U. S. Rev. St. (1878) § 1039 [U. S. Comp. St. (1901) p. 723], requires that all indictments for capital offenses found in the district court shall be remitted to the circuit courts. U. S. *v.* Holliday, 3 Wall. (U. S.) 407, 18 L. ed. 182.

A transfer of the place of trial from one division of a judicial district to another, by a court having jurisdiction over the whole district, when not expressly prohibited, is proper. Rosecrans *v.* U. S., 165 U. S. 257, 17 S. Ct. 302, 41 L. ed. 708.

3. Bacon Abr. tit. "Certiorari," B.

4. Com. *v.* Delamater, 145 Pa. St. 210, 22 Atl. 1098; Com. *v.* Balph, 111 Pa. St. 365, 3 Atl. 220; Hackett *v.* Com., 15 Pa. St. 95; Com. *v.* Simpson, 2 Grant (Pa.) 438. The right to a change of venue does not prevent the operation of the writ. Com. *v.* Smith, 185 Pa. St. 553, 40 Atl. 73. Where the application for removal by certiorari is based upon the prejudice of the judge, the burden of proof is on the applicant. Quay's Petition, 189 Pa. St. 517, 42 Atl. 199.

5. N. J. Gen. St. (1895) 367. As to the granting of writs of certiorari to remove indictments from the court of sessions or oyer to the supreme court in New Jersey see State *v.* New Jersey Jockey Club, 52 N. J. L. 493, 19 Atl. 976; State *v.* Sailer, 16 N. J. L. 357; State *v.* Morris Canal, etc., Co., 13 N. J. L. 192.

6. *Georgia.*— Dismuke *v.* State, 105 Ga. 589, 31 S. E. 561.

Illinois.— Barr *v.* People, 103 Ill. 110; Markee *v.* People, 103 Ill. App. 347; Good-

b. Grounds For Transfer. Some states provide by statute that where the accused, by reason of the interest, relation, or prejudice of a judge, cannot enjoy a fair trial before an inferior court, the judge in his discretion may transfer the case to another court with concurrent jurisdiction.[7] In New York, by statute, a criminal action prosecuted by indictment may at any time before trial, on the application of defendant, be removed from a county court or a city court to a term of the supreme court held in the same county for good cause shown; or from the supreme court, a county court, or a city court, to a term of the supreme court held in another county, on the ground that a fair and impartial trial cannot be had in the county or city where the indictment is pending.[8]

man *v.* People, 90 Ill. App. 533; Fanning *v.* People, 10 Ill. App. 70.

New Jersey.— State *v.* New Jersey Jockey Club, 52 N. J. L. 493, 19 Atl. 976.

New York.—See People *v.* Hogan, 123 N. Y. 219, 25 N. E. 193 [*affirming* 55 Hun 391, 8 N. Y. Suppl. 451, 7 N. Y. Crim. 476]; Leighton *v.* People, 88 N. Y. 117 [*affirming* 10 Abb. N. Cas. 261]; Dolan *v.* People, 6 Hun 493; Thompson *v.* People, 6 Hun 135; People *v.* Shephard, 11 Abb. Pr. 59, 19 How. Pr. 446; People *v.* Johnston, 10 Abb. Pr. 294, 19 How. Pr. 11.

Pennsylvania.— Com. *v.* Shutte, 130 Pa. St. 272, 18 Atl. 635, 17 Am. St. Rep. 773.

South Carolina.— State *v.* McClenton, 59 S. C. 226, 37 S. E. 819.

Texas.— Moore *v.* State, 36 Tex. Crim. 88, 35 S. W. 668.

Virginia.— Drier *v.* Com., 89 Va. 529, 16 S. E. 672; Howell *v.* Com., 86 Va. 817, 11 S. E. 238.

Wisconsin.— See State *v.* McArthur, 13 Wis. 383.

See 14 Cent. Dig. tit. "Criminal Law," § 200.

Transfer after plea.—A request for a transfer by the accused may be refused if made after his plea of not guilty. State *v.* New Jersey Jockey Club, 52 N. J. L. 493, 19 Atl. 976; Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364; Whitehead *v.* Com., 19 Gratt. (Va.) 640.

The transfer from one section of a court to another of a criminal case is legal and constitutional, although the constitution provides that criminal cases shall be assigned among the several sections by lot. State *v.* Arbuno, 105 La. 719, 30 So. 163.

Where the prisoner has an election between courts, he cannot be compelled to exercise it before the court will entertain a motion for a continuance (Howell *v.* Com., 86 Va. 817, 11 S. E. 238; Anderson's Case, 84 Va. 77, 3 S. E. 807); and as soon as he elects to be tried elsewhere the court is without jurisdiction (Howell *v.* Com., 86 Va. 817, 11 S. E. 238).

Duty to advise defendant of right.— Under a statute (Va. Code, § 4016) providing that a person may, upon arraignment for a capital felony in a county court, demand trial in the circuit court, it is not required that he be advised of his right by the clerk of the court, if he has counsel. Drier *v.* Com., 89 Va. 529, 16 S. E. 672.

A statute empowering a court to transfer misdemeanors does not authorize it to transfer jurisdiction over felonies. Fossett *v.* State, 11 Tex. App. 40.

Unconstitutionality of statute.— Where a state constitution directs that in the case of prejudice existing against the accused in one county he shall have a change of venue to an adjoining county, a statute authorizing a city and a county court in the same county to transfer cases from one to the other in all cases of suggestion for removal of criminal causes from these courts is unconstitutional, as it deprives the defendant of the right to a fair and impartial trial, which he would have in the adjoining county. Cromwell *v.* State, 12 Gill & J. (Md.) 257; State *v.* Dashiell, 6 Harr. & J. (Md.) 268.

7. Goldsby *v.* State, 18 Ind. 147; State *v.* Johnson, 104 N. C. 780, 10 S. E. 257; Kendrick *v.* State, Cooke (Tenn.) 474.

8. N. Y. Code Crim. Proc. § 344.

"Good cause" for the removal of an indictment from the court of general sessions to the supreme court exists where the case involves novel and important questions of law (People *v.* Scannell, 35 Misc. (N. Y.) 558, 72 N. Y. Suppl. 25; People *v.* Clark, 15 N. Y. Suppl. 79), as questions of railroad law (People *v.* Clark, 15 N. Y. Suppl. 79); or has attracted great attention and caused much discussion in the press, so that the defendant is in danger of suffering injustice because of public prejudice (People *v.* Squire, 1 N. Y. St. 534; People *v.* Sessions, 10 Abb. N. Cas. (N. Y.) 192, 62 How. Pr. N. Y. 415); but not where the sole ground for removing the case is the high character and political prominence of the accused (People *v.* Clark, 15 N. Y. Suppl. 79), or because great public excitement prevails regarding electrocution (People *v.* Rourke, 11 Abb. N. Cas. (N. Y.) 89), or because there may be some difficulty in obtaining a fair trial before the sessions on account of local clamor against the prisoner, as this will not affect the session justices more than the supreme court justices, and the jurors in both courts are drawn from the same body of citizens (People *v.* Clark, 15 N. Y. Suppl. 79; People *v.* Rourke, 11 Abb. N. Cas. (N. Y.) 89). A party arraigned in general sessions of the city of New York has no vested right to a trial there, and the court may of its own motion, under 3 N. Y. Rev. St. (5th ed.) p. 305, § 7, remit the case to the supreme court, if in the opinion of the court

c. Proceedings For Transfer. The proceedings for a transfer are usually regulated by statutes, which are often construed strictly as against the state and liberally in favor of the accused.[9] But it has been held that the failure of the accused to file a certificate directed to be made by him,[10] or his neglect to forward the original indictment as required by the statute,[11] is fatal, and that the court to which the transfer is attempted to be made does not acquire jurisdiction.[12]

d. Termination of Jurisdiction of Inferior Court. The jurisdiction of an inferior court terminates when the papers are filed in the superior court,[13] on the entry of the order in the inferior court,[14] on the receipt of the indictment by the superior court from the inferior court,[15] or as soon as the inferior court has bound the prisoner over.[16]

e. Proceedings After Transfer. Where a case is transferred to a superior court no new indictment need be found, and the state can proceed on the original papers.[17] If the case has been improperly transferred to the superior court it may be remanded on motion.[18] If the transfer was absolutely without authority mandamus will lie to compel the inferior court to proceed.[19]

4. Transfer Between Justices' Courts. Under statutes in some states, where the defendant shows facts on his arraignment before a justice proving the justice to be prejudiced against him, or so related to the action or to the prosecuting witness that it is not possible for him fairly and impartially to try the accused, the justice must transfer the case to some other justice.[20] Where the statute provides that a

the circumstances justify it. Leighton *v.* People, 88 N. Y. 117 [*affirming* 10 Abb. N. Cas. 261]; Real *v.* People, 42 N. Y. 270; Dolan *v.* People, 6 Hun (N. Y.) 493; Thompson *v.* People, 6 Hun (N. Y.) 135; People *v.* Shepard, 11 Abb. Pr. (N. Y.) 59, 19 How. Pr. (N. Y.) 446; People *v.* Johnston, 10 Abb. Pr. (N. Y.) 294, 19 How. Pr. (N. Y.) 11.

9. Biscoe *v.* State, 68 Md. 294, 12 Atl. 25; State *v.* Mott, 86 N. C. 621; State *v.* Turner, Wright (Ohio) 20.

Appeal.— In Maryland an order removing or refusing to remove a cause to another court for trial determines a constitutional right, and is appealable. McMillan *v.* State, 68 Md. 307, 12 Atl. 8.

10. Mitchell *v.* Com., 89 Va. 826, 17 S. E. 480.

11. Cruiser *v.* State, 18 N. J. L. 206; Shoemaker *v.* State, 12 Ohio 43.

12. **Substantial compliance with statute.**— In Texas it is held that a substantial compliance with the statute is all that is required. Cummings *v.* State, 37 Tex. Crim. 436, 35 S. W. 979; Malloy *v.* State, 35 Tex. Crim. 389, 33 S. W. 1082; Short *v.* State, (Tex. Crim. App. 1895) 29 S. W. 1073; Estes *v.* State, 33 Tex. Crim. 560, 28 S. W. 469; Reiffert *v.* State, (Tex. Crim. App. 1894) 26 S. W. 839; Koenig *v.* State, 33 Tex. Crim. 367, 26 S. W. 835, 47 Am. St. Rep. 35; Chaffin *v.* State, (Tex. Crim. App. 1893) 24 S. W. 411; Johnson *v.* State, 28 Tex. App. 562, 13 S. W. 1005; Lynn *v.* State, 28 Tex. App. 515, 13 S. W. 867; Brannon *v.* State, 23 Tex. App. 428, 5 S. W. 132; McDonald *v.* State, 7 Tex. App. 113; Walker *v.* State, 7 Tex. App. 52. Where the original order transferring a criminal case from the district court to the county court shows the case to have been transferred before the beginning of the term of the district court, but the record contains another order showing the transfer to have been duly made as to the matter of time, the defect is cured. Palmer *v.* State, (Tex. Crim. App. 1902) 70 S. W. 206.

13. Green *v.* State, 59 Ala. 68; Hurt *v.* State, 26 Ind. 106.

14. Manly *v.* State, 7 Md. 135.

15. People *v.* Myers, 2 Hun (N. Y.) 6; Myers *v.* People, 4 Thomps. & C. (N. Y.) 292.

Notice to the accused of an order sending an indictment from the sessions to the supreme court is not necessary. People *v.* Carolin, 115 N. Y. 658, 21 N. E. 1059; Myers *v.* People, 14 Hun (N. Y.) 416; Leighton *v.* People, 10 Abb. N. Cas. (N. Y.) 261. But see McFarland's Case, 7 Abb. Pr. N. S. (N. Y.) 348.

16. State *v.* Pritchard, 35 Conn. 319.

17. State *v.* Watson, 56 Conn. 188, 14 Atl. 797; Hurt *v.* State, 26 Ind. 106.

18. State *v.* Sykes, 104 N. C. 700, 10 S. E. 158.

Objection on appeal.— An objection to the jurisdiction of the superior court cannot be urged for the first time on appeal. Com. *v.* Simpson, 2 Grant (Pa.) 438; Short *v.* State, (Tex. Crim. 1895) 29 S. W. 1073; Thompson *v.* State, 2 Tex. App. 82.

19. State *v.* Laughlin, 75 Mo. 358.

20. *Iowa.*— Griffin *v.* Painter, 65 Iowa 60, 21 N. W. 181; Albertson *v.* Kriechbaum, 65 Iowa 11, 21 N. W. 178; Zelle *v.* McHenry, 51 Iowa 572, 2 N. W. 264.

Nebraska.— Garst's Application, 10 Nebr. 78, 4 N. W. 511.

North Carolina.— State *v.* Ivie, 118 N. C. 1227, 24 S. E. 539.

Washington.— Puyallup *v.* Snyder, 13 Wash. 572, 43 Pac. 635.

Wisconsin.— State *v.* Evans, 88 Wis. 255, 60 N. W. 433; State *v.* Sorenson, 84 Wis. 27,

justice may transfer a cause to any one of several justices, it should be transferred to the one nearest the home of the accused.[21]

5. TRANSFER BY CREATION OF NEW COURT. Where a new court is created by a statute which confers upon it exclusive jurisdiction of certain crimes, and expressly transfers such crimes then pending in other courts, the jurisdiction of the existing court ceases, and the cases are transferred by operation of the statute. No new indictment or process is necessary.[22]

J. Loss of Jurisdiction — 1. CONVICTION OF OFFENSE BELOW JURISDICTION. Where the court has jurisdiction of the crime for which the accused is indicted, it is not lost if on the evidence he is convicted of a crime of an inferior grade, of which it would not have jurisdiction originally.[23]

2. APPLICATION FOR, OR ERRONEOUS DENIAL OF, CHANGE OF VENUE. It has been held that the jurisdiction of a justice of the peace ceases at once on an application for a change of venue, except for the purpose of transferring the case to another justice;[24] but there is also good authority for the proposition that the mere application by affidavit for a change of venue does not terminate the jurisdiction,

53 N. W. 1124; Martin *v.* State, 79 Wis. 165, 48 N. W. 119; Billings *v.* Noble, 75 Wis. 325, 43 N. W. 1131.

Compare People *v.* Duncan, 97 Mich. 632, 57 N. W. 191.

See 14 Cent. Dig. tit. "Criminal Law," § 204.

Substitution of magistrates.— A conviction before a police magistrate is without jurisdiction where the accused was tried before a magistrate by a jury, and pending the trial a magistrate was substituted, as a criminal case cannot be tried partly before one justice of the peace and partly before another, even by consent. People *v.* Norton, 76 Hun (N. Y.) 7, 27 N. Y. Suppl. 851; People *v.* McPherson, 74 Hun (N. Y.) 336, 26 N. Y. Suppl. 236.

The opinion of the accused that he cannot have a fair and impartial trial is not sufficient to procure a transfer of the case to another justice. He should state facts on which the justice hearing the case can exercise his discretion, subject to a review upon an appeal to the superior court. Lowrey *v.* Hogue, 85 Cal. 600, 24 Pac. 995.

The justice to whom, on change of venue, the case is referred must try it. When, on his refusal, the defendant is taken before another justice, the latter has no jurisdiction. Connell *v.* Stelson, 33 Iowa 147.

Statute not applicable to preliminary examination.— A statute permitting the transfer of an action or proceeding from one justice to another at any time before the trial commences does not apply to a preliminary examination to ascertain whether the accused ought to be held or not. State *v.* Bergman, 37 Minn. 407, 34 N. W. 737; Duffies *v.* State, 7 Wis. 672.

21. Albertson *v.* Kriechbaum, 65 Iowa 11, 21 N. W. 178; State *v.* Ivie, 118 N. C. 1227, 24 S. E. 539. But it seems that the determination of the justice as to who is the nearest magistrate is conclusive. State *v.* Evans, 88 Wis. 255, 60 N. W. 433; Martin *v.* State, 79 Wis. 165, 48 N. W. 119.

22. State *v.* Harper, 28 La. Ann. 35; Dyott *v.* Com., 5 Whart. (Pa.) 67; Hildreth *v.* State, 19 Tex. App. 195; Ewing's Case, 5 Gratt. (Va.) 701.

23. *Alabama.*— Fleming *v.* State, 107 Ala. 11, 18 So. 263.

California.— *Ex p.* Bell, (1893) 34 Pac. 641; *Ex p.* Donahue, 65 Cal. 474, 4 Pac. 449; People *v.* Fahey, 64 Cal. 342, 30 Pac. 1030; People *v.* Holland, 59 Cal. 364; People *v.* English, 30 Cal. 214.

Connecticut.— State *v.* Brown, 24 Conn. 316.

District of Columbia.— *Ex p.* Robinson, 3 MacArthur 418.

Florida.— Winburn *v.* State, 28 Fla. 339, 9 So. 694; McLean *v.* State, 23 Fla. 281, 2 So. 5.

Iowa.— State *v.* Jarvis, 21 Iowa 44; State *v.* Stingley, 10 Iowa 488; State *v.* Shepard, 10 Iowa 126; State *v.* Church, 8 Iowa 252.

Louisiana.— State *v.* Malloy, 30 La. Ann. 61; State *v.* De Laney, 28 La. Ann. 434; Bailey *v.* Quick, 28 La. Ann. 432.

Maine.— State *v.* Ham, 54 Me. 194.

Massachusetts.— Com. *v.* Fischblatt, 4 Metc. 354.

Minnesota.— Boyd *v.* State, 4 Minn. 321.

New Hampshire.— State *v.* Webster, 39 N. H. 96; State *v.* Arlin, 27 N. H. 116.

New York.— People *v.* Rose, 15 N. Y. Suppl. 815.

North Carolina.— State *v.* Fesperman, 108 N. C. 770, 13 S. E. 14; State *v.* Johnson, 94 N. C. 863; State *v.* Speller, 91 N. C. 526; State *v.* Ray, 89 N. C. 587; State *v.* Reaves, 85 N. C. 553; State *v.* Cumpton, 1 N. C. 200.

Ohio.— Stewart *v.* State, 5 Ohio 241.

Tennessee.— State *v.* Bowling, 10 Humphr. 52.

Texas.— Johnson *v.* State, 17 Tex. 515; Montgomery *v.* State, 4 Tex. App. 140; Ingle *v.* State, 4 Tex. App. 91; Harberger *v.* State, 4 Tex. App. 26, 30 Am. Rep. 157.

See 14 Cent. Dig. tit. "Criminal Law," § 206.

24. People *v.* Hubbard, 22 Cal. 34; *In re* Justus, 65 Kan. 547, 70 Pac. 354; State *v.* Evans, 13 Mont. 239, 33 Pac. 1010.

although the statute says the justice must grant the change.[25] The erroneous denial of a motion for a change of venue does not oust the jurisdiction.[26]

3. EXPIRATION OF TERM. In the absence of statutory provision to the contrary, a court has jurisdiction to pronounce judgment of conviction or to pronounce sentence at a term subsequent to that in which the verdict was rendered. The expiration of the term does not oust its jurisdiction.[27]

4. UNAUTHORIZED ADJOURNMENT. Where there is no statutory regulation of adjournments in criminal proceedings, the jurisdiction of a court or justice is not lost by an adjournment for a reasonable period.[28] Where an adjournment may be had under a statute for a special cause, an adjournment may be had by consent where this cause does not exist.[29]

5. DETERMINATION OF SANITY OF ACCUSED IN ANOTHER COURT. Where it is alleged that the accused is insane when sentence is to be imposed, the court has discretion to postpone sentence to inquire into his sanity; but the fact that proceedings are then pending in another court to determine the sanity of the accused does not destroy jurisdiction to sentence.[30]

6. CURATIVE STATUTES. Where by statute criminal jurisdiction has been taken from a court, it has no jurisdiction thereafter to indict, and a statute which attempts to confirm and legalize its action is unconstitutional, as in conflict with the United States constitutional provision that no state shall deprive any person of life, liberty, or property without due process of law.[31]

K. Presumption as to Jurisdiction — 1. COURTS OF GENERAL JURISDICTION. A court of general jurisdiction is presumed to have acted within its powers, and the burden is on the accused to show affirmatively that it had no jurisdiction.[32]

25. Ottumwa *v.* Schaub, 52 Iowa 515, 3 N. W. 529; State *v.* Brumley, 53 Mo. App. 126.

26. Turner *v.* Conkey, 132 Ind. 248, 31 N. E. 777, 32 Am. St. Rep. 251, 17 L. R. A. 509 [*overruling* Smelzer *v.* Lockhart, 97 Ind. 315]; Ottumwa *v.* Schaub, 52 Iowa 515, 3 N. W. 529; *In re* Justus, 65 Kan. 547, 70 Pac. 354; State *v.* Brumley, 53 Mo. App. 126.

The proper remedy is by mandamus to compel a change of venue. State *v.* Clayton, 34 Mo. App. 563.

27. *California.*— People *v.* Felix, 45 Cal. 163.

Mississippi.— Smith *v.* State, 61 Miss. 754

Missouri.— State *v.* Watson, 95 Mo. 411, 8 S. W. 383.

New York.— People *v.* Everhardt, 104 N. Y. 591, 11 N. E. 62 [*affirming* 5 N. Y. Crim. 91]; Lowenberg *v.* People, 27 N. Y. 336, 26 How. Pr. 202; Ferris *v.* People, 31 How. Pr. 140.

Pennsylvania.— Williams *v.* Com., 29 Pa. St. 102.

Tennessee.— Greenfield *v.* State, 7 Baxt. 18.

See 14 Cent. Dig. tit. "Criminal Law," § 208.

Plea of guilty.—A court has jurisdiction to sentence upon a plea of guilty, although the plea was made at a prior term. Com. *v.* Chase, Thach. Crim. Cas. (Mass.) 267.

Prolonging the term.— A court having prolonged a term beyond its stated length to finish a trial, by statutory power vested in it, has jurisdiction to sentence one tried earlier in the term. Lowenberg *v.* People, 27 N. Y. 336, 26 How. Pr. (N. Y.) 202.

Delay caused by accused.— Where a convicted person removes his cause from a justice's court to a court of record, and judgment is affirmed, and he obtains a stay to bring a writ of error, resulting in a delay of forty days before he is sentenced, he is estopped to invoke the delay of his own procurement to oust the jurisdiction of the superior court. People *v.* Blake, 54 Mich. 239, 19 N. W. 969.

28. State *v.* Valure, 95 Iowa 401, 64 N. W. 280.

29. People *v.* Hux, 68 Mich. 477, 36 N. W. 229.

As to adjournments to procure witnesses see State *v.* Bliss, 21 Minn. 458.

30. State *v.* Gould, 40 Kan. 258, 19 Pac. 739.

31. State *v.* Doherty, 60 Me. 504, 511, where the court said: "It is not enough that the mere forms of law are observed; there must, also, be present the actual essence of judicial right and authority. If such void claims and empty forms could impart legality to criminal proceedings, it is plain to see that the law might be perverted for the purposes of wrong and oppression."

32. *California.*— People *v.* Blackwell, 27 Cal. 65; People *v.* Lawrence, 21 Cal. 368.

Indiana.— Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; Nichols *v.* State, 127 Ind. 406, 26 N. E. 839.

Kentucky.— Hord *v.* Com., 32 S. W. 176, 17 Ky. L. Rep. 570.

New York.— Smith *v.* People, 47 N. Y. 330, where it was said in substance that the rule that every reasonable doubt on any question of law or fact bearing on the guilt or innocence of the accused should be solved in his favor does not apply to the jurisdiction of the

2. COURTS OF LIMITED JURISDICTION. The record of a criminal court of limited jurisdiction must show affirmatively such facts as confer jurisdiction, and generally no presumption is indulged in favor thereof.[33] But the presumption that an official did his duty and acted within his authority is recognized in connection with criminal courts, where the record is silent,[34] so that if jurisdiction is obtained the validity of a judgment will not be affected by mere irregularity and want of form in the proceedings.[35]

L. Waiver of Objections — 1. IN GENERAL. The objection that a court has no jurisdiction of the person of the accused may be waived. It must be taken when he is arraigned, and is waived if he pleads and goes to trial.[36] But the objection that the court is not a legal court, or that it has no jurisdiction of the offense, cannot be waived, and may therefore be taken at any time.[37] In order that the appearance of the defendant may constitute a waiver it must be voluntary.[38]

2. BY PROCURING CHANGE OF VENUE. An application for a change of venue by the accused waives all objections to the jurisdiction of the court granting the application and of the court trying the case, if there is jurisdiction of the offense.[39]

3. BY PLEA. The objection that the court has no jurisdiction of the person of

court, but doubts as to this may be solved in favor of the tribunal, unless it palpably violates some established rule of law.

North Carolina.— State *v.* Carpenter, 111 N. C. 706, 16 S. E. 339.

South Carolina.— State *v.* Hatcher, 11 Rich. 525.

See 14 Cent. Dig. tit. "Criminal Law," § 214. And see COURTS, 11 Cyc. 691.

Lapse of time.— After a lapse of twenty years from the final sentence the law creates a presumption of regularity in spite of the fact that it does not appear that the court had jurisdiction, and especially where the defendant has made a default. State *v.* Hatcher, 11 Rich. (S. C.) 525.

33. *Alabama.*— Atkinson *v.* State, 122 Ala. 95, 25 So. 624; Wiley *v.* State, 117 Ala. 158, 23 So. 690.

California.— *Ex p.* Kearny, 55 Cal. 212.

Indiana.— Cobb *v.* State, 27 Ind. 133; Holland *v.* State, 22 Ind. 343.

Maine.— State *v.* Hall, 49 Me. 412; State *v.* Hartwell, 35 Me. 129, where it is held that nothing can be presumed in favor of the jurisdiction of a justice of the peace, as his powers are altogether statutory.

Massachusetts.— Com. *v.* Connor, 155 Mass. 134, 29 N. E. 204; Com. *v.* Jeffts, 14 Gray 19; Com. *v.* Fitzgerald, 14 Gray 14.

New York.— People *v.* McLaughlin, 57 N. Y. App. Div. 454, 68 N. Y. Suppl. 246; People *v.* Miller, 14 Johns. 371.

North Carolina.— State *v.* Shelly, 98 N. C. 673, 4 S. E. 530.

Ohio.— Montgomery *v.* State, 7 Ohio St. 107.

Pennsylvania.— Com. *v.* Gillingham, 6 Phila. 321.

Texas.— Weatherford *v.* State, (Crim. App. 1894) 28 S. W. 814; Bailey *v.* State, (Tex. App. 1890) 15 S. W. 117; Harris *v.* State, 14 Tex. App. 676.

See 14 Cent. Dig. tit. "Criminal Law," §§ 213, 215. And see COURTS, 11 Cyc. 693.

34. Rataree *v.* State, 62 Ga. 245; Tharp *v.* Com., 3 Metc. (Ky.) 411; Com. *v.* Lynn, 154 Mass. 405, 28 N. E. 289.

35. Kane *v.* State, 70 Md. 546, 17 Atl. 557.

Election by accused.— If it appears from the entries of a justice that the accused elected, as allowed by statute, to be tried before him instead of being held for trial in the circuit court by jury on indictment, jurisdiction of the person is sufficiently shown. Kane *v.* State, 70 Md. 546, 17 Atl. 557.

Minor jurisdictional facts.— The presumption in favor of the validity of a judgment applies to a judgment of a justice's court, and dispenses with the proof of minor jurisdictional facts. State *v.* Watson, 56 Conn. 188, 14 Atl. 797.

36. *Indiana.*— Ledgerwood *v.* State, 134 Ind. 81, 33 N. E. 631.

Kansas.— State *v.* Woods, 49 Kan. 237, 30 Pac. 520. And see Rice *v.* State, 3 Kan. 141.

Michigan.— People *v.* Hanifan, 98 Mich. 32, 56 N. W. 1048.

Minnesota.— State *v.* Fitzgerald, 51 Minn. 534, 53 N. W. 799.

New York.— Matter of Blum, 9 Misc. 571, 30 N. Y. Suppl. 396.

Pennsylvania.— March *v.* Com., (1888) 14 Atl. 375.

And see the cases cited *infra*, notes 40–42.

Necessity for waiver in writing see Huff *v.* State, 29 Ga. 424.

37. See *infra*, VI, L, 3, note 43.

38. See Brosde *v.* Sanderson, 86 Wis. 368, 57 N. W. 49, holding that where a justice on granting a continuance lost jurisdiction of the case because of failure to make the proper entry, the subsequent appearance of the defendant, who had been released from imprisonment on giving bond to appear, was not voluntary, so as to constitute a waiver of the defect or loss of jurisdiction.

39. Perteet *v.* People, 70 Ill. 171; State *v.* McEvoy, 68 Iowa 355, 27 N. W. 273; People *v.* Dane, 81 Mich. 36, 45 N. W. 655; People *v.* New York Ct. Spec. Sess., 4 Hun (N. Y.) 441.

the defendant, whether by reason of some irregularity in the proceedings,[40] or because of some defect in the constitution of the court which does not prevent it from being a *de facto* court,[41] or for other reasons, is waived by defendant by pleading not guilty and going to trial, or by pleading guilty.[42] But the objection that a court has no jurisdiction of the subject-matter is not waived by plea or going to trial, and may be raised on motion in arrest of judgment, on appeal, or by petition for a writ of habeas corpus.[43]

VII. VENUE.

A. Place of Bringing Prosecution — 1. Common-Law Rule. At common law an indictment can be found in that county only in which the crime has been committed.[44]

2. Constitutional and Statutory Provisions. In the United States most of the state constitutions and declarations of rights expressly provide in substance that all criminal prosecutions shall be brought to trial in the county in which the crime shall have been committed. These provisions are strictly construed in

40. Com. *v.* Carney, 153 Mass. 444, 27 N. E. 9.

41. The objection that the court has no jurisdiction on account of the illegality of the judge's commission (Case *v.* State, 5 Ind. 1; State *v.* Alling, 12 Ohio 16; State *v.* Anone, 2 Nott & M. (S. C.) 27), or that the statute creating the court before which the preliminary examination was had was unconstitutional (*In re* Brown, 62 Kan. 648, 64 Pac. 76), must be taken at the trial.

42. *Alabama.*— Reeves *v.* State, 96 Ala. 33, 11 So. 296.

Connecticut.— State *v.* Bishop, 7 Conn. 181.

Indiana.— Ledgerwood *v.* State, 134 Ind. 81, 33 N. E. 631; Harbin *v.* State, 133 Ind. 698, 33 N. E. 635.

Iowa.— State *v.* Kinney, 41 Iowa 424.

Kansas.— State *v.* Bjorkland, 34 Kan. 377, 8 Pac. 391. And see Junction City *v.* Keeffe, 40 Kan. 275, 19 Pac. 735.

Kentucky.— Tipper *v.* Com., 1 Metc. 6.

Mississippi.— Holley *v.* State, 74 Miss. 878, 21 So. 923.

Missouri.— State *v.* Coover, 49 Mo. 432.

New Jersey.— State *v.* Woods, 66 N. J. L. 458, 49 Atl. 716; Winters *v.* State, 61 N. J. L. 613, 41 Atl. 220.

New York.— People *v.* Hall, 169 N. Y. 184, 62 N. E. 170; People *v.* Shaver, 37 N. Y. App. Div. 21, 55 N. Y. Suppl. 701; People *v.* Burns, 19 Misc. 680, 44 N. Y. Suppl. 1106; Matter of Blum, 9 Misc. 571, 30 N. Y. Suppl. 396.

North Carolina.— State *v.* Giles, 103 N. C. 391, 9 S. E. 433.

Pennsylvania.— Com. *v.* Gillingham, 6 Phila. 321; Com. *v.* McMahon, 30 Pittsb. Leg. J. N. S. 248.

Tennessee.— Agee *v.* Dement, 1 Humphr. 332.

Texas.— Abbott *v.* State, 42 Tex. Crim. 8, 57 S. W. 97. See Palmer *v.* State, (Crim. App. 1902) 70 S. W. 206.

Vermont.— State *v.* Meader, 47 Vt. 78.

Wisconsin.— *In re* Roszcynialla, 99 Wis. 534, 75 N. W. 167.

See 14 Cent. Dig. tit. "Criminal Law," § 216 *et seq.* And see the cases cited *supra*, VI, L, 1, note 36.

43. *California.*— People *v.* Granice, 50 Cal. 447.

Idaho.— People *v.* Du Rell, 1 Ida. 44.

Illinois.— Foley *v.* People, 1 Ill. 57.

Iowa.— State *v.* Rollet, 6 Iowa 535.

Kansas.— Rice *v.* State, 3 Kan. 141.

New Hampshire.— Batchelder *v.* Currier, 45 N. H. 460.

New York.— Shaw *v.* People, 3 Hun 272, 5 Thomps. & C. 439; People *v.* Campbell, 4 Park. Cr. 386.

Pennsylvania.— Mills *v.* Com., 13 Pa. St. 627.

Utah.— State *v.* McNally, 23 Utah 277, 64 Pac. 765; State *v.* Morrey, 23 Utah 273, 64 Pac. 764.

Virginia.— Jackson *v.* Com., 13 Gratt. 795.

Wisconsin.— Hager *v.* Falk, 82 Wis. 644, 52 N. W. 432.

United States.— Indiana *v.* Chicago Tolleston Club, 53 Fed. 18.

See 14 Cent. Dig. tit. "Criminal Law," § 216 *et seq.*

Jurisdiction by consent see *supra*, VI, H, 2.

Motion in arrest of judgment on the ground of want of jurisdiction see *infra*, XV, B.

Writ of error or appeal.— As to raising the question of want of jurisdiction on writ of error or appeal see *infra*, XVII.

Habeas corpus.— As to raising the question of want of jurisdiction on petition for a writ of habeas corpus see Habeas Corpus.

44. *Alabama.*— Hughes *v.* State, 35 Ala. 351.

Nebraska.— *Ex p.* Carr, 22 Nebr. 535, 35 N. W. 409.

New Jersey.— State *v.* Jones, 8 N. J. L. 307, 9 N. J. L. 357, 17 Am. Dec. 483.

North Carolina.— State *v.* Patterson, 5 N. C. 443.

England.— Rex *v.* Jones, 6 C. & P. 137, 25 E. C. L. 360; Bacon Abr. "Indictment" F; 4 Bl. Comm. 303; 1 Chitty Crim. L. 189; 2 Hale P. C. 163; 2 Hawkins P. C. c. 25, §§ 24, 35, 51.

favor of the accused, and with a recognition of the principles of the common law, and the legislature cannot authorize a trial in any other county.[45] It has been held, however, that it is not unconstitutional to permit the trial of an offense committed in an unorganized territory in an organized county to which it is attached,[46] or to create a district out of part of a county and limit the selection of grand and petit jurors of that district to the territory comprising the same.[47] And so it has been held of other statutes.[48] Where the constitution contains no provision requiring the accused to be tried in the county of the commission of the crime, the legislature may fix or allow the venue in any other county.[49] A statute providing that an indictment for an offense "may" be found and tried in the county where the offender resides, or where he is apprehended, is not in derogation of the common-law right of trial and indictment in the county where the offense is committed, but merely enlarges the jurisdiction of the court, and it does not prevent an indictment in the county where the offense was committed.[50] The right which the constitution gives to a defendant to be tried in the county in which the offense was committed is a personal privilege and may be waived by him.[51]

3. Venue of Particular Offenses — a. In General. An offense is committed of course in that county in which the acts constituting the same are done, and under some statutes where the acts are done in different counties the offense is committed in that county in which it is consummated.[52]

45. *Arkansas.*— Walls *v.* State, 32 Ark. 565; Dougan *v.* State, 30 Ark. 41.

Georgia.— Dempsey *v.* State, 94 Ga. 766, 22 S. E. 57.

Illinois.— Buckrice *v.* People, 110 Ill. 29.

Kansas.— State *v.* Knapp, 40 Kan. 148, 19 Pac. 728; State *v.* Potter, 16 Kan. 80.

Missouri.— State *v.* Smiley, 98 Mo. 605, 12 S. W. 247; State *v.* Hatch, 91 Mo. 568, 4 S. W. 502 (holding unconstitutional a statute authorizing an indictment to be found in one of two or more counties where there is doubt as to where the offense was committed); *Ex p.* Slater, 72 Mo. 102; *In re* McDonald, 19 Mo. App. 370.

Nebraska.— State *v.* Crinklaw, 40 Nebr. 759, 59 N. W. 370.

Tennessee.— Craig *v.* State, 3 Heisk. 227; State *v.* Denton, 6 Coldw. 539; Armstrong *v.* State, 1 Coldw. 338.

West Virginia.— State *v.* Lowe, 21 W. Va. 782, 45 Am. Rep. 570.

Wisconsin.— Wheeler *v.* State, 24 Wis. 52.

See 14 Cent. Dig. tit. "Criminal Law," § 219.

Trial of convict.— Inasmuch as the constitutional provision is applicable to freemen and not to convicts, who by reason of their crimes have forfeited all rights except so far as the state grants them by favor, a statute providing that a court in the county where a penitentiary is located shall have jurisdiction of all criminal proceedings against them does not violate the constitution, although applied to a crime committed by a convict in another county. Ruffin *v.* Com., 21 Gratt. (Va.) 790.

Judicial districts.— The provisions of a state constitution giving the accused the right to a trial by a jury of the county do not require that the trial shall take place within the judicial district where the indictment is found. State *v.* McCarty, 52 Ohio St. 363, 39 N. E. 1041, 27 L. R. A. 534. Where the accused is entitled to a trial in the district where the crime was committed, it means the particular territory that is in the jurisdiction of the court, including unorganized territory attached to a county for judicial purposes. State *v.* Crinklaw, 40 Nebr. 759, 59 N. W. 370; Dodge *v.* People, 4 Nebr. 220.

46. *In re* Holcomb, 21 Kan. 628.

47. Walker *v.* State, 35 Ark. 386.

48. See *infra*, VII, A, 3, d (as to larceny); *infra*, VII, A, 3, b (as to homicide); *infra*, VII, A, 5 (as to offenses near county lines); *infra*, VII, A, 8 (as to offenses on public conveyances).

49. Mischer *v.* State, 41 Tex. Crim. 412, 53 S. W. 627; Cohen *v.* State, 20 Tex. App. 224; Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746; Ham *v.* State, 4 Tex. App. 645. See State *v.* Meehan, 62 Conn. 126, 25 Atl. 476; State *v.* Sweetsir, 53 Me. 438. A statute providing that every person charged with an offense shall be tried in the county where the offense was committed, except when "otherwise provided," means when otherwise provided by statute. State *v.* Meehan, 62 Conn. 126, 25 Atl. 476.

The provision in the constitution of the United States (art. 3, § 2) that all crimes shall be tried in the state where committed applies only to trials in the federal courts. State *v.* Caldwell, 115 N. C. 794, 20 S. E. 523; *Ex p.* Pritchard, 43 Fed. 915; Nashville, etc., R. Co. *v.* Alabama, 120 U. S. 96, 9 S. Ct. 28, 32 L. ed. 252.

Retrospective effect of statute.— A statute fixing the county in which an offense may be prosecuted does not apply to offenses committed prior to its enactment. State *v.* Sweat, 16 S. C. 624.

50. State *v.* Sweetsir, 53 Me. 438.

51. State *v.* Potter, 16 Kan. 80.

52. Crow *v.* State, 18 Ala. 541; Brechwald *v.* People, 21 Ill. App. 213; State *v.* Knight,

b. Homicide. Where a mortal blow was inflicted or poison given in one county and death ensued in another, it was doubted at common law whether the homicide could be tried in either.[53] Most of the courts, however, have held that there is jurisdiction in such a case, some holding that the prosecution should be in the county where the blow was given or poison administered,[54] and others holding that it should be in the county where the death occurred.[55] In many jurisdictions the question is now settled by statutes, under some of which the prosecution is in the county where the injury was inflicted,[56] while under others it is in the county where the death ensued,[57] and under others it may be in either county.[58] These statutes have been sustained as constitutional.[59]

c. Abortion. A prosecution for abortion must be brought in the county where the medicine is given, or other acts producing the abortion are performed, although the result of such acts occurs in another county,[60] unless, as in some jurisdictions, a statute allows prosecution in either.[61]

d. Larceny. Both at common law and under statutory provisions in most states one who steals property in one county and brings it into another may be

54 Ohio St. 330, 43 N. E. 281; *In re* Kelly, 46 Fed. 653; and other cases in the notes following.

Offenses committed in two or more counties see *infra*, VII, A, 5.

Separate offenses.— Where a person commits an offense in one county and afterward commits a similar offense in another county, this does not change the venue of the offense first committed. State *v.* Hatch, 91 Mo. 568, 4 S. W. 502.

53. Green *v.* State, 66 Ala. 40, 41 Am. Rep. 744; 4 Bl. Comm. 304; 1 Chitty Crim. L. 177; 1 East P. C. 361; 2 Hawkins P. C. c. 25, § 36. And see *Ex p.* McNeeley, 36 W. Va. 84, 14 S. E. 436, 32 Am. St. Rep. 831, 15 L. R. A. 226.

54. *Alabama.*— Green *v.* State, 66 Ala. 40, 41 Am. Rep. 744.

Kansas.— State *v.* Bowen, 16 Kan. 475.

Maryland.— Stout *v.* State, 76 Md. 317, 25 Atl. 299.

Minnesota.— See State *v.* Gessert, 21 Minn. 369.

Missouri.— See State *v.* Blunt, 110 Mo. 322, 19 S. W. 650.

New Jersey.— See State *v.* Carter, 27 N. J. L. 499.

Tennessee.— Riley *v.* State, 9 Humphr. 646.

England.— Rex *v.* Hargrave, 5 C. & P. 170, 24 E. C. L. 509; 1 East P. C. 361; 1 Hale P. C. 426.

55. State *v.* McCoy, 8 Rob. (La.) 545, 41 Am. Dec. 301. See Com. *v.* Macloon, 101 Mass. 1, 100 Am. Dec. 89.

56. Stout *v.* State, 76 Md. 317, 25 Atl. 299; Robbins *v.* State, 8 Ohio St. 131.

Homicide by administering poison.— The overt act of homicide by administering poison, within the meaning of a statute, consists not simply in prescribing or furnishing the poison, but also in directing and causing it to be taken, so that if the poison be prescribed and furnished in one county to a person who carries it into another county, and there, under the directions given, takes it and becomes poisoned, and dies of the poison, the administering is consummated and the crime committed, if committed at all, in the county where the person is poisoned. Robbins *v.* State, 8 Ohio St. 131.

57. Com. *v.* Parker, 2 Pick. (Mass.) 550; Stoughton *v.* State, 13 Sm. & M. (Miss.) 255; State *v.* Toomer, 1 Cheves (S. C.) 106; 3 Edw. VI, c. 24.

58. *Florida.*— Smith *v.* State, 42 Fla. 605, 28 So. 758.

Iowa.— Nash *v.* State, 2 Greene 286.

Louisiana.— State *v.* Fields, 51 La. Ann. 1239, 26 So. 99; State *v.* Jones, 38 La. Ann. 792.

Missouri.— State *v.* Blunt, 110 Mo. 322, 19 S. W. 650. And see Steerman *v.* State, 10 Mo. 503.

New Mexico.— Hicks *v.* Territory, 6 N. M. 596, 30 Pac. 872.

Wisconsin.— State *v.* Pauley, 12 Wis. 537.

Offense committed partly in two counties see *infra*, VII, A, 6.

59. *Alabama.*— Green *v.* State, 66 Ala. 40, 41 Am. Rep. 744.

Florida.— Smith *v.* State, 42 Fla. 605, 28 So. 758.

Indiana.— Archer *v.* State, 106 Ind. 426, 7 N. E. 225.

Maryland.— Stout *v.* State, 76 Md. 317, 25 Atl. 299.

Massachusetts.— Com. *v.* Parker, 2 Pick. 550. See also Com. *v.* Macloon, 101 Mass. 1, 100 Am. Dec. 89.

Michigan.— Tyler *v.* People, 8 Mich. 320.

Missouri.— See State *v.* Blunt, 110 Mo. 322, 19 S. W. 650.

West Virginia.— See *Ex p.* McNeeley, 36 W. Va. 84, 14 S. E. 436, 32 Am. St. Rep. 831, 15 L. R. A. 226.

Wisconsin.— State *v.* Pauley, 12 Wis. 537.

Statutes not retrospective.— Such statutes do not apply to homicide resulting from an injury inflicted before their enactment. State *v.* Sweat, 16 S. C. 624.

60. State *v.* Hollenbeck, 36 Iowa 112; Moore *v.* State, 37 Tex. Crim. 552, 40 S. W. 287.

61. Hauk *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465.

Offense committed partly in two counties see *infra*, VII, A, 6.

indicted and tried for simple larceny in either county. It is considered that the possession of the stolen goods by the thief is a larceny in every county into which he carries them, because, the legal possession still remaining in the owner, every moment's continuance of the trespass and felony amounts to a new taking and asportation.[62] Statutes to this effect have been enacted in many states, and it is held that they do not violate the constitutional provision guaranteeing to the accused a trial in the county where the offense was committed.[63] The rule applies when certain property is made the subject of larceny by statute.[64] But it does not apply to compound larceny, for all the elements of such offense do not exist except in the first county. The venue of larceny from the person, which is different from ordinary theft, is confined to the county where the property was taken.[65] The same is true of larceny from the dwelling-house, etc.[66]

e. Embezzlement. The crime of embezzlement is committed in the county in

62. *Alabama.*— Kidd *v.* State, 83 Ala. 58, 3 So. 442; Lucas *v.* State, 62 Ala. 26; Smith *v.* State, 55 Ala. 59; Aaron *v.* State, 39 Ala. 684; Crow *v.* State, 18 Ala. 541.

California.— People *v.* Staples, 91 Cal. 23, 27 Pac. 523.

Georgia.— Green *v.* State, 115 Ga. 254, 41 S. E. 642; Soule *v.* State, 71 Ga. 267; Tippins *v.* State, 14 Ga. 422.

Iowa.— State *v.* Lillard, 59 Iowa 479, 13 N. W. 637.

Kansas.— State *v.* Wade, 55 Kan. 693, 41 Pac. 951; State *v.* Hunter, 50 Kan. 302, 32 Pac. 37.

Kentucky.— Massie *v.* Com., 90 Ky. 485, 14 S. W. 419, 12 Ky. L. Rep. 433; Thomas *v.* Com., 15 S. W. 861, 12 Ky. L. Rep. 903.

Louisiana.— State *v.* Sullivan, 49 La. Ann. 197, 21 So. 688, 62 Am. St. Rep. 644; State *v.* McCoy, 42 La. Ann. 228, 7 So. 330.

Maine.— State *v.* Douglas, 17 Me. 193, 35 Am. Dec. 248.

Massachusetts.— Com. *v.* Rubin, 165 Mass. 453, 43 N. E. 200; Com. *v.* Hayes, 140 Mass. 366, 5 N. E. 264; Com. *v.* Rand, 7 Metc. 475, 41 Am. Dec. 455; Com. *v.* Dewitt, 10 Mass. 154.

Missouri.— State *v.* Williams, 147 Mo. 14, 47 S. W. 891; State *v.* Jackson, 86 Mo. 18.

Nebraska.— Hurlburt *v.* State, 52 Nebr. 428, 72 N. W. 471.

New York.— Mack *v.* People, 82 N. Y. 235; Haskins *v.* People, 16 N. Y. 344; People *v.* Gardner, 2 Johns. 477; Paine's Case, 1 City Hall Rec. 64.

North Carolina.— State *v.* Groves, 44 N. C. 191, holding, however, that the rule did not apply to an indictment under a statute for stealing and carrying away a slave, but that the venue for such offense must be laid, and the defendant tried, in the county where the original felonious caption took place.

Oklahoma.— Barclay *v.* U. S., 11 Okla. 503, 69 Pac. 798; Pearce *v.* Territory, 11 Okla. 439, 68 Pac. 504.

Pennsylvania.— Com. *v.* Smith, 1 Pa. L. J. Rep. 400, 3 Pa. L. J. 34.

South Carolina.— State *v.* Bryant, 9 Rich. 113.

Tennessee.— State *v.* Margerum, 9 Baxt. 362.

Texas.— Cox *v.* State, 43 Tex. 101; Rose *v.* State, (Crim. App. 1901) 65 S. W. 911; Coleman *v.* State, (Crim. App. 1900) 55 S. W. 836; Thurman *v.* State, 37 Tex. Crim. 646, 40 S. W. 495; McElmurray *v.* State, 21 Tex. App. 691, 2 S. W. 892; Dixon *v.* State, 15 Tex. App. 480; Cameron *v.* State, 9 Tex. App. 332.

Vermont.— State *v.* Morrill, 68 Vt. 60, 33 Atl. 1070, 54 Am. St. Rep. 870.

Virginia.— Com. *v.* Cousin, 2 Leigh 708.

Washington.— State *v.* Kyle, 14 Wash. 550, 45 Pac. 147.

Wisconsin.— Powell *v.* State, 52 Wis. 217, 9 N. W. 17.

United States.— U. S. *v.* Hankey, 26 Fed. Cas. No. 15,328, 2 Cranch C. C. 65; U. S. *v.* Mason, 26 Fed. Cas. No. 15,738, 2 Cranch C. C. 410.

England.— Rex *v.* Parkin, 1 Moody C. C. 45; 4 Bl. Comm. 305; 1 Chitty Crim. L. 178; 2 East P. C. 771, 772; 2 Hale P. C. 163.

See 14 Cent. Dig. tit. "Criminal Law," § 225.

Property not under thief's control.— The thief can only be tried in the county into which the goods are brought when they are actually under his control at the time. If he sells them and they are brought into the county by another he cannot be tried there, although he may have been with the other. Lucas *v.* State, 62 Ala. 26.

Driving stock from range.— A person may be tried for unlawfully and wilfully driving stock from a range, in violation of Tex. Pen. Code, art. 884, in any county into or through which the stock was driven. McElmurray *v.* State, 21 Tex. App. 691, 2 S. W. 892.

Theft of horse.— Where one hires a horse in one county, with the fraudulent intent at the time to deprive the owner of it and appropriate it, and rides into another county and there sells it, the theft is complete in the first county, and he may be there indicted. Givens *v.* State, 32 Tex. Crim. 457, 24 S. W. 287.

63. State *v.* Johnson, 38 Ark. 568; State *v.* Price, 55 Kan. 606, 40 Pac. 1000; and other cases cited in the note preceding.

64. Com. *v.* Simpson, 9 Metc. (Mass.) 138.

65. Nichols *v.* State, 28 Tex. App. 105, 12 S. W. 500; Gage *v.* State, 22 Tex. App. 123, 2 S. W. 638; 1 Hale P. C. 507, 508.

66. Smith *v.* State, 55 Ala. 59; 1 Hale P. C. 536.

which the money or property is converted, although it may have been received in another county, and it may, and as a rule should, be there indicted and tried.[67] An indictment will lie in the county where the accused, being in possession of the property or money, formed the intent to convert it, although he may have received it and may have actually disposed of or appropriated it in another county.[68] According to some of the cases if the transaction constituting the offense extended through more than one county the county in which the conversion took place has not the exclusive jurisdiction;[69] and by express statutory provision in some states embezzlement is indictable in any county through or into which the property was taken by the accused.[70]

f. False Pretenses and Fraud. A prosecution for obtaining property or money by fraud or false pretenses, where the pretenses are made in one county and the property is obtained in another, is within the jurisdiction of the county where the property was obtained.[71]

g. Robbery. Robbery is committed in the county in which the property is

67. *Arkansas.*— Wallis *v.* State, 54 Ark. 611, 16 S. W. 821.

California.— *Ex p.* Palmer, 86 Cal. 631, 25 Pac. 130; People *v.* Murphy, 51 Cal. 376.

Georgia.— Robson *v.* State, 83 Ga. 166, 9 S. E. 610.

Illinois.— Spalding *v.* People, 172 Ill. 40, 49 N. E. 993.

Iowa.— State *v.* Hengen, 106 Iowa 711, 77 N. W. 453.

Kansas.— State *v.* Small, 26 Kan. 209.

Michigan.— Hill *v.* Taylor, 50 Mich. 549, 15 N. W. 899.

Minnesota.— State *v.* New, 22 Minn. 76.

Ohio.— Campbell *v.* State, 35 Ohio St. 70.

Texas.— Yost *v.* State, (Crim. App. 1896) 38 S. W. 192; Brown *v.* State, 23 Tex. App. 214, 4 S. W. 588; Cohen *v.* State, 20 Tex. App. 224; Cole *v.* State, 16 Tex. App. 461.

Wisconsin.— Dix *v.* State, 89 Wis. 250, 61 N. W. 760.

England.— Reg. *v.* Treadgold, 14 Cox C. C. 220, 39 L. T. Rep. N. S. 291.

Canada.— Reg. *v.* Hogle, 5 Quebec Q. B. 59.

See 14 Cent. Dig. tit. "Criminal Law," § 223.

Presumption.— Where it is shown that an employee received money from his employer in the county in which he is indicted, and there is no evidence that he carried the same out of the county, such evidence, and his unexplained failure to pay the money over or account for it, are *prima facie* proof that he converted it in such county. State *v.* New, 22 Minn. 76. See also Wallis *v.* State, 54 Ark. 611, 16 S. W. 821.

Embezzlement by public officer.— In the absence of affirmative proof to the contrary the embezzlement of public money by a tax-collector will be presumed to have been committed in the county of which he is an officer. Robson *v.* State, 83 Ga. 166, 9 S. E. 610.

68. State *v.* Small, 26 Kan. 209; Reg. *v.* Rogers, 3 Q. B. D. 28, 14 Cox C. C. 22, 47 L. J. M. C. 11, 37 L. T. Rep. N. S. 473, 26 Wkly. Rep. 61; Rex *v.* Taylor, 3 B. & P. 596, 2 Leach C. C. 974, R. & R. 63; Reg. *v.* Murdock, 5 Cox C. C. 360, 2 Den. C. C. 298, 16 Jur. 19, 21 L. J. M. C. 22, T. & M. 604; Rex *v.* Hobson, R. & R. 41. See State *v.* Baumhager, 28 Minn. 226, 9 N. W. 704.

69. In State *v.* Hengen, 106 Iowa 711, 77 N. W. 453, it was held that the indictment would lie in the county in which under his contract the accused was to account to his principal, and whence the goods were shipped to him, although they were received by him in another county, and there converted or appropriated. In State *v.* Bailey, 50 Ohio St. 636, 36 N. E. 233, a contract of employment was made in Lucas county, by which the accused was authorized to canvass for the sale of and sell his employer's goods in Sandusky county, and to account therefor in Lucas county weekly, either by letter or in person; and at his request goods were sent by express from his employer's place of business in Lucas county to him in Sandusky county, where he received and sold the same, converting part of the proceeds to his own use in Sandusky county, and part in the state of New York. After the sale of the goods he wrote a false account of the transaction to his employers, addressed to them in Lucas county, which he mailed to them on the railroad train while absconding, and which they received in Lucas county. It was held that the accused might be indicted and tried in Lucas county for the embezzlement thus committed. See also Campbell *v.* State, 35 Ohio St. 70; Brown *v.* State, 23 Tex. App. 214, 4 S. W. 588; Cohen *v.* State, 20 Tex. App. 224; Reg. *v.* Rogers, 3 Q. B. D. 28, 14 Cox C. C. 22, 47 L. J. M. C. 11, 37 L. T. Rep. N. S. 473, 26 Wkly. Rep. 61; Rex *v.* Taylor, 3 B. & P. 596, 2 Leach C. C. 974, R. & R. 63; Reg. *v.* Treadgold, 14 Cox C. C. 220, 39 L. T. Rep. N. S. 291; Reg. *v.* Murdock, 5 Cox C. C. 360, 2 Den. C. C. 298, 16 Jur. 19, 21 L. J. M. C. 22, T. & M. 604; Reg. *v.* Hogle, 5 Quebec Q. B. 59. But see People *v.* Murphy, 51 Cal. 376; Dix *v.* State, 89 Wis. 250, 61 N. W. 760.

70. People *v.* Garcia, 25 Cal. 531; Brown *v.* State, 23 Tex. App. 214, 4 S. W. 588; Cohen *v.* State, 20 Tex. App. 224; Reed *v.* State, 16 Tex. App. 586; Cole *v.* State, 16 Tex. App. 461.

71. *California.*— People *v.* Cummings, 123 Cal. 269, 55 Pac. 898.

taken by violence or putting in fear, and an indictment will not lie, as in the case of larceny, in another county into which the robber carries the property.[72]

h. Burglary. The offense of burglary is committed in the county where the party breaks and enters,[73] and, where the constitution guarantees to the accused a trial in the county where the offense was committed, the legislature cannot authorize prosecution for burglary in a county in which it was not committed, but into which the accused may have carried property stolen at the time of the burglary.[74]

i. Receiving Stolen Goods. In the absence of a statute the venue of the crime of receiving stolen goods is in the county in which they are received, and not in the county in which they are stolen,[75] nor in a county into which they are subsequently taken.[76] In some jurisdictions this rule is changed by statute.[77]

Florida.— Connor *v.* State, 29 Fla. 455, 10 So. 891, 30 Am. St. Rep. 126.

Georgia.— Garner *v.* State, 100 Ga. 257, 28 S. E. 24.

Indiana.— See Stewart *v.* Jessup, 51 Ind. 413, 19 Am. Rep. 739.

Iowa.— State *v.* Tripp, 113 Iowa 698, 84 N. W. 546; State *v.* House, 55 Iowa 466, 8 N. W. 307.

Massachusetts.— Com. *v.* Taylor, 105 Mass. 172. See also Com. *v.* Wood, 142 Mass. 459, 8 N. E. 432.

Michigan.— People *v.* Arnold, 46 Mich. 268, 9 N. W. 406.

Missouri.— State *v.* Terry, 109 Mo. 601, 19 S. W. 206; State *v.* Lichliter, 95 Mo. 402, 8 S. W. 720; State *v.* Shaeffer, 89 Mo. 271, 1 S. W. 293; State *v.* Dennis, 80 Mo. 589.

Nebraska.— *Ex p.* Parker, 11 Nebr. 309, 9 N. W. 33.

New York.— Skiff *v.* People, 2 Park. Crim. 139.

Ohio.— Norris *v.* State, 25 Ohio St. 217, 18 Am. Rep. 291.

Pennsylvania.— Com. *v.* Karpouski, 3 Pa. Dist. 772, 15 Pa. Co. Ct. 280 [*affirmed* in 167 Pa. St. 225, 31 Atl. 572]; Com. *v.* Smith, 1 Pa. L. J. Rep. 400, 3 Pa. L. J. 34.

Texas.— Sims *v.* State, 28 Tex. App. 447, 13 S. W. 653.

United States.— U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441.

England.— Rex *v.* Burdett, 4 B. & Ald. 95, 6 E. C. L. 404; Reg. *v.* Dawson, 16 Cox C. C. 556, 53 J. P. 280, 59 L. T. Rep. N. S. 932; Reg. *v.* Stanbury, 9 Cox C. C. 94, 8 Jur. N. S. 84, L. & C. 128, 31 L. J. M. C. 88, 5 L. T. Rep. N. S. 686, 10 Wkly. Rep. 236.

False statement by mail.— Where a false statement is made in a letter mailed in one county, addressed to a person in another, who on the strength of it ships goods, it is held that the court of the county where the goods were shipped has jurisdiction, as the common carrier is the agent of the accused and he receives the goods there by such agent. Com. *v.* Taylor, 105 Mass. 172; State *v.* Lichliter, 95 Mo. 402, 8 S. W. 720; Norris *v.* State, 25 Ohio St. 217, 18 Am. Rep. 291; Reg. *v.* Jones, 3 C. & K. 346, 4 Cox C. C. 198, 1 Den. C. C. 551, 14 Jur. 533, 19 L. J. M. C. 162, 4 New Sess. Cas. 953, T. & M. 270; Reg. *v.* Leech, 7 Cox C. C. 100, Dears. C. C. 642, 2 Jur. N. S. 428, 25 L. J. M. C. 77, 4 Wkly. Rep. 482.

72. Sweat *v.* State, 90 Ga. 315, 17 S. E. 273; Rex *v.* Thomson, 2 Russell Crimes 328; 2 Hale P. C. 163; 1 Hale P. C. 507, 508.

Where a person is seized in one county and carried into another, and there forced to surrender money, the venue of the robbery is in the county where the money is so obtained. Sweat *v.* State, 90 Ga. 315, 17 S. E. 273.

73. State *v.* McGraw, 87 Mo. 161.

74. State *v.* McGraw, 87 Mo. 161.

75. *California.*— People *v.* Stakem, 40 Cal. 599.

Connecticut.— See State *v.* Ward, 49 Conn. 429.

Kansas.— State *v.* Rider, 46 Kan. 332, 26 Pac. 745.

New York.— See Wills *v.* People, 3 Park. Crim. 473.

Pennsylvania.— Com. *v.* O'Neill, 10 Pa. Dist. 227.

Rhode Island.— State *v.* Habib, 18 R. I. 558, 30 Atl. 462.

Texas.— Thurman *v.* State, 37 Tex. Crim. 646, 40 S. W. 795.

See 14 Cent. Dig. tit. "Criminal Law," § 226.

Delivery to carrier.—One who receives goods under an arrangement that they were to be stolen in a county other than that in which he was to receive them and then shipped to him is triable in the county from which they were shipped, the delivery to the carrier being a delivery to him. State *v.* Habib, 18 R. I. 558, 30 Atl. 462.

76. Roach *v.* State, 5 Coldw. (Tenn.) 39. See also Licette *v.* State, 75 Ga. 253; Campbell *v.* People, 109 Ill. 565, 50 Am. Rep. 621.

77. Thus a statute sometimes allows a receiver of stolen goods to be prosecuted either in the county where the goods were stolen, or in the county where they were received. State *v.* Ward, 49 Conn. 429. Other statutes allow a prosecution either in the county where the property was received, or in any county into which it has been carried by the receiver, or in which he has had possession of the same. Wills *v.* People, 3 Park. Crim. (N. Y.) 473; Reg. *v.* Cryer, 7 Cox C. C. 335, Dears. & B. 324, 3 Jur. N. S. 698, 26 L. J. M. C. 192, 5 Wkly. Rep. 738. In Texas the statute provides that the offense of receiving

j. Forgery and Uttering. In the absence of a statutory provision to the contrary, a prosecution for forgery must be in the county where the instrument was forged, and a prosecution for uttering in the county where the instrument was uttered or passed.[78] In some states, by statute, the crime of forgery may be prosecuted in the county where it was committed or in any county in which the forged paper was used or passed,[79] or where the defendant is apprehended or in custody.[80]

k. Removing Mortgaged Property. Under a statute providing that prosecutions for offenses committed wholly or partly without and made punishable within the state may be carried on in any county in which the offender is found, a prosecution for removing mortgaged property from the state can be maintained in the county from which the property was removed, and to which the defendant is returned on being arrested in another county.[81]

l. Sending Threatening Letter. It would seem that the offense of sending a threatening letter is committed in the county in which it is despatched, as where it is sent by mail, although it is received in another county, since the sending of it completes the offense; and so it has been held.[82] But there are authorities to the effect that if a person by an innocent agent, like the post-office, sends a threatening letter into another county, where it is delivered, the venue may be laid in the latter county.[83]

m. Bigamy. In the absence of a statute bigamy is indictable only in the county where the bigamous marriage took place, as the offense is there committed.[84] In some states statutes authorize indictment for bigamy either in the county where

stolen property may be prosecuted in the county where the theft was committed, or in any other county through or into which the property may have been carried "by the thief," or in any county where it may have been received or "concealed" by the offender. Tex. Code Crim. Proc. (1895) art. 237. This statute does not permit one who receives stolen property in one county and carries it into another county to be prosecuted in the latter. Thurman *v.* State, 37 Tex. Crim. 654, 40 S. W. 795. See Moseley *v.* State, 36 Tex. Crim. 578, 37 S. W. 736, 38 S. W. 197.

78. *Alabama.*— Scully *v.* State, 39 Ala. 240; Bishop *v.* State, 30 Ala. 34.

Massachusetts.— Com. *v.* Parmenter, 5 Pick. 279.

Montana.— State *v.* Hudson, 13 Mont. 112, 32 Pac. 413, 19 L. R. A. 775.

New York.— People *v.* Rathbun, 21 Wend. 509.

Ohio.— Lindsey *v.* State, 38 Ohio St. 507.

Tennessee.— Foute *v.* State, 15 Lea 712.

Virginia.— Spencer *v.* Com., 2 Leigh 751.

England.— 2 East P. C. 992.

See 14 Cent. Dig. tit. "Criminal Law," § 220. And see FORGERY.

Mailing instrument.— It has been held that one who mails a forged note in one county for the purpose of obtaining money or credit in another must be indicted in the county where the note is received. State *v.* Hudson, 13 Mont. 112, 32 Pac. 413, 19 L. R. A. 775; People *v.* Rathbun, 21 Wend. (N. Y.) 509; Foute *v.* State, 15 Lea (Tenn.) 712.

Presumption.— It has also been held that the possession of a forged instrument in a particular county raises a presumption that it was forged there, if there is nothing to show the contrary. Spencer *v.* Com., 2 Leigh (Va.) 751; U. S. *v.* Britton, 24 Fed. Cas. No. 14,650., 2 Mason 464. *Contra,* Com. *v.* Parmenter, 5 Pick. (Mass.) 279.

Offense through innocent agent.— If a person while in one county causes a forged instrument to be uttered by an innocent agent in another county he should be prosecuted in the latter. See *infra,* VII, A, 4, a.

79. Thulemeyer *v.* State, 34 Tex. Crim. 619, 31 S. W. 659 (holding that on a trial for forging the indorsement upon a treasury warrant, the venue of the prosecution was in the county in which the indorsement was made and in which the warrant was cashed by a bank, and not in the county where the treasury was located, and to which it was afterward sent for collection by the bank which had cashed it); Mason *v.* State, 32 Tex. Crim. 95, 22 S. W. 144, 408; Francis *v.* State, 7 Tex. App. 501.

Where a party forges an instrument and parts with it, and has no further property in or control over it, he cannot be prosecuted for the forgery in some other county in which a subsequent owner or holder may have passed it. Thulemeyer *v.* State, 34 Tex. Crim. 619, 31 S. W. 659.

80. Rex *v.* James, 7 C. & P. 553, 32 E. C. L. 755.

81. Williams *v.* State, 27 Tex. App. 258, 11 S. W. 114.

82. Landa *v.* State, 26 Tex. App. 580, 10 S. W. 218.

83. People *v.* Griffin, 2 Barb. (N. Y.) 427; Rex *v.* Girdwood, 1 Leach C. C. 169; 1 Chitty Crim. L. 191; 2 East P. C. 1120. See *infra,* VII, A, 4, a.

84. *Alabama.*— Beggs *v.* State, 55 Ala. 108. And see Brewer *v.* State, 59 Ala. 101.

Arkansas.— Walls *v.* State, 32 Ark. 565.

the bigamous marriage was entered into or in any county where the defendant is apprehended,[85] or where the parties cohabit;[86] but a statute authorizing indictment in any county in which the accused is apprehended is unconstitutional where the constitution requires the trial of an offense to be in the county of its commission.[87]

n. **Illicit Cohabitation.** A prosecution for unlawful cohabitation may be tried in any county where the unlawful act has been committed.[88]

o. **Abduction and Inveigling.** The offense of abduction for the purpose of prostitution or concubinage is in the county where the girl was forced or induced to go away.[89] Inveigling a person by false representations with intent to induce him to leave the state must be tried in the county where the inveiglement took place.[90]

p. **Bribery.** The offense of bribery or attempt to bribe is committed and indictable in the county where the offer is made, or made and accepted, as the case may be.[91] A prosecution against a county officer for soliciting a bribe outside of his county must be in the county where the bribe was solicited, and not in the county where he holds office.[92]

q. **Perjury.** Where inducements to perjury are offered in one county, but the perjury itself and the preparations for it take place in another county, the venue of the crime of subornation of perjury as well as of the perjury is in the latter county.[93]

r. **Libel.** Prosecutions for libel must be in the county of publication.[94] But it has been held that if a person composes a libel in one county, with intent to publish it in another, and afterward does so publish it, he may be indicted in either.[95]

s. **Nuisance.** By the weight of authority, if a nuisance is erected in one

Missouri.— State *v.* Smiley, 98 Mo. 605, 12 S. W. 247. But see State *v.* Fitzgerald, 75 Mo. 571.

New York.— People *v.* Mosher, 2 Park. Crim. 195.

Tennessee.— Finney *v.* State, 3 Head 544.

Texas.—Brown *v.* State, (Crim. App. 1894) 27 S. W. 137.

United States.— U. S. *v.* Jernegan, 26 Fed. Cas. No. 15,477, 4 Cranch C. C. 1.

England.— 1 Hale P. C. 693.

See 14 Cent. Dig. tit. "Criminal Law," § 221.

85. State *v.* Sweetsir, 53 Me. 438; State *v.* Griswold, 53 Mo. 181; Collins *v.* People, 1 Hun (N. Y.) 610, 4 Thomps. & C. (N. Y.) 77; Houser *v.* People, 46 Barb. (N. Y.) 33; Reg. *v.* Whiley, 1 C. & K. 150, 2 Moody C. C. 186, 47 E. C. L. 150; Rex *v.* Fraser, 1 Moody C. C. 407; Rex *v.* Gordon, R. & R. 36; 2 Jac. I, c. 11.

86. State *v.* Hughes, 58 Iowa 165, 11 N. W. 706.

87. Walls *v.* State, 32 Ark. 565; State *v.* Smiley, 98 Mo. 605, 12 S. W. 247. See *supra*, VII, A, 2.

88. Finney *v.* State, 3 Head (Tenn.) 544.

89. State *v.* Johnson, 115 Mo. 480, 22 S. W. 463. It has been held that one who, under an arrangement with a girl entered into before she left her father's house in the state, took her from a house in another state where she was visiting, and brought her into the state and county of her father's residence for the purpose of prostitution, and there accomplished his purpose, was indictable for the abduction in such county. State *v.* Round, 82 Mo. 679.

90. *In re* Kelly, 46 Fed. 653.

Enticing or inveigling slave.—Where a person residing in one county, with intent to convert a slave to his own use, enticed or inveigled him from the services of his owner in another county, and thereby induced him to come into the county of such person's residence, it was held that the offense was complete in the latter county, and that he might be there indicted. Crow *v.* State, 18 Ala. 541.

Kidnapping slave.—An indictment for aiding and assisting to kidnap and carry away a negro man from the state was held to be properly found and tried in the county in which he was seized, although he was carried through another county into another state. State *v.* Whaley, 2 Harr. (Del.) 538.

91. U. S. *v.* Worrall, 28 Fed. Cas. No. 16,766, 2 Dall. 384. See also State *v.* Knight, 54 Ohio St. 330, 43 N. E. 281.

92. State *v.* Knight, 54 Ohio St. 330, 43 N. E. 281.

93. State *v.* Byam, 54 Iowa 409, 6 N. W. 594.

94. Com. *v.* Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214; Rex *v.* Watson, Campb. 215; Rex *v.* Johnson, 7 East 65. If a person authorizes the publication of a libel by an agent, whether he be an innocent or a guilty agent, he is guilty of a publication in any county in which the libel is published. Rex *v.* Johnson, 7 East 65.

95. Rex *v.* Burdett, 4 B. & Ald. 95, 6 E. C. L. 404.

county and affects the public in another, the offender may be prosecuted in either.[96]

t. Conspiracy. Indictment and trial for conspiracy, where there are no overt acts, must be in the county where it was formed, but where there are overt acts in execution of the conspiracy it is indictable either in the county of the conspiracy or in the county where the overt acts were committed by any one of the conspirators.[97]

u. Killing Estray. In an indictment for unlawfully killing an estray, the venue should be laid in the county where the act was committed, and not in the county from which the animal strayed.[98]

v. Abandonment. It has been held that the crime of abandoning one's family is properly laid in the county where the accused sent his wife and children, and where they became dependent, although he may never have been in that county.[99]

w. Sale of Adulterated Food. Where a statute provides for punishing the sale of adulterated food, one who through traveling salesmen sells such food can be prosecuted in any county where the sale was made.[1]

x. Sale of Intoxicating Liquors. A statute against selling liquors without a license is not broken in the county where the order is taken, where the goods are in another county, for the sale is only executory until the delivery.[2] Since delivery to a common carrier is a delivery to the consignee, a dealer in one county who sends liquor by express to a buyer residing in another cannot be prosecuted in the latter county for illegally selling therein.[3]

y. Attempts and Solicitation. An attempt to commit a crime is committed and indictable in the county where the offense, if perpetrated, must have been committed, whether the accused was in the county at the time or not.[4] And it has been held that a solicitation to commit a crime, when communicated by letter, is indictable in the county where the letter is received.[5]

z. Crimes on Water. An offense committed on a ship on navigable water below low-water mark is within the jurisdiction of the courts of the county adjoining.[6]

96. 2 Hawkins P. C. c. 25, § 37. See also State *v.* Lord, 16 N. H. 357; Com. *v.* Lyons, 1 Pa. L. J. Rep. 497, 3 Pa. L. J. 167; Rex *v.* Burdett, 4 B. & Ald. 95, 6 E. C. L. 404; Scurry *v.* Freeman, 2 B. & P. 381; Scott *v.* Brest, 2 T. R. 238. But see *contra, In re* Eldred, 46 Wis. 530, 1 N. W. 175.

97. *Michigan.*— People *v.* Arnold, 46 Mich. 268, 9 N. W. 406.

New York.— People *v.* Mather, 4 Wend. 229, 21 Am. Dec. 122.

Pennsylvania.— Hazen *v.* Com., 23 Pa. St. 355; Com. *v.* Gillespie, 7 Serg. & R. 469, 10 Am. Dec. 475; Com. *v.* Corlies, 3 Brewst. 575, 8 Phila. 450; Com. *v.* Tack, 1 Brewst. 511; Com. *v.* Westervelt, 11 Phila. 461.

Texas.— Dawson *v.* State, 38 Tex. Crim. 9, 40 S. W. 731.

United States.— U. S. *v.* Newton, 52 Fed. 275.

England.— Rex *v.* Bowes [*cited* in Rex *v.* Brisac, 4 East 164, 171, 7 Rev. Rep. 551]. And see Reg. *v.* Kohn, 4 F. & F. 68. *Compare* Reg. *v.* Best, 1 Salk. 174.

Canada.— Reg. *v.* Connolly, 25 Ont. 151.

See 14 Cent. Dig. tit. "Criminal Law," § 222; and *supra*, VI, F, 3, d, (XIII). See also CONSPIRACY, 8 Cyc. 687.

98. Brogden *v.* State, 44 Tex. 103.

99. Johnson *v.* People, 66 Ill. App. 103. *Compare supra*, VI, F, 3, d, (XII).

1. Meyer *v.* State, 54 Ohio St. 242, 43 N. E. 164; Bissman *v.* State, 9 Ohio Cir. Ct. 714 [*affirmed* in 54 Ohio St. 242, 43 N. E. 164].

2. State *v.* Hughes, 22 W. Va. 743. Where a seller in one county receives from a person in another county an order for goods, and ships the same to an agent of the dealer in that county, to be delivered to the person sending the order, and this is accordingly done, the sale is consummated in the latter county; and this is so, although the person ordering the goods pays for them in advance, and his name is marked on the package when it is shipped to the dealer's agent; and a prosecution for an illegal sale is properly brought in the latter county. Hopson *v.* State, 116 Ga. 90, 42 S. E. 412.

3. Brechwald *v.* People, 21 Ill. App. 213.

County of residence.— A charge of selling liquors cannot be maintained in the county of the residence of the accused, although he may have kept liquors in store there, where he sold them in another county. Duff *v.* Com., 68 S. W. 390, 24 Ky. L. Rep. 201.

4. Griffin *v.* State, 26 Ga. 493. *Compare* State *v.* Terry, 109 Mo. 601, 19 S. W. 206.

5. Griffin *v.* State, 26 Ga. 493.

6. Com. *v.* Peters, 12 Metc. (Mass.) 387; Manley *v.* People, 7 N. Y. 295; People *v.* Wilson, 3 Park. Crim. (N. Y.) 199; State *v.* Stevens,

4. Crimes Committed While Personally Absent[7] — a. In General. Where a person, being in one county, commits a crime by means of an innocent agent in another, he is indictable as principal in the latter.[8] This doctrine has been applied for example to uttering forged paper,[9] sending a letter containing a libel[10] or a threatening letter,[11] larceny,[12] obtaining property or money by false pretenses,[13] assault or homicide by administering poison,[14] procuring an abortion by administering a drug,[15] etc. If a person stands in one county, and by throwing or shooting across the line assaults or kills a person in another county, he is indictable for the homicide or assault in the latter.[16]

b. Principals and Accessaries. By the weight of authority in the absence of a statute the county in which the accessary to a felony, either before or after the fact, acted has exclusive jurisdiction over him, although the offense of the principal was committed in another county.[17] But it has been held that where a statute provides that an accessary before the fact may be prosecuted and convicted as for a substantive felony, whether the principal has or has not been convicted, his crime is cognizable in any court having jurisdiction of the principal, so that an accessary who in one county procures a crime to be committed in another is triable in the latter.[18] In misdemeanors all who take part are liable as principals and are indictable in the county where the offense is committed, although their participation may have been in another county.[19]

5. Offenses At or Near County Boundaries. In some jurisdictions statutes provide that where an offense is committed on a boundary between counties, or

1 Ohio Dec. (Reprint) 82, 2 West. L. J. 66. See *supra*, VI, F, 5, c.

7. Abandonment of children see *supra*, VII, A, 3, v.

8. Bishop *v.* State, 30 Ala. 34; People *v.* Adams, 3 Den. (N. Y.) 190, 45 Am. Dec. 468 [*affirmed* in 1 N. Y. 173]; Reg. *v.* Michael, 9 C. & P. 356, 2 Moody C. C. 120, 38 E. C. L. 213; Anonymous, Kel. C. C. 53; 1 Hale P. C. 430, 431, 615, 617. And see *supra*, V, B, 2; VI, F, 3, b.

9. Bishop *v.* State, 30 Ala. 34; State *v.* Hudson, 13 Mont. 112, 32 Pac. 413, 19 L. R. A. 775; People *v.* Rathbun, 21 Wend. (N. Y.) 509; Dent *v.* State, 43 Tex. Crim. 126, 65 S. W. 627; Strang *v.* State, 32 Tex. Crim. 219, 22 S. W. 680. See *supra*, VI, F, 3, d, (v).

Offense partly in each county. — In such a case it has been held that the offense is not committed partly in each county, so as to authorize an indictment in either. See *infra*, VII, A, 6.

10. Griffin *v.* State, 26 Ga. 493; Com. *v.* Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214. See *supra*, VI, F, 3, d, (x).

11. Rex *v.* Girdwood, 1 Leach C. C. 169; 1 Chitty Crim. L. 191; 2 East P. C. 1120. But see Landa *v.* State, 26 Tex. App. 580, 10 S. W. 218.

12. State *v.* Barnett, 15 Oreg. 77, 14 Pac. 737.

13. Johns *v.* State, 19 Ind. 421, 81 Am. Dec. 374; People *v.* Adams, 3 Den. (N. Y.) 190, 45 Am. Dec. 468 [*affirmed* in 1 N. Y. 173]; People *v.* Rathbun, 21 Wend. (N. Y.) 509. See also State *v.* Chapin, 17 Ark. 561, 65 Am. Dec. 452. And see *supra*, VI, F, 3, d, (IV).

14. Anonymous, Kel. C. C. 53. See also Robbins *v.* State, 8 Ohio St. 131; Reg. *v.* Michael, 9 C. & P. 356, 2 Moody C. C. 120, 38 E. C. L. 213.

15. State *v.* Morrow, 40 S. C. 221, 18 S. E. 853.

16. 1 East P. C. 367; 1 Hale P. C. 475. See also Simpson *v.* State, 92 Ga. 41, 17 S. E. 984, 44 Am. St. Rep. 75, 22 L. R. A. 248; State *v.* Hall, 114 N. C. 909, 19 S. E. 602, 41 Am. St. Rep. 822, 28 L. R. A. 59; U. S. *v.* Davis, 25 Fed. Cas. No. 14,932, 2 Sumn. 482; Rex *v.* Coombes, 1 Leach C. C. 432. And see *supra*, VI, F, 3, d (VI).

17. *California.*— People *v.* Hodges, 27 Cal. 340.

Kentucky.— Tully *v.* Com., 13 Bush 142.

Massachusetts.— See Com. *v.* Pettes, 114 Mass. 307; Com. *v.* Dewitt, 10 Mass. 154.

New York.— People *v.* Hall, 57 How. Pr. 342; Baron *v.* People, 1 Park. Crim. 246.

West Virginia.— State *v.* Ellison, 49 W. Va. 70, 38 S. E. 574.

Compare, however, State *v.* Ayers, 8 Baxt. (Tenn.) 96; Carlisle *v.* State, 31 Tex. Crim. 537, 21 S. W. 358.

See 14 Cent. Dig. tit. "Criminal Law," § 228. And see *supra*, VI, F, 3, b.

English statute. — This rule was established in England by the statute of 2 & 3 Edw. VI, c. 24, § 4.

18. *Alabama.*—Scully *v.* State, 39 Ala. 240.

New York.— People *v.* Wiley, 20 N. Y. Suppl. 445.

Tennessee.—State *v.* Ayers, 8 Baxt. (Tenn.) 96.

Texas.— Carlisle *v.* State, 31 Tex. Crim. 537, 21 S. W. 358.

West Virginia.— State *v.* Ellison, 49 W. Va. 70, 38 S. E. 574.

19. U. S. *v.* King, 20 D. C. 404; Com. *v.* Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am.

within a specified distance of the same, jurisdiction shall be in either county.[20] Some of the courts, but not all, have held that these statutes do not deprive the accused of the constitutional right to a trial by an impartial jury of the county where the offense was committed.[21] They apply only to offenses against the state which may be tried in either county, and not to a local offense, where it must be proved that it was actually committed in the place alleged.[22] In the absence of a statute offenses committed near the boundary between two counties must be prosecuted in the county in which they were committed.[23]

6. Offenses Committed Partly in Two Counties. At common law where a crime was committed partly in one county and partly in another, it was doubtful whether it could be punished in either;[24] but the proper view is that it is indictable in the county where it is consummated.[25] It is now very generally provided by statute that where a crime is committed partly in one county and partly in another, that is, where some acts material and essential to the crime and requisite

Dec. 475; Rex *v.* Brisac, 4 East 164, 7 Rev. Rep. 551. See *supra*, VI, F, 3, b.

20. *Alabama.*— Jackson *v.* State, 90 Ala. 590, 8 So. 862; Grogan *v.* State, 44 Ala. 9.

Iowa.— State *v.* Rockwell, 82 Iowa 429, 48 N. W. 721.

Massachusetts.— Com. *v.* Costley, 118 Mass. 1.

Michigan.— People *v.* Hubbard, 86 Mich. 440, 49 N. W. 265; Bayliss *v.* People, 46 Mich. 221, 9 N. W. 257.

New York.— People *v.* Davis, 56 N. Y. 95 [*affirming* 45 Barb. 494].

Texas.— Walls *v.* State, 43 Tex. Crim. 70, 63 S. W. 328; Willis *v.* State, 10 Tex. App. 493.

Wisconsin.— State *v.* Stewart, 60 Wis. 587, 19 N. W. 429, 50 Am. Rep. 388.

See 14 Cent. Dig. tit. "Criminal Law," § 229.

Homicide.— Under the Massachusetts statute providing that if death ensues in one county from a mortal wound given in another county the offense may be prosecuted in either county, and the statute providing that a strip one hundred rods wide on each side of the county boundary line shall be regarded as being in either county, it was held that a conviction for murder might be had on an indictment in N county, if a pistol was fired in S county more than one hundred rods from the dividing line, and the death ensued in S county within one hundred rods of that line. Com. *v.* Costley, 118 Mass. 1.

21. Jackson *v.* State, 90 Ala. 590, 8 So. 862. Grogan *v.* State, 44 Ala. 9; State *v.* Robinson, 14 Minn. 447; State *v.* McDonald, 109 Wis. 506, 85 N. W. 502; State *v.* Stewart, 60 Wis. 587, 19 N. W. 429, 50 Am. Rep. 388. *Contra*, Buckrice *v.* People, 110 Ill. 29; *In re* McDonald, 19 Mo. App. 370; Armstrong *v.* State, 1 Coldw. (Tenn.) 338; State *v.* Lowe, 21 W. Va. 782, 45 Am. Rep. 570.

22. McKay *v.* State, 110 Ala. 19, 20 So. 455, holding that, under Ala. Code, § 3720, providing that when an offense is committed on the boundary of two or more counties, or within a quarter of a mile thereof, the jurisdiction is in either county, one illegally selling liquor in a county, but within a quarter of a mile of the boundary line between it and another county, could not be convicted in the latter county, where each county had a statute prohibiting the sale of intoxicants, differing in the definition of the offense and in the punishment to be inflicted therefor. In other jurisdictions such statutes have been held applicable to prosecutions for keeping a liquor nuisance. State *v.* Rockwell, 82 Iowa 429, 48 N. W. 721; Com. *v.* Matthews, 167 Mass. 173, 45 N. E. 92.

The English statute of 7 Geo. IV, c. 64, § 12, as to offenses committed within five hundred yards of the boundaries of counties, was held to be confined to county boundaries and prosecutions in counties, and not to apply to prosecutions in limited jurisdictions. Rex *v.* Welsh, 1 Moody C. C. 175.

Under the Massachusetts statute it was held that if an offense of which police courts and trial justices have general jurisdiction is committed within one hundred rods of the dividing line between two counties, police courts and trial justices in either county have jurisdiction to entertain and try a complaint therefor. Com. *v.* Gillon, 2 Allen (Mass.) 502.

23. *In re* McDonald, 19 Mo. App. 370; Armstrong *v.* State, 1 Coldw. (Tenn.) 338; State *v.* Lowe, 21 W. Va. 782, 45 Am. Rep. 570. *Compare* Buckrice *v.* People, 110 Ill. 29.

Presumption.— A person having received a fatal wound in one county, near the border of another, will be presumed, in the absence of proof to the contrary, to have remained in the county where the wound was given until his death. Binfield *v.* State, 15 Nebr. 484, 19 N. W. 607.

24. Bacon Abr. tit. "Indictment"; 4 Bl. Comm. 303; 1 Chitty Crim. L. 178; 1 East P. C. 361; 1 Hale P. C. 126; 1 Hawkins P. C. c. 13, § 13. See *supra*, VII, A, 3, b.

25. See Robbins *v.* State, 8 Ohio St. 131, holding that where poison is prescribed and delivered to a person in one county, and such person takes the poison to another county and there swallows it and dies thereof, the criminal act is commenced in one county and consummated in another county, and the latter county has jurisdiction of the offense of homicide by administering poison, although the accused was never in that county.

to its consummation occur in one county and some in the other, the accused is indictable in either,[26] and it has been held that such a statute is not repugnant to the constitutional provision that the accused shall be entitled to a trial in the county where the crime was committed.[27] Among the offenses to which such statutes have been applied are murder and manslaughter,[28] abortion,[29] seduction under promise of marriage,[30] living in adultery,[31] larceny and embezzlement,[32] false pretenses and fraud,[33] forgery,[34] false statement of the condition of a bank,[35] enticing away a laborer or servant from his employer,[36] and a nuisance by defilement or pollution of a river.[37] These statutes do not change the rule that a person who

26. *Alabama.*— Brown *v.* State, 108 Ala. 18, 18 So. 811; Prestwood *v.* State, 87 Ala. 147, 6 So. 392.

Florida.— Smith *v.* State, 42 Fla. 605, 28 So. 758.

Indiana.— Hauk *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; Archer *v.* State, 106 Ind. 426, 7 N. E. 225; State *v.* Herring, 21 Ind. App. 157, 48 N. E. 598, 69 Am. St. Rep. 351.

Iowa.— State *v.* Glucose Sugar Refining Co., 117 Iowa 524, 91 N. W. 794; State *v.* Spayde, 110 Iowa 726, 80 N. W. 1058; State *v.* Smith, 82 Iowa 423, 48 N. W. 727.

Kansas.— State *v.* Mason, 61 Kan. 102, 58 Pac. 978; State *v.* Rider, 46 Kan. 332, 26 Pac. 745.

Massachusetts.— Com. *v.* Parker, 2 Pick. 550.

New York.— People *v.* Mitchell, 168 N. Y. 604, 61 N. E. 182 [*affirming* 49 N. Y. App. Div. 531, 63 N. Y. Suppl. 522, 14 N. Y. Crim. 539]; People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883 [*affirming* 43 N. Y. Suppl. 1160]; People *v.* Dimick, 107 N. Y. 13, 14 N. E. 178; People *v.* Thorn, 21 Misc. 130, 47 N. Y. Suppl. 46; People *v.* Crotty, 9 N. Y. Suppl. 937.

Wisconsin.—See *In re* Eldred, 46 Wis. 530, 1 N. W. 175; State *v.* Pauley, 12 Wis. 537.

See 14 Cent. Dig. tit. "Criminal Law," § 230. And see *supra*, VII, A, 3, h.

27. Smith *v.* State, 42 Fla. 605, 28 So. 758; and other cases cited in the note preceding.

28. Where a conspiracy to take the life of a person is formed in one county, and in pursuance thereof he is there seized and bound, and is carried into another county and there killed, the murder may be prosecuted in either county. Archer *v.* State, 106 Ind. 426, 7 N. E. 225. See also People *v.* Thorn, 21 Misc. (N. Y.) 130, 47 N. Y. Suppl. 46. And the same is true where an assault is committed, that is, a blow or poison given, in one county and death results in another. Green *v.* State, 66 Ala. 40, 41 Am. Rep. 744; Smith *v.* State, 42 Fla. 605, 28 So. 758; Archer *v.* State, 106 Ind. 426, 7 N. E. 225. See also *supra*, VII, A, 3, b.

29. Hauk *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465, holding under a provision that "where a public offense has been committed partly in one county and partly in another, or the act or effects constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county," that a person charged with procuring an abortion may be indicted and tried in the county in which the woman miscarried and died, although the acts of defendant producing the miscarriage and death were done and committed in another county. And see *supra*, VII, A, 3, c.

30. People *v.* Crotty, 9 N. Y. Suppl. 937, holding that where a man promises in one county to marry a woman, and on the same day takes her into another county, and there seduces her under such promise, he may be prosecuted in either county.

31. Brown *v.* State, 108 Ala. 18, 18 So. 811, holding, however, that Ala. Code (1886), § 3719, providing that where an offense is committed partly in one county and partly in another, or the acts constituting the offense occur in two or more counties, the jurisdiction is in either, does not authorize a conviction for living in adultery in a county in which the parties agreed to go to another county for such purpose, although they lived in adultery in the latter county.

32. People *v.* Mitchell, 168 N. Y. 604, 61 N. E. 182 [*affirming* 49 N. Y. App. Div. 531, 63 N. Y. Suppl. 522, 14 N. Y. Crim. 539]. See *supra*, VII, A, 3, d, e.

33. People *v.* Dimick, 107 N. Y. 13, 14 N. E. 178. See also People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883 [*affirming* 43 N. Y. Suppl. 1160].

34. State *v.* Spayde, 110 Iowa 726, 80 N. W. 1058, holding that where one signs another's name to a note in one county and fills up the blanks in another county, he is guilty of forgery therein, and the venue may be properly laid in the latter county.

35. State *v.* Mason, 61 Kan. 102, 58 Pac. 978, holding that where a false report or statement of the condition of a bank is made, subscribed, and sworn to by an officer of the bank in one county, and is then transmitted to and received by the bank commissioner in another county, in which his office is held, the jurisdiction of the offense is in either county.

36. On a trial for enticing away a laborer from his employer, the local jurisdiction is not necessarily the county in which defendant made the contract of hire with the laborer, but where the acts necessary to the consummation of the offense occurred in two counties, the jurisdiction is in either, as provided by Ala. Code (1886) § 3719. Prestwood *v.* State, 87 Ala. 147, 6 So. 392.

37. State *v.* Smith, 82 Iowa 423, 426, 48 N. W. 727, holding, under a provision that "when a public offense is committed in part

while absent commits a crime through an innocent agent must be prosecuted where the crime was committed. Thus it does not apply where a forged instrument is mailed in one county and received in another, but in such a case the prosecution for uttering the instrument must be in the latter.[38]

7. Organization of New County. Where the territory in which a crime has been committed is created into a new county by a subdivision of an old county or otherwise, the courts of the new county have exclusive jurisdiction.[39] The crime should be charged as having been committed in the old county.[40]

8. Offenses on Public Conveyances. It is a statutory rule in some jurisdictions that where an offense is committed on a railroad car, steamboat, or other public conveyance, and it is impossible to determine in what county it was committed, the accused may be tried in any county through any part of which the vessel or other public conveyance passed on that trip or voyage.[41] It has been held that such statutes violate no constitutional provision.[42]

9. Offenses Against United States — a. Statutes Regulating Venue. It is provided by statute[43] that where any offense against the United States is begun

in one county and part within another, or when the acts or effects constituting or requisite to the consummation of the offense occur in two or more counties, jurisdiction is in either," that where the acts of defilement of a river were committed in one county, and the injury resulted to residents of another, the prosecution was properly brought in the latter. See also State *v.* Herring, 21 Ind. App. 157, 48 N. E. 598, 69 Am. St. Rep. 351; State *v.* Glucose Sugar Refining Co., 117 Iowa 524, 91 N. W. 794.

38. State *v.* Hudson, 13 Mont. 112, 32 Pac. 413, 19 L. R. A. 775; People *v.* Rathbun, 21 Wend. (N. Y.) 509. See *supra*, VII, A, 3, j.

39. *Arkansas.*— McElroy *v.* State, 13 Ark. 708.

California.— People *v.* Stokes, 103 Cal. 193, 37 Pac. 207, 42 Am. St. Rep. 102; People *v.* McGuire, 32 Cal. 140.

Georgia.— Jordan *v.* State, 22 Ga. 545.

Kansas.— State *v.* Bunker, 38 Kan. 737, 17 Pac. 651.

Kentucky.— Macklin *v.* Com., 93 Ky. 294, 19 S. W. 931, 14 Ky. L. Rep. 180.

Maine.— State *v.* Jackson, 39 Me. 291.

Mississippi.— Murrah *v.* State, 51 Miss. 675.

New Jersey.— State *v.* Jones, 9 N. J. L. 357, 17 Am. Dec. 483.

North Carolina.— State *v.* Hart, 26 N. C. 222.

Tennessee.— State *v.* Donaldson, 3 Heisk. 48.

Texas.— Hernandez *v.* State, 19 Tex. App. 408; Weller *v.* State, 16 Tex. App. 200.

Contra, State *v.* Strathmann, 4 Mo. App. 583.

See 14 Cent. Dig. tit. "Criminal Law," § 231.

Jurisdiction of original county.— When a new county is created crimes thereafter committed are not cognizable in the court of the county from which it was created unless the statute continues the prior jurisdiction, but it is proper for the legislature, unless prohibited by a constitutional provision, to enlarge the jurisdiction of the courts, and to continue the jurisdiction of the courts of the old county indefinitely. State *v.* Fish, 26 N. C. 219.

Organization of new county while criminal prosecution is pending.— In such case the prosecution in the old county should be dismissed. People *v.* Stokes, 103 Cal. 193, 37 Pac. 207, 42 Am. St. Rep. 102. The courts of the new county do not acquire jurisdiction until the organization is perfected, and the courts of the old county have jurisdiction until then. People *v.* McGuire, 32 Cal. 140.

40. Jordan *v.* State, 22 Ga. 545; State *v.* Jones, 9 N. J. L. 357, 17 Am. Dec. 483.

41. *Illinois.*— Watt *v.* People, 126 Ill. 9, 18 N. E. 340, 1 L. R. A. 403.

Iowa.— Nash *v.* State, 2 Greene 286, holding that a statute which provides that "when a person shall commit an offence on board of any vessel or float, he may be indicted for the same in any county, through any part of which such vessel or float may have passed on that trip or voyage," is not confined to that part of the trip or voyage which had been performed before the offense was committed, but extends to the entire trip.

Missouri.— Steerman *v.* State, 10 Mo. 503.

New York.— People *v.* Dowling, 84 N. Y. 478; People *v.* Hulse, 3 Hill 309.

Wisconsin.— Powell *v.* State, 52 Wis. 217, 9 N. W. 17.

England.—Reg. *v.* French, 8 Cox C. C. 252; Reg. *v.* Sharpe, 6 Cox C. C. 418, Dears. C. C. 415, 24 L. J. M. C. 40.

See 14 Cent. Dig. tit. "Criminal Law," § 234.

42. Watt *v.* People, 126 Ill. 9, 18 N. E. 340, 1 L. R. A. 403; Steerman *v.* State, 10 Mo. 503. But see Craig *v.* State, 3 Heisk. (Tenn.) 227, where it was held that a statute providing that offenses committed on board a vessel navigating the waters of the state might be tried in any county through which the boat should pass in the course of its voyage was in violation of the constitutional provision for trial in the county or district in which the crime should be committed.

43. U. S. Rev. St. (1878) § 731 [U. S. Comp. St. (1901) p. 585].

in one judicial circuit and completed in another it is within the jurisdiction of the courts of either to inquire into and try the same as though it had been wholly committed therein;[44] but this is subject to the constitutional provision that the offender is entitled to a trial in the district where the crime was committed as constituted by law, and also to the statute requiring that the trial of offenses punishable with death shall be had in the county where the offenses were committed, when that can be done without great inconvenience.[45]

b. Offenses Beyond Limits of Federal District. The venue of offenses committed on the high seas, or elsewhere out of the jurisdiction of any particular state or district, is in the district where the offender is apprehended or into which he is first brought.[46]

B. Change of Venue — 1. Right to Change — a. Right of Accused. At common law, when a fair and impartial trial could not be had in the county where the crime was committed, and the indictment had been removed into the king's bench by certiorari, that court could on application of the accused change the venue to another county.[47] In the United States the power to change the venue in criminal cases is almost wholly a creature of statutes.[48] A statute conferring the right to a change of venue on the accused is not unconstitutional under the provision that he shall have a trial by an impartial jury of the county.[49] The right to a change of venue is not a vested right, and a constitutional or statutory provision granting it may be repealed or modified.[50]

b. Right of Prosecution. Some cases hold that under a constitutional provision securing to the accused a trial by jury in the county or district in which the crime was committed the trial cannot be transferred to another county on motion of the district attorney over the objection or without the consent of the accused.[51] Where, however, the constitution contains no express provision as to

44. See U. S. *v.* Murphy, 91 Fed. 120; U. S. *v.* Nohlom, 27 Fed. Cas. No. 15,896; U. S. *v.* Rindskopf, 27 Fed. Cas. No. 16,165, 6 Biss. 259.

45. U. S. Rev. St. (1878) § 729 [U. S. Comp. St. (1901) p. 585].

Territorial courts.— The courts of a territory, created by the acts of organization, have, and exercise, the jurisdiction of federal courts, with power to fix the time and places of holding courts. Each district court may try crimes committed in the district, although not committed in the county where the court is sitting. Beery *v.* U. S., 2 Colo. 186; U. S. *v.* Mays, 1 Ida. 763.

46. U. S. Rev. St. (1878) § 730 [U. S. Comp. St. (1901) p. 585]. See *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,274, 2 Sprague 292; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,277, 2 Sprague 285. See *supra*, VI, F, 7.

47. 3 Bl. Comm. 294, 350; 1 Chitty Crim. L. 201; Roscoe Ev. 241. And see State *v.* Albee, 61 N. H. 423, 60 Am. Rep. 325; Rex *v.* Holden, 5 B. & A. 347, 2 N. & M. 167, 27 E. C. L. 151; Rex *v.* Hunt, 3 B. & Ald. 444, 2 Chit. 130, 5 E. C. L. 259; Rex *v.* Nottingham, 4 East 208, 1 Smith K. B. 51.

Necessity for the change.— The English cases intimate very strongly that the change of venue is granted in case of felony only when it appears to be absolutely necessary, and that changes of venue are not to be encouraged. Rex *v.* Holden, 5 B. & Ad. 347, 2 N. & M. 167, 27 E. C. L. 151; Rex *v.* Penprase, 4 B. & Ad. 573, 1 N. & M. 312, 24 E. C. L. 252; Rex *v.* Harris, 3 Burr. 1330, 1 W. Bl. 378; Rex *v.* King, 2 Chit. 217, 18 E. C. L. 599; Reg. *v.* Ruxton, 11 Wkly. Rep. 209.

48. *Iowa.*— Miller *v.* State, 4 Iowa 505.

Maryland.— Price *v.* State, 8 Gill 295; Davis *v.* State, 3 Harr. & J. 154.

Missouri.— State *v.* Wofford, 119 Mo. 408, 24 S. W. 1009; State *v.* Daniels, 66 Mo. 192; State *v.* Zeppenfeld, 12 Mo. App. 574.

New Hampshire.— State *v.* Albee, 61 N. H. 423, 60 Am. Rep. 325.

New York.— People *v.* Harris, 4 Den. 150; People *v.* Vermilyea, 7 Cow. 108.

Virginia.— Com. *v.* Wildy, 2 Va. Cas. 69; Com. *v.* Rolls, 2 Va. Cas. 68; Com. *v.* Bedinger, 1 Va. Cas. 125.

See 14 Cent. Dig. tit. "Criminal Law," § 235 *et seq.*

It is reversible error to refuse to permit an application for a change of venue to be filed when made within a reasonable time. Greer *v.* Com., 63 S. W. 443, 23 Ky. L. Rep. 489.

Convicts in the penitentiary who are civilly dead for the term of their sentence are not entitled to a change of venue in a prosecution during such term. Golden *v.* State, 13 Mo. 417. But see State *v.* Conkle, 64 S. C. 371, 42 S. E. 173.

49. Dula *v.* State, 8 Yerg. (Tenn.) 511.

50. Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814; Dulany *v.* State, 45 Md. 99; State *v.* Dyer, 139 Mo. 199, 40 S. W. 768.

51. *Alabama.*— *Ex p.* Rivers, 40 Ala. 712.

Kansas.— State *v.* Kindig, 55 Kan. 113, 39 Pac. 1028; State *v.* Knapp, 40 Kan. 148, 19

the place of trial of an offender the court may order a change of venue on application of the prosecution, where it appears that a fair trial cannot be had in the county where the accused is indicted.[52]

c. **Right of Co-Defendants.** Where several are jointly indicted a change of venue may be ordered as to one upon his motion, without removing the trial of the others,[53] or according to a New York case the court may order a change of venue as to all.[54]

d. **Discretion of Court.** Assuming that the court has power to change the venue it by no means follows that the accused has an absolute right to a change of venue.[55] An application for a change of venue in a criminal case is usually held to be addressed to the sound discretion of the court, and for this reason its refusal is not reversible error unless it appears from the facts presented on the application that the court acted unfairly, or that there was a palpable abuse of the judicial discretion.[56] But it has been held that where the application

Pac. 728; State *v.* Bunker, 38 Kan. 737, 17 Pac. 651; State *v.* Potter, 16 Kan. 80.

Missouri.— State *v.* Hatch, 91 Mo. 568, 4 S. W. 502; State *v.* McGraw, 87 Mo. 161; *Ex p.* Slater, 72 Mo. 102.

Tennessee.— State *v.* Denton, 6 Coldw. 539; Kirk *v.* State, 1 Coldw. 344.

Wisconsin.— Wheeler *v.* State, 24 Wis. 52.

Contra, Hewitt *v.* State, 43 Fla. 194, 30 So. 795, holding that a statute authorizing a change of venue without defendant's consent, when an impartial jury cannot be secured in the county, does not violate a constitutional provision entitling the accused to a trial by an impartial jury in the county where the crime was committed.

See 14 Cent. Dig. tit. "Criminal Law," § 237.

52. *Illinois.*— Perteet *v.* People, 70 Ill. 171.

Kentucky.— Smith *v.* Com., 108 Ky. 53, 55 S. W. 718, 21 Ky. L. Rep. 1470; Com. *v.* Davidson, 91 Ky. 162, 15 S. W. 53, 12 Ky. L. Rep. 767.

Louisiana.— State *v.* McCoy, 29 La. Ann. 593; State *v.* Train, 23 La. Ann. 710.

Michigan.—People *v.* Fuhrmann, 103 Mich. 593, 61 N. W. 865; People *v.* Peterson, 93 Mich. 27, 52 N. W. 1039.

Minnesota.—State *v.* Miller, 15 Minn. 344; State *v.* Gut, 13 Minn. 341.

New Hampshire.— State *v.* Albee, 61 N. H. 423, 60 Am. Rep. 325.

New York.— People *v.* Baker, 3 Abb. Pr. 42, 3 Park. Crim. 181; People *v.* Webb, 1 Hill 179.

Ohio.— State *v.* Myers, 10 Ohio Dec. (Reprint) 397, 21 Cinc. L. Bul. 57 [*overruling* State *v.* Arrison, 10 Ohio Dec. (Reprint) 379, 20 Cinc. L. Bul. 474].

Texas.— Gregory *v.* State, (Crim. App. 1896) 37 S. W. 752; Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746.

See 14 Cent. Dig. tit. "Criminal Law," § 237.

53. Shular *v.* State, 105 Ind. 389, 4 N. E. 870, 55 Am. Rep. 211; State *v.* Martin, 24 N. C. 101; Brown *v.* State, 18 Ohio St. 496; Reg. *v.* Browne, 6 Jur. 168.

54. People *v.* Baker, 3 Park. Crim. (N. Y.) 181.

55. Moses *v.* State, 11 Humphr. (Tenn.) 232; Barnes *v.* State, 36 Tex. 639; Henderson *v.* State, (Tex. Crim. 1897) 39 S. W. 116; Halsell *v.* State, 29 Tex. App. 22, 18 S. W. 418. *Contra,* Brennan *v.* People, 15 Ill. 511; Draughan *v.* Com., 45 S. W. 367, 20 Ky. L. Rep. 102.

56. *Alabama.*— State *v.* Ware, 10 Ala. 814.

California.— People *v.* Elliott, 80 Cal. 296, 22 Pac. 207; People *v.* Perdue, 49 Cal. 425; People *v.* Congleton, 44 Cal. 92.

Delaware.— State *v.* Lynn, 3 Pennew. 316, 51 Atl. 878.

Florida.— Roberson *v.* State, 42 Fla. 223, 28 So. 424; Shepherd *v.* State, 36 Fla. 374, 18 So. 773; Adams *v.* State, 28 Fla. 511, 10 So. 106.

Hawaii.— Republic *v.* Hickey, 11 Hawaii 317.

Idaho.— State *v.* Reed, 3 Ida. 754, 35 Pac. 706.

Illinois.— Myers *v.* People, 26 Ill. 173; Maton *v.* People, 15 Ill. 536.

Indiana.— Smith *v.* State, 145 Ind. 176, 42 N. E. 1019; Ranshottom *v.* State, 144 Ind. 250, 43 N. E. 218; Reinhold *v.* State, 130 Ind. 467, 30 N. E. 306; Droneberger *v.* State, 112 Ind. 105, 13 N. E. 259; Spittorff *v.* State, 108 Ind. 171, 8 N. E. 911; Merrick *v.* State, 63 Ind. 327; Bissot *v.* State, 53 Ind. 408; Hall *v.* State, 8 Ind. 439; Hubbard *v.* State, 7 Ind. 160; Smith *v.* State, 24 Ind. App. 688, 57 N. E. 572.

Iowa.— State *v.* Moats, 108 Iowa 13, 78 N. W. 701; State *v.* Foster, 91 Iowa 164, 59 N. W. 8; State *v.* Belvel, 89 Iowa 405, 56 N. W. 545, 27 L. R. A. 846; State *v.* Woodward, 84 Iowa 172, 50 N. W. 885; State *v.* Hale, 65 Iowa 575, 22 N. W. 682; State *v.* Dunn, 53 Iowa 526, 5 N. W. 707; State *v.* Mewherter, 46 Iowa 88; State *v.* Spurbeck, 44 Iowa 667; State *v.* Ostrander, 18 Iowa 435; State *v.* Mooney, 10 Iowa 506.

Kentucky.— Smith *v.* Com., 108 Ky. 53, 55 S. W. 718, 21 Ky. L. Rep. 1470.

Louisiana.— State *v.* White, 30 La. Ann. 364; State *v.* Train, 23 La. Ann. 710.

Maryland.— Cromwell *v.* State, 12 Gill & J. 257.

Minnesota.—State *v.* Stokely, 16 Minn. 282.

Mississippi.— Weeks *v.* State, 31 Miss. 490.

for a change of venue is based upon the prejudice of the judge he has no discretion to refuse it.[57]

2. GROUNDS FOR CHANGE OF VENUE — a. Local Prejudice. It is not sufficient merely to show that great prejudice exists against the accused. It must appear that the prejudice against him is so great as to prevent him from receiving a fair and impartial trial, and where evidence before the court is conflicting its decision will not be reversed upon appeal. If the affidavits tending to show prejudice are met by an equal or greater number, the court may properly in its discretion deny the application.[58] On the other hand, where the affidavits show by a preponder-

Missouri.— State *v.* Rider, 95 Mo. 474, 8 S. W. 723; State *v.* Hunt, 91 Mo. 490, 3 S. W. 858; State *v.* Wilson, 85 Mo. 134; State *v.* Guy, 69 Mo. 430; State *v.* Sayers, 58 Mo. 585; State *v.* O'Rourke, 55 Mo. 440.

Nebraska.— Argabright *v.* State, 62 Nebr. 402, 87 N. W. 146; Olive *v.* State, 11 Nebr. 1, 7 N. W. 444; Smith *v.* State, 4 Nebr. 277.

New Mexico.—Territory *v.* Kinney, 3 N. M. 97, 2 Pac. 357.

Oklahoma.— Pearce *v.* Territory, 11 Okla. 438, 68 Pac. 504.

Oregon.— State *v.* Savage, 36 Oreg. 191, 60 Pac. 610, 61 Pac. 1128; State *v.* Pomeroy, 30 Oreg. 16, 46 Pac. 797; Packwood *v.* State, 24 Oreg. 261, 33 Pac. 674.

Pennsylvania.— Com. *v.* Cleary, 148 Pa. St. 26, 23 Atl. 1110; Com. *v.* Allen, 135 Pa. St. 483, 19 Atl. 957.

South Carolina.— State *v.* Coleman, 8 S. C. 237.

South Dakota.— State *v.* Hall, (1902) 91 N. W. 325.

Tennessee.— Hudson *v.* State, 3 Coldw. 355.

Texas.— Cotton *v.* State, 32 Tex. 614; Gallaher *v.* State, 40 Tex. Crim. 296, 50 S. W. 388; Mott *v.* State, (Crim. App. 1899) 51 S. W. 368; Baldwin *v.* State, (Crim. App. 1894) 28 S. W. 951; Martin *v.* State, 21 Tex. App. 1, 17 S. W. 430; Dixon *v.* State, 2 Tex. App. 530.

Utah.— State *v.* Haworth, 24 Utah 398, 68 Pac. 155.

United States.— U. S. *v.* White, 28 Fed. Cas. No. 16,676, 5 Cranch C. C. 73.

See 14 Cent. Dig. tit. "Criminal Law," § 241. See also *infra*, VII, B, 2, a.

Decisions to the contrary.—In some states, however, it has been held that a statute empowering the court to hear evidence and from it to determine whether the accused is entitled to a change of venue does not deprive the accused of his right thereto where he makes a case in conformance to the statute or shows reasonable grounds for a belief that he cannot have an impartial trial, and it is the duty of the court to grant his application. Edwards *v.* State, 25 Ark. 444; Higgins *v.* Com., 94 Ky. 54, 21 S. W. 231, 14 Ky. L. Rep. 729; Wilkerson *v.* Com., 88 Ky. 29, 9 S. W. 836, 10 Ky. L. Rep. 656; Johnson *v.* Com., 82 Ky. 116; Freleigh *v.* State, 8 Mo. 606; Territory *v.* Taylor, (N. M. 1903) 71 Pac. 489. And in Illinois it has been held that the court has no discretion to refuse a change of venue in a capital case where the accused complies with the statute. Rafferty *v.* People, 72 Ill. 37; Rafferty *v.* People, 66 Ill. 118; Perteet *v.* People, 65 Ill. 230; Gray *v.* People, 26 Ill. 344; Clark *v.* People, 2 Ill. 117. But see Price *v.* People, 131 Ill. 223, 23 N. E. 639.

57. *Illinois.*— Carrow *v.* People, 113 Ill. 550.

Indiana.— Smelzer *v.* Lockhart, 97 Ind. 315; Duggins *v.* State, 66 Ind. 350; Manly *v.* State, 52 Ind. 215; Mershon *v.* State, 44 Ind. 598; Goldsby *v.* State, 18 Ind. 147.

Kansas.— State *v.* Grinstead, 10 Kan. App. 78, 61 Pac. 976.

Missouri.— State *v.* Thomas, 32 Mo. App. 159.

South Dakota.— State *v.* Henning, 3 S. D. 492, 54 N. W. 536.

Washington.— State *v.* Hawkins, 23 Wash. 289, 63 Pac. 258.

See 14 Cent. Dig. tit. "Criminal Law," § 241. See also *infra*, VII, B, 2, c.

Contra.—State *v.* Heacock, 106 Iowa 191, 76 N. W. 654; State *v.* Sayers, 58 Mo. 585.

58. *Alabama.*—Thompson *v.* State, 122 Ala. 12, 26 So. 141; Hawes *v.* State, 88 Ala. 37, 7 So. 302.

Arizona.— Parker *v.* Territory, (1898) 52 Pac. 361.

California.— People *v.* Congleton, 44 Cal. 92; People *v.* Mahoney, 18 Cal. 180.

Florida.— Shepherd *v.* State, 36 Fla. 374, 18 So. 773; McNealy *v.* State, 17 Fla. 198.

Illinois.— Gitchell *v.* People, 146 Ill. 157, 33 N. E. 757, 37 Am. St. Rep. 147; Hickam *v.* People, 137 Ill. 75, 27 N. E. 88; Dunn *v.* People, 109 Ill. 635.

Indiana.— Smith *v.* State, 145 Ind. 176, 42 N. E. 1019; Masterson *v.* State, 144 Ind. 240, 43 N. E. 138; Bissot *v.* State, 53 Ind. 408.

Iowa.— State *v.* Williams, 115 Iowa 97, 88 N. W. 194; State *v.* Edgerton, 100 Iowa 63, 69 N. W. 280; State *v.* Weems, 96 Iowa 426, 65 N. W. 387; State *v.* Helm, 92 Iowa 540, 61 N. W. 246; State *v.* Belvel, 89 Iowa 405, 56 N. W. 545, 27 L. R A. 846; State *v.* Woodard, 84 Iowa 172, 50 N. W. 885; State *v.* Conable, 81 Iowa 60, 46 N. W. 759; State *v.* Caldwell, 79 Iowa 473, 44 N. W. 711; State *v.* Kennedy, 77 Iowa 208, 41 N. W. 609; State *v.* Rowland, 72 Iowa 327, 33 N. W. 137; State *v.* Hutchinson, 27 Iowa 212.

Kansas.— State *v.* Daugherty, 63 Kan. 473, 65 Pac. 695; State *v.* Rhea, 25 Kan. 576; State *v.* Bohan, 15 Kan. 407.

Kentucky.— Dilger *v.* Com., 88 Ky. 550, 11 S. W. 651, 11 Ky. L. Rep. 67; Howard *v.* Com., 26 S. W. 1, 15 Ky. L. Rep. 873. See Bohannan *v.* Com., 72 S. W. 322, 24 Ky. L. Rep. 1814.

ance of evidence that the trial court has palpably abused its discretion in denying a change of venue, the appellate court will interfere and direct a new trial.[59]

b. Convenience of Witnesses. In the absence of a statute a change of venue cannot be had merely to suit the convenience of witnesses, as where they reside out of the county where the accused is indicted.[60]

c. Disqualification or Prejudice of Judge. Aside from statute the prejudice

Louisiana.— State *v.* Dent, 41 La. Ann. 1082, 7 So. 694; State *v.* Ford, 37 La. Ann. 443.

Michigan.— People *v.* Swartz, 118 Mich. 292, 76 N. W. 491.

Mississippi.— Peeples *v.* State, (1903) 33 So. 289; Tennison *v.* State, 79 Miss. 708, 31 So. 421; Dillard *v.* State, 58 Miss. 368.

Missouri.— State *v.* Wofford, 119 Mo. 408, 24 S. W. 1009; State *v.* Brownfield, 83 Mo. 448; State *v.* Kring, 11 Mo. App. 92.

Montana.— State *v.* Russell, 13 Mont. 164, 32 Pac. 854.

Nebraska.— Goldsberry *v.* State, (1902) 92 N. W. 906.

New York.— People *v.* Sammis, 3 Hun 560, 6 Thomps. & C. 328; People *v.* Diamond, 36 Misc. 71, 72 N. Y. Suppl. 179; People *v.* Sharp, 5 N. Y. Crim. 155; People *v.* Long Island R. Co., 4 Park. Crim. 602.

Ohio.— State *v.* Elliott, 11 Ohio Dec. (Reprint) 253, 25 Cinc. L. Bul. 366.

Oklahoma.— Pearce *v.* Territory, 11 Okla. 438, 68 Pac. 504; Patswald *v.* U. S., 5 Okla. 351, 49 Pac. 57.

Oregon.— State *v.* Pomeroy, 30 Oreg. 16, 46 Pac. 797. And see State *v.* Humphreys, (1902) 70 Pac. 824.

South Carolina.— State *v.* Williams, 2 McCord 383.

Texas.— Renfro *v.* State, 42 Tex. Crim. 393, 56 S. W. 1013; Red *v.* State, (Crim. App. 1899) 53 S. W. 618; Meyers *v.* State, 39 Tex. Crim. 500, 46 S. W. 817; Harrison *v.* State, (Crim. App. 1898) 43 S. W. 1002; Cravey *v.* State, 23 Tex. App. 677, 5 S. W. 162; Magee *v.* State, 14 Tex. App. 366; Dupree *v.* State, 2 Tex. App. 613.

Virginia.— Muscoe *v.* Com., 87 Va. 460, 12 S. E. 790.

West Virginia.— State *v.* Greer, 22 W. Va. 800.

England.— Rex *v.* Hunt, 3 B. & Ald. 444, 2 Chit. 130, 5 E. C. L. 259.

See 14 Cent. Dig. tit. "Criminal Law," § 243. And see *supra*, VII, B, 1, d.

Illustrations.—Newspaper discussion prejudicial to the accused and one-sided accounts of the commission of the crime (Dunn *v.* People, 109 Ill. 635; State *v.* Furbeck, 29 Kan. 532; State *v.* Rhea, 25 Kan. 576; State *v.* Barton, 8 Mo. App. 15; People *v.* Squire, 1 N. Y. St. 534; People *v.* Sharp, 5 N. Y. Crim. 155; Com. *v.* Smith, 185 Pa. St. 553, 40 Atl. 73), actual attempts of a mob to hang the accused (Thompson *v.* State, 122 Ala. 12, 26 So. 141; Rains *v.* State, 88 Ala. 91, 7 So. 315; Jamison *v.* People, 145 Ill. 357, 34 N. E. 486; State *v.* Horne, 9 Kan. 119. *Contra*, Richmond *v.* State, 16 Nebr. 388, 20 N. W. 282; State *v.* Greer, 22 W. Va. 800), and a prejudice in the county against the particular crime which the accused has committed (Shepherd *v.* State, 36 Fla. 374, 18 So. 773; McNealy *v.* State, 17 Fla. 198), although material on an application for a change, have been held not alone sufficient if the court in its discretion believes an impartial trial can be had. So where the prejudice is confined to a limited section of the county so that an impartial jury can be obtained from another section (People *v.* Baker, 1 Cal. 403; Power *v.* People, 17 Colo. 178, 28 Pac. 1121; Price *v.* People, 131 Ill. 223, 23 N. E. 639; State *v.* Hudspeth, 150 Mo. 12, 51 S. W. 483; State *v.* Headrick, 149 Mo. 396, 51 S. W. 99; Johnson *v.* State, 26 Tex. App. 399, 9 S. W. 762), or where, although it once existed, it has subsided and does not exist at the day of the trial (Daughdrill *v.* State, 113 Ala. 7, 21 So. 378; Hawes *v.* State, 88 Ala. 37, 7 So. 302; People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161; State *v.* Williams, 115 Iowa 97, 88 N. W. 194; Dilger *v.* Com., 88 Ky. 550, 11 S. W. 651, 11 Ky. L. Rep. 67; Simmerman *v.* State, 16 Nebr. 615, 21 N. W. 387; Poe *v.* State, 10 Lea (Tenn.) 673; Honeycutt *v.* State, 8 Baxt. (Tenn.) 371; State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676), a change of venue should not be granted. Difficulty in obtaining a jury, although material as showing prejudice, does not justify a change of venue (People *v.* Swartz, 118 Mich. 292, 76 N. W. 491; State *v.* Olds, 19 Oreg. 397, 24 Pac. 394; Moses *v.* State, 11 Humphr. (Tenn.) 232).

59. *Alabama.*—Thompson *v.* State, 117 Ala. 67, 23 So. 676; Scams *v.* State, 84 Ala. 410, 4 So. 521; *Ex p.* Chase, 43 Ala. 303.

Arkansas.— Ward *v.* State, 68 Ark. 466, 60 S. W. 31.

California.— People *v.* Suesser, 132 Cal. 631, 64 Pac. 1095; People *v.* Graham, 21 Cal. 261.

Florida.— Garcia *v.* State, 34 Fla. 311, 16 So. 223.

Iowa.— State *v.* Crafton, 89 Iowa 109, 56 N. W. 257; State *v.* Billings, 77 Iowa 417, 42 N. W. 456; State *v.* Nash, 7 Iowa 347.

Mississippi.—Saffold *v.* State, 76 Miss. 258, 24 So. 314. See Owens *v.* State, (1903) 33 So. 722.

Nebraska.— Richmond *v.* State, 16 Nebr. 388, 20 N. W. 282.

Texas.— Anschicks *v.* State, 45 Tex. 148; Faulkner *v.* State, (Crim. App. 1901) 65 S. W. 1093.

West Virginia.— State *v.* Manns, 48 W. Va. 480, 37 S. E. 613.

See 14 Cent. Dig. tit. "Criminal Law," § 243.

60. People *v.* Mitchell, 168 N. Y. 604, 61 N. E. 182 [*affirming* 49 N. Y. App. Div. 531, 63 N. Y. Suppl. 522]; People *v.* Harris, 4

of the judge against the accused is not alone a sufficient reason for a change of venue.[61] In many states, however, statutes provide substantially that where it appears that a judge is prejudiced against the prisoner or interested in the case a change of venue may be had.[62] Facts and circumstances very clearly showing the prejudice must be proved by affidavits or other competent evidence, and unless this is done the denial of the application will be sustained.[63]

3. CHANGE ON COURT'S OWN MOTION. It seems that the court has no power of its own motion to change the venue, unless such power is conferred by statute as it is in some jurisdictions.[64]

4. APPLICATION AND PROCEDURE — a. Jurisdiction to Change Venue. The court in which the accused is called upon to plead has the sole jurisdiction to change the venue,[65] unless, as is the rule in England and in some of the states, the proceedings have been removed by certiorari to a superior court.[66]

b. Application — (1) *IN GENERAL.* A petition and affidavit for a change of venue may be dispensed with and the change may be made by consent.[67] A change of venue may be granted on an oral application, if assented to by the prosecution,[68] unless a written application is made necessary by statute;[69] but where the change is made on formal application and affidavit, the facts on which

Den. (N. Y.) 150. So in England. Reg. *v.* Dunn, 11 Jur. 287.

61. *California.*— People *v.* Williams, 24 Cal. 31; People *v.* Mahoney, 18 Cal. 180.

Delaware.— State *v.* Lynn, 3 Pennew. 316, 51 Atl. 878.

Florida.— State *v.* King, 20 Fla. 19.

Illinois.— Sampson *v.* People, 188 Ill. 592, 59 N. E. 427.

Texas.— Gaines *v.* State, 38 Tex. Crim. 202, 42 S. W. 385; Johnson *v.* State, 31 Tex. Crim. 456, 20 S. W. 985.

See 14 Cent. Dig. tit. "Criminal Law," § 242.

62. Leyner *v.* State, 8 Ind. 490; State *v.* Callaway, 154 Mo. 91, 55 S. W. 444; State *v.* Anderson, 96 Mo. 241, 9 S. W. 636; Jim *v.* State, 3 Mo. 147; McCarthy *v.* State, 10 Nebr. 438, 6 N. W. 769; Packwood *v.* State, 24 Oreg. 261, 33 Pac. 674. See also *supra*, VII, B, 1, d.

63. Prejudice will not be presumed from the remarks of the court in passing sentence (State *v.* Hale, 65 Iowa 575, 22 N. W. 682), in discussing the testimony (State *v.* Bohan, 19 Kan. 28), in ruling against the accused on a previous trial (State *v.* Bohan, 19 Kan. 28), from a refusal to admit the defendant to bail (State *v.* Alexander, 66 Mo. 148), or from language reprimanding other persons who were indicted with the accused (State *v.* Stark, 63 Kan. 529, 66 Pac. 243, 88 Am. St. Rep. 251, 54 L. R. A. 910). But the remark by the judge while selecting the jury that "I intend to give the defendant a better jury than he is entitled to" indicates such prejudice as requires a change of venue. State *v.* Read, 49 Iowa 85. The fact that the judge who presided at the former trial has formed and expressed an opinion as to the guilt of the accused does not show such a prejudice as will entitle defendant to a change of venue when on trial before him. State *v.* La Grange, 94 Iowa 60, 62 N. W. 664.

64. In Texas the power is conferred by statute (Nite *v.* State, 41 Tex. Crim. 340, 54 S. W. 763; Augustine *v.* State, 41 Tex. Crim. 59, 52 S. W. 77; Frizzell *v.* State, 30 Tex. App. 42, 16 S. W. 751; Bohannon *v.* State, 14 Tex. App. 271; Webb *v.* State, 9 Tex. App. 490; Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746; Brown *v.* State, 6 Tex. App. 286, Code Crim. Proc. art. 613) and the change of venue may be made if the court deems there is not time enough to try the case (Griffey *v.* State, (Crim. App. 1900) 56 S. W. 52), or if the court believes that for any reason a fair and impartial trial cannot be had (Campbell *v.* State, 35 Tex. Crim. 160, 32 S. W. 774; Adams *v.* State, (Crim. App. 1893) 23 S. W. 691; Woodson *v.* State, 24 Tex. App. 153, 6 S. W. 184).

The "great inconvenience" which under the federal judiciary act will justify a change of venue in a capital case occurs where, during a trial for treason, the county in which the trial is had is in a state of insurrection and under military rule. Fries' Case, 9 Fed. Cas. No. 5,126, 3 Dall. 515, 1 L. ed. 701.

65. Price *v.* State, 8 Gill (Md.) 295; Gandy *v.* State, 27 Nebr. 707, 43 N. W. 747, 44 N. W. 108; State *v.* McGehan, 27 Ohio St. 280; State *v.* Howard, 31 Vt. 414.

66. Com. *v.* Balph, 111 Pa. St. 365, 3 Atl. 220.

Where a statute provides for the appointment of a special judge, where the judge of the court is prejudiced against the accused, the former may either try the case himself or he may grant a change of venue, if in his discretion he shall be satisfied that the accused cannot have a fair and impartial trial in the county. State *v.* Higgerson, 110 Mo. 213, 19 S. W. 624. See State *v.* Bulling, 100 Mo. 87, 12 S. W. 356; State *v.* Shipman, 93 Mo. 147, 6 S. W. 97.

67. People *v.* Scates, 4 Ill. 351.

68. Brennan *v.* People, 15 Ill. 511; State *v.* Potter, 16 Kan. 80; State *v.* Peterson, 2 La. Ann. 921; Purvis *v.* State, 71 Miss. 706, 14 So. 268.

69. See Purvis *v.* State, 71 Miss. 706, 14 So. 268, holding that an application not in writing as required by statute should be denied.

the affiant believes that a fair trial cannot be had must be stated.[70] It is not necessary to state that the motion is not made for the purpose of delay.[71] Where, after an application for a change of venue is granted, a new indictment is found and the accused is arrested thereunder, and the former indictment is quashed, a new application for a change of venue is necessary;[72] and the same is true where a new trial has been ordered on a reversal for an abuse of discretion in refusing a change of venue.[73] An application to change to a particular county may be overruled. The proper practice is to move for a change to any county in which a fair trial can be had.[74]

(II) *Time of Application.* The application for a change of venue must be made after issue has been joined,[75] but it is not material, if sufficient facts are stated in the affidavit, that an attempt shall have been made to secure a jury.[76] As a general rule a change of venue ought to be applied for as soon after issue joined as possible, after the grounds for the change become known to the applicant;[77] and the application may be denied for lack of diligence, although it is made some time before trial.[78] In some of the states the right to apply for a change of venue continues until the trial begins, but cannot be made thereafter,[79] and the trial begins when the panel is completed and the jury sworn.[80] The affidavit should state when the facts which call for a change of venue came to deponent's knowledge,[81] and if the application is made within a reasonable period thereafter, no reason exists why it cannot be made at a subsequent term to that at which the accused was arraigned.[82]

(III) *Notice.* On an application for a change of venue in a criminal case the applicant, whether the prosecution or the accused, must within a reasonable time give notice of its filing to the other side, as required by the statutes.[83]

70. Irvin *v.* State, 19 Fla. 872; Myers *v.* People, 26 Ill. 173; State *v.* Elliott, 62 Kan. 869, 64 Pac. 1116.

For form of application and affidavit for change of venue by reason of prejudice see State *v.* Shipman, 93 Mo. 147, 6 S. W. 97; State *v.* Thomas, 32 Mo. App. 159.

71. Packwood *v.* State, 24 Oreg. 261, 33 Pac. 674.

72. State *v.* Normile, 108 Mo. 121, 18 S. W. 975.

73. State *v.* Nash, 7 Iowa 347.

74. Olive *v.* State, 11 Nebr. 1, 7 N. W. 444.

75. People *v.* McCraney, 21 How. Pr. (N. Y.) 149; State *v.* Haywood, 94 N. C. 847.

Before indictment.— A motion to change the place of trial in a criminal case cannot be heard before a bill of indictment has been found. State *v.* Addison, 2 S. C. 356.

76. People *v.* Long Island R. Co., 4 Park. Crim. (N. Y.) 602; Sims *v.* State, 36 Tex. Crim. 154, 36 S. W. 256.

77. Roberts *v.* People, 9 Colo. 458, 13 Pac. 630; Boyle *v.* People, 4 Colo. 176, 34 Am. Rep. 76; Carrow *v.* People, 113 Ill. 550; McCann *v.* People, 88 Ill. 103; Haskins *v.* People, 14 Ill. App. 198; Lott *v.* State, 122 Ind. 393, 24 N. E. 156; State *v.* Chambers, 45 La. Ann. 36, 11 So. 944.

78. *Alabama.*— Byers *v.* State, 105 Ala. 31, 16 So. 716.

Iowa.— State *v.* Adams, 81 Iowa 593, 47 N. W. 770.

Missouri.— State *v.* Matlock, 82 Mo. 455.

Wisconsin.— State *v.* Sasse, 72 Wis. 3, 38 N. W. 343.

United States.— U. S. *v.* White, 28 Fed. Cas. No. 16,676, 5 Cranch C. C. 73.

See 14 Cent. Dig. tit. "Criminal Law," § 249.

79. *Alabama.*— Fallin *v.* State, 86 Ala. 13, 5 So. 423; Shackleford *v.* State, 79 Ala. 26; Wolf *v.* State, 49 Ala. 359.

Arkansas.— Edwards *v.* State, 25 Ark. 444.

California.— People *v.* Cotta, 49 Cal. 166.

Indiana.— Hunnel *v.* State, 86 Ind. 431; Sanders *v.* State, 85 Ind. 318, 44 Am. Rep. 29; Weaver *v.* State, 83 Ind. 289; Ickes *v.* Kelley, 21 Ind. 72.

Maryland.— Gardner *v.* State, 25 Md. 146; Price *v.* State, 8 Gill 295.

Missouri.— State *v.* Andrew, 76 Mo. 101.

North Dakota.— State *v.* Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

Pennsylvania.—Rizzolo *v.* Com., 126 Pa. St. 54, 17 Atl. 520.

Texas.— Morris *v.* State, 43 Tex. Crim. 289, 65 S. W. 531; Carr *v.* State, 19 Tex. App. 635, 53 Am. Rep. 395.

See 14 Cent. Dig. tit. "Criminal Law," § 249.

80. Hunnel *v.* State, 86 Ind. 431; Price *v.* State, 8 Gill (Md.) 295. After a case has been called for trial the state has no right then to put the defendant on trial for a lower grade of crime without giving him a reasonable time to perfect his motion for a change of venue. Blackburn *v.* State, 43 Tex. 522. Where a statute declares that the application for a change of venue must be made before a special venire shall be drawn, such an application is not too late when made after the first venire is quashed, and before the issuance of a writ for the second. Purvis *v.* State, 71 Miss. 706, 14 So. 268.

81. Barrows *v.* People, 11 Ill. 121.

82. State *v.* Clevenger, 156 Mo. 190, 56 S. W. 1078.

83. *Illinois.*— Haskins *v.* People, 14 Ill. App. 198.

c. Affidavits and Other Proof — (i) *In General.* An application for a change of venue is properly refused where it is not supported by the affidavits required by the statute;[84] and while technical defects in the affidavits may be disregarded,[85] they must state the facts or grounds for a belief that a fair and impartial trial cannot be had in the county.[86] The court may inquire into the feelings, interests, and motives of the affiants, and into their relations with the accused;[87] and if the facts stated in the affidavits of the accused are not corroborated it has discretion to deny the application.[88]

Kentucky.— Greer *v.* Com., 63 S. W. 443, 23 Ky. L. Rep. 489; Bishop *v.* Com., 60 S. W. 190, 22 Ky. L. Rep. 1161, 58 S. W. 817, 22 Ky. L. Rep. 760.

Louisiana.— State *v.* Dubuclet, 46 La. Ann. 1436, 16 So. 375; State *v.* Curtis, 44 La. Ann. 320, 11 So. 784.

Missouri.— State *v.* Blitz, 171 Mo. 530, 71 S. W. 1027; State *v.* Callaway, 154 Mo. 91, 55 S. W. 444; State *v.* Grable, 46 Mo. 350; State *v.* Floyd, 15 Mo. 349; Golden *v.* State, 13 Mo. 417; Reed *v.* State, 11 Mo. 379.

Wisconsin.— Lester *v.* State, 91 Wis. 249, 64 N. W. 850.

See 14 Cent. Dig. tit. "Criminal Law," § 250.

A prosecuting witness in a homicide case is not the proper person to give notice, but such notice must be given by the state. State *v.* Addison, 2 Rich. (S. C.) 356.

Notice is waived by appearing and arguing the motion on the merits. Smith *v.* State, 1 Kan. 365. But execution of a bail-bond after a change of venue at the instance of the state is not a waiver or admission of notice of the change. State *v.* Dubuclet, 46 La. Ann. 1436, 16 So. 375.

84. *Arkansas.*—Ward *v.* State, 68 Ark. 466, 60 S. W. 31.

Colorado.—Babcock *v.* People, 13 Colo. 515, 22 Pac. 817.

Iowa.— State *v.* Belvel, 89 Iowa 405, 56 N. W. 545, 27 L. R. A. 846.

Kansas.— Smith *v.* State, 1 Kan. 365.

Kentucky.— Blanks *v.* Com., 105 Ky. 41, 48 S. W. 161, 20 Ky. L. Rep. 1037; Wilkerson *v.* Com., 88 Ky. 29, 9 S. W. 836, 10 Ky. L Rep. 656.

Mississippi.— Purvis *v.* State, 71 Miss. 706, 14 So. 268.

Missouri.— State *v.* Headrick, 149 Mo. 396, 51 S. W. 99; State *v.* Lanahan, 144 Mo. 31, 45 S. W. 1090; State *v.* Turlington, 102 Mo. 642, 15 S. W. 141; State *v.* Neiderer, 94 Mo. 79, 6 S. W. 708; State *v.* Lawther, 65 Mo. 454.

Texas.— Buford *v.* State, 43 Tex. 415.

Wisconsin.— State *v.* Rowan, 35 Wis. 303.

See 14 Cent. Dig. tit. "Criminal Law," § 251.

A constitutional provision that in any criminal proceeding the accused shall be confronted with the witnesses does not prevent the reading of affidavits on a motion for a change of venue. Hussey *v.* State, 87 Ala. 121, 6 So. 420.

Oral testimony reduced to writing by stenographer.— It has been held that a statute providing that the court shall have power to grant changes of venue, provided the application therefor "be supported by affidavits" which shall satisfy the judge that an impartial trial cannot be had in the county where the prosecution was commenced, is complied with when witnesses are introduced in open court and sworn by the presiding judge, and their statements are at the time and place reduced to writing by the official stenographer. State *v.* Sullivan, 39 S. C. 400, 17 S. E. 865.

85. Bittick *v.* State, 67 Ark. 131, 53 S. W. 571; Hanna *v.* People, 86 Ill. 243.

86. *Alabama.*— Byers *v.* State, 105 Ala. 31, 16 So. 716; Salm *v.* State, 89 Ala. 56, 8 So. 66.

California.— People *v.* Shuler, 28 Cal. 490; People *v.* Graham, 21 Cal. 261; People *v.* McCauley, 1 Cal. 379.

Dakota.— Territory *v.* Egan, 3 Dak. 119, 13 N. W. 568.

Delaware.— State *v.* Windsor, 5 Harr. 512.

Kansas.—State *v.* Knadler, 40 Kan. 359, 19 Pac. 923.

Minnesota.— *Ex p.* Curtis, 3 Minn. 274.

Oklahoma.— Peters *v.* U. S., 2 Okla. 116, 33 Pac. 1031.

Virginia.— Wormeley *v.* Com., 10 Gratt. 658.

West Virginia.— State *v.* Douglass, 41 W. Va. 537, 23 S. E. 724.

See 14 Cent. Dig. tit. "Criminal Law," § 251.

Insufficient statement.— Thus the statement of the accused that he does not believe that he will receive a fair and impartial trial without any facts to substantiate it is not sufficient.

Alabama.— Jackson *v.* State, 104 Ala. 1, 16 So. 523.

California.— People *v.* Shuler, 28 Cal. 490; People *v.* McCauley, 1 Cal. 379.

Delaware.— State *v.* Burris, 4 Harr. 582.

Montana.— Territory *v.* Manton, 8 Mont. 95, 19 Pac. 387.

New Mexico.— Territory *v.* Kelly, 2 N. M. 292.

New York.— People *v.* Bodine, 7 Hill 147.

87. Smith *v.* State, 31 Tex. Crim. 14, 19 S. W. 252; Dunn *v.* State, 7 Tex. App. 600.

88. State *v.* Tatlow, 136 Mo. 678, 38 S. W. 552; State *v.* Hildreth, 31 N. C. 429, 51 Am. Dec. 364.

Who may make affidavits.— The affidavits must show that they are made by residents of the county (State *v.* Callaway, 154 Mo. 91, 55 S. W. 444; Simmerman *v.* State, 16 Nebr. 615, 21 N. W. 387), and may be made by defendant's attorneys (State *v.* Mooney, 10 Iowa 506), unless the statute requires the

(11) *Counter-Affidavits and Other Evidence.* In most jurisdictions counter-affidavits are admissible on the hearing of the application for a change of venue.[89] The court also has authority to call and examine other persons as to the existence of the alleged ground of change,[90] but it may refuse to hear oral testimony and require all evidence to be in the form of affidavits.[91] The court may also take[92] or refuse[93] oral evidence to test the credibility of the persons whose affidavits are submitted.[94]

d. Hearing and Determination. It is not error to postpone the determination of the application until after the examination of the jurors,[95] and the fact that a fair and impartial jury has been obtained pending the application may justify the court in denying it,[96] although other facts entitling the accused to it seem to exist.[97] A failure to procure a jury, or delay or difficulty in obtaining impartial jurors, is not conclusive on a motion for a change of venue.[98] The burden of proof is on the applicant to show good grounds for a change of venue.[99] The question should not be determined upon the personal conviction of the court but upon the evidence,[1] and a change should be granted on the ground of prejudice only when the court is satisfied that the prejudice is such as to prevent a fair trial.[2]

affidavits to be made by disinterested persons (Territory *v.* Vialpando, 8 N. M. 211, 42 Pac. 64). Where the statute requires the court to hear the party making the application and to examine the evidence his affidavits are inadmissible. State *v.* Judges Tenth Dist. Ct., 45 La. Ann. 246, 12 So. 135; Brouilette *v.* Judge Tenth Dist. Ct., 45 La. Ann. 243, 12 So. 134; State *v.* Ford, 37 La. Ann. 443; State *v.* Bohanan, 76 Mo. 562.

89. *Alabama.*— Taylor *v.* State, 48 Ala. 180.

Arkansas.— Jackson *v.* State, 54 Ark. 243, 15 S. W. 607.

California.— People *v.* Majors, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295.

Indiana.— Clem *v.* State, 33 Ind. 418.

Iowa.— State *v.* Wells, 46 Iowa 662.

Minnesota.—State *v.* Stokely, 16 Minn. 282.

Nebraska.— Smith *v.* State, 4 Nebr. 277.

Texas.— Baw *v.* State, 33 Tex. Crim. 24, 24 S. W. 293; Pierson *v.* State, 21 Tex. App. 14, 17 S. W. 468; Houillion *v.* State, 3 Tex. App. 537.

See 14 Cent. Dig. tit. "Criminal Law," § 252.

Contra.— Cantwell *v.* People, 138 Ill. 602, 28 N. E. 964.

90. *Indiana.*— Anderson *v.* State, 28 Ind. 22.

Louisiana.—State *v.* Ford, 37 La. Ann. 443.

Mississippi.— Cavanah *v.* State, 56 Miss. 299; Mask *v.* State, 32 Miss. 405; Weeks *v.* State, 31 Miss. 490.

Tennessee.— Porter *v.* State, 3 Lea 496.

Texas.— Crow *v.* State, 41 Tex. 468; Winkfield *v.* State, 41 Tex. 148; Grissom *v.* State, 4 Tex. App. 374.

See 14 Cent. Dig. tit. "Criminal Law," § 252.

91. Taylor *v.* State, 48 Ala. 180.

92. *Arkansas.*— Jackson *v.* State, 54 Ark. 243, 15 S. W. 607.

Indiana.— Anderson *v.* State, 28 Ind. 22.

Louisiana.—State *v.* Ford, 37 La. Ann. 443.

Mississippi.— Cavanah *v.* State, 56 Miss. 299; Mask *v.* State, 32 Miss. 405; Weeks *v.* State, 31 Miss. 490.

New Mexico.— Territory *v.* Leary, 8 N. M. 180, 43 Pac. 688.

Tennessee.— Porter *v.* State, 3 Lea 496.

Texas.— Crow *v.* State, 41 Tex. 468; Winkfield *v.* State, 41 Tex. 148; Cravey *v.* State, 23 Tex. App. 677, 5 S. W. 162; Grissom *v.* State, 4 Tex. App. 374; Dupree *v.* State, 2 Tex. App. 613.

See 14 Cent. Dig. tit. "Criminal Law," § 252.

93. Taylor *v.* State, 48 Ala. 180; State *v.* Rodrigues, 45 La. Ann. 1040, 13 So. 802.

94. Hussey *v.* State, 87 Ala. 121, 6 So. 420. In order that a change of venue may be had, facts and circumstances must be shown from which the conclusion that a fair and impartial trial cannot be had is fairly deducible; and the court must be satisfied from those facts and circumstances, and not from conclusions or opinions of the defendant or his witnesses, that such trial cannot be had. State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676.

95. People *v.* Plummer, 9 Cal. 298; State *v.* Pruett, 49 La. Ann. 283, 21 So. 842; Territory *v.* Manton, 8 Mont. 95, 19 Pac. 387; State *v.* Gray, 19 Nev. 212, 8 Pac. 456.

96. Brinkley *v.* State, 54 Ga. 371; Hunter *v.* State, 43 Ga. 483; State *v.* Causey, 43 La. Ann. 897, 9 So. 900.

97. Com. *v.* Cleary, 148 Pa. St. 26, 23 Atl. 1110.

98. People *v.* Vincent, 95 Cal. 425, 30 Pac. 581; People *v.* Mahoney, 18 Cal. 180; State *v.* Flaherty, 42 W. Va. 240, 24 S. E. 885.

99. Emporia *v.* Volmer, 12 Kan. 622; Blain *v.* State, 34 Tex. Crim. 448, 31 S. W. 368; State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676.

1. State *v.* Mooney, 10 Iowa 506; Cass *v.* State, 2 Greene (Iowa) 353. But see Conrad *v.* State, 144 Ind. 290, 43 N. E. 221.

2. State *v.* Foster, 91 Iowa 164, 59 N. W. 8; State *v.* Nash, 7 Iowa 347; Higgins *v.*

e. Second Application. By statute more than one change of venue is often prohibited,[3] and generally, where the statute makes no provision for a second change, a prohibition of more than one change will be implied.[4]

f. Imposing Conditions on Granting. When the granting of a change of venue is within the discretion of the court, it is in the discretion of the court to impose conditions on granting a change of venue,[5] and it may require a plea to be first entered,[6] or, on application by the prosecution, where defendant states that he is unable to defray the expenses of the attendance of his witnesses in another county, the court may direct the prosecution to pay the same.[7]

g. County to Which Change May Be Made. The selection of the county to which the venue shall be changed is within the judicial discretion, where the statute does not in terms direct a change of venue to a particular county;[8] but a statute requiring a change of venue to the nearest county free from exceptions must be strictly obeyed,[9] unless objection is waived by the accused by going to trial in the county to which the change has been made.[10]

h. Order Making or Refusing Change. Unless it is required by a statute, as is the case in some jurisdictions,[11] an order for a change of venue need not specify the cause of removal,[12] particularly where the cause is stated in the application.[13] The order will not be invalidated by mere technical errors,[14] or by delay in

Com., 94 Ky. 54, 21 S. W. 231, 14 Ky. L. Rep. 729; Johnson *v.* Com., 5 Ky. L. Rep. 877; Richmond *v.* State, 16 Nebr. 388, 20 N. W. 282; Crow *v.* State, 41 Tex. 468.

3. Aikin *v.* State, 35 Ala. 399; Baker *v.* State, 88 Wis. 140, 59 N. Y. 570; Perrin *v.* State, 81 Wis. 135, 50 N. W. 516; Martin *v.* State, 35 Wis. 294.

4. Price *v.* State, 8 Gill (Md.) 295; State *v.* Anderson, 96 Mo. 241, 9 S. W. 636; Webb *v.* State, 9 Tex. App. 490.

Exceptions.— The rule stated in the text seems not to apply to applications to a justice of the peace (State *v.* Minski, 7 Iowa 336); and where pending an application the judge to whom it was made dies, a second application to his successor on account of prejudice cannot be denied on the ground that a change of venue has been granted (Duggins *v.* State, 66 Ind. 350). The statutory rule that in no case shall a second removal be allowed does not prevent a defendant from procuring one on a second indictment, although he has obtained one on a former indictment. State *v.* Billings, 140 Mo. 193, 41 S. W. 778; Luttrell *v.* State, 40 Tex. Crim. 657, 51 S. W. 930.

5. Rattray *v.* State, 61 Miss. 377.

6. Gardner *v.* People, 4 Ill. 83.

7. People *v.* Baker, 3 Abb. Pr. (N. Y.) 42.

8. *Alabama.*— *Ex p.* Hodges, 59 Ala. 305.

Kentucky.— Adkins *v.* Com., 98 Ky. 539, 33 S. W. 948, 32 L. R. A. 108.

Missouri.— State *v.* Elkins, 63 Mo. 159.

New Mexico.— Territory *v.* Kelly, 2 N. M. 292.

New York.— People *v.* Baker, 3 Abb. Pr. 42.

Texas.— Grooms *v.* State, 40 Tex. Crim. 319, 50 S. W. 370; Bohannon *v.* State, 14 Tex. App. 271; Preston *v.* State, 4 Tex. App. 186.

See 14 Cent. Dig. tit. "Criminal Law," § 256.

Where several counties are comprised in one circuit or district, it is improper and generally unconstitutional to transfer the cause to a county outside the district in which the indictment was found (State *v.* Flynn, 31 Ark. 35; State *v.* Kindig, 55 Kan. 113, 39 Pac. 1028; State *v.* Knapp, 40 Kan. 148, 19 Pac. 728; State *v.* Steen, 115 Mo. 474, 22 S. W. 461; State *v.* Higgerson, 110 Mo. 213, 19 S. W. 624; State *v.* Gabriel, 88 Mo. 631; Rex *v.* ——, 6 Jur. 131), unless all the counties in the district are objectionable (Kennedy *v.* Com., 78 Ky. 447).

A change to an adjoining county in a different judicial district, under a statute providing for a change to any adjoining county, does not contravene a constitutional provision that the accused shall have a trial by an impartial jury of the county or district in which the offense is alleged to have been committed. State *v.* McCarty, 52 Ohio St. 363, 39 N. E. 1041, 27 L. R. A. 534.

9. *Ex p.* Reeves, 51 Ala. 55; Baxter *v.* People, 7 Ill. 578; State *v.* Shillinger, 6 Md. 449.

10. State *v.* Hoffmann, 75 Mo. App. 380; State *v.* Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

11. Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746.

12. Wheeler *v.* State, 42 Ga. 306; State *v.* Kindig, 55 Kan. 113, 39 Pac. 1028.

13. State *v.* Worrell, 25 Mo. 205.

14. *Kansas.*— State *v.* Potter, 16 Kan. 80.

Maryland.— Stewart *v.* State, 1 Md. 129.

Missouri.— State *v.* Gleason, 88 Mo. 582.

North Carolina.— State *v.* Shepherd, 30 N. C. 195.

Wisconsin.—State *v.* Compton, 77 Wis. 460, 46 N. W. 535.

See 14 Cent. Dig. tit. "Criminal Law," § 257.

Recognizance.— Where a statute requires the accused to enter into a recognizance for his appearance before a change of venue is granted, an order granting the change is in-

filing.[15] On change of venue in a criminal case, until the prisoner has been transferred, the court granting the change of venue can reopen the proceedings with a view to the modification or rescission of the first order, or the substitution of another order.[16]

i. Presence of Accused. Whether an order changing the venue made in the absence of the accused is valid under constitutional provisions has been decided variously. It has been held that inasmuch as the application for a change of venue is no substantive part of the trial of the accused his presence is immaterial if his counsel is there to represent him,[17] and particularly is this true where the application is made by him.[18] But it has been held that, where an application is made and acted on in the absence of the accused and of his counsel, the order based on it is invalid under a constitutional provision that the accused shall enjoy the right to be heard by himself and counsel.[19]

j. Objections and Exceptions. All objections and exceptions to the sufficiency of the proceedings, or to the propriety of the change on which the order granting change of venue is based, must be made before the court granting it. The order changing the venue cannot be attacked collaterally in the court where the trial is had.[20] Objections to mere irregularities or informalities in the order or in the papers transmitted from the court in which the change was made should be promptly taken on arraignment, and if the accused pleads and is tried, objections to irregularities which might be made on arraignment are waived, and come too late after verdict.[21]

5. Effect of Change and Subsequent Proceedings — a. Record or Transcript — (i) *Filing.* A full transcript of the record and proceedings of the court in which the change of venue was granted should be filed in the court to which the venue

valid until he gives a recognizance. State *v.* Warner, 66 Mo. App. 149.

Where successive indictments are found for the same felony, an order for a change of venue for the last applies to the others, as they are merely different counts in the same proceeding. State *v.* Johnson, 50 N. C. 221.

15. State *v.* Compton, 77 Wis. 460, 46 N. W. 535.

16. Williams *v.* Gray, 109 La. 127, 33 So. 108. See also People *v.* Zane, 105 Ill. 662.

17. Bolling *v.* State, 54 Ark. 588, 16 S. W. 658; Polk *v.* State, 45 Ark. 165; State *v.* Elkins, 63 Mo. 159; Green *v.* State, 97 Tenn. 50, 36 S. W. 700; Hopkins *v.* State, 10 Lea (Tenn.) 204; Rothschild *v.* State, 7 Tex. App. 519. See also *infra*, XIV, B, 3, a (II).

18. Polk *v.* State, 45 Ark. 165.

19. *Ex p.* Bryan, 44 Ala. 402; Lester *v.* State, 91 Wis. 249, 64 N. W. 850.

Waiver.—Doubtless the constitutional right to be present may be waived, but such waiver must be clearly and expressly proved. Lester *v.* State, 91 Wis. 249, 64 N. W. 850.

20. *Alabama.*— State *v.* McLendon, 1 Stew. 195.

Georgia.— Wheeler *v.* State, 42 Ga. 306.

Illinois.— People *v.* Zane, 105 Ill. 662.

Kentucky.— Smith *v.* Com., 67 S. W. 32, 23 Ky. L. Rep. 2271; Yontz *v.* Com., 66 S. W. 383, 23 Ky. L. Rep. 1868.

Louisiana.— State *v.* Harris, 107 La. 325, 31 So. 782.

Missouri.— State *v.* Taylor, 132 Mo. 282, 33 S. W. 1145; State *v.* Gamble, 119 Mo. 427, 24 S. W. 1030; State *v.* Anderson, 96 Mo. 241, 9 S. W. 636; State *v.* Mann, 83 Mo. 589; State *v.* Ware, 69 Mo. 332; State *v.* Knight, 61 Mo. 373.

North Dakota.—State *v.* Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

Texas.— *Ex p.* Cox, 12 Tex. App. 665; Krebs *v.* State, 8 Tex. App. 1; Rothschild *v.* State, 7 Tex. App. 719; Brown *v.* State, 6 Tex. App. 286; Preston *v.* State, 4 Tex. App. 186; Harrison *v.* State, 3 Tex. App. 558.

Virginia.— Vance *v.* Com., 2 Va. Cas. 162.

See 14 Cent. Dig. tit. "Criminal Law," § 258½.

21. *Alabama.*— Bramlett *v.* State, 31 Ala. 376; State *v.* Matthews, 9 Port. 370.

Florida.— Ammons *v.* State, 9 Fla. 530.

Illinois.— Tucker *v.* People, 122 Ill. 583, 13 N. E. 809; Goodhue *v.* People, 94 Ill. 37; Gardner *v.* People, 4 Ill. 83.

Indiana.— Burrell *v.* State, 129 Ind. 290, 28 N. E. 699; App *v.* State, 90 Ind. 73.

Kansas.— State *v.* Kindig, 55 Kan. 113, 39 Pac. 1028; State *v.* Potter, 16 Kan. 80.

Kentucky.— Lightfoot *v.* Com., 80 Ky. 516, 4 Ky. L. Rep. 463.

Missouri.— State *v.* Dusenberry, 112 Mo. 277, 20 S. W. 461; Laporte *v.* State, 6 Mo. 208.

Tennessee.— Major *v.* State, 2 Sneed 11; Ellick *v.* State, 1 Swan 325.

See 14 Cent. Dig. tit. "Criminal Law," § 259.

The accused waives any objections to the denial of his motion for a change of venue where he is afterward given an opportunity to renew it and fails to do so. People *v.* Fredericks, 106 Cal. 554, 39 Pac. 944; People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161; People

is changed,[22] but this will be presumed to have been done when nothing appears to the contrary.[23]

(II) *Contents.* The order, not the record or the certified transcript, confers jurisdiction. The transcript is merely evidence; and where it is defective the remedy is to move for an order directing the clerk to correct it, or to remove the original record by certiorari.[24] What the record or transcript of the proceedings shall contain depends usually upon statutory provision. It ought to show the name of the court,[25] that the grand jury was impaneled and an indictment found[26] and returned in open court,[27] that a statute requiring the original indictment to be transferred has been complied with,[28] and the reasons for the change of venue.[29] It need not include evidence taken on the preliminary examination,[30] the bill of exceptions or charge to the jury,[31] nor the formula by which the grand jury was constituted.[32] Nor need there be an averment that the venue was changed to the nearest county.[33] The certified copy of the indictment must be identical with the original, and contain the names of all persons indicted.[34]

(III) *Certification.* Inaccuracies in the clerk's certificate may be disregarded,[35] and he may amend it at any time.[36] It has been held[37] and also denied[38] that the clerk's seal may be dispensed with. The clerk may certify that he sends the original papers,[39] but this is not necessary.[40]

b. Transmission of Original Papers. In the absence of a statute requiring or permitting the clerk of the court from which the cause is removed to remove

v. Plummer, 9 Cal. 298; Irvin *v.* State, 19 Fla. 872.

22. *Alabama.*— Brister *v.* State, 26 Ala. 107.

Florida.— Ammons *v.* State, 9 Fla. 530.

Indiana.— Pulling *v.* State, 16 Ind. 458.

Kansas.— State *v.* Foulk, 59 Kan. 775, 52 Pac. 864; State *v.* Adams, 20 Kan. 311.

Maryland.— Price *v.* State, 8 Gill 295.

Tennessee.—Adams *v.* State, 1 Swan 466.

See 14 Cent. Dig. tit. "Criminal Law," §§ 260, 261.

A failure to enter the transcript in the records of the court to which the venue is changed is not error. Major *v.* State, 2 Sneed (Tenn.) 11; Adams *v.* State, 1 Swan (Tenn.) 466.

23. State *v.* Williams, 3 Stew. (Ala.) 454; McDonald *v.* State, 78 Miss. 369, 29 So. 171; State *v.* Lingle, 128 Mo. 528, 31 S. W. 20.

24. *Arkansas.*— Williams *v.* State, (1891) 16 S. W. 816.

Missouri.— Laporte *v.* State, 6 Mo. 208.

North Carolina.— State *v.* Scott, 19 N. C. 35.

Tennessee.— Logston *v.* State, 3 Heisk. 414.

Texas.—Brown *v.* State, 6 Tex. App. 286.

Wisconsin.— State *v.* Parish, 43 Wis. 395.

See 14 Cent. Dig. tit. "Criminal Law," §§ 260, 261.

Where two contradictory copies of a record are certified, the court may reconcile them by an inspection of the original record, and for this purpose, on motion in arrest of judgment, the court may grant a certiorari for the original or a more perfect transcript of it and may then proceed to pronounce judgment after inspecting it. State *v.* Scott, 19 N. C. 35; State *v.* Collins, 14 N. C. 117.

25. Loper *v.* State, 3 How. (Miss.) 429.

26. Williamson *v.* State, 64 Miss. 229, 1 So. 171.

The omission from the transcript of a caption on the indictment may be disregarded. Bramlett *v.* State, 31 Ala. 376.

27. Pulling *v.* State, 16 Ind. 458; State *v.* Lee, 80 N. C. 483.

28. Adell *v.* State, 34 Ind. 543.

29. State *v.* Denton, 6 Coldw. (Tenn.) 539.

30. Byrd *v.* State, 26 Tex. App. 374, 9 S. W. 759; Vance *v.* Com., 2 Va. Cas. 162, construing a statute directing the judge to certify the record and all other papers that he may deem necessary.

31. People *v.* Bush, 71 Cal. 602, 12 Pac. 781; Ellick *v.* State, 1 Swan (Tenn.) 325.

32. State *v.* Lamon, 10 N. C. 175.

33. Ellick *v.* State, 1 Swan (Tenn.) 325.

34. Smith *v.* State, 36 Ill. 290. See Indictments and Informations.

35. State *v.* Bell, 136 Mo. 120, 37 S. W. 823. The original indictment and testimony before the grand jury when sent need not be authenticated (State *v.* McGuire, 87 Iowa 142, 54 N. W. 202; State *v.* Brown, 35 La. Ann. 340); nor need each paper which is sent be mentioned specifically in the certificate (Ward *v.* State, 28 Ala. 53). The certificate of the clerk made out of his county is valid. Childs *v.* State, 55 Ala. 25; Collier *v.* State, 2 Stew. (Ala.) 388.

36. State *v.* Gibson, 29 Iowa 295; State *v.* Haws, 98 Mo. 188, 11 S. W. 574, 12 S. W. 126.

37. Childs *v.* State, 55 Ala. 25; Bishop *v.* State, 30 Ala. 34; State *v.* Daniels, 49 La. Ann. 954, 22 So. 415; State *v.* Dusenberry, 112 Mo. 277, 20 S. W. 461; Major *v.* State, 2 Sneed (Tenn.) 11.

38. Hudley *v.* State, 36 Ark. 237. If there be no seal it should be so stated, and the connection of the clerk with the court stated. Williams *v.* State, 48 Ala. 85.

39. State *v.* Ross, 21 Iowa 467.

40. Keith *v.* State, 90 Ind. 89.

the original papers from the files, it is sufficient and proper that he send a transcript thereof properly certified;[41] and this is true where a statute requires a transcript to be sent, even though the order directs the originals to be sent.[42] Unless a statute provides otherwise the fact that the certified transcript of the indictment is sent in place of the original, and the accused is tried thereon, is not error.[43]

e. Jurisdiction After Change — (i) *In General.* It is generally considered that the court granting the change of venue loses jurisdiction, and jurisdiction vests in the court to which the venue is changed, on the entry of the order making the change, and before the original papers in the case have been transmitted to or filed in the latter court,[44] although the court granting the change may, where application is made at the same term and before the papers have been transferred, set aside its own order changing the venue,[45] on notice to[46] or with the consent of the accused;[47] and it may release the accused on bail.[48] Under some statutes requiring the clerk to make and transmit a transcript, the court making the change does not lose jurisdiction, and it does not vest in the court to which the change is made, until the requirements of the statute have been complied with.[49] If the court to which the cause has been transferred has by statute complete jurisdiction of the crime it may allow the indictment to be amended,[50] but generally the new court has no jurisdiction to vacate or amend the records of the court from which the cause has been removed,[51] although it may on application either by certiorari[52] or other appropriate remedy compel the removal of

41. *Alabama.*—Bishop *v.* State, 30 Ala. 34; Harrall *v.* State, 26 Ala. 52; John *v.* State, 2 Ala. 290.

Arkansas.— Pleasant *v.* State, 15 Ark. 624.

Indiana.— Bright *v.* State, 90 Ind. 343.

Maryland.— Price *v.* State, 8 Gill 295.

Mississippi.— Browning *v.* State, 30 Miss. 656.

North Carolina.— State *v.* Shepherd, 30 N. C. 195.

See 14 Cent. Dig. tit. "Criminal Law," § 263.

42. Harrall *v.* State, 26 Ala. 52.

43. Pleasant *v.* State, 15 Ark. 624; State *v.* Kindig, 55 Kan. 113, 39 Pac. 1028; Williamson *v.* State, 64 Miss. 229, 1 So. 171; Browning *v.* State, 33 Miss. 47; Ruby *v.* State, 7 Mo. 206.

Contrary rule.—Under some statutes it has been held that the original indictment should be transmitted. Sawyer *v.* State, 16 Ind. 93. And see Keith *v.* State, 90 Ind. 89; App *v.* State, 90 Ind. 73; Sharp *v.* State, 2 Iowa 454; Preuit *v.* People, 5 Nebr. 377. In such case no certified copy need accompany it. Jones *v.* State, 11 Ind. 357.

44. *Alabama.*— *Ex p.* Rivers, 40 Ala. 712.

Florida.— Ammons *v.* State, 9 Fla. 530.

Illinois.— Goodhue *v.* People, 94 Ill. 37.

Kentucky.— Smith *v.* Com., 95 Ky. 322, 25 S. W. 106, 15 Ky. L. Rep. 637.

Missouri.— State *v.* Lay, 128 Mo. 609, 29 S. W. 999; State *v.* Dusenberry, 112 Mo. 277, 20 S. W. 461; State *v.* Noland, 111 Mo. 473, 19 S. W. 715; *In re* Whitson, 89 Mo. 58, 1 S. W. 125.

North Carolina.—State *v.* Weddington, 103 N. C. 364, 9 S. E. 577.

Loss of jurisdiction in the new court does not occur by reason of defendant withdrawing his application after it has been granted (State *v.* Hayes, 88 Mo. 344), but it is otherwise where the district attorney enters a *nolle prosequi* (State *v.* Patterson, 73 Mo. 695).

If a new indictment is found after the order granting the change, the court may try defendant, subject to his right to renew his application for a change of venue. State *v.* Billings, 140 Mo. 193, 41 S. W. 778. But see Smith *v.* Com., 95 Ky. 322, 25 S. W. 106, 15 Ky. L. Rep. 637.

The death of a judge whom the accused alleges to be prejudiced against him puts an end to all proceedings to change the venue on that account, and his successor has jurisdiction to try the accused. Winn *v.* State, 82 Wis. 571, 52 N. W. 775.

45. People *v.* Zane, 105 Ill. 662; State *v.* Webb, 74 Mo. 333.

46. State *v.* Bragg, 63 Mo. App. 22.

47. Bowles *v.* State, 5 Sneed (Tenn.) 360.

48. State *v.* Schaffer, 36 Mo. App. 589.

49. App *v.* State, 90 Ind. 73; Duncan *v.* State, 84 Ind. 204; Leslie *v.* State, 83 Ind. 180; Fawcett *v.* State, 71 Ind. 590; State *v.* Foulk, 59 Kan. 775, 52 Pac. 864; State *v.* Gray, 109 La. 127, 33 So. 108.

Where the accused is not in confinement or custody, an order granting a change of venue is not valid to vest jurisdiction, unless the accused be recognized to appear in the court to which the venue has been changed. State *v.* Stone, 106 Mo. 1, 16 S. W. 890; State *v.* Butler, 38 Tex. 560; State *v.* Compton, 77 Wis. 460, 46 N. W. 535.

50. State *v.* Lyts, 25 Wash. 347, 65 Pac. 530.

51. State *v.* Start, 62 Kan. 111, 61 Pac. 394.

52. Harrall *v.* State, 26 Ala. 52; State *v.* Scott, 19 N. C. 35; State *v.* Collins, 14 N. C. 117.

papers to it, or obtain fuller transcripts of the records of the court from which the case came.[53]

(II) *Waiver of Right to Trial in County.* An application for a change of venue by the accused is a waiver of his constitutional right to a trial by a jury of the county where the offense was committed.[54]

d. Proceedings After Change — (I) *In General.* It is usually provided that the court to which the change is made shall have the same jurisdiction and proceed in the same manner as though the prosecution had been begun in it originally.[55] The court may at any time during the term order the indictment filed,[56] or the transcript of the record transmitted spread upon its records.[57]

(II) *Arraignment.* Where the prisoner has been arraigned and has pleaded to the indictment before the change of venue, a second arraignment and plea in the new court are not necessary,[58] but a new arraignment is not reversible error.[59]

(III) *Remand.* After a change of venue the cause may be remanded to the original county by agreement between the prisoner and the state,[60] but not by the court on its own motion.[61]

VIII. LIMITATION OF PROSECUTIONS.

A. In General. In most jurisdictions there are statutes limiting the time within which prosecutions for crime may be commenced. Such statutes are to be given a reasonably strict construction in favor of the accused and against the prosecution.[62] By the weight of authority they do not apply to crimes previously committed, unless clearly retrospective in their terms.[63] A statute extending the time for the prosecution of certain crimes, although it may not affect cases in which the period of limitation has expired, extends those limitations which have not expired at the date of its passage.[64]

B. Specific Limitations Applicable — **1. In State Courts.** The periods of limitation applicable to prosecutions for crime differ widely in the various states according to the statutory provisions existing in each.[65] A limitation applicable

53. Goodhue *v.* People, 94 Ill. 37; Noonan *v.* State, 55 Wis. 258, 12 N. W. 379.

54. Kent *v.* State, 64 Ark. 247, 41 S. W. 849; Weyrich *v.* People, 89 Ill. 90; State *v.* Potter, 16 Kan. 80; State *v.* Albee, 61 N. H. 423, 60 Am. Rep. 325.

55. See Beauchamp *v.* State, 6 Blackf. (Ind.) 299; State *v.* Underwood, 75 Mo. 230.

56. Ammons *v.* State, 9 Fla. 530.

57. Major *v.* State, 2 Sneed (Tenn.) 11; Adams *v.* State, 1 Swan (Tenn.) 466.

58. Davis *v.* State, 39 Md. 355; Price *v.* State, 8 Gill (Md.) 295; Com. *v.* Pistorius, 12 Phila. (Pa.) 550; Sims *v.* State, 36 Tex. Crim. 154, 36 S. W. 256; Vance *v.* Com., 2 Va. Cas. 162.

59. Gardner *v.* People, 4 Ill. 83. In Missouri, under Rev. St. § 4167, the defendant may be arraigned and called upon to plead in the court to which the venue has been changed. State *v.* Good, 132 Mo. 114, 33 S. W. 790; State *v.* Renfrow, 111 Mo. 589, 20 S. W. 299.

60. Paris *v.* State, 36 Ala. 232; Hourigan *v.* Com., 94 Ky. 520, 23 S. W. 355, 12 Ky. L. Rep. 265; Lightfoot *v.* Com., 80 Ky. 516. But see *Ex p.* Dennis, 48 Ala. 304.

61. State *v.* Swepson, 81 N. C. 571.

Where one of several co-defendants obtains a change of venue without the consent of the others, the court to which the case is transferred obtains no jurisdiction over them (Hunter *v.* People, 2 Ill. 453; State *v.* Wetherford, 25 Mo. 439), or if by statute it has jurisdiction, they should be remanded for trial in the county where originally indicted (State *v.* Wetherford, 25 Mo. 439).

62. State *v.* Heller, 76 Wis. 517, 45 N. W. 307.

63. People *v.* Lord, 12 Hun (N. Y.) 282; Martin *v.* State, 24 Tex. 61. But see Com. *v.* Hutchinson, 2 Pars. Eq. Cas. (Pa.) 453, 1 Phila. (Pa.) 77.

64. Com. *v.* Duffy, 96 Pa. St. 506, 42 Am. Rep. 554; State *v.* Sneed, 25 Tex. Suppl. 66.

65. Five years' limitation in misdemeanors and felonies see People *v.* Lord, 12 Hun (N. Y.) 282; Com. *v.* Hutchinson, 2 Pars. Eq. Cas. (Pa.) 453, 1 Phila. (Pa.) 77; Com. *v.* Dengler, 2 Lanc. L. Rev. 314.

Four years' limitation see Coker *v.* State, 115 Ga. 210, 41 S. E. 684.

Three years' limitation in prosecutions for felony see People *v.* Haun, 44 Cal. 96; State *v.* Hazard, 8 R. I. 273; Moore *v.* State, 20 Tex. App. 275; State *v.* Erving, 19 Wash. 435, 53 Pac. 717.

Two years' limitation in felonies see Frese *v.* State, 23 Fla. 267, 2 So. 1; Hammock *v.* State, 116 Ga. 595, 43 S. E. 47; Com. *v.* Bunn, 1 Leg. Op. (Pa.) 114; U. S. *v.* Slacum, 27 Fed. Cas. No. 16,311, 1 Cranch C. C. 485.

One year's limitation in felony or misdemeanor see People *v.* Picetti, 124 Cal. 361, 57

to a prosecution for a fine or forfeiture does not apply to a crime punishable by imprisonment,[66] but a fine is barred by a lapse of this period should it be imposed as exclusive punishment or in conjunction with imprisonment.[67]

2. In Federal Courts. By the federal statutes it is provided in substance that no person shall be prosecuted for treason or other capital offense, wilful murder excepted, or for any offense not capital, except crimes under the revenue laws or the slave-trade laws, unless the indictment is found within three years after the offense has been committed. Indictments for crimes under the revenue laws or slave-trade laws may be instituted within five years, as may also be all suits or prosecutions for penalties or forfeitures.[68] An entry of goods at a custom-house by a fraudulent invoice,[69] and attempts to defraud the government of taxes on distilled spirits,[70] or by the prosecution of a false claim or by false testimony,[71] are crimes under the revenue laws to which the five years' limitation is applicable; but an offense arising under the act[72] establishing a money-order system is not an offense under the revenue law, and the limitation applicable thereto is now three years.[73]

C. Commencement of Period of Limitation — 1. Particular Crimes. This is always an important, and sometimes a difficult, point to determine. The period of limitation in homicide runs from the death, not from the wounding;[74] in bigamy, from the date of the bigamous marriage, not from the subsequent cohabitation;[75] in embezzlement or conversion, from the date of the actual misappropriation, not from the date when the accused was called upon to account;[76] in receiving stolen goods, from the actual reception and not from mere possession;[77] in obtaining money under false pretenses, from the date the money was

Pac. 156; State *v.* Enos, Kirby (Conn.) 21; Wallace *v.* State, 5 Ind. 555; Com. *v.* Edwards, 9 Dana (Ky.) 447; State *v.* Walters, 16 La. Ann. 400; State *v.* Markham, 15 La. Ann. 498; State *v.* Jumel, 13 La. Ann. 399; State *v.* Popp, 45 Md. 432; State *v.* Chitty, 1 Bailey (S. C.) 379; State *v.* Sharp, 5 Yerg. (Tenn.) 245; State *v.* Newhous, 41 Tex. 185; Owens *v.* State, 38 Tex. 555.

Six months' limitation in prosecution for a fine see State *v.* King, 29 La. Ann. 704.

66. State *v.* Dent, 1 Rich. (S. C.) 469; State *v.* Fields, 2 Bailey (S. C.) 554; U. S. *v.* Brown, 24 Fed. Cas. No. 14,665, 2 Lowell 267. Cal. Pen. Code, § 801, providing that an indictment for a misdemeanor must be within a year after its commission, applies to an indictment for seduction under promise of marriage, where the judgment imposes a fine as punishment, although section 268 authorizes punishment by imprisonment in the state prison or by fine; section 17 providing that if the judgment imposes a punishment less than imprisonment in the state prison the offense shall be deemed a misdemeanor for all purposes. People *v.* Gray, 137 Cal. 267, 70 Pac. 20.

67. State *v.* Elrod, 12 Rich. (S. C.) 662. And see State *v.* Fields, 2 Bailey (S. C.) 554; State *v.* Free, 2 Hill (S. C.) 628.

68. U. S. Rev. St. (1878) §§ 1043–1048 [U. S. Comp. St. (1901) pp. 725–728]. The statute applies to statutory offenses created after as well as before its enactment (Johnson *v.* U. S., 13 Fed. Cas. No. 7,418, 3 McLean 89; U. S. *v.* Ballard, 24 Fed. Cas. No. 14,507, 3 McLean 469; U. S. *v.* White, 28 Fed. Cas. No. 16,676, 5 Cranch C. C. 73), and to common-law as well as to statutory offenses against the United States (U. S. *v.* Porter, 27 Fed. Cas. No. 16,072, 2 Cranch C. C. 60; U. S. *v.* Slacum, 27 Fed. Cas. No. 16,311, 1 Cranch C. C. 485; U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441).

69. U. S. *v.* Hirsch, 100 U. S. 33, 25 L. ed. 539.

70. U. S. *v.* Dustin, 25 Fed. Cas. No. 15,012.

71. U. S. *v.* Dennee, 25 Fed. Cas. No. 14,948, 3 Woods 47.

72. 13 U. S. St. at L. 76.

73. U. S. *v.* Norton, 91 U. S. 566, 23 L. ed. 454.

74. Reynolds *v.* State, 1 Ga. 222; State *v.* Taylor, 31 La. Ann. 851.

75. Scoggins *v.* State, 32 Ark. 205; Dale *v.* State, 88 Ga. 552, 15 S. E. 287; State *v.* Patterson, 24 N. C. 346, 38 Am. Dec. 699; Gise *v.* Com., 81 Pa. St. 428 [*reversing* 11 Phila. 655]; Com. *v.* McNerny, 10 Phila. (Pa.) 206, 6 Leg. Gaz. (Pa.) 183.

Bigamous cohabitation see *infra*, VIII, C, 2.

76. Baschleben *v.* People, 188 Ill. 261, 58 N. E. 946; Weimer *v.* People, 186 Ill. 503, 58 N. E. 378; State *v.* Mason, 108 Ind. 48, 8 N. E. 716; State *v.* Thomson, 155 Mo. 300, 55 S. W. 1013. Where the accused, being indicted for embezzlement as a guardian, claimed that he was removed before the period of limitation, and that consequently his embezzlement if committed at all was outlawed, and the order removing him was void because granted without notice, it was held that it might be attacked collaterally, so as to bring him within the statute. Colvin *v.* State, 127 Ind. 403, 26 N. E. 888.

77. Jones *v.* State, 14 Ind. 346.

obtained, not from the date of the making of the false statement;[78] and in seduction, from the date of the sexual intercourse and not from the date of the promise made.[79]

2. CONTINUING OFFENSES. Where the offense is continuous, the statute of limitations does not apply where some portion of the crime is within the period, although another portion thereof is not. Thus a prosecution for obstructing a public road may be begun after the statutory period has elapsed, subsequent to the erection of the obstruction, if it still exists within the period of limitations prior to the indictment.[80] The rule also applies to bigamous cohabitation,[81] and according to some of the cases to conspiracy where it continues.[82] It has been held, however, that the crime of withholding pension money, under a statute, is not a continuous one, but is complete on a refusal to pay on demand;[83] and that the crime of deserting one's wife is not a continuous one, but is to be regarded as having been committed when the defendant left his wife.[84]

D. Suspension and Running of Statute — 1. SUSPENSION — a. Absence or Non-Residence of Accused. As a rule where a person after he has committed a crime absconds and absents himself from the state, his absence suspends the running of the statute of limitations.[85]

b. Fugitives From Justice. One who has fled out of the jurisdiction of the court to escape arrest after the statute of limitations has begun to run cannot count the time of his absence as part of the period of limitations;[86] and one is a

78. State *v.* Riley, 65 N. J. L. 192, 46 Atl. 700.

79. People *v.* Millspaugh, 11 Mich. 278; People *v.* Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592.

80. State *v.* Gilbert, 73 Mo. 20; State *v.* Long, 94 N. C. 896; Nashville, etc., R. Co. *v.* State, 1 Baxt. (Tenn.) 55; State *v.* Dry Fork R. Co., 50 W. Va. 235, 40 S. E. 447.

81. The statute does not apply to a bigamous cohabitation continuing until the indictment is found, although the bigamous marriage was contracted prior to the period of limitation. State *v.* Sloan, 55 Iowa 217, 7 N. W. 516.

Bigamy see *supra*, VIII, C, 1.

82. It has been held in New York that the statute is no bar to a conspiracy, although formed prior to the period, if the conspiracy was in active operation by overt acts within it. People *v.* Willis, 23 Misc. (N. Y.) 568, 52 N. Y. Suppl. 808. And in Illinois it has been held that the statute of limitations does not commence to run in case of a conspiracy for a criminal purpose, until the commission of the last overt act in furtherance thereof. Ochs *v.* People, 124 Ill. 399, 16 N. E. 662, conspiracy to obtain money by false pretenses. In Pennsylvania there is a decision to the contrary. Com. *v.* Bartilson, 85 Pa. St. 482. *Compare* Com. *v.* Wishart, 8 Leg. Gaz. (Pa.) 137. And in the federal courts, under statutes requiring an overt act as well as a conspiring, it has been held that where a conspiracy is formed, and an overt act done in pursuance thereof, the crime is consummated, that the statute begins to run and that subsequent overt acts do not render it a continuing crime (U. S. *v.* Owen, 32 Fed. 534, 13 Sawy. 53), and that it cannot be said that there is a new conspiracy for each overt act, or whenever a new party is brought into the scheme, so as to make the statute begin to run from that time (U. S. *v.* McCord, 72 Fed. 159).

83. U. S. *v.* Irvine, 98 U. S. 450, 25 L. ed. 193.

84. State *v.* Langdon, 159 Ind. 377, 65 N. E. 1.

85. *California.*— People *v.* Montejo, 18 Cal. 38.

Indiana.— Ulmer *v.* State, 14 Ind. 52.

Iowa.— State *v.* Soper, 118 Iowa 1, 91 N. W. 774.

Michigan.— People *v.* Clement, 72 Mich. 116, 40 N. W. 190.

New York.— People *v.* Roe, 5 Park. Crim. 231.

Oklahoma.— Coleman *v.* Territory, 5 Okla. 201, 47 Pac. 1079.

Pennsylvania.— Graham *v.* Com., 51 Pa. St. 255, 88 Am. Dec. 581; Com. *v.* Woodward, 1 Chest. Co. Rep. 102.

Texas.— Whitaker *v.* State, 12 Tex. App. 436.

See 14 Cent. Dig. tit. "Criminal Law," § 277.

Contra.— Rouse *v.* State, (Fla. 1902) 32 So. 784, where the statute contained no such exception.

Absence without change of residence.— Under some statutes it is an actual change of residence and not mere absence from the state that prevents the running of the statute. People *v.* McCausey, 65 Mich. 72, 31 N. W. 770.

Absence on military service.— Absence as a volunteer in the military service of the United States does not prevent the running of the statute. Graham *v.* Com., 51 Pa. St. 255, 88 Am. Dec. 581.

86. *District of Columbia.*— Howgate *v.* U. S., 7 App. Cas. 217.

Georgia.— Watkins *v.* State, 68 Ga. 832.

a fugitive from justice even though he has not left the state, where he has successfully hidden or concealed himself within its limits.[87]

c. Concealment of Crime. As a general rule the fact that the accused conceals his crime does not prevent the running of the statute;[88] but it is otherwise in some jurisdictions by express statutory provision.[89]

d. Imprisonment of Accused. The fact that the accused is in prison during a portion of the time limited by the statute of limitations does not suspend the running of the statute during the period of his imprisonment.[90]

2. Computation of Time. In computing the time under a statute requiring a prosecution to be begun within a certain period after the commission of the crime the day on which the crime was committed will be excluded.[91] A statute which declares that the time within which an act is to be done shall be computed by excluding the first day and including the last applies to criminal statutes of limitation,[92] and it has been held that the term "months" in a statute of limitations means lunar months.[93]

3. Indictment For Higher Offense Than Is Proved. If on an indictment for a felony the accused is found guilty of some less crime included in the felony and which constitutes a part of it, the conviction cannot be sustained where the crime of which he is convicted is barred by the statute of limitations, although the crime of which he was indicted is not thus barred.[94] Thus where one is

Louisiana.— State *v.* Gibson, (1902) 32 So. 332; State *v.* Vines, 34 La. Ann. 1073; State *v.* Barton, 32 La. Ann. 278.

Nebraska.— State *v.* Leidigh, 53 Nebr. 148, 73 N. W. 545.

Oklahoma.— Coleman *v.* Territory, 5 Okla. 201, 47 Pac. 1079.

Pennsylvania.— Com. *v.* Blackburn, 3 Pa. Co. Ct. 464.

See 14 Cent. Dig. tit. "Criminal Law," § 278.

No steps to prosecute.— The rule applies, although no steps are taken, during the absence of the accused to prosecute him. State *v.* Vines, 34 La. Ann. 1073; *Ex p.* Trester, 53 Nebr. 148, 73 N. W. 545.

87. Lay *v.* State, 42 Ark. 105; State *v.* Harvell, 89 Mo. 588, 1 S. W. 837; State *v.* Washburn, 48 Mo. 240; Blackman *v.* Com., 124 Pa. St. 578, 17 Atl. 194; Com. *v.* Blackburn, 3 Pa. Co. Ct. 464. "Fleeing from justice," within the meaning of U. S. Rev. St. (1878) § 1045, means a departure of the offender from the place where the crime was committed to another part of the United States for the purpose of avoiding punishment for any offense (U. S. *v.* Smith, 27 Fed. Cas. No. 16,332, Brunn. Col. Cas. 82, 4 Day (Conn.) 121; U. S. *v.* White, 28 Fed. Cas. No. 16,675, 5 Cranch C. C. 38; U. S. *v.* White, 28 Fed. Cas. No. 16,676, 5 Cranch C. C. 73; U. S. *v.* White, 28 Fed. Cas. No. 16,677, 5 Cranch C. C. 116), and it is not necessary that the accused shall have been found in the jurisdiction of another court (Porter *v.* U. S., 91 Fed. 494, 33 C. C. A. 652), for if he conceals himself within the district to avoid detection or punishment, it is a fleeing from justice within the statute (U. S. *v.* O'Brian, 27 Fed. Cas. No. 15,908, 3 Dill. 381). Nor is it necessary to show that he fled to avoid the justice of the United States, for an intent to avoid the justice of the state having jurisdiction over the same territory and act is sufficient. Streep *v.* U. S., 160 U. S. 128, 16 S. Ct. 244, 40 L. ed. 365. But the statute does not apply to a crime committed on a vessel engaged on a whaling voyage which does not return until the period of limitation has expired. U. S. *v.* Brown, 24 Fed. Cas. No. 14,665, 2 Lowell 267.

88. State *v.* Nute, 63 N. H. 79, 80, where the court said: "No man is bound in law to furnish evidence to convict himself of crime, and his refusal to reveal the facts of the crime, which must be a concealment, cannot take away from him the benefit of the limitation which the statute has given him." See also Com. *v.* Sheriff, 3 Brewst. (Pa.) 394; U. S. *v.* White, 28 Fed. Cas. No. 16,675, 5 Cranch C. C. 38; U. S. *v.* White, 28 Fed. Cas. No. 16,676, 5 Cranch C. C. 73.

89. A concealment of the crime, and not of defendant's guilt, is required to avoid the statute. State *v.* Hoke, 84 Ind. 137; Robinson *v.* State, 57 Ind. 113; State *v.* Fries, 53 Ind. 489; Jones *v.* State, 14 Ind. 120; Free *v.* State, 13 Ind. 324. The mere denial by the accused of his guilt is not a concealment. Robinson *v.* State, 57 Ind. 113.

90. *In re* Griffith, 35 Kan. 377, 11 Pac. 174; Com. *v.* Woodward, 1 Chest. Co. Rep. (Pa.) 102; Carr *v.* State, 36 Tex. Cr. 390, 37 S. W. 426.

91. Savage *v.* State, 18 Fla. 970; Com. *v.* Wood, 5 Pa. Dist. 179, 17 Pa. Co. Ct. 133; State *v.* Beasley, 21 W. Va. 777. But see State *v.* Asbury, 26 Tex. 82.

92. State *v.* Beasley, 21 W. Va. 777.

93. State *v.* Jacobs, 2 Harr. (Del.) 548.

94. Turley *v.* State, 3 Heisk. (Tenn.) 11 [*overruling* Carden *v.* State, 3 Head 267]; Wilson *v.* State, 7 Yerg. (Tenn.) 516; Fulcher *v.* State, 33 Tex. Cr. 22, 24 S. W. 292; White *v.* State, 4 Tex. App. 488. But see Clark *v.* State, 12 Ga. 350.

indicted for murder and found guilty only of manslaughter, or of murder in the first degree and found guilty of murder in the second or third degree, he should be discharged when the crime of which he is convicted is outlawed, although the prosecution for the crime for which he is indicted is not.[95]

4. Commencement of Prosecution. If a statute provides that an indictment must be found within the period of limitation, a failure to find the indictment within such period bars the prosecution of the offense,[96] and making a complaint and procuring a warrant for the arrest of the accused does not take the case out of the statute.[97] On the other hand, where the statute simply provides that the prosecution must be commenced within a specified period, a complaint and warrant of arrest issued thereon and executed without unnecessary delay will constitute a commencement of the prosecution.[98] And such would be the effect of the filing of a valid presentment, where it is the practice to try the accused on a presentment as distinguished from an indictment.[99] Where the facts relating to the commencement of the prosecution are controverted the question is for the jury.[1]

5. New Proceedings After Dismissal of First Indictment. The time during which an indictment which has been quashed or set aside was pending is not, in

95. Nelson *v.* State, 17 Fla. 195; State *v.* Morrison, 31 La. Ann. 211; State *v.* Foster, 7 La. Ann. 255; State *v.* Cobbs, 7 La. Ann. 107; Heward *v.* State, 13 Sm. & M. (Miss.) 261. The same rule applies where one is prosecuted and convicted of murder, who was at most guilty only of manslaughter, on the reversal of the conviction. People *v.* Miller, 12 Cal. 291; People *v.* Burt, 51 Mich. 199, 16 N. W. 378.

96. *Alabama.*— Fuller *v.* State, 97 Ala. 27, 12 So. 392.

Florida.— Weinert *v.* State, 35 Fla. 229, 17 So. 570; Warrace *v.* State, 27 Fla. 362, 8 So. 748; Chandler *v.* State, 25 Fla. 728, 6 So. 768; Robinson *v.* State, 20 Fla. 804; Anderson *v.* State, 20 Fla. 381.

Illinois.— Lamkin *v.* People, 94 Ill. 501; Garrison *v.* People, 87 Ill. 96.

Indiana.— Hatwood *v.* State, 18 Ind. 492; Jones *v.* State, 14 Ind. 346; Ulmer *v.* State, 14 Ind. 52.

Kansas.— *In re* Crandall, 59 Kan. 671, 54 Pac. 686.

Louisiana.— State *v.* Tinney, 26 La. Ann. 460.

Mississippi.— McCarty *v.* State, 37 Miss. 411; Miazza *v.* State, 36 Miss. 613.

Missouri.— State *v.* Hughes, 82 Mo. 86; State *v.* Meyers, 68 Mo. 268.

New Hampshire.—State *v.* Havey, 58 N. H. 377; State *v.* Arlin, 39 N. H. 179.

Pennsylvania.— Com. *v.* Bartilson, 85 Pa. St. 482; Gise *v.* Com., 81 Pa. St. 428; Com. *v.* Haas, 57 Pa. St. 443; Com. *v.* Bunn, 1 Leg. Op. 114.

South Carolina.—State *v.* Waters, 1 Strobh. 59; State *v.* Fields, 2 Bailey 554.

Vermont.— State *v.* J. P., 1 Tyler 283.

Virginia.— Com. *v.* Christian, 7 Gratt. 631.

West Virginia.— State *v.* Beasley, 21 W. Va. 777.

See 14 Cent. Dig. tit. "Criminal Law," § 282.

The filing of the indictment after the limitation has expired is not ground for demurrer. Brock *v.* State, 22 Ga. 98; State *v.* Tinney, 26 La. Ann. 460. But see Duncan *v.* State, (Tex. Cr. 1900) 59 S. W. 267.

97. State *v.* Robertson, 55 Nebr. 41, 75 N. W. 37; Boughn *v.* State, 44 Nebr. 889, 62 N. W. 1094; Com. *v.* Haas, 57 Pa. St. 443; Com. *v.* Woodward, 1 Chest. Co. Rep. (Pa.) 102.

98. *Alabama.*— Clayton *v.* State, 122 Ala. 91, 26 So. 118; Ross *v.* State, 55 Ala. 177.

Indiana.— Flick *v.* State, (1898) 51 N. E. 951.

Iowa.— State *v.* Groome, 10 Iowa 308.

Kansas.— *In re* Clyne, 52 Kan. 441, 35 Pac. 23.

Oklahoma.— *Ex p.* Lacey, 6 Okla. 4, 37 Pac. 1095.

Tennessee.— State *v.* Miller, 11 Humphr. 505.

Washington.— State *v.* Erving, 19 Wash. 435, 53 Pac. 717.

See 14 Cent. Dig. tit. "Criminal Law," § 282.

Complaint, warrant, and arrest.—The arrest of the accused on the warrant after the expiration of the time limited is not material (Newell *v.* State, 2 Conn. 38; *In re* Clyne, 52 Kan. 441, 35 Pac. 23), but it has been held that the mere filing of the complaint on which a warrant is not issued is not sufficient (*In re* Griffith, 35 Kan. 377, 11 Pac. 174; People *v.* Clement, 72 Mich. 116, 40 N. W. 190. See, however, State *v.* Howard, 15 Rich. (S. C.) 274; State *v.* May, 1 Brev. (S. C.) 160; Reg. *v.* Cox, 9 Cox C. C. 301; Rex *v.* Willace, 1 East P. C. 186).

Warrant returned not found.— As to the effect of a warrant returned not found on the commencement of a prosecution see Benson *v.* State, 91 Ala. 86, 8 So. 873.

99. State *v.* Kiefer, 90 Md. 165, 44 Atl. 1043; State *v.* Cox, 28 N. C. 440; Com. *v.* Christian, 7 Gratt. (Va.) 631. But see U. S. *v.* Slacum, 27 Fed. Cas. No. 16,311, 1 Cranch C. C. 485.

1. State *v.* West, 105 La. 639, 30 So. 119; State *v.* Victor, 36 La. Ann. 978; State *v.* Foster, 7 La. Ann. 256.

case a new indictment is found, computed as part of the period of limitation, but must be deducted,[2] provided the same offense and the same offender were charged in both indictments.[3] Finding an indictment within a year prevents a bar of the statute from attaching, although the case is afterward prosecuted by information filed after the period of limitation has expired.[4]

IX. FORMER JEOPARDY.

A. In General — 1. Common-Law Rule. It is a universally accepted principle of the common law that no person shall be placed in jeopardy more than once for the same offense. If therefore a defendant has been once fairly acquitted or convicted upon an indictment before any court of competent jurisdiction, he may plead his former acquittal or conviction in bar of a subsequent prosecution for the same offense. The plea in the former case is called a plea of *autrefois acquit*; in the latter a plea of *autrefois convict*.[5]

2. Constitutional and Statutory Provisions — a. In General. The principles of the common law providing for pleas of *autrefois acquit* and *autrefois convict* have been embodied substantially in the federal constitution and in the various state constitutions, in the form of express provisions that no person shall be subject to be twice put in jeopardy of life or limb for the same offense. The provision in the federal constitution[6] to this effect is applicable only to crimes against, and trials under, federal laws, and not to prosecutions by the states;[7] but state constitutions contain a similar provision.[8]

b. Construction. A statute giving the state the right to appeal from the judgment of an inferior court in a criminal case, where the punishment does not

2. *Alabama.*— White *v.* State, 103 Ala. 72, 16 So. 63; Smith *v.* State, 79 Ala. 21; Weston *v.* State, 63 Ala. 155; Foster *v.* State, 38 Ala. 425; State *v.* Dunham, 9 Ala. 76.

Arkansas.— Stafford *v.* State, 59 Ark. 413, 27 S. W. 495; Gill *v.* State, 38 Ark. 524.

Illinois.— Swalley *v.* People, 116 Ill. 247, 4 N. E. 379.

Kansas.— State *v.* Child, 44 Kan. 420, 24 Pac. 952.

Kentucky.— Tully *v.* Com., 13 Bush 142; Com. *v.* Keger, 1 Duv. 240; Louisville, etc., R. Co. *v.* Com., 7 Ky. L. Rep. 836; Louisville, etc., R. Co. *v.* Com., 4 Ky. L. Rep. 627.

Missouri.— State *v.* Owen, 78 Mo. 367; State *v.* Primm, 61 Mo. 166.

North Carolina.— State *v.* Hailey, 51 N. C. 42.

South Carolina.— State *v.* Howard, 15 Rich. 274.

But see to the contrary State *v.* Precovara, 49 La. Ann. 593, 21 So. 724; State *v.* Morrison, 31 La. Ann. 211; State *v.* Baker, 30 La. Ann. 1134; State *v.* Thomas, 30 La. Ann. 301.

See 14 Cent. Dig. tit. "Criminal Law," § 284.

Demurrer and nolle prosequi.— It seems to be immaterial as to the validity of the new indictment, whether the old indictment was dismissed on demurrer or whether a *nolle prosequi* was entered. State *v.* Primm, 61 Mo. 166; State *v.* Howard, 15 Rich. (S. C.) 274.

3. Jackson *v.* State, 106 Ala. 136, 17 So. 349; Smith *v.* State, 62 Ala. 29; State *v.* Dunham, 9 Ala. 76. Where an indictment charging that an offense which was committed by four was quashed as to three, who were subsequently indicted, it was held that as the first charged a crime by four persons and the second a crime by three, the offense was not the same, and the rule did not apply. Jester *v.* State, 14 Ark. 552. The offense must be identical. Buckalew *v.* State, 62 Ala. 334, 34 Am. Rep. 22.

4. State *v.* Cason, 28 La. Ann. 40.

5. 4 Bl. Comm. 335; 1 Chitty Cr. L. 452; 2 Hawkins P. C. c. 35, § 36; 1 Russell Crimes 831; 4 Stephen Comm. 404. See Williams *v.* Com., 78 Ky. 93. See also *infra*, XI, B, 7, h.

6. U. S. Amendm. art. 5.

7. *Connecticut.*—Colt *v.* Eves, 12 Conn. 243.

Ohio.— Prescott *v.* State, 19 Ohio St. 184, 2 Am. Rep. 388.

Pennsylvania.— Dinkey *v.* Com., 17 Pa. St. 126, 55 Am. Dec. 542.

Rhode Island.— State *v.* Flynn, 16 R. I. 10, 11 Atl. 170.

South Carolina.— State *v.* Shirer, 20 S. C. 392.

United States.— Twitchell *v.* Pennsylvania, 7 Wall. 321, 19 L. ed. 223; Fox *v.* Ohio, 5 How. 410, 12 L. ed. 213; Barron *v.* Baltimore, 7 Pet. 243, 8 L. ed. 672; U. S. *v.* Barnhart, 22 Fed. 285, 10 Sawy. 491; U. S. *v.* Gilbert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19; U. S. *v.* Keen, 26 Fed. Cas. No. 15,510, 1 McLean 429.

But see State *v.* Moor, Walk. (Miss.) 134, 12 Am. Dec. 541; People *v.* Goodwin, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203.

See 14 Cent. Dig. tit. "Criminal Law," § 285.

8. See Buhler *v.* State, 64 Ga. 504; Com. *v.* Olds, 5 Litt. (Ky.) 137; State *v.* Cheevers,

involve the loss of life or limb, is not in conflict with the spirit and meaning of the constitutional provision against twice putting in jeopardy for the same offense.[9] So also statutes authorizing an increased punishment for offenses subsequent to a first offense are not in violation of such constitutional provision, as the increased punishment for the later offense is no part of the punishment for the first.[10] A statute authorizing a *nolle prosequi* to be entered in a trial where a material variance occurs justifying the acquittal of the accused,[11] or permitting the court to detain the prisoner until an information is preferred, where he has been acquitted on the ground of variance, which may be obviated by a new information,[12] is not unconstitutional.

3. Who May Urge Defense. A person who has been placed on trial before a competent court and a jury impaneled and sworn, but who by his own act during the course of the proceedings makes it impossible for a valid verdict or judgment to be rendered against him, is not entitled on a subsequent indictment for the same offense to urge the defense of former jeopardy.[13]

4. Jeopardy of Joint Defendants. Where two or more are jointly indicted, but separately tried, the first trial does not constitute a former jeopardy as to the defendants subsequently tried, and the acquittal of one cannot be pleaded by the other as a bar at his subsequent trial.[14]

5. Offenses and Proceedings Where Former Jeopardy Is a Defense. The constitutional provisions expressly mentioning former jeopardy of life and limb are identical in their spirit and in the protection which they give to the principles of the common law.[15] The provisions of the federal constitution in regard to former jeopardy do not apply to proceedings *in rem*.[16] Nor do such constitutional provisions have any application to civil actions. Hence where the law, besides

7 La. Ann. 40; People *v.* Goodwin, 1 Wheel. Cr. (N. Y.) 470.

9. Jones *v.* State, 15 Ark. 261.

10. *California.*— People *v.* Stanley, 47 Cal. 113, 17 Am. Rep. 401.

Illinois.— Kelley *v.* People, 115 Ill. 583, 4 N. E. 644, 56 Am. Rep. 184.

Kentucky.— Chenowith *v.* Com., 12 S. W. 585, 10 Ky. L. Rep. 561; Boggs *v.* Com., 5 S. W. 307, 9 Ky. L. Rep. 342; Taylor *v.* Com., 3 Ky. L. Rep. 783.

Maryland.— Maguire *v.* State, 47 Md. 485.

Massachusetts.— Plumbly *v.* Com., 2 Metc. 413; *In re* Ross, 2 Pick. 165.

New York.— People *v.* Sage, 11 N. Y. App. Div. 4, 42 N. Y. Suppl. 251; People *v.* Bosworth, 64 Hun 72, 19 N. Y. Suppl. 114; People *v.* McCarthy, 45 How. Pr. 97.

Ohio.— *In re* Kline, 6 Ohio Cir. Ct. 215.

Virginia.— Rand *v.* Com., 9 Gratt. 738.

Wisconsin.— Ingalls *v.* State, 48 Wis. 647, 4 N. W. 785.

United States.— McDonald *v.* Massachusetts, 180 U. S. 311, 21 S. Ct. 389, 45 L. ed. 542; Moore *v.* Missouri, 159 U. S. 673, 16 S. Ct. 179, 40 L. ed. 301 [*affirming* 121 Mo. 514, 26 S. W. 345, 42 Am. St. Rep. 542].

See 14 Cent. Dig. tit. "Criminal Law," § 285.

11. State *v.* Kreps, 8 Ala. 951.

12. People *v.* Oreileus, 79 Cal. 178, 21 Pac. 724.

13. People *v.* Higgins, 59 Cal. 357.

Where the presence of the accused during the entire trial is essential to a valid judgment against him, and he voluntarily absents himself and the jury is discharged he is not entitled to this defense. People *v.* Higgins, 59 Cal. 357.

14. *Georgia.*— Dumas *v.* State, 62 Ga. 58.

Iowa.— State *v.* Lee, 91 Iowa 499, 60 N. W. 119; State *v.* McClintock, 1 Greene 392.

Kentucky.— Com. *v.* McChord, 2 Dana 242.

Missouri.— State *v.* Ellis, 74 Mo. 385, 41 Am. Rep. 321; State *v.* Orr, 64 Mo. 339.

North Carolina.— State *v.* Weaver, 93 N. C. 595.

Tennessee.— State *v.* Caldwell, 8 Baxt. 576.

Texas.— Goforth *v.* State, 22 Tex. App. 405, 3 S. W. 332; Ledbetter *v.* State, 21 Tex. App. 344, 17 S. W. 427; Alonzo *v.* State, 15 Tex. App. 378, 49 Am. Rep. 207.

Virginia.— Williams *v.* Com., 85 Va. 607, 8 S. E. 470.

See 14 Cent. Dig. tit. "Criminal Law," § 287.

In crimes where there is a mutual dependence of the guilt of each defendant upon that of the other, the acquittal of one defendant may be pleaded in bar to the subsequent trial of the other. Baumer *v.* State, 49 Ind. 544, 19 Am. Rep. 691.

Entering nolle prosequi.— Where two are jointly indicted for committing the same offense at the same time, and one is proved to have committed it at a different time, a *nolle prosequi* cannot be entered as to him against the objection of the other, as each has been in legal jeopardy and is entitled to an acquittal. McGehee *v.* State, 58 Ala. 360.

15. State *v.* Spear, 6 Mo. 644; *Ex p.* Lange, 18 Wall. (U. S.) 163, 21 L. ed. 872.

16. U. S. *v.* Three Copper Stills, 47 Fed. 495, holding that a conviction for illegally removing distilled spirits is not a bar to subsequent proceedings for their forfeiture.

making an act a crime, permits the recovery of a penalty for its commission, the trial of the offender for the crime is no bar to an action for the penalty.[17] But the doctrine of former jeopardy and the constitutional guarantees are applicable to trials for misdemeanors as well as to trials for felonies.[18]

B. Nature and Elements of Former Jeopardy — 1. Time When Jeopardy Attaches. The submission of an indictment to the grand jury and the examination of witnesses before them,[19] or even the finding of the indictment,[20] does not amount to a putting in jeopardy; but the accused is placed in jeopardy where he has pleaded and has been put on trial before a court of competent jurisdiction upon an indictment valid and sufficient in form and substance to sustain a conviction, and the jury has been sworn and impaneled and charged with the case.[21] Jeopardy does not attach until an issue has been joined; and therefore a defendant has not been in jeopardy where he has not pleaded[22] or where he has been permitted to withdraw his plea.[23]

2. Fine of Public Officer. The imposition of a fine, under the provisions of

17. Latshaw *v.* State, 156 Ind. 194, 59 N. E. 471; Indiana Cent. R. Co. *v.* Potts, 7 Ind. 681; Mitchell *v.* State, 12 Nebr. 538, 11 N. W. 848; People *v.* Stevens, 13 Wend. (N. Y.) 341; Memphis *v.* Smythe, 104 Tenn. 702, 58 S. W. 215.

Punitive damages.— The institution of a civil suit or the rendition of a judgment for punitive damages therein for a tort which has been or which may be punished as a crime is not former jeopardy. Brown *v.* Swineford, 44 Wis. 282, 28 Am. Rep. 582. And see Latshaw *v.* State, 156 Ind. 194, 59 N. E. 471; State *v.* Roby, 142 Ind. 168, 41 N. E. 145, 51 Am. St. Rep. 174, 33 L. R. A. 213; State *v.* Stevens, 103 Ind. 55, 2 N. E. 214, 53 Am. Rep. 482.

18. Brink *v.* State, 18 Tex. App. 344, 51 Am. Rep. 317; Berkowitz *v.* U. S., 93 Fed. 452, 35 C. C. A. 379; Wemyss *v.* Hopkins, L. R. 10 Q. B. 378, 44 L. J. M. C. 101, 33 L. T. Rep. N. S. 9, 23 Wkly. Rep. 691.

19. People *v.* Cummings, 123 Cal. 269, 55 Pac. 898; State *v.* Whipple, 57 Vt. 637; Post *v.* U. S., 161 U. S. 583, 16 S. Ct. 611, 40 L. ed. 816.

20. Bailey *v.* State, 11 Tex. App. 140.

21. *Alabama.*— State *v.* Vaughan, 121 Ala. 41, 25 So. 727; Ned *v.* State, 7 Port. 187.

Arkansas.— Whitmore *v.* State, 43 Ark. 271; McKenzie *v.* State, 26 Ark. 334; State *v.* Cheek, 25 Ark. 206.

California.— People *v.* Cage, 48 Cal. 323, 17 Am. Rep. 436; People *v.* Webb, 38 Cal. 467.

Georgia.— Bell *v.* State, 103 Ga. 397, 30 S. E. 294, 68 Am. St. Rep. 102; Daniels *v.* State, 78 Ga. 98, 6 Am. St. Rep. 238; Nolan *v.* State, 55 Ga. 521, 21 Am. Rep. 281.

Hawaii.— Reg. *v.* Poor, 9 Hawaii 295.

Indiana.— Sanders *v.* State, 85 Ind. 318, 44 Am. Rep. 29; State *v.* Nelson, 26 Ind. 366; Morgan *v.* State, 13 Ind. 215.

Iowa.— State *v.* Fields, 106 Iowa 406, 76 N. W. 802; State *v.* Callendine, 8 Iowa 288.

Kentucky.— Com. *v.* Arnold, 83 Ky. 1, 4 Am. St. Rep. 114, 6 Ky. L. Rep. 181; Williams *v.* Com., 78 Ky. 93; O'Brian *v.* Com., 9 Bush 333, 15 Am. Rep. 715 [*overruling* O'Brian *v.* Com., 6 Bush 563, where it was held that jeopardy did not attach until after verdict]; Tye *v.* Com., 3 Ky. L. Rep. 59.

Louisiana.— State *v.* Paterno, 43 La. Ann. 514, 9 So. 442; State *v.* Walters, 16 La. Ann. 400.

Massachusetts.— Com. *v.* Tuck, 20 Pick. 356.

Minnesota.— State *v.* Sommers, 60 Minn. 90, 61 N. W. 907.

Mississippi.— Helm *v.* State, 66 Miss. 537, 6 So. 322; Teat *v.* State, 53 Miss. 439, 24 Am. Rep. 708. But see State *v.* Moor, Walk. 134, 12 Am. Dec. 541, holding that jeopardy does not attach until after verdict.

North Carolina.— State *v.* Ephraim, 19 N. C. 162; *In re* Spier, 12 N. C. 491.

Ohio.— Mount *v.* State, 14 Ohio 295, 45 Am. Dec. 542.

Oregon.— *Ex p.* Tice, 32 Oreg. 179, 49 Pac. 1038.

Pennsylvania.— Alexander *v.* Com., 105 Pa. St. 1; McFadden *v.* Com., 23 Pa. St. 12, 62 Am. Dec. 308; Com. *v.* Cook, 6 Serg. & R. 577, 9 Am. Dec. 465; Com. *v.* Schench, 8 Kulp 487.

Tennessee.— State *v.* Norvell, 2 Yerg. 24, 24 Am. Dec. 458.

Virginia.— Dulin *v.* Lillard, 91 Va. 718, 20 S. E. 821; Day *v.* Com., 23 Gratt. 915.

Wisconsin.— McDonald *v.* State, 79 Wis. 651, 48 N. W. 863, 24 Am. Rep. 740.

United States.— *Ex p.* Glenn, 111 Fed. 257.

See 14 Cent. Dig. tit. "Criminal Law," § 289 *et seq.*

22. Phillips *v.* People, 88 Ill. 160; Yerger *v.* State, (Tex. Cr. 1897) 41 S. W. 621. Where in a police court a judgment as by default is rendered upon a plea of guilty entered by a marshal against a defendant who has not been served with the warrant and has not been present in court, the judgment is void and the defendant is not put in jeopardy. Ballowe *v.* Com., 44 S. W. 646, 19 Ky. L. Rep. 1867. See also *infra*, IX, E, 2.

23. State *v.* Heard, 49 La. Ann. 375, 21 So. 632.

a statute allowing the imposition of fines upon public officers for certain illegal acts, is not a bar to an indictment under another statute which makes the act for which the officer was fined a crime.[24]

3. PAYMENT OF COSTS TO OPEN DEFAULT. The payment by the defendant of the costs in a criminal case before a justice in order to open his default does not constitute a former jeopardy or bar a further prosecution.[25]

4. JUDGMENT ON RECOGNIZANCE. And a judgment against the accused on a recognizance for failure to appear is not a former jeopardy, and is no bar to another prosecution for the same offense.[26]

5. FRAUDULENT OR COLLUSIVE PROSECUTION. The general rule is that a former conviction or acquittal procured by the fraud of the defendant is no bar to a subsequent prosecution. Thus where the accused hearing of a pending or threatened prosecution by indictment voluntarily or by a collusive arrest goes before a justice of the peace and is by him convicted of a misdemeanor he cannot subsequently plead former jeopardy to an indictment for the same crime.[27] If the prosecution was controlled and managed by the accused he has never been in jeopardy; and the proceedings being void the state may attack it collaterally.[28]

6. VOID OR ABANDONED WARRANT. A void warrant of arrest,[29] or one upon which no proceedings are taken,[30] does not put the accused in jeopardy, and is not a bar to a subsequent prosecution by indictment.

7. DISCHARGE OF JURY AFTER VOID VERDICT. The reception by the court of a verdict which is void, so that no sentence can be imposed thereunder, followed by the discharge of the jury, does not operate as an acquittal, and the accused, upon the verdict being set aside or judgment being arrested, may be tried again for the same crime.[31]

8. DISCHARGE OF JUROR. Where a juror, before the jury is impaneled, is dis-

24. People *v.* Meakim, 133 N. Y. 214, 30 N. E. 828 [*affirming* 61 Hun 327, 15 N. Y. Suppl. 917, 8 N. Y. Cr. 308].

25. Com. *v.* Taylor, 113 Mass. 4.

26. Com. *v.* Thompson, 3 Litt. (Ky.) 284.

27. *Alabama.*— Thomas *v.* State, 114 Ala. 31, 21 So. 784.

Arkansas.— Bradley *v.* State, 32 Ark. 722.

Connecticut.— State *v.* Reed, 26 Conn. 202.

Illinois.— Bulson *v.* People, 31 Ill. 409.

Indiana.— Peters *v.* Koepke, 156 Ind. 35, 59 N. E. 33; Shideler *v.* State, 129 Ind. 523, 28 N. E. 537, 29 N. E. 36, 28 Am. St. Rep. 206, 16 L. R. A. 225.

Iowa.— State *v.* Green, 16 Iowa 239.

Kansas.— State *v.* Smith, 57 Kan. 673, 47 Pac. 541.

Massachusetts.—Com. *v.* Dascom, 111 Mass. 404; Com. *v.* Churchill, 5 Mass. 174; Com. *v.* Alderman, 4 Mass. 477.

Minnesota.— State *v.* Simpson, 28 Minn. 66, 9 N. W. 78, 41 Am. Rep. 269.

Missouri.— State *v.* Cole, 48 Mo. 70.

New Hampshire.— State *v.* Little, 1 N. H. 257.

North Carolina.— State *v.* Swepson, 79 N. C. 632. But see State *v.* Casey, 44 N. C. 209.

Tennessee.— State *v.* Lowry, 1 Swan 34; State *v.* Atkinson, 9 Humphr. 677.

Texas.— Watson *v.* State, 5 Tex. App. 271; Warriner *v.* State, 3 Tex. App. 104, 30 Am. Rep. 124.

Vermont.— State *v.* Wakefield, 60 Vt. 618, 15 Atl. 181.

Virginia.— Com. *v.* Jackson, 2 Va. Cas. 501.

Wisconsin.— McFarland *v.* State, 68 Wis. 400, 32 N. W. 226, 60 Am. Rep. 867.

See 14 Cent. Dig. tit. "Criminal Law," § 299.

An arrest and discharge on bail procured by collusion of the complainant and a justice of the peace is no bar to an arrest by a warrant issued by another justice. Bulson *v.* People, 31 Ill. 409.

28. Halloran *v.* State, 80 Ind. 586.

29. Johnson *v.* State, 82 Ala. 29, 2 So. 466.

30. Bradley *v.* State, 32 Ark. 722.

31. *Alabama.*— *Ex p.* Brown, 102 Ala. 179, 15 So. 602; Zaner *v.* State, 90 Ala. 651, 8 So. 698; Herrington *v.* State, 87 Ala. 1, 5 So. 831; Gunter *v.* State, 83 Ala. 96, 3 So. 600; *Ex p.* Simmons, 62 Ala. 416; Allen *v.* State, 52 Ala. 391; Waller *v.* State, 40 Ala. 325; Turner *v.* State, 40 Ala. 21; Cobia *v.* State, 16 Ala. 781. But see Jackson *v.* State, 102 Ala. 76, 15 So. 351.

California.— People *v.* Curtis, 76 Cal. 57, 17 Pac. 941.

Indiana.— Wright *v.* State, 5 Ind. 527.

Iowa.— State *v.* Redman, 17 Iowa 329.

Louisiana.— State *v.* Walters, 16 La. Ann. 400.

Maryland.— State *v.* Sutton, 4 Gill 494.

South Carolina.— State *v.* Spurgin, 1 McCord 252.

Tennessee.— Murphy *v.* State, 7 Coldw. 516; State *v.* Valentine, 6 Yerg. 533.

Utah.— People *v.* Kerm, 8 Utah 268, 30 Pac. 988.

Virginia.— Stuart *v.* Com., 28 Gratt. 950; Com. *v.* Hatton, 3 Gratt. 623; Com. *v.* Smith,

charged with the consent of the accused, he cannot object on a subsequent trial that he has already been in jeopardy; and where the record is silent his consent will be presumed.[32] The same rule applies where during the trial a juror is discharged on account of sickness, and the trial is begun anew with another juror;[33] but the action of the court in discharging a juror of its own motion without sufficient cause and against the objection of the defendant, after the jury has been sworn, is a bar to a further prosecution.[34]

9. REFUSAL TO ALLOW CHALLENGE. The fact that the court improperly refuses to allow the accused a peremptory challenge and proceeds with the case, so that there is a mistrial on account of the presence of the juror challenged does not entitle the defendant to a plea of former jeopardy on a subsequent trial.[35]

C. Jurisdiction of Court — 1. DISCHARGE OR BINDING OVER BY MAGISTRATE. Where a justice has jurisdiction either to try and finally dispose of a case or to bind over the accused to answer in a higher court, and he acts merely in his capacity as an examining magistrate, his judgment either discharging the accused for want of probable cause to find him guilty, or binding him over to answer in a superior court, cannot be pleaded as former jeopardy.[36]

2. PROCEEDINGS BEFORE COURT WITHOUT JURISDICTION. An acquittal[37] or conviction by a justice of the peace, police magistrate, or other court not having jurisdiction of the offense is not former jeopardy, and is no bar to a subsequent trial in a court which has jurisdiction.[38] So when one is examined on a charge of murder, and the magistrate dismisses the charge of murder but fines the accused for an

2 Va. Cas. 327; Gibson *v.* Com., 2 Va. Cas. 111.

See 14 Cent. Dig. tit. "Criminal Law," § 301.

Where defendant consented to a discharge of the jury after a void or defective verdict, he cannot plead former jeopardy, and if the record is silent as to his consent it will be presumed. People *v.* Kerm, 8 Utah 268, 30 Pac. 988. And see People *v.* Curtis, 76 Cal. 57, 17 Pac. 941.

32. Kingen *v.* State, 46 Ind. 132.

33. State *v.* Hazledahl, 2 N. D. 521, 52 N. W. 315, 16 L. R. A. 150.

34. O'Brian *v.* Com., 9 Bush (Ky.) 333, 15 Am. Rep. 715 [*overruling* O'Brian *v.* Com., 6 Bush (Ky.) 563]; De Berry *v.* State, 99 Tenn. 207, 42 S. W. 31.

A juror may be discharged for cause before the indictment is read, as up to that time the accused has not been in jeopardy. State *v.* Nash, 46 La. Ann. 194, 14 So. 607.

35. Ellis *v.* State, 25 Fla. 702, 6 So. 768.

36. Stoner *v.* State, 7 Ind. App. 620, 35 N. E. 133 (holding that where before a justice the jury found defendant guilty, and furthermore stated that the punishment the jury was authorized to assess was inadequate, and defendant was held for a superior court under Ind. Rev. St. (1881) § 1636, the holding was not former jeopardy); Com. *v.* Hamilton, 129 Mass. 479; Com. *v.* Many, 14 Gray (Mass.) 82; Com. *v.* Boyle, 14 Gray (Mass.) 3; Com. *v.* Harris, 8 Gray (Mass.) 470; Donaldson *v.* State, (Tex. Cr. App. 1900) 55 S. W. 826; Wolverton *v.* Com., 75 Va. 909. See also *infra*, IX, E, 3.

But where the statute expressly requires the justice to proceed and finally dispose of the case, his judgment binding over the defendant may be pleaded as former jeopardy. Brown *v.* State, 105 Ala. 117, 16 So. 929.

37. Com. *v.* Peters, 12 Metc. (Mass.) 387; Ball *v.* U. S., 163 U. S. 662, 16 S. Ct. 1192, 41 L. ed. 300.

38. *Alabama.*— Brown *v.* State, 120 Ala. 378, 25 So. 203; Carter *v.* State, 107 Ala. 146, 18 So. 232.

Arkansas.— Crowder *v.* State, 69 Ark. 330, 63 S. W. 669.

California.— People *v.* Hamberg, 84 Cal. 468, 24 Pac. 298.

Colorado.— Packer *v.* People, 8 Colo. 361, 8 Pac. 564.

Florida.— Alford *v.* State, 25 Fla. 852, 6 So. 857.

Indiana.— Siebert *v.* State, 95 Ind. 471; O'Brian *v.* State, 12 Ind. 369; State *v.* Odell, 4 Blackf. 156.

Iowa.— State *v.* Jamison, 104 Iowa 343, 73 N. W. 831.

Massachusetts.— Com. *v.* Peters, 12 Metc. 387; Com. *v.* Goddard, 13 Mass. 455.

Mississippi.— Montross *v.* State, 61 Miss. 429.

Missouri.— State *v.* Payne, 4 Mo. 376.

New Hampshire.— State *v.* Hodgkins, 42 N. H. 474.

North Carolina.— State *v.* Phillips, 104 N. C. 786, 10 S. E. 463.

Tennessee.— Hodges *v.* State, 5 Coldw. 7.

Texas.— McLain *v.* State, 31 Tex. Cr. 558, 21 S. W. 365; McNeil *v.* State, 29 Tex. App. 48, 14 S. W. 393; Flournoy *v.* State, 16 Tex. 30; Norton *v.* State, 14 Tex. 387.

Vermont.— State *v.* Bruce, 68 Vt. 183, 34 Atl. 701.

West Virginia.— State *v.* Cross, 44 W. Va. 315, 29 S. E. 527.

See 14 Cent. Dig. tit. "Criminal Law," § 306.

Where failure to file a complaint causes lack of jurisdiction, a conviction does not

assault,[39] or holds him on a charge of manslaughter,[40] the accused cannot plead former jeopardy. An acquittal in one county is no bar to an indictment in any other for the same offense, unless it appears that the offense was committed in the former.[41]

3. Verdict Taking Case Out of Jurisdiction. Where the verdict of a jury in a police court fixes the grade of the crime beyond the power of the court to impose sentence there is no jeopardy, for the reason that there is no jurisdiction to enter judgment.[42]

4. Courts of Concurrent Jurisdiction. Where two courts have concurrent jurisdiction of an offense, the verdict or decision rendered in that court which first acquires jurisdiction constitutes former jeopardy and is a bar to a subsequent trial in the other.[43]

5. Character and Constitution of Court. Where the proceedings are void because of the character or constitution of the court, as where the term of the court is not authorized,[44] or one of the judges is related to the defendant,[45] or for any reason incompetent to try the case,[46] there is no jeopardy which can be pleaded in bar to a subsequent prosecution.

6. Discharge on Objection to Jurisdiction. A discharge on an objection that the court has no jurisdiction is of course insufficient to support a plea of former jeopardy.[47]

7. Judgment Arrested For Lack of Jurisdiction. Where judgment is arrested at the prisoner's instance upon the ground that there is no jurisdiction, there is no jeopardy, and the accused may be tried again on the same indictment.[48]

D. The Indictment or Information — 1. Prosecution Under Defective Indictment or Information — a. Acquittal. In England an acquittal upon an indictment so defective that, if it had been objected to at the trial, or by motion in arrest of judgment, or by writ of error, it would not have supported a conviction or sentence, has generally been considered as insufficient to support a plea of former acquittal;[49] and this rule has generally been followed in the United States,[50] except

constitute former jeopardy. State *v.* Goetz, 65 Kan. 125, 69 Pac. 187; Bigham *v.* State, 59 Miss. 529; Wilson *v.* State, 16 Tex. 246.

Federal court not having jurisdiction.— A conviction in a federal court of a crime of which it has no jurisdiction is no bar to a prosecution in a state court. Blyew *v.* Com., 91 Ky. 200, 15 S. W. 356, 12 Ky. L. Rep. 742; Com. *v.* Peters, 12 Metc. (Mass.) 387.

39. State *v.* Morgan, 62 Ind. 35.

40. *In re* Bailey, 1 Va. Cas. 258.

41. Campbell *v.* People, 109 Ill. 565, 50 Am. Rep. 621.

42. Thompson *v.* State, 6 Nebr. 102.

43. State *v.* Roberts, 98 N. C. 756, 3 S. E. 682; State *v.* Bowers, 94 N. C. 910; State *v.* Tisdale, 19 N. C. 159; Burdett *v.* State, 9 Tex. 43; Handley *v.* State, 16 Tex. App. 444.

Where a prosecution for larceny may be had in any county where the thief is found with the goods a trial in one county is a bar to a trial in any other. Tippins *v.* State, 14 Ga. 422.

44. Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54; *In re* McClaskey, 2 Okla. 568, 37 Pac. 854.

45. People *v.* Connor, 142 N. Y. 130, 36 N. E. 807 [*affirming* 65 Hun 392, 20 N. Y. Suppl. 209, 8 N. Y. Cr. 439].

46. Glasgow *v.* State, 9 Baxt. (Tenn.) 485.

47. Duffy *v.* Britton, 48 N. J. L. 371, 7 Atl. 679; Marshall *v.* Com., 20 Gratt. (Va.) 845.

Mistake in discharge of jury.— But where a jury is discharged on a mistaken supposition that the evidence shows that the crime was committed in another county, and the prisoner is committed, it amounts to an acquittal, and he cannot be tried again. State *v.* Spayde, 110 Iowa 726, 80 N. W. 1058.

48. Small *v.* State, 63 Ga. 386.

49. Reg. *v.* O'Brien, 15 Cox C. C. 29, 46 L. T. Rep. N. S. 177; Archbold Cr. Pl. & Ev. 143; 1 Chitty Cr. L. 458; 2 Hale P. C. 248, 394; 2 Hawkins P. C. c. 35, § 8; Russell Crimes 648; 1 Starkie Cr. Pl. 320.

50. *California.*—People *v.* McNealy, 17 Cal. 332, 335, where it was said: "It would be a contradiction in terms to say that a person was put in jeopardy by an indictment under which he could not be convicted, and it is obviously immaterial whether the inability to convict arise from a variance between the proof and the indictment, or from some defect in the indictment itself. If the variance be of such a character that a conviction is legally impossible, the party charged is not in jeopardy within the meaning of the Constitution, and an acquittal under such circumstances cannot be pleaded in bar to a second indictment."

Georgia.— Simmons *v.* State, 106 Ga. 355, 32 S. E. 339; Conley *v.* State, 85 Ga. 348, 11 S. E. 659; Black *v.* State, 36 Ga. 447, 91 Am. Dec. 772.

in cases expressly governed by some constitutional or statutory provision on the subject.[51]

b. Conviction. In like manner a plea of former jeopardy cannot be maintained where a former conviction of the defendant for the same offense was based upon an indictment which has been set aside as insufficient, or an indictment which was so defective that the conviction is void, unless the accused has undergone sentence.[52]

c. Defective Allegations. A plea of former jeopardy cannot be sustained where the indictment in the former case did not contain the recitals necessary to charge the offense,[53] or did not charge the defendant with any crime known to the law.[54]

2. Quashing of Indictment or Information or Sustaining of Demurrer — a. No Jeopardy. As a general rule where an indictment is quashed on motion as insufficient or a demurrer thereto is sustained and the accused is thereupon discharged, there is no such jeopardy as will bar a prosecution on another indictment for the same offense.[55]

Indiana.— Shepler *v.* State, 114 Ind. 194, 16 N. E. 521; Fritz *v.* State, 40 Ind. 18.

Mississippi.— State *v.* McGraw, Walk. 208.

Missouri.— State *v.* Primm, 61 Mo. 166.

New York.— People *v.* Barrett, 1 Johns. 66.

Oregon.— State *v.* Littschke, 27 Oreg. 189, 40 Pac. 167.

Pennsylvania.— Com. *v.* Bass, 4 Kulp 76; Com. *v.* Zepp, 5 Pa. L. J. Rep. 256.

Tennessee.— Pritchett *v.* State, 2 Sneed 285, 62 Am. Dec. 468.

But see Ball *v.* U. S., 163 U. S. 662, 16 S. Ct. 1192, 41 L. ed. 300, where the English doctrine as stated in the text is disapproved by the supreme court of the United States, the court holding that where the indictment is not objected to as insufficient before the verdict a general verdict of acquittal is a bar to a subsequent prosecution for the same offense.

See 14 Cent. Dig. tit. "Criminal Law," § 312.

51. State *v.* Reed, 12 Md. 263; Croft *v.* People, 15 Hun (N. Y.) 484; Mixon *v.* State, 35 Tex. Cr. 458, 34 S. W. 290.

52. *Alabama.*—Finley *v.* State, 61 Ala. 201; Robinson *v.* State, 52 Ala. 587.

Arkansas.— Harp *v.* State, 59 Ark. 113, 26 S. W. 714.

California.— People *v.* Terrill, 133 Cal. 120, 65 Pac. 303; People *v.* Ammerman, 118 Cal. 23, 50 Pac. 15; People *v.* Wickham, 116 Cal. 384, 48 Pac. 329; People *v.* Clark, 67 Cal. 99, 7 Pac. 178; People *v.* Schmidt, 64 Cal. 260, 30 Pac. 814; People *v.* McNealy, 17 Cal. 332.

District of Columbia.— U. S. *v.* Barber, 21 D. C. 456.

Hawaii.— Reg. *v.* Poor, 9 Hawaii 295.

Kentucky.— Mount *v.* Com., 2 Duv. 93; Com. *v.* Olds, 5 Litt. 137.

Louisiana.— State *v.* Cason, 20 La. Ann. 48.

Maryland.— Kearney *v.* State, 48 Md. 16; State *v.* Williams, 5 Md. 82.

Massachusetts.— Com. *v.* Bakeman, 105 Mass. 53; Com. *v.* Curtis, Thach. Cr. Cas. 202.

Michigan.— People *v.* Cook, 10 Mich. 164.

Mississippi.—Kohlheimer *v.* State, 39 Miss. 548, 77 Am. Dec. 689; Munford *v.* State, 39 Miss. 558.

Missouri.— State *v.* Manning, 168 Mo. 418, 68 S. W. 341; State *v.* Patton, 94 Mo. App. 32, 67 S. W. 970.

Rhode Island.— State *v.* Watson, 20 R. I. 354, 39 Atl. 193, 78 Am. St. Rep. 871.

South Carolina.— State *v.* Council, 58 S. C. 368, 36 S. E. 663.

Texas.— Ogle *v.* State, 43 Tex. Cr. 219, 63 S. W. 1009; Davis *v.* State, 37 Tex. Cr. 359, 38 S. W. 616, 39 S. W. 937; McNeill *v.* State, (Cr. App. 1896), 33 S. W. 977; Timon *v.* State, 34 Tex. Cr. 363, 30 S. W. 808; Simco *v.* State, 9 Tex. App. 338.

United States.— U. S. *v.* Jones, 31 Fed. 725.

See 14 Cent. Dig. tit. "Criminal Law," § 312.

Defective complaint before justice of peace see *infra*, IX, I, 1.

53. People *v.* Ammerman, 118 Cal. 23, 50 Pac. 15.

54. People *v.* Clark, 67 Cal. 99, 7 Pac. 178. See also State *v.* Watson, 20 R. I. 354, 39 Atl. 193, 78 Am. St. Rep. 871.

55. *Alabama.*— Weston *v.* State, 63 Ala. 155; Faulk *v.* State, 52 Ala. 415.

Arkansas.— State *v.* Gill, 33 Ark. 129; Brown *v.* State, 10 Ark. 607.

California.— People *v.* O'Leary, 77 Cal. 30, 18 Pac. 856, 22 Pac. 24; People *v.* Varnum, 53 Cal. 630. But see *Ex p.* Williams, 116 Cal. 512, 48 Pac. 499; People *v.* Jordan, 63 Cal. 219, holding that under the California statute the allowance of a demurrer to an indictment is a bar to another prosecution unless the court, being of the opinion that the ground of demurrer may be avoided by a new indictment, directs another to be filed.

Indiana.— Joy *v.* State, 14 Ind. 139.

Iowa.— State *v.* Scott, 99 Iowa 36, 68 N. W. 451. But see State *v.* Fields, 106 Iowa 406, 76 N. W. 802, holding that under the Iowa statute, if the demurrer is sustained because the indictment contains matter which is a legal defense to the indictment the judgment is a bar to a subsequent prosecution.

b. Failure of Subsequent Grand Jury to Indict. A statutory provision that if after a demurrer to an indictment has been sustained a new indictment is not found by the next grand jury defendant shall be discharged does not bar a further prosecution where the case was submitted to three consecutive grand juries.[56]

c. Reversal of Decision Sustaining Demurrer. Where a demurrer to a valid indictment is erroneously sustained, and the judgment sustaining the demurrer is reversed, the defendant has not been in jeopardy and may be subsequently tried for the same offense.[57]

3. Dismissal of Indictment or Information — a. Without Consent of Accused. By the weight of authority, where the accused is arraigned upon a sufficient indictment and pleads, and a jury is impaneled, the dismissal of the indictment without his consent is an acquittal and bars another indictment for the same crime.[58]

b. With Consent of Accused. But where the accused has secured a decision that an indictment is void,[59] or has procured its being quashed,[60] or has been granted an instruction based on its defective character directing the jury to acquit,[61] he is estopped when subsequently indicted to assert that the former indictment was valid.

4. Variance. The effect of a material variance between the allegations of the indictment and the proof is to entitle defendant to an acquittal on the particular indictment, but he is still liable to be tried for his crime. If the accused is acquitted by direction of the court on the ground of material variance, he cannot plead the acquittal as a bar, for he has never been in jeopardy, and when tried on a new indictment the crime then alleged is not the same crime as in the former indictment.[62] And it has been held that if the accused on the prior trial maintained that the variance was material and the court directed a verdict of acquittal

Kentucky.— Little *v.* Com., 3 Bush 22; Com. *v.* Anthony, 2 Metc. 399.

Louisiana.— State *v.* Taylor, 34 La. Ann. 978.

Maryland.— Cochrane *v.* State, 6 Md. 400.

Massachusetts.— Com. *v.* Farrell, 105 Mass. 189; Com. *v.* Gould, 12 Gray 171.

Michigan.— Mentor *v.* People, 30 Mich. 91.

Missouri.— State *v.* Goddard, 162 Mo. 198, 62 S. W. 697.

New York.— People *v.* Gluckman, 60 N. Y. App. Div. 307, 70 N. Y. Suppl. 173; People *v.* Loomis, 30 How. Pr. 323.

Pennsylvania.— Com. *v.* Allen, 24 Pa. Co. Ct. 65.

South Carolina.— State *v.* Jenkins, 20 S. C. 351; State *v.* Ray, Rice 1, 33 Am. Dec. 90.

Tennessee.— Pritchett *v.* State, 2 Sneed 285, 62 Am. Dec. 468.

Utah.— Under the Utah statute, a judgment sustaining a demurrer to an indictment is a bar to a subsequent prosecution for the same offense unless the court, being of the opinion that the ground of demurrer may be avoided by a new indictment, directs the case to be submitted to the same or another grand jury. State *v.* Crook, 16 Utah 212, 51 Pac. 1091.

Virginia.— Stuart *v.* Com., 28 Gratt. 950; Souther *v.* Com., 7 Gratt. 673.

Wisconsin.— Von Rueden *v.* State, 96 Wis. 671, 71 N. W. 1048.

See 14 Cent. Dig. tit. "Criminal Law," § 313.

Time of quashing or sustaining demurrer.— It does not seem to be material whether the indictment was quashed or the demurrer thereto sustained before the jury was impaneled, or thereafter and before the case was submitted to the jury. Brown *v.* State, 109 Ga. 570, 34 S. E. 1031; Joy *v.* State, 14 Ind. 139; Huff *v.* Com., 42 S. W. 907, 19 Ky. L. Rep. 1064.

56. *Ex p.* Job, 17 Nev. 184, 30 Pac. 699.

57. U. S. *v.* Van Vliet, 23 Fed. 35.

58. Williams *v.* State, 42 Ark. 35; Lee *v.* State, 26 Ark. 260, 7 Am. Rep. 611; Williams *v.* Com., 78 Ky. 93. But see Wilson *v.* Com., 3 Bush (Ky.) 105; State *v.* Holton, 88 Minn. 171, 92 N. W. 541.

Constitutionality of statute.— A statute providing that a dismissal of an indictment for want of prosecution shall not bar a second prosecution for the same crime is constitutional. State *v.* Caldwell, 9 Wash. 336, 37 Pac. 669.

59. U. S. *v.* Jones, 31 Fed. 725. See *supra*, IX, D, 2, a.

60. Joy *v.* State, 14 Ind. 139. See *supra*, IX, D, 2, a.

61. State *v.* Meekins, 41 La. Ann. 543, 6 So. 822.

62. *California.*— People *v.* Terrill, 132 Cal. 497, 64 Pac. 894; People *v.* Oreileus, 79 Cal. 178, 21 Pac. 724.

Connecticut.— State *v.* Stebbins, 29 Conn. 463, 79 Am. Dec. 223.

Massachusetts.— Com. *v.* Chesley, 107 Mass. 223.

on that ground, he cannot subsequently on his plea of former acquittal allege or prove that it was not material.[63]

5. Indictment or Information in Several Counts. An acquittal upon one of several counts in an indictment, without a finding on the others, is an entire discharge of the defendant, and may be pleaded in bar of a subsequent trial on the other counts.[64] So also where the accused has been found guilty on one of several counts, and the verdict is silent as to the others, and he obtains a new trial, he can be prosecuted only for the crime of which he was found guilty, and may plead a prior acquittal as to the other counts.[65]

E. Arraignment and Plea — 1. General Effect of. After plea the accused cannot move to quash the indictment unless the court in its discretion permits it; and if this is done the plea is withdrawn with a right to renew if the motion is denied; and if after plea a motion to quash is granted the defendant has not been in jeopardy.[66]

2. Failure to Arraign and Necessity For Plea. Where the accused has not

Mississippi.— Sims *v.* State, 66 Miss. 33, 5 So. 525.

Montana.— State *v.* Sullivan, 9 Mont. 490, 24 Pac. 23.

New York.— Canter *v.* People, 1 Abb. Dec. 305, 2 Transcr. App. 1, 5 Abb. Pr. N. S. 21, 38 How. Pr. 91; People *v.* Meakim, 61 Hun 327, 15 N. Y. Suppl. 917, 8 N. Y. Cr. 308; Hughes' Case, 4 City Hall Rec. 132.

North Carolina.— State *v.* Sherrill, 32 N. C. 694; State *v.* Keeter, 80 N. C. 472; State *v.* Bailey, 65 N. C. 426; State *v.* Revels, 44 N. C. 200.

Pennsylvania.— Com. *v.* Huffman, Add. 140.

South Carolina.— State *v.* Brown, 33 S. C. 151, 11 S. E. 641.

Virginia.— Robinson *v.* Com., 32 Gratt. 866; Burress *v.* Com., 27 Gratt. 934; Com. *v.* Mortimer, 2 Va. Cas. 325.

See 14 Cent. Dig. tit. "Criminal Law," § 318.

63. People *v.* Meakim, 61 Hun (N. Y.) 327, 15 N. Y. Suppl. 917, 8 N. Y. Cr. 308. On the other hand it has been held that an error in regarding as material a variance which is immaterial will not render an acquittal less available as a bar to a subsequent prosecution (People *v.* Hughes, 41 Cal. 234), and that mere variance in the date of the crime does not prevent a judgment of acquittal acting as a bar, as the state is not limited in its proof to the exact date, but may establish the commission of the crime at any time within the statute of limitations. State *v.* Goff, 66 Mo. App. 491.

64. Roland *v.* People, 23 Colo. 283, 47 Pac. 269; Murphy *v.* State, 25 Nebr. 807, 41 N. W. 792; Campbell *v.* State, 9 Yerg. (Tenn.) 333, 30 Am. Dec. 417.

65. *Alabama.*— May *v.* State, 55 Ala. 164; Bell *v.* State, 48 Ala. 684, 17 Am. Rep. 40; Aaron *v.* State, 39 Ala. 75; Nabors *v.* State, 6 Ala. 200.

Florida.— Green *v.* State, 17 Fla. 669.

Georgia.— Stephen *v.* State, 11 Ga. 225.

Illinois.— Logg *v.* People, 8 Ill. App. 99.

Indiana.— Dawson *v.* State, 65 Ind. 442; Bonnell *v.* State, 64 Ind. 498; Bittings *v.* State, 56 Ind. 101; Clem *v.* State, 42 Ind. 420, 13 Am. Rep. 369; Haworth *v.* State, 14 Ind. 590; Weinzorpflin *v.* State, 7 Blackf. 186.

Iowa.— State *v.* Servenson, 79 Iowa 750, 45 N. W. 305; State *v.* Malling, 11 Iowa 239.

Kansas.— State *v.* McNaught, 36 Kan. 624, 14 Pac. 277.

Maine.—State *v.* Watson, 63 Me. 128; State *v.* Phinney, 42 Me. 384.

Maryland.— State *v.* Sutton, 4 Gill 494.

Massachusetts.— Edgerton *v.* Com., 5 Allen 514.

Michigan.— Hall *v.* People, 43 Mich. 417, 5 N. W. 449.

Mississippi.— Morris *v.* State, 8 Sm. & M. 762.

Missouri.— State *v.* Bruffey, 75 Mo. 389; State *v.* Cofer, 68 Mo. 120; State *v.* Brannon, 55 Mo. 63, 17 Am. Rep. 643; State *v.* Kattlemann, 35 Mo. 105; State *v.* Gannon, 11 Mo. App. 502.

New York.— People *v.* Dowling, 84 N. Y. 478; Guenther *v.* People, 24 N. Y. 100.

Pennsylvania.— Girts *v.* Com., 22 Pa. St. 351.

South Carolina.— State *v.* Crossroads Com'rs, Riley 273.

Tennessee.— Major *v.* State, 4 Sneed 597; Esmon *v.* State, 1 Swan 14; Campbell *v.* State, 9 Yerg. 333, 30 Am. Dec. 417.

Vermont.— State *v.* Kittle, 2 Tyler 471.

Virginia.— Stuart *v.* Com., 28 Gratt. 950; Livingston *v.* Com., 14 Gratt. 592.

Wisconsin.— State *v.* Hill, 30 Wis. 416.

See 14 Cent. Dig. tit. "Criminal Law," § 321.

Counts charging same offense.— It has been held that the rule applies only to cases where the different counts of the indictment charge separate and distinct offenses, and not where the crime charged is substantially the same in each count, and the different counts are inserted solely for the purpose of meeting the evidence as it may appear on the trial. Jarvis *v.* State, 19 Ohio St. 585; Lesslie *v.* State, 18 Ohio St. 390.

66. Mentor *v.* People, 30 Mich. 91. See also *supra*, IX, D, 2, a.

been arraigned and in consequence has not pleaded, he is not in jeopardy, although a jury is impaneled and sworn.[67] Nor is he in jeopardy when a jury which was impaneled before his plea is discharged and a new jury is impaneled and sworn.[68]

3. ARRAIGNMENT BEFORE JUSTICE. An arraignment before a justice of the peace who has jurisdiction either to try the case or to act as an examining magistrate and bind over the accused, and who acts in the latter capacity, is not a bar to a subsequent indictment.[69]

4. PLEA OF GUILTY — a. In General. Whether a plea of guilty and judgment and punishment thereon shall constitute former jeopardy depends on the circumstances. A plea of guilty to an indictment, in good faith, with its entry on the record, is former jeopardy, although judgment was suspended,[70] or the prosecution dismissed without the consent of the accused.[71] But the accused is not in jeopardy if his plea of guilty is extorted by duress or by fear of mob violence.[72]

b. Plea Before Justice of Peace. A plea of guilty at a preliminary examination and binding over for a higher court constitutes neither a conviction nor former jeopardy;[73] but such a plea with judgment and sentence, if the magistrate has jurisdiction, is a former conviction and may be so pleaded to a subsequent indictment.[74]

c. Withdrawal of Plea. If the accused withdraws a plea of guilty, with the consent of the court, he waives his defense of former jeopardy.[75]

d. Fraudulent Plea. A plea of guilty fraudulently or collusively entered before a justice, with sentence, is not a bar to an indictment.[76] So also a plea of guilty which the superior court is deceived into accepting for a minor offense, with a discharge thereon, is no defense to a subsequent indictment.[77]

F. Nolle Prosequi or Discontinuance — 1. AS TO ONE OF SEVERAL INDICTMENTS OR COUNTS. A *nolle prosequi* or discontinuance as to one or more counts of an indictment, or as to one of several indictments, is no bar to a prosecution upon the others.[78]

2. TIME OF ENTRY — a. Before Plea. It is a general rule that a *nolle prosequi* entered before the defendant is called upon to plead or the jury is impaneled is not equivalent to an acquittal, and does not bar a subsequent prosecution.[79]

b. Before Beginning Trial. The entry of a *nolle prosequi* by the prosecuting

67. Disney *v.* Com., 5 S. W. 360, 9 Ky. L. Rep. 413; State *v.* Heard, 49 La. Ann. 375, 21 So. 632; Link *v.* State, 3 Heisk. (Tenn.) 252; Yerger *v.* State, (Tex. Cr. 1897) 41 S. W. 621. See also *supra*, IX, B, 1.

68. State *v.* Bronkol, 5 N. D. 507, 67 N. W. 680; U. S. *v.* Riley, 27 Fed. Cas. No. 16,164, 5 Blatchf. 204.

69. Com. *v.* Golding, 14 Gray (Mass.) 49; Com. *v.* Harris, 8 Gray (Mass.) 470. See also *supra*, IX, C, 1.

70. People *v.* Goldstein, 32 Cal. 432.

71. Boswell *v.* State, 111 Ind. 47, 11 N. E. 788.

72. Sanders *v.* State, 85 Ind. 318, 44 Am. Rep. 29.

73. State *v.* Belden, 69 N. H. 647, 46 Atl. 743.

74. Com. *v.* Goddard, 13 Mass. 455.

75. Ledgerwood *v.* State, 134 Ind. 81, 33 N. E. 631; Harbin *v.* State, 133 Ind. 698, 33 N. E. 635; People *v.* Cignarale, 110 N. Y. 23, 17 N. E. 135.

76. See *supra*, IX, B, 5.

77. People *v.* Woods, 84 Cal. 441, 23 Pac. 1119.

78. O'Brien *v.* State, 91 Ala. 25, 8 So. 560; State *v.* Lopez, 19 Mo. 254. An agreement between the state and the accused that he would refrain from further infraction of the law if a *nolle prosequi* was entered is not a defense to a subsequent indictment. Com. *v.* Cutler, 9 Allen (Mass.) 486. And where on an indictment for murder, after the accused is convicted of manslaughter and a new trial is granted, a *nolle prosequi* is entered as to the charge of murder, a plea of former jeopardy cannot be maintained against a new indictment for manslaughter. State *v.* Byrd, 31 La. Ann. 419.

79. *Delaware.*— State *v.* Tindal, 5 Harr. 488.

Georgia.— Jones *v.* State, 115 Ga. 814, 42 S. E. 271; Bird *v.* State, 53 Ga. 602.

Hawaii.— Republic *v.* Oishi, 9 Hawaii 641; Rex *v.* A. Manner, 3 Hawaii 339.

Louisiana.— State *v.* Hornsby, 8 Rob. 583, 41 Am. Dec. 314.

New York.— People *v.* Loomis, 30 How. Pr. 323.

Pennsylvania.— Zink *v.* Schuylkill County, 1 Leg. Chron. 191.

South Carolina.— State *v.* Haskett, Riley 97.

Virginia.— Wortham *v.* Com., 5 Rand. 669; Lindsay *v.* Com., 2 Va. Cas. 345.

United States.—U. S. *v.* Shoemaker, 27 Fed. Cas. No. 16,279, 2 McLean 114.

See 14 Cent. Dig. tit. "Criminal Law," § 326.

attorney before a jury is impaneled being within his discretion, where one is indicted and a *nolle prosequi* is entered before the jury is impaneled, he cannot plead a prior acquittal.[80]

c. After Beginning Trial. But where a jury has been impaneled and sworn the prisoner's jeopardy has begun, and the entry of a *nolle prosequi* thereafter during the trial over the objection of the accused, unless on account of the insufficiency of the indictment,[81] or because of a material variance,[82] will operate and may be subsequently pleaded as an acquittal.[83]

d. After Conviction. Where a defendant has been convicted and a new trial granted him the prosecution may, with the court's consent, enter a *nolle prosequi* without prejudice to a new indictment.[84]

G. Discharge of Jury Without Verdict — 1. In General. At the common law in England, if any evidence had been given, the jury could not be discharged, except in case of the most urgent necessity, until they had given a ver-

80. *Arkansas.*— Salem *v.* Colley, 70 Ark. 71, 66 S. W. 195.

Georgia.— Reynolds *v.* State, 3 Ga. 53.

Indiana.— Dye *v.* State, 130 Ind. 87, 29 N. E. 771.

Kentucky.— Williams *v.* Com., 78 Ky. 93.

Massachusetts.— Com. *v.* Galligan, 156 Mass. 270, 30 N. E. 1142; Com. *v.* Tuck, 20 Pick. 356.

Michigan.— People *v.* Kuhn, 67 Mich. 463, 35 N. W. 88.

Missouri.— State *v.* Taylor, 171 Mo. 465, 71 S. W. 1005; State *v.* Goddard, 162 Mo. 198, 62 S. W. 697; State *v.* Balch, 136 Mo. 103, 37 S. W. 808; *Ex p.* Donaldson, 44 Mo. 149.

New Hampshire.— State *v.* Dover, 46 N. H. 452.

New York.— Gardiner *v.* People, 6 Park. Cr. 155.

North Carolina.— State *v.* Thornton, 35 N. C. 256.

Texas.—Longley *v.* State, 43 Tex. 490; Jackson *v.* State, 37 Tex. Cr. 128, 38 S. W. 1002; Branch *v.* State, 20 Tex. App. 599.

See 14 Cent. Dig. tit. "Criminal Law," § 327.

81. State *v.* Crutch, Houst. Cr. Cas. (Del.) 204; Walton *v.* State, 3 Sneed (Tenn.) 687.

82. Martha *v.* State, 26 Ala. 72; Elehash *v.* State, 35 Tex. Cr. 599, 34 S. W. 928; *Ex p.* Rogers, 10 Tex. App. 655, 38 Am. Rep. 654. See *supra*, IX, D, 4.

83. *Alabama.*— Grogan *v.* State, 44 Ala. 9; State *v.* Kreps, 8 Ala. 951.

Georgia.— Franklin *v.* State, 85 Ga. 570, 11 S. E. 876; Jackson *v.* State, 76 Ga. 551; Doyal *v.* State, 70 Ga. 134; Jones *v.* State, 55 Ga. 625; Reynolds *v.* State, 3 Ga. 53.

Indiana.—Joy *v.* State, 14 Ind. 139; Harker *v.* State, 8 Blackf. 540.

Louisiana.— State *v.* Washington, 33 La. Ann. 1473; State *v.* Brown, 8 Rob. 566.

Michigan.— People *v.* Pline, 61 Mich. 247, 28 N. W. 83.

Missouri.— State *v.* Patterson, 116 Mo. 505, 22 S. W. 696.

Ohio.— Mount *v.* State, 14 Ohio 295, 45 Am. Dec. 542.

Pennsylvania.—Com. *v.* Cawley, 4 Pa. Dist. 69, 7 Kulp 539, 16 Pa. Co. Ct. 259.

Rhode Island.— State *v.* Nelson, 19 R. I. 467, 34 Atl. 990, 61 Am. St. Rep. 780, 33 L. R. A. 559.

South Carolina.— State *v.* McKee, 1 Bailey 651, 21 Am. Dec. 499.

Tennessee.— State *v.* Connor, 5 Coldw. 311.

United States.— U. S. *v.* Farring, 25 Fed. Cas. No. 15,075, 4 Cranch C. C. 465.

But see State *v.* Thornton, 35 N. C. 256.

See 14 Cent. Dig. tit. "Criminal Law," § 328.

In Connecticut if the prisoner does not claim a verdict a *nolle prosequi* or discontinuance of the prosecution entered by advice of the court after the jury is impaneled is not a bar to a subsequent trial for the same offense. State *v.* Garvey, 42 Conn. 232.

In Vermont a *nolle prosequi* entered by order of the court at any stage of the trial before verdict is not a bar to a subsequent indictment. State *v.* Champeau, 52 Vt. 313, 36 Am. Rep. 754; State *v.* Roe, 12 Vt. 93.

84. *Florida.*— Gibson *v.* State, 26 Fla. 109, 7 So. 376.

Indiana.— Patterson *v.* State, 70 Ind. 341.

Kansas.— State *v.* Child, 44 Kan. 420, 24 Pac. 952; State *v.* Rust, 31 Kan. 509, 3 Pac. 428.

Kentucky.— Com. *v.* Arnold, 83 Ky. 1, 4 Am. St. Rep. 114; Fain *v.* Com., 59 S. W. 1091, 22 Ky. L. Rep. 1111.

Louisiana.— State *v.* Hornsby, 8 Rob. 583, 41 Am. Dec. 314.

Texas.— Brill *v.* State, 1 Tex. App. 152.

See 14 Cent. Dig. tit. "Criminal Law," § 329.

Lost indictment.— Where an indictment on which a verdict of guilty has been rendered is lost before sentence, the verdict may be vacated, a *nolle prosequi* entered, and the accused reindicted. State *v.* Mount, 1 Ohio Dec. (Reprint) 89, 2 West. L. J. 81.

Indictment insufficient under statute.— A conviction and *nolle prosequi* on an indictment sufficient at common law, but insufficient under the statute, is a bar to a subsequent indictment under the statute. Fletcher *v.* U. S., 9 Fed. Cas. No. 4,869, 1 Hayw. & H. 200; Fletcher *v.* U. S., 9 Fed. Cas. No. 4,868, 1 Hayw. & H. 186.

dict.[85] The American cases hold generally that there must be a manifest necessity for the discharge of the jury, and leave the courts to determine in their discretion whether under all the circumstances of each case such necessity exists.[86] The power of the court to discharge a jury before verdict should be exercised only in case of a manifest, urgent, or absolute necessity. If the jury are discharged for a reason legally insufficient and without an absolute necessity for it, the discharge is equivalent to an acquittal, and may be pleaded as a bar to a subsequent indictment.[87]

2. **Absence of Accused.** As the accused has a constitutional right to be present during the whole trial, the discharge of the jury in his absence, for whatever

85. 4 Bl. Comm. 361; Coke Litt. 227; Foster Crown L. 27. And see State *v.* Hall, 9 N. J. L. 256; *In re* Spier, 12 N. C. 491; Winsor *v.* Reg., 1 L. R. Q. B. 289, 6 B. & S. 143, 7 B. & S. 490, 10 Cox C. C. 327, 12 Jur. N. S. 561, 35 L. J. M. C. 161, 14 L. T. Rep. N. S. 567, 14 Wkly. Rep. 695, 118 E. C. L. 143; Reg. *v.* Charlesworth, 1 B. & S. 460, 9 Cox C. C. 44, 8 Jur. N. S. 1091, 31 L. J. M. C. 25, 5 L. T. Rep. N. S. 150, 9 Wkly. Rep. 842, 101 E. C. L. 460.

86. *Connecticut.*— State *v.* Woodruff, 2 Day 504, 2 Am. Dec. 122.

District of Columbia.— U. S. *v.* Bigelow, 3 Mackey 393.

Georgia.— Stocks *v.* State, 91 Ga. 831, 18 S. E. 847; Cunningham *v.* State, 80 Ga. 4, 5 S. E. 251.

Iowa.— State *v.* Pierce, 77 Iowa 245, 42 N. W. 181.

Kentucky.— Com. *v.* Olds, 5 Litt. 137.

Maryland.— Anderson *v.* State, 86 Md. 479, 38 Atl. 937; Hoffman *v.* State, 20 Md. 425.

Massachusetts.— Com. *v.* Purchase, 2 Pick. 521, 13 Am. Dec. 452; Com. *v.* Bowden, 9 Mass. 494.

Missouri.— State *v.* Arthur, 32 Mo. App. 24.

New York.— Canter *v.* People, 1 Abb. Dec. 305, 2 Transcr. App. 1, 5 Abb. Pr. N. S. 21, 38 How. Pr. 91; People *v.* Goodwin, 18 Johns. 187, 9 Am. Dec. 203.

Pennsylvania.— Com. *v.* Cook, 6 Serg. & R. 577, 9 Am. Dec. 465.

United States.— Thompson *v.* U. S., 155 U. S. 271, 15 S. Ct. 73, 39 L. ed. 146; Logan *v.* U. S., 144 U. S. 263, 12 S. Ct. 617, 36 L. ed. 429; U. S. *v.* Perez, 9 Wheat. 579, 580, 6 L. ed. 165, where it was said: "They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be exercised with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, the court should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have a right to order the discharge."

See 14 Cent. Dig. tit. "Criminal Law," § 330.

87. *Alabama.*— Bell *v.* State, 44 Ala. 393.

Arkansas.— Ball *v.* State, 48 Ark. 94, 2 S. W. 462; Atkins *v.* State, 16 Ark. 568.

California.— People *v.* Arnett, 129 Cal. 306, 61 Pac. 930; People *v.* Cage, 48 Cal. 323, 17 Am. Rep. 436.

Indiana.— Maden *v.* Emmons, 83 Ind. 331; State *v.* Wamire, 16 Ind. 357; McCorkle *v.* State, 14 Ind. 39; Miller *v.* State, 8 Ind. 325; Wright *v.* State, 5 Ind. 290, 61 Am. Dec. 90; Weinzorpflin *v.* State, 7 Blackf. 186.

Iowa.— State *v.* Callendine, 8 Iowa 288.

Kansas.— State *v.* Allen, 59 Kan. 758, 54 Pac. 1060.

Kentucky.— Robinson *v.* Com., 88 Ky. 386, 11 S. W. 210, 10 Ky. L. Rep. 972; Williams *v.* Com., 78 Ky. 93; Thompson *v.* Com., 25 S. W. 1059, 15 Ky. L. Rep. 838.

Louisiana.— State *v.* Robinson, 46 La. Ann. 769, 15 So. 146.

Michigan.— People *v.* Jones, 48 Mich. 554, 12 N. W. 848.

Mississippi.— Helm *v.* State, 66 Miss. 537, 6 So. 322; Teat *v.* State, 53 Miss. 439, 24 Am. Rep. 708.

New York.— King *v.* People, 5 Hun 297; Grant *v.* People, 4 Park. Cr. 527.

North Carolina.—State *v.* Collins, 115 N. C. 716, 20 S. E. 452; State *v.* Prince, 63 N. C. 529; *In re* Spier, 12 N. C. 491; State *v.* Garrigues, 2 N. C. 241.

Ohio.— Mitchell *v.* State, 42 Ohio St. 383; Hines *v.* State, 24 Ohio St. 134; State *v.* Hoffman, 8 Ohio Dec. (Reprint) 128, 5 Cinc. L. Bul. 875.

Pennsylvania.— Com. *v.* Hetrich, 1 Woodw. 288.

South Carolina.— State *v.* Burket, 2 Mill 155, 12 Am. Dec. 662.

Washington.— State *v.* Costello, 29 Wash. 366, 69 Pac. 1099.

United States.— *Ex p.* Ulrich, 42 Fed. 587; U. S. *v.* Coolidge, 25 Fed. Cas. No. 14,858, 2 Gall. 364; U. S. *v.* Shoemaker, 27 Fed. Cas. No. 16,279, 2 McLean 1141.

See 14 Cent. Dig. tit. "Criminal Law," § 330.

The constitutional guarantee of a trial by jury includes the right to have the deliberations of the jury continue after they have heard any evidence, until the occurrence of a sufficient legal reason for their discharge with the chance of a verdict of acquittal at their hands during that time. Hence their unauthorized discharge is an acquittal. McCauley *v.* State, 26 Ala. 135.

Juryman temporarily leaving jury-box.— Where a juror, directed by the court to leave the jury-box, remains in the court and immediately on defendant's objection is directed

cause, operates as an acquittal,[88] unless his absence is caused by his flight, in which case the court may discharge the jury and he may be again indicted.[89] It has been both held[90] and denied[91] that his right to be present may be waived by his counsel.

3. Illness of Juror. The illness of a juror which incapacitates him from performing his duty, either before or after the jury has retired, constitutes such necessity as to justify a discharge, and will not be equivalent to an acquittal.[92]

4. Illness of Judge. Where a jury, after being impaneled and sworn, is discharged on account of the illness of the presiding judge, the accused cannot plead former jeopardy.[93]

5. Expiration of Term of Court. The expiration of a term of the court, in the absence of a statutory provision to the contrary, discharges a jury in a criminal trial not finished at that time; but this is not an acquittal and the accused may be retried at a subsequent term.[94]

6. Consent and Estoppel of Accused. A defendant cannot plead former jeop-

to resume his place there is no discharge of the jury. Lewis *v.* State, 121 Ala. 1, 25 So. 1017.

88. *Indiana.*— Maden *v.* Emmons, 83 Ind. 331; State *v.* Wilson, 50 Ind. 487, 19 Am. Rep. 719.

Kansas.— State *v.* White, 19 Kan. 445, 27 Am. Rep. 137.

Kentucky.— Temple *v.* Com., 14 Bush 769, 29 Am. Rep. 442.

Minnesota.— State *v.* Sommers, 60 Minn. 90, 61 N. W. 907.

Texas.— Rudder *v.* State, 29 Tex. App. 262, 15 S. W. 717. But see Selman *v.* State, 33 Tex. Cr. 631, 28 S. W. 541, holding that in cases of misdemeanors the jury may be discharged in the absence of the accused.

See 14 Cent. Dig. tit. "Criminal Law," § 331.

89. State *v.* Battle, 7 Ala. 259.

90. People *v.* Smalling, 94 Cal. 112, 29 Pac. 421.

91. Cook *v.* State, 60 Ala. 39, 31 Am. Rep. 31.

92. *Alabama.*— Mixon *v.* State, 55 Ala. 129, 28 Am. Rep. 605.

Arkansas.— Lee *v.* State, 26 Ark. 260, 7 Am. Rep. 611.

California.— People *v.* Ross, 85 Cal. 383, 24 Pac. 789.

Florida.— Ellis *v.* State, 25 Fla. 702, 6 So. 768.

Indiana.— Doles *v.* State, 97 Ind. 555. But see Rulo *v.* State, 19 Ind. 298, holding that where the juror's statement as to his sickness is not made under oath and no medical evidence is heard on the question, a discharge is improper, and is a bar to a subsequent trial.

Kansas.— State *v.* Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322.

Kentucky.— Hilbert *v.* Com., 51 S. W. 817, 21 Ky. L. Rep. 537.

Massachusetts.— Com. *v.* Merrill, Thach. Cr. Cas. 1.

New York.— People *v.* Smith, 172 N. Y. 210, 64 N. E. 814.

Tennessee.—De Berry *v.* State, 99 Tenn. 207, 42 S. W. 31.

Texas.— Woodward *v.* State, 42 Tex. Cr. 188, 58 S. W. 135.

Vermont.— State *v.* Emery, 59 Vt. 84, 7 Atl. 129.

England.— Rex *v.* Edwards, 3 Camph. 207, 2 Leach C. C. 621 note, R. & R. 234, 4 Taunt. 309; Rex *v.* Scalbert, 2 Leach C. C. 706.

See 14 Cent. Dig. tit. "Criminal Law," § 333.

Illness of juror's wife.— A dangerous illness of the wife of a juror is not ground for discharging the jury over the objection of the accused, and where this is done without his knowledge or the knowledge of his counsel it is equivalent to an acquittal and will sustain a plea of former jeopardy. Upchurch *v.* State, 36 Tex. Cr. 624, 38 S. W. 206, 44 L. R. A. 694.

The insanity of a juror is an "accident or calamity" authorizing the discharge of the jury within the meaning of a statute providing for such a contingency. Davis *v.* State, 51 Nebr. 301, 70 N. W. 984.

93. Nugent *v.* State, 4 Stew. & P. (Ala.) 72, 24 Am. Dec. 746. But see *Ex p.* Ulrich, 42 Fed. 587, holding that where, after a trial was begun, it was continued from day to day and other cases were disposed of, and on the adjournment day the jury was discharged on account of the illness of the judge, the discharge amounted to an acquittal and was a bar to a subsequent trial.

94. *Alabama.*— Lore *v.* State, 4 Ala. 173.

Kansas.— *In re* Scrafford, 21 Kan. 735.

Kentucky.— Com. *v.* Olds, 5 Litt. 137.

Missouri.— State *v.* Jeffors, 64 Mo. 376.

North Carolina.— State *v.* Tillitson, 52 N. C. 114, 75 Am. Dec. 456. But see *In re* Spier, 12 N. C. 491. And see State *v.* McGimsey, 80 N. C. 777, 30 Am. Rep. 90, holding that under a statute providing that where the term shall expire during a trial for a felony, the judge may continue the term as long as may be necessary for the purposes of the case, the defendant cannot be retried if the jury is discharged without a verdict at the expiration of the term.

South Carolina.— State *v.* McLeymour, 2 Hill 680.

Virginia.— Com. *v.* Thompson, 1 Va. Cas. 319.

England.— Reg. *v.* Newton, 3 Cox C. C. 489.

ardy where the jury before which he was first on trial was discharged on his own motion or with his consent.[95] The silence of the accused does not constitute a consent or a waiver of his constitutional right.[96]

7. Defective Indictment or Information. The accused is not in jeopardy if the indictment or the information is so defective that a verdict and judgment could not be sustained,[97] and where the jury is discharged for that reason without his consent it is not an acquittal.[98]

8. Discharge to Try For Higher Offense. Where on the trial the court, without the consent of the accused, discharges the jury because it is of the opinion that the evidence shows him guilty of a higher crime, for which crime he is subsequently indicted, he is twice in jeopardy and should be acquitted.[99]

9. Absence of Witness. If, after the accused has pleaded, the prosecuting attorney, finding himself unprepared with evidence, withdraws a juror against the objection of the accused, the latter cannot be tried again.[1]

10. Separation of Jury. At the common law, where the jury separated after retiring, they might be discharged and a new jury sworn, by whom the accused might then be tried;[2] and this rule has been followed in some of the states.[3] In other states, however, it has been held that where a jury disperse or separate after they have retired to make up their verdict, such circumstance does not authorize their discharge, and if they are discharged, a plea of former jeopardy should be sustained in a subsequent prosecution.[4] Where, even with the consent of the accused, the separation of the jury is permitted before they retire, and on their reassemblage any of them are missing, and the jury is discharged for this reason, he may afterward plead former jeopardy.[5]

See 14 Cent. Dig. tit. "Criminal Law," § 334.

95. *Alabama.*— Hughes *v.* State, 35 Ala. 351; Cobia *v.* State, 16 Ala. 781; Ned *v.* State, 7 Port. 187.

Indiana.— State *v.* Wamire, 16 Ind. 357; McCorkle *v.* Com., 14 Ind. 39.

Massachusetts.— Com. *v.* Sholes, 13 Allen 554.

Michigan.— People *v.* White, 68 Mich. 648, 37 N. W. 34; People *v.* Gardner, 62 Mich. 307, 29 N. W. 19.

North Carolina.— State *v.* Davis, 80 N. C. 384.

Ohio.—Stewart *v.* State, 15 Ohio St. 155.

Pennsylvania.— Peiffer *v.* Com., 15 Pa. St. 468, 53 Am. Dec. 605; Com. *v.* Cook, 6 Serg. & R. 577, 9 Am. Dec. 465.

South Carolina.—State *v.* Coleman, 54 S. C. 282, 32 S. E. 406.

Texas.— Arcia *v.* State, 28 Tex. App. 198, 12 S. W. 599.

England.— Rex *v.* Stokes, 6 C. & P. 151, 25 E. C. L. 367; Foster Crown L. 27; 2 Hawkins P. C. c. 47, § 1. But see Rex *v.* Perkins, Holt K. B. 403.

See 14 Cent. Dig. tit. "Criminal Law," § 335.

96. State *v.* Richardson, 47 S. C. 166, 25 S. E. 220, 35 L. R. A. 238.

97. See *supra*, IX, D.

98. *Alabama.*—*Ex p.* Winston, 52 Ala. 419.

Arkansas.— State *v.* Ward, 48 Ark. 36, 2 S. W. 191.

Iowa.— State *v.* Smith, 88 Iowa 178, 55 N. W. 198.

Nebraska.— State *v.* Priebnow, 16 Nebr. 131, 19 N. W. 628.

North Carolina.—State *v.* England, 78 N. C. 552.

See 14 Cent. Dig. tit. "Criminal Law," § 336.

Offense charged as subsequent to indictment.— If it is discovered on the trial that the offense is charged as of a date subsequent to the indictment, the jury may be discharged. People *v.* Larson, 68 Cal. 18, 8 Pac. 517; Johnson's Case, 5 City Hall Rec. (N. Y.) 103.

99. People *v.* Ny Sam Chung, 94 Cal. 304, 29 Pac. 642, 28 Am. St. Rep. 129. This rule applies to one indicted for manslaughter, where the court discharges the jury and he is subsequently indicted for murder. People *v.* Hunckeler, 48 Cal. 331.

1. State *v.* Callendine, 8 Iowa 288; People *v.* Barrett, 2 Cai. (N. Y.) 304, 2 Am. Dec. 239; Klock *v.* People, 2 Park. Cr. (N. Y.) 676; State *v.* Richardson, 47 S. C. 166, 25 S. E. 220, 35 L. R. A. 238; Pizano *v.* State, 20 Tex. App. 139, 54 Am. Dec. 511.

Ground for rule.— The rule of the text is sometimes based on the fact that the accused has been in jeopardy, and sometimes on his right to a speedy trial, but it is a sound rule that the discharge of the jury under such circumstances is an acquittal. Klock *v.* People, 2 Park. Cr. (N. Y.) 676.

2. 2 Hale P. C. 295.

3. State *v.* Hall, 9 N. J. L. 256; People *v.* Reagle, 60 Barb. (N. Y.) 527.

4. Maden *v.* Emmons, 83 Ind. 331 (where the jury dispersed without the knowledge of the court, counsel, or defendant); Hilands *v.* Com., 111 Pa. St. 1, 2 Atl. 70, 56 Am. Rep. 235.

5. State *v.* Ward, 48 Ark. 36, 2 S. W. 191 (where the court said that consent to a separation is not consent that a juror may absent himself and necessitate the discharge of the

11. Disqualification of Juror. Where the jury are discharged after the trial has begun, by reason of the fact that a juror has become disqualified,[6] or because he was disqualified when he was sworn,[7] there is neither an acquittal nor former jeopardy, although the accused offers to waive the disqualification and proceed with the jurors on the panel, or with a jury of less than the legal number.[8]

12. Misconduct of Jurors. If a juror favorable to the accused fraudulently procures himself to be impaneled, he may be directed to withdraw and the jury be discharged, and although the prisoner was not implicated in the fraud, there is no jeopardy.[9] The same rule applies to misconduct on the part of a juror which would justify the court in discharging him,[10] as where he procures liquor for the other jurors or holds communications with outside parties.[11]

13. Misconduct of Officer. The misconduct of an officer having the jury in charge does not necessarily constitute sufficient ground for discharging the jury against the consent of the accused after the trial has begun.[12]

14. Failure of Jury to Agree. Although there have been some decisions to the contrary,[13] it is now generally held that the discharge of the jury, where after full consideration they fail to agree, and there is no reasonable expectation that they will be able to agree, is not a bar to another trial, on the ground that such a condition of affairs constitutes absolute and urgent necessity, and justifies the court in discharging the jury.[14]

jury); State *v.* McKie, 1 Bailey (S. C.) 651, 21 Am. Rep. 499. *Compare*, however, State *v.* Costello, 11 La. Ann. 283, holding that where the jury were discharged on motion of the state, because they had separated after being sworn, but before evidence had been taken, the accused might be subsequently tried for the same offense.

6. Gardes *v.* U. S., 87 Fed. 172, 30 C. C. A. 596.

7. Lewis *v.* State, 121 Ala. 1, 25 So. 1017; State *v.* Allen, 46 Conn. 531; Com. *v.* McCormick, 130 Mass. 61, 39 Am. Rep. 423.

8. *Connecticut.*— State *v.* Allen, 46 Conn. 531.

Illinois.— Stone *v.* People, 3 Ill. 326.

New York.— People *v.* Damon, 13 Wend. 351.

United States.— U. S. *v.* Morris, 26 Fed. Cas. No. 15,815, 1 Curt. 23.

England.— Reg. *v.* Ward, 10 Cox C. C. 573.

See 14 Cent. Dig. tit. "Criminal Law," § 342.

The discharge of the jury after arraignment, but before any evidence has been received, because of the disqualification of the jurors, and the subsequent impaneling of a new jury, does not entitle the accused to plead former jeopardy. Watkins *v.* State, 60 Ga. 601.

9. State *v.* Washington, 89 N. C. 535, 45 Am. Rep. 700; State *v.* Bell, 81 N. C. 591.

10. McKenzie *v.* State, 26 Ark. 334.

11. *In re* Ascher, 130 Mich. 540, 90 N. W. 418.

12. State *v.* Leunig, 42 Ind. 541.

13. Com. *v.* Clue, 3 Rawle (Pa.) 498; Com. *v.* Cook, 6 Serg. & R. (Pa.) 577, 9 Am. Dec. 465; Williams *v.* Com., 2 Gratt. (Va.) 567, 44 Am. Dec. 403.

14. *Arkansas.*— McRae *v.* State, 49 Ark. 195, 4 S. W. 758.

California.— People *v.* Greene, 100 Cal. 140, 34 Pac. 630; People *v.* James, 97 Cal. 400, 32 Pac. 317; People *v.* Cage, 48 Cal. 323, 17 Am. Rep. 436.

Colorado.— *In re* Allison, 13 Colo. 525, 22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790.

Connecticut.— State *v.* Woodruff, 2 Day 504, 2 Am. Dec. 122.

Florida.— Smith *v.* State, 40 Fla. 203, 23 So. 854.

Georgia.— Lester *v.* State, 33 Ga. 329.

Idaho.—State *v.* Crump, 5 Ida. 166, 47 Pac. 814.

Illinois.— Dreyer *v.* People, 188 Ill. 40, 58 N. E. 620, 59 N. E. 424, 58 L. R. A. 869.

Iowa.— State *v.* Vaughan, 29 Iowa 286.

Kansas.— State *v.* Hager, 61 Kan. 504, 59 Pac. 1080, 48 L. R. A. 254.

Kentucky.— Thompson *v.* Com., 25 S. W. 1059, 15 Ky. L. Rep. 838.

Louisiana.— State *v.* Blackman, 35 La. Ann. 483.

Massachusetts.— Com. *v.* Cody, 165 Mass. 133, 42 N. E. 575; Com. *v.* Purchase, 2 Pick. 521, 13 Am. Dec. 452; Com. *v.* Bowden, 9 Mass. 494.

Michigan.— People *v.* Schoeneth, 44 Mich. 489, 7 N. W. 70.

Mississippi.— State *v.* Moor, Walk. 134, 12 Am. Dec. 541.

Missouri.— State *v.* Copeland, 65 Mo. 497.

Nebraska.— Conklin *v.* State, 25 Nebr. 784, 41 N. W. 788.

Nevada.— *Ex p.* Maxwell, 11 Nev. 428.

New York.— People *v.* Olcott, 2 Johns. Cas. 301, 1 Am. Dec. 168; People *v.* Denton, 2 Johns. Cas. 275.

North Carolina.— State *v.* Whitson, 111 N. C. 695, 16 S. E. 332; State *v.* Washington, 90 N. C. 664.

Ohio.— Dobbins *v.* State, 14 Ohio St. 493.

Oregon.— State *v.* Shaffer, 23 Oreg. 555, 32 Pac. 545.

Pennsylvania.— McCreary *v.* Com., 29 Pa. St. 323.

H. Acquittal or Discharge — 1. Acquittal — a. In General. An acquittal of a crime is a bar to a further prosecution for that crime, although the court on the trial may have erroneously favored the defendant.[15] So although the court may have prevented the state from entering a *nolle prosequi*, or may have misdirected the jury, or erred in admitting illegal, or in rejecting legal, evidence, or the verdict may have been against the evidence, the judgment and verdict of acquittal, if fairly obtained, are conclusive and will bar a subsequent prosecution for the same offense.[16]

b. Acquittal as Principal as Bar to Prosecution as Accessary and Vice Versa. The acquittal of one indicted as a principal is not a bar to his trial as an accessary.[17] So, *e converso*, one tried and acquitted as an accessary before the fact may be subsequently tried as a principal.[18]

c. Acquittal Before Justice as Bar to Subsequent Indictment. An acquittal before a justice having jurisdiction to try the case and impose sentence constitutes jeopardy, and is a bar to a subsequent indictment for the same crime,[19] but not for another crime of which it forms an ingredient, and of which the justice has no jurisdiction.[20]

d. Acquittal on Indictment as Bar to Trial Before Justice. Although an acquittal on an indictment will not bar a subsequent prosecution before a justice for a minor offense of which the defendant could not have been convicted under the indictment, it will bar a subsequent prosecution for the same offense.[21]

South Carolina.— State *v.* Stephenson, 54 S. C. 234, 32 S. E. 305; State *v.* Shirer, 20 S. C. 392.

Tennessee.— State *v.* Pool, 4 Lea 363.

Texas.— Powell *v.* State, 17 Tex. App. 345.

Vermont.— State *v.* Champeau, 52 Vt. 313, 36 Am. Rep. 754.

Virginia.— Jones *v.* Com., 86 Va. 740, 10 S. E. 1004.

Wisconsin.— State *v.* Crane, 4 Wis. 400.

United States.—Dreyer *v.* Illinois, 187 U. S. 71, 23 S. Ct. 28, 47 L. ed. 79 [*affirming* 188 Ill. 40, 58 N. E. 620, 59 N. E. 424, 58 L. R. A. 869]; Logan *v.* U. S., 144 U. S. 263, 12 S. Ct. 617, 36 L. ed. 429; U. S. *v.* Perez, 9 Wheat. 579, 6 L. ed. 165; Kelly *v.* U. S., 27 Fed. 616; *Ex p.* Hibbs, 26 Fed. 421 (holding that where two or more are joined in one indictment, or two or more indictments are consolidated, and the jury find a verdict as to one or more of the charges, but fail to agree as to the remainder, they may be discharged and the defendant thereafter tried on those charges on which they failed to agree); U. S. *v.* Workman, 28 Fed. Cas. No. 16,764.

England.— Winsor *v.* Reg., L. R. 1 Q. B. 289, 7 B. & S. 490, 10 Cox C. C. 327, 12 Jur. N. S. 561, 35 L. J. M. C. 161, 14 L. T. Rep. N. S. 567, 14 Wkly. Rep. 695.

See 14 Cent. Dig. tit. "Criminal Law," § 344.

15. *Arkansas.*—State *v.* Gooch, 60 Ark. 218, 29 S. W. 640.

Connecticut.— Wilson *v.* State, 24 Conn. 57.

Maine.— Stevens *v.* Fassett, 27 Me. 266.

Massachusetts.— Com. *v.* Squire, 1 Metc. 258.

Michigan.—People *v.* Taylor, 117 Mich. 583, 76 N. W. 158; People *v.* Cook, 10 Mich. 164.

Mississippi.— State *v.* Taylor, (1898) 23 So. 34; Hurt *v.* State, 25 Miss. 378, 59 Am. Dec. 225.

Missouri.— State *v.* Wisebeck, 139 Mo. 214, 40 S. W. 946; State *v.* Spear, 6 Mo. 644.

Nevada.— State *v.* Herrick, 3 Nev. 259.

New York.— People *v.* Corning, 2 N. Y. 9, 49 Am. Dec. 364.

North Carolina.— State *v.* Jesse, 20 N. C. 95.

Pennsylvania.— Heikes *v.* Com., 26 Pa. St. 513; Com. *v.* Bargar, 2 L. T. N. S. 161.

Rhode Island.— State *v.* Lee, 10 R. I. 494.

Washington.— State *v.* Hubbell, 18 Wash. 482, 51 Pac. 1039.

Wisconsin.— State *v.* Moon, 41 Wis. 684.

England.— Rex *v.* Emden, 9 East 437; Rex *v.* Dann, 1 Moody C. C. 424.

See 14 Cent. Dig. tit. "Criminal Law," § 345.

Insufficient indictment or information see *supra*, IX, D.

16. State *v.* Davis, 4 Blackf. (Ind.) 345, and other cases cited in the preceding note.

The minutes of a court of record showing an acquittal of the crime, when in fact there had been a mistrial, are conclusive. State *v.* Taylor, (Miss. 1898) 23 So. 34.

17. Reynolds *v.* People, 83 Ill. 479, 25 Am. Rep. 410; State *v.* Buzzell, 58 N. H. 257, 42 Am. Rep. 586; State *v.* Larkin, 49 N. H. 36, 6 Am. Rep. 456; Morrow *v.* State, 14 Lea (Tenn.) 475; Rex *v.* Plant, 7 C. & P. 575, 1 Moody C. C. 477, 32 E. C. L. 766.

Aiding and abetting.— But one who is acquitted as a principal in the first degree may plead the acquittal in bar to a subsequent indictment for aiding and abetting, particularly where all implicated in a crime are regarded as principals. Gaskins *v.* Com., 97 Ky. 494, 30 S. W. 1017, 17 Ky. L. Rep. 352.

18. State *v.* Larkin, 49 N. H. 36, 6 Am. Rep. 456; 1 Hale P. C. 625.

19. Com. *v.* Cunningham, 13 Mass. 245; Reg. *v.* Miles, 24 Q. B. D. 423, 17 Cox C. C. 9, 54 J. P. 549, 59 L. J. M. C. 56, 62 L. T. Rep. N. S. 572, 38 Wkly. Rep. 334.

20. White *v.* State, 9 Tex. App. 390.

21. State *v.* Wightman, 26 Mo. 515.

e. Acquittal Under Erroneous Directions. A verdict of not guilty on a direction by the court which, under a statute, it was unauthorized to give is an acquittal, and may be pleaded as such.[22]

f. Acquittal Before Justice as Bar to New Trial on Appeal. Where, by statute, the state is entitled to an appeal which does not reverse the judgment, but is merely to obtain a correct exposition of the law, the prosecution cannot, after appealing from an acquittal before a justice, compel the accused to stand a second trial.[23]

g. Acquittal by "Jury." Acquittal by a jury is not usually requisite to constitute former jeopardy, but under a constitutional provision that no person shall be put in jeopardy a second time after having been once acquitted "by a jury" the immunity extends only to those who have been so acquitted.[24]

h. Acquittal by Court-Martial. An acquittal before a court-martial is no bar to an indictment in a court of law for the same offense,[25] but its findings are entitled to weight as an expression of the opinion of the military court on the prisoner's innocence.[26]

i. Failure to Enter Judgment of Acquittal. The failure of the clerk to enter judgment on a verdict of acquittal does not affect its validity as a bar to a subsequent prosecution.[27]

j. Verdict of Acquittal Rendered on Sunday. An acquittal is not deprived of its effect as a bar by the fact that the verdict was received and the order of discharge entered on Sunday.[28]

k. Reversal of Acquittal. At common law the right of the crown to a writ of error after an acquittal was very much in doubt.[29] Generally in the United States a verdict of acquittal cannot be reversed on an appeal.[30] In a few states, however, an appeal from an acquittal has been allowed by statute, and it has been there held that a new trial ordered on an appeal from an acquittal is not a second jeopardy.[31]

2. DISCHARGE — **a. On Preliminary Examination.** The discharge of the accused by a justice on a preliminary examination is not a bar to another preliminary examination, or to an indictment and trial, for the accused is not placed in jeopardy by a mere preliminary examination, and his discharge is in no sense an acquittal.[32]

22. People *v.* Horn, 70 Cal. 17, 11 Pac. 470; People *v.* Webb, 38 Cal. 467; Black *v.* State, 36 Ga. 447, 91 Am. Dec. 772; State *v.* Davis, 4 Blackf. (Ind.) 345.

23. State *v.* Van Horton, 26 Iowa 402.

24. State *v.* Shirer, 20 S. C. 392.

25. State *v.* Rankin, 4 Coldw. (Tenn.) 145; *In re* Fair, 100 Fed. 149; U. S. *v.* Cashiel, 25 Fed. Cas. No. 14,744, 1 Hughes 552.

26. U. S. *v.* Clark, 31 Fed. 710.

27. Wright *v.* Fansler, 90 Ind. 492; State *v.* Norvell, 2 Yerg. (Tenn.) 24, 24 Am. Dec. 458.

28. Ball *v.* U. S., 163 U. S. 662, 16 S. Ct. 1192, 41 L. ed. 300.

29. See State *v.* Lee, 65 Conn. 265, 277, 30 Atl. 1110, 48 Am. St. Rep. 202, 27 L. R. A. 498.

30. **Right of prosecution to appeal** see *infra*, XVII.

31. Taylor *v.* State, 36 Ark. 84; Jones *v.* State, 15 Ark. 261; State *v.* Lee, 65 Conn. 265, 30 Atl. 1110, 48 Am. St. Rep. 202, 27 L. R. A. 498.

32. *Alabama.*— *Ex p.* Robinson, 108 Ala. 161, 18 So. 729; *Ex p.* Crawlin, 92 Ala. 101, 9 So. 334.

Arkansas.— Fluty *v.* State, 45 Ark. 97.

California.— *Ex p.* Fenton, 77 Cal. 183, 19 Pac. 267.

Illinois.— Mooney *v.* People, 96 Ill. App. 622.

Indiana.— State *v.* Hattabough, 66 Ind. 223.

Kansas.— State *v.* Jones, 16 Kan. 608.

Kentucky.— Com. *v.* Weber, 33 S. W. 821, 17 Ky. L. Rep. 1131.

Massachusetts.— Com. *v.* Sullivan, 156 Mass. 487, 31 N. E. 647.

Michigan.— Gaffney *v.* Missaukee County, 85 Mich. 138, 48 N. W. 478.

Nebraska.— Van Buren *v.* State, (1902) 91 N. W. 201; Garst's Application, 10 Nebr. 78, 4 N. W. 511.

Virginia.— McCann *v.* Com., 14 Gratt. 570. See Com. *v.* Myers, 1 Va. Cas. 188, holding that an examining court has no power to acquit a person charged with murder of that crime and to remand him to be tried for manslaughter; and if it makes such a discrimination the prisoner is not thereby discharged, but may be indicted for murder.

Wisconsin.— Campbell *v.* State, 111 Wis. 152, 86 N. W. 855.

See 14 Cent. Dig. tit. "Criminal Law," § 356.

b. For Failure to Prosecute. A discharge for lack of prosecution, being merely from imprisonment or bail and not from the penalty, is not an acquittal barring a subsequent indictment,[33] unless it is so provided by statute.[34]

c. Under Habeas Corpus Proceedings. A discharge on habeas corpus, being merely from custody and not from the penalty, does not operate as an acquittal, and is not a bar to a subsequent indictment.[35]

d. To Try on Another Complaint. The discharge of a prisoner by the judge of a police court, after the trial is partly concluded, because he desires to try him on another complaint, is an acquittal.[36]

e. After Conviction Without Judgment. The plea of prior conviction is good where after a verdict of guilty exceptions are filed, the case continued, and after the expiration of the term the indictment is dismissed and the defendant discharged without day.[37]

I. Conviction — 1. Under Defective Complaint. A conviction before a justice of the peace having jurisdiction is a bar to an indictment, although the proceedings before him were so defective or irregular that they might have been set aside for error.[38]

2. In Court of Limited Jurisdiction. A plea of former conviction to an indictment in a court of general jurisdiction is sustained by proving a conviction in a court of limited jurisdiction upon a prosecution instituted and carried through in good faith,[39] unless the indictment was found prior to the prosecution in the lower court and the defendant had been arrested under it.[40]

3. Conviction of Minor Offense as Bar to Prosecution For Greater. In some states it is held that a conviction in a justice's court having competent jurisdiction of a minor offense which is a misdemeanor is a bar to an indictment for any higher grade of offense of which it forms a part, and which constitutes a felony;[41] but in others this doctrine has been condemned on the principle that there is no identity between the two crimes, and the plea of former conviction under such circumstances has been overruled.[42]

33. Byrd *v.* State, 1 How. (Miss.) 163; State *v.* Garthwaite, 23 N. J. L. 143.

34. See Hester *v.* Com., 85 Pa. St. 139.

35. *Illinois.*—Walker *v.* Martin, 43 Ill. 508.

Kansas.— *In re* Clyne, 52 Kan. 441, 35 Pac. 23.

Missouri.— State *v.* Schierhoff, 103 Mo. 47, 15 S. W. 151.

Ohio.— *Ex p.* McKnight, 4 Ohio S. & C. Pl. Dec. 284.

South Carolina.— State *v.* Fley, 2 Brev. 338, 4 Am. Dec. 583.

Wisconsin.— *Ex p.* Booth, 3 Wis. 145.

But see Com. *v.* McBride, 2 Brewst. (Pa.) 545.

See 14 Cent. Dig. tit. "Criminal Law," § 358.

36. Com. *v.* Hart, 149 Mass. 7, 20 N. E. 310.

37. State *v.* Elden, 41 Me. 165.

38. State *v.* George, 53 Ind. 434; Com. *v.* Loud, 3 Metc. (Mass.) 328, 37 Am. Dec. 139.

Defective indictment or information see *supra*, IX, D, 1, b.

39. *Indiana.*— Bryant *v.* State, 72 Ind. 400.

Kentucky.— Com. *v.* Miller, 5 Dana 320; Offutt *v.* Com., 3 Ky. L. Rep. 333.

Massachusetts.—Com. *v.* Goddard, 13 Mass. 455.

Tennessee.— State *v.* Layne, 96 Tenn. 668, 36 S. W. 390; McGinnis *v.* State, 9 Humphr. 43, 49 Am. Dec. 697.

Texas.— Dunn *v.* State, 6 Tex. 542.

England.— Reg. *v.* Walker, 2 M. & Rob. 446.

See 14 Cent. Dig. tit. "Criminal Law," § 365.

Exceptions.— A conviction before a justice of the peace, with an appeal to a higher court, followed by the dismissal of the appeal, is not a bar to a subsequent information. State *v.* Curtis, 29 Kan. 384. And if a statute provides that a conviction in a court of limited jurisdiction shall be a bar in any court of similar jurisdiction, the conviction is by implication no bar to a subsequent indictment. Williams *v.* State, 63 Ark. 307, 38 S. W. 337.

Fraudulent or collusive prosecution see *supra*, IX, B, 5.

40. See Mize *v.* State, 49 Ga. 375; State *v.* Casey, 44 N. C. 209; State *v.* Tisdale, 19 N. C. 159.

41. Powell *v.* State, 89 Ala. 172, 8 So. 109; Moore *v.* State, 71 Ala. 307; State *v.* Smith, 53 Ark. 24, 13 S. W. 391 [but see State *v.* Nichols, 38 Ark. 550]; State *v.* Gleason, 56 Iowa 203, 9 N. W. 126; State *v.* Albertson, 113 N. C. 633, 18 S. E. 321. Thus a conviction of petty larceny bars a prosecution for grand larceny. Southworth *v.* State, 42 Ark. 270; State *v.* Gleason, 56 Iowa 203, 9 N. W. 126.

42. *Connecticut.*— Hurd *v.* State, 2 Root 186; State *v.* Farrand, 1 Root 446.

Florida.— Boswell *v.* State, 20 Fla. 869.

4. Necessity For and Effect of Judgment. It has been held [43] and also denied [44] that a former conviction cannot be pleaded in bar unless it has been followed by a judgment.

5. Conviction Under Void Statute. A conviction under a statute which is unconstitutional or otherwise void in a court of limited jurisdiction is no bar to a prosecution on an indictment; [45] but a conviction on an indictment under a valid statute, followed by a sentence to be executed under a statute which has been repealed, is jeopardy, and, although the judgment is invalid for want of a statute under which to punish, the conviction is a bar to a subsequent trial.[46]

6. Conviction of Offense Not Recognized by Statute. A conviction of an offense not recognized by statute is no bar to a prosecution for a statutory offense.[47]

7. Conviction of Employer as Bar to Prosecution of Employee. The conviction of an employer for selling intoxicating liquors is no bar to a subsequent indictment of his employee for the same crime.[48]

8. Conviction of Husband as Bar to Prosecution of Wife and Vice Versa. Nor is a conviction of either a husband or a wife for selling liquor a bar to the conviction of the other for the same crime, although the same testimony proves both crimes.[49]

9. Verdict Set Aside on Application of Defendant — a. For Defect in Indictment or Information. An arrest of judgment for a defect in the information or indictment if granted on the application of defendant will prevent him from pleading the former conviction as a bar.[50]

b. For Illegality. And a plea of former jeopardy cannot be sustained on proof that the conviction of the accused on the former trial was set aside by the trial court because of a void or illegal verdict.[51]

Iowa.— State *v.* Foster, 33 Iowa 525; Scott *v.* U. S., Morr. 142. But see State *v.* Gleason, 56 Iowa 203, 9 N. W. 126.

Tennessee.— Mikels *v.* State, 3 Heisk. 321.

Texas.— Henkel *v.* State, 27 Tex. App. 510, 11 S. W. 671; White *v.* State, 9 Tex. App. 390; Allen *v.* State, 7 Tex. App. 298.

See 14 Cent. Dig. tit. "Criminal Law," § 366.

43. *Louisiana.*— State *v.* Isaac, 3 La. Ann. 359.

Massachusetts.—Com. *v.* Fraher, 126 Mass. 265.

Ohio.— White *v.* State, 13 Ohio St. 569.

Tennessee.— State *v.* Layne, 96 Tenn. 668, 36 S. W. 390.

United States.— U. S. *v.* Herbert, 26 Fed. Cas. No. 15,354, 5 Cranch C. C. 87.

See 14 Cent. Dig. tit. "Criminal Law," § 367.

44. Brennan *v.* People, 15 Ill. 511; Shepherd *v.* People, 25 N. Y. 406, 24 How. Pr. (N. Y.) 388; Kuckler *v.* People, 5 Park. Cr. (N. Y.) 212.

45. Rector *v.* State, 6 Ark. 187; State *v.* Oleson, 26 Minn. 507, 5 N. W. 959.

46. Hartung *v.* People, 26 N. Y. 167, 28 N. Y. 400, 25 How. Pr. (N. Y.) 221; Shepherd *v.* People, 25 N. Y. 406, 24 How. Pr. (N. Y.) 388; Kuckler *v.* People, 5 Park. Cr. (N. Y.) 212. And see Com. *v.* Brown, 167 Mass. 144, 45 N. E. 1.

47. Davidson *v.* State, 99 Ind. 366.

48. State *v.* Finan, 10 Iowa 19; People *v.* Ackerman, 80 Mich. 588, 45 N. W. 367.

49. Com. *v.* Heffron, 102 Mass. 148; Com. *v.* Welch, 97 Mass. 593.

50. *Alabama.*— State *v.* Phil, 1 Stew. 31.

California.— People *v.* Eppinger, 109 Cal. 294, 41 Pac. 1037.

Georgia.— Conley *v.* State, 85 Ga. 348, 11 S. E. 659.

Illinois.— Gannon *v.* People, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147; Bedee *v.* People, 73 Ill. 320.

Kentucky.— Cornelius *v.* Com., 3 Metc. 481.

Louisiana.— State *v.* Victor, 36 La. Ann. 978; State *v.* Owens, 28 La. Ann. 5.

Missouri.— State *v.* Owen, 78 Mo. 367.

New Hampshire.— State *v.* Sherburne, 58 N. H. 535.

New York.— People *v.* Loomis, 30 How. Pr. 323; People *v.* Cashorus, 13 Johns. 351.

Texas.— Brown *v.* State, 43 Tex. Cr. 272, 64 S. W. 1056.

Virginia.— White *v.* Com., 79 Va. 611.

United States.— U. S. *v.* Martin, 28 Fed. 812.

See 14 Cent. Dig. tit. "Criminal Law," § 373.

Where the court on its own motion arrests judgment, because from the evidence it appears that there is a material variance, a plea of former jeopardy should be sustained upon a subsequent prosecution for the same offense. State *v.* Adams, 11 S. D. 431, 78 N. W. 353.

51. *Alabama.*— Kendall *v.* State, 65 Ala. 492.

Illinois.— Hudson *v.* People, 29 Ill. App. 454.

Iowa.— State *v.* Redman, 17 Iowa 329.

Louisiana.—State *v.* Benjamin, 45 La. Ann. 1281, 14 So. 71; State *v.* Oliver, 39 La. Ann. 470, 2 So. 194.

New Hampshire.— State *v.* Blaisdell, 59 N. H. 328.

Tennessee.— Fitts *v.* State, 102 Tenn. 141, 50 S. W. 756.

c. Grant of New Trial. Where a new trial is granted on motion of the defendant, and the verdict and conviction set aside, the defendant has thereby waived his right and is estopped to plead the former conviction as a bar to a new indictment.[52]

10. Judgment Reversed on Appeal — a. Estoppel to Plead Conviction. The accused is estopped to plead a prior conviction where his conviction has been reversed for error on an appeal or writ of error brought by himself, although he has served a part of his term of imprisonment.[53]

b. For Defective Verdict. A plea of former jeopardy or conviction is not sustained by showing that a defective verdict was set aside and a new trial granted on an appeal. The appeal estops the accused to the same extent as moving to set aside the verdict.[54]

Texas.— Garza *v.* State, 39 Tex. Cr. 358, 46 S. W. 932, 73 Am. St. Rep. 927; Sterling *v.* State, 25 Tex. App. 716, 9 S. W. 45, 8 Am. St. Rep. 452.

Virginia.— Jones *v.* Com., 20 Gratt. 848.

But see *Ex p.* Snyder, 29 Mo. App. 256, where the court on its own motion set the verdict aside.

See 14 Cent. Dig. tit. "Criminal Law," § 374.

Amendment or correction of verdict.— Where the verdict is incomplete its recommittal or amendment does not put the accused twice in jeopardy (Pehlman *v.* State, 115 Ind. 131, 17 N. E. 270); but where the jury returned a verdict, finding the accused guilty of larceny, where he was indicted for burglary and larceny, and the judge sent them back because the verdict was not responsive, and they then, failing to agree, were discharged and a new jury impaneled, and a verdict of guilty of burglary and larceny was rendered, it was held that the verdict of the first jury being legal and valid and their discharge improper the defendants had been in jeopardy, and the second trial was illegal. State *v.* St. Clair, 42 La. Ann. 755, 7 So. 713.

52. *Alabama.*— State *v.* McFarland, 121 Ala. 45, 25 So. 625.

California.— People *v.* Mooney, 132 Cal. 13, 63 Pac. 1070.

Illinois.— Gerard *v.* People, 4 Ill. 362.

Indiana.— Joy *v.* State, 14 Ind. 139.

Iowa.— State *v.* Bowman, 94 Iowa 288, 62 N. W. 759.

Kentucky.— Fain *v.* Com., 109 Ky. 549, 59 S. W. 1091, 22 Ky. L. Rep. 1111.

Louisiana.— State *v.* Walters, 16 La. Ann. 400.

Massachusetts.— Com. *v.* Brown, 167 Mass. 144, 45 N. E. 1.

Michigan.— People *v.* Murray, 89 Mich. 276, 50 N. W. 995, 28 Am. St. Rep. 294, 14 L. R. A. 809.

Missouri.— State *v.* Snyder, 98 Mo. 555, 12 S. W. 369.

New York.— People *v.* Shields, 34 Misc. 256, 69 N. Y. Suppl. 620; People *v.* McKay, 18 Johns. 212; People *v.* Casborus, 13 Johns. 351.

North Carolina.— State *v.* Lee, 114 N. C. 844, 19 S. E. 375.

South Carolina.— State *v.* Stephens, 13 S. C. 285.

Tennessee.— State *v.* Hays, 2 Lea 156.

Texas.— Maines *v.* State, 37 Tex. Cr. 617, 40 S. W. 490; Dubose *v.* State, 13 Tex. App. 418.

Virginia.— Briggs *v.* Com., 82 Va. 554.

West Virginia.— State *v.* Cross, 44 W. Va. 315, 29 S. E. 527.

Wisconsin.— *In re* Keenan, 7 Wis. 695.

United States.— U. S. *v.* Ball, 163 U. S. 662, 16 S. Ct. 1192, 14 L. ed. 300.

See 14 Cent. Dig. tit. "Criminal Law," § 375.

53. *Alabama.*—Morrisette *v.* State, 77 Ala. 71; Jeffries *v.* State, 40 Ala. 381.

Arkansas.— Johnson *v.* State, 29 Ark. 31, 21 Am. Rep. 154; Stewart *v.* State, 13 Ark. 720.

California.— People *v.* Mooney, 132 Cal. 13, 63 Pac. 1070; People *v.* Tucker, 117 Cal. 225, 49 Pac. 134. And see People *v.* McFarlane, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245.

Georgia.— McGee *v.* State, 97 Ga. 360, 23 S. E. 831.

Illinois.— Lane *v.* People, 10 Ill. 305.

Iowa.— State *v.* Knouse, 33 Iowa 365.

Maryland.— Cochrane *v.* State, 6 Md. 400.

Michigan.— People *v.* Price, 74 Mich. 37, 41 N. W. 853; People *v.* White, 68 Mich. 648, 37 N. W. 34.

New Jersey.— Smith *v.* State, 41 N. J. L. 598.

New York.— People *v.* Hartung, 23 How. Pr. 314; People *v.* Goodwin, 18 Johns. 187, 9 Am. Dec. 203.

South Carolina.— State *v.* Wyse, 33 S. C. 582, 12 S. E. 556.

South Dakota.—State *v.* Reddington, 8 S. D. 315, 66 N. W. 464.

Tennessee.— State *v.* Thurston, 3 Heisk. 67.

Texas.— *Ex p.* Graham, 43 Tex. Cr. 643, 66 S. W. 840; Thompson *v.* State, 9 Tex. App. 649.

Virginia.— Watts *v.* Com., 99 Va. 872, 39 S. E. 706.

Washington.— State *v.* Freidrich, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332.

West Virginia.— State *v.* Conkle, 16 W. Va. 736; Younger *v.* State, 2 W. Va. 579, 98 Am. Dec. 791.

England.— Reg. *v.* Drury, 3 C. & K. 193, 3 Cox C. C. 544, 18 L. J. M. C. 189.

See 14 Cent. Dig. tit. "Criminal Law," § 376.

54. *Alabama.*— Gunter *v.* State, 83 Ala. 96, 3 So. 600.

c. New Trial After Reversal. A defendant waives his right to plead former jeopardy by applying for a new trial. When therefore a new trial is granted in the appellate court, and he is reindicted, or tried on the original indictment, he cannot plead the conviction which was reversed on the appeal as a bar to the prosecution.[55] But where there has been an acquittal on one count of an indictment and a conviction on another, and a new trial is granted, he can plead the acquittal, and can be tried upon that count only upon which he was convicted.[56]

d. Reversal as to Co-Defendant. The effect of the acquittal of a defendant as a bar to his subsequent trial is not affected by the reversal of the judgment of conviction as against a joint defendant.[57]

11. Conviction by House of Representatives. A conviction and sentence of a person not a member, by the house of representatives, for an assault and battery upon a member, are not a bar to a subsequent criminal prosecution by indictment for the offense.[58]

Arkansas.—Carpenter *v.* State, 62 Ark. 286, 36 S. W. 900.

California.—People *v.* Bannister, (1893) 34 Pac. 710; People *v.* Travers, 73 Cal. 580, 15 Pac. 293.

Florida.— Lovett *v.* State, 33 Fla. 389, 14 So. 837.

Kansas.— State *v.* Terreso, 56 Kan. 126, 42 Pac. 354.

Louisiana.— State *v.* Ritchie, 3 La. Ann. 715.

Maryland.— Ford *v.* State, 12 Md. 514.

Massachusetts.— Com. *v.* Call, 21 Pick. 509, 32 Am. Dec. 284.

Texas.—Chambers *v.* State, (Cr. App. 1902) 68 S. W. 286.

United States.— U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441.

See 14 Cent. Dig. tit. "Criminal Law," § 377.

55. *Alabama.*— Morrisette *v.* State, 77 Ala. 71; Jeffries *v.* State, 40 Ala. 381.

Arizona.— Territory *v.* Dorman, 1 Ariz. 56, 25 Pac. 516.

Arkansas.— Johnson *v.* State, 29 Ark. 31, 21 Am. Rep. 154.

California.— People *v.* Travers, 77 Cal. 176, 19 Pac. 268; People *v.* Hardisson, 61 Cal. 378; People *v.* Barrie, 49 Cal. 342.

Georgia.— Taylor *v.* State, 110 Ga. 150, 35 S. E. 161.

Kansas.—State *v.* Hart, 33 Kan. 218, 6 Pac. 288.

Kentucky.— Wells *v.* Com., 6 S. W. 150, 9 Ky. L. Rep. 658; Haskins *v.* Com., 1 S. W. 730, 8 Ky. L. Rep. 419.

Louisiana.— State *v.* Walters, 16 La. Ann. 400.

Massachusetts.—Com. *v.* Murphy, 174 Mass. 369, 54 N. E. 860, 75 Am. St. Rep. 353, 48 L. R. A. 393.

Minnesota.— State *v.* Brecht, 41 Minn. 50, 42 N. W. 602.

Missouri.— State *v.* Goddard, 162 Mo. 198, 62 S. W. 697.

Montana.— State *v.* Thompson, 10 Mont. 549, 27 Pac. 349.

Nebraska.— McGinn *v.* State, 46 Nebr. 427, 65 N. W. 46, 50 Am. St. Rep. 617, 30 L. R. A. 450.

New York.—McKee *v.* People, 32 N. Y. 239; People *v.* Rulloff, 5 Park. Cr. 77.

North Carolina.—State *v.* Rhodes, 112 N. C. 857, 17 S. E. 164.

Ohio.— Sutcliffe *v.* State, 18 Ohio 469, 51 Am. Dec. 459.

Texas.— Harvey *v.* State, (Cr. App. 1901) 64 S. W. 1039.

Utah.— State *v.* Kessler, 15 Utah 142, 49 Pac. 293, 62 Am. St. Rep. 911.

Virginia.— Benton *v.* Com., 91 Va. 782, 21 S. E. 495.

Washington.—State *v.* White, 8 Wash. 230, 35 Pac. 1100.

United States.— U. S. *v.* Harding, 26 Fed. Cas. No. 15,301, 1 Wall. Jr. 127.

See 14 Cent. Dig. tit. "Criminal Law," § 378.

56. *Alabama.*— Bell *v.* State, 48 Ala. 684, 17 Am. Rep. 40; Fisher *v.* State, 46 Ala. 717.

Nebraska.— George *v.* State, 59 Nebr. 163, 80 N. W. 486; Bohanan *v.* State, 18 Nebr. 57, 24 N. W. 390, 53 Am. Rep. 791.

Ohio.— State *v.* Behimer, 20 Ohio St. 572; Lesslie *v.* State, 18 Ohio St. 390.

Tennessee.— Campbell *v.* State, 9 Yerg. 333, 30 Am. Dec. 417.

Virginia.— Stuart *v.* Com., 28 Gratt. 950; Lithgow *v.* Com., 2 Va. Cas. 297.

Where after a trial is commenced the judge withdraws, and the trial is completed by another judge, and judgment is reversed for that cause, the accused may be tried again, although the judgment of reversal does not award a *venire de novo.* State *v.* Abram, 4 Ala. 272.

Burglary and larceny, although they may be charged in one count, are separate crimes, and where defendant is acquitted of the burglary and convicted of the larceny he may plead the prior acquittal on a subsequent trial for burglary. State *v.* Bruffey, 11 Mo. App. 79.

Murder and manslaughter.— So where one has been tried for murder and convicted of manslaughter only, he can plead an acquittal of murder where the judgment of conviction of manslaughter is reversed. State *v.* Chandler, 5 La. Ann. 489, 52 Am. Dec. 599; State *v.* Desmond, 5 La. Ann. 398.

57. Ball *v.* U. S., 163 U. S. 662, 16 S. Ct. 1192, 41 L. ed. 300.

58. U. S. *v.* Houston, 26 Fed. Cas. No. 15,398, 4 Cranch C. C. 261.

12. Pendency of Appeal. The fact that an appeal from a judgment of conviction is pending does not deprive the accused of the protection of the conviction as a bar to a new indictment.[59]

J. Identity of Offenses — 1. Necessity For. The general rule is somewhat vaguely stated to be that the plea of former conviction or acquittal must be upon a prosecution for the identical act and crime.[60] This is to be qualified, however, by the statement that the two charges need not be precisely the same in point of degree, for it is enough if an acquittal of the one shows that the defendant could not have been guilty of the other.[61]

2. Rules to Determine Identity — a. In General. Several rules have been laid down by the authorities for determining whether the crimes are identical. One test is to ascertain whether the facts alleged in the second indictment would, if given in evidence, have warranted a conviction on the first, and if this is the case, then the crimes are assumed to be identical. Another test is to inquire, where the two crimes are not the same, whether they grow out of the same transaction; but this test is correct only in a general way, as a single act or transaction may contain elements, each of which are crimes at common law or under different statutes.[62] The safest general rule is that the two offenses must be in substance precisely the same, or they must be of the same nature or the same species, so that the evidence which proves the one would prove the other; or if this is not the case then the one crime must be an ingredient of the other.[63]

b. Sufficiency of Facts Charged in Second Indictment to Sustain Former. A test almost universally applied to determine the identity of the offenses is to ascertain the identity, in character and effect, of the evidence in both cases. If the evidence which is necessary to support the second indictment was admissible

Contempt before congressional committee.— A statute which provides that an act which by the inherent powers of congress may be punished by it as a contempt shall be a misdemeanor punishable by indictment is not invalid as putting the accused twice in jeopardy. *In re* Chapman, 166 U. S. 661, 17 S. Ct. 677, 41 L. ed. 1154, where the defendant was convicted of a misdemeanor for refusing to testify before a congressional committee.

59. U. S. *v.* Olsen, 57 Fed. 579.

60. 4 Bl. Comm. 336.

61. 1 Chitty Cr. L. 452–456. And see the cases cited in the notes following.

62. State *v.* Helveston, 38 La. Ann. 314; State *v.* Howe, 27 Oreg. 138, 44 Pac. 672; and other cases cited in the notes following.

63. *Alabama.*— Hawkins *v.* State, 1 Port. 475, 27 Am. Dec. 641.

Arkansas.— State *v.* McMinn, 34 Ark. 160.

California.— People *v.* Bentley, 77 Cal. 7, 18 Pac. 799, 11 Am. St. Rep. 224.

Florida.— Wallace *v.* State, 41 Fla. 547, 26 So. 713.

Georgia.— Gully *v.* State, 116 Ga. 527, 42 S. E. 790; Downing *v.* State, 66 Ga. 160.

Illinois.— People *v.* McCoy, 30 Ill. App. 272.

Iowa.— State *v.* Caywood, 96 Iowa 367, 65 N. W. 385; State *v.* Foster, 33 Iowa 525.

Kentucky.— Turner *v.* Com., 42 S. W. 1129, 19 Ky. L. Rep. 1161.

Massachusetts.— Com. *v.* Fredericks, 155 Mass. 455, 29 N. E. 622; Com. *v.* Tenney, 97 Mass. 50.

Missouri.— State *v.* Miller, 90 Mo. App. 131.

New Jersey.— State *v.* Cooper, 13 N. J. L. 361, 25 Am. Dec. 490.

New York.— People *v.* Saunders, 4 Park. Cr. 196; Van Houton's Case, 2 City Hall Rec. 73.

North Carolina.— State *v.* Morgan, 95 N. C. 641.

Ohio.— Methard *v.* State, 19 Ohio St. 363.

Oregon.— State *v.* Howe, 27 Oreg. 138, 44 Pac. 672; State *v.* Stewart, 11 Oreg. 52, 238, 4 Pac. 128.

South Carolina.— State *v.* Taylor, 2 Bailey 49.

Tennessee.— State *v.* Ellison, 4 Lea 229; State *v.* Cameron, 3 Heisk. 78.

Texas.— Powell *v.* State, 42 Tex. Cr. 11, 57 S. W. 94; Nichols *v.* State, 37 Tex. Cr. 616, 40 S. W. 502; Inman *v.* State, 35 Tex. Cr. 36, 30 S. W. 219; Harrington *v.* State, 31 Tex. Cr. 577, 21 S. W. 356; Willis *v.* State, 24 Tex. App. 586, 6 S. W. 857.

Utah.— People *v.* Kerm, 8 Utah 268, 30 Pac. 988.

Virginia.— Page *v.* Com., 27 Gratt. 954.

United States.— Berkowitz *v.* U. S., 93 Fed. 452, 35 C. C. A. 379; U. S. *v.* Three Copper Stills, 47 Fed. 495; U. S. *v.* Butler, 38 Fed. 498.

England.— Reg. *v.* Gilmore, 15 Cox C. C. 85.

See 14 Cent. Dig. tit. "Criminal Law," § 382.

Murder.— An acquittal on an indictment for a murder committed by shooting with a gun is no bar to an indictment for a murder

under the former, related to the same crime, and was sufficient if believed by the jury to have warranted a conviction of that crime, the offenses are identical, and a plea of former conviction or acquittal is a bar.[64]

3. Periods Covered by Prosecution. An acquittal or a conviction of a crime is no bar to a subsequent indictment for the same offense or the same species of crime, where the latter is alleged to have been committed at a different date from that previously tried, unless the offense is continuous.[65] But where a continuous offense is charged between specified dates, if any portion of the time covered by the indictment has been used on or applied under a former indictment and has resulted in a conviction the former conviction is a bar.[66]

committed by beating upon the head with a gun. Guedel *v.* People, 43 Ill. 226.

Same offense by different names.—The plea of *autrefois acquit* is sufficient whenever the proof shows that the second case involves the same transaction as the first, although the offense is called by a different name. Holt *v.* State, 38 Ga. 187.

64. *Alabama.*— State *v.* Johnson, 12 Ala. 840, 46 Am. Dec. 283.

Arkansas.— McCoy *v.* State, 46 Ark. 141, holding that a plea of former acquittal is not sustained by proof of an acquittal under a former indictment of acts of which the defendant could not be acquitted under the later indictment.

Colorado.— Dill *v.* People, 19 Colo. 469, 36 Pac. 229, 41 Am. St. Rep. 254.

Connecticut.— Wilson *v.* State, 24 Conn. 57, holding that generally to constitute a legal identity between two offenses, so as to make an acquittal or conviction of one available as a defense against a prosecution for the other, it is necessary that the averments of the second information should be such that if proved they would have warranted a conviction under the first.

Georgia.— Roberts *v.* State, 14 Ga. 8, 58 Am. Dec. 528.

Hawaii.— Republic *v.* Radin, 11 Hawaii 802.

Illinois.— Durham *v.* People, 5 Ill. 172, 39 Am. Dec. 407.

Indiana.— Smith *v.* State, 85 Ind. 553; State *v.* Rosenbaum, 23 Ind. App. 236, 55 N. E. 110, 77 Am. St. Rep. 432.

Kentucky.— Colliver *v.* Com., 90 Ky. 262, 13 S. W. 922, 12 Ky. L. Rep. 160; Henderson *v.* Com., 7 Ky. L. Rep. 745.

Louisiana.— State *v.* Williams, 45 La. Ann. 936, 12 So. 932; State *v.* Keogh, 13 La. Ann. 243.

Massachusetts.— Com. *v.* Sutherland, 109 Mass. 342.

Mississippi.— Rocco *v.* State, 37 Miss. 357.

New York.— People *v.* Burch, 1 N. Y. St. 751.

North Carolina.— State *v.* Birmingham, 44 N. C. 120; State *v.* Jesse, 20 N. C. 95.

Ohio.— Price *v.* State, 19 Ohio 423.

Pennsylvania.— Com. *v.* Hiland, 1 Pa. Co. Ct. 532; Com. *v.* Maher, 16 Phila. 451.

South Carolina.— State *v.* Switzer, 65 S. C. 187, 43 S. E. 513; State *v.* Copeland, 46 S. C. 13, 23 S. E. 980.

Texas.— Landrum *v.* State, 37 Tex. Cr. 666, 40 S. W. 737; Fenton *v.* State, 33 Tex. Cr. 633, 28 S. W. 537; McElmurray *v.* State, 21 Tex. App. 691, 2 S. W. 892.

United States.— U. S. *v.* Nickerson, 17 How. 204, 15 L. ed. 219; U. S. *v.* Flecke, 25 Fed. Cas. No. 15,120, 2 Ben. 456.

See 14 Cent. Dig. tit. "Criminal Law," § 384.

65. *Arkansas.*— State *v.* Blahut, 48 Ark. 34, 2 S. W. 190.

Iowa.— State *v.* Ingraham, 96 Iowa 278, 65 N. W. 152; State *v.* Webber, 76 Iowa 686, 39 N. W. 286; State *v.* Sterrenberg, 69 Iowa 544, 29 N. W. 457; State *v.* Derichs, 42 Iowa 196.

Kansas.— State *v.* Shafer, 20 Kan. 226.

Louisiana.— State *v.* Malone, 28 La. Ann. 80.

Missouri.— State *v.* Burlingame, 146 Mo. 207, 48 S. W. 72.

New York.— People *v.* Sinell, 131 N. Y. 571, 30 N. E. 47 [*affirming* 58 Hun 607, 12 N. Y. Suppl. 40].

Ohio.— Gormley *v.* State, 37 Ohio St. 120.

Pennsylvania.—Com. *v.* Walker, 3 Pa. Dist. 348.

South Carolina.— State *v.* Cassety, 1 Rich. 90.

Texas.— Fehr *v.* State, 36 Tex. Cr. 93, 35 S. W. 381, 650; Hunt *v.* State, (Cr. App. 1901) 60 S. W. 965.

Utah.— U. S. *v.* Snow, 4 Utah 295, 9 Pac. 686.

United States.— Bliss *v.* U. S., 105 Fed. 508, 44 C. C. A. 324.

See 14 Cent. Dig. tit. "Criminal Law," § 385.

66. Smith *v.* State, 79 Ala. 257; Fleming *v.* State, 28 Tex. App. 234, 12 S. W. 605.

The keeping of disorderly houses and of gaming-houses are continuous offenses, and a conviction of either crime bars all prosecutions covering the period up to the time of such conviction. Freeman *v.* State, 119 Ind. 501, 21 N. E. 1101; State *v.* Lindley, 14 Ind. 430; People *v.* Cox, 107 Mich. 435, 65 N. W. 283; Huffman *v.* State, 23 Tex. App. 491, 5 S. W. 134; Dixon *v.* Washington, 7 Fed. Cas. No. 3,935, 4 Cranch C. C. 114; U. S. *v.* Burch, 24 Fed. Cas. No. 14,683, 1 Cranch C. C. 36.

Desertion of wife.— A conviction of a husband for the abandonment of his wife bars a subsequent conviction for the same abandonment, although prolonged beyond the first, for the whole of the continuous, unbroken abandonment is one offense. State *v.* Dunston,

4. Several Offenses Involved in Same Transaction — a. In General. The legislature may carve out of a single act or transaction several crimes,[67] so that the individual may, at the same time and in the same transaction, commit several distinct crimes, in which case an acquittal or a conviction of one will not be a bar to an indictment for the other.[68]

78 N. C. 418; Com. *v.* Markley, 5 Pa. Dist. 134, 17 Pa. Co. Ct. 254.

Sunday observance.— A conviction for doing business on Sunday is a bar to a prosecution for doing business at other times on the same day. Com. *v.* Moses, 15 Pa. Co. Ct. 224. And see Altenburg *v.* Com., 126 Pa. St. 602, 17 Atl. 799, 4 L. R. A. 543.

Common seller of intoxicating liquors.— A conviction of this offense for a continuous period is no bar to a prosecution for a date not included in it (Com. *v.* Keefe, 7 Gray (Mass.) 332), and seemingly for a specific date included in it (Com. *v.* Hudson, 14 Gray (Mass.) 11), but it has also been held that a conviction as a common seller of liquor is a bar to all complaints for sales prior to the filing of the complaint (Com. *v.* Cain, 14 Gray (Mass.) 9; State *v.* Nutt, 28 Vt. 598).

Continuous maintenance of nuisance.— A conviction of maintaining a nuisance during a continuous period is not a bar to a subsequent prosecution for a period included in the former, where the acts charged were not the product of a single impulse. Com. *v.* Respass, 50 S. W. 549, 21 Ky. L. Rep. 140.

67. U. S. *v.* Harmison, 26 Fed. Cas. No. 15,308, 3 Sawy. 556. "The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offence. A single act may be an offence against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." Morey *v.* Com., 108 Mass. 433, 434.

68. *Alabama.*— Brewer *v.* State, 59 Ala. 101; State *v.* Standifer, 5 Port. 523.

California.— People *v.* Bentley, 77 Cal. 7, 18 Pac. 799, 11 Am. St. Rep. 225.

Georgia.— McIntosh *v.* State, 116 Ga. 543, 42 S. E. 793.

Hawaii.— Rex *v.* Tai Wa, 5 Hawaii 596.

Indiana.— State *v.* Balsley, 159 Ind. 395, 65 N. E. 185.

Kentucky.— Smith *v.* Com., 32 S. W. 137, 17 Ky. L. Rep. 541.

Louisiana.— State *v.* Faulkner, 39 La. Ann. 811, 2 So. 539.

Maine.— State *v.* Inness, 53 Me. 536.

Massachusetts.— Morey *v.* Com., 108 Mass. 433; Com. *v.* Clair, 7 Allen 525.

Mississippi.— Teat *v.* State, 53 Miss. 439, 24 Am. Rep. 708.

North Carolina.— State *v.* Lawson, 123 N. C. 740, 31 S. E. 667, 68 Am. St. Rep. 844.

Oregon.— State *v.* Magone, 35 Oreg. 114, 56 Pac. 648.

Pennsylvania.— Dinkey *v.* Com., 17 Pa. St. 126, 55 Am. Dec. 542; Com. *v.* Neeley, 2 Chest. Co. Rep. 191.

South Carolina.— State *v.* Williams, 11 S. C. 288; State *v.* Glasgow, Dudley 40.

Tennessee.— Fiddler *v.* State, 7 Humphr. 508.

Vermont.— State *v.* Matthews, 42 Vt. 542.

Virginia.— Benton *v.* Com., 91 Va. 782, 21 S. E. 495; Forbes *v.* Com., 90 Va. 550, 19 S. E. 164.

Wisconsin.— Clifford *v.* State, 29 Wis. 327.

United States.— Carter *v.* McClaughry, 183 U. S. 365, 22 S. Ct. 181, 46 L. ed. 236.

See 14 Cent. Dig. tit. "Criminal Law," § 386.

Illustrations in cases of conviction.—In the following cases a conviction of the crime first enumerated was held no bar to a prosecution for that coupled with it, although both were involved in the same act: Robbery from the person and assault with intent to commit murder (Wilcox *v.* State, 6 Lea (Tenn.) 571, 40 Am. Rep. 53); robbery and burglary in the same transaction (Copenhaven *v.* State, 15 Ga. 264); intoxication and profanity, and disturbing religious worship by the same and other modes (Ball *v.* State, 67 Miss. 358, 7 So. 353); administering a drug with intent to produce a miscarriage and manslaughter (Lohman *v.* People, 1 N. Y. 379, 49 Am. Dec. 340); breach of the peace and perjury committed at the trial therefor (Wadlington *v.* Com., 59 S. W. 851, 22 Ky. L. Rep. 1108); disturbing a religious assembly by firing a pistol and an attempt to commit murder at the same time with the same pistol (State *v.* Ross, 4 Lea (Tenn.) 442); bigamy and adultery (Swancoat *v.* State, 4 Tex. App. 105); and killing an animal with intent to injure its owner and wantonly killing the same (Irvin *v.* State, 7 Tex. App. 78).

Illustrations in cases of acquittal.— An acquittal on a prosecution for maliciously shooting and wounding a horse is no bar to a prosecution for shooting with intent to kill, the shooting being one and the same. State *v.* Horneman, 16 Kan. 452. An acquittal on an indictment for stealing money bars an indictment for stealing a national bank-note, both indictments being for the same act. State *v.* Moore, 66 Mo. 372. A prosecution and acquittal of perjury to procure a continuance does not bar a prosecution for perjury in the same affidavit to procure an attachment. State *v.* Williams, 1 N. C. 528.

Aiding escape.— A conviction of aiding A to escape from prison is a bar to an indictment for aiding B to escape when the means and time of the escape were the same. Hurst *v.* State, 86 Ala. 604, 6 So. 120, 11 Am. St. Rep. 79.

Libel.— An acquittal of libel in a specified newspaper article is a bar to a subsequent prosecution for other libelous words in

b. Less Offense Included in Greater. One who is convicted of a crime less in degree than the offense for which he is indicted is by implication acquitted of the greater offense and may plead the acquittal as a bar to a subsequent indictment for it.[69] On the other hand an acquittal or conviction of an offense which necessarily includes a minor crime is a bar to a subsequent prosecution for the latter.[70]

c. Assault and Other Offenses[71] — (i) *In General.* An assault is a necessary element of many felonies and is usually an element of an attempt to commit the same crimes. An assault also frequently accompanies the commission of other crimes of which it is not a necessary element. It is usually held that an acquittal or conviction of a simple assault and battery, where it is an element of another crime, is a bar to a subsequent prosecution for the greater crime.[72] A conviction of an assault is a bar to a prosecution for the battery or mayhem in which it terminated.[73]

(ii) *Assault in Different Degrees.* A conviction of simple assault, or of assault and battery, where one is indicted for aggravated assault, as for assault

the same newspaper article. People *v.* Stephens, 79 Cal. 428, 21 Pac. 856, 4 L. R. A. 845.

Embezzlement.—A person who is intrusted with a check to be carried into another county and cashed, and who upon his return to the county from which he started appropriates the proceeds, may be tried for embezzlement in that county, although previously acquitted of the same charge in the county where the check was cashed, and in which no offense was committed. State *v.* Bacon, 170 Mo. 161, 70 S. W. 473.

69. *Alabama.*— Storrs *v.* State, 129 Ala. 101, 29 So. 778.

California.— People *v.* Apgar, 35 Cal. 389.

Kentucky.—Williams *v.* Com., 102 Ky. 381, 43 S. W. 455, 19 Ky. L. Rep. 1427.

Missouri.— State *v.* Pitts, 57 Mo. 85; State *v.* Brannon, 55 Mo. 63, 11 Am. Rep. 643; State *v.* Smith, 53 Mo. 139.

Pennsylvania.— Com. *v.* Morgan, 9 Kulp 573; Com. *v.* Reed, 4 Lanc. L. Rev. 89; Com. *v.* Neeley, 2 Chest. Co. Rep. 191.

Texas.— Achterberg *v.* State, 8 Tex. App. 463.

Vermont.— State *v.* Smith, 43 Vt. 324.

Wisconsin.— State *v.* Martin, 30 Wis. 216, 11 Am. Rep. 567.

United States.—*In re* Bennett, 84 Fed. 324.

See 14 Cent. Dig. tit. "Criminal Law," § 387.

70. *Alabama.*— State *v.* Standifer, 5 Port. 523.

Delaware.— State *v.* Townsend, 2 Harr. 543.

Indiana.— State *v.* Hattabough, 66 Ind. 223.

Kentucky.— Triplett *v.* Com., 84 Ky. 193, 1 S. W. 84, 8 Ky. L. Rep. 67.

Pennsylvania.— Com. *v.* Neeley, 2 Chest. Co. Rep. 191.

England.— Reg. *v.* Gould, 9 C. & P. 364, 38 E. C. L. 217.

See 14 Cent. Dig. tit. "Criminal Law," § 387.

71. Assault upon different persons see *infra*, IX, J, 7, a.

72. *Alabama.*— State *v.* Blevine, 134 Ala. 213, 32 So. 637, 92 Am. St. Rep. 52; Storrs *v.* State, 129 Ala. 101, 29 So. 778; Gunter *v.* State, 111 Ala. 23, 23 So. 632, 66 Am. St. Rep. 17.

California.— People *v.* Defoor, 100 Cal. 150, 34 Pac. 642.

Georgia.— Bell *v.* State, 103 Ga. 397, 30 S. E. 294, 68 Am. St. Rep. 102.

Indiana.— Hamilton *v.* State, 36 Ind. 280, 10 Am. Rep. 22.

Louisiana.— State *v.* Cheevers, 7 La. Ann. 40.

Mississippi.— Rucker *v.* State, (1898) 24 So. 311.

Missouri.— State *v.* Hatcher, 136 Mo. 641, 38 S. W. 719.

North Carolina.— State *v.* Robinson, 116 N. C. 1046, 21 S. E. 701.

Pennsylvania.— Com. *v.* Neeley, 2 Chest. Co. Rep. 191.

Tennessee.— State *v.* Chaffin, 2 Swan 493.

Texas.— Herera *v.* State, 35 Tex. Cr. 607, 34 S. W. 943.

Contra, State *v.* Nichols, 83 Ark. 550.

See 14 Cent. Dig. tit. "Criminal Law," § 388.

Assault with intent to murder, being an offense of a different nature from threats to kill, a conviction for the one is no bar to a prosecution for the other. Lewis *v.* State, 1 Tex. App. 323.

Breach of the peace and assault.— A conviction of breach of the peace is a bar to a prosecution for the assault, as the breach of the peace is included in the assault. Com. *v.* Hawkins, 11 Bush (Ky.) 603; Com. *v.* Foster, 3 Metc. (Ky.) 1; Com. *v.* Miller, 5 Dana (Ky.) 320. But see State *v.* Sly, 4 Oreg. 277. But a conviction for a breach of the peace by assaulting A will not bar a subsequent prosecution for an assault and battery upon B, although both offenses are parts of the same transaction. Olathe *v.* Thomas, 26 Kan. 233.

Robbery and assault.— One cannot be convicted for robbery and also for an assault with intent to commit murder growing out of the robbery. Wilcox *v.* State, 6 Lea (Tenn.) 571, 40 Am. Rep. 53; Moore *v.* State, 33 Tex. Cr. 166, 25 S. W. 1120.

73. People *v.* Defoor, 100 Cal. 150, 34 Pac. 642; State *v.* Chaffin, 2 Swan (Tenn.) 493.

with intent to kill or rape, is an implied acquittal of the crime of the higher grade, and will be a bar to a subsequent indictment for it.[74] It has been held in Indiana, however, that a conviction or acquittal of simple assault and battery does not bar a prosecution for assault with intent to commit a felony.[75]

(III) *ASSAULT AND AFFRAY.* A conviction of an affray is a bar to a subsequent prosecution for assault and battery involved in the same transaction.[76] And *vice versa* a conviction of an assault and battery is a bar to an indictment for an affray.[77]

(IV) *ASSAULT AND RIOT.* A conviction of an assault and battery committed in a riot is no bar to a conviction under an indictment for the riot,[78] unless the assault and riot are so inseparably connected that the evidence which would prove the one will prove the other.[79]

(V) *ASSAULT AND HOMICIDE.* A conviction or acquittal of assault and battery, or of assault with intent to commit murder, or do grievous bodily harm, is not a bar to a subsequent prosecution for murder or manslaughter, where the person assaulted died of the blows inflicted.[80]

(VI) *ASSAULT AND CONTEMPT.* A fine inflicted for contempt of court in committing a battery in open court is not a former conviction of that crime, so as to bar an indictment for it.[81]

d. Homicide in Different Degrees.[82] The authorities are hopelessly at variance

74. Moore *v.* State, 71 Ala. 307; Drake *v.* State, 60 Ala. 42; People *v.* McDaniels, 137 Cal. 192, 69 Pac. 1006, 92 Am. St. Rep. 81; People *v.* Defoor, 100 Cal. 150, 34 Pac. 642; People *v.* Gordon, 99 Cal. 227, 33 Pac. 901; Reagan *v.* State, (Tex. Cr. 1899) 51 S. W. 914; Huff *v.* State, (Tex. Cr. 1894) 24 S. W. 903; Robinson *v.* State, 21 Tex. App. 160, 17 S. W. 632; Tribble *v.* State, 2 Tex. App. 424; Stuart *v.* Com., 28 Gratt. (Va.) 950.

Contra.— State *v.* Foster, 33 Iowa 525. Some of the cases hold that the defendant by applying for and procuring a new trial waives his right to plead the conviction of the simple assault as a bar. People *v.* Palmer, 109 N. Y. 413, 17 N. E. 213, 4 Am. St. Rep. 477.

75. State *v.* Hattabough, 66 Ind. 223. But see State *v.* Hatcher, 136 Mo. 641, 38 S. W. 719, and other cases cited in the preceding note. An acquittal of assault with intent to rob is not a bar to an indictment for robbery connected with the assault (State *v.* Caddy, 15 S. D. 167, 87 N. W. 927, 91 Am. St. Rep. 666) or for a murder which was involved in an assault with intent to commit robbery (Taylor *v.* State, 41 Tex. Cr. 564, 55 S. W. 961); but a conviction of an assault with intent to kill will be a bar to an indictment for the same assault with intent to rob, as the two indictments relate to the same act. State *v.* Chinault, 55 Kan. 326, 40 Pac. 662.

76. Fritz *v.* State, 40 Ind. 18; State *v.* Stanly, 49 N. C. 290. But a conviction of an affray by beating in public one person will not be a bar to an indictment for assault and battery in striking another at the same time and place. State *v.* Parish, 8 Rich. (S. C.) 322.

77. Com. *v.* McChord, 2 Dana (Ky.) 242.

78. Skidmore *v.* Bricker, 77 Ill. 164; Freeland *v.* People, 16 Ill. 380; U. S. *v.* Peaco, 27 Fed. Cas. No. 16,018, 4 Cranch C. C. 601.

79. Wininger *v.* State, 13 Ind. 540; Com. *v.* Reed, 4 Lanc. L. Rev. 89. A conviction of a riot is a bar to a prosecution for an assault involved in it. State *v.* Lindsay, 61 N. C. 468.

80. *California.*— People *v.* Defoor, 100 Cal. 150, 34 Pac. 642.

District of Columbia.— Hopkins *v.* U. S., 4 App. Cas. 430.

Maine.— State *v.* Littlefield, 70 Me. 452, 35 Am. Rep. 335.

Massachusetts.— Com. *v.* Roby, 12 Pick. 496.

New York.— Burns *v.* People, 1 Park. Cr. 182.

Ohio.— State *v.* Ross, 4 Ohio S. & C. Pl. Dec. 5, 2 Ohio N. P. 368.

Pennsylvania.— Com. *v.* Neeley, 2 Chest. Co. Rep. 191.

Texas.— Curtis *v.* State, 22 Tex. App. 227, 3 S. W. 86, 58 Am. Rep. 635; Johnson *v.* State, 19 Tex. App. 453, 53 Am. Rep. 385.

England.— Reg. *v.* Morris, L. R. 1 C. C. 90, 10 Cox C. C. 480, 36 L. J. M. C. 84, 16 L. T. Rep. N. S. 636, 15 Wkly. Rep. 990; Reg. *v.* Friel, 17 Cox C. C. 325; Reg. *v.* De Salvi, 10 Cox C. C. 481 note.

See 14 Cent. Dig. tit. "Criminal Law," § 392.

An acquittal under an indictment charging murder without averring an assault and battery is not an implied acquittal of the latter crimes, nor a bar to their prosecution. Moore *v.* State, 59 Miss. 25.

A conviction of involuntary manslaughter in killing one person by shooting at another is a bar to an indictment for assaulting the other with intent to kill, as a conviction of the former crime necessarily implies an acquittal of the latter. Carson *v.* People, 4 Colo. App. 463, 36 Pac. 551.

81. State *v.* Gardner, 72 N. C. 379; State *v.* Yancy, 4 N. C. 133, 6 Am. Dec. 553.

82. Homicide of different persons see *infra*, IX, J, 7, a.

upon the question whether, where the accused, being indicted for murder, is convicted of manslaughter, or of some degree of homicide less than murder in the first degree, and obtains a new trial, he can be indicted and tried for murder. Some cases hold that the conviction of the less degree of homicide is an implied acquittal of the murder, and bars a subsequent indictment for it.[83] Other cases deny this doctrine altogether.[84]

e. Abduction and Kidnapping. A conviction of simple abduction will bar a subsequent indictment for kidnapping or felonious abduction.[85]

f. Larceny and Kindred Offenses. Larceny is usually involved in burglary, receiving stolen goods, and the statutory offenses of false pretenses and embezzlement, and always in the crime of robbery. Whether acquittal or conviction of larceny will be a bar to an indictment for any of these crimes connected with it, and whether, on the other hand, a conviction of any of these crimes will be a bar to an indictment for the larceny which is involved in it, depends upon the circumstances of the case. If the two offenses are identical in time, place, and motive, so that the proof of one is necessary to convict of the other, the conviction of either, in the absence of a statute, is a bar to the prosecution for the other. But generally the fact that these crimes are parts of one transaction does not make them. The cases sustain these general principles with some lack of harmony in applying them to the facts.[86]

83. *Alabama.*— Sylvester *v.* State, 72 Ala. 201; Berry *v.* State, 65 Ala. 117.

Arkansas.— Johnson *v.* State, 29 Ark. 31, 21 Am. Rep. 154.

California.— People *v.* McFarlane, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245; People *v.* Gilmore, 4 Cal. 376, 60 Am. Dec. 620. But see People *v.* Carty, 77 Cal. 213, 19 Pac. 490; People *v.* Keefer, 65 Cal. 232, 3 Pac. 818.

Florida.— Golding *v.* State, 31 Fla. 262, 12 So. 525; Johnson *v.* State, 27 Fla. 245, 9 So. 208.

Iowa.— State *v.* Helm, 92 Iowa 540, 61 N. W. 246; State *v.* Tweedy, 11 Iowa 350.

Louisiana.— State *v.* Joseph, 40 La. Ann. 5, 3 So. 405; State *v.* Dennison, 31 La. Ann. 847; State *v.* Byrd, 31 La. Ann. 419; State *v.* Johnson, 10 La. Ann. 456.

Mississippi.— Rolls *v.* State, 52 Miss. 391; Hurt *v.* State, 25 Miss. 378, 59 Am. Dec. 225.

Oregon.— State *v.* Steeves, 29 Oreg. 85, 43 Pac. 947.

Pennsylvania.— Com. *v.* Neeley, 2 Chest. Co. Rep. 191; Com. *v.* Werbine, 12 Lanc. Bar 79.

Tennessee.— Slaughter *v.* State, 6 Humphr. 410. See also Greer *v.* State, 3 Baxt. 321.

Texas.— Flynn *v.* State, 43 Tex. Cr. 407, 66 S. W. 551; Coleman *v.* State, 43 Tex. Cr. 280, 65 S. W. 90; Pickett *v.* State, 43 Tex. Cr. 1, 63 S. W. 325; Harvey *v.* State, 35 Tex. Cr. 545, 34 S. W. 623; Black *v.* State, (Cr. App. 1902) 68 S. W. 683; Davis *v.* State, (Cr. App. 1898) 47 S. W. 978.

Washington.— State *v.* Murphy, 13 Wash. 229, 43 Pac. 44.

West Virginia.— State *v.* Cross, 44 W. Va. 315, 29 S. E. 527.

Wisconsin.— State *v.* Belden, 33 Wis. 120, 14 Am. Rep. 748.

See 14 Cent. Dig. tit. "Criminal Law," § 394.

84. *Georgia.*— Waller *v.* State, 104 Ga. 505, 30 S. E. 835; Bailey *v.* State, 26 Ga. 579.

Indiana.— Veatch *v.* State, 60 Ind. 291; *Ex p.* Bradley, 48 Ind. 548.

Kansas.— State *v.* Miller, 35 Kan. 328, 10 Pac. 865.

Kentucky.— Com. *v.* Arnold, 83 Ky. 1, 6 Ky. L. Rep. 181, 4 Am. St. Rep. 114.

Missouri.— State *v.* Billings, 140 Mo. 193, 41 S. W. 778; State *v.* Anderson, 89 Mo. 312, 1 S. W. 135; State *v.* Simms, 71 Mo. 538; State *v.* Kring, 11 Mo. App. 92. Prior to the constitution of 1875 the rule in Missouri was otherwise. State *v.* Smith, 53 Mo. 139; State *v.* Ross, 29 Mo. 32.

Nebraska.— Bohanan *v.* State, 18 Nebr. 57, 24 N. W. 390, 53 Am. Rep. 791.

Ohio.— State *v.* Behimer, 20 Ohio St. 572.

Vermont.— State *v.* Bradley, 67 Vt. 465, 32 Atl. 238.

Virginia.— Briggs *v.* Com., 82 Va. 554.

England.— Reg. *v.* Tancock, 13 Cox C. C. 217, 34 L. T. Rep. N. S. 455; Reg. *v.* Connell, 6 Cox C. C. 178.

See 14 Cent. Dig. tit. "Criminal Law," § 394.

85. Mason *v.* State, 29 Tex. App. 24, 14 S. W. 71.

86. Robbery and larceny.— An acquittal (People *v.* McGowan, 17 Wend. (N. Y.) 386) or conviction of robbery (State *v.* Pitts, 57 Mo. 85; State *v.* Brannon, 55 Mo. 63, 17 Am. Rep. 643) is a bar to a subsequent indictment for the larceny involved in the robbery. On the other hand, a conviction of larceny is a bar to an indictment for robbery arising out of the same transaction. Powell *v.* State, 89 Ala. 172, 8 So. 109; Moore *v.* State, 71 Ala. 307; State *v.* Mikesell, 70 Iowa 176, 30 N. W. 474.

Burglary and larceny, although committed at the same time, are essentially separate crimes, and a conviction of one is no bar to

g. Offenses in Relation to Intoxicating Liquors. Many transactions have by statutes regulating the sale of intoxicants been divided into two or more crimes so distinct in their characters that jeopardy for one is not a bar to a prosecution for the other.[87]

a prosecution for the other. State *v.* Martin, 76 Mo. 337. But it has been held that an acquittal or conviction for burglary with intent to commit larceny may be pleaded in bar on a subsequent indictment for the larceny, where the taking was a part of the transaction constituting the alleged burglary. Triplett *v.* Com., 84 Ky. 193, 1 S. W. 84, 8 Ky. L. Rep. 67; State *v.* De Graffenreid, 9 Baxt. (Tenn.) 287; Davis *v.* State, 3 Coldw. (Tenn.) 77. *Contra,* State *v.* Warner, 14 Ind. 572; People *v.* Parrow, 80 Mich. 567, 45 N. W. 514. A conviction or an acquittal of larceny is not a bar to a subsequent separate indictment for the burglary of which it was a part. Wilson *v.* State, 24 Conn. 57; State *v.* Ingalls, 98 Iowa 728, 68 N. W. 445; State *v.* Hackett, 47 Minn. 425, 50 N. W. 472, 28 Am. St. Rep. 380; Territory *v.* Willard, 8 Mont. 328, 21 Pac. 301; Sharp *v.* State, 61 Nebr. 187, 85 N. W. 38; People *v.* McCloskey, 5 Park. Cr. (N. Y.) 57; Com. *v.* Neeley, 2 Chest. Co. Rep. (Pa.) 191; Fielder *v.* State, 40 Tex. Cr. 184, 49 S. W. 376; Loakman *v.* State, 32 Tex. Cr. 563, 25 S. W. 22; Turner *v.* State, 22 Tex. App. 42, 2 S. W. 619; Howard *v.* State, 8 Tex. App. 447. *Contra,* Bowen *v.* State, 106 Ala. 178, 17 So. 335; State *v.* Cooper, 13 N. J. L. 361, 25 Am. Dec. 490.

Larceny and receiving stolen goods.— An acquittal or conviction of larceny is no bar to a subsequent indictment for receiving stolen goods, as the two crimes are separate and independent, require different facts to prove them and the proof of either will not sustain a charge of the other. Foster *v.* State, 39 Ala. 229. See also Pat *v.* State, 116 Ga. 92, 42 S. E. 389. Where both are included in one indictment, a conviction of one is an implied acquittal of the other, and bars a subsequent prosecution for it. George *v.* State, 59 Nebr. 163, 80 N. W. 486; U. S. *v.* Harmison, 26 Fed. Cas. No. 15,308, 3 Sawy. 556. But neither an acquittal of larceny nor a conviction of receiving stolen goods is a bar to a subsequent indictment as an accessary before the fact to the larceny. State *v.* Larkin, 49 N. H. 36, 6 Am. Rep. 456.

Burglary with intent to steal and receiving stolen goods are not the same crime, nor can the same individual be guilty of both of them so far as the same goods are concerned, and an acquittal of burglary is no bar to a prosecution for receiving the goods which were taken from the house by the burglar. Pat *v.* State, 116 Ga. 92, 42 S. E. 389; Com. *v.* Bragg, 104 Ky. 306, 47 S. W. 212, 20 Ky. L. Rep. 541.

Larceny and false pretenses.— In England, by statute, one convicted or acquitted of obtaining goods by false pretenses cannot be convicted on the same facts of larceny (Reg. *v.* King, [1897] 1 Q. B. 214, 18 Cox C. C. 447, 61 J. P. 329, 66 L. J. Q. B. 87, 75 L. T. Rep. N. S. 392; Reg. *v.* Henderson, 1 C. & M. 328, 2 Moody C. C. 193, 41 E. C. L. 183); but, generally, in the United States, as the constituents of the two offenses are not the same, a conviction or acquittal of either crime is not a bar to an indictment for the other. Dominick *v.* State, 40 Ala. 680, 91 Am. Dec. 496. But see State *v.* Reiff, 14 Wash. 664, 45 Pac. 318.

Larceny and bringing stolen property into state.— An acquittal of larceny in another state is a bar to a proceeding for bringing stolen property into the state. *In re* Hess, 5 Kan. App. 763, 48 Pac. 596.

Larceny from different persons see *infra,* IX, J, 7, b.

87. A conviction of maintaining a common nuisance is no bar to an indictment for illegally keeping liquors for sale (State *v.* Zimmerman, 78 Iowa 614, 43 N. W. 458; State *v.* Wold, 96 Me. 401, 52 Atl. 909; Com. *v.* McCabe, 163 Mass. 400, 40 N. E. 182; Com. *v.* McCabe, 163 Mass. 98, 39 N. E. 777; State *v.* Wheeler, 62 Vt. 439, 20 Atl. 601; State *v.* Jangraw, 61 Vt. 39, 17 Atl. 733; State *v.* Lincoln, 50 Vt. 644), or for being a common seller of intoxicating liquors (State *v.* Inness, 53 Me. 536; Com. *v.* Cutler, 9 Allen (Mass.) 486; Com. *v.* O'Donnell, 8 Allen (Mass). 548; Com. *v.* Bubser, 14 Gray (Mass.) 83; Com. *v.* Lahy, 8 Gray (Mass.) 459); and a conviction of the latter offense is no bar to a conviction for a single sale (State *v.* Maher, 35 Me. 225; State *v.* Coombs, 32 Me. 529). Keeping liquors for sale and keeping a place in which they may be sold (State *v.* Moriarty, 50 Conn. 415; State *v.* Brown, 75 Iowa 768, 39 N. W. 829; State *v.* Graham, 73 Iowa 553, 35 N. W. 628; State *v.* Harris, 64 Iowa 287, 20 N. W. 439; Com. *v.* Breesford, 161 Mass. 61, 36 N. E. 677; Com. *v.* Sullivan, 150 Mass. 315, 23 N. E. 47; Com. *v.* Hanley, 140 Mass. 457, 5 N. E. 468; Com. *v.* McShane, 110 Mass. 502; Com. *v.* Sheehan, 105 Mass. 192; Com. *v.* McCauley, 105 Mass. 69; Com. *v.* Hogan, 97 Mass. 122), selling to a minor and selling otherwise illegally (Ruble *v.* State, 51 Ark. 170, 10 S. W. 262; State *v.* Gapen, 17 Ind. App. 524, 45 N. E. 678, 47 N. E. 25; Com. *v.* Vaughn, 101 Ky. 603, 42 S. W. 117, 19 Ky. L. Rep. 777, 45 L. R. A. 858; Mitchell *v.* State, 12 Nebr. 538, 11 N. W. 848; Miller *v.* State, 3 Ohio St. 475), selling on Sunday, and selling without a license (Smith *v.* State, 105 Ga. 724, 32 S. E. 127; Com. *v.* Montross, 8 Pa. Super. Ct. 237) are different offenses.

See 14 Cent. Dig. tit. "Criminal Law," § 397.

Separate sales.— A conviction of selling beer without an inspection cannot be pleaded in bar to another sale under the same circumstances, as each and every sale without inspection is a separate offense. State *v.* Broeder, 90 Mo. App. 169.

h. Violation of Sunday Laws and Other Offenses. A conviction of violating the Sunday law is no bar to a subsequent indictment for maintaining a disorderly house,[88] for the sale of liquors without a license,[89] or for the illegal sale and keeping of liquors,[90] as the evidence differs in each case, and the latter offenses are distinct crimes on whatever day they may be committed.

i. Forgery and Other Offenses. The crime of forgery and the crime of uttering a forged writing are by statute and at common law distinct offenses, and usually an acquittal of one is no bar to a prosecution for the other.[91] But it has been held that an acquittal of the forgery of an instrument will be a bar to a subsequent indictment for obtaining money by its use, where the forgery and the obtaining of the money are parts of the same transaction in point of time,[92] although not where they are separated in point of time, so that the evidence which would convict of one would not convict of the other.[93]

j. Arson and Other Offenses. At common law to constitute arson the house burned must be a dwelling house, but statutes have enlarged its scope so that it includes the burning of other buildings. Hence under an indictment in two counts, one for burning a dwelling, the other for burning a barn, a general verdict of guilty of arson applies to both, and there is no acquittal of either by implication.[94] Where by statute arson is divided into different degrees, a conviction of any degree implies an acquittal of the others.[95] A conviction of arson in burning a dwelling which results in the death of a person living in it is a bar to a subsequent prosecution for the homicide.[96]

k. Gaming and Other Offenses. A conviction under a municipal ordinance of keeping a gambling-house is not a bar to a subsequent prosecution for the same act as a nuisance at common law,[97] and as the crimes of keeping a gambling-house or gambling apparatus and of gambling and betting are distinct a conviction of either is no bar to a prosecution for the other.[98]

l. Conspiracy and Other Offenses. Where a conspiracy to commit a crime is a substantive offense, as is generally the case, neither an acquittal nor a conviction of a conspiracy to commit a crime is a bar to a prosecution for the commission of that crime.[99] For the same reason an acquittal[1] or a conviction[2] of a particular

88. Price *v.* State, 96 Ala. 1, 11 So. 128.

89. Com. *v.* Shea, 14 Gray (Mass.) 386.

90. Arrington *v.* Com., 87 Va. 96, 12 S. E. 224, 10 L. R. A. 242.

91. Harrison *v.* State, 36 Ala. 248; Beyerline *v.* State, 147 Ind. 125, 45 N. E. 772; State *v.* Williams, 152 Mo. 115, 53 S. W. 424, 75 Am. St. Rep. 441; Preston *v.* State, 40 Tex. Cr. 72, 48 S. W. 581; Hooper *v.* State, 30 Tex. App. 412, 17 S. W. 1066, 28 Am. St. Rep. 926. Under Tex. Pen. Code, art. 549*a*, by which a conviction of forgery is a bar to any other prosecution on the forged instrument, an acquittal of forging a deed is no bar to a prosecution for uttering the same deed where the offenses are distinct and cannot be proved by the same evidence. Preston *v.* State, 41 Tex. Cr. 300, 53 S. W. 127, 881; Green *v.* State, 36 Tex. Cr. 109, 35 S. W. 971; Reddick *v.* State, 31 Tex. Cr. 587, 21 S. W. 684.

Allegation of offense against different persons see *infra*, IX, J, 7, d.

92. People *v.* Krummer, 4 Park. Cr. (N. Y.) 217.

93. People *v.* Ward, 15 Wend. (N. Y.) 231; Com. *v.* Quann, 2 Va. Cas. 89.

94. State *v.* Fry, 98 Tenn. 323, 39 S. W. 231.

Difference in alleging ownership of house see *infra*, IX, J, 7, c.

95. State *v.* Colgate, 31 Kan. 511, 3 Pac. 346, 47 Am. Rep. 507. *Compare*, however, People *v.* Handley, 93 Mich. 46, 52 N. W. 1032; State *v.* Jenkins, 20 S. C. 351.

96. State *v.* Cooper, 13 N. J. L. 361, 25 Am. Dec. 490; Com. *v.* Reed, 4 Lanc. L. Rev. 89. But an acquittal on a charge of murder caused by burns received during the burning of a house is not a bar to an indictment for the arson. Reg. *v.* Lau Kin Chew, 8 Hawaii 370.

97. Respass *v.* Com., 107 Ky. 139, 53 S. W. 24, 21 Ky. L. Rep. 789; U. S. *v.* Holly, 26 Fed. Cas. No. 15,381, 3 Cranch C. C. 656; U. S. *v.* Hood, 26 Fed. Cas. No. 15,385, 2 Cranch C. C. 133. *Compare infra*, IX, J, 5, a.

98. Tuberson *v.* State, 26 Fla. 472, 7 So. 858; De Haven *v.* State, 2 Ind. App. 376, 28 N. E. 562; State *v.* Mosby, 53 Mo. App. 571; Tutt *v.* State, (Tex. Cr. 1895) 29 S. W. 268.

99. Davis *v.* People, 22 Colo. 1, 43 Pac. 122; Berkowitz *v.* U. S., 93 Fed. 452, 35 C. C. A. 379.

1. State *v.* Sias, 17 N. H. 558.

2. Bailey *v.* State, 42 Tex. 289, 59 S. W. 900; Whitford *v.* State, 24 Tex. App. 489, 6 S. W. 537, 5 Am. St. Rep. 896.

crime is no bar to a subsequent indictment for a conspiracy to commit the same.[3]

m. Rape and Other Offenses. A conviction of an attempt to commit rape is a bar to a subsequent indictment for the crime of rape,[4] but a prosecution for the crime of rape is not barred by a conviction of an assault and battery,[5] although doubtless an acquittal upon the charge of assault and battery would be a bar to a subsequent indictment for rape where both charges are based on the same transaction.[6] Under the general principle condemning the splitting of criminal acts into several crimes, it has been held that a conviction of rape is a bar to any offense included in the transaction,[7] but this rule is not universally recognized.[8]

5. Offenses Against Different Sovereignties — a. State and Municipality. Crimes are often punishable under municipal ordinances while also punishable under the state law as offenses against the state. Where the same act constitutes two crimes, one violating a city ordinance and the other violating a state statute, it is generally held that one charged therewith may be tried for both, and that a conviction or an acquittal of either is no bar to a conviction of the other.[9]

b. Different States. A conviction in one state for an act in violation of its laws is not a bar to a prosecution in another for the same act if it violates the laws of the latter,[10] unless by compact between the states it has been agreed that the jurisdiction shall vest exclusively in the state first apprehending and arresting the accused.[11]

3. A defendant who has been acquitted as an accessary before the fact to the commission of a crime cannot be subsequently tried for conspiracy to commit the crime, as the evidence necessary to support the second indictment would have procured a legal conviction on the first. Davis *v.* People, 22 Colo. 1, 43 Pac. 122.

4. State *v.* Shepard, 7 Conn. 54.

5. People *v.* Saunders, 4 Park. Cr. (N. Y.) 196; Reg. *v.* Gisson, 2 C. & K. 781, 61 E. C. L. 781.

6. People *v.* Purcell, 16 N. Y. Suppl. 199.

Burglary and rape.— A conviction of rape is a bar to a subsequent indictment for a burglary committed with intent to commit the crime. Com. *v.* Reed, 4 Lanc. L. Rev. 89.

7. Com. *v.* Arner, 149 Pa. St. 35, 24 Atl. 83; Com. *v.* McIlvain, 5 Pa. Dist. 175, 17 Pa. Co. Ct. 174.

8. Hall *v.* State, (Ala. 1902) 32 So. 750; Stewart *v.* State, 35 Tex. Cr. 174, 32 S. W. 766, 60 Am. St. Rep. 35.

9. *Alabama.*— Englehardt *v.* State, 88 Ala. 100, 7 So. 154.

Arkansas.— Van Buren *v.* Wells, 53 Ark. 368, 14 S. W. 38, 22 Am. St. Rep. 214. But see Richardson *v.* State, 56 Ark. 367, 19 S. W. 1052, under the act of March 30, 1891, which changes the former rule in this state.

California.— *Ex p.* Hong Shen, 98 Cal. 681, 33 Pac. 799.

Colorado.— Hughes *v.* People, 8 Colo. 536, 9 Pac. 50.

Florida.— Bueno *v.* State, 40 Fla. 160, 23 So. 862; Theisen *v.* McDavid, 34 Fla. 440, 16 So. 321, 26 L. R. A. 234; Hunt *v.* Jacksonville, 34 Fla. 504, 16 So. 398, 43 Am. St. Rep. 214.

Georgia.— De Graffenreid *v.* State, 72 Ga. 212.

Illinois.— Robbins *v.* People, 95 Ill. 175.

Indiana.— Ambrose *v.* State, 6 Ind. 351.

Kentucky.— Respass *v.* Com., 107 Ky. 139, 53 S. W. 24, 21 Ky. L. Rep. 789; Fortner *v.* Duncan, 91 Ky. 171, 15 S. W. 55, 12 Ky. L. Rep. 788, 11 L. R. A. 188; Kemper *v.* Com., 85 Ky. 219, 3 S. W. 159, 8 Ky. L. Rep. 763, 7 Am. St. Rep. 593. But see March *v.* Com., 12 B. Mon. 25; Lynch *v.* Com., 35 S. W. 264, 18 Ky. L. Rep. 145.

Louisiana.— State *v.* Baker, 105 La. 373, 29 So. 940; State *v.* Clifford, 45 La. Ann. 980, 13 So. 281; State *v.* Fourcade, 45 La. Ann. 717, 13 So. 187, 40 Am. St. Rep. 249.

Maryland.— Shafer *v.* Mumma, 17 Md. 331, 79 Am. Dec. 656.

Minnesota.— State *v.* Lee, 29 Minn. 445, 13 N. W. 913.

Mississippi.— Johnson *v.* State, 59 Miss. 543.

Missouri.— State *v.* Gustin, 152 Mo. 108, 53 S. W. 421; State *v.* Muir, 86 Mo. App. 642. The doctrine of the earlier cases to the contrary (State *v.* Thornton, 37 Mo. 360; State *v.* Simonds, 3 Mo. 414; State *v.* Freeman, 56 Mo. App. 579; Pilot Grove *v.* McCormick, 56 Mo. App. 530) is overruled.

North Carolina.— State *v.* Reid, 115 N. C. 741, 20 S. E. 468; State *v.* Stevens, 114 N. C. 873, 19 S. E. 861.

Ohio.— Koch *v.* State, 53 Ohio St. 433, 41 N. E. 689; Koch *v.* State, 8 Ohio Cir. Ct. 641.

South Carolina.— Anderson *v.* O'Donnell, 29 S. C. 355, 7 S. E. 523, 13 Am. St. Rep. 728, 1 L. R. A. 632.

Tennessee.— Greenwood *v.* State, 6 Baxt. 567, 32 Am. Rep. 539.

Texas.— Hamilton *v.* State, 3 Tex. App. 643.

See 14 Cent. Dig. tit. "Criminal Law," § 404.

10. Phillips *v.* People, 55 Ill. 429; Marshall *v.* State, 6 Nebr. 120, 29 Am. Rep. 363.

11. Com. *v.* Frazee, 2 Phila. (Pa.) 191.

c. State and United States. As the same transaction may constitute a crime under the laws of the United States and also under the laws of a state, the accused may be punished for both crimes, and an acquittal or conviction in the court of either is no bar to an indictment in the other.[12]

6. Prosecution For Part of Single Offense. The theft of several articles at one and the same time constitutes an indivisible offense, and a conviction or acquittal of the larceny of any one or more of them is a bar to a subsequent prosecution for the larceny of the others.[13] So where several forged papers are uttered at one time and to the same party it is one transaction, and a conviction of uttering one is a bar to a trial for uttering another.[14]

7. Offenses Committed Against Different Persons — a. Homicide and Assault. Crimes are not usually identical if committed against different persons, but by the weight of authority where the same act or stroke results in the death of two persons an acquittal or conviction of the murder of one bars a subsequent prosecution for the killing of the other, because the killing is but one crime and cannot be divided.[15] The rule also applies where the same blow produces a separate assault and battery on two different persons.[16] But where one assaults[17] or kills[18] two persons by separate shots or strokes, although in the same riot or affray, an acquittal or conviction of one assault or homicide is no bar to an indictment for the other, as they are distinct acts.[19]

b. Larceny. An acquittal or conviction of the larceny of property alleged in the indictment to belong to A is not a bar to an indictment and prosecution for larceny of property at the same time which is alleged to belong to B,[20] unless

12. Stat *v.* Rankin, 4 Coldw. (Tenn.) 145; U. S. *v.* Barnhart, 22 Fed. 285, 10 Sawy. 491. But see Com. *v.* Overby, 3 Ky. L. Rep. 704, passing counterfeit money.

13. *Alabama.*— Foster *v.* State, 88 Ala. 182, 7 So. 185.

Indiana.— Jackson *v.* State, 14 Ind. 327.

Kentucky.— Fisher *v.* Com., 1 Bush 211, 89 Am. Dec. 620.

Louisiana.— State *v.* Augustine, 29 La. Ann. 119.

Massachusetts.— Com. *v.* Prescott, 153 Mass. 396, 26 N. E. 1005.

Oregon.— State *v.* McCormack, 8 Oreg. 236.

Texas.— Wilson *v.* State, 45 Tex. 76, 23 Am. Rep. 602; Hudson *v.* State, 9 Tex. App. 151, 35 Am. Rep. 732; Quitzow *v.* State, 1 Tex. App. 47, 28 Am. Rep. 396.

United States.— U. S. *v.* Lee, 26 Fed. Cas. No. 15,586, 4 Cranch C. C. 446.

See 14 Cent. Dig. tit. "Criminal Law," § 407.

14. State *v.* Benham, 7 Conn. 414; State *v.* Egglesht, 41 Iowa 574, 20 Am. Rep. 612; State *v.* Moore, 86 Minn. 422, 90 N. W. 787, 61 L. R. A. 819; People *v.* Van Keuren, 5 Park. Cr. (N. Y.) 66. But see Nichols *v.* State, (Tex. Cr. 1898) 44 S. W. 1091.

Acts of counterfeiting notes of the same series from the same plate at different times constitute separate crimes, and a conviction of one is no bar to a prosecution for another. Bliss *v.* U. S., 105 Fed. 508, 44 C. C. A. 324.

Possessing two counterfeit plates at the same place and time is a single indivisible crime, particularly if they are so connected that possessing one necessarily involves the possession of the other. U. S. *v.* Miner, 26 Fed. Cas. No. 15,780, 11 Blatchf. 511.

15. Gunter *v.* State, 111 Ala. 23, 20 So. 632, 56 Am. St. Rep. 17; Ben *v.* State, 22 Ala. 9, 58 Am. Dec. 234; Clem *v.* State, 42 Ind. 420, 13 Am. Rep. 369; Womack *v.* State, 7 Coldw. (Tenn.) 508. *Contra*, People *v.* Majors, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295.

16. Gunter *v.* State, 111 Ala. 23, 20 So. 632, 56 Am. St. Rep. 17; State *v.* Damon, 2 Tyler (Vt.) 387.

17. State *v.* Standifer, 5 Port. (Ala.) 523; Ashton *v.* State, 31 Tex. Cr. 482, 21 S. W. 48; Winn *v.* State, 82 Wis. 571, 52 N. W. 775.

18. State *v.* Nash, 86 N. C. 650, 41 Am. Rep. 472; Kelly *v.* State, 43 Tex. Cr. 40, 62 S. W. 915; Augustine *v.* State, 41 Tex. Cr. 59, 52 S. W. 77; Vaughan *v.* Com., 2 Va. Cas. 273; State *v.* Robinson, 12 Wash. 491, 41 Pac. 884.

19. Teat *v.* State, 53 Miss. 439, 24 Am. Rep. 708. See also State *v.* Vines, 34 La. Ann. 1079.

20. *Kentucky.*— Riffe *v.* Com., 56 S. W. 265, 21 Ky. L. Rep. 1331.

Massachusetts.— Com. *v.* Hoffman, 121 Mass. 369; Com. *v.* Andrews, 2 Mass. 409.

Montana.— State *v.* English, 14 Mont. 399, 36 Pac. 815.

North Carolina.— State *v.* Bynum, 117 N. C. 752, 23 S. E. 219.

South Carolina.— State *v.* Risher, 1 Rich. 219; State *v.* Thurston, 2 McMull. 382.

Texas.— Morgan *v.* State, 34 Tex. 677; Alexander *v.* State, 21 Tex. App. 406, 17 S. W. 139, 57 Am. Rep. 617; Parchman *v.* State, 2 Tex. App. 228, 28 Am. Rep. 435.

Vermont.— State *v.* Emery, 68 Vt. 109, 34 Atl. 432, 54 Am. St. Rep. 878.

it is actually proved that A and B are the same person, in which case the former conviction or acquittal is a bar.[21]

c. Arson. An acquittal of burning a dwelling-house and barn belonging to A and B is no bar to an indictment for the same offense which alleges that the property belonged to A and C.[22]

d. Forgery. An immaterial difference in the allegation of the name forged between two indictments does not destroy the identity of the crime,[23] but on an indictment for forging the election returns of one township an acquittal of forging the returns of another is no bar.[24]

X. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

A. Preliminary Proceedings in General — 1. Modes of Instituting Prosecution — a. In General. Broadly speaking there are four modes by which an offender may be brought to justice. The accuser may give information to the public prosecuting officer, which will result in an indictment being prepared and sent to the grand jury, or he may file a written complaint on oath before the examining magistrate, obtain a warrant of arrest, followed by a preliminary examination, and the binding over of the accused; or the grand jury may act upon its own knowledge that a crime has been committed, or upon information from others, and make a presentment against the offender; or the prosecuting attorney may file an information.[25] By statute minor offenses may be prosecuted summarily on complaint before a magistrate.[26]

b. Definition of "Complaint." "The term 'complaint' is a technical one, descriptive of proceedings before magistrates."[27] It is the preliminary charge or accusation against an offender, made by a private person or an informer to a justice of the peace or other proper officer, charging that the offender has violated the law.[28]

2. Constitutional Provisions — a. In General. The legislature generally has power to prescribe the conditions to be fulfilled before a warrant can be issued,[29] and to regulate complaints in criminal cases. An act which provides for an entry by the clerk on the record of the statement of the offense of which the accused is charged, which shall stand as a complaint, does not deprive the accused of his constitutional right to be informed of the nature and cause of the accusation.[30]

See 14 Cent. Dig. tit. "Criminal Law," § 409.

21. Knox *v.* State, 89 Ga. 259, 15 S. E. 308; Knight *v.* State, 73 Ga. 804; Goode *v.* State, 70 Ga. 752; State *v.* Wiseback, 139 Mo. 214, 40 S. W. 946.

22. Com. *v.* Wade, 17 Pick. (Mass.) 395.

23. Durham *v.* People, 5 Ill. 172, 39 Am. Dec. 407.

24. Com. *v.* Trimmer, 84 Pa. St. 65.

25. U. S. *v.* Kilpatrick, 16 Fed. 765. In England there were four modes of prosecuting criminal pleas: Presentment, indictment, information, and appeal. In Connecticut there are four modes, one of which is by complaint or presentment by a grand juror, which is statutory. In that state prosecutions before a single magistrate have long been known by the name of complaints, which term is used in the statutes with reference to accusations not made by the grand jury or the state's attorney, but by a private person. Goddard *v.* State, 12 Conn. 448.

Indictment, presentment, and information see Indictments and Informations.

26. See *infra*, X, E.

27. Shaw, C. J., in Com. *v.* Davis, 11 Pick. (Mass.) 432, 436.

28. Webster Dict. [*quoted* in Goddard *v.* State, 12 Conn. 448, 454]. See Gardner *v.* People, 62 N. Y. 299, 304. "Complaint" is defined in Indian Code Crim. Proc. (1882) § 4, to mean the allegation made orally or in writing to a magistrate with a view to his taking action. *In re* Surendranth Banerjea, L. R. 10 Indian App. 171, 178. It differs from an information, which is a prosecution by the public prosecuting officer, and from a presentment or indictment, which is the method of accusation by the grand jury. Webster Dict. [*quoted* in Goddard *v.* State, 12 Conn. 448, 454].

29. Sunderlin *v.* Ionia County, 119 Mich. 535, 78 N. W. 651, holding that the legislature has power to prescribe conditions to be fulfilled before the issuing of a warrant under a constitutional provision that justices of the peace "shall have such criminal jurisdiction and perform such duties as shall be prescribed by the legislature."

30. State *v.* Messolongitis, 74 Minn. 165, 77 N. W. 29.

The fact that the information filed by the prosecuting attorney is not verified by him,[31] or that it is verified by him on information and belief,[32] does not violate the constitutional provision that no warrant shall issue but on probable cause supported by oath, if with the information a complaint verified by some credible person is also filed. A statute providing that the clerk may receive complaints, administer oaths, and issue warrants, being construed to require that the clerk when he issues a warrant on a complaint to the court should issue it as the warrant of the court and not as his own warrant, is constitutional.[33]

b. Right of Accused to Confront Witnesses and Have Counsel. The constitutional right of the accused to be confronted by the witnesses against him and to be represented by counsel has reference to the trial only, and is not infringed by preliminary proceedings.[34] Nor will the absence of a preliminary examination be an infringement of his right to confront the witnesses.[35]

c. Discovery of Evidence For Defense. The accused, on the preliminary examination, has the right to a subpœna to compel the attendance of witnesses, and to compel the production of papers which are material to his defense and not in his possession.[36]

3. Courts Having Jurisdiction — a. Justices' Courts. A justice of the peace, police magistrate, or similar judge, usually has jurisdiction by statute to examine the accused on complaint and warrant, and on sufficient cause to hold him to bail or commit him for the action of the court having jurisdiction of his crime.[37]

b. Superior Courts. In some states, by statute, power to conduct preliminary examinations has been conferred upon judges of the higher courts.[38]

B. Preliminary Complaint or Affidavit — 1. Necessity For. As a general rule a justice of the peace or other examining magistrate has no authority to issue a warrant unless upon written complaint or affidavit, verified by oath, showing that an offense has been committed and that probable cause exists to believe the accused committed that crime.[39] He cannot hold an offender arrested on his own

31. Noble *v.* People, 23 Colo. 9, 45 Pac. 376; Holt *v.* People, 23 Colo. 1, 45 Pac. 374; Ratcliff *v.* People, 22 Colo. 75, 43 Pac. 553; Territory *v.* Cutinola, 4 N. M. 160, 14 Pac. 809.

32. Brown *v.* People, 20 Colo. 161, 36 Pac. 1040; Washburn *v.* People, 10 Mich. 372; *In re* Boulter, 5 Wyo. 329, 40 Pac. 520. See also Indictments and Informations.

33. Com. *v.* Posson, 182 Mass. 339, 65 N. E. 381.

34. *In re* Bates, 2 Fed. Cas. No. 1,099*a*. And see Rex *v.* Borron, 3 B. & Ald. 432, 22 Rev. Rep. 447, 5 E. C. L. 252; Cox *v.* Coleridge, 1 B. & C. 37, 2 D. & R. 86, 25 Rev. Rep. 298, 8 E. C. L. 17.

35. Goldsby *v.* U. S., 160 U. S. 70, 16 S. Ct. 216, 40 L. ed. 343.

36. See U. S. *v.* Burr, 25 Fed. Cas. No. 14,692*d*.

Prosecution for selling adulterated food.— But it has been held that in a prosecution for selling adulterated food the accused is not entitled of right to a sample of the adulterated article in the possession of the state, unless he shows inability to make a defense without it, and that even then it is discretionary with the court to appoint an expert to analyze it in his behalf, who must make the analysis in the presence of the expert representing the prosecution. State *v.* Breckenridge, 5 Ohio S. & C. Pl. Dec. 546, 7 Ohio N. P. 663.

37. *California.*— People *v.* Crespi, 115 Cal. 50, 46 Pac. 863.

Maine.— Osborn *v.* Sargent, 23 Me. 527.

Massachusetts.— Com. *v.* Taber, 155 Mass. 5, 28 N. E. 1056.

Michigan.— Allor *v.* Wayne County, 43 Mich. 76, 4 N. W. 492.

Pennsylvania.—Com. *v.* Brower, 7 Pa. Dist. 254, 20 Pa. Co. Ct. 405.

Utah.— State *v.* Pierpont, 16 Utah 476, 52 Pac. 992.

See 14 Cent. Dig. tit. "Criminal Law," § 414.

38. *Alabama.*— Pierson *v.* State, 129 Ala. 120, 29 So. 843.

California.— People *v.* Smith, 1 Cal. 9.

Kentucky.— Com. *v.* Cummins, 18 B. Mon. 26; Com. *v.* Leight, 1 B. Mon. 107; Com. *v.* Edwards, 1 J. J. Marsh. 352.

Mississippi.— State *v.* Wofford, 10 Sm. & M. 626.

Pennsylvania.— March *v.* Com., (1888) 14 Atl. 375. In Pennsylvania, under a constitutional provision that election officers shall be privileged from arrest on election day except on a warrant of the court of record or judge thereof, each and every judge thereof may sit as a committing magistrate and issue warrants for election frauds. *In re* Election Ct., 204 Pa. St. 92, 53 Atl. 784.

See 14 Cent. Dig. tit. "Criminal Law," § 414.

39. *Illinois.*— Myers *v.* People, 67 Ill. 503.

personal view without a written complaint.[40] The district attorney or other prosecuting officer may, however, on his own motion present an indictment to the grand jury without the presentation of an affidavit charging the offense.[41]

2. BEFORE WHOM MADE. Generally the complaint or affidavit must be made and verified before a magistrate or judge,[42] and it cannot be made and verified before a clerk of the court[43] or before a notary public,[44] unless the statute permits the oath to be administered by the clerk or by a notary.[45] In the federal courts the oath to the complaint may and must be taken before the judge, the clerk, or some commissioner.[46]

3. WHO MAY MAKE. The person aggrieved or any person having knowledge of an infraction of the law may make the complaint or affidavit.[47] An information signed and verified by the county attorney has been held sufficient in one case,[48] while in another it has been held insufficient, being verified on information and belief.[49] The affidavit of a convicted felon is valid, and confers jurisdiction to issue the warrant, where such person is not incompetent as a witness,[50] and it seems to have been held valid, even where he is not a competent witness.[51]

4. REQUISITES AND SUFFICENCY — a. Certainty Required. A complaint or affidavit made before a magistrate for the purpose of a preliminary examination only does not require the same certainty in the statement of the offense as an information, indictment, or complaint upon which the accused is tried, but it is sufficient if it states the offense in substance.[52]

Kansas.— State *v.* Goetz, 65 Kan. 125, 69 Pac. 187, construing Gen. St. (1901) § 5807.

Louisiana.— State *v.* Williams, 34 La. Ann. 1198.

Michigan.— People *v.* McLean, 68 Mich. 480, 36 N. W. 231.

Pennsylvania.— Matter of Memorial Citizens' Assoc., 8 Phila. 478; Gelbert *v.* Com., 3 Lack. Jur. 374.

Texas.— Domingues *v.* State, 37 Tex. Cr. 425, 35 S. W. 973 (construing Code Cr. Proc. 1895, § 467); White *v.* State, (Cr. App. 1896) 35 S. W. 391; Wadgymar *v.* State, 21 Tex. App. 459, 2 S. W. 768; Casey *v.* State, 5 Tex. App. 462; Turner *v.* State, 3 Tex. App. 551; Thornberry *v.* State, 3 Tex. App. 36.

Vermont.— State *v.* Wakefield, 60 Vt. 618, 15 Atl. 181.

United States.— U. S. *v.* Burr, 25 Fed. Cas. No. 14,692, Brunn. Col. Cas. 493.

See 14 Cent. Dig. tit. "Criminal Law," § 415.

The voluntary appearance of the accused and his plea of guilty will not dispense with the formal written complaint. State *v.* Goetz, 65 Kan. 125, 69 Pac. 187.

The word "complaint" as used in statutes referring to criminal offenses means either the written charge of crime or the oral charge which is made to the magistrate and reduced to writing by him or his clerk. Hobbs *v.* Hill, 157 Mass. 556, 32 N. E. 862.

Affidavit made before complaint reduced to writing see People *v.* Bechtel, 80 Mich. 623, 45 N. W. 582.

Complaint or affidavit as basis for summary trial see *infra*, X, E, 1, f.

40. Tracy *v.* Williams, 4 Conn. 107, 10 Am. Dec. 102.

41. Annis *v.* People, 13 Mich. 511; State *v.* Bullock, 54 S. C. 300, 32 S. E. 424; State *v.* Bowman, 43 S. C. 108, 20 S. E. 1010. See INDICTMENTS AND INFORMATIONS.

42. Lloyd *v.* State, 70 Ala. 32; People *v.* Le Roy, 65 Cal. 613, 4 Pac. 649; Carrow *v.* People, 113 Ill. 550; People *v.* Nowak, 1 Silv. Supreme (N. Y.) 411, 5 N. Y. Suppl. 239, 7 N. Y. Cr. 69.

43. Lloyd *v.* State, 70 Ala. 32; People *v.* Le Roy, 65 Cal. 613, 4 Pac. 649; People *v.* Colleton, 59 Mich. 573, 36 N. W. 771.

44. People *v.* Nowak, 1 Silv. Supreme (N. Y.) 411, 5 N. Y. Suppl. 239, 7 N. Y. Cr. 69; U. S. *v.* Smith, 17 Fed. 510. But see State *v.* Freeman, 59 Vt. 661, 10 Atl. 752.

45. State *v.* Louver, 26 Nebr. 757, 42 N. W. 762.

46. U. S. *v.* Smith, 17 Fed. 510.

47. State *v.* Woodmansee, 19 R. I. 651, 35 Atl. 961; Daniels *v.* State, 2 Tex. App. 353; State Treasurer *v.* Rice, 11 Vt. 339; U. S. *v.* Skinner, 27 Fed. Cas. No. 16,309, 1 Brunn. Col. Cas. 446.

As to the meaning of complaint by "credible" witnesses see State *v.* Touchet, 46 La. Ann. 827, 15 So. 390.

The authority of a peace officer or policeman to file a complaint on behalf of the commonwealth which he represents, under a statute, is strictly construed and will not be extended. Foster *v.* Clinton County, 51 Iowa 541, 2 N. W. 207; Santo *v.* State, 2 Iowa 165, 63 Am. Dec. 487; Reg. *v.* St. Louis, 6 Quebec Q. B. 389.

48. State *v.* Clancy, 20 Mont. 498, 52 Pac. 267.

49. Daniels *v.* State, 2 Tex. App. 353.

50. People *v.* Stokes, 24 N. Y. Suppl. 727, 30 Abb. N. Cas. (N. Y.) 200; Perez *v.* State, 10 Tex. App. 327; Rivers *v.* State, 10 Tex. App. 177.

51. State *v.* Killet, 2 Bailey (S. C.) 289.

52. Annias *v.* People, 13 Mich. 511; Kraushopf *v.* Tallman, 38 N. Y. App. Div. 273, 56 N. Y. Suppl. 967 [*affirmed* in 170 N. Y. 561, 62 N. E. 1096]; Bell *v.* State, 18 Tex. App.

b. Verification, Signature, and Jurat. The general rules relating to the formal parts and contents of affidavits are applicable to the affidavit or complaint upon which a warrant is granted.[53] An information, affidavit, or complaint filed by an official as part of his duty need not be verified,[54] but one filed by a private person must be.[55] The cases do not agree as to whether it is necessary for the signature of the justice to be attached to the jurat. Some hold that it should be,[56] while others hold it unnecessary.[57] The omission of a justice's seal has been held no ground for reversal.[58] In some jurisdictions a seal is not necessary at all.[59] A complaint duly charging an offense, certified in the usual form by the magistrate to whom it was presented to have been sworn to by the complainant, cannot be affected by evidence that there was no further examination of the complainant on oath before issuing the warrant.[60]

c. Charging Offense — (i) "*Knowledge*" or "*Information and Belief.*" In some jurisdictions the complaint or affidavit must state the facts on the complainant's positive knowledge, and where it states them upon hearsay or upon information and belief, a warrant cannot be issued, and if the accused has been arrested he must be discharged.[61] But in other jurisdictions this rule does not

53, 51 Am. Rep. 293; Arrington *v.* State, 13 Tex. App. 551; Butler *v.* State, 102 Wis. 364, 78 N. W. 590; State *v.* Evans, 88 Wis. 255, 60 N. W. 433. See also Jefferson *v.* State, 24 Tex. App. 535, 7 S. W. 244. And see *infra*, X, B, 4, c, (II).

The complaint need not be in writing, unless required by statute. People *v.* Hicks, 15 Barb. (N. Y.) 153. See People *v.* Bechtel, 80 Mich. 623, 45 N. W. 582, 80 Mich. 633, 45 N. W. 585.

Recognizance to keep the peace.— As to requirement of a written complaint in case of proceedings to compel a party to enter into a recognizance to keep the peace see Bradstreet *v.* Furgeson, 23 Wend. (N. Y.) 638. And see BREACH OF THE PEACE, 5 Cyc. 1031.

53. See Hosea *v.* State, 47 Ind. 180.

Form and contents of affidavits in general see AFFIDAVITS, 2 Cyc. 17 *et seq.*

54. State *v.* Maupin, 71 Mo. App. 54; State *v.* McCarver, 47 Mo. App. 650; State *v.* Ransberger, 42 Mo. App. 466; State *v.* Comstock, 27 Vt. 553.

55. Cantwell *v.* State, 27 Ind. 505; Conner *v.* Com., 3 Binn. (Pa.) 38; U. S. *v.* Shepard, 27 Fed. Cas. No. 16,273, 1 Abb. 431. See also Hathcock *v.* State, 88 Ga. 91, 13 S. E. 959.

Where a verification is not required by statute, it is nevertheless implied that a complaint must be made under oath. This may fairly be understood as a part of the technical meaning of the word "complaint," where it is used in a statute providing for criminal prosecutions. Campbell *v.* Thompson, 16 Me. 117.

An affirmation is generally permissible if the complainant has conscientious scruples about taking an oath. State *v.* Adams, 78 Me. 486, 7 Atl. 267. And see AFFIDAVITS, 2 Cyc. 16.

Where the affiant signs by a mark an attestation is not necessary. State *v.* Depoyster, 21 Nev. 107, 25 Pac. 1000.

56. Jennings *v.* State, 30 Tex. App. 428, 18 S. W. 90; Neiman *v.* State, 29 Tex. App. 360, 16 S. W. 253; Robertson *v.* State, 25 Tex. App. 529, 8 S. W. 659; Morris *v.* State, 2 Tex. App. 502; State *v.* J. H., Tyler (Vt.) 444. See also Mican *v.* State, (Tex. App. 1892) 19 S. W. 762. And see AFFIDAVITS, 2 Cyc. 30.

Showing official character.— The jurat should show the official capacity of the person before whom the complaint or affidavit was sworn. Mican *v.* State, (Tex. App. 1892) 19 S. W. 762; Neiman *v.* State, 29 Tex. App. 360, 16 S. W. 253; Robertson *v.* State, 25 Tex. App. 529, 8 S. W. 659. The initials "J. P." in the jurat of an officer is a sufficient indication of his office as a justice of the peace. Hawkins *v.* State, 136 Ind. 630, 36 N. E. 419. See also Com. *v.* Taber, 155 Mass. 5, 28 N. E. 1056. And see, generally, AFFIDAVITS, 2 Cyc. 31.

57. People *v.* Lane, 124 Mich. 271, 82 N. W. 896; Fry *v.* Tippett, 16 Lea (Tenn.) 516, holding that no certificate is necessary. And see State *v.* Freeman, 59 Vt. 661, 10 Atl. 752, holding that an omission of a certificate of the oath is a formal defect and amendable. See also AFFIDAVITS, 2 Cyc. 30.

58. Qualter *v.* State, 120 Ind. 92, 22 N. E. 100.

59. See AFFIDAVITS, 2 Cyc. 32.

60. Com. *v.* Farrell, 8 Gray (Mass.) 463.

61. *Alabama.*— Butler *v.* State, 130 Ala. 127, 30 So. 338.

Kansas.— Holton *v.* Bimrod, 61 Kan. 13, 58 Pac. 558 (holding, however, that if the complaint is sworn to positively, and not on information and belief, it is immaterial that the prosecuting witness had no personal knowledge); State *v.* Clark, 34 Kan. 289, 8 Pac. 528; Garnett *v.* Quynn, 7 Kan. App. 414, 53 Pac. 275. See also State *v.* Carey, 56 Kan. 84, 42 Pac. 371; State *v.* Gleason, 32 Kan. 245, 4 Pac. 363.

Maine.— State *v.* Hobbs, 39 Me. 212, holding that a positive charge, verified by complainant's oath "according to the best of his knowledge and belief" is sufficient.

Michigan.— Sparta *v.* Boorom, 129 Mich.

obtain;[62] and in jurisdictions where it is required that the complaint or affidavit shall state facts on the complainant's positive knowledge, it has been held that if the accused voluntarily submits to a preliminary examination and is held on competent evidence supplementing an affidavit on information and belief, he may be regarded as having waived that defect.[63]

(II) *Allegation of Commission of Offense.* If the statute does not prescribe any particular form of affidavit or complaint it is not necessary that such affidavit or complaint should charge the crime with the fulness and particularity required in an information or indictment.[64] A complaint or affidavit must, however, state the essentials of the offense intended to be charged, together with such facts and circumstances as will enable a person of average intelligence to understand the nature of the charge made against him.[65] A complaint must charge

555, 89 N. W. 435, 90 N. W. 681; People *v.* Heffron, 53 Mich. 527, 19 N. W. 170.

Missouri.— State *v.* Hayward, 83 Mo. 299; State *v.* Downing, 22 Mo. App. 504 [*overruling* State *v.* Kaub, 19 Mo. App. 149].

New York.— *In re* Blum, 9 Misc. 571, 30 N. Y. Suppl. 396. See also Blodgett *v.* Race, 18 Hun 132. But see People *v.* Hicks, 15 Barb. 153.

Pennsylvania.— Com. *v.* Clement, 8 Pa. Dist. 705; *In re* Charge to Grand Jury, 3 Pittsb. 174; Com. *v.* Roland, 18 Lanc. L. Rev. 25.

Tennessee.— State *v.* Good, 9 Lea 240.

United States.— U. S. *v.* Sapinkow, 90 Fed. 654 (holding that the grounds for information and belief must be stated); U. S. *v.* Collins, 79 Fed. 65.

See 14 Cent. Dig. tit. "Criminal Law," § 423.

The invalidity of one count in a complaint, because made solely on information and belief, will not invalidate the counts as to which the affiant swore to the facts as within his personal knowledge. Rice *v.* Ames, 180 U. S. 371, 21 S. Ct. 406, 45 L. ed. 577.

62. *Ex p.* Buncel, 25 Nev. 246, 62 Pac. 207; State *v.* Davie, 62 Wis. 305, 22 N. W. 411.

In Texas by statute an affidavit that the defendant has good reason to believe and does believe that the accused has committed an offense is sufficient. Dodson *v.* State, 35 Tex. Cr. 571, 34 S. W. 754; Anderson *v.* State, 34 Tex. Cr. 96, 29 S. W. 384; Staley *v.* State, (Cr. App. 1895) 29 S. W. 272; Hall *v.* State, 32 Tex. Cr. 594, 25 S. W. 292; Clark *v.* State, 23 Tex. App. 260, 5 S. W. 115.

63. Monroe *v.* Lawrence, 44 Kan. 607, 24 Pac. 1113, 10 L. R. A. 520; Sparta *v.* Boorom, 129 Mich. 555, 89 N. W. 435, 90 N. W. 681; Swart *v.* Campbell, 43 Mich. 443, 5 N. W. 635; Lewis *v.* State, 15 Nebr. 89, 17 N. W. 366; *In re* Cummings, 11 Okla. 286, 66 Pac. 332.

64. *Alabama.*—Hampton *v.* State, 133 Ala. 180, 32 So. 230. See also Field *v.* Ireland, 21 Ala. 240; Ewing *v.* Sanford, 19 Ala. 605.

Colorado.— People *v.* Mellor, 2 Colo. 705.

Connecticut.— State *v.* Holmes, 28 Conn. 230.

Georgia.— See Sasser *v.* McDaniel, 73 Ga. 547.

Indiana.— State *v.* Gachenheimer, 30 Ind. 63. See also Jeffries *v.* McNamara, 49 Ind. 142.

Kansas.— State *v.* Baker, 57 Kan. 541, 46 Pac. 947.

Maine.— State *v.* Corson, 10 Me. 473.

Michigan.— Matter of Way, 41 Mich. 299, 1 N. W. 1021.

Missouri.— State *v.* Morse, 55 Mo. App. 332; State *v.* Cornell, 45 Mo. App. 94.

New York.— People *v.* Hicks, 15 Barb. 153.

Texas.— Bell *v.* State, 18 Tex. App. 53, 51 Am. Rep. 293; Williams *v.* State, 17 Tex. App. 521; Arrington *v.* State, 13 Tex. App. 554.

Washington.— State *v.* Newton, 29 Wash. 373, 70 Pac. 31.

See *supra*, X, B, 4, a.

"Against the peace and dignity of the state," etc.— A complaint for a preliminary examination need not contain the formal language "against the peace and dignity of the state of Wisconsin and the statutes in such case made and provided." State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700. But see Miller *v.* State, 81 Miss. 162, 32 So. 951, holding that where a state constitution requires that an indictment shall conclude "against the peace and dignity of the state" an affidavit omitting these words is bad.

65. *Indiana.*— State *v.* Bailey, 157 Ind. 324, 61 N. E. 730; State *v.* Cuppy, 50 Ind. 291.

Kansas.— State *v.* Gallup, 1 Kan. App. 618, 42 Pac. 406.

Louisiana.— State *v.* Arnauld, 50 La. Ann. 1, 22 So. 886.

Missouri.— State *v.* Cornell, 45 Mo. App. 94.

New York.— People *v.* Tuthill, 79 N. Y. App. Div. 24, 79 N. Y. Suppl. 905; People *v.* Hannah, 92 Hun 476, 37 N. Y. Suppl. 702; People *v.* Pillion, 78 Hun 74, 29 N. Y. Suppl. 267. See also Devoe *v.* Davis, 12 N. Y. Wkly. Dig. 544.

North Dakota.— State *v.* Barnes, 3 N. D. 131, 54 N. W. 541.

Wisconsin.— See Heckman *v.* Swartz, 64 Wis. 48, 24 N. W. 473.

Setting fire feloniously is a sufficient charge of a crime. Com. *v.* Flynn, 3 Cush. (Mass.) 525.

something more than a mere suspicion of a violation of unspecified statutes.[66] While allegations of crime in the language of the statute are usually safe, it is advisable to state the facts which constitute the offense.[67]

(III) *VENUE OF OFFENSE.* The complaint or affidavit ought to state the venue, but ordinarily its statement in the caption will be sufficient.[68] An imperfect or improper statement of the venue may be disregarded,[69] particularly where the defect is cured by other papers in the case.[70]

d. Name of Accused. The name of the accused must be stated in the complaint or affidavit if it is known, but it is sufficient to allege the name by which he is commonly or usually known, although differing from his true or baptismal name, and where a person has or is known by two or more names he may be described by either or any one or all of them.[71] In some states a person charged with crime may be held by the examining magistrate to answer, although in the complaint he was given a fictitious name.[72] In others it is provided by statute that the complaint must state the name of the accused if known, and if not it must give some reasonably definite description of him.[73] The title is no part of a complaint made before a magistrate for the purpose of a preliminary examination, and cannot be considered as charging the commission of a crime against one named therein and not charged in the body of the complaint.[74]

e. Sufficiency of Quashed Indictment as Complaint. Although an indictment has been set aside, it may still be good as the sworn accusation on which the court may remand the accused to answer.[75]

An allegation that goods had been stolen and were in the possession of the accused does not charge him with any crime. Housh *v.* People, 75 Ill. 487.

Affidavits which charge the utterance of slanderous or obscene language ought to set out such language in full. Miles *v.* State, 94 Ala. 106, 11 So. 403; State *v.* Burrell, 86 Ind. 313; State *v.* Whitaker, 75 Mo. App. 184.

Larceny is sufficiently described, although the name of the owner of the property is omitted. Brown *v.* State, 109 Ga. 570, 34 S. E. 1031; Montgomery *v.* State, 7 Ohio St. 107.

A complaint for forgery should specify the papers forged. *Ex p.* Van Hoven, 28 Fed. Cas. No. 16,858, 4 Dill. 411.

Unlawful use of naturalization certificates. — It is insufficient to state that a certain person did unlawfully use certain naturalization certificates without stating in what respect such use was unlawful. *In re* Coleman, 6 Fed. Cas. No. 2,980, 15 Blatchf. 406.

Justice and officer protected although complaint defective.— Smith *v.* Jones, (S. D. 1902) 92 N. W. 1084. See JUSTICES OF THE PEACE; SHERIFFS AND CONSTABLES.

Complaints before magistrates should receive a liberal construction, as they are frequently prepared by persons of limited intelligence and education who are unacquainted with the technicalities of criminal pleading. Every charge of crime should be made in direct, concise, and positive terms, but technical objections may be overruled if from the tenor of the complaint a fairly intelligible description of the crime, the manner of its commission, and the party charged can be made out. Wilson *v.* State, 80 Miss. 388, 31 So. 787.

The fact that two offenses are charged in one count of the complaint before an examining magistrate does not render the proceedings invalid, nor can it be urged in abatement of an information filed and based on such examination. Sothman *v.* State, (Nebr. 1902) 92 N. W. 303.

66. State *v.* Arnauld, 50 La. Ann. 1, 22 So. 886.

67. People *v.* Pillion, 78 Hun (N. Y.) 74, 29 N. Y. Suppl. 267.

68. Hawkins *v.* State, 136 Ind. 630, 36 N. E. 419; People *v.* Hannan, 92 Hun (N. Y.) 476, 37 N. Y. Suppl. 702; Com. *v.* Phelps, 3 Lack. Jur. (Pa.) 409; Strickland *v.* State, 7 Tex. App. 34. And see People *v.* Polhamus, 8 N. Y. App. Div. 133, 40 N. Y. Suppl. 491.

69. Burnett *v.* State, 72 Miss. 994, 18 So. 432. The omission of the name of the county from the venue in a complaint charging a crime which is alleged to have been committed in a city in such county will not affect the validity of such complaint. People *v.* Kahler, 93 Mich. 625, 53 N. W. 826.

70. Topeka *v.* Dupree, 8 Kan. App. 286, 55 Pac. 511; Krowenstrot *v.* State, 15 Ohio Cir. Ct. 73.

71. Henry *v.* State, 113 Ind. 304, 15 N. E. 593. See also State *v.* Pipes, 65 Kan. 543, 70 Pac. 363. See, generally, INDICTMENTS AND INFORMATIONS.

72. People *v.* Wheeler, 73 Cal. 252, 14 Pac. 796.

In Indiana by statute an affidavit charging a public offense will be sufficient if the defendant is described therein as a person whose name is unknown to the affiant. Ard *v.* State, 114 Ind. 542, 16 N. E. 504.

73. See Beaumont *v.* Dallas, 34 Tex. Cr. 68, 29 S. W. 157; Alford *v.* State, 8 Tex. App. 545.

74. White *v.* State, 28 Nebr. 341, 44 N. W. 443.

75. *In re* Smith, 4 Colo. 532.

5. Filing Complaint or Affidavit. Where an information is not filed by the prosecuting attorney on his own knowledge or information, it must be upon a complaint or affidavit filed with the justice by the person making it or by the prosecuting attorney with the information.[76] The omission of the magistrate to indorse the fact of filing on the complaint does not deprive him of jurisdiction.[77]

6. Effect of Defects, Omissions, and Irregularities — a. In General. Misstatements or improper allegations which are surplusage may be disregarded.[78] Failure to punctuate properly,[79] to spell correctly,[80] or the use of abbreviations[81] do not affect the validity of the complaint. But an omission of essential allegations cannot be cured by amendment on the examination.[82] A complaint which charges an offense to have been committed subsequent to the making of the complaint is fatally defective.[83] A mere defect in the affidavit upon which a warrant issues will not deprive the justice who issued the same of jurisdiction to inquire into the charge and take a recognizance from the accused.[84]

b. Time of Making Objections. The accused, by failing to object on his preliminary examination to the sufficiency of the affidavit or complaint, and by pleading not guilty, waives mere defects and cannot object to the jurisdiction of the court to which he is remanded.[85] But a plea of not guilty does not waive the sufficiency of the complaint to charge a crime.[86]

7. Quashing or Striking Complaint From Record. Under a statute which allows a prosecution by affidavit and information, the sufficiency of the affidavit and information may be determined on a motion to quash. A motion to quash reaches all defects apparent on the face of the affidavit and information.[87] But the fact that the warrant issued on a criminal complaint is defective is no ground for quashing the complaint.[88] Where there are two complaints in the record, one of them being filed before, and the other after, the presentment of the information, the latter complaint should be stricken from the record.[89]

8. Amendment or Substitution. A justice of the peace may permit the papers to be amended to correct immaterial errors[90] or new affidavits to be filed in place

76. State *v.* De Long, 88 Ind. 312; State *v.* Sartin, 66 Mo. App. 626; Johnson *v.* State, (Tex. Cr. App. 1899) 49 S. W. 618.

77. People *v.* Hiltel, 131 Cal. 577, 63 Pac. 919.

78. People *v.* George, 121 Cal. 492, 53 Pac. 1098; State *v.* Judge Second Recorder's Ct., 44 La. Ann. 1093, 11 So. 872; Malz *v.* State, 36 Tex. Cr. 447, 34 S. W. 267, 37 S. W. 748; State *v.* Dewey, 55 Vt. 550; State *v.* Soragan, 40 Vt. 450.

79. Fuller *v.* State, 117 Ala. 200, 23 So. 73.

80. Reeves *v.* State, 116 Ala. 481, 23 So. 28.

81. State *v.* Quintini, 76 Miss. 498, 25 So. 365.

82. People *v.* Olmsted, 74 Hun (N. Y.) 323, 26 N. Y. Suppl. 818; Paschal *v.* State, 9 Tex. App. 205.

83. Womick *v.* State, 31 Tex. Cr. 41, 19 S. W. 605.

84. State *v.* Gachenheimer, 30 Ind. 63.

85. *California.*— People *v.* Sehorn, 116 Cal. 503, 48 Pac. 495; People *v.* Rodrigo, 69 Cal. 601, 11 Pac. 481.

Kansas.— State *v.* Stoffel, 48 Kan. 364, 29 Pac. 685.

Massachusetts.— Com. *v.* Reid, 175 Mass. 325, 56 N. E. 617.

Michigan.— People *v.* Turner, 116 Mich. 390, 74 N. W. 519; People *v.* Dowd, 44 Mich. 488, 7 N. W. 71.

Montana.— State *v.* McCaffery, 16 Mont. 33, 40 Pac. 63.

North Dakota.— State *v.* Rozum, 8 N. D. 548, 80 N. W. 477.

Oklahoma.— *In re* Cummings, 11 Okla. 286, 66 Pac. 332.

South Carolina.— See Florence *v.* Berry, 61 S. C. 237, 39 S. E. 389.

See 14 Cent. Dig. tit. "Criminal Law," §§ 431, 432.

86. Fletcher *v.* State, 12 Ark. 169; State *v.* Watson, 41 La. Ann. 598, 7 So. 125; Akerman *v.* Lima, 8 Ohio S. & C. Pl. Dec. 430; Grossman *v.* Oakland, 30 Oreg. 478, 41 Pac. 5, 60 Am. St. Rep. 832, 36 L. R. A. 593.

87. Nichols *v.* State, 127 Ind. 406, 26 N. E. 839; Miller *v.* State, 122 Ind. 355, 24 N. E. 156; Swiney *v.* State, 119 Ind. 478, 21 N. E. 1102; State *v.* Burnett, 119 Ind. 392, 21 N. E. 972; Hoover *v.* State, 110 Ind. 349, 11 N. E. 434; Sample *v.* State, 104 Ind. 289, 4 N. E. 40; Stoner *v.* State, 80 Ind. 89.

88. Wilson *v.* State, 99 Ala. 194, 13 So. 427.

89. Hardy *v.* State, (Tex. App. 1890) 13 S. W. 1008.

90. People *v.* Mellor, 2 Colo. 705; Oats *v.* State, 153 Ind. 436, 55 N. E. 226; Taylor *v.*

of those which have been lost.[91] A magistrate has no right to alter an information in any material part of it without the consent of the person who made it. And even when done with his consent it should be reverified before any further step is taken under it.[92]

9. Dismissal or Withdrawal of Complaint. A defective complaint may be withdrawn by the prosecuting attorney and a full preliminary examination had upon another complaint subsequently made.[93]

C. Preliminary Warrant or Other Process — 1. General Character. A warrant is a written mandate in the name of the state, based upon a complaint or affidavit, or an indictment,[94] proceeding from the court and directed to an officer or other proper person, commanding him to arrest and return before the court the person named in it.[95] In some states by statute in the case of minor offenses the accused may be brought before the court by a summons, but generally a warrant and not a summons is the process in criminal cases.[96] A capias has been sustained as the first process against a person for unlawful gaming.[97]

2. Necessity For. The cases in which a warrant is necessary and those in which an arrest may be made without it are elsewhere considered.[98] Where one is arrested without a warrant and brought before a magistrate, the charge against him may be investigated and he may be committed in default of bail without the issuance of a warrant,[99] or he may be tried without the issuance of a warrant,[1] unless a warrant on a sworn complaint is required by statute to confer jurisdiction.[2] A magistrate, if he sees an offense committed, or if he has reasonable grounds to believe that one is about to be committed in his presence, may order the arrest of the offender without a warrant,[3] and where a prisoner after having been arrested escapes he may be pursued and retaken without a warrant.[4]

3. Issuance of Warrant — a. Discretion to Issue. A magistrate has a discretion as to whether he shall issue a warrant, and if upon the allegations of the complaint and the evidence he is satisfied that no probable cause exists, he may deny the application, and a writ of mandamus will not lie to compel him to grant

State, 32 Ind. 153; State *v.* McCray, 74 Mo. 303; Edgerton *v.* State, (Tex. Cr. App. 1902) 68 S. W. 678. But see U. S. *v.* Tureaud, 20 Fed. 621.

Amendment of jurat.— Neiman *v.* State, 29 Tex. App. 360, 16 S. W. 253.

Erroneous date.— An affidavit charging a criminal offense will not be quashed because the jurat gives an erroneous date, since this is merely a clerical error which can be corrected at any time before or during trial, and since the affidavit sufficiently shows the date when taken with the certificate of the clerk as to the time of filing. Ross *v.* State, 9 Ind. App. 35, 36 N. E. 167. See also Allen *v.* State, (Tex. App. 1890) 13 S. W. 998.

91. Hubbard *v.* State, (Tex. Cr. App. 1894) 24 S. W. 648. But a lost complaint by A cannot be supplied by substituting a complaint by B. Morrison *v.* State, 43 Tex. Cr. 437, 66 S. W. 779.

92. Lewis *v.* State, 15 Nebr. 89, 17 N. W. 366.

93. *Ex p.* Launch, 71 Mo. 233; State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382.

94. **Bench-warrant or other process after indictment** see *infra*, XI, A.

95. 4 Bl. Comm. 290–292; 4 Chitty Cr. L. 198.

Arrest by warrant see Arrest, 3 Cyc. 875.

96. State *v.* Ohio, etc., R. Co., 23 Ind. 362. See also Philadelphia *v.* Campbell, 11 Phila. (Pa.) 163.

97. U. S. *v.* Cottom, 25 Fed. Cas. No. 14,873, 1 Cranch C. C. 55.

98. See Arrest, 3 Cyc. 877.

99. *Ex p.* Thomas, 100 Ala. 101, 13 So. 517; Hoggatt *v.* Bigley, 6 Humphr. (Tenn.) 236; Waller *v.* Com., 84 Va. 492, 5 S. E. 364.

1. People *v.* Webster, 75 Hun (N. Y.) 278, 26 N. Y. Suppl. 1007.

2. People *v.* Howard, 13 Misc. (N. Y.) 763, 35 N. Y. Suppl. 233; People *v.* Fuerst, 13 Misc. (N. Y.) 304, 34 N. Y. Suppl. 1115. And see O'Brian *v.* State, 12 Ind. 369.

3. *Connecticut.*— Holcomb *v.* Cornish, 8 Conn. 375.

Illinois.— Lancaster *v.* Lane, 19 Ill. 242.

Indiana.— O'Brian *v.* State, 12 Ind. 369.

Massachusetts.— Com. *v.* McGahey, 11 Gray 194.

New Hampshire.—Bissell *v.* Bissell, 3 N. H. 520.

New York.— Farrell *v.* Warren, 3 Wend. 253.

North Carolina.— State *v.* Shaw, 25 N. C. 20.

Tennessee.— Touhey *v.* King, 9 Lea 422.

Virginia.— Johnston *v.* Moorman, 80 Va. 131.

England.— 4 Bl. Comm. 292; 2 Hale P. C. 86; 2 Hawkins P. C. c. 13, § 14.

4. Simpson *v.* State, 56 Ark. 8, 19 S. W. 99; Com. *v.* McGahey, 11 Gray (Mass.) 194; State *v.* Holmes, 48 N. H. 377; *Ex p.* Sher-

a warrant.[5] But the writ will lie where the magistrate refuses to act in accordance with his duty, and there is no attempt to control his discretion.[6]

b. Who May Issue. When authorized by statute the clerk may issue a warrant in vacation,[7] but at other times it must be issued by the justice himself, in the absence of a statute permitting the clerk to issue it, and in the county where the offense was committed,[8] and should be made returnable before him. The fact that in minor crimes a summons may be issued to the accused does not deprive the justice of authority to issue a warrant in the first instance.[9] A statute may authorize a warrant to be issued and signed by the prosecuting attorney.[10]

c. Time of Issuance. In the absence of a statutory provision to the contrary a warrant may be issued at any time of the day or night, and on Sunday as well as on any other day.[11]

d. Preliminary Examination. Where a statute merely requires an examination of the complainant on oath by the justice to authorize the issue of the warrant a complaint sworn to before the justice is sufficient,[12] but it is otherwise where a statute provides that when an information is laid before a magistrate he must examine the informant and his witnesses under oath.[13]

e. Reduction of Evidence to Writing. Where a statute does not require it, it is not usual or necessary to reduce the evidence upon which the warrant is issued to writing.[14] And where it is required, a justice or clerk need not do so

wood, 29 Tex. App. 334, 15 S. W. 812. And see 1 Chitty Cr. L. 61.

5. U. S. *v.* Lawrence, 3 Dall. (U. S.) 42, 1 L. ed. 502; Thompson *v.* Desnoyers, 16 Quebec Super. Ct. 253, 3 Can. Cr. Cas. 68. See also Reg. *v.* Russell, 6 Jur. 221. And see, generally, MANDAMUS.

6. Benners *v.* State, 124 Ala. 97, 26 So. 942; State *v.* McCutcheon, 20 Nebr. 304, 30 N. W. 58; Reg. *v.* Hicks, 19 Nova Scotia 89. And see Sadler *v.* Sheahan, 92 Mich. 630, 52 N. W. 1030; Rex *v.* Martyr, 13 East 55. See also MANDAMUS.

7. State *v.* Johnson, (Kan. Sup. 1899) 58 Pac. 559; Com. *v.* Posson, 182 Mass. 339, 65 N. E. 381.

The clerk should issue the warrant of the court, and not his own warrant, if the warrant is returnable to the court of which he is clerk. Com. *v.* Posson, 182 Mass. 339, 65 N. E. 381.

A clerk pro tem. appointed under a statute, in case of the absence, death, or removal of the clerk, has the power of the clerk to issue a warrant. Com. *v.* Posson, 182 Mass. 339, 65 N. E. 381.

8. Woodall *v.* McMillan, 38 Ala. 622, holding that a justice of the peace has no authority to act upon a complaint and issue a warrant for the arrest of a party, where the offense was committed in another county and that if he does so the warrant is void.

The jurisdiction of justices to issue warrants is generally regulated by statute. See Com. *v.* Walcott, 126 Mass. 238; Com. *v.* Wolcott, 110 Mass. 67; State *v.* Hawes, 65 N. C. 301.

The mere grant of exclusive jurisdiction to a police court by statute over certain offenses does not exclude the authority of justices of the peace to receive complaints and issue warrants returnable before that court against persons charged with those offenses. Com. *v.* O'Connell, 8 Gray (Mass.) 464; Com. *v.* Roark, 8 Cush. (Mass.) 210.

An ex officio justice of the peace, as a notary public or city recorder, has the same power and authority to issue warrants as other justices. Harper *v.* State, 109 Ala. 66, 19 So. 901; State *v.* Riley, 34 Mo. App. 426.

Issue after term of office.— A warrant issued by a justice of the peace, or by an *ex officio* justice, as a notary public or recorder, after his term of office has expired, is void, unless the facts are such as to render him an officer *de facto*. Cary *v.* State, 76 Ala. 78.

9. State *v.* Ohio, etc., R. Co., 23 Ind. 362. See U. S. *v.* Cottom, 25 Fed. Cas. No. 14,873, 1 Cranch C. C. 55.

10. State *v.* Dibble, 59 Conn. 168, 22 Atl. 155, holding that a warrant so signed was not invalid because the attorney also signed the complaint, as his signing the warrant was merely a ministerial act.

11. Pearce *v.* Atwood, 13 Mass. 324. And see State *v.* Conwell, 96 Me. 172, 51 Atl. 873, 90 Am. St. Rep. 333.

12. State *v.* Nerbovig, 33 Minn. 480, 24 N. W. 321.

13. People *v.* Nowak, 1 Silv. Supreme (N. Y.) 411, 5 N. Y. Suppl. 239, 7 N. Y. Cr. 69.

Private examination.— An application for a warrant is not holding court within the provision of N. Y. Code Civ. Proc. § 5, that court sittings shall be public, and therefore the justice may examine the witnesses on such applications in private. People *v.* Cornell, 6 Misc. (N. Y.) 568, 27 N. Y. Suppl. 859.

14. People *v.* Rush, 113 Mich. 539, 71 N. W. 863; People *v.* Caldwell, 107 Mich. 374, 65 N. W. 213; People *v.* Bechtel, 80 Mich. 623, 45 N. W. 582.

with his own hand, but it is sufficient if he take the oath of the complainant to a written complaint.[15]

f. Sufficiency of Evidence or Probable Cause. The object of the examination of the complainant and his witnesses by the magistrate before he issues the warrant is to ascertain whether sufficient grounds exist for requiring the examination of the accused, and no stronger evidence should be required for a warrant than is required for holding the accused.[16] The magistrate should require evidence amounting to a direct charge of guilt or creating a strong suspicion thereof,[17] and no warrant ought to be issued based on hearsay or information and belief, or on evidence so insufficient and unsatisfactory that it does not show probable cause for its issuance.[18] An objection that the evidence before a justice of the peace was insufficient to authorize him to issue the warrant of arrest cannot be raised on the trial of the accused in the circuit court.[19]

g. Alias Warrants and Reissue. An alias warrant may issue where the original is lost.[20] A warrant remains in force until it is returned, but after it has been returned it is *functus officio*, and it cannot be reissued.[21]

h. Alteration of Warrant. No alteration can be made in a warrant by any person other than the magistrate who issued it. Any material alteration by another magistrate before whom it is returnable or by any other person renders it invalid.[22]

4. Requisites and Sufficiency — a. In General. A warrant must state or at least show the time of issuance,[23] and it should contain recitals showing authority to issue it, as that a complaint on oath or affirmation has been made, unless this is rendered unnecessary by statute.[24] It must direct and not merely authorize the arrest of the accused,[25] and must command the officer to bring him before the proper magistrate to be dealt with according to law.[26] The warrant, where it is founded on a statute, must show on its face a compliance with all the requirements

15. State *v.* Guinness, 16 R. I. 401, 16 Atl. 910.

Reduction of evidence on preliminary examination to writing see *infra*, X, D, 2, e.

16. People *v.* Lynch, 29 Mich. 274. See People *v.* Staples, 91 Cal. 23, 27 Pac. 523; *In re* Bates, 2 Fed. Cas. No. 1,099*a*.

Presumption.— Where a warrant shows that the justice examined witnesses on oath, it will be presumed that the evidence was sufficient to authorize its issuance, in the absence of proof to the contrary. See People *v.* Berry, 107 Mich. 256, 65 N. W. 98.

17. Welch *v.* Scott, 27 N. C. 72.

18. *Alabama.*— Rhodes *v.* King, 52 Ala. 272.

California.— *Ex p.* Dimmig, 74 Cal. 164, 15 Pac. 619. See People *v.* Staples, 91 Cal. 23, 27 Pac. 523.

Michigan.— People *v.* Berry, 107 Mich. 256, 65 N. W. 98.

New York.— McKelvey *v.* Marsh, 63 N. Y. App. Div. 396, 71 N. Y. Suppl. 541; Comfort *v.* Fulton, 39 Barb. 56; People *v.* McGirr, 39 Misc. 471, 80 N. Y. Suppl. 171.

Pennsylvania.—See Conner *v.* Com., 3 Binn. 38.

United States.— *In re* Bates, 2 Fed. Cas. No. 1,099*a*; *In re* Rule of Ct., 20 Fed. Cas. No. 12,126, 3 Woods 502.

See 14 Cent. Dig. tit. "Criminal Law," § 443.

A warrant based on common rumor and the danger of defendant's escape is invalid. Conner *v.* Com., 3 Binn. (Pa.) 38.

A statement in the complaint sworn to positively is conclusive, and it is proper to exclude evidence that the prosecuting witness had no knowledge of the facts sworn to except such as was based upon rumor, hearsay, information, and belief. Holton *v.* Bimrod, 8 Kan. App. 265, 55 Pac. 505.

19. People *v.* Payment, 109 Mich. 553, 67 N. W. 689.

20. Clayton *v.* State, 122 Ala. 91, 26 So. 118.

21. State *v.* Queen, 66 N. C. 615.

22. Haskins *v.* Young, 19 N. C. 527, 31 Am. Dec. 426.

23. Donahoe *v.* Shed, 8 Metc. (Mass.) 326.

24. *Georgia.*— Brady *v.* Davis, 9 Ga. 73.

Massachusetts.— Com. *v.* Ward, 4 Mass. 497.

Missouri.— See Halsted *v.* Brice, 13 Mo. 171.

New York.— See Bissell *v.* Gold, 1 Wend. 210, 19 Am. Dec. 480.

Pennsylvania.—See Conner *v.* Com., 3 Binn. 38.

South Carolina.— See State *v.* Wimbush, 9 S. C. 309.

England.— Caudle *v.* Seymour, 1 Q. B. 889, 1 G. & D. 454, 5 Jur. 1196, 10 L. J. M. C. 130, 41 E. C. L. 889; Smith *v.* Bouchier, 2 Str. 993.

25. Abbott *v.* Booth, 51 Barb. (N. Y.) 546.

26. Reg. *v.* Downey, 7 Q. B. 281, 9 Jur. 1073, 15 L. J. M. C. 29, 53 E. C. L. 281. See Bookhout *v.* State, 66 Wis. 415, 28 N. W. 179, holding that the use in the mandate of a

of the statute.[27] The complaint and warrant may be upon the same paper.[28] Where they are not, if the complaint sets out the offense in full, it is sufficient that the warrant is "to answer the above charge" without repeating it.[29] The omission of the name of the county from the warrant may render it illegal.[30]

b. To Whom Directed. A warrant is usually directed to any peace officer of a certain class.[31] When it is to be executed by an officer, it must be directed to a proper officer by name or a proper class of officers by the description of their office.[32] The justice may direct the warrant to a private person by name to execute the same,[33] but he should not do so unless it is absolutely necessary.[34]

c. Name and Description of Accused — (i) *In General.* As a general rule a warrant must be specific and correctly name the person to be arrested, giving his christain name, or if his name is unknown it must so state, and must describe him so that he may be identified.[35] A general warrant to apprehend all persons suspected of a crime, as for instance to apprehend the authors, printers, and publishers of a libel, without naming them is void.[36]

(ii) *Warrants in Blank.* Warrants signed in blank by a magistrate and

warrant of the phrase "to be dealt with according to law," instead of "to answer such complaint," as provided by statute, is a mere informality which does not affect the validity of the warrant.

Direction for custody, etc.— A direction that the officer apprehend a party and keep him in safe custody is illegal, as the police have no power to keep a prisoner in their custody until trial, but he should be either admitted to bail or sent to jail in default thereof. *Ex p.* Nisbett, 8 Jur. 1071. A warrant should state where the prisoner should be taken for the purpose of being bailed. Reg. *v.* Downey, 7 Q. B. 281, 9 Jur. 1073, 15 L. J. M. C. 29, 53 E. C. L. 281.

27. State *v.* Staples, 37 Me. 228. But the title of the statute need not be indorsed on the warrant. Johnson *v.* Barclay, 16 N. J. L. 1.

28. State *v.* Goyette, 11 R. I. 592.

29. State *v.* Sharp, 125 N. C. 628, 34 S. E. 264, 74 Am. St. Rep. 663.

30. Toliver *v.* State, 32 Tex. Cr. 444, 24 S. W. 286.

31. Wilson *v.* State, 99 Ala. 194, 13 So. 427; Johnson *v.* State, 73 Ala. 21. See also Arrest, 3 Cyc. 875, 876.

32. Brady *v.* Davis, 9 Ga. 73; State *v.* Wenzel, 77 Ind. 428; Abbott *v.* Booth, 51 Barb. (N. Y.) 546; Wells *v.* Jackson, 3 Munf. (Va.) 458. But see Com. *v.* Moran, 107 Mass. 239.

Where an appointment of a special constable must be in writing an indorsement on a warrant is sufficient as such. State *v.* Hallback, 40 S. C. 298, 18 S. E. 919.

33. Tesh *v.* Com., 4 Dana (Ky.) 522; McClain *v.* Lawrence County, 14 Pa. Super. Ct. 273; Com. *v.* Blair County Jail Warden, 8 Pa. Dist. 159; Com. *v.* Baird, 21 Pa. Co. Ct. 488; 2 Hawkins P. C. c. 13, § 27.

34. Com. *v.* Foster, 1 Mass. 488; 2 Hawkins P. C. c. 13, § 27.

35. *Colorado.*— Allison *v.* People, 6 Colo. App. 80, 39 Pac. 903.

Georgia.—Johnson *v.* Riley, 13 Ga. 97, 137; Brady *v.* Davis, 9 Ga. 73.

Illinois.— Rafferty *v.* People, 69 Ill. 111, 18 Am. Rep. 601.

Massachusetts.— Com. *v.* Crotty, 10 Allen 403, 87 Am. Dec. 669; Nichols *v.* Thomas, 4 Mass. 232.

New Hampshire.— Clark *v.* Bragdon, 37 N. H. 562; Melvin *v.* Fisher, 8 N. H. 406.

New York.— Miller *v.* Foley, 28 Barb. 630; Gurnsey *v.* Lovell, 9 Wend. 319; Scott *v.* Ely, 4 Wend. 555; Mead *v.* Haws, 7 Cow. 332; Griswold *v.* Sedgwick, 6 Cow. 456.

North Carolina.— Haskins *v.* Young, 19 N. C. 527, 31 Am. Dec. 426.

Texas.— Alford *v.* State, 8 Tex. App. 545.

Virginia.— Wells *v.* Jackson, 3 Munf. 458.

Wisconsin.— Scheer *v.* Keown, 29 Wis. 586.

United States.— West *v.* Cabell, 153 U. S. 78, 14 S. Ct. 752, 38 L. ed. 643.

England.— Money *v.* Leach, 3 Burr. 1742, 1 W. Bl. 555; Hoye *v.* Bush, 1 M. & G. 775, 39 E. C. L. 1020; Rex *v.* Hood, 1 Moody C. C. 281; Wilks *v.* Lorck, 2 Taunt. 399.

The arrest of a person by a wrong name cannot be justified, although he was the person intended, unless it be shown that he was known by one name as well as the other. Mead *v.* Haws, 7 Cow. (N. Y.) 332; Griswold *v.* Sedgwick, 6 Cow. (N. Y.) 456; Shadgett *v.* Clipson, 8 East 328; Wilks *v.* Lorck, 2 Taunt. 399.

Amendment.— It has been held, however, that under statutes allowing amendments in criminal proceedings and process, where a person has been arrested under a complaint and warrant giving a wrong name, they may be amended so as to give his name correctly. It was so held where Mary E. Keehn had been arrested under a complaint and warrant against Jenny M. Keehn, and an action was brought for false imprisonment. Keehn *v.* Stein, 72 Wis. 196, 39 N. W. 372.

Idem sonans.— There is no misnomer of the accused in a warrant where the name given and the name of the accused are *idem sonans.* People *v.* Gosch, 82 Mich. 22, 46 N. W. 101, holding that the proper names "Amel" and "Amiel," and the names "Brearly" and "Brailey," in a warrant of arrest, were *idem sonans.* See, generally, Names.

36. Money *v.* Leach, 3 Burr. 1742, 1 W. Bl. 555; 4 Bl. Comm. 291. And see Com. *v.*

delivered to a police officer to be filled up by the latter with the names of persons to be arrested as occasion may require are null and void.[37]

(III) *FICTITIOUS NAME.* In the absence of a statute, even when an offender's name is unknown, a warrant cannot be issued describing him by a fictitious name, as "John Doe," unless it also contains such a description as will identify him;[38] but in some jurisdictions a statute expressly authorizes the use of a fictitious name, where the real name is unknown.[39]

d. Signature and Seal. The common law requires that warrants shall be under seal,[40] and by the weight of authority unless a statute authorizes them to issue without seal the omission of a seal renders them invalid.[41] The warrant must be subscribed by the justice of the peace,[42] the clerk,[43] or the prosecuting attorney,[44] according to the practice.

e. Description and Venue of Crime. A warrant of arrest before indictment[45] must, generally by express constitutional or statutory provision, state shortly the offense for which the arrest is to be made, or recite the substance of the accusation, and must show an offense for which an arrest may lawfully be made.[46] It should

Crotty, 10 Allen (Mass.) 403, 87 Am. Dec. 669.

Exception.— In England, under statutes which are old enough to have become a part of our common law, general warrants to take up loose, idle, and disorderly persons, such as prostitutes, vagrants, drunkards, and the like, are an exception to this rule. Money *v.* Leach, 3 Burr. 1742, 1 W. Bl. 555.

37. *Illinois.*— Rafferty *v.* People, 69 Ill. 111, 18 Am. Rep. 601.

Massachusetts.— Com. *v.* Crotty, 10 Allen 403, 87 Am. Dec. 669.

Texas.— Alford *v.* State, 8 Tex. App. 545.

Virginia.— See Wells *v.* Jackson, 3 Munf. 458.

England.— 1 Chitty Cr. L. 39; 1 East P. C. 110, 111; Foster Crown L. 312; 1 Hale P. C. 465, 577.

Compare, however, Bailey *v.* Wiggins, 5 Harr. (Del.) 462, 60 Am. Dec. 650, sustaining a warrant against one whose name was unknown, in which a blank was left for the name, and was filled up after his arrest.

38. Allison *v.* People, 6 Colo. App. 80, 39 Pac. 903; Com. *v.* Crotty, 10 Allen (Mass.) 403, 87 Am. Dec. 669; Gurnsey *v.* Lovell, 9 Wend. (N. Y.) 319.

39. People *v.* City Prison, 37 Misc. (N. Y.) 676, 76 N. Y. Suppl. 424; People *v.* Jerome, 34 Misc. (N. Y.) 575, 70 N. Y. Suppl. 377. See also Gurnsey *v.* Lovell, 9 Wend. (N. Y.) 319.

40. 2 Hawkins P. C. c. 13, § 21.

41. *Georgia.*— State *v.* Caswell, T. U. P. Charlt. 280.

Maine.— State *v.* Drake, 36 Me. 366, 58 Am. Dec. 757; State *v.* Coyle, 33 Me. 427.

Maryland.— Somervell *v.* Hunt, 3 Harr. & M. 113.

New Hampshire.— State *v.* Weed, 21 N. H. 262, 53 Am. Dec. 188.

New York.— Beekman *v.* Traver, 20 Wend. 67; People *v.* Holcomb, 3 Park. Cr. 656.

North Carolina.— State *v.* Worley, 33 N. C. 242; Welch *v.* Scott, 27 N. C. 72; State *v.* Curtis, 2 N. C. 471.

Rhode Island.— State *v.* Goyette, 11 R. I. 592; Lough *v.* Millard, 2 R. I. 436.

Tennessee.— Tackett *v.* State, 3 Yerg. 392, 24 Am. Dec. 582.

England.— 4 Bl. Comm. 290; 1 Chitty Cr. L. 38; Foster Crown L. 311, 312; 1 Hale P. C. 577.

See, however, Thompson *v.* Fellows, 21 N. H. 425; Davis *v.* Clements, 2 N. H. 390; State *v.* Vaughn, Harp. (S. C.) 313; Burley *v.* Griffith, 8 Leigh (Va.) 442; Padfield *v.* Cabell, Willes 411.

See 14 Cent. Dig. tit. "Criminal Law," § 448.

Officer having no seal.— A warrant without a seal, issued by a United States commissioner having no seal, and not required by any statute to be under seal, is not void. Starr *v.* U. S., 153 U. S. 614, 14 S. Ct. 919, 38 L. ed. 841.

A wafer or scroll is sufficient in some jurisdictions, if intended as a seal. State *v.* McNally, 34 Me. 210, 56 Am. Dec. 650; State *v.* Thompson, 49 Mo. 188. See SEALS.

42. Siler *v.* Ward, 4 N. C. 161 (holding, however, that a warrant signed by a justice of the peace is not invalid because it does not mention his official character); Davis *v.* Sanders, 40 S. C. 507, 19 S. E. 138; U. S. *v.* Thompson, 28 Fed. Cas. No. 16,484, 2 Cranch C. C. 409 (holding that a signature of a warrant of arrest issued by the justice of the peace in black lead pencil was not a sufficient signature because of its liability to be easily obliterated); 2 Hawkins P. C. c. 13, § 21. *Compare,* however, under a statute, Com. *v.* Brusie, 145 Mass. 117, 13 N. E. 378.

43. Spear *v.* State, 120 Ala. 351, 25 So. 46; O'Brien *v.* Cleveland, 4 Ohio Dec. (Reprint) 189, 1 Clev. L. Rep. 100.

44. State *v.* Dibble, 59 Conn. 168, 22 Atl. 155, holding that the signature is a mere ministerial act, which is probably the rule in most cases.

45. See Brady *v.* Davis, 9 Ga. 73. And see *infra,* XI, A.

46. *Alabama.*— Duckworth *v.* Johnston, 7 Ala. 578. And see Johnson *v.* State, 73 Ala. 21; Brazleton *v.* State, 66 Ala. 96.

Arkansas.— Floyd *v.* State, 12 Ark. 43, 44 Am. Dec. 250.

state the place of the offense with reasonable certainty,[47] and the time of its commission,[48] although it has been held that a clerical error in this respect, which cannot mislead, will not render a warrant invalid.[49] A formal and detailed description of an offense, stating all the facts on which the charge is founded, is never necessary in the warrant, but it is sufficient if it describes the offense with sufficient precision to inform the accused, assuming that he is of ordinary intelligence, as to what charge he will have to meet.[50] A statute requiring that a warrant shall recite the substance of the accusation is complied with by making the warrant on the same paper as the complaint and referring to it.[51]

f. Directions as to Return. A warrant ought to contain a command to return the same, although the absence thereof will not excuse the officer from making a return,[52] nor justify the court in discharging the prisoner.[53] The direction may be to return the accused before the magistrate who issued the warrant,[54] or before some other magistrate of the county,[55] or before some court designated by stat-

Connecticut.— State *v.* Leach, 7 Conn. 452, 18 Am. Dec. 113.

Georgia.— Brady *v.* Davis, 9 Ga. 73.

Illinois.— Moore *v.* Watts, 1 Ill. 42.

New York.— People *v.* Mead, 92 N. Y. 415.

North Carolina.— State *v.* Jones, 88 N. C. 671; State *v.* Whitaker, 85 N. C. 566.

Texas.— Garcia *v.* Sanders, (Civ. App. 1896) 35 S. W. 52.

England.— Caudle *v.* Seymour, 1 Q. B. 889, 1 G. & D. 454, 5 Jur. 1196, 10 L. J. M. C. 130, 41 E. C. L. 889; Money *v.* Leach, 3 Burr. 1742, 1 W. Bl. 555.

A warrant which names no offense known to the law is void under a statute providing that "it must state that the person is accused of some offense against the laws of the state, naming the offense." Garcia *v.* Sanders, (Tex. Civ. App. 1896) 35 S. W. 52.

Where the intent is material, the warrant should charge the commission of the crime unlawfully and wilfully (State *v.* Whitaker, 85 N. C. 566), but if a warrant for murder charge that it was done unlawfully, feloniously, premeditatedly, and deliberately with malice aforethought it is not necessary to charge that it was done wilfully. State *v.* Smith, 50 Kan. 69, 31 Pac. 784. And see State *v.* Tennison, 39 Kan. 726, 18 Pac. 948.

A warrant for larceny on which a prosecution is based in a justice's court must state the value of the stolen property, so that it may appear whether the lower or higher court has jurisdiction. People *v.* Belcher, 58 Mich. 325, 25 N. W. 303.

The fact that two offenses are charged in a warrant is no ground for the officer's refusal to execute it, where the justice of the peace has jurisdiction over both offenses. Patterson *v.* Kise, 2 Blackf. (Ind.) 127.

47. Price *v.* Graham, 48 N. C. 545. See also State *v.* Tennison, 39 Kan. 726, 18 Pac. 948. *Contra* in the case of a summons see Word *v.* Com., 3 Leigh (Va.) 743. A failure to lay the venue properly is not fatal to a justice's warrant on which the accused is tried and convicted. State *v.* Williamson, 81 N. C. 540.

48. State *v.* Tennison, 39 Kan. 726, 18 Pac. 948. *Contra* in the case of a summons. Word *v.* Com., 3 Leigh (Va.) 743.

49. Heckman *v.* Swartz, 64 Wis. 48, 24 N. W. 473.

50. *Alabama.*— Adams *v.* Coe, 123 Ala. 664, 26 So. 652; Johnson *v.* State, 73 Ala. 21; Brazleton *v.* State, 66 Ala. 96.

Kansas.— *In re* Stewart, 60 Kan. 781, 57 Pac. 976; State *v.* Smith, 57 Kan. 673, 47 Pac. 541; State *v.* Reedy, 44 Kan. 190, 24 Pac. 66 (warrant for incest); State *v.* Tennison, 39 Kan. 726, 18 Pac. 948; State *v.* Arnstein, 9 Kan. App. 697, 59 Pac. 602.

Kentucky.— Megowan *v.* Com., 2 Metc. 3.

Maine.— State *v.* Hobbs, 39 Me. 212.

New York.— People *v.* Mead, 92 N. Y. 415; Krauskopf *v.* Tallman, 38 N. Y. App. Div. 273, 56 N. Y. Suppl. 967 [*affirmed* in 170 N. Y. 561, 62 N. E. 1096].

North Carolina.— State *v.* Cainan, 94 N. C. 880; State *v.* Jones, 88 N. C. 671; State *v.* Bryson, 84 N. C. 780.

South Carolina.— State *v.* Hallback, 40 S. C. 298, 18 S. E. 919; State *v.* Rowe, 8 Rich. 17; State *v.* Everett, Dudley 295.

Vermont.— *In re* Durant, 60 Vt. 176, 12 Atl. 650, perjury.

Virginia.— Lacy *v.* Palmer, 93 Va. 159, 24 S. E. 930, 57 Am. St. Rep. 795, 31 L. R. A. 822.

Washington.— State *v.* Yourex, 30 Wash. 611, 71 Pac. 203.

Wisconsin.— Fetkenhauer *v.* State, 112 Wis. 491, 88 N. W. 294.

See 14 Cent. Dig. tit. "Criminal Law," § 449.

51. State *v.* McAllister, 25 Me. 490; Com. *v.* Dean, 9 Gray (Mass.) 283.

52. Tubbs *v.* Tukey, 3 Cush. (Mass.) 438, 50 Am. Dec. 744.

Form of direction.— A warrant is not objectionable because it is made returnable to the "Pike County Criminal Court" of said county instead of to "the Criminal Court of Pike county." Wilson *v.* State, 99 Ala. 194, 13 So. 427.

53. Com. *v.* Boon, 2 Gray (Mass.) 74.

54. See *Ex p.* Branigan, 19 Cal. 133; State *v.* Aldrich, 50 Kan. 666, 32 Pac. 408; People *v.* Fuller, 17 Wend. (N. Y.) 211.

55. *Ex p.* Branigan, 19 Cal. 133; Hendee *v.* Taylor, 29 Conn. 448; Com. *v.* Wilcox, 1 Cush. (Mass.) 503; Foster's Case, 5 Coke 59*a*; 2 Hale P. C. 112.

ute.[56] It must be returnable before some magistrate or court having jurisdiction of the subject-matter.[57]

5. Warrants For Escaped or Fugitive Offenders. In misdemeanors the justice of the peace of the county where the offense is alleged to have been committed may issue a warrant for the return of the fugitive, and this indorsed by a justice of the county where he is found is sufficient.[58]

6. Execution of Warrant in Another County. At common law a warrant cannot confer authority to execute it outside of the jurisdiction of the issuing magistrate or judge, and therefore a warrant issued by a judge or justice of the peace of one county must be backed or indorsed by a judge or justice of the peace of another county before it can be executed in the latter.[59] In some states this rule has been more or less changed by statute.[60]

7. Defects in Warrant — a. Effect in General. As a general rule clerical errors, erroneous omission or insertion of words, or other defects in a warrant do not render it invalid, if they are immaterial and cannot prejudice or mislead the accused.[61]

b. Waiver and Cure. A general appearance by the accused and his plea of "not guilty" are a waiver of all objections to matters of form in the warrant. Such objections should be made by plea in abatement before the court in which the warrant is returnable.[62] The same result follows where the accused enters into

56. *Alabama.*— Withers *v.* State, 117 Ala. 89, 23 So. 147; Reeves *v.* State, 116 Ala. 481, 23 So. 28; Harden *v.* State, 109 Ala. 50, 19 So. 494; Walker *v.* State, 89 Ala. 74, 8 So. 144.

Maine.— State *v.* Stevens, 53 Me. 548.

Massachusetts.— Com. *v.* Certain Intoxicating Liquors, 128 Mass. 72.

New Hampshire.— Batchelder *v.* Currier, 45 N. H. 460.

Rhode Island.— State *v.* Sherman, 16 R. I. 631, 18 Atl. 1040.

See 14 Cent. Dig. tit. "Criminal Law," § 452.

57. Stetson *v.* Packer, 7 Cush. (Mass.) 562.

58. Com. *v.* Jailer, 1 Grant (Pa.) 218.

A statute permitting a justice to issue a warrant for one who has escaped out of prison does not authorize a warrant for one who escapes while on his way to prison. McClintic *v.* Lockridge, 11 Leigh (Va.) 235.

59. Butolph *v.* Blust, 41 How. Pr. (N. Y.) 481; 4 Bl. Comm. 291; 1 Chitty Cr. L. 49; 2 Hale P. C. 115.

It is so by express statutory provision in some states. See State *v.* Dooley, 121 Mo. 591, 26 S. W. 558; Peter *v.* State, 23 Tex. App. 684, 5 S. W. 228; Ledbetter *v.* State, 23 Tex. App. 247, 5 S. W. 226. See also N. Y. Code Cr. Proc. § 156.

60. See Kan. Code Cr. Proc. § 39; Kan. Gen. St. (1899) § 5287; N. Y. Code Cr. Proc. § 155.

A warrant issued by a police justice of a village may, under N. Y. Code Cr. Proc. §§ 146, 147 and 155, 156, be executed anywhere within the county, although beyond the limits of the village. Orleans County *v.* Winchester, 18 N. Y. Suppl. 668.

61. *Alabama.*— Wilson *v.* State, 99 Ala. 194, 13 So. 427; Johnson *v.* State, 73 Ala. 21, holding that a warrant of arrest signed by a justice of the peace was not impaired by the omission of the word "me" after the word "before," in stating by whom it was issued.

Massachusetts.—Com. *v.* Martin, 98 Mass. 4.

Michigan.—People *v.* Kahler, 93 Mich. 625, 53 N. W. 826, holding that a warrant alleging that the accused unlawfully sold "a large quantity of, to wit, spirituous and intoxicating liquors" was not void because of the insertion of the words "to wit."

New York.— People *v.* Holmes, 41 Hun 55; Payne *v.* Barnes, 5 Barb. 465.

North Carolina.— State *v.* Williamson, 81 N. C. 540.

Virginia.— Lacey *v.* Palmer, 93 Va. 159, 24 S. E. 930, 57 Am. St. Rep. 795, 31 L. R. A. 822.

Wisconsin.— Bookhout *v.* State, 66 Wis. 415, 28 N. W. 179 (holding that where a statute required the mandate of the warrant to be that the accused he brought before the justice "to answer such complaint," and the mandate of a warrant as issued used the phrase "to be dealt with according to law," the informality was immaterial); Heckman *v.* Swartz, 64 Wis. 48, 24 N. W. 473 (holding that a warrant of arrest issued in March, 1878, and stating that the offense was committed on May 20, 1878, instead of on May 20, 1877, as charged in the complaint, was not invalid, as the mistake was clerical and not misleading).

See 14 Cent. Dig. tit. "Criminal Law," § 453.

62. *California.*— People *v.* Staples, 91 Cal. 23, 27 Pac. 523; People *v.* Smith, 1 Cal. 9.

Connecticut.—State *v.* Dibble, 59 Conn. 168, 22 Atl. 155.

Kansas.— *In re* Stewart, 60 Kan. 781, 57 Pac. 976; State *v.* Tennison, 39 Kan. 726, 18 Pac. 948.

Maine.— State *v.* Regan, 67 Me. 380.

a recognizance for his appearance on the return of the warrant and is discharged from arrest, as he is held under the recognizance thereafter.[63] So also a waiver of the preliminary examination constitutes a waiver of all defects in the warrant.[64]

c. Amendment. Immaterial irregularities in the warrant may be cured by amendment, but an amendment striking out the offense charged and inserting another cannot be permitted.[65]

8. COMMITMENT FOR PRELIMINARY EXAMINATION. The constitutional right of the accused to a speedy trial demands that he shall have a prompt preliminary examination after his arrest. A commitment for an indefinite time in order that the prosecution may prepare the case against him and procure evidence is improper.[66]

9. REMOVAL TO ANOTHER JUSTICE OR JURISDICTION. Where serious inconvenience and delay would ensue, either to the public or to the prisoner, by taking him before the judge or justice who has issued the warrant, he may be taken before some other justice in the same county.[67] A statute requiring the officer making an arrest under a warrant from another county to carry the accused for examination to the county in which the offense was committed is mandatory, and he must do so, although the accused offers to waive examination and tenders bail for his appearance in such other county for trial.[68] Where a removal is sought, under the federal statute,[69] from the district where the accused is found to the district where the offense was committed, there should be a preliminary examination to establish the identity and probable guilt of the accused before the issue of a warrant for his removal.[70]

D. Preliminary Examination and Commitment — 1. NATURE AND REQUISITES OF PRELIMINARY EXAMINATION — a. In General. The preliminary examination is to ascertain whether the crime charged has been committed, and whether there is

Massachusetts.— Com. *v.* Hart, 123 Mass. 416. And see Com. *v.* Gregory, 7 Gray 498.

Michigan.— People *v.* Harris, 103 Mich. 473, 61 N. W. 871; People *v.* Kenyon, 93 Mich. 19, 52 N. W. 1033; People *v.* Allen, 51 Mich. 176, 16 N. W. 370; People *v.* Dowd, 44 Mich. 488, 7 N. W. 71.

New York.— Day *v.* Wilber, 2 Cai. 134.

Ohio.—Pope *v.* Cincinnati, 2 Ohio Cir. Dec. 285.

Pennsylvania.— Com. *v.* Fairchild, 9 Kulp 211, 21 Pa. Co. Ct. 310.

Rhode Island.— State *v.* Sherman, 16 R. I. 631, 18 Atl. 1040.

South Carolina.— State *v.* Mays, 24 S. C. 190.

See 14 Cent. Dig. tit. "Criminal Law," §§ 454, 455.

63. Laney *v.* State, 109 Ala. 34, 19 So. 531; Ard *v.* State, 114 Ind. 542, 16 N. E. 504; State *v.* Downs, 8 Ind. 42.

64. State *v.* Goff, 10 Kan. App. 268, 61 Pac. 680 [*reversed* on other grounds in 62 Kan. 104, 61 Pac. 683]; State *v.* Stredder, 3 Kan. App. 631, 44 Pac. 34; People *v.* Harris, 103 Mich. 473, 61 N. W. 871; Everson *v.* State, (Nebr. 1903) 93 N. W. 394; Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744. See also Laney *v.* State, 109 Ala. 34, 19 So. 531.

65. State *v.* Taylor, 118 N. C. 1262, 24 S. E. 526; State *v.* Wilson, 106 N. C. 718, 11 S. E. 254; State *v.* Freeman, 59 Vt. 661, 10 Atl. 752.

Amendment as to name of accused see *supra*, X, C, 4, c, (I), note 35.

66. U. S. *v.* Worms, 28 Fed. Cas. No. 16,765, 4 Blatchf. 332. At common law three days was regarded as a reasonable time to wait for a preliminary examination. 2 Hawkins P. C. c. 16, § 12.

One accused of a crime which can be tried only in a federal court may be committed by a state court for such a time as is reasonably necessary to place him in federal custody. *Ex p.* Smith, 5 Cow. (N. Y.) 273.

Bringing accused before magistrate.— Under a statute requiring a warrant to command the officer to whom it is directed to take the accused and bring him before the magistrate, a magistrate cannot order a person accused of crime to be committed until the subsequent day for examination, without the accused being first brought before him. Pratt *v.* Hill, 16 Barb. (N. Y.) 303.

Necessity for commitment.— In a proceeding in which it is necessary to commit the accused to await a hearing or pending examination, a writ of commitment is necessary, setting forth the cause of detention and why the examination is postponed. Erwin *v.* U. S., 37 Fed. 470, 2 L. R. A. 229.

67. *Ex p.* Branigan, 19 Cal. 133; Wiggins *v.* Norton, 83 Ga. 148, 9 S. E. 607.

New complaint and warrant.— Where a preliminary examination is transferred from one justice to another, a new complaint and warrant are not required. *Ex p.* Moan, 65 Cal. 216, 3 Pac. 644.

68. Lamb *v.* Dillard, 94 Ga. 206, 21 S. E. 463.

69. U. S. Rev. St. (1878) § 1014 [U. S. Comp. St. (1901) p. 717].

70. *In re* Burkhardt, 33 Fed. 25.

probable cause to believe a jury will convict the accused upon the evidence adduced.[71] In many of the states the preliminary examination is purely statutory, and compliance with the statute is requisite to give jurisdiction.[72]

b. Purpose of and Right to Examination — (i) *In General.* By the English law[73] it was provided in substance that where one was brought on his arrest before an officer such officer should take his examination, and the information of those who brought him, and commit the same to writing. This statute, where it has not been repealed, has been recognized as in force in the United States,[74] but in most states the subject is now regulated by statute. In many states a preliminary examination is expressly required as a prerequisite to a prosecution by information, and an information filed without a previous preliminary examination is invalid[75] unless an examination has been waived.[76] The information therefore can only be for the offense upon a charge of which the accused has had a preliminary examination or for an offense included in such charge.[77] The accused cannot claim that he has had no preliminary examination where a complaint was made charging him with a crime and evidence of witnesses has been taken bearing directly on the crime and sufficient to show probable cause for holding him.[78] The rule requiring a preliminary examination as a prerequisite to an information does not apply to fugitives from justice.[79] Nor does the rule apply where the charge is to be tried and determined by the magistrate himself.[80] A party cannot be committed to jail on an accusation without being heard, and a mittimus to such effect is illegal.[81] In some states by statute an information may be filed by leave of the court without a preliminary examination,[82] and in some states an information may be filed without a preliminary examination and without obtaining leave of the court.[83]

Removal from one federal district to another see *infra*, X, D, 3, b, (IV).

71. Guion *v.* Brunot, 104 La. 237, 28 So. 996; Wagener *v.* Ramsey County, 76 Minn. 368, 79 N. W. 166; Van Buren *v.* State, (Nebr. 1902) 91 N. W. 201; Latimer *v.* State, 55 Nebr. 609, 76 N. W. 207, 70 Am. St. Rep. 403. And see Hawaii *v.* Yamane Nenchiro, 12 Hawaii 189.

72. Matter of Gessner, 53 How. Pr. (N. Y.) 515; State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

73. St. 1 & 2 P. & M. cc. 3, 13; St. 2 & 3 P. & M. c. 10; 2 Hawkins P. C. c. 16, § 11.

74. See *In re* Bates, 2 Fed. Cas. No. 1,099*a*.

75. *California.*— People *v.* Beam, 66 Cal. 394, 5 Pac. 677.

Kansas.— State *v.* Geer, 48 Kan. 752, 30 Pac. 236; State *v.* Spaulding, 24 Kan. 1; State *v.* Smith, 13 Kan. 274.

Louisiana.— Macarty's Case, 2 Mart. 279.

Michigan.— People *v.* Sessions, 58 Mich. 594, 26 N. W. 291; O'Hara *v.* People, 41 Mich. 623, 3 N. W. 161; Sneed *v.* People, 38 Mich. 248; Byrnes *v.* People, 37 Mich. 515; Turner *v.* People, 33 Mich. 363.

Montana.— See State *v.* Brett, 16 Mont. 360, 40 Pac. 873.

Nebraska.— Latimer *v.* State, 55 Nebr. 609, 76 N. W. 207, 70 Am. St. Rep. 403; Coffield *v.* State, 44 Nebr. 417, 62 N. W. 875.

New Hampshire.—State *v.* Hilton, 32 N. H. 285.

Ohio.— Gates *v.* State, 3 Ohio St. 293.

Pennsylvania.— Com. *v.* Sheppard, 20 Pa. Super. Ct. 417.

See 14 Cent. Dig. tit. "Criminal Law," § 461 *et seq.*; and Indictments and Informations.

76. See *infra*, X, D, 1, b, (VI).

77. Turner *v.* People, 33 Mich. 363. See also State *v.* Spaulding, 24 Kan. 1; People *v.* Sessions, 58 Mich. 594, 26 N. W. 291; Boyd *v.* Com., 1 Rob. (Va.) 691. See Indictments and Informations.

Embezzlement.— A preliminary examination on a charge of the embezzlement of money as clerk will support an information charging in different counts the embezzlement of the same money, at the same time, and from the same party, as clerk, as agent, as servant, etc. State *v.* Spaulding, 24 Kan. 1; State *v.* Smith, 13 Kan. 274.

Homicide.— An examination on a charge of murder will support an information for manslaughter, which is included in murder. People *v.* Sessions, 58 Mich. 594, 26 N. W. 291.

78. People *v.* Beam, 66 Cal. 394, 5 Pac. 677; State *v.* Geer, 48 Kan. 752, 30 Pac. 236; State *v.* Spaulding, 24 Kan. 1; State *v.* Smith, 13 Kan. 274; People *v.* Sessions, 58 Mich. 594, 26 N. W. 291; Boyd *v.* Com., 1 Rob. (Va.) 691.

79. State *v.* Woods, 49 Kan. 237, 30 Pac. 520; People *v.* Kuhn, 67 Mich. 463, 35 N. W. 88; Coffield *v.* State, 44 Nebr. 417, 62 N. W. 875. See also Com. *v.* Shupp, 6 Kulp (Pa.) 430. See Indictments and Informations.

80. Byrnes *v.* People, 37 Mich. 515.

81. Macarty's Case, 2 Mart. (La.) 279.

82. State *v.* Brett, 16 Mont. 360, 40 Pac. 873.

83. See State *v.* Belding, (Oreg. 1903) 71 Pac. 330; State *v.* McGilvery, 20 Wash. 240,

(II) *Proceedings Before Grand Jury.* As a general rule a preliminary examination is not necessary where the prosecuting attorney goes before the grand jury, and an indictment will not be dismissed because of the lack of a preliminary examination;[84] but under the statutes in some jurisdictions the rule is otherwise.[85]

(III) *Coroner's Inquest.* Where by statute the inquisition and other proceedings before a coroner have all the force of a preliminary examination, the accused is not entitled to an examination before a justice.[86]

(IV) *Necessity For New Examination.* Where an information or indictment is quashed on demurrer, or set aside because defective, the accused may be held to answer a new indictment or information without another preliminary examination.[87]

(V) *Finding of Indictment Pending Examination.* Where the accused is under arrest on a warrant based on an information filed with a justice of the peace, he cannot by the finding of an indictment be deprived of his right to have the examination then pending completed by the examining magistrate.[88]

(VI) *Waiver of Preliminary Examination.* A preliminary examination is a personal right or privilege, and the accused may waive it and submit to be bound over without it,[89] unless, as it has been held, the committing magistrate shall deem

55 Pac. 115; State *v.* Williams, 13 Wash. 333, 43 Pac. 15; Ackerman *v.* State, 7 Wyo. 504, 54 Pac. 228; U. S. *v.* Benzone, 27 Fed. Cas. No. 16,192, 14 Blatchf. 69. See INDICTMENTS AND INFORMATIONS.

Constitutionality of statute.— The constitutional requirement that the accused shall have a right to demand the nature and cause of the accusation against him and to meet the witnesses face to face does not invalidate a statute which provides that an information shall be construed as an indictment and that the information shall be filed on or before the first day of the next regular term at which he is required to appear, although under such provision one may be tried on an information without having had a preliminary examination. A guarantee that the accused shall have the right to meet the witnesses face to face is satisfied by his being confronted with them on the trial. State *v.* Belding, (Oreg. 1903) 71 Pac. 330.

84. *California.*— People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161.

Idaho.— State *v.* Schieler, 4 Ida. 120, 37 Pac. 272.

Louisiana.— State *v.* Bunger, 14 La. Ann. 461.

New York.— People *v.* Diamond, 72 N. Y. App. Div. 281, 76 N. Y. Suppl. 57.

Pennsylvania.— Davidson *v.* Com., (1886) 6 Atl. 770; McCullough *v.* Com., 67 Pa. St. 30; Com. *v.* Shupp, 6 Kulp 430; Com. *v.* English, 11 Phila. 439; Com. *v.* Miller, 17 Pa. Co. Ct. 333; Com. *v.* Taylor, 12 Pa. Co. Ct. 326; Com. *v.* Wilson, 2 Chest. Co. Rep. 164; Com. *v.* Wetherhold, 2 Pa. L. J. Rep. 476, 4 Pa. L. J. 265.

West Virginia.—State *v.* Mooney, 49 W. Va. 712, 39 S. E. 657.

United States.— U. S. *v.* Bollman, 24 Fed. Cas. No. 14,622, 1 Cranch C. C. 373; U. S. *v.* Fuers, 25 Fed. Cas. No. 15,174.

See 14 Cent. Dig. tit. "Criminal Law," § 463; and INDICTMENTS AND INFORMATIONS.

85. Butler *v.* Com., 81 Va. 159; Anonymous, 1 Va. Cas. 144. *Compare*, however, Jackson *v.* Com., 23 Gratt. 919; Chahoon *v.* Com., 20 Gratt. 733; Shelly *v.* Com., 19 Gratt. 653; Com. *v.* Blakeley, 1 Va. Cas. 129. Under a statute giving one accused of felony the right to elect whether he will be examined or not by the county court touching the crime with which he is charged, before trial in the circuit court, it is error to put a defendant on trial in such a case before examination, if he makes due application therefor before trial, although it may be a year after indictment. State *v.* Strauder, 8 W. Va. 686.

86. *Ex p.* Anderson, 55 Ark. 527, 18 S. W. 856. *Contra*, Matter of Ramsear, 10 Abb. N. Cas. (N. Y.) 442, 63 How. Pr. (N. Y.) 255, on the ground that the coroner was not entitled to hear exculpatory evidence, and the accused had no right to cross-examine the witnesses. See CORONERS, 9 Cyc. 985.

87. *Alabama.*— *Ex p.* Graves, 61 Ala. 381; Crumpton *v.* State, 43 Ala. 31.

California.— People *v.* Sexton, 132 Cal. 37, 64 Pac. 107; *Ex p.* Nicholas, 91 Cal. 640, 28 Pac. 47. But see *Ex p.* Baker, 88 Cal. 84, 25 Pac. 966.

North Dakota.—State *v.* Hasledahl, 3 N. D. 36, 53 N. W. 430.

Pennsylvania.— Com. *v.* Wescott, 4 C. Pl. 58.

Virginia.— Stuart *v.* Com., 28 Gratt. 950; Com. *v.* Linton, 2 Va. Cas. 205.

See 14 Cent. Dig. tit. "Criminal Law," § 465; and INDICTMENTS AND INFORMATIONS.

88. State *v.* Orleans Parish, 42 La. Ann. 1091, 8 So. 279, 16 L. R. A. 137; Matter of Gessner, 53 How. Pr. (N. Y.) 515; People *v.* Drury, 2 Edm. Sel. Cas. (N. Y.) 351.

89. *Idaho.*— State *v.* Larkins, 5 Ida. 200, 47 Pac. 945.

Kansas.— State *v.* Lewis, 19 Kan. 260, 27 Am. Rep. 113, holding also that the effect of a waiver was not impaired because the accused was handcuffed.

that the interests of justice require an immediate investigation, when he may proceed, although the accused offers to waive examination.[90] A waiver of a preliminary examination will be implied from the fact that the accused, against whom no written complaint was filed, gave bail to answer at the next term of court,[91] or that he stipulated to appear on a future day and was then released on parol,[92] or that on being arraigned before the examining magistrate he voluntarily pleaded guilty and was committed,[93] or pleaded not guilty and submitted to be bound over without an examination, or on being called for trial, entered a plea of not guilty, whereupon the trial was then proceeded with.[94] By waiving the examination either expressly or by implication the accused is thereafter estopped to claim a discharge because none was held,[95] and his waiver may properly be regarded at his subsequent trial as a substantial equivalent for his examination and the finding of probable cause required by the statute.[96] But he is not estopped from claiming in habeas corpus proceedings that he is not detained on sufficient evidence to support the charge.[97]

c. Constitution of Examining Court. The statutes sometimes allow or require examining magistrates to associate with them other magistrates.[98] When a statute provides that one justice cannot commit or hold to bail, but must associate another justice with him, his assumption of the power to act singly renders his committal void.[99]

d. Particular Magistrate or Judge Having Authority. The jurisdiction of particular magistrates and judges of the preliminary examination of persons accused of crime depends upon the statutes in the particular states.[1] The judge

Nebraska.—Reinoehl *v.* State, 62 Nebr. 619, 87 N. W. 355.

Ohio.— State *v.* Ritty, 23 Ohio St. 562.

South Dakota.— State *v.* Wright, 15 S. D. 628, 91 N. W. 311.

Texas.— Bishop *v.* Lucy, 21 Tex. Civ. App. 326, 50 S. W. 1029.

Contra, Ex p. Ah Bau, 10 Nev. 264.

See 14 Cent. Dig. tit. "Criminal Law," § 468.

90. State *v.* Brunot, 104 La. 237, 28 So. 996; Van Buren *v.* U. S., 36 Fed. 77.

91. Cunningham *v.* State, 116 Ind. 433, 17 N. E. 904.

92. Nowak *v.* Waller, 10 N. Y. Suppl. 199.

93. State *v.* Kornstett, 62 Kan. 221, 61 Pac. 805; Latimer *v.* State, 55 Nebr. 609, 76 N. W. 207, 70 Am. St. Rep. 403.

94. *Louisiana.*— State *v.* Caulfield, 23 La. Ann. 148.

Michigan.— People *v.* Williams, 93 Mich. 623, 53 N. W. 779; Washburn *v.* People, 10 Mich. 372.

Nebraska.— Dinsmore *v.* State, 61 Nebr. 418, 85 N. W. 445.

New York.— Devine *v.* People, 20 Hun 98.

Ohio.— State *v.* Ritty, 23 Ohio St. 562.

Utah.— State *v.* Norman, 16 Utah 457, 52 Pac. 986.

See 14 Cent. Dig. tit. "Criminal Law," §§ 469, 470.

95. *Florida.*— Benjamin *v.* State, 25 Fla. 675, 6 So. 433.

Kansas.— State *v.* Kornstett, 62 Kan. 221, 61 Pac. 805; State *v.* Myers, 54 Kan. 206, 38 Pac. 296.

Michigan.—People *v.* Sutherland, 104 Mich. 468, 62 N. W. 566; Turner *v.* People, 33 Mich. 363.

Nebraska.— Korth *v.* State, 46 Nebr. 631, 65 N. W. 792.

New York.— People *v.* Johnson, 46 Hun 667.

Ohio.— State *v.* Ritty, 23 Ohio St. 362.

See 14 Cent. Dig. tit. "Criminal Law," § 468 *et seq.*

96. State *v.* Cobb, 71 Me. 198; Hannan *v.* Doherty, 136 Mass. 567; People *v.* Sligh, 48 Mich. 54, 11 N. W. 782; Hess *v.* Oregon German Baking Co., 31 Oreg. 503, 49 Pac. 803.

97. Cowell *v.* Patterson, 49 Iowa 514.

As to conferring jurisdiction on court to try accused where he waives examination see Latimer *v.* State, 55 Nebr. 609, 76 N. W. 207, 70 Am. St. Rep. 403.

98. Where a justice of the peace on a preliminary examination associates with him "one or more magistrates of equal grade," as allowed by statute (Ala. Code, § 4693), it is no objection to the validity of their proceedings that the associate justices are acting outside of their respective precincts; nor are their proceedings void because one of the associates is incompetent to sit. Boynton *v.* State, 77 Ala. 29.

99. Murphy *v.* Com., 11 Bush (Ky.) 217; Revill *v.* Pettit, 3 Metc. (Ky.) 314.

1. As to the jurisdiction under statutes in particular states see the following cases:

Alabama.— Lowe *v.* State, 86 Ala. 47, 5 So. 435.

California.— People *v.* Sansome, 98 Cal. 235, 33 Pac. 202.

Indiana.— *Ex p.* State, 7 Ind. 347.

Kansas.— State *v.* Davis, 26 Kan. 205.

Pennsylvania.—Com. *v.* Jailer, 1 Grant 218.

Tennessee.— Johnston *v.* State, 2 Yerg. 58.

of a municipal court who has by statute the powers and authority belonging to justices of the peace may act as a committing magistrate to inquire into violations of state laws.[2]

e. Action of Clerk Under Magistrate's Supervision. When the statute provides that the clerk may examine witnesses applying for warrants, reduce the examination to writing and file it, and issue all warrants, his action in doing so does not render the subsequent examination of the accused by the justice invalid, as the statute assumes that the clerk acts under the justice's supervision.[3]

f. Federal Judges and Commissioners as Examining Magistrates. In the federal courts the preliminary examination for violations of federal laws may be held before any commissioner sitting in the district where the warrant was issued, where for any reason the commissioner before whom it is returnable cannot take the examination and transfers the same.[4] A district judge taking the preliminary examination exercises the powers of a commissioner only.[5]

g. Time For, and Adjournment Of, Examination. In some states the statutes limit the time for which the examination may be adjourned without the prisoner's consent.[6] He is of right entitled to an examination as soon as it can be had consistently with the interests of justice.[7] An adjournment over a holiday,[8] or a short adjournment to enable the prosecution or the accused to procure witnesses or evidence,[9] or to give the accused an opportunity to recover from intoxication or illness,[10] is not objectionable. In the absence of a statute the accused is not entitled to be allowed time to prepare for his preliminary examination, and an indictment or information will not be quashed because he was examined on the same day on which he was committed for examination.[11]

h. Second Examination. Where on a preliminary examination before a justice of the peace a defendant is admitted to bail without the examination of any witnesses as required by statute, it is not a bar to a subsequent examination on the same charge before another officer, conducted according to the statutory requirements.[12]

2. Conduct of Preliminary Examination — a. Rights of Accused. The accused has the right to be present during the preliminary examination,[13] and the constitutional right of a party accused of crime to be represented by counsel includes the right to be represented by counsel at the preliminary examination.[14] The

Texas.— Arrington *v.* State, 13 Tex. App. 551.

See 14 Cent. Dig. tit. "Criminal Law," § 473.

2. Lowe *v.* State, 86 Ala. 47, 5 So. 435.

3. Ryan *v.* State, 83 Wis. 486, 53 N. W. 836.

4. *In re* Wahll, 42 Fed. 822.

5. U. S. *v.* Hughes, 70 Fed. 972.

6. People *v.* Van Horn, 119 Cal. 323, 51 Pac. 538.

The delay of one who has been indicted to demand a preliminary examination which he may elect to demand by statute does not deprive him of his right if he applies for the examination before trial. State *v.* Strauder, 8 W. Va. 686.

7. State *v.* Freeman, 8 Iowa 428, 74 Am. Dec. 317; Matter of Peoples, 47 Mich. 626, 14 N. W. 112; Bishop *v.* Lucy, 21 Tex. Civ. App. 326, 50 S. W. 1029; Morrissett *v.* Com., 6 Gratt. (Va.) 673.

The discharge of the accused may properly be ordered if the prosecution delays unreasonably to have the examination completed, and he is confined to jail. U. S. *v.* Worms, 28 Fed. Cas. No. 16,765, 4 Blatchf. 332.

8. Hamilton *v.* People, 29 Mich. 173.

9. Potter *v.* Kingsbury, 4 Day (Conn.) 98; State *v.* Aucoin, 47 La. Ann. 1677, 18 So. 709; Matter of Blair, 32 Misc. (N. Y.) 175, 65 N. Y. Suppl. 640, 8 N. Y. Annot. Cas. 54, 15 N. Y. Cr. 87.

10. Pepper *v.* Mayes, 81 Ky. 673.

11. Kemp *v.* Com., 18 Gratt. (Va.) 969. See Indictments and Informations.

12. *Ex p.* Walsh, 39 Cal. 705.

13. U. S. *v.* Rundlett, 27 Fed. Cas. No. 16,208, 2 Curt. 41.

14. People *v.* Napthaly, 105 Cal. 641, 39 Pac. 29; People *v.* Elliott, 80 Cal. 296, 22 Pac. 207; People *v.* Fuller, 68 N. Y. Suppl. 742; Low *v.* People, 12 Wend. (N. Y.) 344 (holding, however, that a conviction would not be quashed because the accused had no counsel at his preliminary examination); U. S. *v.* Bollman, 24 Fed. Cas. No. 14,622, 1 Cranch C. C. 373. It seems that in the absence of a constitutional or statutory provision the accused is not entitled to be represented by counsel at his preliminary examination. People *v.* Johnson, 2 Wheel. Cr. (N. Y.) 361.

Presumption of authority of counsel.—As

accused, however, may waive his right to counsel by failure to assert the same,[15] and he has no right to ask for an unreasonable delay in order to procure counsel.[16] Where two persons are jointly charged, their separate examination is in the discretion of the court.[17]

b. Counsel For Prosecution. The public prosecuting attorney has a right to appear and examine witnesses at a preliminary examination,[18] but he is not bound to do so unless it is required by statute.[19] The prosecutor may usually be represented at a preliminary examination by private counsel who may examine his witnesses and cross-examine those for the accused.[20]

c. Questions For Determination on Preliminary Hearing. Questions which may be more properly or more conveniently determined on the trial will not be determined on preliminary examination, as for example the plea of former jeopardy,[21] and novel questions of statutory construction.[22]

d. Functions of Magistrate — (i) *In General.* On the preliminary examination it is for the committing magistrate to hear the testimony of the witnesses for the prosecution and for the accused, and to commit the accused or hold him to bail if the evidence shows probable cause to believe him guilty of the offense charged, or to discharge him if the evidence does not show probable cause; and the question of probable cause is for the magistrate alone.[23] The inquiry is limited to the particular offense charged and minor offenses included therein.[24]

(ii) *Reception of Evidence and Examination of Witnesses.* For the purpose of determining whether there is probable cause for holding the accused, the magistrate should examine both the witnesses for the state and those offered by the accused;[25] but in the reception of evidence he is not strictly governed by

magistrates' courts are not courts of record, no written substitution of attorneys is required, and it is presumed that an attorney who appears for the prisoner has authority to represent him. People *v.* Fuller, 68 N. Y. Suppl. 742.

15. See People *v.* Elliott, 80 Cal. 296, 22 Pac. 207.

16. People *v.* Figueroa, 134 Cal. 159, 66 Pac. 202.

17. People *v.* Burns, 121 Cal. 529, 53 Pac. 1096.

18. See People *v.* Grady, 66 Hun (N. Y.) 465, 21 N. Y. Suppl. 381. When the prosecuting attorney appears the magistrate should govern his official action somewhat by his advice. He ought very seldom to hold a party to bail when the prosecuting attorney in good faith advises him that no crime is made out. In many cases he should seek the advice of the prosecuting attorney in advance of the issue of a warrant, and should refuse it even when the complainant is able to make a *prima facie* showing of a technical offense, if the prosecuting attorney is of the opinion that the case would fail on full hearing, or that the criminal intent was so far wanting that the cause of justice would not be advanced by the prosecution. Beecher *v.* Anderson, 45 Mich. 543, 8 N. W. 539.

19. People *v.* Grady, 66 Hun (N. Y.) 465, 21 N. Y. Suppl. 381. And see McCurdy *v.* New York L. Ins. Co., 115 Mich. 20, 72 N. W. 996.

20. McCurdy *v.* New York L. Ins. Co., 115 Mich. 20, 72 N. W. 996; People *v.* Grady, 66 Hun (N. Y.) 465, 21 N. Y. Suppl. 381.

21. U. S. *v.* Burr, 25 Fed. Cas. No. 14,694*a*.

22. U. S. *v.* Greene, 108 Fed. 816.

23. U. S. *v.* Greene, 108 Fed. 816; U. S. *v.* White, 28 Fed. Cas. No. 16,685, 2 Wash. 29. See also Yaner *v.* People, 34 Mich. 286.

Probable cause see *infra*, X, D, 2, f.

Issue of warrant.— The facts constituting the probable cause referred to in U. S. Const. Amendm. 4, as the basis of a warrant of arrest, must be submitted to the committing magistrate, who must judge of the sufficiency of the grounds shown for believing the accused guilty. *In re* Rule of Ct., 20 Fed. Cas. No. 12,126, 3 Woods 502.

24. The proceedings on a preliminary examination in a criminal case under the state laws must be limited to the specific offense charged in the warrant, or if the offense as charged includes others of lower degree, the magistrate should determine which offense, if any, has been committed, to the end that the accused may not be put upon trial for an offense different or greater than that for which he has been examined and held for trial. The magistrate is not required to weigh evidence as nicely as a petit jury would, nor to discharge the prisoner where there is a conflict of evidence, or on a mere reasonable doubt of his guilt, and his inquiry may extend to all the facts connected with the charge, although they show an offense different or greater than that charged; but if it appear that a higher or different offense has been committed a new warrant should be issued charging the proper offense, upon which an examination may be had. Yaner *v.* People, 34 Mich. 286.

25. U. S. *v.* White, 28 Fed. Cas. No. 16,685, 2 Wash. 29, holding, however, that cross-examination of witnesses for the prosecution is improper.

the technical rules applicable on a final trial.[26] Under some circumstances the magistrate may act upon affidavits.[27] A statute which provides that the justice shall examine the complainant and the witnesses on oath is directory as to the quantity of evidence to be taken, and does not require him to examine all the witnesses for the state if he is satisfied with less.[28] Where the accused waives preliminary examination, the state need not introduce any testimony, but the accused may be held for trial on the showing made before the magistrate to procure the warrant of arrest.[29]

(III) *EXAMINATION OF ACCUSED.* The examination or interrogation of the accused by the magistrate on the preliminary investigation or examination, without his consent, is unwarranted by the principles of the common law, and is contrary to the constitutional provision that no person shall be compelled to give evidence against himself; and statements or confessions made by the accused in response to questions thus propounded by the magistrate are not competent evidence against him.[30]

e. Reduction of Evidence to Writing. In the absence of a statute the justice need not commit the evidence taken at the preliminary examination to writing;[31] but this is sometimes required by statute,[32] and in some jurisdictions a failure to do so, where no waiver is shown, is ground for quashing the information,[33] or for reversal of a judgment of conviction.[34] Where the accused pleads guilty or waives examination he cannot complain that the magistrate does not examine the witnesses and reduce their testimony to writing.[35] Where the statute merely requires the testimony of witnesses at a preliminary examination to be reduced to writing by

Separation of witnesses.—A statute providing that during proceedings in examining courts the magistrate may cause witnesses to be kept out of the hearing of witnesses deposing, and "shall do so upon the request of the prosecuting attorney or the defendant" is mandatory where the request for such separation is made by either party. Johnson *v.* Clem, 4 Ky. L. Rep. 860.

26. U. S. *v.* Greene, 108 Fed. 816, holding also that where fraud is charged or a conspiracy to defraud a wide latitude must be given in the introduction of circumstantial evidence.

27. U. S. *v.* Burr, 24 Fed. Cas. No. 14,692*c* (holding that where a witness resides at a great distance, and there is no evidence that the materiality of his testimony was known to the prosecutors in time to procure his attendance, the magistrate may act upon his affidavit); U. S. *v.* White, 28 Fed. Cas. No. 16,685, 2 Wash. 29.

Affidavit before another magistrate.— One magistrate may commit a person for an offense on the evidence furnished by an affidavit taken before another magistrate. *Ex p.* Bollman, 4 Cranch (U. S.) 75, 2 L. ed. 554.

28. People *v.* Curtis, 95 Mich. 212, 54 N. W. 767; Emery *v.* State, 92 Wis. 146, 65 N. W. 848.

29. Stuart *v.* People, 42 Mich. 255, 3 N. W. 863.

30. Kelly *v.* State, 72 Ala. 244. And see People *v.* Gibbons, 43 Cal. 557; People *v.* Hendrickson, 8 How. Pr. (N. Y.) 404. See also *infra*, XII, E, 2, j.

31. People *v.* Hare, 57 Mich. 505, 24 N. W. 843.

32. *Idaho.*— State *v.* Braithwaite, 3 Ida. 119, 27 Pac. 731.

Kansas.— State *v.* Flowers, 58 Kan. 702, 50 Pac. 938.

Michigan.— People *v.* Brock, 64 Mich. 691, 31 N. W. 585; People *v.* Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 854; People *v.* Smith, 25 Mich. 497.

New York.— See People *v.* Hines, 57 N. Y. App. Div. 419, 68 N. Y. Suppl. 276, 15 N. Y. Cr. 327; People *v.* Restell, 3 Hill 289.

North Carolina.— State *v.* Bridgers, 87 N. C. 562, holding that the magistrate is not required to write down the very words of the witness as they are uttered.

Tennessee.— State *v.* Miller, 1 Lea 596.

See 14 Cent. Dig. tit. "Criminal Law," § 489.

Reduction of evidence on which warrant is issued to writing see *supra*, X, C, 3, e.

33. People *v.* Smith, 25 Mich. 497. *Contra*, State *v.* Flowers, 58 Kan. 702, 50 Pac. 938.

34. State *v.* Braithwaite, 3 Ida. 119, 27 Pac. 731; People *v.* Brock, 64 Mich. 691, 31 N. W. 585; People *v.* Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857.

Questions and answers.— Under a constitutional provision authorizing an information after commitment by a magistrate, and a statute providing that no information shall be filed until the accused shall have had a preliminary examination as provided by law, the court has no jurisdiction of a prosecution by information where there has been no compliance on the preliminary examination with a statute providing that the depositions on such examination must contain the questions put to the witnesses and their answers thereto. State *v.* Braithwaite, 3 Ida. 119, 27 Pac. 731.

35. Stuart *v.* People, 42 Mich. 255, 3 N. W. 863; State *v.* Miller, 1 Lea (Tenn.) 596.

the magistrate or under his orders, the testimony need not be signed by the witnesses or certified by the justice;[36] but where the statute expressly requires that the testimony shall be signed by the witnesses and certified by the justice, a failure to comply with such requirement will avoid all subsequent proceedings.[37]

f. Sufficiency of Evidence. It is sufficient to authorize the commitment of the accused or the holding him to bail if it be shown that probable cause exists to believe that he committed the crime charged,[38] and the sufficiency of the facts from which this may be deduced is for the determination of the magistrate alone.[39] It is not necessary to produce evidence which would convince a jury of the guilt of the accused beyond a reasonable doubt.[40] A statute which forbids a conviction on the unsupported testimony of the prosecutrix, as in the case of seduction or rape, does not apply to a preliminary examination, but furnishes a rule of evidence for the trial only.[41] The confession of the accused will justify holding him, although without proof of the *corpus delicti* or any other evidence.[42] In the federal courts a certified copy of an indictment found in another district is sufficient to justify the commitment of the accused and his removal to such district.[43]

g. Publicity of Examination. An examining magistrate has the power to exclude the public from a preliminary examination,[44] unless there is a constitutional

And see People *v.* Carter, 88 Hun (N. Y.) 304, 34 N. Y. Suppl. 764.

36. State *v.* Allen, 37 La. Ann. 685.

37. State *v.* Braithwaite, 3 Ida. 119, 27 Pac. 731; People *v.* Dowdigan, 67 Mich. 95, 38 N. W. 920 (holding that under a statute providing that examinations taken by a magistrate shall be forthwith certified and returned by him to the clerk of the court where the accused is bound to appear, a certificate by the justice that the witness was examined by him on oath, and that the examination was sworn to and subscribed by the witness before him, the deposition so certified being returned by him to the clerk with the other papers, is sufficient); People *v.* Brock, 64 Mich. 691, 31 N. W. 585 (holding that where the principal witness of a preliminary examination had not signed his testimony as required by statute, and a conviction was had over defendant's objection, he should be discharged on appeal under exceptions before judgment); People *v.* Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857 (holding that where the testimony of the only witness for the state at a preliminary examination was reduced to the form of a deposition, a failure to read the evidence thus recorded to the witness and get his signature to the same was a fatal defect and avoided all subsequent proceedings; and holding further that the justice had no power to amend the defect after he had made his return to the circuit court).

Separate certificates.— A statute requiring an examining magistrate to certify to the testimony taken before him and reduced to writing does not require a separate certificate to the testimony of each witness, but only a general certificate to all the testimony. Evans *v.* State, 13 Tex. App. 225.

38. *California.*—People *v.* Sherman, (1893) 32 Pac. 879.

Michigan.— Yaner *v.* People, 34 Mich. 286.

Montana.— State *v.* Second Judicial Dist. Ct., 26 Mont. 275, 67 Pac. 943.

Nebraska.— Rhea *v.* State, 61 Nebr. 15, 84 N. W. 414.

New York.— People *v.* Crane, 80 N. Y. App. Div. 202, 80 N. Y. Suppl. 408.

Texas.— *Ex p.* Burkham, (Cr. App. 1896) 33 S. W. 974; *Ex p.* Walck, 25 Tex. App. 168, 7 S. W. 665.

United States.— U. S. *v.* Burr, 4 Cranch 469, 2 L. ed. 684, 25 Fed. Cas. No. 14,692*a*; U. S. *v.* Greene, 100 Fed. 941, 108 Fed. 816; U. S. *v.* Cobb, 25 Fed. Cas. No. 14,820; U. S. *v.* Lumsden, 26 Fed. Cas. No. 15,641, 1 Bond 5; U. S. *v.* Steffens, 27 Fed. Cas. No. 16,384; *In re* Van Campen, 28 Fed. Cas. No. 16,835, 2 Ben. 419.

See 14 Cent. Dig. tit. "Criminal Law," § 493.

39. *California.*— People *v.* Beach, 122 Cal. 37, 54 Pac. 369; People *v.* Sherman, (1893) 32 Pac. 879.

New York.— Matter of Blair, 32 Misc. 175, 65 N. Y. Suppl. 640.

Texas.— *Ex p.* Walck, 25 Tex. App. 168, 7 S. W. 665.

United States.— *In re* Rule of Ct., 20 Fed. Cas. No. 12,126, 3 Woods 502.

England.— Reg. *v.* Clark, 5 Cox C. C. 230.

40. Rhea *v.* State, 61 Nebr. 15, 84 N. W. 414.

41. *In re* Dempsey, 65 N. Y. Suppl. 717.

42. People *v.* Cokahonour, 120 Cal. 253, 52 Pac. 505; U. S. *v.* Bloomgart, 24 Fed. Cas. No. 14,612, 2 Ben. 356.

43. *In re* Alexander, 1 Fed. Cas. No. 162, 1 Lowell 530; U. S. *v.* Haskins, 26 Fed. Cas. No. 15,322, 3 Sawy. 262. See *infra*, X, D, 3, b, (IV), (B).

44. People *v.* Wyatt, 39 Misc. (N. Y.) 456, 80 N. Y. Suppl. 198 [*reversed* on other grounds in 81 N. Y. App. Div. 51, 80 N. Y. Suppl. 816]. And see People *v.* Cornell, 6 Misc. (N. Y.) 568, 27 N. Y. Suppl. 859, holding that when a magistrate entertains an information or application for a warrant, he does not hold court within the meaning of N. Y. Code Civ. Proc. § 5, providing that

or statutory provision that the accused shall be entitled to a public examination;[45] and even when there is such a provision it may be waived by the accused.[46]

3. Determination on Preliminary Hearing and Commitment For Trial — a. Discharge or Holding to Answer — (i) *In General.* After the preliminary examination has begun, the accused has a right to require that it shall be continued to a final determination, and that he shall be either discharged or held. The statutes are mandatory in this respect.[47] Where the offense is bailable and the justice finds that there is probable cause to believe the accused guilty, he must take a recognizance for his appearance before the court having jurisdiction of the offense,[48] but he cannot require him to give sureties to keep the peace where he has no jurisdiction to try the crime.[49] If the justice himself has jurisdiction to try the offense, he must proceed to try and determine, and he cannot shift the responsibility by taking a preliminary examination and holding the accused to answer in a higher court.[50]

(ii) *Detention to Institute New Proceedings.* Where the accused is acquitted because of a variance,[51] because his arrest was illegal,[52] or because the jury failed to agree,[53] or where judgment is rendered for him on a plea in abatement,[54] he may be detained in custody until a new warrant is obtained or an information or indictment is filed.

(iii) *Arrest on One Charge and Commitment on Another.* If on the examination charging a certain crime the justice finds that the accused has not committed it, but that he has committed a different crime, he should commit him until the appropriate complaint or affidavit can be filed, and then take his recognizance or commit him upon that charge.[55]

(iv) *Commitment For Further Examination.* A person arrested on a criminal charge may be committed for further examination and held under such commitment for a reasonable time;[56] but if he is committed for an unreasonable time the commitment and custody are illegal.[57] In the absence of a statute a magistrate on adjourning a preliminary examination has no authority to admit the accused to bail, but must commit him to the custody of the sheriff.[58] By

the sittings of every court within the state shall be public and every citizen may freely attend the same, and therefore he may exclude the public when examining witnesses on such application.

Excluding public at trial see *infra*, XIV, B, 1, c.

45. See People *v.* Tarbox, 115 Cal. 57, 46 Pac. 896.

46. The exclusion of the public from a preliminary examination at the request of the accused is a waiver of his constitutional right to a public examination, and he cannot afterward complain. People *v.* Tarbox, 115 Cal. 57, 46 Pac. 896. See also *infra*, XIV, B, 1, c.

47. Matter of Gessner, 53 How. Pr. (N. Y.) 515.

48. Com. *v.* Ward, 4 Mass. 497. And see Osborn *v.* Sargent, 23 Me. 527. See, generally, Bail.

49. Knowles *v.* Davis, 2 Allen (Mass.) 61; Com. *v.* Ward, 4 Mass. 497.

50. Thomm *v.* State, 35 Ark. 327; Darling *v.* Hubbell, 9 Conn. 350; *In re* Crandall, 59 Kan. 671, 54 Pac. 686. But see State *v.* Sargent, 71 Minn. 28, 73 N. W. 626, holding otherwise where the crime, although within the jurisdiction of the justice, is also indictable, and the grand jury is actually in session or soon will be. See also *infra*, X, E, 1, g, (II).

51. Cameron *v.* State, 13 Ark. 712.

52. *Ex p.* Crandall, 2 Cal. 144.

53. Taintor *v.* Taylor, 36 Conn. 242, 4 Am. Rep. 58.

54. Rowland *v.* State, 126 Ind. 517, 26 N. E. 485.

55. People *v.* Wheeler, 73 Cal. 252, 14 Pac. 796 (construing Pen. Code, § 872); People *v.* Smith, 1 Cal. 9; Parks *v.* Nelms, 115 Ga. 242, 41 S. E. 605; State *v.* Shaw, 4 Ind. 428; Redmond *v.* State, 12 Kan. 172.

56. *In re* Bates, 2 Fed. Cas. No. 1,099*a*; U. S. *v.* Bates, 24 Fed. Cas. No. 14,544; Cave *v.* Mountain, 9 L. J. M. C. 90, 1 M. & G. 259, 1 Scott N. R. 132, 39 E. C. L. 747.

Adjournment of examination see *supra*, X, D, 1, g.

Form of commitment for further examination see *Ex p.* Fletcher, 1 D. & L. 896, 8 Jur. 269, 13 L. J. M. C. 67, 1 New Sess. Cas. 40.

57. Com. *v.* Maloney, 145 Mass. 205, 208, 13 N. E. 482; Davis *v.* Capper, 10 B. & C. 28, 21 E. C. L. 22, 4 C. & P. 134, 19 E. C. L. 442, 8 L. J. M. C. O. S. 67, 5 M. & R. 53; Cave *v.* Mountain, 9 L. J. M. C. 90, 1 M. & G. 257, 1 Scott N. R. 132, 39 E. C. L. 747.

58. State *v.* Kruise, 32 N. J. L. 313; State *v.* Jones, 100 N. C. 438, 6 S. E. 655. See also State *v.* Bartlett, 70 Minn. 199, 72 N. W. 1067. *Compare* State *v.* Gachenheimer, 30 Ind. 63.

statute in some jurisdictions, however, when a preliminary examination is adjourned, the accused may be admitted to bail where the offense charged is a misdemeanor, but not where it is a felony,[59] and under some statutes he may be admitted to bail whether the offense is a felony or a misdemeanor.[60]

(v) *Effect of Determination on Subsequent Proceedings.* The dismissal of a prosecution on appeal for lack of a proper preliminary examination,[61] or the discharge or committal of the accused on such examination, is no bar to a second preliminary examination or a subsequent prosecution for the same offense.[62] Where a justice of the peace determines that an offense is of such a grade as to be beyond his jurisdiction and binds the accused over to a higher court for trial, his determination is not conclusive upon the higher court.[63]

(vi) *Rehearing or New Trial.* The functions of the examining magistrate and his jurisdiction over the accused terminate when he commits or remands him,[64] or takes his recognizance,[65] and he has no authority to grant a rehearing or new examination. An order of committal for trial at once confers jurisdiction of the accused on the trial court,[66] and he can only be discharged or released on bail by a court having power to entertain a writ of habeas corpus.[67]

b. Order or Warrant of Commitment and Custody of Accused — (i) *Form and Requisites of Warrant or Order of Commitment*[68] — (a) *In General.* An oral order for the commitment of a prisoner on a criminal charge does not authorize the officer to detain him,[69] but the fact that there was no formal commitment as required by statute is not ground for reversal of a conviction.[70] The warrant or order of commitment should state that probable cause supported by oath or affirmation exists for holding the accused,[71] must recite concisely the com-

59. Ky. Cr. Code (1899), § 55. See Com. *v.* Moore, 3 Metc. (Ky.) 477. See also State *v.* Bartlett, 70 Minn. 199, 72 N. W. 1067.

60. Potter *v.* Kingsbury, 4 Day (Conn.) 98. See Murphy *v.* Com., 11 Bush (Ky.) 217; Com. *v.* Salyer, 8 Bush (Ky.) 461. See also Lewis *v.* People, 23 Ill. App. 28.

Jurisdiction to admit to bail see, generally, Bail, 5 Cyc. 76.

Offense committed in another county.— Although a statute allows the magistrate or judge to admit the accused to bail on postponement of an examination on a charge of felony, he has no power to do so where the offense is charged to have been committed in another county, and the statute makes it his duty to "commit the defendant to a peace officer, to be conveyed by him before a magistrate of the county in which the offense is charged to have been committed," his authority in such case being limited to the inquiry whether there are sufficient grounds for an examination in the county in which the offense was committed. Com. *v.* Salyer, 8 Bush (Ky.) 461. See Ky. Cr. Code (1899), § 46.

61. People *v.* Brock, 64 Mich. 691, 31 N. W. 585.

62. *Alabama.*— *Ex p.* Robinson, 108 Ala. 161, 18 So. 729; *Ex p.* Crawlin, 92 Ala. 101, 9 So. 334.

California.— *Ex p.* Fenton, 77 Cal. 183, 19 Pac. 267.

Illinois.— *In re* McIntyre, 10 Ill. 422.

Indiana.— State *v.* Hattabough, 66 Ind. 223.

Kansas.— State *v.* Jones, 16 Kan. 608.

Massachusetts.— Com. *v.* Sullivan, 156 Mass. 487, 31 N. E. 647.

Michigan.— Gaffney *v.* Missaukee County Cir. Judge, 85 Mich. 138, 48 N. W. 478.

Nebraska.— Garst's Application, 10 Nebr. 78, 4 N. W. 511.

Texas.— *Ex p.* Porter, 16 Tex. App. 321.

Virginia.— See McCann *v.* Com., 14 Gratt. 570.

Wisconsin.— See Jambor *v.* State, 75 Wis. 664, 44 N. W. 963.

See 14 Cent. Dig. tit. "Criminal Law," §§ 356, 500.

Information after discharge.— But where by a statute a preliminary examination is necessary before there can be prosecution by information, a prosecution on information should be arrested at any stage where it appears to the court that the accused was discharged on the preliminary examination. Morrisey *v.* People, 11 Mich. 327.

63. State *v.* McKettrick, 14 S. C. 346.

64. Butler *v.* State, (Tex. Cr. 1896) 38 S. W. 46.

65. Steel *v.* Williams, 13 Ind. 73; Sandrock *v.* Knop, 34 How. Pr. (N. Y.) 191.

66. Nelson *v.* People, 38 Mich. 618.

67. State *v.* Randolph, 26 Mo. 213.

68. Commitment after conviction before magistrate see *infra*, X, E, 1, h, (v).

69. State *v.* James, 78 N. C. 455. And see People *v.* Wilson, 93 Cal. 377, 28 Pac. 1061.

Signature.— A mittimus signed by two justices of the peace, with the initials "J. P." added, is sufficient to authorize and require an officer to hold the accused in custody. State *v.* Manley, 1 Overt. (Tenn.) 428.

70. People *v.* Sehorn, 116 Cal. 503, 48 Pac. 495.

71. State *v.* Tennison, 39 Kan. 726, 18 Pac. 948; King *v.* State, 18 Nebr. 375, 25 N. W.

plaint on which it is founded,[72] describe some offense which is indictable and for which the accused is held,[73] and describe the accused by name;[74] and it must always be directed to the officer or class of officers by whom it is to be executed.[75] In some states the order of commitment is required by statute to be indorsed on the depositions which have been taken or on the complaint.[76] In some jurisdictions a commitment must be under seal.[77] It need not state that the accused is held "for trial," as that is taken for granted,[78] or that he is held for a failure to give the recognizance required by statute.[79]

(B) *Description of Offense.* A warrant of commitment before indictment must describe the offense plainly and fully, and show that it is an offense for which the accused may be held, and it must state the time and place of its commission.[80] It is not necessary, however, that the offense shall be described with the certainty required in an indictment, but it is sufficient if it is charged with

519; People *v.* Rhoner, 4 Park. Cr. (N. Y.) 166; *Ex p.* Burford, 3 Cranch (U. S.) 448, 2 L. ed. 495 [*reversing* 4 Fed. Cas. No. 2,148, 1 Cranch C. C. 276]; Erwin *v.* U. S., 37 Fed. 470, 2 L. R. A. 229; *Ex p.* Bennett, 3 Fed. Cas. No. 1,311, 2 Cranch C. C. 612; *Ex p.* Sprout, 22 Fed. Cas. No. 13,267, 1 Cranch C. C. 424. In Com. *v.* Murray, 2 Va. Cas. 504, it was held that it is not indispensable to the validity of a warrant of commitment that it shall set forth that the accused was charged under oath. See also Rex *v.* Platt, 1 Leach C. C. 187; Rex *v.* Wyndham, 1 Str. 2; Rex *v.* Wilkes, 2 Wils. C. P. 151; 1 Chitty Cr. L. 110.

Evidence.— It is not necessary to set out the evidence adduced before the magistrate. Rex *v.* Wilkes, 2 Wils. C. P. 151. And see *In re* Ricker, 32 Me. 37.

Use of the phrase "cause to suspect" in a commitment, instead of the phrase "cause to believe," does not render it insufficient. Brownell *v.* People, 38 Mich. 732.

72. Com. *v.* Ward, 4 Mass. 497.

73. *Ex p.* Welsh, 4 Rev. de Jur. 437.

Description of offense see *infra*, X, D, 3, b, (I), (B).

74. Hodgins *v.* Poe, 16 Wkly. Rep. 224; 1 Chitty Cr. L. 110; 1 Hale P. C. 577.

75. Russell *v.* Hubbard, 6 Barb. (N. Y.) 654.

76. See People *v.* Sehorn, 116 Cal. 503, 48 Pac. 495; People *v.* Dolan, 96 Cal. 315, 31 Pac. 107; People *v.* Wilson, 93 Cal. 377, 28 Pac. 1061; People *v.* McCurdy, 68 Cal. 576, 10 Pac. 207; People *v.* Young, 64 Cal. 212, 30 Pac. 628; State *v.* Rozum, 8 N. D. 548, 80 N. W. 477.

Under a statute providing that if on a preliminary examination it appears that a public offense has been committed, and there is sufficient cause to believe defendant guilty thereof, the magistrate must make or indorse on the depositions taken on such examination an order to that effect, and that defendant be held to answer to the same, the order must be in writing and signed by the magistrate, and an oral order reduced to writing by the reporter is not a compliance with the statute. People *v.* Wilson, 93 Cal. 377, 28 Pac. 1061. It has been held, however, that such statute is sufficiently complied with where an order of commitment in due form is filed with the other papers in the case, and refers to the complaint as "the within deposition" (People *v.* Dolan, 96 Cal. 315, 31 Pac. 107), or where the order is indorsed on the complaint (People *v.* Sehorn, 116 Cal. 503, 48 Pac. 495). It has also been held that it is sufficient if such order be entered on the magistrate's docket, in which by statute all proceedings must be entered. People *v.* Wallace, 94 Cal. 497, 29 Pac. 950; State *v.* Clark, 4 Ida. 7, 35 Pac. 710.

77. Somervell *v.* Hunt, 3 Harr. & M. (Md.) 113; Lough *v.* Millard, 2 R. I. 436. *Contra*, Gano *v.* Hall, 5 Park. Cr. (N. Y.) 651. And see State *v.* Vaughn, Harp. (S. C.) 313.

At common law the seal could not be dispensed with. 2 Hawkins P. C. c. 16, § 13.

78. Brownell *v.* People, 38 Mich. 732.

79. Douglass *v.* Barber, 18 R. I. 459, 28 Atl. 805.

80. *California.*— *Ex p.* Branigan, 19 Cal. 133.

Georgia.— Brady *v.* Davis, 9 Ga. 73; State *v.* Bandy, Ga. Dec. 40, Pt. II, holding that a mittimus for larceny must specify the time, place, and subject of the offense.

Maine.— *In re* Ricker, 32 Me. 37.

Maryland.— Day *v.* Day, 4 Md. 262.

Michigan.— *In re* Leddy, 11 Mich. 197.

Minnesota.— Collins *v.* Brackett, 34 Minn. 339, 25 N. W. 708.

New York.— People *v.* Johnson, 110 N. Y. 134, 17 N. E. 684.

Virginia.— Young *v.* Com., 1 Rob. 744.

Wisconsin.— *In re* Booth, 3 Wis. 1.

England.—Rex *v.* Marks, 3 East 157; Judd's Case, 2 East P. C. 1018, 1 Leach C. C. 484, 2 T. R. 255, 1 Rev. Rep. 477; Rex *v.* Remnant, 1 East P. C. 420, 2 Leach C. C. 583, Nolan 205, 5 T. R. 169; Rex *v.* Kendal, 1 Ld. Raym. 65; Rex *v.* Wyndham, 1 Str. 2; Rex *v.* Wilkes, 2 Wils. C. P. 151; 4 Bl. Comm. 300; 1 Chitty Cr. L. 110; 2 Hale P. C. 122.

See 14 Cent. Dig. tit. "Criminal Law," § 502.

Statute rendering mistake in description of offense harmless.— Under a statute providing that no person should be discharged from an order of commitment on account of any defect in the charge or process or for want of alleged probable cause, it was held that a defendant who had been charged with petit larceny and who had waived examination be-

convenient or reasonable certainty.[81] The commitment need not set forth, as in an indictment, all of the facts essential to constitute the offense.[82] It has been held[83] and denied[84] that the committing magistrate must determine and specify in the warrant of commitment the grade of the offense, in order that it may be known whether or not it is bailable.[85]

(c) *Indorsing or Fixing Amount of Bail.* The neglect of the committing magistrate to fix and indorse the amount of bail as required by statute renders the warrant of commitment invalid.[86] But his neglect to indorse on the warrant in what sum bail ought to be taken does not have this effect if the warrant itself shows the amount of bail required.[87]

(II) *Defects and Amendment.* Immaterial defects in the order or warrant of commitment, not prejudicing the substantial rights of the accused,[88] or unnecessary matter therein,[89] may be disregarded. A justice may amend his commit-

fore a justice of the peace and been committed in default of bail was not entitled to a discharge on habeas corpus because the mittimus erroneously described the offense as grand larceny. Davis *v.* Bible, 134 Ind. 108, 33 N. E. 910.

81. *California.*— *Ex p.* Walpole, 85 Cal. 362, 24 Pac. 657, holding that a commitment on a charge of murder need not give the name of the deceased.

Kansas.— State *v.* Bailey, 32 Kan. 83, 3 Pac. 769.

Minnesota.— Collins *v.* Brackett, 34 Minn. 339, 25 N. W. 708.

Missouri.— Lilly *v.* State, 3 Mo. 10.

New York.— People *v.* Johnson, 110 N. Y. 134, 17 N. E. 684 [*affirming* 46 Hun 667]; People *v.* Collins, 11 Abb. Pr. 406, 20 How. Pr. 111, holding that a commitment for murder was not void because it did not contain the word "feloniously," where the felonious intent could be gathered from the context. See Pratt *v.* Bogardus, 49 Barb. 89.

North Carolina.— See State *v.* Jones, 88 N. C. 671.

South Carolina.— State *v.* Potter, Dudley 296; State *v.* Killet, 2 Bailey 289.

Virginia.— Clore's Case, 8 Gratt. 606.

Wisconsin.— State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

United States.—*In re* Kelly, 46 Fed. 653; U. S. *v.* Martin, 17 Fed. 150, 9 Sawy. 90.

England.— Rex *v.* Croker, 2 Chit. 138, 18 E. C. L. 551; 1 Chitty Cr. L. 109, 111; 2 Hale P. C. 122; 1 Hale P. C. 94, 460; 2 Hawkins P. C. c. 16, § 16; 2 Inst. 52, 591.

See 14 Cent. Dig. tit. "Criminal Law," § 502.

Technical accuracy is not required. State *v.* Killet, 2 Bailey (S. C.) 289.

82. Collins *v.* Brackett, 34 Minn. 339, 25 N. W. 708; People *v.* Johnson, 110 N. Y. 134, 17 N. E. 684 [*affirming* 46 Hun 667]; U. S. *v.* Martin, 17 Fed. 150, 9 Sawy. 90, holding that a commitment to await the action of the grand jury on the charge of murder need not describe the offense as the killing of a human being with malice aforethought, but it is sufficient if the accused is charged with the crime of "murder." But see *Ex p.* Branigan, 19 Cal. 133.

Complaint and evidence.— It is not necessary that the mittimus shall copy the complaint or set out the evidence before the magistrate. *In re* Ricker, 32 Me. 37; Rex *v.* Wilkes, 2 Wils. C. P. 151.

83. Yaner *v.* People, 34 Mich. 286.

84. Hawley *v.* Com., 75 Va. 847.

85. Where, upon examination of a charge of murder, the magistrate had refused on request to determine whether the evidence showed manslaughter or murder an information for murder was quashed. Yaner *v.* People, 34 Mich. 286.

86. Yaner *v.* People, 34 Mich. 286; *In re* Leddy, 11 Mich. 197. But see People *v.* Thompson, 84 Cal. 598, 24 Pac. 384, holding that neglect of a magistrate to comply with Pen. Code, § 875, which provides that in bailable offenses the order of commitment shall recite the amount of the defendant's bail and provide for his discharge on giving bail, did not defeat the jurisdiction of the superior court over an information based on such order, where it appeared that the magistrate had properly conducted the preliminary examination and had adjudged that the defendant should be tried for the offense and be committed to the proper officer for that purpose.

87. Bulson *v.* People, 31 Ill. 409.

88. *Ex p.* Estrado, 88 Cal. 316, 26 Pac. 209; People *v.* Young, 64 Cal. 212, 30 Pac. 628 (under a statute); Nason *v.* Staples, 48 Me. 123 (holding that where one accused of crime is bound over for his appearance at a higher court, and neglects to give a recognizance, the mittimus is sufficient, although it states that he was "convicted," instead of stating that there is probable cause to believe him guilty); State *v.* Banks, 24 Nebr. 322, 38 N. W. 830 (holding that a mittimus entitled, "The State of Nebraska, —— county," was not void); *Ex p.* Johnson, 15 Nebr. 512, 19 N. W. 594; People *v.* Markell, 92 Hun (N. Y.) 286, 26 N. Y. Suppl. 723 (holding that a commitment by a police justice was not void merely because through a clerical error it was dated 1885 instead of 1895).

An order committing persons for trial in a wrong county does not invalidate a preliminary examination nor prevent the filing of an information thereon in the proper county. *In re* Schurman, 40 Kan. 533, 20 Pac. 277.

89. People *v.* Smith, 1 Cal. 9. See *Ex p.* Estrado, 88 Cal. 316, 26 Pac. 209.

ment or cause a new one to be issued if he can do so from the record,[90] but he should not attempt to do so from his recollection of the facts.[91]

(III) *Duration of Detention.* The warrant of commitment must specify some limit upon the period of the detention by stating the term for which the accused is committed, which is usually until he is discharged or convicted.[92]

(IV) *Removal of Accused to Another Federal District* — (A) *In General.* By an act of congress[93] it is provided that for any crime or offense against the United States[94] the offender may, by any justice or judge of the United States,[95] or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense;[96] and where any offender is committed in any district other than that where the offense is to be tried, it is the duty of the judge of the district where such offender is imprisoned seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.[97] Under this statute an offender may be committed and removed or

90. *Ex p.* Branigan, 19 Cal. 133. And see State *v.* Banks, 24 Nebr. 322, 38 N. W. 830; People *v.* Markell, 92 Hun (N. Y.) 286, 36 N. Y. Suppl. 723; Matter of Hogan, 55 How. Pr. (N. Y.) 458.

91. *Ex p.* Branigan, 19 Cal. 133.

92. 1 Chitty Cr. L. 111. And see Danforth *v.* Classen, 21 Ill. App. 572; U. S. *v.* Harden, 10 Fed. 802, 4 Hughes 455; *Ex p.* Bennett, 3 Fed. Cas. No. 1,311, 2 Cranch C. C. 612; *Ex p.* Sprout, 22 Fed. Cas. No. 13,267, 1 Cranch C. C. 424. A mittimus issued by a justice to the jailer, to receive a person into his keeping in default of giving bail to answer a criminal charge, does not justify a detention after the expiration of the term of court to which the prisoner was held to answer. *Ex p.* Christmas, 1 Ohio Dec. (Reprint) 594, 10 West. L. J. 541.

To what term.— Where a grand jury has been dismissed for the term, the justice has discretion to remand the accused for the next term. *Ex p.* Glascow, (Tex. Civ. App. 1901) 64 S. W. 1053.

93. U. S. Rev. St. (1878) § 1014.

94. Offenses in the District of Columbia punished by act of congress are offenses against the United States for which the offender can be removed from another district under this statute. U. S. *v.* Price, 84 Fed. 636; *In re* Price, 83 Fed. 830 [*affirmed* in 89 Fed. 84, 32 C. C. A. 162]; *In re* Wolf, 27 Fed. 606; *In re* Cross, 20 Fed. 824. A person arrested in any state on a bench-warrant issued by the supreme court of the District of Columbia, on an indictment there found, can only be removed to that district for trial by proceedings under this statute. *In re* Price, 83 Fed. 830 [*affirmed* in 89 Fed. 84, 32 C. C. A. 162]. In the case of *In re* Buell, 4 Fed. Cas. No. 2,102, 3 Dill. 116, it was held that a libel committed within the District of Columbia, and there indictable as at common law under the act of congress continuing in force in the District of Columbia the common law as it existed in Maryland was an offense against the United States, for which the offender could be removed from another district under the statute. But the contrary was held in U. S. *v.* Dana, 68 Fed. 886.

Removal for trial in a police court of the District of Columbia will not be granted where the offense is one for which the accused is entitled to a trial by jury. *In re* Cross, 20 Fed. 824.

Contempt of court is an offense against the United States for which the offender may be removed under this statute. U. S. *v.* Jacobi, 26 Fed. Cas. No. 15,460, 1 Flipp. 108.

Offenders in custody for offense against state.— In the case of *In re* James, 18 Fed. 853, an application in Missouri for removal of an offender against the laws of the United States to the northern district of Alabama, where the offense was committed, and where he had been indicted, was denied because it appeared that the accused had been indicted and released on bail in Missouri for an offense against the state, and he was delivered into the custody of his bondsmen.

95. Authority of circuit judge.— As to whether the judge of a circuit court of the United States has power to order the removal of a person under this statute or whether the power rests in the district judge only see *In re* Bailey, 2 Fed. Cas. No. 730, 1 Woolw. 422.

96. Territorial courts have been held to be "courts of the United States" within the meaning of this statute, so that for an offense against the United States committed in an organized territory the offender may be arrested in any district of the United States and removed to the territory for trial, if the territorial courts have cognizance of the offense. U. S. *v.* Haskins, 26 Fed. Cas. No. 15,322, 3 Sawy. 262.

97. Strict construction of statute.— This statute is a law in restraint of liberty, and like all laws of this character is to be strictly

bailed either after[98] or before[99] an indictment has been found against him in the district in which the offense was committed.

(B) *Probable Cause For Removal and Procedure.* By the express terms of this statute the rules of procedure to be followed in a proceeding for removal thereunder are those in force in the state at the time and place of the proceeding.[1] A warrant of removal cannot be issued until the accused has been arrested and committed.[2] And he has a right to be discharged on bail unless the offense is punishable by death.[3] The accused has a right to an examination in the district in which he is arrested to determine his identity and whether there is probable cause to believe him guilty, and he is entitled to introduce evidence to show want of probable cause.[4] The facts and circumstances showing criminality must appear by oath or affidavit or other competent proof, and the judge or magistrate must be satisfied that there is probable cause to believe the accused guilty.[5] A

construed and strictly pursued, although the very substance of the law is not to be construed away. *In re* Wolf, 27 Fed. 606.

98. U. S. *v.* Haskins, 26 Fed. Cas. No. 15,322, 3 Sawy. 262. See also U. S. *v.* Greene, 100 Fed. 941; U. S. *v.* Dana, 68 Fed. 886; *In re* Wolf, 27 Fed. 606; *In re* Alexander, 1 Fed. Cas. No. 162, 1 Lowell 530; U. S. *v.* Pope, 27 Fed. Cas. No. 16,069.

99. Greene *v.* Henkel, 183 U. S. 249, 22 S. Ct. 218, 46 L. ed. 177; Price *v.* McCarty, 89 Fed. 84, 32 C. C. A. 162 [*affirming* 83 Fed. 830]. But see U. S. *v.* Price, 84 Fed. 636; U. S. *v.* White, 25 Fed. 716.

1. U. S. *v.* Greene, 100 Fed. 941; U. S. *v.* Price, 84 Fed. 636; *In re* Price, 83 Fed. 830 [*affirmed* in 89 Fed. 84, 32 C. C. A. 162]; U. S. *v.* Dana, 68 Fed. 886; U. S. *v.* Rundlett, 27 Fed. Cas. No. 16,208, 2 Curt. 41.

2. U. S. *v.* Lee, 84 Fed. 626; U. S. *v.* Jacobi, 26 Fed. Cas. No. 15,460, 1 Flipp. 108; U. S. *v.* Shepard, 27 Fed. Cas. No. 16,273, 1 Abb. 431. See, however, U. S. *v.* Harris, 26 Fed. Cas. No. 15,313, where the removal was granted on production of a bench-warrant from the court of the other district.

3. U. S. *v.* Jacobi, 26 Fed. Cas. No. 15,460, 1 Flipp. 108; U. S. *v.* Shepard, 27 Fed. Cas. No. 16,273, 1 Abb. 431.

Review of action of commissioner in fixing bail.— The judge to whom application is made for a warrant of removal to another district for trial may review, without a writ of habeas corpus, the action of the committing magistrate, and reduce the bail required by him, if it appears to be excessive. U. S. *v.* Brawner, 7 Fed. 86.

4. U. S. *v.* Greene, 100 Fed. 941; U. S. *v.* Karlin, 85 Fed. 963; *In re* Beshears, 79 Fed. 70; U. S. *v.* Dana, 68 Fed. 886; *In re* Burkhardt, 33 Fed. 25; U. S. *v.* Shepard, 27 Fed. Cas. No. 16,273, 1 Abb. 431, holding that it is not lawful to arrest a person in one district for an alleged offense against the laws of the United States and remove him to another district for examination. *In re* Bailey, 2 Fed. Cas. No. 730, 1 Woolw. 422.

Notice and opportunity to object.—Upon an application to a district judge for an order for the removal of a prisoner in the custody of the marshal to another district for trial the prisoner is entitled to notice, and if he desires it to be brought before the judge for the purpose of presenting any objections he may have to the making of the order. *In re* Beshcars, 79 Fed. 70.

Petition alleging affidavit only.— If the petition of the United States district attorney alleges merely an affidavit charging an offense, without showing an examination before a commissioner or other magistrate, or the finding of an indictment in the district to which removal is asked, the prisoner must be released. U. S. *v.* Karlin, 85 Fed. 963.

5. Greene *v.* Henkel, 183 U. S. 249, 22 S. Ct. 218, 46 L. ed. 177; *In re* Richter, 100 Fed. 295; U. S. *v.* Dana, 68 Fed. 886; U. S. *v.* Jacobi, 26 Fed. Cas. No. 15,460, 1 Flipp. 108; U. S. *v.* Newcomer, 27 Fed. Cas. No. 15,869; U. S. *v.* Shepard, 27 Fed. Cas. No. 16,273, 1 Abb. 431.

Complaint on information and belief.— A complaint on which a person is arrested for the purpose of having him removed to another district, to answer to a criminal charge, when made by a district attorney of the United States, is not insufficient because made on information and belief alone, without reference to an indictment or a statement of his means of information or grounds of belief. *In re* Richter, 100 Fed. 295.

Sufficiency of evidence.— On application for removal of an offender to another district the judge or commissioner is not required to decide absolutely the question of guilt or innocence, nor is he authorized to discharge the accused because he has some doubt as to his guilt. If his identity is shown, and the evidence shows probable cause to believe him guilty, it is incumbent upon the judge or commissioner to issue a warrant for his removal to the proper district, where the jury may determine upon all the evidence the question of his guilt or innocence. *In re* Burkhardt, 33 Fed. 25.

Latitude in reception of evidence.— The evidence receivable on a hearing before a commissioner in proceedings for the removal to another district of persons charged with the commission of a crime therein is not to be strictly limited by the technical rules applicable on a final trial. Where fraud is charged or a conspiracy to defraud a somewhat wide latitude must necessarily be given in the introduction of circumstantial evidence. U. S. *v.* Greene, 108 Fed. 816.

bench-warrant,[6] or a duly authenticated copy of a sufficient indictment in the district to which removal is asked, is *prima facie* but not conclusive evidence of probable cause.[7] There can be no removal unless the offense charged is within the accused is to be tried. Price *v.* McCarty, 89 Fed. 84, 32 C. C. A. 162 [*affirming* 83 Fed. 830]; *In re* Buell, 4 Fed. Cas. No. 2,102, 3 Dill. 116. And see *In re* Doig, 4 Fed. 193; *In re* Clark, 5 Fed. Cas. No. 2,797, 2 Ben. 540. The circuit court of the district in which an offender is held for removal to another district in which he has been indicted has authority on habeas corpus to examine the indictment, and to release the accused if in its judgment the indictment should be quashed on demurrer. *In re* Terrell, 51 Fed. 213. An indictment charging embezzlement, which is a purely statutory crime in a territory where there is no statutory offense by that name, is fatally defective and will not afford a basis for an order for the removal of the accused to such territory for trial, although the acts charged constitute the offense of larceny under its statutes. *In re* Richter, 100 Fed. 295.

Insufficiency of one or more counts only.— Where one count in the indictment charges an offense for which the accused may be tried in the district to which the removal is sought, and other counts do not charge such an offense, a warrant of removal which recites that the accused is to be tried in such district "upon such counts in the indictment . . . as [he] can be legally tried upon" is not objectionable on the ground that it authorizes trial upon the whole indictment, or on the ground that it is void for indefiniteness. Horner *v.* U. S., 143 U. S. 207, 12 S. Ct. 407, 36 L. ed. 126 [*affirming* 44 Fed. 677].

A certified copy of an information filed for an offense against the laws of the United States, without a copy of any oath or affirmation to facts showing probable cause to believe the accused guilty, does not authorize a warrant of arrest or removal. U. S. *v.* Shepard, 27 Fed. Cas. No. 16,273, 1 Abb. 431.

Power to go behind indictment.— The statute invests the judge to whom application for removal is made with plenary power to grant or refuse the warrant of removal, and the fact that an indictment has been found against the accused in the district to which removal is asked is not conclusive. The judge, in determining whether there is probable cause to believe the accused guilty, and whether the court of the district where the removal is asked has jurisdiction of the offense, may go behind the indictment and hear evidence, and may refuse a warrant of removal if he is satisfied that there is not probable cause to believe the defendant guilty or that the offense charged is not within the jurisdiction of the federal court of the district in which the offense was committed. U. S. *v.* Greene, 100 Fed. 941; U. S. *v.* Fowkes, 53 Fed. 13, 3 C. C. A. 394 [*affirming* 49 Fed. 50]; U. S. *v.* Rogers, 23 Fed. 658.

The court may require other evidence than the indictment. *In re* Richter, 100 Fed. 295; *In re* Wood, 95 Fed. 288.

6. The mere production of a bench-warrant from the United States circuit court for one state by an officer thereof to a United States district court in another state is of itself sufficient to authorize a warrant of arrest in the latter state and removal to the former. U. S. *v.* Harris, 26 Fed. Cas. No. 15,313. See also *In re* Price, 83 Fed. 830 [*affirmed* in 89 Fed. 84, 32 C. C. A. 162].

7. U. S. *v.* Greene, 100 Fed. 941; *In re* Richter, 100 Fed. 295; *In re* Belknap, 96 Fed. 614; *In re* Wood, 95 Fed. 288; U. S. *v.* Price, 84 Fed. 636; *In re* Price, 83 Fed. 830 [*affirmed* in 89 Fed. 84, 32 C. C. A. 162]; U. S. *v.* Dana, 68 Fed. 886; *In re* Wolf, 27 Fed. 606; *In re* Alexander, 1 Fed. Cas. No. 162, 1 Lowell 530; U. S. *v.* Haskins, 26 Fed. Cas. No. 15,322, 3 Sawy. 262; U. S. *v.* Pope, 27 Fed. Cas. No. 16,069. Where the indictment charges the defendant as principal of an offense within the jurisdiction of the court for the district where he has been indicted, an objection to the issuing of a writ of removal to such district because defendant was only an accomplice or accessary before the fact, and that whatever he did was done in the district from which it is sought to remove him, is in the nature of a plea in abatement to the jurisdiction of the court, and must be supported by evidence *aliunde* the record to justify a refusal of the writ. U. S. *v.* White, 25 Fed. 716.

Sufficiency of indictment.— When a district judge or commissioner is called upon to issue his warrant for the removal of an alleged offender to the district in which the offense was committed, and in which the accused has been indicted, he may look into the indictment and refuse to issue the warrant if the indictment is fatally defective, or if it fails to charge an offense against the United States, or one of which the court of the district to which removal is asked has jurisdiction. Greene *v.* Henkel, 183 U. S. 249, 22 S. Ct. 218, 46 L. ed. 177; U. S. *v.* Conners, 111 Fed. 734; U. S. *v.* Greene, 100 Fed. 941; *In re* Richter, 100 Fed. 295; *In re* Belknap, 96 Fed. 614; U. S. *v.* Lee, 84 Fed. 626; U. S. *v.* Dana, 68 Fed. 886; *In re* Huntington, 68 Fed. 881; *In re* Terrell, 51 Fed. 213; *In re* Corning, 51 Fed. 205; *In re* Doig, 4 Fed. 193; *In re* Buell, 4 Fed. Cas. No. 2,102, 3 Dill. 116; U. S. *v.* Pope, 27 Fed. Cas. No. 16,069. The warrant of removal should be refused if the indictment is so inconsistent or vague in its averments as not to clearly show the commission of an offense against the United States in the district to which removal is asked (U. S. *v.* Dana, 68 Fed. 886), or if it is so inconsistent that it sets forth an impossible offense (U. S. *v.* Pope, 27 Fed. Cas. No. 16,069). But mere technical or formal defects in the indictment should be disregarded, and the sufficiency of the indictment left to the disposition of the court by which

the jurisdiction of the federal court of the district to which removal is asked, and the question of jurisdiction may be raised either before the judge or commissioner to whom the application for removal is made or on petition for habeas corpus.[8] On the application for removal the judge or commissioner acts judicially in determining whether an offense has been committed against the United States, whether there is probable cause to believe the accused guilty, and whether the court of the district to which removal is asked has jurisdiction.[9] The warrant can

Irregularity in finding of indictment.— It has been held that evidence which does not form the subject-matter of a defense, but merely tends to show that the indictment has been irregularly found will be heard in defendant's behalf in proceedings for a warrant of removal. U. S. *v.* Fowkes, 49 Fed. 50 [*affirmed* in 53 Fed. 13, 3 C. C. A. 394], holding that where a prisoner had been arrested on a warrant founded on an indictment found by a federal grand jury of a district in which he did not reside and was not found, which presumably had not been instructed by the court as to the constituents of the crime charged, and where there had been no previous arrest, hearing, or binding over, the court of the district in which the arrest was made would discharge him on habeas corpus. But in Greene *v.* Henkel, 183 U. S. 249, 22 S. Ct. 218, 46 L. ed. 177, it was held that where a copy of an indictment found in the district to which it is sought to remove the accused is good on its face, and is certified by the proper officer, a magistrate is justified in treating it as having been found by a competent grand jury, and is not authorized to go into evidence which may show or tend to show violations of the federal statutes in the drawing of the jurors composing the grand jury which found the indictment. A federal court will not, on an application for an order removing to another district for trial persons there indicted, hold the indictment void for irregularity in drawing the grand jury, where the question involved is a new one of statutory construction, which has never been adjudicated, but will leave the accused to raise the question in the trial, where the decision can be reviewed in the regular course of appeal. It is only where there can be no reasonable doubt of the alleged invalidity that removal should be refused on such ground. U. S. *v.* Greene, 108 Fed. 816.

Evidence to aid indictment.— The finding of an indictment does not preclude the government from giving evidence of a certain and definite character concerning the commission of the offense by the accused in regard to acts, times, and circumstances which are stated in the indictment itself with less minuteness and detail, in order to supply technical defects in the indictment. Greene *v.* Henkel, 183 U. S. 249, 22 S. Ct. 218, 46 L. ed. 177.

Consent of accused or failure to object.— A federal court will not order a person to be removed to another district for trial on an indictment which does not state facts constituting an offense, although the accused does not resist the removal, or even though he consents thereto. U. S. *v.* Conners, 111 Fed. 734.

8. Horner *v.* U. S., 143 U. S. 207, 12 S. Ct. 407, 36 L. ed. 126 [*affirming* 44 Fed. 677]; *In re* Richter, 100 Fed. 295; U. S. *v.* Lee, 84 Fed. 626; U. S. *v.* Fowkes, 53 Fed. 13, 3 C. C. A. 392 [*affirming* 49 Fed. 50]; *In re* Corning, 51 Fed. 205; *In re* Wolf, 27 Fed. 606; U. S. *v.* Rogers, 23 Fed. 658; *In re* Doig, 4 Fed. 193.

9. Greene *v.* Henkel, 183 U. S. 249, 22 S. Ct. 218, 46 L. ed. 177; Price *v.* McCarty, 89 Fed. 84, 32 C. C. A. 162 [*affirming* 83 Fed. 830]; U. S. *v.* Fowkes, 53 Fed. 13, 3 C. C. A. 392 [*affirming* 49 Fed. 50]; *In re* Corning, 51 Fed. 205; *In re* Wolf, 27 Fed. 606; U. S. *v.* Rogers, 23 Fed. 658; *In re* James, 18 Fed. 853; *In re* Doig, 4 Fed. 193; *In re* Buell, 4 Fed. Cas. No. 2,102, 3 Dill. 116.

Review of action of commissioner.— Where a prisoner has been held by a United States commissioner upon conflicting evidence as regards identity, or the commission of the offense, or probable cause, for removal to another district for trial, and there is sufficient proof to make out a *prima facie* case, aside from the evidence in behalf of the prisoner, the court should not examine the evidence as an original question, but is required to issue the warrant of removal. U. S. *v.* Lantry, 30 Fed. 232. See also Greene *v.* Henkel, 183 U. S. 249, 22 S. Ct. 218, 46 L. ed. 177; U. S. *v.* Greene, 108 Fed. 816; Price *v.* McCarty, 89 Fed. 84, 32 C. C. A. 162 [*affirming* 83 Fed. 830]. On an application for a warrant for the removal to another district for trial of a person arrested on a commissioner's warrant based on an indictment found in such other district, or on the hearing on a writ of habeas corpus sued out by such person, the only question to be considered is whether the indictment on its face charges the commission of an offense within the jurisdiction of the court in which it was returned. *In re* Belknap, 96 Fed. 614.

The question of the identity of the accused is a question of fact which the judge or commissioner has full jurisdiction to decide for the purpose of removal, and his decision will not be reviewed on a petition for a writ of habeas corpus. Horner *v.* U. S., 143 U. S. 207, 12 S. Ct. 407, 36 L. ed. 126 [*affirming* 44 Fed. 677].

Irregularities in arrest, examination, or commitment.— On a writ of habeas corpus in behalf of one held under a warrant for removal to another district for trial, the court can only consider questions going to the authority and jurisdiction of the dis-

authorize the removal of the accused for trial on that offense only with which he is charged, and as to which he has had an examination.[10]

c. Record or Certificate of and Return to Preliminary Examination — (I) *In General.* The record of a committing magistrate or judge must show the preliminary examination and commitment.[11] A record showing a sufficient complaint and warrant, an examination before the magistrate who issued the warrant or a waiver thereof, and a commitment in which is stated the crime charged and that there is probable cause to believe the accused guilty thereof is sufficient.[12] If the accused is discharged on his preliminary examination, and is subsequently indicted, the indictment will not be set aside because the minutes of the preliminary examination were not filed in the trial court, where the statute requires such filing only where the accused is held to answer.[13] The examination of the committing magistrate need not be certified under seal.[14] The absence of statutory formalities in the transcript of the evidence taken at the preliminary examination constitutes no objection to an indictment based on the transcript, where it appears that it was the identical transcript of the examination.[15]

(II) *Correction or Amendment.* After the justice has certified the record of a preliminary examination he may upon the trial and by direction of the court amend or complete his record where it is deficient by inserting additional or corrected entries consistent with the record as previously made out and certified.[16]

d. Objections and Exceptions — (I) *Time of Taking and Waiver.* Objection to the preliminary complaint or warrant, or the objection that no preliminary examination was had, or that it was invalid or not properly certified, must be raised before trial or plea of not guilty by motion to quash or by plea in abate-

trict judge to issue the warrant of removal. If there was a proper case for removal, the prisoner should be remanded, notwithstanding irregularities or errors of procedure in his arrest, examination, or commitment. Price *v.* McCarty, 89 Fed. 84, 32 C. C. A. 162 [*affirming* 83 Fed. 830].

Finding conclusive on government.— The action of a commissioner in discharging a person in proceedings for his removal to another district for trial on a criminal charge, after a full hearing, should be conclusive on the government, especially where the testimony offered is that upon which an indictment has been found. *In re* Wood, 95 Fed. 288.

10. U. S. *v.* Price, 84 Fed. 636. But the fact that a warrant of removal of one accused of larceny directs the accused to be delivered for trial for the larceny of a part only of the property for which he was committed by the commissioner for stealing does not vitiate the warrant. Price *v.* McCarty, 89 Fed. 84, 32 C. C. A. 162 [*affirming* 83 Fed. 830].

11. March *v.* Com., (Pa. 1888) 14 Atl. 375; Com. *v.* McCaul, 1 Va. Cas. 271

12. People *v.* Coffman, 59 Mich. 1, 26 N. W. 207; Korth *v.* State, 46 Nebr. 631, 65 N. W. 792. See also State *v.* Countryman, 57 Kan. 815, 48 Pac. 137; People *v.* Sutherland, 104 Mich. 468, 62 N. W. 566; Com. *v.* Pole, 11 Pa. Co. Ct. 226.

A certificate of the justice that he finds the offense, "as charged in said complaint and warrant, to have been committed," is sufficient without stating the exact character or grade of the crime. People *v.* Whittemore, 102 Mich. 519, 61 N. W. 13; Cargen *v.* People, 39 Mich. 549; State *v.* Crook, 16 Utah 212, 51 Pac. 1091.

The justice need not subscribe his name to the docket (People *v.* Sehorn, 116 Cal. 503, 48 Pac. 495) nor to the deposition of each witness (Reg. *v.* Parker, L. R. 1 C. C. 225, 11 Cox C. C. 478, 39 L. J. M. C. 60, 21 L. T. Rep. N. S. 724, 18 Wkly. Rep. 353), unless required by statute.

Transcription of stenographer's notes.—An order of commitment being made after examination, the transcription of the notes of the shorthand reporter is not essential to the jurisdiction to proceed by information. People *v.* Riley, 65 Cal. 107, 3 Pac. 413.

Death of magistrate and certification by successor.— Where a justice of the peace has certified on his docket to all the facts and proceedings necessary to confer jurisdiction on the circuit court in a criminal case, his successor in office, who has the legal custody of his papers and dockets, has authority to certify such proceedings to the circuit court. People *v.* Schick, 75 Mich. 592, 42 N. W. 1008.

13. State *v.* Helvin, 65 Iowa 289, 21 N. W. 645.

14. State *v.* Pressley, 90 N. C. 730.

15. State *v.* Turner, 114 Iowa 426, 87 N. W. 287.

16. People *v.* Thompson, 84 Cal. 598, 24 Pac. 384; State *v.* McGann, (Ida. 1901) 66 Pac. 823; State *v.* Geary, 58 Kan. 502, 49 Pac. 596; People *v.* Wright, 89 Mich. 70, 50 N. W. 792.

ment, or it will be presumed to have been waived.[17] One who waives examination before the justice and gives bond to appear at the higher court for trial cannot object in the higher court to the sufficiency of the warrant, affidavit, or complaint.[18]

(11) *Bill of Exceptions.* An examining court has no authority to sign a bill of exceptions to any opinion or act of the court, and if it does so the bill is no part of the record of the case.[19]

E. Summary or Other Trials Without Jury — 1. Nature, Incidents, and Jurisdiction — a. In General. Summary trials without a jury are in derogation of the common law, and the proceedings therefore must be in strict conformity to the statute which authorizes them.[20] Such a statute must be strictly construed, and if an act imposes a penalty, but prescribes no method or form of prosecution, the conviction must be in accordance with the rules of the common law.[21] The right to a trial by jury secured by constitutional provisions is not infringed by statutes providing for the summary trial of small offenses against the state or of violations of municipal ordinances.[22]

b. Offenses Summarily Punishable. By the constitution or by statute justices of the peace and police courts are usually given power to summarily try and determine petty misdemeanors and trivial breaches of the peace, and such offenses only.[23] In some states it seems that justices of the peace have no jurisdiction to try and determine criminal cases, but can only act as committing magistrates.[24]

c. Appearance of Accused. Some cases hold that judgment cannot be

17. *California.*— People *v.* McIntyre, 127 Cal. 423, 59 Pac. 779.

Connecticut.— Northrop *v.* Brush, Kirby 108.

Kansas.— State *v.* Woods, 49 Kan. 237, 30 Pac. 520; State *v.* Allison, 44 Kan. 423, 24 Pac. 964.

Massachusetts.— Com. *v.* Lynn, 154 Mass. 405, 28 N. E. 289.

Michigan.— People *v.* Whipple, 108 Mich. 587, 66 N. W. 490; People *v.* Gleason, 63 Mich. 626, 30 N. W. 210; People *v.* Hare, 57 Mich. 505, 24 N. W. 843. And see People *v.* Goulette, 82 Mich. 36, 45 N. W. 1124; People *v.* Sligh, 48 Mich. 54, 11 N. W. 782.

Nebraska.— Coffield *v.* State, 44 Nebr. 417, 62 N. W. 875.

Nevada.— State *v.* Davis, 14 Nev. 407, 33 Am. Rep. 563.

Pennsylvania.— March *v.* Com., (1888) 14 Atl. 375.

See 14 Cent. Dig. tit. "Criminal Law," §§ 516, 517.

Waiver by petition for removal to federal court.— Where a warrant is issued upon an information charging the unlawful sale of intoxicating liquor, and defendant, without making any objection to the sufficiency of the warrant or of the verification of the information, files a sworn petition for removal of the cause to the circuit court of the United States, in which petition he seeks to justify his illegal sales as those of original packages, he waives defects or irregularities in the issuance of the warrant and verification of the information. State *v.* Tuchman, 47 Kan. 726, 28 Pac. 1004; State *v.* Longton, 35 Kan. 375, 11 Pac. 163.

18. Laney *v.* State, 109 Ala. 34, 10 So. 531.

19. Souther *v.* Com., 7 Gratt. (Va.) 673.

20. People *v.* Phillips, 1 Park. Cr. (N. Y.) 95; Com. *v.* Hardy, 1 Ashm. (Pa.) 410; Com. *v.* Morey, 3 Pittsb. (Pa.) 530.

Approval of prosecuting attorney.— Under a statute prohibiting prosecution of criminal proceedings against persons before justices of the peace until an order allowing the same, signed by the prosecuting attorney, is filed with the justice, it is not necessary that the prosecuting attorney shall authorize such prosecution, where he appears and prosecutes a person before a justice, as this is sufficient approval by him. People *v.* Griswold, 64 Mich. 722, 31 N. W. 809.

21. Com. *v.* Liller, 12 Lanc. Bar (Pa.) 188.

22. McInerney *v.* Denver, 17 Colo. 302, 29 Pac. 516; Theisen *v.* McDavid, 34 Fla. 440, 16 So. 321, 26 L. R. A. 234; Duffy *v.* People, 6 Hill (N. Y.) 75; State *v.* Conlin, 27 Vt. 318. And see Juries.

23. *Arkansas.*— Mann *v.* State, 37 Ark. 405.

Indiana.— Webber *v.* Harding, 155 Ind. 408, 58 N. E. 533; State *v.* McCory, 2 Blackf. 5.

Iowa.— State *v.* Koehler, 6 Iowa 398.

Kansas.— *In re* Eddy, 40 Kan. 592, 20 Pac. 283.

Kentucky.— Com. *v.* Clark, 6 Ky. L. Rep. 301.

Missouri.— State *v.* Johnson, 4 Mo. 618.

New Jersey.— State *v.* Briton, 3 N. J. L. 949.

See 14 Cent. Dig. tit. "Criminal Law," §§ 520, 521.

24. Jackson *v.* State, 33 Fla. 620, 15 So. 250; St. Landry Parish *v.* Bloch, 45 La. Ann. 1090, 13 So. 742.

rendered in a summary trial unless the accused appears in person,[25] but others hold that he may appear by attorney in misdemeanor cases and a trial be had in his absence resulting in a fine,[26] although it has been held that no judgment of imprisonment can be rendered without an appearance in person.[27]

d. Notice or Summons. The party accused must be notified or summoned to appear.[28] A fine imposed without notice or summons cannot be collected.[29]

e. Rights of Accused and Waiver — (i) *In General.* In summary trials before justices of the peace and other inferior courts the accused should be informed of his constitutional and statutory rights, and as a rule if he is deprived of such rights a conviction may be set aside unless a waiver is shown.[30]

(ii) *Election to Be Tried by Jury.* Where a justice of the peace or other inferior court has concurrent jurisdiction of a crime triable on indictment, the statutes generally allow the accused to elect whether he shall be tried summarily, or shall give bail to answer and have the complaint go before the grand jury, so that he may be tried on indictment and by a jury in a higher court, and if he is deprived of this right, a summary conviction cannot be sustained.[31] Under some statutes to give a magistrate jurisdiction to proceed summarily, the accused must in writing waive his right to a trial by jury.[32] It has been held that the

25. Camman *v.* Randolph, 7 N. J. L. 136; Bigelow *v.* Stearns, 19 Johns. (N. Y.) 39, 10 Am. Dec. 189; State *v.* Clark, 44 Vt. 636.

26. Warren *v.* State, 19 Ark. 214, 68 Am. Dec. 214; Denzin *v.* Com., 3 Pa. Co. Ct. 654; Pifer *v.* Com., 14 Gratt. (Va.) 710; 1 Bishop New Cr. Proc. § 270; 1 Chitty Cr. L. 411, 412; Cooley Const. Lim. 319; Wharton Cr. Pl. and Pr. § 540.

27. Pifer *v.* Com., 14 Gratt. (Va.) 710; State *v.* Campbell, 42 W. Va. 246, 24 S. E. 875.

28. State *v.* Handlin, 16 N. J. L. 96; Bigelow *v.* Stearns, 19 Johns. (N. Y.) 39, 10 Am. Dec. 189: Northern Liberties *v.* O'Neill, 1 Phila. (Pa.) 427; Com. *v.* Kemery, 2 Leg. Chron. (Pa.) 321, Reg. *v.* Venables, 2 Ld. Raym. 1405, 1 Str. 630; Reg. *v.* Barret, 1 Salk. 382; Reg. *v.* Dyer, 1 Salk. 181; 4 Bl. Comm. 382.

29. State *v.* Savannah, T. U. P. Charlt. (Ga.) 235, 4 Am. Dec. 708.

30. Hanaghan *v.* State, 51 Ohio St. 24, 36 N. E. 1072.

Right to appeal.— It has been held that failure of a justice of the peace to inform the defendant upon his conviction of his right to appeal, and to make an entry on his docket of the giving of such information, as required by statute, does not deprive the defendant of that right or render the conviction void. Jacoby *v.* Waddell, 61 Iowa 247, 16 N. W. 119.

Presence of accused.— The right of the accused to be confronted with witnesses against him and to have the evidence delivered to the jury in his presence, secured to him by statute, is a right which may be waived in the case of offenses cognizable by a justice of the peace, at least where counsel for the accused is present for him. State *v.* Reckards, 21 Minn. 47.

Right to copy of accusation.— In view of the Washington statute (2 Hill Code, § 1223) requiring the clerk of the court to furnish defendant a copy of the indictment, or to permit him to make one, it has been held that the constitutional provision (Wash. Const. art. 1, § 22) entitling the accused "to have a copy" of his accusation is complied with in a justice's court, where the justice hands the accused the original complaint and tells him that he can copy it if he pleases. State *v.* White, 8 Wash. 230, 35 Pac. 1100.

Opportunity to procure counsel.— N. Y. Code Cr. Proc. §§ 188, 189, relating to the right of defendant to have an opportunity to procure counsel and to be informed thereof do not apply to a prosecution for petit larceny by complaint, of which the courts of special sessions have exclusive jurisdiction. People *v.* Cook, 45 Hun (N. Y.) 34.

31. *Ex p.* Gibson, 89 Ala. 174, 7 So. 833; People *v.* Barry, 16 N. Y. App. Div. 462, 44 N. Y. Suppl. 913; People *v.* Berberrich, 20 Barb. (N. Y.) 224; Hill *v.* People, 18 How. Pr. (N. Y.) 289; People *v.* Putnam, 3 Park. Cr. (N. Y.) 386; Hanaghan *v.* State, 51 Ohio St. 24, 36 N. E. 1072. And see, generally, Jury.

Informing accused of right.— N. Y. Code Cr. Proc. § 211, providing that where the defendant is charged with an offense triable by a jury of special sessions the magistrate must inform him of his right to be tried by jury, after indictment, and must ask him how he will be tried, is complied with where the defendant is asked how he will be tried, and replies that he will be tried by the court without a jury. People *v.* McCann, 6 N. Y. St. 541. Under some statutes it is not necessary in order to render a summary conviction valid that the justice shall inform the defendant of his right to be tried by a jury, or that the defendant shall expressly waive his right to a jury trial. People *v.* Goodwin, 5 Wend. (N. Y.) 251.

Demand in writing.— Under some statutes demand of indictment by a grand jury must be made in writing. Smith *v.* State, 63 Ga. 168.

32. See Hanaghan *v.* State, 51 Ohio St. 24, 36 N. E. 1072.

right to a jury trial is waived by a plea of guilty before the justice,[33] but not, it seems, by a plea of not guilty and adjournments, where the magistrate has not informed the accused of his right to elect, as provided by statute.[34] The right of the accused to have a summary trial is as absolute as his right to a trial by jury, and cannot be defeated by the fact that the state asks only for a preliminary examination.[35]

f. Complaint or Information[36] — (i) *Form and Requisites in General.* Where a justice or similar officer is empowered to try a misdemeanor on a written affidavit or complaint, provided the accused shall indorse thereon a waiver of his right to be indicted by the grand jury, a valid complaint or affidavit is necessary.[37] The affidavit or complaint must show all the facts which the statute renders necessary to give the magistrate jurisdiction.[38] According to the rule of the common law a summary conviction is illegal and absolutely void unless based upon a complaint in writing verified by oath.[39] In some jurisdictions a written complaint is expressly required by statute,[40] while in others oral complaints will suffice in certain cases.[41]

(ii) *Venue.* The complaint must state the place where the offense was committed and show that it was committed within the territorial jurisdiction of the magistrate,[42] but it is sufficient if the caption of the complaint properly sets forth

33. Plato *v.* People, 3 Park. Cr. (N. Y.) 586. But see Hanaghan *v.* State, 51 Ohio St. 24, 36 N. E. 1072, holding that under a statute providing that in misdemeanor cases, where the accused in writing waives his right to a trial by jury, the magistrate may render final judgment, a written plea of guilty is not such a waiver of a jury trial as to authorize the magistrate to render final judgment.

34. People *v.* Freileweh, 11 N. Y. App. Div. 409, 42 N. Y. Suppl. 373.

35. *Ex p.* Donnelly, 30 Kan. 191, 424, 1 Pac. 648, 778.

36. Complaint or affidavit for purpose of preliminary examination see *supra*, X, B.

37. Scroggins *v.* State, 55 Ga. 380; State *v.* Pendleton, 65 N. C. 617.

Not necessary to allege credibility of person making complaint.— State *v.* Downing, 22 Mo. App. 504; Dodson *v.* State, 35 Tex. Cr. 571, 34 S. W. 754.

Names of witnesses.— It is not necessary that the names of witnesses be indorsed on the complaint filed in a prosecution before a justice of the peace, unless this is required by statute. State *v.* Wood, 49 Kan. 711, 31 Pac. 786.

Affidavit of private citizen.— Under a constitutional provision requiring the prosecution of a crime before a justice of the peace to be by information, a prosecution cannot be based wholly on an affidavit of a private citizen. State *v.* Rockwell, 18 Mo. App. 395.

Surplusage in the complaint will be disregarded. Com. *v.* Randall, 4 Gray (Mass.) 38; Com. *v.* Penniman, 8 Metc. (Mass.) 519; Brown *v.* State, 16 Nebr. 658, 21 N. W. 454; Brown *v.* Toledo, 5 Ohio S. & C. Pl. Dec. 210; State *v.* Soragan, 40 Vt. 450. See Indictments and Informations.

Preliminary affidavit or warrant.— The preliminary affidavit on which the warrant was issued (Dickson *v.* State, 62 Ga. 583), or the warrant which has been issued upon it (State *v.* Hawes, 65 N. C. 301), may, even in an appellate court by consent (Carlisle *v.* State, 76 Ala. 75), be used as the accusation upon which the trial of the accused is to proceed.

38. State *v.* Pendleton, 65 N. C. 617. See Com. *v.* Fay, 126 Mass. 235. Where a statute confers upon a justice of the peace jurisdiction of an offense only when it is committed with a particular intent, a complaint which fails to allege such intent confers no jurisdiction. *Ex p.* Phillips, 33 Tex. Cr. 126, 25 S. W. 629.

39. Prell *v.* McDonald, 7 Kan. 426, 12 Am. Rep. 423. See also State *v.* Drew, 51 Vt. 56.

40. State *v.* Quigg, 13 N. J. L. 293; State *v.* Walker, 9 S. D. 438, 69 N. W. 586.

41. Hobbs *v.* Hill, 157 Mass. 556, 32 N. E. 862; People *v.* Bennett, 107 Mich. 430, 65 N. W. 280; Oran *v.* Bles, 52 Mo. App. 509.

42. *Maine.*— State *v.* Coombs, 32 Me. 526.

Massachusetts.— Com. *v.* Carroll, 145 Mass. 403, 14 N. E. 618; Com. *v.* Barnard, 6 Gray 488; Com. *v.* Cummings, 6 Gray 487. See Com. *v.* Clancy, 154 Mass. 128, 27 N. E. 1001.

Michigan.— People *v.* Gregory, 30 Mich. 371.

Minnesota.— State *v.* Bell, 26 Minn. 388, 5 N. W. 970.

Missouri.— St. Louis *v.* Fitz, 53 Mo. 582.

North Carolina.— State *v.* Pendleton, 65 N. C. 617.

Pennsylvania.— Evans *v.* Com., 5 Pa. Co. Ct. 362; Davis *v.* Com., 3 Lack. Jur. 373.

South Carolina.— State *v.* Mays, 24 S. C. 190.

See 14 Cent. Dig. tit. "Criminal Law," § 528.

In Alabama under the statute (Acts 1882–1883, p. 214, §§ 3, 12) dividing Sumter county into two divisions for the trial of misdemeanors and requiring that on prosecution by affidavit the affidavit shall state the

the venue and the body of the complaint refers to it.[43] Where a complaint sufficiently shows that the offense was committed within the jurisdiction of the court, the fact that it is without any caption or venue in the margin is immaterial.[44]

(III) *ALLEGATION OF OFFENSE.* A complaint which does not set forth facts with sufficient certainty to constitute an offense will not support a conviction.[45] Describing the offense in the language of the statute or ordinance is sufficient where the statute states all the ingredients of the offense with legal certainty,[46] but not otherwise.[47] The complaint must be certain and particular,[48] although less formal in its allegations than an indictment.[49] It must state with certainty the time when the offense was committed,[50] the place of its commis-

district in which the offense was committed, but providing further that where a prosecution is commenced in the wrong division it can only be taken advantage of by a sworn plea which if sustained results in the transfer of the cause, it has been held that an affidavit failing to state the locality of the offense, as required by statute, is not demurrable. Henderson *v.* State, 109 Ala. 40, 19 So. 733.

Offenses near county-line.—Where a statute provides that a crime committed within one hundred yards of the line between two counties may be alleged to have been committed and may be prosecuted and punished in either county, a complaint in one county for an offense committed in the adjoining county within one hundred yards of the boundary may allege that the offense was committed in the county in which the complaint is made, and need not allege that it was committed in the adjoining county within the prescribed distance from the boundary. Com. *v.* Gillon, 2 Allen (Mass.) 502. See INDICTMENTS AND INFORMATIONS.

43. Smith *v.* Emporia, 27 Kan. 528; State *v.* Bell, 26 Minn. 388, 5 N. W. 970.

44. Com. *v.* Quin, 5 Gray (Mass.) 478.

45. *Alabama.*— Williams *v.* State, 88 Ala. 80, 7 So. 101.

Indiana.— Deveny *v.* State, 47 Ind. 208.

Maine.— State *v.* Miller, 48 Me. 576.

Massachusetts.— Com. *v.* Bartley, 138 Mass. 181; Com. *v.* Washburn, 128 Mass. 421.

Nebraska.— *Ex p.* Maule, 19 Nebr. 273, 27 N. W. 119.

North Carolina.— State *v.* Whitaker, 85 N. C. 566. See State *v.* Price, 111 N. C. 703, 16 S. E. 414; State *v.* Winslow, 95 N. C. 649.

Oregon.— Wong *v.* Astoria, 13 Oreg. 538, 11 Pac. 295.

Rhode Island.— State *v.* Fiske, 18 R. I. 416, 28 Atl. 348; State *v.* Lake, 16 R. I. 511, 17 Atl. 552.

Vermont.— State *v.* McCaffrey, 69 Vt. 85, 37 Atl. 234; State *v.* Wheeler, 64 Vt. 569, 25 Atl. 434.

See 14 Cent. Dig. tit. "Criminal Law," § 529.

46. *California.*—People *v.* Maguire, 26 Cal. 635.

Connecticut.—State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497; State *v.* Schweitzer, 57 Conn. 532, 18 Atl. 256, 14 Am. St. Rep. 106; State *v.* Cady, 47 Conn. 44; State *v.* Bierce, 27 Conn. 319.

Kansas.— Lincoln Center *v.* Bailey, 64 Kan. 885, 67 Pac. 455; State *v.* Armell, 8 Kan. 288; Lincoln Center *v.* Linker, 6 Kan. App. 369, 51 Pac. 807, 7 Kan. App. 282, 53 Pac. 787.

Massachusetts.— Com. *v.* Connelly, 163 Mass. 539, 40 N. E. 862; Com. *v.* Malloy, 119 Mass. 347.

Nebraska.— State *v.* Lauver, 26 Nebr. 757, 42 N. W. 762.

North Carolina.— State *v.* Whitaker, 85 N. C. 566.

See 14 Cent. Dig. tit. "Criminal Law," § 529; and, generally, INDICTMENTS AND INFORMATIONS.

47. State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497; Com. *v.* Bartley, 138 Mass. 181. See INDICTMENTS AND INFORMATIONS.

48. *Delaware.*— Vandever *v.* State, 1 Marv. 209, 40 Atl. 1105.

Georgia.— Dickson *v.* State, 62 Ga. 583; Johnson *v.* State, 58 Ga. 397.

Massachusetts.—Com. *v.* Bartley, 138 Mass. 181; Com. *v.* Phillips, 16 Pick. 211.

New York.— People *v.* James, 11 N. Y. App. Div. 699, 43 N. Y. Suppl. 315, 12 N. Y. Cr. 196.

Rhode Island.— State *v.* Fiske, 18 R. I. 416, 28 Atl. 348.

49. Republic *v.* Parsons, 10 Hawaii 601; Ford *v.* State, 3 Pinn. (Wis.) 449, 4 Chandl. (Wis.) 148.

In Indiana, in a prosecution by affidavit and information under the statute, the same certainty is required in such affidavit and information as is necessary in an indictment. State *v.* Beebe, 83 Ind. 171; Burroughs *v.* State, 72 Ind. 334.

50. State *v.* Saxton, 2 Kan. App. 13, 41 Pac. 1113 (holding, however, that where from the entire statement in a complaint filed before a justice of the peace the date on which the offense was committed can be ascertained the complaint is not had because the date is not expressly averred); State *v.* Baker, 34 Me. 52; Com. *v.* Hersey, (Mass. 1887) 9 N. E. 837; Com. *v.* Walton, 11 Allen (Mass.) 238; Com. *v.* Hutton, 5 Gray (Mass.) 89, 66 Am. Dec. 352; Com. *v.* Adams, 1 Gray (Mass.) 481; People *v.* Gregory, 30 Mich. 371. See also Scott *v.* State, (Tex. Cr. 1900) 56 S. W. 61. But see *Ex p.* Ah Sing, 87 Cal. 423, 25 Pac. 552; Com. *v.* Keefe, 7 Gray (Mass.) 332. See INDICTMENTS AND INFORMATIONS.

Omission of year.— A complaint which contains no mention of the year in laying the offense is fatally defective. It must affirma-

sion,[51] the intent when this is material,[52] and the owner of the property against which the offense was committed;[53] and it must correctly recite the statute upon which it is based.[54] A complaint is no doubt governed by the same rule with respect to duplicity as an indictment and information.[55]

(IV) *SIGNATURE AND VERIFICATION.* The complaint must generally be subscribed[56] and sworn to[57] by the complainant. Slight irregularities in the jurat and signature may be disregarded.[58] The jurat must usually be signed by the justice,[59] but it need not have the seal of the court.[60] An attestation by a clerk

tively appear in the complaint charged that it was not done so early as to be barred by the statute of limitations. People *v.* Gregory, 30 Mich. 371. See INDICTMENTS AND INFORMATIONS.

Use of figures and abbreviations.— The time of commission of an offense may be stated by the use of Arabic figures, the letters "A. D.," and like well-known abbreviations. Com. *v.* Smith, 153 Mass. 97, 26 N. E. 436; Com. *v.* Hagarman, 10 Allen (Mass.) 401; Com. *v.* Clark, 4 Cush. (Mass.) 596. See INDICTMENTS AND INFORMATIONS.

Several counts.— Where a complaint contains two counts and the time and place are definitely stated in the first, and the second charges the defendant with then and there doing acts which constitute an offense, the time of the commission of an offense is sufficiently set forth. State *v.* Allphin, 2 Kan. App. 28, 42 Pac. 55.

Statement of time as to continuing offense, as the maintenance of a liquor nuisance, see Com. *v.* Rhodes, 148 Mass. 123, 19 N. E. 22; Com. *v.* Sheehan, 143 Mass. 468, 9 N. E. 839; Com. *v.* Hersey, (Mass. 1887) 9 N. E. 837; Com. *v.* McIvor, 117 Mass. 118; Com. *v.* Walton, 11 Allen (Mass.) 238; Com. *v.* Frates, 16 Gray (Mass.) 236. See also INDICTMENTS AND INFORMATIONS.

Reference to jurat.— Where a complaint alleges the commission of an offense on a certain day and on other days between that and the date of receiving the complaint, the jurat annexed to the complaint and properly certified with the record may be referred to for the purpose of determining the day on which the complaint was received. Com. *v.* McIvor, 117 Mass. 118.

51. See *supra*, X, E, 1, f, (II).

52. State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497; State *v.* Whitaker, 85 N. C. 566; *Ex p.* Phillips, 33 Tex. Cr. 126, 25 S. W. 629.

"Wilfully and unlawfully" for knowingly. —Wong *v.* Astoria, 13 Oreg. 538, 11 Pac. 295.

53. Withers *v.* State, 117 Ala. 89, 23 So. 147. See INDICTMENTS AND INFORMATIONS.

Where a church is mentioned by name as the owner of property in an affidavit or complaint, it is not necessary to specify the persons who compose it, unless it affirmatively appears that the church is not a corporation. Smith *v.* State, 63 Ga. 168.

54. Com. *v.* Unknown, 6 Gray (Mass.) 489. See also Nesbit *v.* State, (Kan. App. 1898) 54 Pac. 326.

55. See INDICTMENTS AND INFORMATIONS.

What constitutes duplicity.— A complaint charging prostitution and lewdness is not objectionable as charging two offenses. State *v.* Hanchett, 38 Conn. 35. And a complaint charging cruelty to animals is not double because it alleges that defendant cruelly tormented and wounded a horse, and also alleges that he deprived it of necessary sustenance. State *v.* Haskell, 76 Me. 399. Nor is a complaint bad for duplicity because it charges that the defendant, not being licensed, owned and kept intoxicating liquors with intent to sell them, exposed and offered them for sale, and sold them, although each of the several acts charged is itself specifically forbidden by the statute (State *v.* Burns, 44 Conn. 149; State *v.* Bielby, 21 Wis. 206); or because it charges the selling of intoxicating liquor to two different persons at different times (Com. *v.* Broker, 151 Mass. 355, 23 N. E. 1137; Com. *v.* Dillane, 11 Gray (Mass.) 67); or the maintenance of a liquor nuisance on a certain day and on divers other days between that day and a later day (Com. *v.* Sheehan, 143 Mass. 468, 9 N. E. 839). See also INTOXICATING LIQUORS.

56. Com. *v.* Barhight, 9 Gray (Mass.) 113.

57. Campbell *v.* Thompson, 16 Me. 117 (holding that where a statute requires criminal prosecutions to be instituted "on complaint," a complaint under oath or affirmation is implied as a part of the technical meaning of the term); State *v.* Calfer, (Mo. 1887) 4 S. W. 418.

58. Cherokee *v.* Fox, 34 Kan. 16, 7 Pac. 625; Com. *v.* Intoxicating Liquors, 142 Mass. 470, 8 N. E. 421; Com. *v.* Mosher, 134 Mass. 226; Com. *v.* Wingate, 6 Gray (Mass.) 485; Com. *v.* Clark, 4 Cush. (Mass.) 596; State *v.* Glennon, 3 R. I. 276.

59. Com. *v.* Bennett, 7 Allen (Mass.) 533; Com. *v.* Wallace, 14 Gray (Mass.) 382; Com. *v.* McGuire, 11 Gray (Mass.) 459; State *v.* Wright, 16 R. I. 518, 17 Atl. 998.

A jurat signed by a notary public was held good in Hunter *v.* State, 102 Ind. 428, 1 N. E. 361.

The official character of the magistrate is sufficiently shown by a complaint which describes him as "special justice of the District Court of Hampshire," and by the words "special justice" appended to the jurat. Com. *v.* Lynn, 154 Mass. 405, 28 N. E. 289.

A complaint sworn to before a police judge is not void because the letters "J. P." instead of the letters "P. J.," or the words "police judge," are attached to his name signed to the jurat. Cherokee *v.* Fox, 34 Kan. 16, 7 Pac. 625.

60. The jurat to an affidavit or complaint charging an offense, made before a justice of

pro tempore is *prima facie* sufficient.[61] The complainant's signature by mark without an attesting witness is sufficient when certified by the justice.[62] It seems that an information prepared and filed by a prosecuting attorney need not be sworn to by him.[63] It has been held in some states that a complaint or affidavit made by a prosecuting witness merely on information and belief is insufficient;[64] but in others the contrary view has been taken.[65]

(v) *Conclusion.* The complaint before a justice of the peace need not usually conclude with the expression "against the peace and dignity of the state,"[66] or the expression "against the form of the statute in such case made and provided."[67]

(vi) *Joinder of Offenses.* In prosecutions before justices of the peace two offenses may be charged in one affidavit, and both may be tried together. There is no such thing as different counts in an affidavit.[68] A joint complaint against and conviction of three persons for offenses individually separate and distinct, although all against the same statutory provision, are illegal.[69]

(vii) *Amendment.* The affidavit or complaint on which a prosecution is based is usually amendable by the justice as to matters of form,[70] but not as to matters of substance so as to affect a substantial right of the accused, as by substituting a charge of another offense.[71]

(viii) *Defects and Objections.* Not only are affidavits and complaints containing minor defects amendable, but ordinarily, where the rights of the accused are not prejudiced and the intent is clear such minor defects may be disregarded

the peace or police judge for use in his court, need not have the seal of the court, unless it is required by statute. Rosenstein *v.* State, 9 Ind. App. 290, 36 N. E. 652; Com. *v.* De Voe, 159 Mass. 101, 34 N. E. 85.

61. Com. *v.* Gay, 153 Mass. 211, 26 N. E. 571, 852; Com. *v.* Connell, 9 Allen (Mass.) 488.

62. Com. *v.* Sullivan, 14 Gray (Mass.) 97.

63. *In re* Lewis, 31 Kan. 71, 1 Pac. 283; O'Brien *v.* Cleveland, 4 Ohio Dec. (Reprint) 189, 1 Clev. L. Rep. 100.

In Missouri it is not necessary that the prosecuting attorney should swear to an information presented to a justice of the peace, and under Mo. Rev. St. (1889) § 4329, such information need not show that it was based on the personal knowledge of such attorney, or on the oath of some other person who had personal knowledge of the offense. State *v.* Ransberger, 106 Mo. 135, 17 S. W. 290 [*affirming* 42 Mo. App. 466]; State *v.* McCarver, 47 Mo. App. 650; State *v.* Webb, 47 Mo. App. 599; State *v.* Hatfield, 40 Mo. App. 358; State *v.* Wilkson, 36 Mo. App. 373; State *v.* Humble, 34 Mo. App. 343; State *v.* Ristig, 30 Mo. App. 360; State *v.* Kemple, 27 Mo. App. 392.

64. State *v.* Ristig, 30 Mo. App. 360; State *v.* Kemple, 27 Mo. App. 392; People *v.* Pratt, 22 Hun (N. Y.) 300.

"Probable cause to suspect."—A complaint and information on oath "that the complainant has probable cause to suspect" that the accused has committed the offense charged is not sufficiently certain to support a conviction and sentence. Com. *v.* Phillips, 16 Pick. (Mass.) 211.

65. State *v.* Davie, 62 Wis. 305, 22 N. W. 411. See Deveny *v.* State, 47 Ind. 208, holding sufficient an affidavit charging the offense "as the affiant verily believes." See also Brown *v.* State, 16 Nebr. 658, 21 N. W. 454.

Where the prosecuting attorney files a complaint before a justice of the peace and a trial is had thereon, the conviction and sentence are not void because the complaint was sworn to by him on information and belief. *In re* Lewis, 31 Kan. 71, 1 Pac. 283.

66. Thomas *v.* State, 107 Ala. 61, 17 So. 941; Com. *v.* Clark, 6 Ky. L. Rep. 301. *Contra,* State *v.* Morgan, 79 Miss. 659, 31 So. 338.

67. *Ex p.* Mansfield, 106 Cal. 400, 39 Pac. 775; Downing *v.* State, 66 Ga. 160.

In North Carolina a justice's warrant should conclude "against the form of the statute." State *v.* Lowder, 85 N. C. 564; State *v.* Luther, 77 N. C. 492; State *v.* Muse, 20 N. C. 463.

68. Deveny *v.* State, 47 Ind. 208.

69. State *v.* Handlin, 16 N. J. L. 96, holding that where several persons disturb religious worship by laughing and talking to each other contrary to statute, each is guilty of a separate offense, and a conviction of all under a complaint against them jointly will be set aside, although a separate fine was imposed on each.

70. *Illinois.*— Truitt *v.* People, 88 Ill. 518.

Iowa.— State *v.* Merchant, 38 Iowa 375, attaching signature of prosecuting witness.

Missouri.— State *v.* Whitaker, 75 Mo. App. 184.

Rhode Island.— Kenney *v.* State, 5 R. I. 385.

Vermont.— State *v.* Sutton, 65 Vt. 439, 26 Atl. 66; State *v.* Batchelder, 6 Vt. 479.

Wisconsin.— Keehn *v.* Stein, 72 Wis. 196, 39 N. W. 372.

See 14 Cent. Dig. tit. "Criminal Law," § 534.

71. State *v.* Runnals, 49 N. H. 498; State *v.* Dolby, 49 N. H. 483, 6 Am. Rep. 588.

by the court.[72] Where, however, the inaccuracy or omission is such that it cannot be disregarded without prejudice to the accused a conviction ought to be set aside.[73] As a rule defects in the complaint will be waived by the accused if he goes to trial on a plea of not guilty.[74]

g. Trial — (I) *In General.* The mode of conducting the trial is usually regulated by statute. Rules of procedure of the higher courts may be followed unless they are inapplicable or are expressly restricted to trials by indictment.[75] Subject to statutory provisions the justice may grant a reasonable postponement on the application of the prosecution or of the accused, and may commit the accused to custody pending such postponement.[76]

(II) *Jurisdiction to Hold Accused to Answer.* A justice of the peace who has exclusive original jurisdiction to try and determine the offense charged cannot merely take a preliminary examination and commit the prisoner,[77] as he may do in his discretion where he has concurrent jurisdiction with the court to which he sends the case,[78] and as he must do where the prisoner is charged

72. *Alabama.*— Henderson *v.* State, 109 Ala. 40, 19 So. 733.

Illinois.— Byars *v.* Vernon, 77 Ill. 467.

Indiana.— State *v.* Kutter, 59 Ind. 572.

Kansas.— Kingman *v.* Berry, 40 Kan. 625, 20 Pac. 527.

Massachusetts.— Com. *v.* Harvey, 111 Mass. 420.

New York.— People *v.* Green, 4 N. Y. Cr. 442.

Rhode Island.—State *v.* Read, 12 R. I. 135; Kenney *v.* State, 5 R. I. 385.

See 14 Cent. Dig. tit. "Criminal Law," § 535.

Scandalous matter unnecessarily inserted, although deserving of rebuke by the court as to the parties who used it, is not a ground for discharging the accused. Butte *v.* Peasley, 18 Mont. 303, 45 Pac. 210.

73. Com. *v.* Crossley, 162 Mass. 515, 39 N. E. 278; Lanham *v.* State, 9 Tex. App. 232.

74. *Alabama.*— Aderhold *v.* Anniston, 99 Ala. 521, 12 So. 472; Williams *v.* State, 88 Ala. 80, 7 So. 101.

Kansas.— State *v.* McManus, 4 Kan. App. 247, 45 Pac. 130.

Massachusetts.— In this state, under the statute, formal objections cannot be taken after judgment. Com. *v.* Hersey, (Mass. 1887) 9 N. E. 838; Com. *v.* Keefe, 143 Mass. 467, 9 N. E. 840; Com. *v.* Lagorio, 141 Mass. 81, 6 N. E. 546; Com. *v.* Peto, 136 Mass. 155; Green *v.* Com., 111 Mass. 417.

Rhode Island.—State *v.* Drury, 13 R. I. 540, misnomer.

Vermont.— State *v.* Norton, 45 Vt. 258, omission of memorandum of names of witnesses.

Wisconsin.—State *v.* Boncher, 59 Wis. 477, 18 N. W. 335.

United States.— U. S. *v.* Smith, 17 Fed. 510.

See 14 Cent. Dig. tit. "Criminal Law," § 536.

In Iowa objection to an information may be made in the district court if it is defective in substance. State *v.* Thompson, 44 Iowa 399.

75. State *v.* Wagner, 23 Minn. 544.

Function of prosecuting attorney.— The prosecuting attorney should not be permitted to control or direct the proceedings, to direct a conviction or an acquittal, or to interfere with the functions of the judge or jury in any way. People *v.* Hicks, 72 Mich. 181, 40 N. W. 244.

Necessity of examining complaining witness in presence of defendant.— It is no ground for dismissing an appeal, or for arresting judgment in the superior court on appeal, that the record of the justice does not show that the complainant was examined in the presence of the defendant. Com. *v.* Harrison, 11 Gray (Mass.) 310; Com. *v.* Dillane, 11 Gray (Mass.) 67.

Conviction by majority of magistrates.— In New York in the court of special sessions the majority of the magistrates is sufficient to convict, as the statute only requires the presence and deliberation of all three. People *v.* Wandell, 21 Hun (N. Y.) 515.

76. People *v.* Hodgson, 12 N. Y. Suppl. 699. See also State *v.* Valure, 95 Iowa 401, 64 N. W. 280.

Adjournment in violation of statute.— A conviction before a magistrate will not be reversed on appeal merely because the magistrate adjourned the cause for a period of more than ten days, contrary to a statute prohibiting adjournments exceeding that time, where the adjournment was on motion of the accused. State *v.* Miller, 48 Me. 576.

77. *Alabama.*— Brown *v.* State, 105 Ala. 117, 16 So. 929.

Arkansas.— Thomm *v.* State, 35 Ark. 327.

Connecticut.— Darling *v.* Hubbell, 9 Conn. 350.

Kansas.— *In re* Crandall, 59 Kan. 671, 54 Pac. 686.

Pennsylvania.— Com. *v.* Kehoe, 11 Pa. Co. Ct. 516.

Virginia.— Lacey *v.* Palmer, 93 Va. 159, 24 S. E. 930, 57 Am. St. Rep. 795, 31 L. R. A. 822.

See 14 Cent. Dig. tit. "Criminal Law," § 542.

78. Com. *v.* Sullivan, 156 Mass. 487, 31 N. E. 647; Com. *v.* Harris, 8 Gray (Mass.) 470; Com. *v.* Goddard, 13 Mass. 455 (holding that the justice may rescind an order

with an offense which he is not authorized to try and determine, but of which he has jurisdiction merely as a committing magistrate.[79]

(III) *Effect of Discharge.* Where a justice has dismissed a case and released the prisoner, even though he may have erred in so doing, he cannot reinstate the case or bring the party before him for trial without commencing anew.[80]

h. Judgment, Sentence, Record, and Commitment — (I) *In General.* It is the imperative duty of a justice in a criminal case tried by a jury before him to enter judgment and pronounce sentence on a verdict of guilty. He cannot set their verdict aside[81] or entertain a motion in arrest of judgment.[82] Nor can a court exercising the powers of a justice reorganize after the trial to resentence a defendant, where the sentence was defective.[83]

(II) *Time of Entry of Judgment.* If the accused is convicted the legality of the sentence imposed is in no respect invalidated by a delay of the justice in entering the judgment on his docket, since the delay in doing this merely ministerial act in no way prejudices the accused.[84]

(III) *Requisites, Sufficiency, and Contents of Record* — (A) *Contents in General.* The justice before whom conviction is had should make out a record of the conviction,[85] which should contain the information or complaint under oath, giving the date and place where made and the names of the complainant, magistrate, and accused, the time of committing, with an exact description of the crime, the summons or warrant, with the statement that the defendant was duly notified thereof, that he appeared and confessed, or that evidence for and against him was taken and reduced to writing, that it is returned with the record, and the judgment of conviction, which must be expressed in legal form and not in vague and loose terms.[86] Greater certainty is always required in records of

holding over the accused and try him for the offense himself); State *v.* Sargent, 71 Minn. 28, 73 N. W. 626; *Re* Macrae, 4 Brit. Col. 18. And see Johnson *v.* Waukesha County, 64 Wis. 281, 25 N. W. 7.

79. *Ex p.* Burke, 58 Miss. 50. And see Hanaghan *v.* State, 51 Ohio St. 24, 36 N. E. 1072.

80. State *v.* Secrest, 33 Minn. 381, 23 N. W. 545.

81. Moore *v.* State, 72 Ind. 358; Dupont *v.* Downing, 6 Iowa 172.

Suspension of sentence.— In the absence of a statute a justice has no authority, where the defendant pleads guilty, to suspend sentence and to grant an indefinite continuance upon the accused paying the costs and arranging with him that he would present himself for sentence at a future time on notice. Com. *v.* Maloney, 145 Mass. 205, 13 N. E. 482; Com. *v.* Dowdican, 115 Mass. 133.

Presence of accused.— The defendant cannot be sentenced by a justice if he does not appear. Davis *v.* Com., 3 Lack. Jur. (Pa.) 133. If he is not in custody the justice should issue a warrant to apprehend him and bring him in to receive sentence. Sawyer *v.* Joiner, 16 Vt. 497.

82. Pritchett *v.* Cox, 154 Ind. 108, 56 N. E. 20.

83. People *v.* Webster, 92 Hun (N. Y.) 378, 36 N. Y. Suppl. 995, holding that in the court of special sessions as soon as judgment is pronounced and the certificate of conviction made the court ceases to exist for the purposes of that case and cannot reassemble to take any further action in the matter of that prosecution.

84. *Ex p.* Raye, 63 Cal. 491; Wright *v.* Fansler, 90 Ind. 492; Holley *v.* State, 74 Miss. 878, 21 So. 923; Lunenberger *v.* State, 74 Miss. 379, 21 So. 134; *Ex p.* Quong Lee, 34 Tex. Cr. 511, 31 S. W. 391.

An order sending a case to another court for trial is not void solely because of delay in entering it. People *v.* Myers, 2 Hun (N. Y.) 6.

85. Filing record in superior court.— In the absence of a special statute requiring it it is never necessary that the record of the justice showing a conviction should be filed in a superior court unless the accused appeals or moves for a new trial, when he must usually bring up the record. Matter of Williamson, 3 Abb. Pr. N. S. (N. Y.) 244, 19 Abb. Pr. (N. Y.) 413; Layden's Case, 3 Abb. Pr. (N. Y.) 331. But this is sometimes required by statute. Bennac *v.* People, 4 Barb. (N. Y.) 164.

86. *Alabama.*— Marks *v.* State, 131 Ala. 44, 31 So. 18.

California.— *Ex p.* Turner, 75 Cal. 226, 16 Pac. 898.

Connecticut.— Knowles *v.* State, 2 Root 282.

Indiana.— Webber *v.* Harding, 155 Ind. 408, 58 N. E. 533; State *v.* Bins, 9 Ind. App. 280, 36 N. E. 655.

New Jersey.— Marcovitz *v.* Collins, 65 N. J. L. 193, 46 Atl. 758; Schlachter *v.* Stokes, 63 N. J. L. 138, 43 Atl. 571; Preusser *v.* Cass, 54 N. J. L. 532, 24 Atl. 480.

summary convictions before justices of the peace and police courts than in the case of indictments.[87]

(B) *Jurisdictional Facts.* The record must set out all the facts enumerated in the preceding section and all other facts, if any there be, which are necessary to give the justice jurisdiction over the offense, and to warrant him in pronouncing judgment.[88]

(C) *Distribution of Fine.* Where the statute provides that the fine levied shall be paid to certain persons, it is not necessary to specify them in the sentence,[89] but it seems that where the sentence directs it to be paid to the wrong person it may be set aside.[90]

(D) *Description of Offense.* A conviction will be set aside where the record does not contain such an accurate and complete description of the offense as to show that it is a crime.[91] Where the offense is statutory, a description in the language of the statute is generally sufficient.[92]

(E) *Setting Out Evidence.* The record of the proceedings and conviction before the justice must contain the substance at least of the evidence taken before him, to enable the appellate court to determine whether the justice has or has not exceeded his jurisdiction. If the record filed does not contain the evidence the sentence should be set aside.[93]

(F) *Finding or Verdict.* The sentence will be set aside where the record does not show any verdict or finding of guilty,[94] or where the information

New York.— Matter of Travis, 55 How. Pr. 347; People *v.* Phillips, 1 Edm. Sel. Cas. 386, 1 Park. Cr. 95.

Pennsylvania.— Com. *v.* Clauss, 5 Pa. Dist. 658, 18 Pa. Co. Ct. 381; Laverty *v.* Com., 4 Pa. Co. Ct. 137; Com. *v.* Morey, 10 Phila. 460; Com. *v.* Liller, 12 Lanc. Bar 188.

See 14 Cent. Dig. tit. "Criminal Law," § 548 *et seq.*

87. People *v.* Phillips, 1 Edm. Sel. Cas. (N. Y.) 386, 1 Park. Cr. (N. Y.) 95.

Everything to sustain the lawfulness of a conviction must appear on the face of the record. Keeler *v.* Milledge, 24 N. J. L. 142; Philadelphia *v.* Campbell, 11 Phila. (Pa.) 163.

88. *California.*— *Ex p.* Turner, 75 Cal. 226, 16 Pac. 898.

Delaware.— Stewart *v.* State, 1 Pennew. 16, 39 Atl. 464.

Massachusetts.— Com. *v.* Huard, 121 Mass. 56.

Michigan.—Fruitport Tp. *v.* Dickerman, 90 Mich. 20, 51 N. W. 109, showing time of appearance.

New York.— People *v.* Whitney, 22 Misc. 226, 49 N. Y. Suppl. 591; People *v.* Charles, 1 Edm. Sel. Cas. 264.

Pennsylvania.— Com. *v.* Blossom, 12 Pa. Co. Ct. 580; Northern Liberties *v.* O'Neill, 1 Phila. 427; Com. *v.* Kinter, 1 Wilcox 3; Com. *v.* Kemery, 2 Leg. Chron. 321.

Vermont.— Brackett *v.* State, 2 Tyler 152.

Wisconsin.— Hepler *v.* State, 43 Wis. 479.

See 14 Cent. Dig. tit. "Criminal Law," § 549.

Failure of the record to show that the defendant did not demand a jury does not render a judgment of conviction before the court of special sessions in New York defective. People *v.* Luczak, 10 Misc. (N. Y.) 590, 32 N. Y. Suppl. 219.

89. Com. *v.* Kinter, 1 Wilcox (Pa.) 3.

90. Com. *v.* Liller, 12 Lanc. Bar (Pa.) 188; Com. *v.* Ressequi, 1 L. T. N. S. (Pa.) 124.

91. Com. *v.* McIvor, 117 Mass. 118; Keeler *v.* Milledge, 24 N. J. L. 142; Reid *v.* Wood, 102 Pa. St. 312; Com. *v.* Nesbit, 34 Pa. St. 398; Com. *v.* Clauss, 5 Pa. Dist. 658, 18 Pa. Co. Ct. 381; Com. *v.* Cane, 2 Pars. Eq. Cas. (Pa.) 265; Com. *v.* Fisher, 3 Lanc. L. Rev. 17.

See 14 Cent. Dig. tit. "Criminal Law," § 553.

The date of the offense must be stated. *In re* Brown, 19 Misc. (N. Y.) 692, 44 N. Y. Suppl. 1096.

Place of offense.— A judgment of a justice of the peace in a criminal case is erroneous if the record does not show in what town or county the alleged offense was committed. Thayer *v.* Com., 12 Metc. (Mass.) 9.

92. Byers *v.* Com., 42 Pa. St. 89; Com. *v.* Blossom, 12 Pa. Co. Ct. 580.

93. Kolb *v.* Boonton, 64 N. J. L. 163, 44 Atl. 873; Schneider *v.* Marinelli, 62 N. J. L. 739, 42 Atl. 1077 [*affirming* 61 N. J. L. 177, 39 Atl. 640]; Lyons *v.* Spratford, 43 N. J. L. 376; People *v.* Nash, 38 Misc. (N. Y.) 283, 77 N. Y. Suppl. 944; People *v.* Benison, 32 Misc. (N. Y.) 366, 66 N. Y. Suppl. 734, 15 N. Y. Cr. 142; Com. *v.* Borden, 61 Pa. St. 272; Crader *v.* Com., 4 Pa. Dist. 731; Com. *v.* Crader, 17 Pa. Co. Ct. 4; Com. *v.* Liller, 12 Lanc. Bar (Pa.) 188; State *v.* Freeman, 43 S. C. 105, 20 S. E. 974.

See 14 Cent. Dig. tit. "Criminal Law," § 554.

94. Atwood *v.* Atwater, 34 Nebr. 402, 51 N. W. 1073. But it has been held that a trial justice's omission to indorse upon the information his finding of guilty is a mere irregularity, not available on appeal. State *v.* Mays, 24 S. C. 190.

contains several counts for distinct offenses and the finding of guilty is general.[95]

(G) *Signature of Justice.* The judgment in a summary proceeding before a justice will be set aside where the record is not signed by him.[96]

(IV) *Extent of Jurisdiction as to Punishment.* The extent of the power of a justice to impose punishment by fine or imprisonment is measured by the character of the penalties which by the statutes are attached to the crimes which he has jurisdiction to try and determine.[97] Justices usually have power to sentence to imprisonment in the county jail,[98] or to imprison as a means of enforcing the payment of a fine.[99] A sentence to jail or to the workhouse for an indefinite time is void at common law,[1] and in the absence of statute a justice cannot impose an alternative sentence.[2] Where a defendant is committed to enforce the payment of a fine, the commitment should have an express limit not to be exceeded under any circumstances, so that the confinement will be required to terminate certainly at the time so fixed, and as much earlier as payment may be made.[3]

(V) *Commitment or Certificate of Conviction*[4] — (A) *Necessity For and Time of Issuance.* As a rule, to justify detention of the accused after conviction, there must be a valid mittimus or warrant of commitment,[5] but in some states a mittimus is not necessary where the jailer or other custodian of the accused has a duly certified transcript of the judgment of conviction.[6] Delay of the justice in issuing a mittimus after conviction does not invalidate the conviction. He may issue the same even after adjournment.[7]

(B) *Sufficiency in General.* A justice's warrant of commitment must con-

95. State *v.* Brown, 66 Mo. App. 280.

96. Com. *v.* Barry, 115 Mass. 146; Com. *v.* Jeffts, 14 Gray (Mass.) 19; Howard *v.* People, 3 Mich. 207; Com. *v.* Cummings, 2 Pa. L. J. Rep. 49, 3 Pa. L. J. 265; State *v.* White, 8 Wash. 230, 35 Pac. 1100. *Contra*, State *v.* Bliss, 21 Minn. 458, holding that it is proper but not essential, in the absence of a statute, for the justice to sign his docket.

97. Schreitz *v.* State, 1 Pennew. (Del.) 18, 39 Atl. 453; Del Veichi *v.* Com., (Mass. 1896) 43 N. E. 506.

Right of accused to give surety for good behavior.— Where a statute provides for imprisonment for disorderly conduct only on failure to give surety for good behavior, a justice is absolutely precluded from convicting without permitting the giving of such security. Matter of Motley, 24 Misc. (N. Y.) 488, 53 N. Y. Suppl. 878.

98. *Ex p.* Gayles, 108 Ala. 514, 19 So. 12.

99. *Ex p.* Miller, 82 Cal. 454, 22 Pac. 1113.

A justice cannot commit a defendant for non-payment of costs, as the costs are no part of the fine imposed as a penalty for the offense. *In re* Lackey, 6 S. D. 526, 62 N. W. 134.

1. Washburn *v.* Belknap, 3 Conn. 502; Yates *v.* People, 6 Johns. (N. Y.) 337; Com. *v.* Irwin, 3 Pa. L. J. 59; Rex *v.* Hall, 3 Burr. 1636; Rex. *v.* Rhodes, 4 T. R. 220.

2. Brownbridge *v.* People, 38 Mich. 751, holding further that if it be uncertain whether the sentence is intended as being in the alternative or whether the imprisonment imposed is merely a means to enforce the payment of a fine it is also bad for ambiguity.

A certificate of conviction apparently in the alternative is not invalid if the commitment shows that it was not so intended. *In re* Bray, 12 N. Y. Suppl. 366.

3. Brownbridge *v.* People, 38 Mich. 751. See also Brock *v.* State, 22 Ga. 98. A judgment that the defendant be fined a specified sum, and in default thereof be imprisoned a specified number of days, is in conformity with a statute that he shall be committed until the fine is paid. *Ex p.* Ellis, 54 Cal. 204.

Cumulative sentence.— A judgment imposing a cumulative sentence need not set out the previous judgment, but may direct each term to commence at the expiration of the previous sentence. People *v.* Forbes, 22 Cal. 135.

4. **Commitment after preliminary examination** for trial in a higher court see *supra*, X, D, 3.

5. Gurney *v.* Tufts, 37 Me. 130, 58 Am. Dec. 777; *In re* Ricker, 32 Me. 37; People *v.* Rawson, 61 Barb. (N. Y.) 619; State *v.* Dean, 48 N. C. 393; *Ex p.* Burford, 3 Cranch (U. S.) 448, 2 L. ed. 495.

Parol authority.—A justice cannot by parol confer authority to commit a prisoner to jail. State *v.* Dean, 48 N. C. 393.

6. *In re* Ring, 28 Cal. 247; People *v.* District Prisons, 73 Hun (N. Y.) 118, 25 N. Y. Suppl. 1095; People *v.* Nevins, 1 Hill (N. Y.) 154; *In re* Workhouse, 5 Ohio S. & C. Pl. Dec. 574, 7 Ohio N. P. 554. And see *Ex p.* Wilson, 114 U. S. 417, 5 S. Ct. 935, 29 L. ed. 89; *In re* Wilson, 18 Fed. 33.

7. Mann *v.* People, (Colo. App. 1901) 66 Pac. 452; Scott *v.* Spiegel, 67 Conn. 349, 35 Atl. 262; Pritchett *v.* Cox, 154 Ind. 108, 56 N. E. 20; People *v.* Rawson, 61 Barb. (N. Y.) 619.

tain a statement of a good cause for commitment, expressed with certainty and supported by oath.[8] It must set out concisely all preliminary steps taken,[9] and show on its face that the justice had jurisdiction.[10] It need not include the complaint,[11] or state whether the accused demanded a jury,[12] and it is not invalidated by the absence of a seal.[13] Unnecessary statements of fact or mere irregularities in the commitment, not prejudicing any substantial right of the accused, may be disregarded.[14]

(c) *Specification of Punishment.* A warrant of commitment or mittimus must specify the punishment imposed or term of imprisonment.[15] Where the sentence is for both fine and imprisonment, a warrant, in the absence of statute, is in proper form where it directs the keeper of the jail to safely keep the prisoner until the expiration of his term of imprisonment, stating the period, and until he shall pay his fine or be discharged by due course of law.[16] On conviction under a statute imposing a fine it is not necessary that the sentence shall be in the alternative to pay the fine or be committed, but it is essential that this alternative be contained in the warrant or mittimus.[17]

(d) *Description of Offense.* Both at common law[18] and by statute a warrant of commitment must set forth the crime of which the defendant has been convicted and describe it with reasonable certainty.[19] If it fails to do so the officer is not liable for suffering the accused to escape.[20] It is not necessary, however, that the warrant shall set out all the facts necessary to make out the offense or all the elements of the offense.[21]

2. Appeal and Error, Review, and Trial De Novo — a. Form of Remedy, Jurisdiction and Right of Review, and Procedure — (i) *Right to Appeal or Maintain Writ of Error.* In conformity with the general rule that where a

8. *Ex p.* Burford, 3 Cranch (U. S.) 448, 2 L. ed. 495; 1 Hale P. C. 94; 2 Hawkins P. C. c. 16, § 16.

9. Matter of Travis, 55 How. Pr. (N. Y.) 347.

10. Gurney *v.* Tufts, 37 Me. 130, 58 Am. Dec. 777; Matter of Travis, 55 How. Pr. (N. Y.) 347. See also People *v.* Whitney, 22 Misc. (N. Y.) 226, 49 N. Y. Suppl. 591.

Where a statute prescribes the requisites for the record of the judgment, and jurisdictional facts are not required to be stated therein, it is not necessary that they should be stated in the commitment. Matter of Hogan, 55 How. Pr. (N. Y.) 458; People *v.* Moore, 3 Park. Cr. (N. Y.) 465.

11. *In re* Ricker, 32 Me. 37.

12. People *v.* Moore, 3 Park. Cr. (N. Y.) 465.

13. Webber *v.* Harding, 155 Ind. 408, 58 N. E. 533; People *v.* Rawson, 61 Barb. (N. Y.) 619. But see 2 Hawkins P. C. c. 16, § 13.

14. State *v.* James, 37 Conn. 355; *Ex p.* Hunter, 16 Fla. 575; Evans *v.* Com., 5 Pa. Co. Ct. 362.

15. People *v.* Rawson, 61 Barb. (N. Y.) 619; Matter of Hoffman, 1 N. Y. Cr. 484; Com. *v.* Kinter, 1 Wilcox (Pa.) 3.

Extent of jurisdiction as to punishment see *supra*, X, E, 1, h, (IV).

16. People *v.* Rawson, 61 Barb. (N. Y.) 619.

Specifying punishment in disjunctive.— Where the statute allows a sentence imposing a fine or imprisonment, or both, the commitment cannot be worded in the disjunctive, but must state clearly in which manner the judgment is to be satisfied. Matter of Hoffman, 1 N. Y. Cr. 484.

17. Com. *v.* Kinter, 1 Wilcox (Pa.) 3.

18. 1 Hale P. C. 94; 2 Hawkins P. C. c. 16, § 16.

19. *Arkansas.*— *In re* Jackson, 45 Ark. 158.

New Jersey.— State *v.* Webster, 10 N. J. L. 293.

New York.— People *v.* Webster, 86 Hun 68, 33 N. Y. Suppl. 337.

Vermont.— *In re* McLaughlin, 58 Vt. 136, 4 Atl. 862, holding that a mittimus was void in reciting that the accused had been convicted of the crime of selling "intoxicants," instead of the statutory phrase "intoxicating liquor," and that he was entitled to be discharged on habeas corpus.

United States.— *Ex p.* Burford, 3 Cranch 448, 2 L. ed. 495.

See 14 Cent. Dig. tit. "Criminal Law," § 564.

In New York the statute requires a brief designation of the offense to be inserted in the certificate of conviction. People *v.* Markell, 22 Misc. (N. Y.) 607, 50 N. Y. Suppl. 766; People *v.* Wood, 66 N. Y. Suppl. 1123; *In re* Gray, 11 Abb. Pr. (N. Y.) 56.

20. 1 Hale P. C. 109. See Escape.

21. People *v.* Webster, 86 Hun (N. Y.) 68, 33 N. Y. Suppl. 337; People *v.* Gray, 11 Abb. Pr. (N. Y.) 56, 4 Park. Cr. (N. Y.) 616; *In re* Hogan, 55 How. Pr. (N. Y.) 458, holding that a mittimus on a conviction for petit larceny need not, in reciting the stealing of the property, use the word "taken," or state who was the owner, or that the owner, being

particular criminal jurisdiction is conferred on an inferior court its decision within its jurisdiction is final, no right to an appeal or writ of error from the decision of a justice is recognized unless provision is made for the same by statute.[22] In most jurisdictions, however, there are statutory provisions allowing review of judgments of a justice of the peace, under certain circumstances, by writ of error or appeal.[23] Where a statute provides for appeal only from a justice of the peace a writ of error will not lie.[24] Although appeals may be allowed from summary convictions by a justice of the peace, it has been held that an appeal will not lie from an order of a justice requiring one to give a bond to keep the peace,[25] or from the dismissal of a complaint asking for such surety.[26]

(II) *REVIEW BY CERTIORARI.* Where no right to an appeal or writ of error is conferred by statute, an erroneous judgment of a justice of the peace may, in some jurisdictions by express statutory provision, be brought into the superior court for review by writ of certiorari.[27] The fact that the statute allows an appeal from a summary conviction before a magistrate does not exclude the remedy by certiorari in proper cases,[28] unless such an intention on the part of the legislature appears.[29]

a company, was incorporated. *Compare* People *v.* Forbes, 4 Park. Cr. (N. Y.) 611.

22. *Illinois.*— Ward *v.* People, 13 Ill. 635.
Iowa.— Part of Lot 294 *v.* State, 1 Iowa 507.
Kansas.— State *v.* Forbriger, 34 Kan. 1, 7 Pac. 631; State *v.* Lofland, 17 Kan. 390.
New Jersey.— Greeley *v.* Passaic, 42 N. J. L. 87.
New York.— *In re* Jones, 1 City Hall Rec. 85.
Ohio.— See Winn *v.* State, 10 Ohio 345.
Oregon.— Corvallis *v.* Stock, 12 Oreg. 391, 7 Pac. 524; La Fayette *v.* Clark, 9 Oreg. 225.
Vermont.— Tyler *v.* State, 63 Vt. 300, 21 Atl. 611.
See 14 Cent. Dig. tit. "Criminal Law," §§ 567, 568.

23. *Indiana.*— Jarrell *v.* Snyder, 7 Blackf. 551.
Kentucky.— Evans *v.* Com., 13 Bush 269.
Louisiana.— State *v.* Isabel, 40 La. Ann. 340, 4 So. 1.
Maine.— State *v.* Tibbetts, 86 Me. 189, 29 Atl. 979.
Massachusetts.— Com. *v.* O'Neil, 6 Gray 343.
Mississippi.— Jones *v.* State, 70 Miss. 398, 12 So. 710.
New Hampshire.— See Leonard *v.* State, 65 N. H. 671, 23 Atl. 621; Philpot *v.* State, 65 N. H. 250, 20 Atl. 955.
North Carolina.— State *v.* Griffis, 117 N. C. 709, 23 S. E. 164; State *v.* Bill, 35 N. C. 373.
Ohio.— State *v.* Langenstroer, 67 Ohio St. 7, 65 N. E. 152.
Oregon.— Hill *v.* State, 23 Oreg. 446, 32 Pac. 160; Sellers *v.* Corvallis, 5 Oreg. 273.
Vermont — Brackett *v.* State, 2 Tyler 152.
See 14 Cent. Dig. tit. "Criminal Law," §§ 567, 568.

Final judgment only.—A statute conferring the right to an appeal from the final judgment of a justice of a peace does not authorize one from an interlocutory judgment of *respondeat ouster*. State *v.* Beecher, 25 Conn. 539.

24. State *v.* Lofland, 17 Kan. 390.

25. State *v.* Gregory, 118 N. C. 1199, 24 S. E. 712; State *v.* Walker, 94 N. C. 857; State *v.* Lyon, 93 N. C. 575. *Contra*, Jones *v.* State, 70 Miss. 398, 12 So. 710.

26. State *v.* Long, 18 Ind. 438.

27. *Alabama.*— Dean *v.* State, 63 Ala. 153.
Georgia.— State *v.* Savannah, T. U. P. Charlt. 235, 4 Am. Dec. 708; *Ex p.* Roe, T. U. P. Charlt. 31.
Maryland.— Judefind *v.* State, 78 Md. 510, 28 Atl. 405, 22 L. R. A. 721.
Minnesota.— Tierney *v.* Dodge, 9 Minn. 166.
New Jersey.— Mowery *v.* Camden, 49 N. J. L. 106, 6 Atl. 438.
New York.— People *v.* Walsh, 33 Hun 345; Clark *v.* Holdridge, 58 Barb. 61, 40 How. Pr. 320; *In re* Twelve Commitments, 19 Abb. Pr. 394; People *v.* New York Gen. Sess., 15 Abb. Pr. 59.
Pennsylvania.— Com. *v.* Johnston, 1 Pa. Co. Ct. 22.
Tennessee.— Kendrick *v.* State, Cooke 474.
Washington.— State *v.* White, 8 Wash. 230, 35 Pac. 1100.
Contra, Winn *v.* State, 10 Ohio 345.
See 14 Cent. Dig. tit. "Criminal Law," § 568.

Extent of review on certiorari see *infra*, X, E, 2, b, (III), (C).

28. Starry *v.* State, 115 Wis. 50, 90 N. W. 1014.

29. **In New York** the statutes abolishing writs of error and certiorari in criminal actions and proceedings and special proceedings of a criminal nature, and making an appeal the only mode of reviewing a judgment or order in such an action or proceeding, and authorizing an appeal from a conviction before a police court, police magistrate, or justice of the peace, render an appeal the only mode of reviewing summary convictions before a justice of the peace or other magistrate, and certiorari will not lie. Code Cr. Proc. §§ 515, 749; People *v.* Murray, 62 Hun

(III) *APPELLATE JURISDICTION.* The courts to which appeals or writs of error may be taken from judgments of justices of the peace are designated by statute, and the statutes vary in the different states.[30] If an appeal is properly perfected by taking the steps required by the statute,[31] the jurisdiction of the justice will cease and the jurisdiction of the appellate court attach.[32] The jurisdiction of the appellate court is not divested by the fact that the recognizance required of the appellant was illegal,[33] or because it subsequently appears that on the trial the justice committed errors which divested his jurisdiction.[34] If the justice's court had no jurisdiction an appeal from its decision gives the appellate court no jurisdiction, except to dismiss the prosecution for want of jurisdiction in the lower court.[35] But where the justice had jurisdiction the fact that the judgment as rendered is void and that the defendant may treat it as a nullity does not prevent him from appealing from it.[36] Whether an allowance of the appeal is indispensable depends on the statute.[37]

(IV) *RIGHT OF ACCUSED AND OF STATE TO REVIEW.* In some jurisdictions the statutes allow the state as well as the accused the right to appeal from the judgment of a justice of the peace.[38] Whether an appeal will lie from a judgment of conviction in a justice's court, where the defendant pleads guilty, depends upon the wording of the particular statute. Under the statutes in some jurisdictions an appeal will lie in such cases,[39] and in others it will not.[40] The refusal of

30, 16 N. Y. Suppl. 325; People *v.* Vitan, 20 Abb. N. Cas. 298.

30. For decisions under the statutes in particular states see the following cases:

Alabama.— Blankenshire *v.* State, 70 Ala. 10.

California.— People *v.* Fowler, 9 Cal. 85.

Colorado.— Huer *v.* Central, 14 Colo. 71, 23 Pac. 323; Knight *v.* People, 11 Colo. 308, 17 Pac. 902; Farley *v.* People, 3 Colo. 65.

Connecticut.— Steele *v.* State, 39 Conn. 276.

Illinois.— Neatherly *v.* People, 24 Ill. App. 273.

Indiana.— Baptiste *v.* State, 5 Blackf. 283.

Kansas.— State *v.* Harpster, 15 Kan. 322.

Kentucky.— Com. *v.* Ingraham, 7 Bush 106.

New York.— People *v.* Glaze, 65 Hun 560, 20 N. Y. Suppl. 577.

Pennsylvania.— Evans *v.* Com., 5 Pa. Co. Ct. 362; Com. *v.* Rosenthal, 3 Pa. Co. Ct. 26.

Rhode Island.— State *v.* Crogan, 6 R. I. 40.

See 14 Cent. Dig. tit. "Criminal Law," § 569.

31. Holton *v.* Stanley, 6 Kan. 103, 49 Pac. 679; State *v.* Langenstroer, 67 Ohio St. 7, 65 N. E. 152; State *v.* Zingsem, 7 Oreg. 137.

32. Hamersley *v.* Blair, 48 Conn. 58.

The filing of an amended record in the appellate court, necessary to give it jurisdiction, operates retrospectively to confer jurisdiction from the beginning and validates every step properly taken. Com. *v.* Quirk, 155 Mass. 296, 29 N. E. 514.

33. Com. *v.* Campion, 105 Mass. 184; Com. *v.* Leighton, 7 Allen (Mass.) 528.

34. State *v.* Boncher, 59 Wis. 477, 18 N. W. 335.

35. *Kentucky.*— Klyman *v.* Com., 97 Ky. 484, 30 S. W. 985, 17 Ky. L. Rep. 237.

Nebraska.— Keeshan *v.* State, 46 Nebr. 155, 64 N. W. 695.

New Mexico.— Territory *v.* Valencia, 2 N. M. 108.

New York.— Powers *v.* People, 4 Johns. 292.

Wisconsin.— Klaise *v.* State, 27 Wis. 462.

See 14 Cent. Dig. tit. "Criminal Law," §§ 570, 571.

36. State *v.* Gowing, 27 Mo. App. 389; State *v.* Haas, 52 Wis. 407, 9 N. W. 9.

37. In Pennsylvania, in all cases of summary conviction before a court not of record, an appeal can be taken (Wilkes-barre *v.* Stewart, 10 Kulp 28; Com. *v.* Davison, 9 Kulp 491; Mahanoy City *v.* Bissell, 9 Pa. Co. Ct. 469; Com. *v.* Johnston, 1 Pa. Co. Ct. 22) or a writ of certiorari issue (Scully *v.* Com., 35 Pa. St. 511; Com. *v.* Mattern, 24 Pa. Co. Ct. 655; Com. *v.* Morey, 10 Phila. 460) only on an allowance by the appellate court.

38. State *v.* Tait, 22 Iowa 140.

Constitutionality of statute.— In jurisdictions where, on an appeal from a justice's judgment, a trial *de novo* is had, the allowance of an appeal to the state after a judgment of acquittal would be in contravention of the constitutional provisions against twice putting in jeopardy for the same offense. State *v.* Powell, 86 N. C. 640, holding that a statute allowing "the party against whom judgment is given" in such cases to appeal does not apply to the state, and is solely for the benefit of the accused, although the judgment may be reviewed in so far as it is personal to and taxes with the payment of costs the injured party by whom the proceeding was instituted.

39. Niblett *v.* State, 25 Miss. 105, 21 So. 799; State *v.* Little, 42 Vt. 430. See also Republic *v.* Ah Chen, 10 Hawaii 469.

In Iowa the state may appeal from a judgment entered on a plea of guilty. State *v.* Tait, 22 Iowa 140.

40. Holsclaw *v.* State, 114 Ind. 506, 17 N. E. 112 (holding that where a judgment is rendered upon a plea of guilty, there is no trial within the meaning of the statute al-

one co-defendant to join in an appeal does not deprive the other of his right to appeal.[41]

(v) *Proceedings For Review on Appeal or Writ of Error.* The procedure with respect to notice, hearing, etc., on appeal or writ of error from a justice of the peace or other inferior court, is regulated by statutory provisions.[42] Usually written notice must be served by the appellant on the prosecuting attorney,[43] but sometimes notice of appeal must be given orally in open court and entered on the docket of the justice.[44]

(vi) *Time of Taking Appeal.* The time within which an appeal or writ of error from a summary conviction must be taken is fixed by statutory provisions, which must be strictly observed.[45] The period ranges from immediately or within twenty-four hours to ten days and upward.[46]

(vii) *Bond or Undertaking.* Whether an undertaking or appeal-bond is necessary depends upon the statute.[47] Slight irregularities, defects, or omissions in a bond or recognizance required by statute may be disregarded,[48] and the court must allow an amendment if application be made therefor within a reasonable time.[49] Where a bond for costs is required in criminal appeals from justices of the peace, an appeal cannot be prosecuted *in forma pauperis*, unless permitted by the statute.[50] An appeal from a judgment of a justice, if claimed within the time limited, must be allowed whether bail for appearance is procured as provided by the statute or not. If it is not procured the appellant simply remains in custody.[51]

lowing the defendant to appeal within ten days "after trial"); Orear *v.* State, 22 Ind. App. 553, 53 N. E. 249; State *v.* Haller, 23 Mo. App. 460 (holding that where defendant pleads guilty he is not convicted within the meaning of the statute allowing an appeal where any person is "convicted" before a justice of the peace).

41. People *v.* Wayne Cir. Judge, 36 Mich. 331.

42. See Cox *v.* State, 9 Mo. 181; State *v.* Gerry, 68 N. H. 495, 38 Atl. 272, 38 L. R. A. 228; State *v.* Zingsem, 7 Oreg. 137; Com. *v.* Johnston, 1 Pa. Co. Ct. 22.

43. State *v.* Jones, 55 Minn. 329, 56 N. W. 1068.

44. McDougall *v.* State, 32 Tex. Cr. 174, 22 S. W. 593; Parker *v.* State, (Tex. Cr. 1893) 21 S. W. 370.

45. State *v.* Quinn, 96 Me. 496, 52 Atl. 1009.

46. For decisions under the statutes in particular states see the following cases:

Iowa.— Part of Lot 294 *v.* State, 1 Iowa 507.

Kansas.— State *v.* Leigh, 45 Kan. 523, 26 Pac. 59.

Massachusetts.—Weiner *v.* Wentworth, 181 Mass. 15, 62 N. E. 992.

Missouri.—State *v.* Clevenger, 20 Mo. App. 626; State *v.* Herman, 20 Mo. App. 548; *Ex p.* Thamm, 10 Mo. App. 595.

Nebraska.— *In re* Newton, 39 Nebr. 757, 58 N. W. 436.

Ohio.— State *v.* Langenstroer, 67 Ohio St. 7, 65 N. E. 152.

Pennsylvania.— Fairchild *v.* Best, 6 Pa. Dist. 478; Com. *v.* Rosenthal, 3 Pa. Co. Ct. 669.

Virginia.— Combs *v.* Com., 95 Va. 88, 27 S. E. 817.

Wisconsin.— Ridgley *v.* State, 7 Wis. 661. See 14 Cent. Dig. tit. "Criminal Law," § 576.

Extension of time.— The time to appeal cannot be extended by the appellate court. State *v.* Kunbert, 14 Ind. 374.

Where no time is specified by statute for filing certified copies of the record it is sufficient if they are filed at any time before the argument. Com. *v.* McPherson, 147 Mass. 578, 18 N. E. 417.

47. State *v.* Delano, 37 Ind. 249; Rhodes *v.* Com., 7 Ky. L. Rep. 515; State *v.* White, 41 N. H. 194; Sires *v.* State, 73 Wis. 251, 41 N. W. 81; Schieve *v.* State, 17 Wis. 253.

48. State *v.* Richards, 77 Ind. 101; Ott *v.* State, 35 Ind. 365 (condition to "pay such judgment as may be rendered," where imprisonment is part of the punishment provided); McGill *v.* State, 36 Tex. Cr. 108, 35 S. W. 656 (amount); Eichman *v.* State, 22 Tex. App. 137, 2 S. W. 538; Taylor *v.* State, 16 Tex. App. 514 (failure of justice to indorse approval); Sires *v.* State, 73 Wis. 251, 41 N. W. 81 (bond according to form in civil cases); Schieve *v.* State, 17 Wis. 253.

Time of execution.—In the absence of statutory provision to the contrary the appeal-bond may be executed at any time after conviction. Smith *v.* Boykin, 61 Miss. 110.

Statement of offense.—A bond given on appeal from a justice of the peace in a criminal case need not state the offense of which the appellant was convicted, unless this is required by statute. Miller *v.* State, 21 Tex. App. 275, 17 S. W. 429.

49. Weist *v.* People, 39 Ill. 507; Fairchild *v.* Best, 6 Pa. Dist. 478.

50. Parks *v.* State, 37 Ark. 97.

51. *In re* Kennedy, 55 Vt. 1.

(VIII) *TRANSCRIPT OF RECORD.* On appeal from a conviction before a justice of the peace or police court, an authenticated transcript of the record must be transmitted to the appellate court.[52] If the statute does not prescribe the time within which the record shall be transmitted it may be transmitted at any time before the new trial,[53] and the failure of the justice to transmit the record within the statutory period does not deprive the accused of his appeal.[54] The justice in the case of an appeal from a summary proceeding must certify the transcript of the record to be a true copy,[55] and the record must show a sufficient complaint and other facts necessary to sustain the conviction,[56] and the taking of the steps necessary to perfect the appeal.[57] He ought to certify the original complaint,[58] and the transcript must be properly attested by the clerk or justice.[59] The certification may be at the end of the record.[60] Copies of the record of a municipal court on appeal need not be certified under the seal of the court, unless it is required by statute.[61] Errors or omissions in the record certified to the appellate court may be cured by the justice by filing an amended copy.[62] The appellant may move for a rule [63] and may be granted a writ of certiorari to procure a fuller and more correct transcript.[64]

(IX) *EFFECT OF APPEAL.* In many states it is provided by statute that where an appeal is taken from a judgment of conviction rendered by a justice the cause

52. See *Ex p.* Perrin, 41 Ark. 194.

Transmission by the clerk see Com. *v.* Bray, 117 Mass. 150, holding an order of the inferior court authorizing the transmission of the record unnecessary.

53. Com. *v.* Wiggins, 111 Mass. 428.

54. State *v.* Cressinger, 88 Ind. 499.

55. State *v.* Anderson, 17 Kan. 89; Com. *v.* Munn, 156 Mass. 51, 30 N. E. 86; Com. *v.* Doran, 14 Gray (Mass.) 37; Com. *v.* Sheehan, 12 Gray (Mass.) 28.

Certification by special justice.— Com. *v.* McCarty, 14 Gray (Mass.) 18.

56. Cummings' Case, 3 Me. 51, holding that a conviction of larceny could not be sustained where the complaint charged the stealing of "the goods in the schedule hereunto annexed," and no schedule was sent up with the record. See also as to the sufficiency of the record in this respect Com. *v.* Keenan, 140 Mass. 481, 5 N. E. 477 (complaint and judgment); Com. *v.* Ballou, 112 Mass. 279 (copy of warrant); Powers *v.* People, 4 Johns. (N. Y.) 292 (showing that the justice had jurisdiction).

57. Ball *v.* State, 31 Tex. Cr. 214, 20 S. W. 363, failure to show that notice of appeal was given and entered on the justice's docket. See also as to the sufficiency of the record in this respect Com. *v.* Bisch, 145 Mass. 375, 14 N. E. 156 (showing as to recognizance); Com. *v.* Sullivan, 11 Gray (Mass.) 203; People *v.* McCann, 6 N. Y. St. 541 (specification of errors in the affidavit for the appeal).

Record on return to writ of certiorari see People *v.* Etter, 72 Mich. 175, 40 N. W. 241; Mullins *v.* People, 24 N. Y. 399, 23 How. Pr. (N. Y.) 289; People *v.* New York City, 2 Hill (N. Y.) 9; Com. *v.* Morey, 10 Phila. (Pa.) 460; Gelbert *v.* Com., 3 Lack. Jur. (Pa.) 374.

58. State *v.* Anderson, 17 Kan. 89. It is not necessary that any certificate should appear upon the complaint. It is sufficient if it appears from the record that the complaint is the original. Topeka *v.* Raynor, 8 Kan. App. 279, 55 Pac. 509.

59. Com. *v.* Hogan, 11 Gray (Mass.) 313; Com. *v.* Burns, 8 Gray (Mass.) 482; St. Louis *v.* Bird, 31 Mo. 88. Attestation of a copy of the record by a justice of the peace as "justice," without adding the words "of the peace," is sufficient. Com. *v.* Downing, 4 Gray (Mass.) 29. The same is true of an attestation as "justice" instead of "trial justice." Com. *v.* McParland, 145 Mass. 378, 14 N. E. 164. As to the sufficiency of the attestation by the clerk of a police court see Com. *v.* Dow, 11 Gray (Mass.) 316.

Attestation by "B., clerk pro tem.," is sufficient without stating the cause of the appointment of a clerk *pro tempore*. Com. *v.* Connell, 9 Allen (Mass.) 488.

Time of attestation see Com. *v.* Douglass, 3 Ky. L. Rep. 685.

60. Com. *v.* Wait, 131 Mass. 417; Com. *v.* Ford, 14 Gray (Mass.) 399.

61. Com. *v.* Barry, 115 Mass. 146; Com. *v.* Bellows, 115 Mass. 139; Com. *v.* Cavey, 97 Mass. 541.

62. Cline *v.* State, 25 Ind. App. 331, 58 N. E. 210; State *v.* Libby, 85 Me. 169, 26 Atl. 1015; State *v.* Maher, 35 Me. 225; Com. *v.* Vincent, 165 Mass. 18, 42 N. E. 332; Com. *v.* Quirk, 155 Mass. 296, 29 N. E. 514; Com. *v.* Sullivan, 138 Mass. 191; Com. *v.* Magoun, 14 Gray (Mass.) 398; *Ex p.* Howard, 26 Vt. 205. But a justice cannot legalize his illegal acts in a summary proceeding by inserting matter in his docket after he has lost jurisdiction by an appeal, and then file an amended transcript. Stanberry *v.* Proctor, 48 Mo. App. 56.

63. St. Louis *v.* Bird, 31 Mo. 88.

64. Ball *v.* State, 31 Tex. Cr. 214, 20 S. W. 363; Vogt *v.* State, 21 Tex. App. 331, 17 S. W. 624; Bracket *v.* State, 2 Tyler (Vt.) 152.

shall be tried *de novo* in the superior court. Under such circumstances the jurisdiction is not properly speaking appellate, and the superior court has no power to review, or to affirm or reverse the magistrate's conviction, but the cause stands in the higher court as though it had been there instituted and must there be tried on the law and the evidence, irrespective of what the magistrate decided.[65] In some states, however, on such an appeal the accused is not entitled as of right to a trial *de novo*.[66] An appeal from a judgment of conviction before a justice of the peace supersedes, but does not vacate, the judgment, and if the appeal is dismissed for want of prosecution that fact should be certified to the justice and he should then enforce his judgment.[67]

b. Review, Determination, and Disposition of Cause — (I) *Assignments of Error, Reasons of Appeal, and Bill of Exceptions.* On appeal from a justice of the peace, where the case is to be reviewed and not tried *de novo*,[68] the statutes sometimes require assignments of errors in the appeal affidavit or otherwise, so that errors not assigned cannot be considered.[69] In some states the reasons of appeal are required to be filed.[70] Assignments of error or reasons of appeal must be filed within the time prescribed by statute.[71] Where the case is to be tried *de novo* on appeal from a justice of the peace or police court, a bill of exceptions or statement of the rulings in the justice's or police court is not necessary.[72]

(II) *Who May Except to Rulings.* The state cannot, on an appeal by the accused from a conviction, except to the rulings which may cause his acquittal.[73]

(III) *Extent of Review and Waiver of Objections* — (A) *On Appeal For Trial De Novo.* On appeal from a summary conviction by a justice of the peace or other inferior court, where there is to be a trial *de novo*, the appeal constitutes a waiver of or renders immaterial irregularities and informalities in the proceedings before the justice not affecting his jurisdiction.[74] Objection cannot

65. *Alabama.*— Johnson *v.* State, 105 Ala. 113, 17 So. 99; Williams *v.* State, 88 Ala. 80, 7 So. 101; Tomlin *v.* State, 19 Ala. 9.

Arkansas.— Thomas *v.* State, 41 Ark. 408.

Colorado.— Morris *v.* People, 5 Colo. App. 138, 38 Pac. 78.

Connecticut.— State *v.* Harding, 39 Conn. 561.

Illinois.— Shirtliff *v.* People, 3 Ill. 7.

Iowa.— State *v.* Valure, 95 Iowa 401, 64 N. W. 280; State *v.* McCombs, 13 Iowa 426.

Kansas.— State *v.* Coulter, 40 Kan. 87, 19 Pac. 368; State *v.* Young, 6 Kan. 37.

Minnesota.— State *v.* Bliss, 21 Minn. 458; State *v.* Tiner, 13 Minn. 520.

Missouri.— State *v.* Geiger, 45 Mo. App. 111.

New Jersey.— McLorinan *v.* Ryno, 49 N. J. L. 603, 10 Atl. 189.

New Mexico.— Territory *v.* Lowitski, 6 N. M. 235, 27 Pac. 496.

North Carolina.— State *v.* Koonce, 108 N. C. 752, 12 S. E. 1032.

Texas.— Higgins *v.* State, 34 Tex. 137; *Ex p.* McNamara, 33 Tex. Cr. 363, 26 S. W. 506.

Virginia.— Read *v.* Com., 24 Gratt. 618.

See 14 Cent. Dig. tit. "Criminal Law," § 584. And see *infra*, X, E, 2, b, (III), (A).

Affirmance on default.—In such a case there can be no affirmance on a default. Thomas *v.* State, 41 Ark. 408; Morris *v.* People, 5 Colo. App. 138, 38 Pac. 78.

Trial de novo see *infra*, X, E, 2, c.

66. *Ex p.* Peacock, 25 Fla. 478, 6 So. 473; Ellis *v.* State, 3 Iowa 217; Baurose *v.* State, 1 Iowa 374; State *v.* White, 41 N. H. 194; State *v.* Brown, 14 S. C. 380.

See 14 Cent. Dig. tit. "Criminal Law," § 584.

67. *Ex p.* Caldwell, 62 Miss. 774.

68. Trial de novo see *infra*, X, E, 2, c.

69. State *v.* Nichols, 5 Iowa 413; People *v.* McGann, 43 Hun (N. Y.) 55; People *v.* Beatty, 39 Hun (N. Y.) 476; People *v.* Hildebrandt, 16 Misc. (N. Y.) 195, 38 N. Y. Suppl. 958. And see People *v.* McCann, 6 N. Y. St. 541; Germantown *v.* Basore, 22 Ohio Cir. Ct. 417, 12 Ohio Cir. Dec. 500; Com. *v.* Evans, 29 Leg. Int. (Pa.) 133.

70. Denneny *v.* Webster, 16 R. I. 6, 11 Atl. 295.

71. Denneny *v.* Webster, 16 R. I. 6, 11 Atl. 295.

72. People *v.* Maguire, 26 Cal. 635.

73. Com. *v.* Forrest, 3 Pa. Dist. 797.

74. *Alabama.*— Aderhold *v.* Anniston, 99 Ala. 521, 12 So. 472 (objection that the prosecution was commenced without affidavit or warrant); Miles *v.* State, 94 Ala. 106, 11 So. 403; Blankenshire *v.* State, 70 Ala. 10.

Arkansas.— Martin *v.* State, 46 Ark. 38; Marre *v.* State, 36 Ark. 222, want of affidavit containing charges against accused.

Illinois.— Byars *v.* Mt. Vernon, 77 Ill. 467; Jacksonville *v.* Block, 36 Ill. 507.

Iowa.— State *v.* McCombs, 13 Iowa 426, failure to read information to accused or to

be raised for the first time in the appellate court to the justice's jurisdiction over the person accused,[75] or to mere formal defects in the complaint or affidavit charging the offense.[76] But the accused may object that the justice had no jurisdiction of the offense, for if the justice had no jurisdiction the appellate court has none,[77] and even though he pleaded guilty[78] he may object that the complaint, affidavit, or warrant charges no offense.[79]

(B) *On Appeal For Review.* Where the appeal from the judgment of a justice of the peace or other magistrate is for the purpose of review and not for trial *de novo*, the proceedings are reviewed, and prejudicial errors or irregularities, if not waived, will be ground for reversal or modification of the judgment. The judgment will be reversed if the magistrate or court had no jurisdiction,[80]

enter plea of not guilty on the record. And see State *v.* Valure, 95 Iowa 401, 64 N. W. 280, holding that under Code, § 4702, providing that where an appeal is taken from a justice's court in a criminal case the cause shall be tried anew in the district court without regard to technical errors, and section 4703, declaring that no appeal from a justice's court shall be dismissed, the failure of a justice to make proper and timely entries and to order a second trial until nine days after the first jury was discharged does not affect the rights of the parties after an appeal to the district court has been taken.

Kansas.— State *v.* McManus, 4 Kan. App. 247, 45 Pac. 130, defect in form of verdict or sentence.

Massachusetts.— Com. *v.* Gavin, 148 Mass. 449, 18 N. E. 675, 19 N. E. 554; Com. *v.* Whalen, 147 Mass. 376, 17 N. E. 881; Com. *v.* Huard, 121 Mass. 56; Com. *v.* Burke, 121 Mass. 39; Com. *v.* Fredericks, 119 Mass. 199; Com. *v.* Harvey, 111 Mass. 420; Com. *v.* McCormack, 7 Allen 532; Com. *v.* Tinkham, 14 Gray 12.

Michigan.— People *v.* Schottey, 66 Mich. 708, 33 N. W. 810, complaint sworn to by person having no knowledge of facts.

Minnesota.— State *v.* Tiner, 13 Minn. 520.

Rhode Island.— State *v.* McCarty, 4 R. I. 82.

See 14 Cent. Dig. tit. "Criminal Law," § 585 *et seq.* And see *supra*, X, E, 2, a, (IX).

Error in the sentence of the justice is no ground for dismissal of the complaint in the appellate court where there is to be a trial *de novo*. Com. *v.* Tinkham, 14 Gray (Mass.) 12.

75. *Alabama.*— Aderhold *v.* Anniston, 99 Ala. 521, 12 So. 472 (arrest without affidavit or warrant); Blankenshire *v.* State, 70 Ala. 10.

Arkansas.— Martin *v.* State, 46 Ark. 38.

Illinois.— Byars *v.* Mt. Vernon, 77 Ill. 467; Scott *v.* People, 59 Ill. App. 112, service of civil summons instead of criminal warrant in prosecution for allowing animals to run at large.

Kansas.— State *v.* McManus, 4 Kan. App. 247, 45 Pac. 130, objection that the warrant of arrest was issued on a complaint not properly verified.

Massachusetts.—Com. *v.* Harvey, 111 Mass. 420 (objection to service of warrant); Com. *v.* Henry, 7 Cush. 512 (objection to form and sufficiency of warrant).

Rhode Island.— State *v.* Goyette, 11 R. I. 592; State *v.* McCarty, 4 R. I. 82.

See 14 Cent. Dig. tit. "Criminal Law," § 587 *et seq.*

76. Byars *v.* Mt. Vernon, 77 Ill. 467; State *v.* McManus, 4 Kan. App. 247, 45 Pac. 130 (complaint sworn to on information and belief only); Com. *v.* Keefe, 143 Mass. 467, 9 N. E. 840; Com. *v.* Peto, 136 Mass. 155; Com. *v.* Lewis, 123 Mass. 251; Com. *v.* McCue, 121 Mass. 358; Com. *v.* Doherty, 116 Mass. 13; Com. *v.* Harvey, 111 Mass. 420; Com. *v.* Emmons, 98 Mass. 6; Com. *v.* Norton, 13 Allen (Mass.) 550; Com. *v.* Jackson, Thach. Cr. Cas. (Mass.) 277, joint complaint against defendants charged severally with distinct offenses. *Compare*, however, Rocher *v.* Society, etc., 47 N. J. L. 237.

77. Klyman *v.* Com., 97 Ky. 484, 30 S. W. 985, 17 Ky. L. Rep. 237; Keeshan *v.* State, 46 Nebr. 155, 64 N. W. 695; Powers *v.* People, 4 Johns. (N. Y.) 292; Klaise *v.* State, 27 Wis. 462. See also People *v.* Du Rell, 1 Ida. 44. And see *supra*, X, E, 2, a, (III).

Irregularities.— But objection because of mere irregularities cannot be raised for the first time on the appeal. Martin *v.* State, 46 Ark. 38, objection to jurisdiction of magistrate on the ground that a change of venue was not supported by affidavit.

78. State *v.* Howie, 130 N. C. 677, 41 S. E. 291.

79. *Alabama.*— Miles *v.* State, 94 Ala. 106, 11 So. 403.

Indiana.— Goshen *v.* Crary, 58 Ind. 268.

Massachusetts.— Com. *v.* Washburn, 128 Mass. 421.

Michigan.—People *v.* Belcher, 58 Mich. 325, 25 N. W. 303.

North Carolina.— State *v.* Howie, 130 N. C. 677, 41 S. E. 291.

Wisconsin.— Steuer *v.* State, 59 Wis. 472, 18 N. W. 433.

80. See People *v.* Du Rell, 1 Ida. 44.

Decision of justice as to jurisdiction not conclusive.— Under a statute (S. C. Gen. St. § 824) providing that trial justices may punish all assaults "when the offence is not of a high and aggravated nature, requiring in their judgment greater punishment" than they are allowed to impose, the determination of the trial justice that a certain case is or is not within his jurisdiction is not binding on appeal to the circuit court. State *v.* Burch, 43 S. C. 3, 20 S. E. 758.

or if the complaint or warrant on which the accused was tried is insufficient.[81] Ordinarily the appellate court cannot review the evidence before the magistrate and reverse on the ground of its insufficiency,[82] or reverse for rulings on questions within the discretion of the magistrate;[83] and the discretion of the justice in assessing the punishment on a plea of guilty is not reviewable.[84] When the statute authorizes the appellate court to review the evidence, the conclusions of the magistrate will be sustained if the evidence was such that it could be left to a jury on a trial in court.[85]

(c) *On Writ of Certiorari or Review.* A writ of certiorari to review a summary conviction by a magistrate[86] brings up for review all jurisdictional errors apparent on the face of the record.[87] Some courts have held that it brings up jurisdictional errors only.[88] Others hold that the magistrate must insert in the record and include in his return to the writ of certiorari the evidence on which the accused was convicted, and that, although the court will not review the weight or sufficiency of the evidence, the conviction will be quashed if the record does not show that there was any evidence to sustain it.[89] Where the accused may either appeal from a summary conviction before a justice or remove the conviction by a writ of certiorari, and he elects the latter remedy, he will be concluded by the return of the justice and cannot show error not appearing therein.[90] In some jurisdictions statutes provide for a writ called a writ of review to take the place of the writ of certiorari, for the purpose of reviewing summary convictions before a justice of the peace. The extent of the review under these statutes depends upon their terms. In Oregon it is substantially the same as on certiorari.[91]

81. Roeber *v.* Society, etc., 47 N. J. L. 237 (where it was held that the objection that the complaint did not conform to the statute could be raised for the first time on the appeal); State *v.* Howie, 130 N. C. 677, 41 S. E. 291 (where the warrant charged no offense and defendant pleaded guilty). See also People *v.* Beatty, 39 Hun (N. Y.) 476.

82. State *v.* McGinnis, 30 Minn. 48, 14 N. W. 256 [*distinguishing* State *v.* Mahoney, 23 Minn. 181]; Vanderwerker *v.* People, 5 Wend. (N. Y.) 530; Williams *v.* State, 25 Ohio St. 628. See Com. *v.* Hardy, 1 Ashm. (Pa.) 410.

83. State *v.* Haller, 23 Mo. App. 460; People *v.* Carnrick, 15 N. Y. Suppl. 437, refusal of adjournment.

Appeal from judgment taxing costs against prosecutor.— In Iowa on appeal from the judgment of a justice taxing the costs of a prosecution against the prosecutor on acquittal of the accused, on the ground that the prosecution was malicious, the district court may determine whether the justice abused his discretion, and it has power to correct the justice's transcript and statement of evidence, but additional or new evidence cannot be introduced. State *v.* Kerns, 64 Iowa 306, 20 N. W. 448. But to authorize the district court to interfere with the judgment it must be affirmatively shown that the justice abused his discretion. Palo Alto *v.* Moncrief, 58 Iowa 131, 12 N. W. 142. *Compare* State *v.* Roney, 37 Iowa 30. See also *infra*, note 88.

84. State *v.* Haller, 23 Mo. App. 460.

85. Com. *v.* Hardy, 1 Ashm. (Pa.) 410.

86. When writ of certiorari will lie see *supra*, X, E, 2, a, (II).

87. Powers *v.* People, 4 Johns. (N. Y.) 292; Starry *v.* State, 115 Wis. 50, 90 N. W. 1014, holding that if a justice of the peace renders a judgment which he has no authority to render under any circumstances, he thereby commits a jurisdictional error, remediable by certiorari. See also Plainfield *v.* Marcellus, 68 N. J. L. 201, 52 Atl. 233. A conviction will be quashed if the record of the magistrate does not show that any trial was had or judgment entered. Bolivar *v.* Coulter, 10 Pa. Dist. 171.

Fatal defect in complaint.—Gelbert *v.* Com., 3 Lack. Jur. (Pa.) 374, holding also that the transcript of the magistrate cannot on certiorari supply a fatal omission in the complaint.

88. Starry *v.* State, 115 Wis. 50, 90 N. W. 1014. See also Com. *v.* Gipner, 118 Pa. St. 379, 12 Atl. 306. And see CERTIORARI.

Judgment taxing prosecutor with costs.— In State *v.* Green, 2 Head (Tenn.) 356, it was held that the discretionary power of a magistrate, under a statute, to tax the prosecutor with costs could be reviewed on certiorari. See also *supra*, note 83.

89. Mullins *v.* People, 24 N. Y. 399, 23 How. Pr. (N. Y.) 289 [*citing* Rex *v.* Chandler, 14 East 267; Rex *v.* Crisp, 7 East 389, 3 Smith K. B. 377; Rex *v.* Lloyd, 2 Str. 996; Rex *v.* Theed, 2 Str. 919; Rex *v.* Smith, 8 T. R. 588; Rex *v.* Clarke, 8 T. R. 220]; Reg. *v.* Coulson, 27 Ont. 59. But see Vanderwerker *v.* People, 5 Wend. (N. Y.) 530; Tyler *v.* State, 28 Oreg. 238, 42 Pac. 518.

90. People *v.* Etter, 72 Mich. 175, 40 N. W. 241; People *v.* Hobson, 48 Mich. 27, 11 N. W. 771.

91. See Tyler *v.* State, 28 Oreg. 238, 42 Pac. 518, holding that a writ of review under the

(IV) *CONCLUSIVENESS AND EFFECT OF RECORD.* The recitals and entries in the record of the justice of the facts and details of the proceedings before him are *prima facie* true and correct, and the burden of proof to show their falsity is upon the party seeking to contradict them.[92] On some questions the record of the justice is conclusive.[93] The statements of the affidavit for an appeal from a magistrate must be taken as true, unless the state controverts them and establishes their falsity.[94] The transcript of a magistrate cannot supply a fatal omission in the complaint.[95]

(V) *DETERMINATION AND DISPOSITION OF APPEAL.* The disposition which the appellate court must make of the case on appeal from a magistrate depends of course on the statutes in the particular jurisdiction. In some jurisdictions there must be a trial *de novo*, and the court has no power to affirm or reverse the judgment of the magistrate,[96] while in others the conviction is reviewed and affirmed, reversed, or modified.[97] In some jurisdictions, whether the appeal from a magistrate is solely upon questions of law, or upon questions of fact, or both, the appellate court may render such judgment as according to the law of the case ought to be entered, and if the judgment of the justice is in part valid and in part erroneous, he may reject what is erroneous and affirm as to the remainder.[98] Where the defendant fails to appear in the appellate court and prosecute his appeal, it should in some jurisdictions be dismissed, and a writ of procedendo issued to the justice,[99] while in other jurisdictions the judgment should be affirmed.[1] An appeal will be dismissed, although allowed by the justice, where the accused has failed to give the security required by statute.[2]

(VI) *RECOMMITMENT, REMAND, OR PROCEDENDO.* Where a conviction is

Oregon statute (1 Hill Anno. Laws (1892), § 582 *et seq.*) brings up only the record, and that, since the record of a justice's court under the Oregon statutes consists only of the docket and all papers and process filed in such court, the justice is not required to reduce to writing or return with the writ the testimony given on a criminal trial.

92. *Iowa.*— Beekman *v.* State, 4 Iowa 452; Garrettson *v.* State, 4 Iowa 338; Gribble *v.* State, 3 Iowa 217.

Massachusetts.— Com. *v.* Calhane, 110 Mass. 498; Com. *v.* Hassenger, 105 Mass. 385.

Minnesota.— State *v.* Christensen, 21 Minn. 500.

New York.— Day *v.* Wilber, Col. & C. Cas. 381.

Pennsylvania.— Com. *v.* Phelps, 3 Lack. Jur. 409.

See 14 Cent. Dig. tit. "Criminal Law," § 590.

93. Com. *v.* Hassinger, 105 Mass. 385, statement that complaint was received and sworn to.

94. Beekman *v.* State, 4 Iowa 452; Garrettson *v.* State, 4 Iowa 338.

95. Gelbert *v.* Com., 3 Lack. Jur. (Pa.) 374.

96. State *v.* Young, 6 Kan. 37; Territory *v.* Lowitski, 9 N. M. 235, 27 Pac. 496. See *supra*, X, E, 2, a, (IX); *infra*, X, E, 2, c.

Passing sentence on plea of guilty.—Where a defendant pleads guilty to a complaint in a municipal court and appeals to the superior court, if the plea is not withdrawn by leave of court, and no motion is interposed in arrest of judgment for legal defects apparent on the record, there is nothing for the superior court to do but to pass sentence. Com. *v.* Mahoney, 115 Mass. 151.

97. See State *v.* Bliss, 21 Minn. 458; Roeber *v.* Society, etc., 47 N. J. L. 237.

98. State *v.* Bliss, 21 Minn. 458. See also Com. *v.* Hazen, 20 Pa. Super. Ct. 487.

99. Henning *v.* Greenville, 69 Miss. 214, 12 So. 559; Henderson *v.* State, (Miss. 1891) 8 So. 649; Thomas *v.* State, 68 Miss. 91, 8 So. 647; Bush *v.* State, (Miss. 1889) 6 So. 647; *Ex p.* Caldwell, 62 Miss. 774.

Setting aside default and trial de novo.— In Massachusetts, on appeal to the superior court from a summary conviction, where the record is so defective as not to confer jurisdiction on the appellate court, and defendant fails to appear and is defaulted, and an amended record is filed curing the defects, it is within the discretion of the superior court to strike off the default and try the defendant. Com. *v.* Quirk, 155 Mass. 296, 29 N. E. 514.

1. State *v.* Thevenin, 19 Mo. 237. But a person who appeals from a conviction before a justice and enters into a recognizance required by statute need not appear in person in the appellate court, and to affirm the judgment on his failure to do so is error. State *v.* Buhs, 18 Mo. 318.

A petition to affirm a justice's judgment, where the accused has appealed and neglected to enter his appeal, is in the nature of a motion and need not be made personally by the state's attorney, to whose duty it most properly pertains, and if his acquiescence is necessary it will be presumed. State *v.* Wooley, 44 Vt. 363.

2. State *v.* White, 41 N. H. 194. See *supra*, X, E, 2, a, (VII).

affirmed on appeal or certiorari,[3] or where an appeal is dismissed because the appellant fails to prosecute it,[4] the cause is returned to the justice for execution of the judgment.[5] If the appellant has been released pending the appeal he ought to be recommitted when the appeal is dismissed or the judgment affirmed.[6] The commitment need only recite the judgment, the appeal, and the dismissal or affirmance.[7]

c. Trial De Novo — (I) *Mode of Trial.* In some jurisdictions, as has been shown, the statutes provide that on appeal from a justice of the peace or from a police court the case shall be tried *de novo*, and the case is to be tried without regard to the decision of the magistrate and as if originally commenced in the appellate court.[8] Generally the only objections to the proceedings before the magistrate that are to be considered are such as relate to his jurisdiction and to the perfection of the appeal.[9] The statutes sometimes provide for a trial by the court,[10] and sometimes for a trial by jury, or for either at the election of the accused.[11]

(II) *Arraignment and Plea.* Where the accused has been arraigned and pleaded not guilty before a justice of the peace, it is not necessary that he should be arraigned and plead upon his trial *de novo* on appeal,[12] but where the defendant was not arraigned before the justice, he should be arraigned in the circuit court, and after entry of plea he should be tried *de novo*, as if he had been arraigned before the justice.[13]

(III) *Complaint or Other Accusation* — (A) *Original Complaint or Affidavit.* As a general rule a new complaint or information need not be filed on an appeal from a conviction before a magistrate, where the statute provides that the accused shall be tried *de novo* in the appellate court, but the original complaint or affidavit used before the justice may be used.[14] The accused need not be

3. Duffy *v.* Britton, 47 N. J. L. 251.

4. *Ex p.* Caldwell, 62 Miss. 774. And see *supra*, note 99.

5. **Remand where there was an erroneous change of venue.**— On appeal from a conviction before a justice of the peace in a case of which he had no jurisdiction because of an erroneous change of venue, the appellate court may remand the case to the original justice, to be removed by him to some justice having jurisdiction, unless the application for removal shall be withdrawn. State *v.* Ivie, 118 N. C. 1227, 24 S. E. 539.

6. *Ex p.* Whitty, 65 Cal. 168, 3 Pac. 660; *Ex p.* Jones, 41 Cal. 209.

7. *Ex p.* Jones, 41 Cal. 209.

8. Williams *v.* State, 88 Ala. 80, 7 So. 101; State *v.* Young, 6 Kan. 37; State *v.* Tiner, 13 Minn. 520. See *supra*, IX, E, 2, a, (IX).

9. State *v.* Tiner, 13 Minn. 520. See *supra*, X, E, 2, b, (III).

10. Com. *v.* Forrest, 3 Pa. Dist. 797.

11. Com. *v.* Ingersoll, 145 Mass. 381, 14 N. E. 449.

Trial by jury on appeal from summary conviction see Juries.

12. Poole *v.* People, 24 Colo. 510, 52 Pac. 1025, 65 Am. St. Rep. 251; Territory *v.* Marshall, 13 Hawaii 76 (holding also that the accused is not required to plead to a charge as amended in matter of form in the circuit court, where he has pleaded to the original charge); Johns *v.* State, 104 Ind. 557, 4 N. E. 153; Eisenman *v.* State, 49 Ind. 520; Cline *v.* State, 25 Ind. App. 331, 58 N. E. 210; State *v.* Haycroft, 49 Mo. App. 488.

Motion to quash not a withdrawal of plea. — Where a defendant appeals from a conviction before a justice on a plea of not guilty, a motion made by him in the circuit court to quash the affidavit filed before the justice, which motion is entertained and overruled, does not operate as a withdrawal of his plea, when no leave to withdraw has been asked or granted. Cline *v.* State, 25 Ind. App. 331, 58 N. E. 210.

13. State *v.* Gowing, 27 Mo. App. 389.

A formal plea cannot be required on appeal from a justice's judgment, where it is not required before the justice. Hennies *v.* People, 70 Ill. 100.

Failure of record to show arraignment and plea.— It has been held that on a criminal prosecution commenced before a justice of the peace the failure of the record on appeal to show affirmatively that the defendant was arraigned in either the justice's court or the circuit court, or that a plea was entered in either court, is not cause for reversal in the appellate court. Weir *v.* State, 115 Ind. 210, 16 N. E. 631; Johns *v.* State, 104 Ind. 557, 4 N. E. 153.

Pleas or defenses see *infra*, X, E, 2, c, (IV).

14. *Alabama.*— Frost *v.* State, 124 Ala. 85, 27 So. 251; Thomas *v.* State, 107 Ala. 61, 17 So. 941; Williams *v.* State, 88 Ala. 80, 7 So. 101; Connelly *v.* State, 60 Ala. 89, 31 Am. Rep. 34.

Indiana.— Hosea *v.* State, 47 Ind. 180; Wachstetter *v.* State, 42 Ind. 166. And see Strong *v.* State, 105 Ind. 1, 4 N. E. 293.

Kansas.— State *v.* Durein, 65 Kan. 700, 70

indicted,[15] unless an indictment is expressly required by statute, as is the case in some jurisdictions.[16]

(B) *Statement of Prosecuting Attorney.* Under the Alabama statute the trial *de novo* on appeal from a summary conviction is on "a brief statement of the cause of complaint" made by the solicitor for the state,[17] but the parties may by agreement dispense with this statement and substitute the affidavit for the warrant of arrest, when it is sufficiently specific in its averments.[18] Such statement cannot be filed and the accused tried thereon, after the appellate court has sustained a demurrer to the affidavit filed in the lower court.[19]

(C) *Amendment or Substitution.* As a rule, in some jurisdictions by statute, the complaint, affidavit, or warrant used before the justice or other magistrate may be amended, if defective, or a new complaint may be substituted, in the discretion of the appellate court, when the accused is to be tried *de novo*.[20] In some states, however, the rule is otherwise.[21] Where the complaint or warrant on which the trial is had before the justice fails to charge an offense within his jurisdiction, it cannot be amended in the circuit court so as to charge such offense.[22] The statement of the cause of complaint which the Alabama statute requires the solicitor for the state to file in the appellate court[23] may be amended by leave of court.[24] Where the copy of the complaint made before the justice is incorrect, the appellate court may allow and receive a new and correct copy at any time before the case is given to the jury, or the record of the justice may be amended so as to make the copy of the complaint conform to the original.[25]

(D) *Lost Complaint or Affidavit.* Where an original complaint or affidavit

Pac. 601 (also holding that defendant cannot be compelled to plead until the justice has certified the complaint); State *v.* Forner, 32 Kan. 281, 4 Pac. 357.

Maine.— State *v.* Libby, 85 Me. 169, 26 Atl. 1015.

Massachusetts.— Com. *v.* Phelps, 11 Gray 72.

Texas.— *Ex p.* Morales, (Cr. App. 1899) 53 S. W. 107.

See 14 Cent. Dig. tit. "Criminal Law," § 599 *et seq.*

Names of witnesses need not be indorsed on the complaint. State *v.* Wood, 49 Kan. 711, 31 Pac. 786.

15. Williams *v.* State, 88 Ala. 80, 7 So. 101.

16. Com. *v.* Clark, 3 Pa. Super. Ct. 141.

17. Williams *v.* State, 88 Ala. 80, 7 So. 101; Tatum *v.* State, 66 Ala. 465.

Amendment of statement see *infra*, X, E, 2, c, (III), (C).

18. Carlisle *v.* State, 76 Ala. 75.

19. Miles *v.* State, 94 Ala. 106, 11 So. 403. *Compare* Blankenshire *v.* State, 70 Ala. 10.

20. *Alabama.*— Blankenshire *v.* State, 70 Ala. 10.

Illinois.— See Shirtliff *v.* People, 3 Ill. 7.

Kansas.— State *v.* Hinkle, 27 Kan. 308.

Mississippi.— By express statutory provision in this state. Brown *v.* State, 8 Miss. 137, 32 So. 952; Garman *v.* State, 66 Miss. 196, 5 So. 385.

North Carolina.— By express statutory provision in this state. State *v.* Davis, 111 N. C. 729, 16 S. E. 540; State *v.* Norman, 110 N. C. 484, 14 S. E. 968; State *v.* Koonce, 108 N. C. 752, 12 S. E. 1032; State *v.* Vaughan, 91 N. C. 532. Although the statute gives the court the power to amend a warrant in a proceeding before a justice of the peace after verdict, it should only be done where the evidence was sufficient to prove the offense as if properly and sufficiently charged in the first place. State *v.* Baker, 106 N. C. 758, 11 S. E. 360.

Oregon.— State *v.* Jones, 18 Oreg. 256, 22 Pac. 840.

See 14 Cent. Dig. tit. "Criminal Law," § 601.

Necessity for new affidavit.— A criminal complaint before a justice of the peace cannot be amended in the circuit court on appeal except by swearing anew to it if interlined or corrected, or by substituting a new affidavit. Strong *v.* State, 105 Ind. 1, 4 N. E. 293.

21. State *v.* Kanaman, 94 Mo. 71, 6 S. W. 704; State *v.* Russell, 88 Mo. 648; State *v.* Stegall, 65 Mo. App. 243.

A town grand juror's complaint cannot be amended in the appellate court in matters of substance, as the juror is not in court. State *v.* Wheeler, 64 Vt. 569, 25 Atl. 434.

22. People *v.* Belcher, 58 Mich. 325, 25 N. W. 303, holding that when a warrant for the arrest of a party for larceny, issued by a justice of the peace, and on which he was tried by the justice, failed to state the value of the goods, it could not be amended in the circuit court on appeal from the justice by inserting such value.

23. See *supra*, X, E, 2, c, (III), (B).

24. Tatum *v.* State, 66 Ala. 465. See also Perry *v.* State, 78 Ala. 22.

25. State *v.* Libby, 85 Me. 169, 26 Atl. 1015; Com. *v.* Vincent, 165 Mass. 18, 42 N. E. 332. See also Com. *v.* Sullivan, 138 Mass. 191; Com. *v.* Magoun, 14 Gray (Mass.) 398. And see *supra*, X, E, 2, a, (VIII).

used before the magistrate has been lost, a new one, if actually produced and offered to be filed,[26] and if it is an exact copy of the original, signed and sworn to by the same person who signed the original, may be used.[27] But where the original complaint has been quashed by the appellate court for insufficiency, the accused cannot be tried on a new complaint originating in the appellate court, where that court has no original jurisdiction of the offense.[28]

(IV) *PLEAS AND DEFENSES.* The defendant on the trial *de novo* may plead the same plea that he pleaded in the justice's court, or any matter subsequent to it which he would have had the right to plead there, but he cannot plead any matter which occurred prior to that pleaded and determined in the court below.[29] He may demur or move to quash or dismiss on the ground that the complaint does not set forth facts sufficient to constitute an offense, or an offense within the jurisdiction of the justice.[30] If the defendant has pleaded guilty in the magistrate's court, he cannot withdraw the plea without the permission of the appellate court.[31]

(V) *ISSUES AND PROOF.* Upon the trial *de novo* on appeal from a summary conviction, the issues must in most jurisdictions be the same as on the trial before the justice, and the defendant cannot be convicted of an offense other than that of which he was convicted before the justice;[32] but the conviction need not be upon the same evidence.[33] The accused cannot be tried and convicted in an appellate court on counts in the complaint on which he was tried and acquitted in the court below,[34] or on counts which were withdrawn in the

26. State *v.* Toohy, 46 Ind. 378.

27. Small *v.* State, 106 Ind. 94, 5 N. E. 750; Miller *v.* State, 72 Ind. 421; Bays *v.* State, 6 Nebr. 167.

28. Burlington *v.* James, 17 Kan. 221. But see State *v.* Barada, 49 Mo. 504.

29. Wickwire *v.* State, 19 Conn. 477; State *v.* Moor, 9 Nev. 355.

Necessity for new arraignment and plea see *supra*, X, E, 2, c, (II).

The defendant cannot plead a misnomer not pleaded before the justice, unless by leave of the court. Com. *v.* Darcey, 12 Allen (Mass.) 539. See District of Columbia *v.* Rubert, 7 Mackey (D. C.) 208.

One who pleads a misnomer in a municipal court, and appeals from an adverse judgment there rendered upon that issue, cannot waive that plea in the appellate court and ask a trial upon the merits. State *v.* Corkrey, 64 Me. 521.

30. Goshen *v.* Crary, 58 Ind. 268; Com. *v.* Washburn, 128 Mass. 421; Steuer *v.* State, 59 Wis. 472, 18 N. W. 433. See also Miles *v.* State, 94 Ala. 106, 11 So. 403; People *v.* Belcher, 58 Mich. 325, 25 N. W. 303; State *v.* Howie, 130 N. C. 677, 41 S. E. 291.

31. Com. *v.* Ingersoll, 145 Mass. 381, 14 N. E. 449.

Such permission ought to be given where the defendant pleaded guilty in the justice's court to a warrant charging no offense, and the warrant has been amended in the appellate court to charge an offense. State *v.* Howie, 130 N. C. 677, 41 S. E. 291.

32. Brown *v.* State, 63 Ala. 97; Marre *v.* State, 36 Ark. 222; Com. *v.* Ronan, 126 Mass. 59; Com. *v.* Dressel, 110 Mass. 102; Com. *v.* Phelps, 11 Gray (Mass.) 72 (copy of complaint alleging sale of liquor on different day from that alleged in the original complaint); Com. *v.* Dillane, 11 Gray (Mass.) 67; Com. *v.* Blood, 4 Gray (Mass.) 31 (proof of sale of liquor to a different person or on a different day). *Contra*, State *v.* Remelee, 35 Vt. 562.

Presumption and evidence as to identity of offense.— If an offense proved on appeal and trial *de novo* corresponds with that alleged in the complaint, the presumption is that it is the same of which the defendant was convicted in the court below, and the jury may consider other evidence besides the record in deciding whether it is the same. Com. *v.* Dillane, 11 Gray (Mass.) 67. As to the presumption of identity of the offense proved on appeal see also Com. *v.* Ferry, 146 Mass. 203, 15 N. E. 484; Com. *v.* Holmes, 119 Mass. 195; Com. *v.* Fields, 119 Mass. 105; Com. *v.* Carr, 111 Mass. 423; Com. *v.* Burke, 14 Gray (Mass.) 81.

Instruction as to burden of proving identity of offense.— Com. *v.* Hogan, 11 Gray (Mass.) 315.

33. State *v.* Forner, 32 Kan. 281, 4 Pac. 357; Com. *v.* Prescott, 153 Mass. 396, 26 N. E. 1005; Com. *v.* Murphy, 153 Mass. 290, 26 N. E. 860; Com. *v.* Ronan, 126 Mass. 59; State *v.* Heinze, 45 Mo. App. 403, proof of other sales of liquor than those proved before the justice.

34. State *v.* Wood, 49 Kan. 711, 31 Pac. 786.

Appeal from conviction in case of several counts.— But where one is tried on an information charging several distinct offenses in different counts, and is found guilty as in the information and fined as for one offense, without being specially acquitted as to any count, he may be tried on each count of the information on appeal. State *v.* Malling, 11 Iowa 239.

court below.[35] On appeal from a summary conviction the record from the justice constitutes no part of the evidence on the trial anew.[36]

(VI) *CONDUCT OF TRIAL.* The conduct of a trial *de novo* on appeal from a summary conviction is governed by substantially the same rules as an ordinary trial on indictment or information, except in so far as differences in the mode of accusation and trial render such rules inapplicable.[37] The justice who has tried the accused should not be permitted to interfere in any way, or to appear before the appellate court on the trial *de novo* for the purpose of sustaining his own decision.[38] A statement by the county attorney in his opening to the jury on a trial *de novo* that the defendant has been tried in the justice's court and there convicted is not reversible error.[39]

(VII) *JOINT AND SEPARATE TRIALS.* Several defendants separately tried by a justice may be jointly tried by the appellate court,[40] and one of several defendants jointly tried by the justice may in the discretion of the appellate court be given a separate trial *de novo*.[41]

(VIII) *WAIVER OF DEFECTS AND OBJECTIONS.* Pleading and going to trial in the appellate court waives all objections to defects or irregularities in formal parts of the papers sent up from the court below.[42]

(IX) *POWER TO IMPOSE SENTENCE.* On the trial *de novo* the court cannot exceed the limit of punishment which the magistrate could have imposed, but may within that limit impose a lighter or heavier penalty than was adjudged below.[43]

XI. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

A. Bench-Warrant or Other Process After Indictment. By the early common law it was the practice to issue a venire facias for the accused after indictment, where he was not in custody, and a capias if the venire facias was ineffectual, but this was subsequently changed so that in the time of Blackstone, upon the certificate of an indictment found, the court of king's bench issued a capias immediately to bring in the accused. In the case of felony a capias was issued in the first instance.[44] Some of the early cases in the United States followed this practice.[45] At the present time the practice is for the court to issue a bench-warrant for the arrest of the accused, and a warrant of commitment, reciting the fact of indictment and describing the crime.[46] If the accused, when indicted, is in custody,[47] or if he appears in court and submits to the jurisdiction,[48] he cannot object that no process had issued to arrest him.[49] A bench-warrant and warrant of commitment after indictment should state the fact of indictment and

35. State *v.* Shilling, 10 Iowa 106.

36. Bryan *v.* State, 4 Iowa 349.

37. Conduct of trial see *infra*, X, E, 2, c, (VI).

38. Holliman *v.* Hawkinsville, 109 Ga. 107, 34 S. E. 214.

39. State *v.* Valure, 95 Iowa 401, 64 N. W. 280.

40. Martin *v.* State, 46 Ark. 38.

41. Com. *v.* Miller, 150 Mass. 69, 22 N. E. 434.

42. State *v.* English, 34 Kan. 629, 9 Pac. 761; Com. *v.* Murphy, 155 Mass. 284, 29 N. E. 469; Com. *v.* Oakes, 151 Mass. 59, 23 N. E. 660.

Waiver of objections see, generally, *supra*, X, E, 2, b, (III).

43. Batchelder *v.* Com., 109 Mass. 361; *In re* Irvin, 29 Mich. 43; State *v.* Stafford, 113 N. C. 635, 18 S. E. 256; State *v.* Johnson, 94 N. C. 863.

44. 4 Bl. Comm. 319; 2 Hale P. C. 216.

45. U. S. *v.* Burr, 25 Fed. Cas. No. 14,694; U. S. *v.* Jamesson, 26 Fed. Cas. No. 15,466, 1 Cranch C. C. 62; U. S. *v.* Veitch, 28 Fed. Cas. No. 16,613, 1 Cranch C. C. 81. And see McEwin *v.* State, 3 Sm. & M. (Miss.) 120; People *v.* Vermilyea, 7 Cow. (N. Y.) 108.

46. *Ex p.* Cook, 35 Cal. 107; Brady *v.* Davis, 9 Ga. 73; People *v.* Mead, 28 Hun (N. Y.) 227, 64 How. Pr. (N. Y.) 41 [*affirmed* in 92 N. Y. 415].

Issuing of a bench-warrant by clerk.—State *v.* Gordon, 18 La. Ann. 528.

47. State *v.* Keena, 64 Conn. 212, 29 Atl. 470; Webster *v.* Com., 5 Cush. (Mass.) 386.

48. State *v.* Ray, 50 Iowa 520; State *v.* Cook, 58 Mo. 546.

49. No new order of arrest is needed where the accused, having been bailed, is surrendered to the sheriff and he detains him on the original order of arrest. *In re* Siebert, 61 Kan. 112, 58 Pac. 971.

the offense,[50] but it is sufficient if it recites the fact of indictment and describes the offense generally.[51] The return of a summons to answer an indictment directed to the sheriff of a particular county is not bad because it omits to state that it was served in that county.[52]

B. Arraignment and Pleas — 1. In General — a. Definition and Manner of Arraignment. The arraignment is the call of the prisoner to the bar, in order that he may answer the charge against him in the indictment.[53] At common law defendant, when brought to the bar, was called upon by name to hold up his hand for the purpose of identifying him, and the indictment was then read to him in the English language and he was asked whether he was guilty of the crime for which he was indicted or not guilty; but the practice of reading the indictment has been generally discontinued and the practice of furnishing the defendant or his counsel with a copy of it substituted for the former method.[54] The object of the arraignment and plea is to identify the accused and to frame an issue upon which he may be tried.[55]

b. Necessity For Arraignment and Plea. An arraignment, unless waived by the accused, and the entry of a plea either by or for him, are absolutely essential on a trial for a felony, and in some jurisdictions on a trial for a misdemeanor; and a conviction cannot be sustained, in the absence of a valid waiver by the accused,[56] where the record does not show that these requirements have been substantially complied with.[57] In some jurisdictions, however, the rule is not so

50. See Brady *v.* Davis, 9 Ga. 73; Erwin *v.* U. S., 37 Fed. 470, 2 L. R. A. 229.

51. Brady *v.* Davis, 9 Ga. 73; People *v.* Mead, 28 Hun (N. Y.) 227, 64 How. Pr. (N. Y.) 41 [*affirmed* in 92 N. Y. 415].

52. State *v.* Campbell, 42 W. Va. 246, 24 S. E. 875.

53. 4 Bl. Comm. 322; 2 Hale P. C. 216.

54. See 4 Bl. Comm. 322; 2 Hale P. C. 219; Minich *v.* People, 8 Colo. 440, 9 Pac. 4; Fitzpatrick *v.* People, 98 Ill. 259.

55. Hendrick *v.* State, 6 Tex. 341.

Holding up the hand for identification was never indispensable if it appeared to the court that the person before the bar was the person indicted. 4 Bl. Comm. 322; 2 Hale P. C. 219.

Trial of issue as to identity.— The issue formed by the denial of the prisoner, when arraigned, of his identity with the person named in the indictment, was at common law tried at once by a jury sworn for that special purpose. Rex *v.* Rogers, 3 Burr. 1809.

Separate arraignment of co-defendants.— Defendants jointly indicted may be arraigned separately, but are more commonly arraigned together, and as the purpose of arraignment is to establish identity, where each is asked whether he is guilty or not, his answer is a valid plea, and it is not material that a separate trial is not granted. Moore *v.* State, (Fla. 1902) 32 So. 795.

56. Waiver of arraignment or plea see *infra*, XI, B, 1, f.

57. *Alabama.*— Bowen *v.* State, 98 Ala. 83, 12 So. 808; Jackson *v.* State, 91 Ala. 55, 8 So. 773. 24 Am. St. Rep. 860; State *v.* Hughes, 1 Ala. 655.

Arizona.— Territory *v.* Brash, (1890) 32 Pac. 260.

California.— People *v.* Gaines, 52 Cal. 479; People *v.* Corbett, 28 Cal. 328.

Colorado.— Ray *v.* People, 6 Colo. 231.

Hawaii.— Territory *v.* Marshall, 13 Hawaii 76.

Illinois.— Parkinson *v.* People, 135 Ill. 401, 25 N. E. 764, 10 L. R. A. 91; Gould *v.* People, 89 Ill. 216; Hoskins *v.* People, 84 Ill. 87, 25 Am. Rep. 433; Yundt *v.* People, 65 Ill. 372; Aylesworth *v.* People, 65 Ill. 301; Johnson *v.* People, 22 Ill. 314; Persefield *v.* People, 100 Ill. App. 488; Miller *v.* People, 47 Ill. App. 472; Avery *v.* People, 11 Ill. App. 332; Spicer *v.* People, 11 Ill. App. 294; Price *v.* People, 9 Ill. App. 36.

Indiana.— Johns *v.* State, 104 Ind. 557, 4 N. E. 153; Fletcher *v.* State, 54 Ind. 462; McJunkins *v.* State, 10 Ind. 140; Sanders *v.* State, 4 Cr. L. Mag. 359.

Iowa.— Powell *v.* U. S., Morr. 17. But in State *v.* Hayes, 67 Iowa 27, 24 N. W. 575, it was held that a conviction would not be set aside because through inadvertence defendant neglected to plead, where there was a trial as though he had pleaded not guilty.

Kansas.— State *v.* Wilson, 42 Kan. 587, 22 Pac. 622.

Louisiana.— State *v.* Fontenette, 45 La. Ann. 902, 12 So. 937; State *v.* Hunter, 43 La. Ann. 157, 8 So. 624; State *v.* Ford, 30 La. Ann. 311; State *v.* Price, 6 La. Ann. 691; State *v.* Lartigue, 6 La. Ann. 404.

Michigan.— Grigg *v.* People, 31 Mich. 471.

Mississippi.— Sartorious *v.* State, 24 Miss. 602.

Missouri.— State *v.* Hopper, 142 Mo. 478, 44 S. W. 272; State *v.* Williams, 117 Mo. 379, 22 S. W. 1104; State *v.* Taylor, 111 Mo. 448, 20 S. W. 193; State *v.* Llewellyn, 93 Mo. 469, 67 S. W. 677; State *v.* Billings, 72 Mo. 662; State *v.* Montgomery, 63 Mo. 296; State *v.* Koerner, 51 Mo. 174; State *v.* Grassle, 74 Mo. App. 313; State *v.* Hubbell, 55 Mo. App. 262.

strict in cases of misdemeanor, and arraignment may be dispensed with if a plea is entered.[58]

c. Further Arraignment and Plea. Where a defendant has been arraigned and pleaded not guilty, and a judgment of conviction is reversed and the case remanded, a rearraignment is unnecessary, as the plea of guilty interposed on the first trial remains in full force until the indictment is finally disposed of.[59] Where defendant withdraws his plea of not guilty and substitutes another plea, or demurs or moves to quash the indictment, and the plea, demurrer, or motion is overruled, the plea of not guilty is not thereby reinstated, and it should be reëntered before trial;[60] but it has been held that the plea may be reëntered by

Nebraska.— Browning *v.* State, 54 Nebr. 203, 74 N. W. 631; Barker *v.* State, 54 Nebr. 53, 74 N. W. 427.

New York.— People *v.* Bradner, 10 N. Y. St. 667.

North Carolina.— State *v.* Cunningham, 94 N. C. 824.

Pennsylvania.— See Com. *v.* Higgins, 3 Leg. Chron. 109.

South Carolina.— See State *v.* Moore, 30 S. C. 69, 8 S. E. 437.

Tennessee.— Link *v.* State, 3 Heisk. 252; Hill *v.* State, 1 Yerg. 76, 24 Am. Dec. 441.

Texas.— Oliver *v.* State, (Cr. App. 1897) 41 S. W. 623; Munson *v.* State, (App. 1889) 11 S. W. 114; Jefferson *v.* State, 24 Tex. App. 535, 7 S. W. 244; Shaw *v.* State, 17 Tex. App. 225; Huddleston *v.* State, 14 Tex. App. 73; Warren *v.* State, 13 Tex. App. 348; Ellison *v.* State, 6 Tex. App. 248; Parchman *v.* State, 3 Tex. App. 225; Smith *v.* State, 1 Tex. App. 408.

Virginia.— Stoneham *v.* Com., 86 Va. 523, 10 S. E. 238.

Washington.— Palmer *v.* U. S., 1 Wash. Terr. 5.

Wisconsin.— Lanphere *v.* State, 114 Wis. 193, 89 N. W. 128; Davis *v.* State, 38 Wis. 487; Douglass *v.* State, 3 Wis. 820; Anderson *v.* State, 3 Pinn. 367.

United States.— Crain *v.* U. S., 162 U. S. 625, 16 S. Ct. 952, 40 L. ed. 1097; Shelp *v.* U. S., 81 Fed. 694, 26 C. C. A. 570.

See 14 Cent. Dig. tit. "Criminal Law," § 612.

Prosecution by information.— A statute providing for arraignment and pleading in criminal cases generally applies to prosecution by information as well as by indictment. McJunkins *v.* State, 10 Ind. 140. See also Browning *v.* State, 54 Nebr. 203, 74 N. W. 631; Barker *v.* State, 54 Nebr. 54, 74 N. W. 427.

On appeal from a judgment of conviction in the justice's court, where defendant was not arraigned before the justice, he should be arraigned in the circuit court, and after entry of plea should be tried *de novo,* as if he had been arraigned before the justice. State *v.* Gowing, 27 Mo. App. 389.

58. See Griffin *v.* Com., 66 S. W. 740, 23 Ky. L. Rep. 2148; Salfner *v.* State, 84 Md. 299, 35 Atl. 885; Browning *v.* State, 54 Nebr. 203, 74 N. W. 631; Allyn *v.* State, 21 Nebr. 593, 33 N. W. 212; Kruger *v.* State, 1 Nebr. 365; State *v.* Moore, 30 S. C. 69, 8 S. E. 437; Lynch *v.* State, 99 Tenn. 124, 41 S. W. 348.

59. *Alabama.*— Levy *v.* State, 49 Ala. 390.

Florida.— Bradham *v.* State, 41 Fla. 541, 26 So. 730; Reynolds *v.* State, 34 Fla. 175, 16 So. 78.

Georgia.—Atkins *v.* State, 69 Ga. 595.

Illinois.— Morton *v.* People, 47 Ill. 468.

Indiana.— Hatfield *v.* State, 9 Ind. App. 296, 36 N. E. 664.

Louisiana.— State *v.* Hunter, 43 La. Ann. 157, 8 So. 624; State *v.* Boyd, 38 La. Ann. 374; State *v.* Johnson, 10 La. Ann. 456.

Maryland.— Davis *v.* State, 39 Md. 355.

Mississippi.— McGuire *v.* State, 76 Miss. 504, 25 So. 495.

Missouri.— State *v.* Tate, 156 Mo. 119, 56 S. W. 1099; State *v.* Simms, 71 Mo. 538.

New York.— People *v.* McElvaine, 125 N. Y. 596, 26 N. E. 929.

Ohio.— Gormley *v.* State, 37 Ohio St. 120.

South Carolina.— State *v.* Stewart, 26 S. C. 125, 1 S. E. 468.

Texas.— Shaw *v.* State, 32 Tex. Cr. 155, 22 S. W. 588.

United States.— Gardes *v.* U. S., 87 Fed. 172, 30 C. C. A. 596.

See 14 Cent. Dig. tit. "Criminal Law," § 613.

60. *California.*— People *v.* Monaghan, 102 Cal. 229, 36 Pac. 511.

Illinois.— Morton *v.* People, 47 Ill. 468.

Indiana.— Hatfield *v.* State, 9 Ind. App. 296, 36 N. E. 664.

Louisiana.— State *v.* Hunter, 43 La. Ann. 157, 8 So. 624.

Wisconsin.— Lamphere *v.* State, 114 Wis. 193, 89 N. W. 128.

But see Hensche *v.* People, 16 Mich. 46; People *v.* Bradner, 107 N. Y. 1, 13 N. E. 87.

Effect of stipulation.— It has been held that the effect of a stipulation, made on withdrawing a plea of not guilty, that if the motion to quash is overruled the trial shall immediately proceed, is to reënter the plea after such overruling. Morton *v.* People, 47 Ill. 468.

Plea not stricken from record.— In Gormley *v.* State, 37 Ohio St. 120, where leave to withdraw a plea of not guilty and to substitute a plea of former conviction was granted, but the plea of not guilty was not stricken from the record, and after the plea of former conviction was overruled a trial was had without further plea, it was held that there was no error.

order of the court without any rearraignment of defendant.[61] If an information is amended after arraignment and plea, so as to charge the commission of the offense as of another date, a conviction thereon cannot be sustained without rearraignment and plea.[62]

d. Time of Arraignment and Plea. The arraignment and plea ought to precede the impaneling and swearing of the jury and the hearing of the evidence, for until plea there is no issue. The failure to arraign a prisoner and enter his plea before the jury is sworn is a fatal omission, and an entry of the plea afterward is too late.[63] At common law a demurrer to an indictment, whether for felony or misdemeanor, amounted to a confession, and if overruled the accused could not withdraw it, but judgment followed.[64] But it is now provided by statute in most states that the court after overruling a demurrer must permit the accused to plead not guilty,[65] or enter a plea of not guilty if he stand mute.[66] The defendant should be required to plead before a change of venue is granted,[67] but a conviction will not be reversed because this is not done.[68] In the absence of a statute defendant may be required to plead at once when arraigned; he has no right to a delay.[69]

e. Requisites and Sufficiency of Arraignment and Record. A record showing that defendant was brought into court, appeared by counsel, and pleaded to the indictment sufficiently shows an arraignment.[70] The accused possesses the

61. Lamphere *v.* State, 114 Wis. 193, 89 N. W. 128. And see Wheeler *v.* State, 158 Ind. 687, 63 N. E. 975; Hensche *v.* People, 16 Mich. 46. *Contra,* State *v.* Hunter, 43 La. Ann. 157, 8 So. 624.

62. People *v.* Moody, 69 Cal. 184, 10 Pac. 392. But see State *v.* Beatty, 45 Kan. 492, 25 Pac. 899.

63. *Alabama.*— Ferguson *v.* State, 134 Ala. 63, 32 So. 760, 92 Am. St. Rep. 17; State *v.* Hughes, 1 Ala. 655.

Florida.— Dixon *v.* State, 13 Fla. 631.

Georgia.— Bryans *v.* State, 34 Ga. 323.

Illinois.— Parkinson *v.* People, 135 Ill. 401, 25 N. E. 764, 10 L. R. A. 91.

Louisiana.— State *v.* Chenier, 32 La. Ann. 103.

Missouri.— State *v.* Montgomery, 63 Mo. 296.

Contra, Wallace *v.* State, 4 Lea (Tenn.) 309. And see Weaver *v.* State, 83 Ind. 289, where, however, the jury was resworn after entry of the plea.

See 14 Cent. Dig. tit. "Criminal Law," § 617.

In Texas, under Code Cr. Proc. arts. 603, 604, the accused may plead after the jury is sworn and impaneled, where his application for a continuance has been overruled, as the plain purpose of the statute is fulfilled if issue is joined by plea before any testimony is given. McGraw *v.* State, 31 Tex. Cr. 336, 20 S. W. 740; Morris *v.* State, 30 Tex. App. 95, 16 S. W. 757; Smith *v.* State, 1 Tex. App. 408.

64. State *v.* Dresser, 54 Me. 569; State *v.* Merrill, 37 Me. 329; People *v.* Taylor, 3 Den. (N. Y.) 91; Reg. *v.* Faderman, 3 C. & K. 359, 4 Cox C. C. 361, 1 Den. C. C. 565, 14 Jur. 377, 19 L. J. M. C. 147, 4 New Sess. Cas. 161, T. & M. 286.

65. State *v.* Abrisch, 42 Minn. 202, 43 N. W. 1115.

66. People *v.* King, 28 Cal. 266; Thomas *v.* State, 6 Mo. 457.

Under the Washington statute it is held that if the defendant does not avail himself of his right to plead not guilty after the overruling of a demurrer to the indictment, judgment may properly be rendered against him. State *v.* Harding, 20 Wash. 556, 56 Pac. 399, 929; State *v.* Straub, 16 Wash. 111, 47 Pac. 227.

67. 2 Hale P. C. 216; Gardner *v.* People, 4 Ill. 83.

68. Hudley *v.* State, 36 Ark. 237.

69. State *v.* Shields, 33 La. Ann. 1410; People *v.* Allen, 1 Wheel. Cr. (N. Y.) 38.

In Missouri, in capital cases, but not in other felonies, defendant is given twenty-four hours in which to plead after being furnished a list of the panel. State *v.* Hunter, 171 Mo. 435, 71 S. W. 675.

In Texas two entire days after his arrest are allowed the accused by statute (Code Cr. Proc. art. 567) in which to file written pleadings, and this time is not waived by filing them sooner. Evans *v.* State, 36 Tex. Cr. 32, 35 S. W. 169; Reed *v.* State, 31 Tex. Cr. 35, 19 S. W. 678. The filing of a new information on the quashing of another makes a new case, allowing the accused two days after his arrest to prepare and file his written pleadings. McFadin *v.* State, (Cr. App. 1903) 72 S. W. 172; Whitesides *v.* State, (Cr. App. 1903) 71 S. W. 969.

70. Denham *v.* State, 22 Fla. 664; Reed *v.* State, 16 Fla. 564; Fitzpatrick *v.* People, 98 Ill. 259. Where the record on appeal from a conviction shows that the accused, "in response to the court," pleaded guilty, it sufficiently appears that the accused was asked whether he pleaded guilty or not guilty, as required by a statute in relation to arraignment. People *v.* Miller, 137 Cal. 642, 70 Pac. 735.

In Pennsylvania an entry of the arraignment on the record is necessary only in capital cases. Jacobs *v.* Com., 5 Serg. & R. (Pa.) 315.

fundamental right to be represented by counsel, and his arraignment in the absence of counsel is reversible error.[71] An arraignment is not invalid because the accused does not hold up his hand, if he admits his identity;[72] or, unless required by statute, because he is not before his plea informed of his right to have counsel assigned;[73] or because a list of the witnesses is not read to him;[74] or because the court asks him whether he has been convicted before, as alleged in the indictment.[75] Reading the indictment to the accused is indispensable at common law, if demanded by him;[76] but an arraignment is not invalid because the indictment is not read to the accused where the statute requires a copy to be furnished him.[77] The indictment need not be read more than once,[78] and it may be read to the accused by his counsel,[79] or he may be called upon to listen while the prosecuting attorney reads it to the jury,[80] and if he be deaf and dumb it may be read and interpreted to him by a sworn interpreter.[81] The defendant may be arraigned on a certified copy of the record of a lost indictment.[82]

f. Waiver of Arraignment and Plea and Defects Therein. In some states it has been held that one who is indicted for a felony cannot, either personally or by attorney, waive arraignment and plea.[83] Generally, however, arraignment in the case of misdemeanors may be waived, and a waiver will be implied if the accused proceeds to trial in the usual manner without objection.[84] And in some jurisdictions, even in trials for felony, the accused may waive arraignment by pleading, or even without plea if he is identified and consents to or acquiesces in proceeding to a trial on the merits.[85] By voluntarily pleading to an indictment

71. State *v.* Moore, 61 Kan. 732, 60 Pac. 748.

72. 4 Bl. Comm. 322; 2 Hale P. C. 219; U. S. *v.* Pittman, 27 Fed. Cas. No. 16,053, 3 Cranch C. C. 289, holding also that in order to preserve order and regularity the prisoner ought to be placed in the box for arraignment.

73. People *v.* Miller, 137 Cal. 642, 70 Pac. 735; People *v.* Villarino, 66 Cal. 228, 5 Pac. 154, holding that it is sufficient if the information is given in the course of the arraignment.

74. People *v.* Neary, 104 Cal. 373, 37 Pac. 943.

75. People *v.* McGregar, 88 Cal. 140, 26 Pac. 97.

76. 2 Hale P. C. 219. And see Galloway *v.* Com., 5 Ky. L. Rep. 213; Wilkins *v.* State, 15 Tex. App. 420; Reg. *v.* Newton, 1 C. & K. 469, 47 E. C. L. 469; Reg. *v.* Frost, 9 C. & P. 129, 38 E. C. L. 87. But it has been held that failure to read an indictment, when not demanded by the accused, and where the substance of the indictment is stated to the jury, is not a fatal omission. People *v.* Sprague, 53 Cal. 491.

A statement in the record that the accused was arraigned implies that the indictment was read to him. Clare *v.* State, 68 Ind. 17.

77. Minich *v.* People, 8 Colo. 440, 9 Pac. 4; Fitzpatrick *v.* People, 98 Ill. 259; Goodin *v.* State, 16 Ohio St. 344.

78. Reg. *v.* Dowling, 3 Cox C. C. 509.

79. Stewart *v.* State, 111 Ind. 554, 13 N. E. 59.

80. Bateman *v.* State, 64 Miss. 233, 1 So. 172. Reading the indictment to the jury within the hearing of the accused is sufficient. Utterback *v.* Com., 105 Ky. 723, 49 S. W. 479, 20 Ky. L. Rep. 1515, 88 Am. St. Rep. 328.

81. See Com. *v.* Hill, 14 Mass. 207.

82. Buckner *v.* State, 56 Ind. 208.

83. Territory *v.* Brash, (Ariz. 1890) 32 Pac. 260; Hoskins *v.* People, 84 Ill. 87, 25 Am. Rep. 433; Miller *v.* People, 47 Ill. App. 472; State *v.* McMichael, 50 La. Ann. 428, 23 So. 992; State *v.* Ford, 30 La. Ann. 311; Wilson *v.* State, 42 Miss. 639.

84. Com. *v.* Neat, 89 Ky. 241, 12 S. W. 256, 11 Ky. L. Rep. 434; Salfner *v.* State, 84 Md. 299, 35 Atl. 885; Douglass *v.* State, 3 Wis. 820.

85. *Georgia.*— Tarver *v.* State, 95 Ga. 222, 21 S. E. 381.

Indiana.— Molihan *v.* State, 30 Ind. 266.

Iowa.— State *v.* Thompson, 95 Iowa 464, 64 N. W. 419; State *v.* Hayes, 67 Iowa 27, 24 N. W. 575.

Kansas.— State *v.* Baker, 57 Kan. 541, 46 Pac. 947; State *v.* Glave, 51 Kan. 330, 33 Pac. 8.

Kentucky.— Hendrickson *v.* Com., 64 S. W. 964, 23 Ky. L. Rep. 1191.

Missouri.— State *v.* Hoffman, 70 Mo. App. 271.

New York.— People *v.* Tower, 17 N. Y. Suppl. 395; People *v.* McHale, 15 N. Y. Suppl. 496.

South Carolina.— State *v.* Brock, 61 S. C. 141, 39 S. E. 359.

Washington.— State *v.* Straub, 16 Wash. 111, 47 Pac. 227.

United States.— U. S. *v.* Molloy, 31 Fed. 19.

Contra, People *v.* Corbett, 28 Cal. 328; Anderson *v.* State, 3 Pinn. (Wis.) 367.

See 14 Cent. Dig. tit. "Criminal Law," §§ 614, 615.

The denial of the privilege of defendant to waive an arraignment, where he does not manifest his intentions so to do by pleading and going to trial, but asks time to plead

or information without objection, a defendant waives formal arraignment or defects in the arraignment.[86] If defendant when arraigned asks for and obtains time to plead, he waives any defect in the statutory detail of the proceedings constituting the arraignment, such as failure to deliver a copy of the indictment.[87]

2. REFUSAL OR FAILURE TO PLEAD. In England, by the early common law, where the accused on a trial for felony obstinately refused to plead after warning and a respite that he might consider the matter, he could be sentenced to solitary confinement in a dark cell upon bread and water, his body loaded with chains, and there confined until he answered.[88] By a statute of George III[89] it was enacted that every person who should stand mute on arraignment should be convicted, and judgment and execution thereupon awarded as if he had been convicted by verdict or on confession; but by a subsequent statute[90] it was the practice, where a prisoner stood mute, for the court to impanel a jury to try whether he was mute by the visitation of God or whether he was mute of malice, and if the jury found that he stood mute of malice, the court ordered a plea of not guilty to be entered,[91] although it has been held that in such cases sentence might be passed without further inquiry.[92] If the jury found that he was mute by the visitation of God, a plea of not guilty might be entered and he might then be tried and found guilty or acquitted by the same jury.[93] It is now very generally provided by statute that where defendant stands mute the court shall order a plea of not guilty to be entered.[94]

3. PLEAS IN GENERAL[95] — a. Names and Nature of the Several Pleas. The pleas which may be made upon arraignment are thus classified: (1) Pleas to the juris-

specially, is not reversible error. State *v.* Pierce, 77 Iowa 245, 42 N. W. 181. See Wood *v.* State, 92 Ind. 269.

86. *Arkansas.*— Ransom *v.* State, 49 Ark. 176, 4 S. W. 658.

California.— See People *v.* Corbett, 28 Cal. 328.

Florida.— Bassett *v.* State, (1902) 33 So. 262; Dixon *v.* State, 13 Fla. 631.

Indiana.— Meyers *v.* State, 156 Ind. 388, 59 N. E. 1052 (plea of guilty); Johns *v.* State, 104 Ind. 557, 4 N. E. 153; Turpin *v.* State, 80 Ind. 148.

Kentucky.— Utterback *v.* Com., 105 Ky. 723, 49 S. W. 479, 20 Ky. L. Rep. 1515, 88 Am. St. Rep. 328.

Missouri.— State *v.* Weeden, 133 Mo. 70, 34 S. W. 473; State *v.* Braunschweig, 36 Mo. 397.

Ohio.— Goodin *v.* State, 16 Ohio St. 344.

Texas.— Wilson *v.* State, 17 Tex. App. 525.

See 14 Cent. Dig. tit. "Criminal Law," §§ 614, 615.

87. People *v.* Lightner, 49 Cal. 226.

88. 4 Bl. Comm. 325–327; 2 Hale P. C. 319; 2 Hawkins P. C. c. 30.

89. 12 Geo. III, c. 20.

90. 7 & 8 Geo. IV, c. 28, § 2.

91. 2 Hale P. C. 321; Reg. *v.* Schleter, 10 Cox C. C. 409; Reg. *v.* Yscuado, 6 Cox C. C. 386.

92. Com. *v.* Moore, 9 Mass. 402; Rex *v.* Mercier, 1 Leach C. C. 218.

93. Com. *v.* Braley, 1 Mass. 103; Reg. *v.* Israel, 2 Cox C. C. 263; Rex *v.* Pritchard, 7 C. & P. 303, 32 E. C. L. 626; Reg. *v.* Bernard, 1 F. & F. 240; Rex *v.* Steel, 2 Leach C. C. 507; Rex *v.* Hamilton, R. & M. 78, 21 E. C. L. 706.

94. *Alabama.*— Mose *v.* State, 33 Ala. 211; Fernandez *v.* State, 7 Ala. 511.

California.— People *v.* Bowman, 81 Cal. 566, 22 Pac. 917; People *v.* Thompson, 4 Cal. 238.

Hawaii.— Hawaiian Islands *v.* Hering, 9 Hawaii 181.

Illinois.— Johnson *v.* People, 22 Ill. 314; Persefield *v.* People, 100 Ill. App. 488.

Iowa.— State *v.* McCombs, 13 Iowa 426.

Louisiana.— State *v.* Shields, 33 La. Ann. 1410.

Massachusetts.— Com. *v.* Quirk, 155 Mass. 296, 29 N. E. 514; Com. *v.* Lannan, 13 Allen 563.

Michigan.— People *v.* Bringard, 39 Mich. 22, 23 Am. Rep. 344.

Missouri.— State *v.* Kring, 74 Mo. 612.

Montana.— State *v.* Clancy, 20 Mont. 498, 52 Pac. 267.

Pennsylvania.— Com. *v.* Place, 153 Pa. St. 314, 26 Atl. 620.

Tennessee.— Link *v.* State, 3 Heisk. 252.

Texas.—Gonzales *v.* State, (Cr. App. 1899) 50 S. W. 1018.

Wisconsin.— Anderson *v.* State, 3 Pinn. 367.

United States.— U. S. *v.* Borger, 7 Fed. 193, 19 Blatchf. 249; U. S. *v.* Hare, 26 Fed. Cas. No. 15,304, 2 Wheel. Cr. Cas. 283.

England.— Reg. *v.* Bernard, 1 F. & F. 240.

See 14 Cent. Dig. tit. "Criminal Law," §§ 619, 620.

Effect of plea.— The refusal of defendant to plead and an entry of a plea of not guilty does not admit the jurisdiction of the court or waive objections to the sufficiency or validity of the complaint. People *v.* Gregory, 30 Mich. 371.

95. **Necessity for arraignment and plea** see *supra*, XI, B, 1.

diction, by which the accused denies the authority of the court to try him; (2) declinatory pleas which are now obsolete, but which anciently consisted of the plea of sanctuary and the plea of clergy; (3) pleas in abatement of the indictment, which may be either for defects in the indictment which are apparent of record, or for defects which are not apparent of record, as for example the plea of misnomer; (4) special pleas in bar, by which defendant shows extrinsic facts by reason of which the indictment is not maintainable; and (5) the plea of the general issue by which he claims that he is not guilty.[96] The defendant may also plead guilty or interpose the plea of *nolo contendere*, which is an implied confession.[97] And he may demur to the accusation as insufficient in law, or move to quash the same, or to dismiss the prosecution.[98] Strictly speaking, however, the latter are not pleas.

b. **Duplicity.** The rule that duplicity renders a pleading bad applies to pleas as well as to indictments. A plea is bad and demurrable if it sets up two distinct offenses, either in bar or in abatement.[99]

c. **Number of Pleas and Successive Pleas.** At common law the general rule is that in criminal as well as in civil cases, defendant must rely on one ground of defense and cannot file two or more pleas setting up distinct offenses, which is called double pleading;[1] but the rule was relaxed in case of felonies. In prosecutions for misdemeanor, in the absence of a statute, if defendant pleads in abatement[2] or specially in bar,[3] or if he demurs,[4] he cannot plead not guilty, either at the same time or after the issue on the plea or demurrer has been decided against him, but he may be sentenced as upon a conviction,[5] unless the

96. 2 Hale P. C. 236; 1 Starkie Cr. Pl. (2d ed.) 310–320.

97. See *infra*, XI, B, 4.

98. See INDICTMENTS AND INFORMATIONS.

99. *Maine.*— State *v.* Heselton, 67 Me. 598; State *v.* Ward, 63 Me. 225, pleas in abatement for defects in drawing grand jurors.

Massachusetts.— Nauer *v.* Thomas, 13 Allen, 572, special plea in bar.

Michigan.— Findley *v.* People, 1 Mich. 234, plea in abatement for defects in grand jury.

Vermont.— State *v.* Emery, 59 Vt. 84, 7 Atl. 129, plea in abatement for defects in grand jury and disqualification of jurors.

England.— Rex *v.* Sheen, 2 C. & P. 634, 12 E. C. L. 776, plea of former acquittal setting up two distinct records of acquittal.

A plea is not bad for duplicity because it is not confined to a single fact. If the facts pleaded depend upon the same evidence, or constitute together but one defense, there is no duplicity. State *v.* Ward, 63 Me. 225; State *v.* Fidler, 23 R. I. 41, 49 Atl. 100, plea in abatement alleging improper selection of two grand jurors.

1. Com. *v.* Blake, 12 Allen (Mass.) 188; Reg. *v.* Charlesworth, 1 B. & S. 460, 9 Cox C. C. 44, 8 Jur. N. S. 1091, 31 L. J. M. C. 25, 5 L. T. Rep. N. S. 150, 9 Wkly. Rep. 842, 101 E. C. L. 460; 1 Chitty Cr. L. 434.

The statute of Anne, allowing more than one plea, did not apply to criminal cases. State *v.* Potter, 61 N. C. 338; *Re* Strahan, 7 Cox C. C. 85; 1 Chitty Cr. L. 434.

2. See *infra*, XI, B, 6.

3. See *infra*, XI, B, 7.

4. See INDICTMENTS AND INFORMATIONS.

5. *Connecticut.*— Wickwire *v.* State, 19 Conn. 477. See State *v.* Ward, 49 Conn. 429, a prosecution for felony, however.

Massachusetts.— Com. *v.* Blake, 12 Allen 188.

Nebraska.— Marshall *v.* State, 6 Nebr. 120, 29 Am. Rep. 363.

North Carolina.— State *v.* Potter, 61 N. C. 338.

Tennessee.— State *v.* Copeland, 2 Swan 626; Hill *v.* State, 2 Yerg. 248.

United States.— U. S. *v.* Shorey, 27 Fed. Cas. No. 16,280.

England.— Reg. *v.* Charlesworth, 1 B. & S. 460, 9 Cox C. C. 44, 8 Jur. N. S. 1091, 31 L. J. M. C. 25, 5 L. T. Rep. N. S. 150, 9 Wkly. Rep. 842, 101 E. C. L. 460; *Re* Strahan, 7 Cox C. C. 85; Kirton *v.* Williams, Cro. Eliz. 495; Rex *v.* Gibson, 8 East 107; 1 Chitty Cr. L. 435; 2 Hawkins P. C. c. 31, § 7.

Contra, State *v.* Greenwood, 5 Port. (Ala.) 474.

Illustrations.— It has been held that the rule stated in the text applies to a plea of former conviction, acquittal, or jeopardy and a plea of not guilty (Marshall *v.* State, 6 Nebr. 120, 29 Am. Rep. 363; State *v.* Potter, 61 N. C. 338; State *v.* Copeland, 2 Swan (Tenn.) 626; Hill *v.* State, 2 Yerg. (Tenn.) 248; Reg. *v.* Charlesworth, 1 B. & S. 460, 9 Cox C. C. 44, 8 Jur. N. S. 1091, 3 L. J. M. C. 25, 5 L. T. Rep. N. S. 150, 9 Wkly. Rep. 842, 101 E. C. L. 460; Reg. *v.* Gilmore, 15 Cox C. C. 85. But see in a case of felony Thompson *v.* U. S., 155 U. S. 271, 15 S. Ct. 73, 39 L. ed. 146), unless the rule has been changed by statute. Crippen *v.* State, 3 Heisk. (Tenn.) 25. The rule has also been applied to other special pleas in bar and the plea of not guilty (Com. *v.* Blake, 12 Allen (Mass.) 188; *Re* Strahan, 7 Cox C. C. 85); to a plea of not guilty and a plea

court in its discretion allows him to do so, as it may.[6] In prosecutions for a felony, however, because the punishment was death, defendant was and is allowed to plead in abatement or specially in bar, or to demur, and also to plead not guilty.[7] In some states double pleading is now allowed by statute whether the offense is a felony or a misdemeanor.[8]

d. Plea of Insanity and Not Guilty. Where the accused files a special plea of insanity, refusing to plead not guilty, it is no error to compel him to plead in addition guilty or not guilty, since the plea of insanity is a part of a plea of not guilty. His sanity may be determined under the latter plea, and he is not bound to plead it specially.[9]

e. Entry or Indorsement of Plea. The plea of defendant should be entered and appear on the record,[10] but in some states it has been held that failure of the record to show the plea is not fatal to a conviction.[11] The statute sometimes requires the plea to be indorsed on the back of the indictment, but failure to do so does not invalidate a conviction.[12]

f. Withdrawal of Pleas. It is wholly in the discretion of the court whether a plea of any sort may be withdrawn. Permission may always be granted, but unless an abuse of discretion is shown the refusal of permission to withdraw a plea is not error.[13] Thus it is discretionary with the court to permit or refuse to permit a plea of not guilty to be withdrawn for the purpose of interposing a plea in abatement, as a plea of misnomer or a plea setting up defects in the grand jury,[14]

of the statute of limitations (State *v.* Ward, 49 Conn. 429; U. S. *v.* Shorey, 27 Fed. Cas. No. 16,280); and to a plea of not guilty and a plea in abatement for misnomer (Kirton *v.* Williams, Cro. Eliz. 495; Rex *v.* Gibson, 8 East 107).

6. Com. *v.* Merrill, 8 Allen (Mass.) 545; Reg. *v.* Gilmore, 15 Cox C. C. 85; Rex *v.* Gibson, 8 East 107; Crosby *v.* Wadsworth, 6 East 602, 2 Smith K. B. 559, 8 Rev. Rep. 556; Reg. *v.* Goddard, 2 Ld. Raym. 920.

Several pleas in abatement may be filed at the same time by leave of the court, if consistent with each other. State *v.* Greenwood, 5 Port. (Ala.) 474; Com. *v.* Long, 2 Va. Cas. 318; U. S. *v.* Richardson, 28 Fed. 61; U. S. *v.* Reeves, 27 Fed. Cas. No. 16,139, 3 Woods 199.

7. Wickwire *v.* State, 19 Conn. 477; State *v.* McCoy, 111 Mo. 517, 20 S. W. 240 (plea of not guilty and demurrer); State *v.* Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349; Thompson *v.* U. S., 155 U. S. 271, 15 S. Ct. 73, 39 L. ed. 146; Kirton *v.* Williams, Cro. Eliz. 495 (not guilty and plea in abatement for misnomer); Rex *v.* Gibson, 8 East 107; Reg. *v.* Goddard, 2 Ld. Raym. 920; 1 Chitty Cr. L. 435; 2 Hale P. C. 255; 2 Hawkins P. C. c. 23, § 128; c. 31, § 6. And see State *v.* Greenwood, 5 Port. (Ala.) 474. But see State *v.* Ward, 49 Conn. 429.

8. Crippen *v.* State, 3 Heisk. (Tenn.) 25, holding also, under a statute allowing double pleading, that the several pleas (not guilty and former conviction) must be put in so as to be tried at the same time.

9. Long *v.* State, 38 Ga. 491.

10. Anderson *v.* State, 3 Pinn. (Wis.) 367. See *supra*, XI, B, 1.

Error of clerk in entering plea.— Failure of the clerk of the court to make the entry of a plea as fully as he ought to make it cannot prejudice defendant. People *v.* O'Leary, (Cal. 1888) 16 Pac. 884.

11. Avery *v.* People, 11 Ill. App. 332; Spicer *v.* People, 11 Ill. App. 294; Palmer *v.* U. S., 1 Wash. Terr. 5. See *supra*, XI, B, 1.

12. Preuit *v.* People, 5 Nebr. 377; Waldschmidt *v.* Territory, 1 Wyo. 149.

13. *Alabama.*— Hubbard *v.* State, 72 Ala. 164.

California.— People *v.* Lewis, 64 Cal. 401, 1 Pac. 490.

Connecticut.— Wickwire *v.* State, 19 Conn. 477.

District of Columbia.— District of Columbia *v.* Rubert, 7 Mackey 208.

Florida.— Adams *v.* State, 28 Fla. 511, 10 So. 106.

Illinois.— Phillips *v.* People, 55 Ill. 429.

Indiana.— Cline *v.* State, 25 Ind. App. 331, 58 N. E. 210.

Virginia.— Early *v.* Com., 86 Va. 921, 11 S. E. 795.

West Virginia.— State *v.* Shanley, 38 W. Va. 516, 18 S. E. 734.

England.— Rex *v.* Chamberlain, 6 C. & P. 93, 25 E. C. L. 338; Reg. *v.* Brown, 17 L. J. M. C. 145.

See 14 Cent. Dig. tit. "Criminal Law," §§ 629, 633, 687.

Plea of guilty to former conviction on indictment for second offense.— Where a defendant is indicted for larceny and charged with a previous conviction of a like offense, and upon his arraignment pleads "not guilty to the offense charged in the indictment," it is not error for the trial court to refuse an offer to plead guilty to the charge of previous conviction. People *v.* Lewis, 64 Cal. 401, 1 Pac. 490.

14. *Alabama.*— Hubbard *v.* State, 72 Ala. 164.

a plea to the jurisdiction,[15] a special plea in bar,[16] a plea of guilty,[17] a demurrer or motion to quash,[18] or a motion to compel the prosecution to elect between offenses charged in different counts.[19] The rule applies also to pleas of guilty. Where defendant pleads guilty, he may be allowed to withdraw the plea and substitute another, or a demurrer or motion to quash, but if the plea is made with an understanding of its nature, and the indictment charges an offense the court may properly refuse to permit him to substitute a plea of not guilty,[20] unless

District of Columbia.— District of Columbia *v.* Rubert, 7 Mackey 208.

Florida.— Knight *v.* State, 42 Fla. 546, 32 So. 110; Adams *v.* State, 28 Fla. 511, 10 So. 106.

Maryland.— Mills *v.* State, 76 Md. 274, 25 Atl. 229 (holding that in allowing a plea in abatement after a plea of not guilty the court may add such conditions as it deems proper); Cooper *v.* State, 64 Md. 40, 20 Atl. 986.

Missouri.— Sunday *v.* State, 14 Mo. 417.

New York.— People *v.* Allen, 43 N. Y. 28.

North Carolina.— State *v.* Jones, 88 N. C. 671; State *v.* Lamon, 10 N. C. 175.

Rhode Island.— State *v.* Watson, 20 R. I. 354, 39 Atl. 193, 78 Am. St. Rep. 871.

South Carolina.— State *v.* Montague, 2 McCord 257.

Virginia.— Reed *v.* Com., 98 Va. 817, 36 S. E. 399; Early *v.* Com., 86 Va. 921, 11 S. E. 795; Com. *v.* Scott, 10 Gratt. 749.

Wisconsin.— Richards *v.* State, 82 Wis. 172, 51 N. W. 652.

See 14 Cent. Dig. tit. "Criminal Law," § 687. And see *infra*, XI, B, 6, c.

15. State *v.* Watson, 20 R. I. 354, 39 Atl. 193, 78 Am. St. Rep. 871.

16. Phillips *v.* People, 55 Ill. 429; Com. *v.* Lannan, 13 Allen (Mass.) 563; State *v.* Salge, 2 Nev. 321; Com. *v.* Scott, 10 Gratt. (Va.) 749.

17. State *v.* Shanley, 38 W. Va. 516, 18 S. E. 734, holding that on an indictment for a violation of the state revenue law in selling spirituous liquors without a license the plea of guilty may be entered without formally and expressly withdrawing a plea of not guilty theretofore entered.

18. *Alabama.*— Oakley *v.* State, 135 Ala. 15, 33 So. 23.

California.— People *v.* Shem Ah Fook, 64 Cal. 380, 1 Pac. 347; People *v.* Lee, 17 Cal. 76.

Indiana.— See Cline *v.* State, 25 Ind. App. 331, 58 N. E. 210.

Massachusetts.— Com. *v.* Chapman, 11 Cush. 422.

Minnesota.— State *v.* Arbes, 70 Minn. 462, 73 N. W. 403.

New Jersey.— In re Nicholls, 5 N. J. L. 539.

New Mexico.—Territory *v.* Barrett, 8 N. M. 70, 42 Pac. 66, after change of venue.

New York.— People *v.* Doyle, 11 N. Y. App. Div. 447, 42 N. Y. Suppl. 319, 11 N. Y. Cr. 322.

South Dakota.— State *v.* Van Nice, 7 S. D. 104, 63 N. W. 537.

See 14 Cent. Dig. tit. "Criminal Law," § 687.

Contra.— State *v.* Hale, 44 Iowa 96 (holding that defendant has a right to withdraw a plea of not guilty and file a motion to set aside the indictment); Cochrane *v.* State, 6 Md. 400 (holding that defendant has an unconditional right to withdraw a plea of not guilty and demur, and that it is not a mere matter of favor). In State *v.* Decker, 1 Ohio Dec. (Reprint) 527, 10 West. L. J. 328, on the other hand, it was held that a defendant in a criminal case is never allowed to withdraw his plea of not guilty for the purpose of moving to quash the indictment for irregularity, since if such irregularity exists it may be taken advantage of by motion in arrest of judgment. See also State *v.* Burlingham, 15 Me. 104.

19. State *v.* Abrahams, 6 Iowa 117, 71 Am. Dec. 399.

20. *California.*— People *v.* Miller, 114 Cal. 10, 45 Pac. 986; People *v.* Lennox, 67 Cal. 113, 7 Pac. 260.

Indiana.— Myers *v.* State, 156 Ind. 388, 59 N. E. 1052; Peters *v.* Koepke, 156 Ind. 35, 59 N. E. 33; Monahan *v.* State, 135 Ind. 216, 34 N. E. 967; Pattee *v.* State, 109 Ind. 545, 10 N. E. 421; Conover *v.* State, 86 Ind. 99.

Kansas.— State *v.* Yates, 52 Kan. 566, 35 Pac. 209; Salina *v.* Cooper, 45 Kan. 12, 25 Pac. 233.

Louisiana.— State *v.* Jammerson, 49 La. Ann. 597, 21 So. 728; State *v.* Williams, 45 La. Ann. 1356, 14 So. 32; State *v.* Delahoussaye, 37 La. Ann. 551.

Massachusetts.— Com. *v.* Ingersoll, 145 Mass. 381, 14 N. E. 449; Com. *v.* Mahoney, 115 Mass. 151; Com. *v.* Winton, 108 Mass. 485 (on appeal from police court); Com. *v.* Hagarman, 10 Allen 401 (on appeal from magistrate).

Mississippi.—Mastronada *v.* State, 60 Miss. 86.

Missouri.— State *v.* Richardson, 98 Mo. 564, 12 S. W. 245.

New Hampshire.—State *v.* Cotton, 24 N. H. 143, after motion in arrest of judgment and before judgment is rendered.

New Jersey.— Clark *v.* State, 58 N. J. L. 383, 34 Atl. 3 [*affirming* 57 N. J. L. 489, 31 Atl. 979].

New Mexico.— Territory *v.* Cook, 7 N. M. 248, 33 Pac. 1022.

Pennsylvania.— McCue *v.* Ferguson, 73 Pa. St. 333; Com. *v.* Stephenson, 9 Kulp 561; Com. *v.* Joyce, 7 Pa. Dist. 400; Com. *v.* Gerrity, 1 Lack. Leg. Rec. 430.

Texas.— Tate *v.* State, (Cr. App. 1898) 45 S. W. 707.

Vermont.— State *v.* Martin, 68 Vt. 91, 34 Atl. 40, on appeal from justice of the peace.

a right to withdraw the plea of guilty is given by statute;[21] but abuse of discretion in refusing to allow a plea of guilty to be withdrawn is reversible error.[22] As in the case of a plea of guilty, the court may in its discretion allow a plea of *nolo contendere* to be withdrawn.[23] A plea of not guilty should be withdrawn before a demurrer, motion to quash, or plea in abatement is entertained,[24] but if it be not withdrawn defendant cannot take advantage of the omission.[25] A plea in abatement or a motion to quash, irregularly permitted to be filed after a plea of not guilty, does not operate as a withdrawal of the plea of not guilty.[26] Where the plea of not guilty is withdrawn by permission of the court for the purpose of allowing some other plea, or a demurrer or motion, it should, upon the overruling of the latter, be reëntered before a trial upon the merits; but it has been held that a rearraignment is not necessary.[27]

g. Demurrer to Pleas. If a plea interposed by defendant is insufficient as a matter of law, either in matter of substance or of form, the state may demur thereto.[28] On demurrer to a pleading in a criminal case judgment is to be given, as in civil cases, against the party who has committed the first fault in pleading.[29]

4. Pleas of Guilty and Nolo Contendere — a. Plea of Guilty — (I) *Right to Plead Guilty.* In the absence of a statutory provision to the contrary, defendant, even in a capital case, has a right to plead guilty, and the court must accept the plea and pronounce the proper judgment and sentence.[30] In some states, however, it is otherwise by statute in capital cases, and such a statute is valid.[31]

(II) *Plea by Counsel.* If a defendant is competent to plead, a plea of

West Virginia.— State *v.* Shanley, 38 W. Va. 516, 18 S. E. 734.

United States.— U. S. *v.* Bayaud, 23 Fed. 721, 21 Blatchf. 217; U. S. *v.* Dixon, 25 Fed. Cas. No. 14,968, 1 Cranch C. C. 414.

England.— Reg. *v.* Sell, 9 C. & P. 346, 38 E. C. L. 207.

See 14 Cent. Dig. tit. "Criminal Law," § 633.

The accused must give a reason for, and full evidence in support of, his request to withdraw a plea of guilty. Griffith *v.* State, 36 Ind. 406; Com. *v.* Winton, 108 Mass. 485.

21. In Iowa by statute defendant has the right to withdraw a plea of guilty and substitute another plea at any time before judgment. State *v.* Oehlshlager, 38 Iowa 297; State *v.* Kraft, 10 Iowa 330. The same is true in Kentucky. The motion must be made before judgment is rendered. Mounts *v.* Com., 89 Ky. 274, 12 S. W. 311, 11 Ky. L. Rep. 474.

In Michigan, under the statute relating to trial *de novo* on appeal from a magistrate, it is held that where the conviction was on a plea of guilty, the accused has a right to withdraw his plea and plead not guilty, and have a trial on the merits. People *v.* Richmond, 57 Mich. 399, 24 N. W. 124.

22. State *v.* Yates, 52 Kan. 566, 35 Pac. 209; Salina *v.* Cooper, 45 Kan. 12, 25 Pac. 233 (before police judge); McCue *v.* Ferguson, 73 Pa. St. 333; Com. *v.* Gerrity, 1 Lack. Leg. Rec. (Pa.) 430.

It is an abuse of judicial discretion to refuse to permit a plea of guilty to be withdrawn where it is entered by mistake to a wrong indictment (Davis *v.* State, 20 Ga. 674), **or by a person as to whose sanity at the time of the plea there is doubt** (People *v.* Scott, 59 Cal. 341; Deloach *v.* State, 77 Miss. 691, 27 So. 618), **but the mere fact that the punishment he receives is greater than he expected** (Mastronada *v.* State, 60 Miss. 86), **or that the prosecution is permitted to prove aggravating circumstances** (Mounts *v.* Com., 89 Ky. 274, 12 S. W. 311, 11 Ky. L. Rep. 474) **is not alone sufficient cause to require permission to withdraw the plea.**

23. Com. *v.* Ingersoll, 145 Mass. 381, 14 N. E. 449.

24. Joy *v.* State, 14 Ind. 139.

25. Joy *v.* State, 14 Ind. 139; Baker *v.* State, 88 Wis. 140, 59 N. W. 570.

26. Cline *v.* State, 25 Ind. App. 331, 58 N. E. 210; State *v.* Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349; Baker *v.* State, 88 Wis. 140, 59 N. W. 570.

27. See *supra*, XI, B, 1, c.

28. State *v.* Barrett, 54 Ind. 434; Com. *v.* Jackson, 2 Va. Cas. 501, general demurrer.

Demurer to plea in abatement see *infra*, XI, B, 6, i.

29. People *v.* Krummer, 4 Park. Cr. (N. Y.) 217; U. S. *v.* Lawrence, 26 Fed. Cas. No. 15,573, 13 Blatchf. 295.

30. Green *v.* Com., 12 Allen (Mass.) 155. And see Territory *v.* Miller, 4 Dak. 173, 29 N. W. 7. But the court may and generally will advise the accused to withdraw his plea in a capital case and plead not guilty, and will give him a reasonable time to consider and retract the plea. 4 Bl. Comm. 29; 2 Hale P. C. 225; 2 Hawkins P. C. c. 31, § 2. And see Com. *v.* Battis, 1 Mass. 95.

Withdrawal of plea of guilty see *supra*, XI, B, 3, f.

31. A statute directing that, if to an indictment for murder a prisoner pleads guilty,

guilty should be made by him personally and not by counsel;[32] but where such a plea is made by counsel, and defendant, when asked by the court if it is his plea, assents by a sign or gesture, it is sufficient.[33]

(III) *Effect of Plea.* A plea of guilty is a confession of guilt and is equivalent to a conviction. The court must pronounce judgment and sentence as upon a verdict of guilty.[34] By a plea of guilty the accused simply confesses that he is guilty in manner and form as charged in the indictment, and if the indictment charges no criminal offense, or is otherwise fatally defective, it may be subsequently attacked on that ground.[35] But a plea of guilty waives defects in the indictment which require a plea in abatement,[36] as for example the right to object that another indictment for the same crime is pending against him elsewhere,[37] and is also a waiver of a trial by jury, so that the court may at once, under the statute, proceed to determine the degree of guilt, for the purpose of fixing the punishment.[38]

(IV) *Voluntary Character of Plea.* To authorize the acceptance and entry of a plea of guilty and judgment and sentence thereon, the plea must be entirely voluntary. It must not be induced by fear, or by misrepresentation, persuasion, or the holding out of false hopes, nor made through inadvertence or ignorance.[39] The court should be satisfied as to the voluntary character of the

the plea shall be disregarded, and a plea of not guilty substituted, is constitutional. State *v.* Genz, 57 N. J. L. 459, 31 Atl. 1037.

Minor offense included in charge.— A statute prohibiting a plea of guilty in a capital case does not prevent a plea of guilty to a minor offense included in a capital charge. People *v.* Smith, 78 Hun (N. Y.) 179, 28 N. Y. Suppl. 912.

32. Saunders *v.* State, 10 Tex. App. 336; State *v.* Blake, 5 Wyo. 107, 38 Pac. 354.

33. State *v.* Blake, 5 Wyo. 107, 38 Pac. 354. And see State *v.* Richardson, 98 Mo. 564, 12 S. W. 245. *Compare* People *v.* McCrory, 41 Cal. 458.

34. Green *v.* Com., 12 Allen (Mass.) 155; People *v.* Luby, 99 Mich. 89, 57 N. W. 1092; 4 Bl. Comm. 329; 1 Chitty Cr. L. 429; 2 Hale P. C. 225; 2 Hawkins P. C. c. 31, § 1.

Degree of offense.— The plea of guilty to an indictment for murder confesses defendant's guilt as charged in the indictment and not his guilt of the lowest offense possible thereunder. Territory *v.* Miller, 4 Dak. 173, 29 N. W. 7. And see Green *v.* Com., 12 Allen (Mass.) 155.

A plea of guilty to an indictment for larceny admits that defendant took the property described in the indictment, and that its value was that alleged in the indictment. State *v.* Walker, 22 La. Ann. 425.

Embezzlement as agent.— Where an information against an attorney at law for embezzlement charges him as agent, and defendant, understanding that he is pleading guilty to the offense charged, pleads guilty "as an attorney at law," he pleads guilty to the offense as agent. People *v.* Converse, 74 Mich. 478, 42 N. W. 70, 16 Am. St. Rep. 648.

Where an indictment or information contains two counts, defendant cannot, by pleading guilty to one count, prevent action by the state as to any prosecution under the remaining count. Dancey *v.* State, 35 Tex. Cr. 615, 34 S. W. 113, 938.

Failure to plead as plea of guilty.— In Kentucky the absence of the accused, and his consequent failure to plead to an indictment for a misdemeanor, is equivalent to a plea of guilty. Sharp *v.* Com., 30 S. W. 414, 16 Ky. L. Rep. 840; Payne *v.* Com., 30 S. W. 416, 16 Ky. L. Rep. 839.

35. *Arkansas.*— Fletcher *v.* State, 12 Ark. 169.

Hawaii.— Hawaii *v.* Ah Cheon, 10 Hawaii 469; Hawaiian Islands *v.* Mura, 9 Hawaii 428.

Massachusetts.— Com. *v.* Kennedy, 131 Mass. 584.

Michigan.— Boody *v.* People, 43 Mich. 34, 4 N. W. 549. See also People *v.* Town, 53 Mich. 488, 19 N. W. 158.

Missouri.— State *v.* Levy, 119 Mo. 434, 24 S. W. 1026.

Nebraska.— Moore *v.* State, 53 Nebr. 831, 74 N. W. 319.

Ohio.— Akerman *v.* Lima, 8 Ohio S. & C. Pl. Dec. 430, 7 Ohio N. P. 92.

Texas.— Crow *v.* State, 6 Tex. 334.

See 14 Cent. Dig. tit. "Criminal Law," § 631.

36. Carper *v.* State, 27 Ohio St. 572.

37. State *v.* Webb, 74 Mo. 333.

38. People *v.* Lennox, 67 Cal. 113, 7 Pac. 260; People *v.* Noll, 20 Cal. 164; Cornelison *v.* Com., 84 Ky. 583, 2 S. W. 235, 8 Ky. L. Rep. 793.

39. *Illinois.*— Gardner *v.* People, 106 Ill. 76.

Indiana.— Monahan *v.* State, 135 Ind. 216, 34 N. E. 967; Myers *v.* State, 115 Ind. 554, 18 N. E. 42 (holding out false hopes); Sanders *v.* State, 85 Ind. 318, 44 Am. Rep. 29.

Kansas.— State *v.* Yates, 52 Kan. 566, 35 Pac. 209.

Massachusetts.— Green *v.* Com., 12 Allen 155; Com. *v.* Battis, 1 Mass. 95.

Michigan.— O'Hara *v.* People, 41 Mich. 623, 3 N. W. 161 (extorting plea by threat of severe punishment after conviction); Hen-

plea before giving judgment and passing sentence, and in some states such an investigation is required by statute.[40] In some states the statute requires the court to admonish defendant as to the consequences of the plea.[41]

b. Plea of Nolo Contendere. A plea of *nolo contendere*, which is still allowed in some jurisdictions, is an implied confession of the crime charged, and as regards the case in which it is entered is equivalent to a plea of guilty, except that it gives the accused the advantage of not being estopped to deny his guilt in a civil action based upon the same facts as he would be upon a plea of guilty.[42] If accepted by the court[43] sentence is imposed as upon a plea of guilty.[44]

5. Plea to Jurisdiction — a. In General. A plea to the jurisdiction is proper when the court before which the indictment is preferred has no cognizance of the offense, either because of its nature or because it was not committed within the territorial jurisdiction of the court, or when the court has no jurisdiction of the person of the defendant.[45] The fact, however, that the court is without jurisdiction may usually be shown under the general issue, or, when the want of jurisdiction appears on the face of the indictment, by demurrer or motion in arrest, and where this is so a plea to the jurisdiction is unnecessary.[46]

ning *v.* People, 40 Mich. 733. But see People *v.* Brown, 54 Mich. 15, 19 N. W. 571, holding out by judge of a hope of leniency.

Missouri.— State *v.* Stephens, 71 Mo. 535, hope of clemency.

Tennessee.— Swang *v.* State, 2 Coldw. 212, 88 Am. Dec. 593.

Texas.— King *v.* State, (Cr. App. 1898) 46 S. W. 813; O'Brien *v.* State, (Cr. App. 1896) 35 S. W. 666; Wallace *v.* State, 10 Tex. App. 407; Saunders *v.* State, 10 Tex. App. 336.

But see State *v.* Reininghaus, 43 Iowa 149, holding out false hopes as to punishment.

See 14 Cent. Dig. tit. "Criminal Law," § 632.

Ignorance of the accused.— Gardner *v.* People, 106 Ill. 76.

In Texas a statute requires that to sustain a plea of guilty it must appear that defendant was sane and that he was not influenced by fear, persuasion, or delusive hope of pardon. See O'Brien *v.* State, (Tex. Cr. App. 1896) 35 S. W. 666; Coleman *v.* State, 35 Tex. Cr. App. 404, 33 S. W. 1083; Scott *v.* State, 29 Tex. App. 217, 15 S. W. 814; Turner *v.* State, 17 Tex. App. 587; Paul *v.* State, 17 Tex. App. 583; Harris *v.* State, 17 Tex. App. 559; Wallace *v.* State, 10 Tex. App. 407; Saunders *v.* State, 10 Tex. App. 336.

40. In Michigan the statute provides that whenever a defendant pleads guilty, the court, before pronouncing judgment or sentence, shall make such investigation as will satisfy him that the plea was made freely, with a full knowledge of the accusation, and without undue influence. People *v.* Lepper, 51 Mich. 196, 16 N. W. 377; People *v.* Lewis, 51 Mich. 172, 16 N. W. 326; People *v.* Ferguson, 48 Mich. 41, 11 N. W. 777; Bayliss *v.* People, 46 Mich. 221, 9 N. W. 257. And see People *v.* Luby, 99 Mich. 89, 57 N. W. 1092. It is a sufficient inquiry as to the voluntary character of a plea of guilty to interview defendant's counsel and friends. Henning *v.* People, 40 Mich. 733. And an examination of defendant by the judge to ascertain whether his plea of guilty is voluntary is not necessarily defective because made in open court and in the presence of the prosecuting attorney and others. People *v.* Lewis, 51 Mich. 172, 16 N. W. 326; Bayliss *v.* People, 46 Mich. 221, 9 N. W. 257. But see People *v.* Stickney, 50 Mich. 99, 14 N. W. 880. Where it affirmatively appears that the judge made inquiry as to the voluntary character of the plea, there can be no assumption that defendant acted in ignorance or under compulsion. People *v.* Coveyou, 48 Mich. 353, 12 N. W. 200.

41. See Harris *v.* State, 17 Tex. App. 559, holding that a recital in the judgment that defendant, "in open court duly entered his plea of guilty," does not show a compliance with such a statute. See also Turner *v.* State, 17 Tex. App. 587; Paul *v.* State, 17 Tex. App. 583. *Compare* Scott *v.* State, 29 Tex. App. 217, 15 S. W. 814. In Texas the statutory provision that "if the defendant pleads guilty, he shall be admonished by the court of the consequences" applies only to felonies. Berliner *v.* State, 6 Tex. App. 181.

42. Com. *v.* Ingersoll, 145 Mass. 381, 14 N. E. 449; Com. *v.* Horton, 9 Pick. (Mass.) 206; Com. *v.* Holstine, 132 Pa. St. 357, 19 Atl. 273; U. S. *v.* Hartwell, 26 Fed. Cas. No. 15,318, 3 Cliff. 221; Reg. *v.* Templeman, 1 Salk. 55; 1 Chitty Cr. L. 431; 2 Hawkins P. C. c. 31, § 3.

43. Com. *v.* Ingersoll, 145 Mass. 381, 14 N. E. 449.

44. Com. *v.* Ingersoll, 145 Mass. 381, 14 N. E. 449; Com. *v.* Holstine, 132 Pa. St. 357, 19 Atl. 273, and other authorities cited in the notes preceding.

Consent of prosecutor.— Under the Massachusetts statute it must appear by the record that the plea was entered with the consent of the prosecutor. Com. *v.* Ingersoll, 145 Mass. 381, 14 N. E. 449; Com. *v.* Adams, 6 Gray (Mass.) 359.

45. 4 Bl. Comm. 333; 2 Hale P. C. 256. And see Gaston *v.* State, 11 Tex. App. 143; Brumley *v.* State, 11 Tex. App. 114; Blandford *v.* State, 10 Tex. App. 627.

46. *Indiana.*— Jones *v.* State, 74 Ind. 249.

North Carolina.— State *v.* Mitchell, 83

b. Sufficiency and Time of Filing. A plea to the jurisdiction must, like other dilatory pleas, be certain to every intent. It must specifically and clearly show the facts necessary to sustain it.[47] And such a plea must precede the plea of not guilty. The court may in its discretion refuse to allow a plea of not guilty to be withdrawn and a plea to the jurisdiction to be filed.[48]

6. Plea in Abatement[49]— a. In General. Any defect apparent on the face of the indictment, or founded on matter extrinsic of the record, rendering the indictment insufficient, may be made the ground of a plea in abatement, and if found for defendant will abate the indictment.[50] Matter in abatement must be so pleaded.[51] A plea in abatement is the proper mode of raising the objection that the indictment was found by an illegal grand jury, or illegally found by a legal grand jury;[52] that a mistake was made by the clerk in indorsing the indictment a "true bill";[53] that there has been no sufficient preliminary examination;[54] that the crime charged is not the crime for which he was extradited;[55] that there is a

N. C. 674. See State *v.* Allen, 107 N. C. 805, 11 S. E. 1016.

Tennessee.— Bennett *v.* State, 1 Swan 411.

Texas.— Field *v.* State, 34 Tex. 39; Blandford *v.* State, 10 Tex. App. 627. But see Myers *v.* State, 33 Tex. 525.

Virginia.— Fitch *v.* Com., 92 Va. 824, 24 S. E. 272; Ryan *v.* Com., 80 Va. 385.

England.— Rex *v.* Johnson, 6 East 583, 3 Smith K. B. 591, 8 Rev. Rep. 550; Parker *v.* Elding, 1 East 352; Rex *v.* Fearnley, 2 Leach C. C. 475, 1 T. R. 316; 2 Hale P. C. 291. But see 2 Hawkins P. C. c. 38, § 5.

See 14 Cent. Dig. tit. "Criminal Law," § 636.

In North Carolina, however, by statute, the offense is admitted and held to have been committed, if at all, in the county in which it is charged to have been committed, unless defendant pleads in abatement under oath, whereupon the cause is removed to the other county. State *v.* Allen, 107 N. C. 805, 11 S. E. 1016. This statute does not apply where the alleged offense was committed outside of the state. State *v.* Mitchell, 83 N. C. 674.

Title of judge to office.— A plea to the jurisdiction, on the ground that the judge presiding is not entitled to the office is demurrable, since the right of a judge to the office cannot be tried in a collateral way. State *v.* Conlan, 60 Conn. 483, 23 Atl. 150.

Plea raising question of guilt or innocence. — It is proper to overrule a plea to the jurisdiction of the court which substantially raises the question of the guilt or innocence of the accused. Salina *v.* Cooper, 45 Kan. 12, 25 Pac. 233.

Error in change of venue in a criminal case is not available by plea to the jurisdiction of the court to which the case has been transferred, but exception must be taken and reserved in the tribunal by which the change is ordered. Bowden *v.* State, 12 Tex. App. 246. *Compare* Gaston *v.* State, 11 Tex. App. 143; Brumley *v.* State, 11 Tex. App. 114.

Facts not admitted.— It is not error to refuse to sustain a plea to the jurisdiction where the correctness of such refusal depends on the existence of facts which are not admitted. Wright *v.* U. S., 158 U. S. 232, 15 S. Ct. 819, 39 L. ed. 963.

47. Taylor *v.* State, 79 Md. 130, 28 Atl. 815; Clark *v.* Mikesell, 81 Mich. 45, 45 N. W. 377; People *v.* Lent, 2 Wheel. Cr. (N. Y.) 548.

48. State *v.* Watson, 20 R. I. 354, 39 Atl. 193, 78 Am. St. Rep. 871.

49. Several pleas in abatement see *supra*, XI, B, 3, c.

50. *Alabama.*— Nugent *v.* State, 19 Ala. 540; State *v.* Williams, 5 Port. 130.

Arkansas.— Wilburn *v.* State, 21 Ark. 198.

Florida.— Donald *v.* State, 31 Fla. 255, 12 So. 695.

Indiana.— Uterburgh *v.* State, 8 Blackf. 202; Eggleston *v.* State, 6 Blackf. 436.

Michigan.— Washburn *v.* People, 10 Mich. 372.

Nebraska.— State *v.* Bailey, 57 Nebr. 204, 77 N. W. 654; Whitener *v.* State, 46 Nebr. 144, 64 N. W. 704.

North Carolina.— State *v.* Horton, 63 N. C. 595.

Virginia.— Day *v.* Com., 2 Gratt. 562; Com. *v.* Long, 2 Va. Cas. 318.

England.— Rex *v.* Hammersmith, 1 Stark. 357, 2 E. C. L. 140; 1 Chitty Cr. L. 445; 2 Hale P. C. 236, 238; 2 Hawkins P. C. c. 25, § 70.

See 14 Cent. Dig. tit. "Criminal Law," § 638 *et seq.*

An objection that no warrant has been served on the accused and that he has never been arrested cannot be raised by a plea in abatement, where the party had a preliminary examination. Sothman *v.* State, (Nebr. 1902) 92 N. W. 303.

A motion to set aside or quash an indictment is in some states equivalent to a plea in abatement. Com. *v.* Smith, 10 Bush (Ky.) 476; State *v.* Bishop, 22 Mo. App. 435.

51. Uterburgh *v.* State, 8 Blackf. (Ind.) 202; Eggleston *v.* State, 6 Blackf. (Ind.) 436; State *v.* Maher, 49 Me. 569; Washburn *v.* People, 10 Mich. 372; Whitener *v.* State, 46 Nebr. 144, 64 N. W. 704; and cases cited under the sections following.

52. See *infra*, XI, B, 6, e, f.

53. State *v.* Horton, 63 N. C. 595.

54. See *infra*, XI, B, 6, d.

55. State *v.* Roller, 30 Wash. 692, 71 Pac. 718.

misnomer of the defendant;[56] and similar objections. The defendant cannot plead in abatement matters which are admissible in defense under the plea of not guilty,[57] or any matter which has been admitted by his previous pleadings.[58] In some states pleas in abatement have been abolished.[59]

b. Form and Requisites. Pleas in abatement must specifically set forth the grounds of objection. Being dilatory pleas they are not favored and are strictly construed, and they must possess the highest degree of certainty in every particular and to every intent.[60] They must anticipate and exclude by proper allegations every legal conclusion that may be made against them, and which might defeat them.[61] A plea in abatement is bad if it is repugnant or contradicts the record,[62] presents two or more issuable facts disjunctively,[63] or alleges facts by way of recital instead of directly.[64] A plea in abatement must be in writing,[65] and signed by defendant[66] or by his counsel,[67] and by the weight of authority it must be verified as to all allegations not of record.[68] The plea should conclude with a prayer that the indictment be quashed.[69] It seems that a plea in abatement is not amendable.[70] Objections to the form of the plea are waived by joining issue thereon.[71]

56. See *infra*, X, B, 6, g.

57. State *v.* Bailey, 57 Nebr. 204, 77 N. W. 654; Keneval *v.* State, 107 Tenn. 581, 64 S. W. 897.

58. Wickwire *v.* State, 19 Conn. 477.

59. People *v.* Hooghkerk, 96 N. Y. 149; People *v.* Petrea, 30 Hun (N. Y.) 98 [*affirmed* in 92 N. Y. 128]; People *v.* Scannell, 36 Misc. (N. Y.) 483, 73 N. Y. Suppl. 1067.

60. *Alabama.*— State *v.* Brooks, 9 Ala. 9.

Florida.— Ford *v.* State, (1902) 33 So. 301; Kelly *v.* State, (1902) 33 So. 235; Easterlin *v.* State, 43 Fla. 565, 31 So. 350; Knight *v.* State, 42 Fla. 546, 28 So. 759; Miller *v.* State, 42 Fla. 266, 28 So. 208; Reeves *v.* State, 29 Fla. 527, 10 So. 901.

Illinois.— Brennan *v.* People, 15 Ill. 511.

Indiana.— State *v.* Comer, 157 Ind. 611, 62 N. E. 452; Klein *v.* State, 157 Ind. 146, 60 N. E. 1036; State *v.* Wilson, 156 Ind. 343, 59 N. E. 932; State *v.* Drake, 125 Ind. 367, 25 N. E. 434; Billings *v.* State, 107 Ind. 54, 6 N. E. 914, 7 N. E. 763, 57 Am. Rep. 77; Hardin *v.* State, 22 Ind. 347.

Maine.— State *v.* Flemming, 66 Me. 142, 22 Am. Rep. 552.

Michigan.— People *v.* Lauder, 82 Mich. 109, 46 N. W. 956; Findley *v.* People, 1 Mich. 234.

Nebraska.— Baldwin *v.* State, 12 Nebr. 61, 10 N. W. 463.

New Jersey.— State *v.* Rickey, 10 N. J. L. 83.

New York.— Dolan *v.* People, 64 N. Y. 485.

Rhode Island.— State *v.* Duggan, 15 R. I. 412, 6 Atl. 597.

Tennessee.— Dyer *v.* State, 11 Lea 509; Lewis *v.* State, 1 Head 329; State *v.* Bryant, 10 Yerg. 527.

Texas.— Thomason *v.* State, 2 Tex. App. 550.

Vermont.— State *v.* Ward, 60 Vt. 142, 14 Atl. 187; State *v.* Emery, 59 Vt. 84, 7 Atl. 129.

Virginia.— Tilley *v.* Com., 89 Va. 136, 15 S. E. 526; Lawrence *v.* Com., 86 Va. 573, 10 S. E. 840.

United States.— U. S. *v.* Greene, 113 Fed. 683; U. S. *v.* Hammond, 26 Fed. Cas. No. 15,294, 2 Woods 197; U. S. *v.* Williams, 28 Fed. Cas. No. 16,716, 1 Dill. 485.

England.— Rex *v.* Cooke, 2 B. & C. 871, 4 B. & R. 592, 2 L. J. K. B. O. S. 152, 9 E. C. L. 375; O'Connell *v.* Reg., 11 Cl. & F. 155, 1 Cox C. C. 413, 9 Jur. 25, 8 Eng. Reprint 1061; 4 Bac. Abr. 51.

See 14 Cent. Dig. tit. "Criminal Law," § 645 *et seq.*

Common-law rules.— In the absence of statute, the form of plea must be tested by the rules of common law. U. S. *v.* Williams, 28 Fed. Cas. No. 16,716, 1 Dill. 485.

Duplicity.— A plea in abatement must not set up two distinct grounds of abatement. State *v.* Emery, 59 Vt. 84, 7 Atl. 129. See *supra*, XI, B, 3, b.

61. State *v.* Hewes, 60 Kan. 765, 57 Pac. 959; Dyer *v.* State, 11 Lea (Tenn.) 509; State *v.* Wills, 11 Humphr. (Tenn.) 222.

62. Hardin *v.* State, 22 Ind. 347; Turk *v.* State, 7 Ohio 240, Pt. II; Stahl *v.* State, 11 Ohio Cir. Ct. 23.

63. State *v.* Ward, 60 Vt. 142, 14 Atl. 187.

64. State *v.* Emery, 59 Vt. 84, 7 Atl. 129.

65. Crawford *v.* State, 112 Ala. 1, 21 So. 214; State *v.* Farr, 12 Rich. (S. C.) 24.

66. State *v.* Middleton, 5 Port. (Ala.) 484.

67. Davids *v.* People, 192 Ill. 176, 61 N. E. 537; Bohanan *v.* State, 15 Nebr. 209, 18 N. W. 129.

68. State *v.* Allen, 91 Me. 258, 39 Atl. 994; Findley *v.* People, 1 Mich. 234; Com. *v.* Sayers, 8 Leigh (Va.) 722; Rex *v.* Grainger, 3 Burr. 1617. But see U. S. *v.* Hammond, 26 Fed. Cas. No. 15,294, 2 Woods 197, holding that a plea in abatement alleging a disqualification of one of the grand jurors need not be verified. And see State *v.* Welch, 33 Mo. 33, holding that failure to verify a plea in abatement is not ground for demurrer.

69. State *v.* Middleton, 5 Port. (Ala.) 484; Findley *v.* People, 1 Mich. 234; Lewis *v.* State, 1 Head (Tenn.) 329; U. S. *v.* Hammond, 26 Fed. Cas. No. 15,294, 2 Woods 197.

70. Rex *v.* Cooke, 2 B. & C. 871, 4 B. & R. 592, 2 L. J. K. B. O. S. 152, 9 E. C. L. 375.

71. Carter *v.* Territory, 1 N. M. 317.

c. Time and Order of Pleading. A plea in abatement need not be filed at the term at which the indictment is found, but may be filed when the prisoner is arraigned.[72] A plea in abatement should be pleaded on the arraignment and before pleading not guilty or otherwise in bar.[73] The court may in its discretion refuse to allow a plea of not guilty to be withdrawn and a plea in abatement to be filed.[74] The right to plead in abatement is waived by a plea in bar,[75] or by pleading not guilty and going to trial.[76] Where a statute limits the time within which a plea in abatement may be filed, delay beyond such time is not excused by the mere fact that defendant did not know the facts, but he must have exercised reasonable diligence to ascertain them.[77]

d. Want or Insufficiency of Preliminary Examination. The objection that the accused has had no preliminary examination, or that the examination was not a proper one, may and should be raised by a plea in abatement;[78] and the same is

72. Lawrence *v.* State, 59 Ala. 61; Vattier *v.* State, 4 Blackf. (Ind.) 73; State *v.* Jackson, 82 N. C. 565. See also Harrington *v.* State, 83 Ala. 9, 3 So. 425, holding that the Alabama statute requiring a plea in abatement based on the ground that the grand jury was improperly drawn to be filed at the term at which the indictment is found is directory only. *Compare* State *v.* Swafford, 1 Lea (Tenn.) 274.

After application for change of venue.— A plea in abatement should be filed before an application for a change of venue. Caldwell *v.* State, 41 Tex. 86.

After withdrawal of demurrer.— Brannigan *v.* People, 3 Utah 488, 24 Pac. 767.

After general continuance.—State *v.* Myers, 10 Lea (Tenn.) 717; State *v.* Swafford, 1 Lea (Tenn.) 274; State *v.* Deason, 6 Baxt. (Tenn.) 511.

On appeal from summary conviction.— Smith *v.* State, 19 Conn. 493.

73. *Alabama.*— Grimes *v.* State, 105 Ala. 86, 17 So. 184; Haley *v.* State, 63 Ala. 89.

Connecticut.— State *v.* Dibble, 59 Conn. 168, 22 Atl. 155; Smith *v.* State, 19 Conn. 493.

Florida.— Hodge *v.* State, 29 Fla. 500, 10 So. 556; Ellis *v.* State, 25 Fla. 702, 6 So. 768.

Georgia.— Dutton *v.* State, 92 Ga. 14, 18 S. E. 545; Moseley *v.* State, 74 Ga. 404.

Indiana.— Pointer *v.* State, 89 Ind. 255; State *v.* Freeman, 6 Blackf. 248.

Iowa.— State *v.* Winstrand, 37 Iowa 110.

Kentucky.— Com. *v.* Smith, 10 Bush 476.

Maine.— State *v.* Carver, 49 Me. 588, 77 Am. Dec. 275.

Maryland.— Mills *v.* State, 76 Md. 274, 25 Atl. 229; Cooper *v.* State, 64 Md. 40, 20 Atl. 986.

Massachusetts.— Com. *v.* Butler, 1 Allen 4; Martin *v.* Com., 1 Mass. 347.

Mississippi.— McQuillen *v.* State, 8 Sm. & M. 587.

Missouri.— Sunday *v.* State, 14 Mo. 417.

Nevada.— State *v.* Burns, 8 Nev. 251.

North Carolina.— State *v.* Jones, 88 N. C. 671; State *v.* Watson, 86 N. C. 624; State *v.* Jackson, 82 N. C. 565; State *v.* Baldwin, 80 N. C. 390; State *v.* Seaborn, 15 N. C. 305.

Pennsylvania.— Com. *v.* Jackson, 1 Grant 262.

South Carolina.— State *v.* Farr, 12 Rich. 24; State *v.* Montague, 2 McCord 257.

Tennessee.— Dyer *v.* State, 11 Lea 509; Epperson *v.* State, 5 Lea 291 (holding that by pleading not guilty and going to trial defendant waives a plea in abatement on which no action is taken); State *v.* Swafford, 1 Lea 274; State *v.* Deason, 6 Baxt. 511.

Virginia.— Com. *v.* Scott, 10 Gratt. 749.

Wisconsin.— Ryan *v.* State, 83 Wis. 486, 53 N. W. 836.

United States.— Agnew *v.* U. S., 165 U. S. 36, 17 S. Ct. 235, 41 L. ed. 624; U. S. *v.* Gale, 109 U. S. 65, 3 S. Ct. 1, 27 L. ed. 857.

England.— 2 Hale P. C. 175; 2 Hawkins P. C. c. 34, § 4.

See 14 Cent. Dig. tit. "Criminal Law," §§ 643, 644.

74. In addition to the cases above cited see *supra*, XI, B, 3, f.

75. *Alabama.*— Grimes *v.* State, 105 Ala. 86, 17 So. 184; Haley *v.* State, 63 Ala. 89.

Florida.— Hodge *v.* State, 29 Fla. 500, 10 So. 556; Ellis *v.* State, 25 Fla. 702, 6 So. 768.

Indiana.— Pointer *v.* State, 89 Ind. 255; State *v.* Freeman, 6 Blackf. 248.

Kentucky.— Com. *v.* Smith, 10 Bush 476.

Maine.— State *v.* Carver, 49 Me. 588, 77 Am. Dec. 275.

Massachusetts.— Com. *v.* Butler, 1 Allen 4.

Mississippi.— McQuillen *v.* State, 8 Sm. & M. 587.

North Carolina.— State *v.* Watson, 86 N. C. 624; State *v.* Seaborn, 15 N. C. 305.

Tennessee.— Dyer *v.* State, 11 Lea 509.

Virginia.— Clore's Case, 8 Gratt. 606.

United States.— U. S. *v.* Gale, 109 U. S. 65, 3 S. Ct. 1, 27 L. ed. 857.

See 14 Cent. Dig. tit. "Criminal Law," §§ 643, 644.

76. Epperson *v.* State, 5 Lea (Tenn.) 291; State *v.* Deason, 6 Baxt. (Tenn.) 511; Thompson *v.* State, (Tex. Cr. App. 1901) 62 S. W. 919.

77. Moorer *v.* State, 115 Ala. 192, 22 So. 592.

78. Reed *v.* State, (Nebr. 1902) 92 N. W. 321; State *v.* Bailey, (Nebr. 1898) 77 N. W. 654; Cowan *v.* State, 22 Nebr. 519, 55 N. W. 405. But see Washburn *v.* People, 10 Mich. 372, where the court suggested a motion to quash the information as a proper and a simpler course.

true of the objection that the offense charged in the indictment or information differs from that charged in the preliminary complaint or affidavit.[79]

e. Defects in Drawing or Impaneling, or in the Constitution of Grand Jury. In the absence of a prohibitive statute, the accused may and should except to the organization of a grand jury, to the incompetency of the persons composing it, or to any irregularity in summoning them, by a plea in abatement to the indictment. He may base a plea in abatement upon any objection which would have been a good cause of challenge.[80] In some jurisdictions the grounds of objection to the grand jury which may be raised by a plea in abatement are limited by statute,[81] and in others the defendant cannot plead in abatement, but must raise his objection by challenge, unless he has no opportunity to do so.[82] In such a plea the greatest accuracy and certainty are required.[83] It must specifically point

The plea must state not only that the defendant did not have any preliminary examination but also that he was not a fugitive from justice, where a preliminary examination is unnecessary in such a case. State *v.* Riggs, 47 Kan. 507, 28 Pac. 204; State *v.* White, 44 Kan. 514, 25 Pac. 33.

Time of plea.— A plea in abatement based on the illegality of the preliminary examination must be made before a plea of not guilty, unless the latter plea is withdrawn by leave of the court. Ryan *v.* State, 83 Wis. 486, 53 N. W. 836. See *supra*, XI, B, 6, c.

79. Whitner *v.* State, 46 Nebr. 144, 64 N. W. 704.

80. *Alabama.*— Nugent *v.* State, 19 Ala. 540; State *v.* Middleton, 5 Port. 484; State *v.* Greenwood, 5 Port. 474; State *v.* Williams, 5 Port. 130.

Arkansas.— Wilburn *v.* State, 21 Ark. 198; Brown *v.* State, 13 Ark. 96; Shropshire *v.* State, 12 Ark. 190.

Florida.— Tervin *v.* State, 37 Fla. 396, 20 So. 551; Potsdamer *v.* State, 17 Fla. 895; Burroughs *v.* State, 17 Fla. 643; Kitrol *v.* State, 9 Fla. 9.

Indiana.— Henning *v.* State, 106 Ind. 386, 6 N. E. 803, 55 Am. Rep. 756; Pointer *v.* State, 89 Ind. 255; Mershon *v.* State, 51 Ind. 14; Hardin *v.* State, 22 Ind. 347.

Maine.— State *v.* Carver, 49 Me. 588, 77 Am. Dec. 275.

Maryland.— Clare *v.* State, 30 Md. 163.

Massachusetts.— Com. *v.* Smith, 9 Mass. 107.

Mississippi.— Rawls *v.* State, 8 Sm. & M. 599; McQuillen *v.* State, 8 Sm. & M. 587.

Nebraska.— State *v.* Bailey, (1898) 77 N. W. 654.

North Carolina.— State *v.* Haywood, 73 N. C. 437.

Rhode Island.— State *v.* Davis, 12 R. I. 492, 34 Am. Rep. 704.

Tennessee.— State *v.* Dines, 10 Humphr. 512; State *v.* Duncan, 7 Yerg. 271.

Texas.— Martin *v.* State, 22 Tex. 214; Vanhook *v.* State, 12 Tex. 252; State *v.* Foster, 9 Tex. 65; Lewis *v.* State, 42 Tex. Cr. 278, 59 S. W. 1116.

Vermont.— State *v.* Johnson, 72 Vt. 118, 47 Atl. 398; State *v.* Ward, 60 Vt. 142, 14 Atl. 187.

Virginia.— Com. *v.* Long, 2 Va. Cas. 318.

Wisconsin.— Newman *v.* State, 14 Wis. 393.

United States.— U. S. *v.* Hammond, 26 Fed. Cas. No. 15,294, 2 Woods 197.

But see Com. *v.* Chauncey, 2 Ashm. (Pa.) 90.

See 14 Cent. Dig. tit. "Criminal Law," § 640. And see GRAND JURIES.

Whether the grand jury was sworn according to the requirements of the law cannot be made the subject of a plea in abatement, but must be ascertained by an inspection of the record. Smith *v.* State, 28 Miss. 728.

That grand jurors were not reputable is no ground for plea in an abatement to an indictment. Hardin *v.* State, 22 Ind. 347.

Time of pleading see *supra*, XI, B, 6, c.

81. Germolgez *v.* State, 99 Ala. 216, 13 So. 517; Cooper *v.* State, 120 Ind. 377, 22 N. E. 320; State *v.* Turner, 63 Kan. 233, 65 Pac. 217; State *v.* Turlington, 102 Mo. 642, 15 S. W. 141.

82. *Georgia.*— Fisher *v.* State, 93 Ga. 309, 20 S. E. 329; Lascelles *v.* State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216.

Iowa.— Dixon *v.* State, 3 Iowa 416.

Mississippi.— Lee *v.* State, 45 Miss. 114.

Missouri.— State *v.* Drogmond, 55 Mo. 87; State *v.* Connell, 49 Mo. 282; State *v.* Bleekley, 18 Mo. 428; State *v.* Freeze, 30 Mo. App. 347.

Oklahoma.— Stanley *v.* U. S., 1 Okla. 336, 33 Pac. 1025.

Texas.— Kemp *v.* State, 11 Tex. App. 174.

See 14 Cent. Dig. tit. "Criminal Law," §§ 640, 647.

Opportunity to challenge.— A plea based on an allegation that defendant had no opportunity to challenge because he was in jail must show that he was in jail when the jurors were sworn. Hauk *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; Mershon *v.* State, 51 Ind. 14.

After challenge.— The defendant cannot plead in abatement the same grounds or facts upon which he has challenged the array of the grand jury. McClary *v.* State, 75 Ind. 260; Meiers *v.* State, 56 Ind. 336.

83. State *v.* Brooks, 9 Ala. 9; Reeves *v.* State, 29 Fla. 527, 10 So. 901; U. S. *v.* Chaires, 40 Fed. 820; U. S. *v.* Hammond, 26 Fed. Cas. No. 15,294, 2 Woods 197. See *supra*, XI, B, 6, b.

out the particular objection or defect relied on,[84] and must negative every conclusion in favor of the legality of the drawing and impaneling.[85]

f. Irregularities in Proceedings of Grand Jury. In some jurisdictions it is held that the fact that an indictment is found without the concurrence of the number of grand jurors required by law or otherwise irregularly may be shown by a plea in abatement,[86] or on a motion to strike the indictment from the files;[87] but in others it is held that an indictment properly returned and indorsed is conclusive of the regularity of its finding, that the proper number concurred therein, and that a plea in abatement based on irregularity in the proceedings cannot be allowed.[88] A plea in abatement will not lie on the ground that the evidence upon which the grand jury found an indictment was insufficient,[89] or because of alleged error in the special charge given by the judge to the grand jury.[90]

g. Misnomer of Defendant. A misnomer of the defendant in an indictment or information may and must be pleaded in abatement,[91] and the accused cannot, after plea of not guilty has been entered and the trial begun, be heard to object to a misnomer in the indictment.[92] A plea in abatement for misnomer must state,

84. *Georgia.*— Wellman *v.* State, 100 Ga. 576, 28 S. E. 605.

Nebraska.— Priest *v.* State, 10 Nebr. 393, 9 N. W. 468.

New York.— Dolan *v.* People, 64 N. Y. 485.

Ohio.— Stahl *v.* State, 11 Ohio Cir. Ct. 23, 5 Ohio Cir. Dec. 29.

Rhode Island.—State *v.* Duggan, 15 R. I. 412, 6 Atl. 597.

Virginia.— Tilley *v.* Com., 89 Va. 136, 15 S. E. 526.

Wisconsin.— Newman *v.* State, 14 Wis. 393.

United States.— U. S. *v.* Greene, 113 Fed. 683.

See 14 Cent. Dig. tit. "Criminal Law," § 647.

85. *Alabama.*— State *v.* Brooks, 9 Ala. 9.

Florida.— Shiver *v.* State, 41 Fla. 630, 27 So. 36; Tervin *v.* State, 37 Fla. 396, 20 So. 551.

Georgia.— Timberlake *v.* State, 100 Ga. 66, 27 S. E. 158.

Indiana.— State *v.* Newer, 7 Blackf. 307.

Maine.— State *v.* Ward, 64 Me. 545.

Michigan.— People *v.* Lauder, 82 Mich. 109, 46 N. W. 956.

Rhode Island.— State *v.* Mead, 15 R. I. 416, 6 Atl. 867; State *v.* Duggan, 15 R. I. 412, 6 Atl. 597. And see State *v.* Rife, 18 R. I. 596, 30 Atl. 467.

Texas.— Sayle *v.* State, 8 Tex. 120.

Virginia.— Com. *v.* Thompson, 4 Leigh 667, 26 Am. Dec. 339.

West Virginia.— State *v.* Carter, 49 W. Va. 709, 39 S. E. 611.

See 14 Cent. Dig. tit. "Criminal Law," § 647.

86. Donald *v.* State, 31 Fla. 255, 12 So. 695; *Ex p.* Warris, 28 Fla. 371, 9 So. 718; Low's Case, 4 Me. 439, 16 Am. Dec. 271; Com. *v.* Smith, 9 Mass. 107. And see GRAND JURIES.

A plea that an incompetent witness testified before the grand jury must show that he testified to a material and necessary fact, and that he was the sole witness to it. People *v.* Lauder, 82 Mich. 109, 46 N. W. 956.

Third person in jury room.— Where the accused pleads that there was a third person, not an officer of the court, present at the hearing before the grand jury, he must allege that such person was not a witness. Lawrence *v.* Com., 86 Va. 573, 10 S. E. 840.

87. Sparrenberger *v.* State, 53 Ala. 481, 25 Am. Rep. 643; Jillard *v.* Com., 26 Pa. St. 169.

88. *Connecticut.*—State *v.* Fasset, 16 Conn. 457.

Indiana.— State *v.* Comer, 157 Ind. 611, 62 N. E. 452; Stewart *v.* State, 24 Ind. 142.

Iowa.— State *v.* Fowler, 52 Iowa 103, 2 N. W. 983.

New Jersey.— State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270.

New York.— Hope *v.* People, 83 N. Y. 418, 38 Am. Rep. 460.

89. Hope *v.* People, 83 N. Y. 418, 34 Am. Rep. 460.

90. Stahl *v.* State, 11 Ohio Cir. Ct. 23, 5 Ohio Cir. Dec. 29.

91. *Alabama.*— Washington *v.* State, 68 Ala. 85; Daniels *v.* State, 60 Ala. 56; Lawrence *v.* State, 59 Ala. 61; Miller *v.* State, 54 Ala. 155.

Arkansas.— Gabe *v.* State, 6 Ark. 519.

Illinois.— Davids *v.* People, 192 Ill. 176, 61 N. E. 537.

Indiana.— Gardner *v.* State, 4 Ind. 632.

Maine.— State *v.* Knowlton, 70 Me. 200.

Massachusetts.— Com. *v.* Fredericks, 119 Mass. 199; Com. *v.* Dedham, 16 Mass. 141.

New Hampshire.— State *v.* Narcarm, 69 N. H. 237, 45 Atl. 744.

Pennsylvania.— Com. *v.* Demain, Brightly 441, 3 Pa. L. J. Rep. 487, 6 Pa. L. J. 29.

South Carolina.— State *v.* Lorey, 2 Brev. 395.

Wisconsin.— State *v.* Brunell, 29 Wis. 435.

England.— Rex *v.* Shakspeare, 10 East 83; 2 Hale P. C. 237.

See 14 Cent. Dig. tit. "Criminal Law," § 642.

92. *Georgia.*— Dutton *v.* State, 92 Ga. 14, 18 S. E. 545.

Illinois.— Davids *v.* People, 192 Ill. 176, 61 N. E. 537.

not only the true name of the accused, but also that he was not commonly known and called by the name under which he was indicted.[93]

h. Another Indictment Pending. The fact that another indictment is pending against the accused for the same crime is no ground for a plea in abatement.[94]

i. Demurrer to Plea in Abatement. If a plea in abatement is insufficient or defective, it may be demurred to; and this is the proper way of raising the objection, rather than by motion to strike out.[95] On such demurrer judgment should be rendered against the party who has committed the first fault in pleading.[96]

j. Replication and Issue. An issue of fact on a plea in abatement sufficient in form must be raised by replication,[97] and where issue is taken any defects in the plea which would have been a ground for demurrer are thereby waived.[98]

k. Evidence. The burden of proof is on defendant, under a plea in abatement, to show by competent evidence the facts on which his plea is based.[99] On an issue of misnomer the state may show that defendant pleaded in another court to the name under which he is indicted,[1] or that he has been called by that name and has answered to it in conversation.[2]

l. Trial and Determination. Where the issue on a plea in abatement may be determined by inspecting the record,[3] or where it involves a question of law,[4] or

Iowa.— State *v.* Winstrand, 37 Iowa 110.
Nevada.— State *v.* Burns, 8 Nev. 251.
New York.— People *v.* Smith, 1 Park. Cr. 329.
South Carolina.— State *v.* Farr, 12 Rich. 24; State *v.* Montague, 2 McCord 257.
Canada.— *Ex p.* Corrigan, 2 Can. Cr. Cas. 591.
See 14 Cent. Dig. tit. "Criminal Law," § 643; and *supra*, XI, B, 6, c.

93. *Alabama.*— Ruffin *v.* State, 124 Ala. 91, 27 So. 307; Bright *v.* State, 76 Ala. 96; Wren *v.* State, 70 Ala. 1.
Florida.— Waldron *v.* State, 41 Fla. 265, 26 So. 701.
Georgia.— Henderson *v.* State, 95 Ga. 326, 22 S. E. 537.
Illinois.— Amann *v.* People, 76 Ill. 188.
Indiana.— State *v.* Cooper, 96 Ind. 331.
Pennsylvania.— Com. *v.* Demain, Brightly 441, 3 Pa. L. J. Rep. 487, 6 Pa. L. J. 29.
Tennessee.— State *v.* Hughes, 1 Swan 261.
United States.— U. S. *v.* Janes, 74 Fed. 543.
See 14 Cent. Dig. tit. "Criminal Law," § 650.
It is a question for the jury to determine, by personal inspection, whether the plea of misnomer is sustained, where defendant's name is so written in the indictment that it is uncertain what it is. Washington *v.* State, 113 Ga. 698, 39 S. E. 294.

94. *Alabama.*— Bell *v.* State, 115 Ala. 25, 22 So. 526.
Florida.— Knight *v.* State, 42 Fla. 546, 28 So. 759.
Georgia.— Williams *v.* State, 57 Ga. 478.
Indiana.— Hardin *v.* State, 22 Ind. 347.
Massachusetts.— Com. *v.* Drew, 3 Cush. 279.
Nebraska.— Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744.
Compare Austin *v.* State, 12 Mo. 393.

95. *Alabama.*— McLeroy *v.* State, 120 Ala. 274, 25 So. 247.
Indiana.— State *v.* Barrett, 54 Ind. 434.
Massachusetts.— Com. *v.* Lannan, 13 Allen 563.
Vermont.— State *v.* Emery, 59 Vt. 84, 7 Atl. 129.
Virginia.— Com. *v.* Jackson, 2 Va. Cas. 501.
Wisconsin.— Newman *v.* State, 14 Wis. 393.
England.— Rex *v.* Cooke, 2 B. & C. 618, 4 D. & R. 618, 9 E. C. L. 271; Rex *v.* Clark, 1 D. & R. 43, 16 E. C. L. 17.
See 14 Cent. Dig. tit. "Criminal Law," § 652.

96. People *v.* Krummer, 4 Park. Cr. (N. Y.) 217; U. S. *v.* Lawrence, 26 Fed. Cas. No. 15,573, 13 Blatchf. 295. In criminal as in civil pleading, a demurrer will reach fatal defects in any of the pleadings. Thus a demurrer to a replication to a plea in abatement will reach the plea. Reeves *v.* State, 29 Fla. 527, 10 So. 901; Com. *v.* Hazlett, 16 Pa. Super. Ct. 534; State *v.* Wills, 11 Humphr. (Tenn.) 222.

97. State *v.* Malia, 79 Me. 540, 11 Atl. 602; Com. *v.* Dockham, Thach. Cr. Cas. (Mass.) 238; Lewis *v.* State, 1 Head (Tenn.) 329; Baker *v.* State, 80 Wis. 416, 50 N. W. 518; Martin *v.* State, 79 Wis. 165, 48 N. W. 119. The replication must be certain (Cochran *v.* State, 89 Ala. 40, 8 So. 78), and it may be interposed after a demurrer to the plea is overruled (People *v.* O'Neill, 107 Mich. 556, 65 N. W. 540).

98. State *v.* Ligon, 7 Port. (Ala.) 167.

99. Everson *v.* State, (Nebr. 1903) 93 N. W. 394.

1. White *v.* State, 72 Ala. 195.

2. State *v.* Homer, 40 Me. 438; Com. *v.* Brigham, 147 Mass. 414, 18 N. E. 167; Com. *v.* Gale, 11 Gray (Mass.) 320; Rockwell *v.* State, 12 Ohio St. 427.

3. Chase *v.* State, 46 Miss. 683; Smith *v.* State, 28 Miss. 728; Hoover *v.* State, 48 Nebr. 184, 66 N. W. 1117.

4. State *v.* Nield, 4 Kan. App. 626, 45 Pac. 623; State *v.* Goddard, 162 Mo. 198, 62 S. W.

the sufficiency of evidence,[5] it should be tried by the court. Where an issue of fact necessitates hearing parol evidence it is for the jury.[6]

m. Judgment. At common law the accused could not as a matter of right plead over when an issue of fact was found against him on a plea in abatement to an indictment for a misdemeanor,[7] although under similar circumstances on trial for felony he had a right to plead over to the felony.[8] At the present time under an indictment either for a misdemeanor or for a felony, where the state's demurrer to a plea in abatement is sustained, defendant may plead over.[9]

7. Special Pleas in Bar — a. In General. In a criminal prosecution defendant may and should plead specially in bar any matter in confession and avoidance constituting a defense and not admissible under a plea of not guilty.[10] The defendant need not specially plead any defense which is admissible under the plea of not guilty,[11] and by the weight of authority a special plea setting up a defense which is admissible under the plea of not guilty is bad and should be stricken out,[12] unless the objection is waived by the state.[13] In some jurisdictions, by statute, all pleas in bar except the plea of not guilty have been dispensed with, and

697; Turney *v.* State, 40 Tex. Cr. 561, 51 S. W. 243.

5. Campbell *v.* State, 111 Wis. 152, 86 N. W. 855.

6. *Alabama.*— Bean *v.* State, 126 Ala. 1, 28 So. 578.

Arkansas.— Cooper *v.* State, 21 Ark. 228; Bond *v.* State, 17 Ark. 290; Wilson *v.* State, 16 Ark. 601.

Kansas.— State *v.* Nield, 4 Kan. App. 626, 45 Pac. 623.

Maine.— State *v.* Sweetsir, 53 Me. 438.

Mississippi.— Stokes *v.* State, 24 Miss. 621.

Nebraska.— Bohanan *v.* State, 15 Nebr. 209, 18 N. W. 129.

Virginia.— Day *v.* Com., 2 Gratt. 562.

See 14 Cent. Dig. tit. "Criminal Law," § 655.

Where several are indicted and one pleads misnomer and the others not guilty, separate juries for these issues are not necessary, and the plea of misnomer may be tried by the jury which determines the general issue. Schram *v.* People, 29 Ill. 162.

7. *Arkansas.*— Guess *v.* State, 6 Ark. 147.

Illinois.— Schram *v.* People, 29 Ill. 162.

Massachusetts.— Com. *v.* Carr, 114 Mass. 280, 19 Am. Rep. 345.

Mississippi.— Miazza *v.* State, 36 Miss. 613.

England.— Kirton *v.* Williams, Cro. Eliz. 495; Rex *v.* Gibson, 8 East 107; 1 Chitty Cr. L. 451.

See 14 Cent. Dig. tit. "Criminal Law," § 656.

8. 2 Hale P. C. 256.

9. *Alabama.*— Fisher *v.* State, 46 Ala. 717.

Arkansas.— Harding *v.* State, 22 Ark. 210; Buzzard *v.* State, 20 Ark. 106.

Delaware.— State *v.* Reiman, 3 Pennew. 73, 50 Atl. 268.

Maine.— State *v.* Allen, 91 Me. 258, 39 Atl. 994.

Massachusetts.— Com. *v.* Golding, 14 Gray 49.

New York.— Decker *v.* People, 25 Hun 67.

Ohio.— Hirn *v.* State, 1 Ohio St. 15.

Pennsylvania.— Barge *v.* Com., 3 Penr. & W. 262, 23 Am. Dec. 81.

Tennessee.— Lewis *v.* State, 1 Head 329.

England.— Rex *v.* Cooke, 2 B. & C. 871, 4 B. & R. 592, 2 L. J. K. B. O. S. 152, 9 E. C. L. 375.

See 14 Cent. Dig. tit. "Criminal Law," § 656.

10. 1 Chitty Cr. L. 472. See also Davis *v.* State, 152 Ind. 145, 52 N. E. 754; Neaderhouser *v.* State, 28 Ind. 257; Frayser *v.* State, 16 Lea (Tenn.) 671.

Plea of former acquittal or conviction see *infra*, XI, B, 7, h.

11. Albritton *v.* State, 94 Ala. 76, 10 So. 426 (alibi); Hankins *v.* People, 106 Ill. 628; Neaderhouser *v.* State, 28 Ind. 257; Eggleston *v.* State, 6 Blackf. (Ind.) 436.

Plea of former acquital or conviction see *infra*, XI, B, 7, h.

12. *Georgia.*— Danforth *v.* State, 75 Ga. 614, 58 Am. Rep. 480.

Illinois.— Hankins *v.* People, 106 Ill. 628.

Iowa.— Peters *v.* State, 3 Greene 74, holding that where a plea to an indictment for selling liquor without a license admitted the selling, but averred a license, and issue was joined upon that averment, the issue was immaterial and judgment should be arrested.

Maryland.— Fox *v.* State, 89 Md. 381, 43 Atl. 775, 73 Am. St. Rep. 193.

Massachusetts.— Com. *v.* Lannan, 13 Allen 563.

North Carolina.— State *v.* Potts, 100 N. C. 457, 6 S. E. 657.

Ohio.— Billigheimer *v.* State, 32 Ohio St. 435; Hirn *v.* State, 1 Ohio St. 15.

South Carolina.— State *v.* Howard, 2 Brev. 165.

Tennessee.— Keneval *v.* State, 107 Tenn. 581, 64 S. W. 897. But see Frayser *v.* State, 16 Lea 671.

West Virginia.— State *v.* Evans, 33 W. Va. 417, 10 S. E. 792.

England.— 1 Chitty Cr. L. 473.

But see Neaderhouser *v.* State, 28 Ind. 257; Thompson *v.* State, 54 Miss. 740.

See 14 Cent. Dig. tit. "Criminal Law," § 657.

13. Hirn *v.* State, 1 Ohio St. 15, holding that the state waives objection by demurring generally or taking issue on the plea.

under the latter plea defendant may avail himself of any meritorious defense he may have,[14] and under such a statute it has been held that a special plea in bar is demurrable.[15] A special plea is bad if it sets up a fact established by the record,[16] if it presents in different words the same defense and issue as is presented by another plea,[17] or if it does not answer the whole indictment or all of the counts to which it is pleaded.[18] A special plea in bar should be pleaded before a plea of not guilty, and it may be disregarded if a plea of not guilty is on the record, unless the court in its discretion allows the latter plea to be withdrawn.[19] In some states by statute no plea is allowed except the pleas of guilty, not guilty, and former acquittal or conviction.[20]

b. Replication and Demurrer. If the prosecuting officer disputes the facts set forth in a special plea in bar, he should reply thereto and raise an issue of fact.[21] If he denies its sufficiency in law he should demur.[22] By demurring to a plea in bar the state admits all facts well pleaded,[23] but for the purposes of the demurrer only and not for the purposes of the trial, and the overruling of the demurrer does not entitle defendant to a discharge.[24] Where defendant demurs to a replication to his special plea in bar, and the demurrer is overruled, he cannot rejoin to the replication without first withdrawing his demurrer.[25]

c. Judgment and Pleading Over. If a special plea in bar is sustained defendant is discharged.[26] If it is held bad on demurrer or not sustained by the proof, the judgment in case of a misdemeanor is at common law final as upon conviction;[27] but in the case of a felony the judgment is *respondeat ouster* unless defendant has pleaded over with his special plea, in which case there is a trial on the plea of not guilty.[28] At the present time the judgment is *respondeat ouster* in all cases, whether the offense is a felony or a misdemeanor.[29]

d. Plea of Limitations.[30] In most of the cases it has been held that the statute of limitations is available under the general issue, and need not be specially pleaded,[31] and in some states this is so by the express provision of a

14. Hankins *v.* People, 106 Ill. 628; Nearderhouser *v.* State, 28 Ind. 257; Eggleston *v.* State, 6 Blackf. (Ind.) 436. See State *v.* Howard, 2 Brev. (S. C.) 165.

15. Hankins *v.* People, 106 Ill. 628. But see to the contrary Davis *v.* State, 152 Ind. 145, 52 N. E. 754; Neaderhouser *v.* State, 28 Ind. 257.

16. People *v.* Harding, 53 Mich. 48, 481, 18 N. W. 555, 19 N. W. 155, 51 Am. St. Rep. 95.

17. Smith *v.* Com., 85 Va. 924, 9 S. E. 148.

18. Fox *v.* State, 89 Md. 381, 43 Atl. 775, 73 Am. St. Rep. 193; Marshall *v.* State, 6 Nebr. 120, 29 Am. Rep. 363. And see Nauer *v.* Thomas, 13 Allen (Mass.) 572.

19. Com. *v.* Blake, 12 Allen (Mass.) 188; George *v.* State, 59 Nebr. 163, 80 N. W. 486; Davis *v.* State, 51 Nebr. 301, 70 N. W. 984; Marshall *v.* State, 6 Nebr. 120, 29 Am. Rep. 363; Reg. *v.* Charlesworth, 1 B. & S. 460, 9 Cox C. C. 44, 8 Jur. N. S. 1091, 31 L. J. M. C. 25, 5 L. T. Rep. N. S. 150, 9 Wkly. Rep. 842, 101 E. C. L. 460.

20. Under a statute, providing that the only pleas to an indictment shall be guilty or not guilty or a plea of former acquittal or conviction, where one is indicted for perjury on his trial for larceny, of which he was acquitted, it is proper to strike out a plea setting out what defendant claimed was in issue on the trial for larceny, and averring that the same matters were in issue under the indictment for perjury. State *v.* Caywood, 96 Iowa 367, 65 N. W. 385. See also Davis *v.* State, 152 Ind. 145, 52 N. E. 754.

21. 1 Chitty Cr. L. 460. And see Hite *v.* State, 9 Yerg. (Tenn.) 357; Rex *v.* Wildey, 1 M. & S. 183. See also *infra*, XI, B, 7, h, (IV).

22. State *v.* Locklin, 59 Vt. 654, 10 Atl. 464; Rex *v.* Vandercom, 2 East P. C. 519, 2 Leach C. C. 715. And see *infra*, XI, B.

23. Smith *v.* State, 42 Nebr. 356, 60 N. W. 585.

24. State *v.* Barrett, 54 Ind. 434.

25. Page *v.* Com., 27 Gratt. (Va.) 954.

26. 2 Hale P. C. 391.

27. 1 Chitty Cr. L. 461. See *infra*, XI, B, 7, h, (VII).

28. Com. *v.* Wade, 17 Pick. (Mass.) 395; Com. *v.* Roby, 12 Pick. (Mass.) 496, 510; Rex *v.* Vandercom, 2 East P. C. 519, 2 Leach C. C. 715; Rex *v.* Roche, 1 Leach C. C. 160. See *infra*, XI, B, 7, h, (VII).

29. *Massachusetts.*— Com. *v.* Golding, 14 Gray 49; Com. *v.* Goddard, 13 Mass. 455.
New York.— Decker *v.* People, 25 Hun 67.
Ohio.— Hirn *v.* State, 1 Ohio St. 15.
Pennsylvania.— Barge *v.* Com., 3 Penr. & W. 262, 23 Am. Dec. 81.
Tennessee.— Fulkner *v.* State, 3 Heisk. 33.
Wisconsin.— McFarland *v.* State, 68 Wis. 400, 32 N. W. 226, 60 Am. Rep. 867.
See *infra*, XI, B, 7, h, (VII).

30. Limitation of prosecutions see *supra*, VIII.

31. *Arkansas.*— State *v.* Gill, 33 Ark. 129.
Florida.— Nelson *v.* State, 17 Fla. 195.

statute,[32] so that a special plea is bad and should be stricken out.[33] Some courts, however, in the absence of a statute, have held that a special plea is necessary,[34] or that it may be pleaded even though the defense may also be proved under the plea of not guilty.[35] If the statute is relied upon, it must be set up at the trial, either by a special plea or under the general issue.[36] It is not a ground for a demurrer to the indictment,[37] and is not available on a motion in arrest of judgment,[38] or on an application for a writ of habeas corpus.[39]

e. Plea of Insanity. In the absence of statute requiring insanity to be specially pleaded,[40] the rule is that evidence of the insanity of defendant at the time the offense was committed is admissible under a plea of not guilty,[41] and a special plea setting up such defense is bad.[42] In the absence of a statute,[43] no plea of insanity at the time of the trial is required. If at any time during the proceedings in a criminal trial a doubt arises as to the sanity of defendant, it is the duty of the court, of its own motion, to suspend further proceedings in the case until the question of sanity has been determined.[44]

f. Plea of Pardon. A pardon, to be available as a defense, must be specially pleaded.[45]

g. Plea of Agreement to Turn State's Evidence. In Texas, and perhaps in other states, a special plea may be filed setting up an agreement by the prosecuting officer not to prosecute in consideration of the defendant's turning state's evidence, and performance of the agreement by defendant.[46]

h. Plea of Former Acquittal, Conviction, or Jeopardy — (i) *In General.* In most jurisdictions a former acquittal or conviction, or former jeopardy, is not admissible as a defense under the general issue raised by a plea of not guilty, or on demurrer, motion in arrest, or writ of error, but must be set up by a special plea in bar;[47] but in some states, by statute, the defense may be proved under

Indiana.— Hatwood *v.* State, 18 Ind. 492; Ulmer *v.* State, 14 Ind. 52.

Kentucky.— Com. *v.* Washington, 1 Dana 446.

Mississippi.— Thompson *v.* State, 54 Miss. 740.

Pennsylvania.— Com. *v.* Ruffner, 28 Pa. St. 259; Com. *v.* Grise, 23 Pittsb. Leg. J. 138; Com. *v.* Bunn, 1 Leg. Op. 114. But see Com. *v.* Hutchinson, 2 Pars. Eq. Cas. 453, 1 Phila. 77.

United States.— U. S. *v.* Cook, 17 Wall. 168, 21 L. ed. 538; U. S. *v.* Brown, 24 Fed. Cas. No. 14,665, 2 Lowell 267.

See 14 Cent. Dig. tit. "Criminal Law," § 660.

32. State *v.* Whalen, 98 Iowa 662, 68 N. W. 554.

33. State *v.* Whalen, 98 Iowa 662, 68 N. W. 554.

34. State *v.* McIntire, 58 Iowa 572, 12 N. W. 593; State *v.* Groome, 10 Iowa 308; State *v.* Hussey, 7 Iowa 409. *Contra*, by statute, State *v.* Whalen, 98 Iowa 662, 68 N. W. 554.

35. Thompson *v.* State, 54 Miss. 740; U. S. *v.* Cook, 17 Wall. (U. S.) 168, 21 L. ed. 538. *Compare*, however, *supra*, XI, B, 7, a.

36. State *v.* Thrasher, 79 Me. 17, 7 Atl. 814. See also U. S. *v.* Brown, 24 Fed. Cas. No. 14,665, 2 Lowell 267.

37. State *v.* Gill, 33 Ark. 129; State *v.* McIntyre, 58 Iowa 572, 12 N. W. 593; State *v.* Hussey, 7 Iowa 409; Thompson *v.* State, 54 Miss. 740. And see INDICTMENTS AND INFORMATIONS.

38. State *v.* Thrasher, 79 Me. 17, 7 Atl. 814.

39. Johnson *v.* U. S., 13 Fed. Cas. No. 7,418, 3 McLean 89. See HABEAS CORPUS.

40. Ward *v.* State, 96 Ala. 100, 11 So. 217; Walker *v.* State, 91 Ala. 76, 9 So. 87; Maxwell *v.* State, 89 Ala. 150, 7 So. 824; Walker *v.* State, 136 Ind. 663, 36 N. E. 356.

41. People *v.* Olwell, 28 Cal. 456; Danforth *v.* State, 75 Ga. 614, 58 Am. Rep. 480; State *v.* Potts, 100 N. C. 457, 6 S. E. 657.

42. Danforth *v.* State, 75 Ga. 614, 58 Am. Rep. 480.

43. Danforth *v.* State, 75 Ga. 614, 58 Am. Rep. 480. See State *v.* Spivey, 132 N. C. 989, 43 S. E. 475.

44. People *v.* Ah Ying, 42 Cal. 18; State *v.* Reed, 41 La. Ann. 581, 7 So. 132. And see INSANE PERSONS.

45. Michael *v.* State, 40 Ala. 361; State *v.* Keith, 63 N. C. 140; State *v.* Blalock, 61 N. C. 242; *In re* Fries, Whart. St. Tr. (Pa.) 587; U. S. *v.* Wilson, 7 Pet. (U. S.) 150, 8 L. ed. 640; Fries' Case, 9 Fed. Cas. No. 5,126, 3 Dall. 515. *Contra*, Territory *v.* Richardson, 9 Okla. 579, 60 Pac. 244, 49 L. R. A. 440, holding that the defense of pardon may be set up by a motion to dismiss the indictment made after the entry of a plea of not guilty.

46. Camron *v.* State, 32 Tex. Cr. 180, 22 S. W. 682, 40 Am. St. Rep. 763. And see *supra*, II, E, 10.

47. *Alabama.*— Morring *v.* State, 129 Ala. 66, 29 So. 664; Burton *v.* State, 115 Ala. 1, 22 So. 585; Jordan *v.* State, 81 Ala. 20, 1 So. 577; Baysinger *v.* State, 77 Ala. 60; De

the general issue and a special plea is unnecessary,[48] and according to some of the cases improper.[49] In some states it has been held that a special plea is unnecessary where the former proceeding was on the same indictment and in the same court, or even on a different indictment, as the court in such a case will take cognizance of the record.[50] Of course the plea of former acquittal or conviction can be pleaded only after an acquittal or conviction. It cannot be based upon the fact that another indictment is pending for the same offense.[51]

(11) *Form and Sufficiency.* The pleas of former acquittal and conviction, being pleas in bar, are favored pleas and do not require so high a degree of certainty as an indictment or as a plea in abatement or other dilatory plea;[52] but they must sufficiently set forth the defense.[53] Such a plea consists partly of matter of record and partly of matter of fact. It must, in the absence of a statute, set forth the record of the former acquittal or conviction,[54] and it must allege

Arman *v.* State, 77 Ala. 10; Rickles *v.* State, 68 Ala. 538.

California.— People *v.* Bennett, 114 Cal. 56, 45 Pac. 1013 (cannot raise the question on motion for a new trial); People *v.* Lee Yune Chong, 94 Cal. 379, 29 Pac. 776; People *v.* Olwell, 28 Cal. 456.

Colorado.— Guenther *v.* People, 22 Colo. 121, 43 Pac. 999; *In re* Allison, 13 Colo. 525, 22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790.

Kentucky.— Com. *v.* Olds, 5 Litt. 137.

Maine.— State *v.* Barnes, 32 Me. 534.

Maryland.— Neff *v.* State, 57 Md. 385.

Massachusetts.— Com. *v.* O'Neil, (1892) 29 N. E. 1146; Com. *v.* Chesley, 107 Mass. 223; Com. *v.* Merrill, 8 Allen 545.

Missouri.— State *v.* Huffman, 136 Mo. 58, 37 S. W. 797.

New Jersey.—State *v.* Ackerman, 64 N. J. L. 99, 45 Atl. 27.

New York.— People *v.* Benjamin, 2 Park. Cr. 201.

North Carolina.— State *v.* Morgan, 95 N. C. 641.

Tennessee.— Zachary *v.* State, 7 Baxt. 1.

Texas.— Samuels *v.* State, 25 Tex. App. 537, 8 S. W. 656; Brill *v.* State, 1 Tex. App. 152. And see Pickett *v.* State, 43 Tex. Cr. 1, 63 S. W. 325.

Utah.— *In re* Maughan, 6 Utah 167, 21 Pac. 1088, holding that the defense, not having been pleaded, could not be raised on habeas corpus.

Virginia.— Justice *v.* Com., 81 Va. 209.

West Virginia.— State *v.* Cross, 44 W. Va. 315, 29 S. E. 527.

United States.— U. S. *v.* Moller, 26 Fed. Cas. No. 15,794, 16 Blatchf. 65.

England.— Rex *v.* Chamberlain, 6 C. & P. 93, 25 E. C. L. 338.

Contra, State *v.* Conlin, 27 Vt. 318.

See 14 Cent. Dig. tit. "Criminal Law," § 666.

After verdict the defendant cannot for the first time take advantage of a former acquittal or former jeopardy. Morring *v.* State, 129 Ala. 66, 29 So. 664; People *v.* Bennett, 114 Cal. 56, 45 Pac. 1013; Com. *v.* Maher, 16 Phila. (Pa.) 451; Pickett *v.* State, 43 Tex. Cr. 1, 63 S. W. 325.

A plea in abatement alleging a former conviction, acquittal, or jeopardy is demurrable. Klein *v.* State, 157 Ind. 146, 60 N. E. 1036. *Compare* Ellis *v.* State, 25 Fla. 702, 6 So. 768.

48. People *v.* Cage, 48 Cal. 323, 17 Am. Rep. 436 (former jeopardy); Haskins *v.* People, 106 Ill. 628; Bryant *v.* State, 72 Ind. 400; Brinkman *v.* State, 57 Ind. 76; Clem *v.* State, 42 Ind. 420, 13 Am. Rep. 369; Lee *v.* State, 42 Ind. 152; Danneburg *v.* State, 20 Ind. 181.

49. Haskins *v.* People, 106 Ill. 628. But see Davis *v.* State, 152 Ind. 145, 52 N. E. 754; Clem *v.* State, 42 Ind. 420, 13 Am. Rep. 369, holding it optional with defendant to plead specially or to introduce the defense under the plea of not guilty. And see *supra,* XI, B, 7, a.

50. People *v.* Taylor, 117 Mich. 583, 76 N. W. 158 (where the defendant had been put on trial and discharged, and the discharge was afterward set aside and the case reinstated, and he was again put on trial, the whole matter appearing on the record); People *v.* Harding, 53 Mich. 48, 481, 18 N. W. 555, 19 N. W. 155, 51 Am. Rep. 95; George *v.* State, 59 Nebr. 163, 80 N. W. 486; Robinson *v.* State, 21 Tex. App. 160, 17 S. W. 632; State *v.* Cross, 44 W. Va. 315, 29 S. E. 527. *Contra,* People *v.* Bennett, 114 Cal. 56, 45 Pac. 1013.

51. 1 Chitty Cr. L. 463. And see State *v.* Benham, 7 Conn. 414; Withipole's Case, Cro. Car. 147; Rex *v.* Stratton, Dougl. (3d ed.) 239; Reg. *v.* Goddard, 2 Ld. Raym. 920. And see *supra,* XI, B, 6, h.

52. Harp *v.* State, 59 Ark. 113, 26 S. W. 714; Helm *v.* State, 66 Miss. 537, 6 So. 322; State *v.* Ackerman, 64 N. J. L. 99, 45 Atl. 27; State *v.* Cross, 44 W. Va. 315, 29 S. E. 527.

53. State *v.* Cross, 44 W. Va. 315, 29 S. E. 527, and other cases in the following notes.

54. *Alabama.*— Smith *v.* State, 52 Ala. 407; Foster *v.* State, 39 Ala. 229; Henry *v.* State, 33 Ala. 389.

Arkansas.— Harp *v.* State, 59 Ark. 113, 26 S. W. 714; Evans *v.* State, 54 Ark. 227, 15 S. W. 360; Bradley *v.* State, 32 Ark. 722.

Dakota.— Territory *v.* King, 6 Dak. 131, 50 N. W. 623.

Georgia.— Blair *v.* State, 81 Ga. 628, 7 S. E. 855; Daniels *v.* State, 78 Ga. 98, 6 Am. St. Rep. 238; Evans *v.* State, 68 Ga. 826; Crocker *v.* State, 47 Ga. 568.

Indiana.— Hensley *v.* State, 107 Ind. 587, 8 N. E. 692.

and show that the offense charged and the person are the same as in the first

Nebraska.— Davis *v.* State, 51 Nebr. 301, 70 N. W. 984.

New Jersey.—State *v.* Ackerman, 64 N. J. L. 99, 45 Atl. 27.

New York.— People *v.* Smith, 172 N. Y. 210, 64 N. E. 814.

Tennessee.— Zachary *v.* State, 7 Baxt. 1.

Texas.— Ford *v.* State, (Cr. App. 1900) 56 S. W. 918; Wheelock *v.* State, (Cr. App. 1896) 38 S. W. 182; Washington *v.* State, 35 Tex. Cr. 156, 32 S. W. 694; Grisham *v.* State, 19 Tex. App. 504; Williams *v.* State, 13 Tex. App. 285, 46 Am. Rep. 237.

West Virginia.— State *v.* Cross, 44 W. Va. 315, 29 S. E. 527.

England.— Vaux's Case, 4 Coke 44*a*; Reg. *v.* Connell, 6 Cox C. C. 178; Rex *v.* Emden, 9 East 437; Rex *v.* Vandercom, 2 East P. C. 519, 2 Leach C. C. 816; Rex *v.* Wildey, 1 M. & S. 183; 1 Chitty Cr. L. 459; 2 Hale P. C. 241, 243, 255; 2 Hawkins P. C. c. 35, § 2.

See 14 Cent. Dig. tit. "Criminal Law," §§ 668–670.

A bill of exceptions perpetuating a record of the proceedings on the former trial is not essential to the sufficiency of a plea of former acquittal or conviction. Pizano *v.* State, 20 Tex. App. 139, 54 Am. Rep. 511.

Failure to set out the record of the former acquittal or conviction has been held not fatal where both trials are in the same court, on the ground that the court will take judicial cognizance of the former proceedings. Foster *v.* State, 25 Tex. App. 543, 8 S. W. 664. See also Woodward *v.* State, 42 Tex. Cr. 188, 58 S. W. 135.

As to sufficiency of plea of former acquittal see the following cases:

Alabama.— Harris *v.* State, 128 Ala. 41, 29 So. 581.

Arkansas.— Harp *v.* State, 59 Ark. 113, 26 S. W. 714, copies of indictment, verdict, and judgment referred to and attached as exhibits.

Dakota.— Territory *v.* King, 6 Dak. 131, 50 N. W. 623.

Hawaii.— Reg. *v.* Lau Kin Chew, 8 Hawaii 370.

Indiana.— Burk *v.* State, 81 Ind. 128.

Kentucky.— Com. *v.* Rose, 107 Ky. 566, 54 S. W. 863, 21 Ky. L. Rep. 1281; Com. *v.* C. B. Cook Co., 102 Ky. 288, 43 S. W. 400, 19 Ky. L. Rep. 1336, setting up dismissal of former indictment on demurrer.

Massachusetts.— Com. *v.* Bressant, 126 Mass. 246; Com. *v.* Bosworth, 113 Mass. 200, 18 Am. Rep. 467.

New York.— Canter *v.* People, 1 Abb. Dec. 305, 2 Transcr. App. 1, 5 Abb. Pr. N. S. 21, 38 How. Pr. 91.

Ohio.— Hurley *v.* State, 6 Ohio 399, must show judgment as well as verdict.

Pennsylvania.— Com. *v.* Hazlett, 16 Pa. Super. Ct. 534, averments insufficient to overcome record.

Texas.— McCullough *v.* State, (Cr. App. 1896) 34 S. W. 753.

United States.— Berkowitz *v.* U. S., 93 Fed. 452, 35 C. C. A. 379.

England.— Reg. *v.* Connell, 6 Cox C. C. 178; Reg. *v.* Bird, 5 Cox C. C. 11.

See 14 Cent. Dig. tit. "Criminal Law," §§ 668–670.

In a plea of former acquittal before a justice it has been held unnecessary to set out the judgment rendered by the justice. Storrs *v.* State, 129 Ala. 101, 29 So. 778. But the plea must set out the affidavit or complaint on which the prosecution was based (Cross *v.* State, 117 Ala. 73, 23 So. 784) and must show that the offense was within the jurisdiction of the justice (Smith *v.* State, 67 Miss. 116, 7 So. 208).

As to sufficiency of plea of former conviction see the following cases:

Arkansas.— Evans *v.* State, 54 Ark. 227, 15 S. W. 360.

Dakota.— Territory *v.* King, 6 Dak. 131, 50 N. W. 623.

Georgia.— Blair *v.* State, 81 Ga. 628, 7 S. E. 855; Evans *v.* State, 68 Ga. 826.

Hawaii.— Hawaii *v.* Radin, 11 Hawaii 802.

Massachusetts.— Com. *v.* Curtis, 11 Pick. 134.

Minnesota.— State *v.* Charles, 16 Minn. 474.

Missouri.— State *v.* Gustin, 152 Mo. 108, 53 S. W. 421.

Nevada.— State *v.* Salge, 2 Nev. 321.

New Hampshire.— State *v.* Hodgkins, 42 N. H. 474.

Texas.— Ford *v.* State, (Cr. App. 1900) 56 S. W. 918 (plea must set up the indictment, verdict, and judgment at the former trial); Washington *v.* State, 35 Tex. Cr. 156, 32 S. W. 694; Brill *v.* State, 1 Tex. App. 152; Quitzow *v.* State, 1 Tex. App. 47, 28 Am. Rep. 396.

United States.— U. S. *v.* Olsen, 57 Fed. 579.

See 14 Cent. Dig. tit. "Criminal Law," §§ 668–670.

A plea of former conviction must aver that the judgment is unreversed and continues in full force and effect. U. S. *v.* Olsen, 57 Fed. 579.

The day, month, or year of the former trial need not be stated. Deaton *v.* State, 44 Tex. 446.

A plea of a former conviction and sentence before a magistrate should set forth the amount of the fine imposed to show that it was within the magistrate's jurisdiction (State *v.* Layne, 96 Tenn. 668, 36 S. W. 390; State *v.* Atkinson, 9 Humphr. (Tenn.) 677); and it should set forth the complaint or affidavit on which the conviction was had (Black *v.* State, 123 Ala. 78, 26 So. 340; Hollis *v.* State, 123 Ala. 74, 26 So. 231; Cross *v.* State, 117 Ala. 73, 23 So. 784), show the authority of the magistrate (State *v.* Charles, 16 Minn. 474; State *v.* Gustin, 152 Mo. 108, 53 S. W. 421), and that the offense was committed within his jurisdiction (State *v.* Haywood, (Miss. 1897) 21 So. 660); and it has been

prosecution.[55] A plea of former jeopardy, without any conviction or acquittal, must set forth facts to show that the defendant has been in jeopardy and must show how and in what manner.[56] The allegations of the plea will be controlled by the record.[57] It was formerly necessary in the case of felony to plead over at the time of the special plea not guilty of the offense charged,[58] but this does not now seem to be required.[59] The plea should conclude with a prayer that defendant be discharged.[60] It should be in writing and signed by the defendant or his counsel,[61]

held that it should allege that he heard the evidence (State *v.* Layne, 96 Tenn. 668, 36 S. W. 390; State *v.* Spencer, 10 Humphr. (Tenn.) 431).

55. *Alabama.*— Baysinger *v.* State, 77 Ala. 60; Smith *v.* State, 52 Ala. 407; Henry *v.* State, 33 Ala. 389.

Arkansas.— Jones *v.* State, 61 Ark. 88, 32 S. W. 81; Evans *v.* State, 54 Ark. 227, 15 S. W. 360.

Florida.— Newberry *v.* State, 26 Fla. 334, 8 So. 445.

Georgia.— Daniels *v.* State, 78 Ga. 98, 6 Am. St. Rep. 238.

Illinois.— McQuoid *v.* People, 8 Ill. 76.

Mississippi.— Pope *v.* State, 63 Miss. 53.

Missouri.— State *v.* Wister, 62 Mo. 592.

Nebraska.— Davis *v.* State, 51 Nebr. 301, 70 N. W. 984.

New Jersey.— State *v.* Ackerman, 64 N. J. L. 99, 45 Atl. 27.

New York.— People *v.* Saunders, 4 Park. Cr. 196.

Rhode Island.— State *v.* Watson, 20 R. I. 354, 39 Atl. 193, 78 Am. St. Rep. 871.

Texas.— King *v.* State, 43 Tex. 351; Boggess *v.* State, 43 Tex. 347; Williams *v.* State, 13 Tex. App. 285, 46 Am. Rep. 237.

West Virginia.— State *v.* Cross, 44 W. Va. 315, 29 S. E. 527.

England.— Reg. *v.* Salvi, 10 Cox C. C. 481 note *b*; Reg. *v.* Connell, 6 Cox C. C. 178; 1 Chitty Cr. L. 460; 3 Hale P. C. 241; 1 Hale P. C. 255, 392; 2 Hawkins P. C. c. 35, § 3.

See 14 Cent. Dig. tit. "Criminal Law," § 669.

Sufficiency of averments and showing as to identity of offense.— *Alabama.*— Gunter *v.* State, 111 Ala. 23, 20 So. 632, 56 Am. St. Rep. 17 (stating mere legal conclusion insufficient); Foster *v.* State, 39 Ala. 229 (variance in description of goods stolen does not necessarily render plea bad).

Arkansas.— Jones *v.* State, 61 Ark. 88, 32 S. W. 81.

Florida.— Newberry *v.* State, 26 Fla. 334, 8 So. 445.

Georgia.— Crocker *v.* State, 47 Ga. 568.

Illinois.— McQuoid *v.* People, 8 Ill. 76.

Indiana.— Clem *v.* State, 42 Ind. 420, 13 Am. Rep. 369.

Massachusetts.— Com. *v.* Bosworth, 113 Mass. 200, 18 Am. Rep. 467. See Com. *v.* Curtis, 11 Pick. 134, larceny in dwelling-house and simple larceny.

Mississippi.— Pope *v.* State, 63 Miss. 53.

Missouri.— State *v.* Wister, 62 Mo. 592; State *v.* Vollenweider, 94 Mo. App. 158, 67 S. W. 942, abandonment of wife.

Texas.— King *v.* State, 43 Tex. 351; Boggess *v.* State, 43 Tex. 347; McCullough *v.* State, (Cr. App. 1896) 34 S. W. 753; Brothers *v.* State, 22 Tex. App. 447, 3 S. W. 737.

Vermont.— State *v.* Locklin, 59 Vt. 654, 10 Atl. 464.

Virginia.— Day *v.* Com., 23 Gratt. 915.

West Virginia.— State *v.* Evans, 33 W. Va. 417, 10 S. E. 792.

England.— Reg. *v.* Salvi, 10 Cox C. C. 481 note *b*.

See 14 Cent. Dig. tit. "Criminal Law," § 669.

Identity of offenses see *supra*, IX, J.

Offense must be same in law and fact.— A plea of former acquittal or conviction to be effectual must show the acquittal or conviction of an offense which is the same in law as it is in fact. People *v.* Saunders, 4 Park. Cr. (N. Y.) 196; State *v.* Watson, 20 R. I. 354, 39 Atl. 193, 78 Am. St. Rep. 871.

Several counts charging different offenses.— Marshall *v.* State, 6 Nebr. 120, 29 Am. Rep. 363.

56. Lyman *v.* State, 47 Ala. 686; Atkins *v.* State, 16 Ark. 568.

As to sufficiency of plea of former jeopardy, where there was neither a conviction nor an acquittal, as where there was a discharge of the jury without a verdict, see the following cases:

Alabama.— Lyman *v.* State, 47 Ala. 686; McCauley *v.* State, 26 Ala. 135.

Arkansas.— Wilson *v.* State, 16 Ark. 601; Atkins *v.* State, 16 Ark. 568.

California.— People *v.* O'Leary, 77 Cal. 30, 18 Pac. 856.

Indiana.— Klein *v.* State, 157 Ind. 146, 60 N. E. 1036 (alleging former information only); Hensley *v.* State, 107 Ind. 587, 8 N. E. 692.

Mississippi.— Helm *v.* State, 66 Miss. 537, 6 So. 322.

New York.— Canter *v.* People, 1 Abb. Dec. 305, 2 Transcr. App. 1, 5 Abb. Pr. N. S. 21, 38 How. Pr. 91.

Texas.— Usher *v.* State, 42 Tex. Cr. 461, 60 S. W. 555; Hooper *v.* State, (Cr. App. 1897) 42 S. W. 398.

See 14 Cent. Dig. tit. "Criminal Law," § 670.

57. Fluty *v.* State, 45 Ark. 97. And see Com. *v.* Hazlett, 16 Pa. Super. Ct. 534.

58. 1 Chitty Cr. L. 460; 2 Hale P. C. 255.

59. Com. *v.* Goddard, 13 Mass. 455; Barge *v.* Com., 3 Penr. & W. (Pa.) 262, 23 Am. Dec. 81.

60. Rex *v.* Vandercom, 2 East P. C. 519, 2 Leach C. C. 816.

61. Davis *v.* State, 51 Nebr. 301, 70 N. W. 984; State *v.* Ackerman, 64 N. J. L. 99, 45

and at common law should be verified.[62] In some states the form of pleas of former acquittal, conviction, and jeopardy is prescribed by statute.[63] If the plea sets forth two distinct records of acquittal it is demurrable for duplicity.[64]

(III) *TIME AND ORDER OF PLEADING.* A plea of former acquittal, conviction, or jeopardy should be pleaded when the defendant is arraigned and before or at the time of a plea of not guilty, and the court may in its discretion refuse to allow a plea of not guilty to be withdrawn and the special plea substituted;[65] but if the defendant's counsel so requests he should be allowed a reasonable time to file the plea,[66] and it may be filed even after trial has been commenced if it could not be filed sooner.[67] Some of the cases hold that a plea of not guilty and a plea of former conviction cannot be pleaded at the same time,[68] while others hold the contrary.[69] The pleas of not guilty and former acquittal or jeopardy, being consistent, may be pleaded at the same time.[70] A plea of former acquittal does not withdraw a plea of not guilty,[71] but filing and going to trial upon a plea of not guilty after filing a plea of former conviction is a waiver of the latter plea, although it has been replied to.[72]

(IV) *JOINDER OF ISSUE, REPLICATION, AND DEMURRER.* Where the plea of former acquittal or conviction is interposed, the prosecuting officer may join issue by a *similiter*, or may reply, taking issue upon the averment of identity of the offense or of the person, or setting up facts in avoidance, or reply *nul tiel* record, if he disputes the fact of the alleged acquittal or conviction.[73] If the plea is

Atl. 27 (rule not changed by statute); Reg. *v.* Chamberlain, 6 C. & P. 93, 25 E. C. L. 338; Reg. *v.* Walker, 2 M. & Rob. 446.

Contra in a justice's court.—Preston *v.* People, 45 Mich. 486, 8 N. W. 96.

62. Davis *v.* State, 51 Nebr. 301, 70 N. W. 984; Samuels *v.* State, 25 Tex. App. 537, 8 S. W. 656; Rex *v.* Vandercom, 2 East P. C. 519, 2 Leach C. C. 816; 2 Hale P. C. 392. But see Guenther *v.* People, 22 Colo. 121, 43 Pac. 999, holding verification unnecessary if the plea states defendant's willingness to verify.

63. See People *v.* O'Leary, 77 Cal. 30, 18 Pac. 856; State *v.* Ackerman, 64 N. J. L. 99, 45 Atl. 27; People *v.* Smith, 172 N. Y. 210, 64 N. E. 814 (plea must, under Code Cr. Proc. § 334, allege former conviction or former acquittal); Reg. *v.* Connell, 6 Cox C. C. 178; Reg. *v.* Bird, 5 Cox C. C. 11.

64. Rex *v.* Sheen, 2 C. & P. 634, 12 E. C. L. 776. See *supra*, XI, B, 3, b.

65. Hall *v.* State, 103 Ga. 403, 29 S. E. 915; Com. *v.* Maher, 16 Phila. (Pa.) 451; *In re* Barton, 6 Utah 264, 21 Pac. 998. See *supra*, XI, B, 3, f.

66. Coon *v.* State, 21 Tex. App. 332, 17 S. W. 351 (holding that it was error to allow fifteen minutes only, and to exclude the plea where it was filed as soon as prepared, although part of the state's evidence was in); Com. *v.* Myers, 1 Va. Cas. 188.

67. Pearce *v.* Com., 5 Ky. L. Rep. 407, holding that where the defendant pending proceedings on an indictment is acquitted or convicted of the same offense under another indictment, he is then entitled to plead the acquittal or conviction, as he could not have pleaded it sooner. See also People *v.* Stewart, 64 Cal. 60, 28 Pac. 112 (where a juror was discharged and a new juror substituted during the trial of an indictment); Davis *v.* State, 51 Nebr. 301, 70 N. W. 984.

68. Davis *v.* State, 51 Nebr. 301, 70 N. W. 984; Korth *v.* State, 46 Nebr. 631, 65 N. W. 792; Marshall *v.* State, 6 Nebr. 120, 29 Am. Rep. 363; State *v.* Copeland, 2 Swan (Tenn.) 626; Hill *v.* State, 2 Yerg. (Tenn.) 248. See *supra*, XI, B, 3, c.

69. Solliday *v.* Com., 28 Pa. St. 13.

70. State *v.* Respass, 85 N. C. 534; State *v.* Pollard, 83 N. C. 597; Thompson *v.* U. S., 155 U. S. 271, 15 S. Ct. 73, 39 L. ed. 146. See *infra*, XI, B, 7, h, (VI).

71. Tandy *v.* State, 94 Wis. 498, 69 N. W. 160.

72. McBean *v.* State, 3 Heisk. (Tenn.) 20.

73. *Alabama.*— Wesson *v.* State, 109 Ala. 61, 19 So. 514, replication as to identity of offense. *Compare* Walkley *v.* State, 133 Ala. 183, 31 So. 854.

Florida.— See Tufts *v.* State, 41 Fla. 663, 27 So. 218.

Ohio.— Miller *v.* State, 3 Ohio St. 475.

Pennsylvania.— See Com. *v.* Boyer, 8 Phila. 611.

Tennessee.— State *v.* Clenny, 1 Head 270; State *v.* Colvin, 11 Humphr. 599, 54 Am. Dec. 58; Hite *v.* State, 9 Yerg. 357.

Vermont.— State *v.* Conlin, 27 Vt. 318, identity of offense.

Virginia.— Page *v.* Com., 27 Gratt. 954; Com. *v.* Jackson, 2 Va. Cas. 501.

West Virginia.— State *v.* Cross, 44 W. Va. 315, 29 S. E. 527.

England.— Reg. *v.* Connell, 6 Cox C. C. 178; Reg. *v.* Bird, 5 Cox C. C. 11; Rex *v.* Bowman, 6 C. & P. 101, 337, 25 E. C. L. 342, 462; Rex *v.* Wildey, 1 M. & S. 183; 1 Chitty Cr. L. 460; 2 Hale P. C. 255.

See 14 Cent. Dig. tit. "Criminal Law," § 673.

A replication of arrest of judgment merely is bad. Henry *v.* State, 33 Ala. 389.

New assignment not admissible.— Duncan *v.* Com., 6 Dana (Ky.) 295.

insufficient on its face as a matter of law, either in substance or form, he may demur,[74] but a demurrer will not lie if the plea is good on its face.[75] A general demurrer to a plea of former acquittal or conviction admits its truth.[76] On demurrer to such a plea judgment must be for defendant if the indictment is defective.[77] It has been held that it is improper to overrule a plea of former acquittal or conviction unless it is traversed or demurred to,[78] but this is not true where the plea is wholly frivolous and insufficient.[79] Failure to take issue on a plea of former acquittal or conviction is not fatal.[80]

(v) *EVIDENCE.* To sustain a plea of former acquittal, conviction, or jeopardy, the defendant must prove by a preponderance of the evidence[81] both the former conviction, acquittal, or jeopardy and the identity of the person and of the offense, the burden of proof being on him;[82] and the burden is not shifted by

Writing out replication after trial of the facts begins.— Carter *v.* State, 107 Ala. 146, 18 So. 232.

Sufficiency of rejoinder to replication.— Com. *v.* Curtis, 11 Pick. (Mass.) 134.

74. *Indiana.*— Hensley *v.* State, 107 Ind. 587, 8 N. E. 692.

Massachusetts.— Com. *v.* Bressant, 126 Mass. 246.

Texas.— Brothers *v.* State, 22 Tex. App. 447, 3 S. W. 737, offenses not identical.

Vermont.— State *v.* Locklin, 59 Vt. 654, 10 Atl. 464.

West Virginia.— State *v.* Evans, 33 W. Va. 417, 10 S. E. 792, offenses not identical.

England.— Reg. *v.* Connell, 6 Cox C. C. 178; Rex *v.* Vandercom, 2 East P. C. 519, 2 Leach C. C. 816.

See 14 Cent. Dig. tit. "Criminal Law," § 673.

Insufficient indictment or information.— If a plea of former jeopardy shows that the former indictment or information was so defective that it could not support a conviction the plea is properly stricken out. Williams *v.* State, 34 Tex. Cr. 433, 30 S. W. 1063. See *supra*, IX, D.

A demurrer is waived or abandoned where after it is overruled the prosecuting officer joins issue on the plea and goes to trial on the merits (State *v.* Caldwell, 70 Ark. 74, 66 S. W. 150), or where he files a replication to the plea after a decision sustaining the demurrer, but before it is recorded (State *v.* Barrett, 54 Ind. 434).

75. Hollis *v.* State, 123 Ala. 74, 26 So. 231; Raubold *v.* Com., 111 Ky. 433, 63 S. W. 781, 23 Ky. L. Rep. 735; Emmons *v.* State, 34 Tex. Cr. 118, 29 S. W. 475; Rudder *v.* State, 29 Tex. App. 262, 15 S. W. 717; Shubert *v.* State, 21 Tex. App. 551, 2 S. W. 883. See Murphy *v.* State, 25 Nebr. 807, 41 N. W. 792.

Replication and not demurrer is the proper mode of avoiding a plea of former acquittal before a magistrate on the ground that the former proceeding was by fraud of defendant. State *v.* Clenny, 1 Head (Tenn.) 270. And see State *v.* Colvin, 11 Humphr. (Tenn.) 599, 54 Am. Dec. 58.

76. Com. *v.* Bosworth, 113 Mass. 200, 18 Am. Rep. 467. And see State *v.* Ackerman, 64 N. J. L. 99, 45 Atl. 27; Com. *v.* Myers, 1 Va. Cas. 188.

77. People *v.* Krummer, 4 Park. Cr. (N. Y.) 217.

78. Lovett *v.* State, 80 Ga. 255, 4 S. E. 912.

79. Ellis *v.* State, 25 Fla. 702, 6 So. 768, holding that it is not error to overrule a plea where it is frivolous and states no reason why the defendant cannot be again tried, as such a plea is a nullity. And see Davis *v.* State, 51 Nebr. 301, 70 N. W. 984; Wortham *v.* Com., 5 Rand. (Va.) 669.

80. Omission of a *similiter* is not fatal. State *v.* Ackerman, 64 N. J. L. 99, 45 Atl. 27.

Amendment.— Error in adding the *similiter* or in not adding it is amendable. Berrian *v.* State, 22 N. J. L. 9.

Waiver.— Failure to take issue on a plea of former acquittal or conviction is waived by going to trial on it. Com. *v.* McCauley, 105 Mass. 69; State *v.* Howe, 27 Oreg. 138, 44 Pac. 672.

By statute in some states no reply or demurrer is necessary. State *v.* Jamison, 104 Iowa 343, 73 N. W. 831; Com. *v.* Rose, 107 Ky. 566, 54 S. W. 863, 21 Ky. L. Rep. 1281; Vowells *v.* Com., 83 Ky. 193, 7 Ky. L. Rep. 176.

81. State *v.* Scott, 1 Kan. App. 748, 42 Pac. 264; State *v.* Ackerman, 64 N. J. L. 99, 45 Atl. 27; Davidson *v.* State, 40 Tex. Cr. 285, 49 S. W. 372, 50 S. W. 365; Willis *v.* State, 24 Tex. App. 586, 6 S. W. 857.

82. *Alabama.*— Faulk *v.* State, 52 Ala. 415.

Arkansas.—Emerson *v.* State, 43 Ark. 372.

Indiana.— Jenkins *v.* State, 78 Ind. 133; Cooper *v.* State, 47 Ind. 61; Marshall *v.* State, 8 Ind. 498.

Kentucky.— Vowells *v.* Com., 83 Ky. 193, 7 Ky. L. Rep. 176.

Massachusetts.— Com. *v.* Wermouth, 174 Mass. 74, 54 N. E. 352; Com. *v.* Daley, 4 Gray 209.

Mississippi.— Brown *v.* State, 72 Miss. 95, 16 So. 202; Rocco *v.* State, 37 Miss. 357.

Missouri.— State *v.* Wister, 62 Mo. 592; State *v.* Small, 31 Mo. 197; State *v.* Andrews, 27 Mo. 267.

New Jersey.—State *v.* Ackerman, 64 N. J. L. 99, 45 Atl. 27.

New York.— People *v.* Cramer, 5 Park. Cr. 171.

Ohio.— Bainbridge *v.* State, 30 Ohio St. 264.

prima facie proof.[83] On the trial of the issue on such a plea it is proper to exclude evidence which has no bearing on the issue raised by the plea and replication.[84] The record of the former conviction or acquittal is admissible,[85] provided it is a sufficient record or transcript and is properly certified or authenticated[86] and shows the identity of the offense and of the person, or is accompanied by proof of such identity, or an offer to prove the same.[87] Ordinarily the former conviction or acquittal cannot be proved otherwise than by the record, which is the best evidence, and parol evidence is inadmissible, unless a foundation for its introduction is laid.[88] Parol evidence is admissible to the extent required by

Texas.— Davidson *v.* State, 40 Tex. Cr. 285, 49 S. W. 372, 50 S. W. 365; O'Connor *v.* State, 28 Tex. App. 288, 13 S. W. 14; Willis *v.* State, 24 Tex. App. 586, 6 S. W. 857; Hozier *v.* State, 6 Tex. App. 501; Campbell *v.* State, 2 Tex. App. 187.

Vermont.— State *v.* Ainsworth, 11 Vt. 91.

England.— Reg. *v.* Austin, 2 Cox C. C. 59.

See 14 Cent. Dig. tit. "Criminal Law," §§ 674, 675.

Sufficiency of proof of former acquittal, conviction, or jeopardy.— *Alabama.*—Martha *v.* State, 26 Ala. 72.

Arkansas.— State *v.* Bradley, 45 Ark. 31. See Allen *v.* State, 70 Ark. 22, 65 S. W. 933.

Georgia.— Daniels *v.* State, 78 Ga. 98, 6 Am. St. Rep. 238.

New York.— People *v.* Richards, 44 Hun 278.

North Dakota.— State *v.* Bronkol, 5 N. D. 507, 67 N. W. 680.

See 14 Cent. Dig. tit. "Criminal Law," § 678. And see *supra*, IX.

The verdict is conclusive as to the issue raised by a plea of former acquittal (Com. *v.* Wermouth, 174 Mass. 74, 54 N. E. 352), unless it is proved that it was not duly received or is otherwise illegal (State *v.* Scott, 1 Kan. App. 748, 42 Pac. 264).

A variance between the record referred to in the plea and that produced is fatal. State *v.* Williamson, 7 N. C. 216.

Fraud and collusion in prosecution before magistrate.— Com. *v.* Dascom, 111 Mass. 404.

Discharge of jury on inability to agree.— People *v.* Greene, 100 Cal. 140, 34 Pac. 630; Dobbins *v.* State, 14 Ohio St. 493; O'Connor *v.* State, 28 Tex. App. 288, 13 S. W. 14.

Sufficiency of proof of identity of offense and person.— *Alabama.*— Faulk *v.* State, 52 Ala. 415.

Hawaii.— Hawaii *v.* Radin, 11 Hawaii 802.

Missouri.— State *v.* Small, 31 Mo. 197; State *v.* Andrews, 27 Mo. 267.

New York.— People *v.* Satchwell, 61 N. Y. App. Div. 312, 70 N. Y. Suppl. 307.

Ohio.— Bainbridge *v.* State, 30 Ohio St. 264.

Texas.— Reed *v.* State, (Cr. App. 1895) 29 S. W. 1085; Wright *v.* State, 17 Tex. App. 152; Lowe *v.* State, 4 Tex. App. 34; Campbell *v.* State, 2 Tex. App. 187.

Vermont.— State *v.* Ainsworth, 11 Vt. 91.

England.— Reg. *v.* Austin, 2 Cox C. C. 59, identity of the person.

See 14 Cent. Dig. tit. "Criminal Law," § 678. And see *supra*, IX, J.

83. Com. *v.* Daley, 4 Gray (Mass.) 209.

84. Carter *v.* State, 107 Ala. 146, 18 So. 232 (evidence of what took place before a justice, the only question being as to his jurisdiction); Ball *v.* State, 48 Ark. 94, 2 S. W. 462 (former jeopardy); State *v.* Struble, 71 Iowa 11, 32 N. W. 1 (dismissal of count by state, rendering evidence irrelevant); State *v.* McCaffery, 16 Mont. 33, 40 Pac. 63 (testimony where the jurors did not deliver a verdict, as to what they agreed and disagreed upon).

85. Dunn *v.* State, 70 Ind. 47; Marshall *v.* State, 8 Ind. 498 (transcript of justice's record); State *v.* O'Conner, 4 Ind. 299. And see other cases in the notes following.

86. Moore *v.* State, 51 Ark. 130, 10 S. W. 22; Com. *v.* Roby, 12 Pick. (Mass.) 496.

Sufficiency of record.— Myers *v.* State, 92 Ind. 390 (omission of copy of appointment of special judge and failure to show that the judgment was signed by the trial judge); Jenkins *v.* State, 78 Ind. 133 (omission of warrant from transcript); Porter *v.* State, 17 Ind. 415 (failure to show that indictment was recorded, compared with original, and certified by the judge).

Admissibility of justice's record.— Moore *v.* State, 51 Ark. 130, 10 S. W. 22; Goudy *v.* State, 4 Blackf. (Ind.) 548; Ford *v.* State, 7 Ind. App. 567, 35 N. E. 34; Territory *v.* Stocker, 9 Mont. 6, 22 Pac. 496.

Certiorari, on suggestion of diminution of the record by the prosecuting attorney, will be awarded, directing a justice of the peace or municipal court to certify the entire record. Com. *v.* Roby, 12 Pick. (Mass.) 496.

87. Peachee *v.* State, 63 Ind. 399; Porter *v.* State, 17 Ind. 415; Boyer *v.* State, 16 Ind. 451; Marshall *v.* State, 8 Ind. 498.

88. *Georgia.*— Bailey *v.* State, 26 Ga. 579.

Indiana.— Walter *v.* State, 105 Ind. 589, 5 N. E. 735; Farley *v.* State, 57 Ind. 331.

Mississippi.— Brown *v.* State, 72 Miss. 95, 16 So. 202; Rocco *v.* State, 37 Miss. 357.

Missouri.— State *v.* Orr, 64 Mo. 339.

New York.— People *v.* Benjamin, 2 Park. Cr. 201.

Ohio.— Robbins *v.* Budd, 2 Ohio 16, docket of justice.

Tennessee.— Jacobs *v.* State, 4 Lea 196.

West Virginia.— State *v.* Hudkins, 35 W. Va. 247, 13 S. E. 367.

England.— Rex *v.* Bowman, 6 C. & P. 101, 25 E. C. L. 342.

See 14 Cent. Dig. tit. "Criminal Law," §§ 675, 676; and, generally, EVIDENCE.

The original indictment and minutes of the verdict upon it are admissible to support a

the circumstances.[89] It is admissible on the question of the identity of the defendant[90] and of the offense,[91] and it is admissible to show the facts relative to a trial before a justice of the peace,[92] or to show fraud and collusion in a former prosecution before a magistrate.[93] On the issue of *nul tiel* record a reasonable time should be given the defendant to produce the record.[94]

(VI) *TRIAL AND DETERMINATION.* The defendant is entitled to a jury trial on issues of fact raised by his plea of former acquittal, conviction, or jeopardy,[95] such as the issue as to the identity of the offense, where it is to be determined from the testimony and not merely from an inspection of the record,[96] and the issue whether a former prosecution before a justice of the peace was collusive and fraudulent,[97] and it is for the court to determine issues of law,[98] such as the

plea of former acquittal without a record being drawn up. Rex *v.* Parry, 7 C. & P. 836, 1 Jur. 674, 32 E. C. L. 898.

89. Riley *v.* State, 43 Miss. 397; Noonan *v.* State, 1 Sm. & M. (Miss.) 562. And see the following cases:

Kansas.— State *v.* Scott, 1 Kan. App. 748, 42 Pac. 264, evidence that verdict was not duly received.

Louisiana.— State *v.* Judge, 42 La. Ann. 414, 7 So. 678, proof outside the record, on plea of former acquittal, that the indictment is not maintainable.

Mississippi.— Helm *v.* State, 67 Miss. 562, 7 So. 487, testimony of judge and jurors as to whether the jury were discharged for failure to agree and as to the necessity of the discharge.

Montana.— Territory *v.* Stocker, 9 Mont. 6, 22 Pac. 496, testimony of magistrate as to contents of complaint, and that it was sworn to, after he has testified that it cannot be found after diligent search.

England.— Reg. *v.* Austin, 2 Cox C. C. 59, parol evidence in absence of record.

90. Reg. *v.* Austin, 2 Cox C. C. 59.

91. *Hawaii.*— Hawaii *v.* Radin, 11 Hawaii 802; Reg. *v.* Poor, 9 Hawaii 295.

Indiana.— Dunn *v.* State, 70 Ind. 47; Wilkinson *v.* State, 59 Ind. 416, 26 Am. Rep. 84.

Iowa.— State *v.* Waterman, 87 Iowa 255, 54 N. W. 359.

Kentucky.— Duncan *v.* Com., 6 Dana 295.

Mississippi.— Brown *v.* State, 72 Miss. 95, 16 So. 202; Rocco *v.* State, 37 Miss. 357.

Missouri.— State *v.* Thornton, 37 Mo. 360.

North Carolina.— State *v.* Smith, 33 N. C. 33, testimony of a witness as to what another witness testified to at the former trial.

Ohio.— Bainbridge *v.* State, 30 Ohio St. 264, holding that the state may prove that on the former trial it elected what transaction it would rely upon for a conviction, and that it was different from that solely relied upon on the second trial.

Virginia.— Page *v.* Com., 27 Gratt. 954, fact or opinion.

West Virginia.— State *v.* Hudkins, 35 W. Va. 247, 13 S. E. 367.

United States.—Durland *v.* U. S., 161 U. S. 306, 16 S. Ct. 508, 40 L. ed. 709.

See 14 Cent. Dig. tit. "Criminal Law," §§ 676, 677.

The record cannot be contradicted by parol evidence. State *v.* Haynes, 35 Vt. 565.

92. Goudy *v.* State, 4 Blackf. (Ind.) 548. But it is not admissible to contradict the record of the justice. Conway *v.* State, 4 Ind. 94.

93. State *v.* Reed, 26 Conn. 202; Com. *v.* Dascom, 111 Mass. 404.

94. Brady *v.* Com., 1 Bibb (Ky.) 517.

95. Caldwell *v.* State, 69 Ark. 322, 63 S. W. 59, 70 Ark. 74, 66 S. W. 150; State *v.* Judge, 42 La. Ann. 414, 7 So. 678; State *v.* Ackerman, 64 N. J. L. 99, 45 Atl. 27.

96. *Kentucky.*— Raubold *v.* Com., 111 Ky. 433, 63 S. W. 781, 23 Ky. L. Rep. 735; Chesapeake, etc., R. Co. *v.* Com., 88 Ky. 368, 11 S. W. 87, 10 Ky. L. Rep. 919.

Louisiana.— State *v.* Judge, 42 La. Ann. 414, 7 So. 678.

Missouri.—State *v.* Laughlin, 168 Mo. 415, 68 S. W. 340; State *v.* Wiseback, 139 Mo. 214, 40 S. W. 946; State *v.* Hatcher, 136 Mo. 641, 38 S. W. 719; State *v.* Huffman, 136 Mo. 58, 37 S. W. 797.

New York.— People *v.* Connor, 142 N. Y. 130, 36 N. E. 807 [*affirming* 65 Hun 392, 20 N. Y. Suppl. 209, 8 N. Y. Cr. 439].

Texas.—Prine *v.* State, 41 Tex. 300; Woodward *v.* State, 42 Tex. Cr. 188, 58 S. W. 135; Scott *v.* State, (Cr. App. 1902) 67 S. W. 680; Cook *v.* State, 43 Tex. Cr. 182, 63 S. W. 872; Munch *v.* State, 25 Tex. App. 30, 7 S. W. 341.

West Virginia.— State *v.* Cross, 44 W. Va. 315, 29 S. E. 527; State *v.* Hudkins, 35 W. Va. 247, 13 S. E. 367.

England.— Rex *v.* Parry, 7 C. & P. 836, 1 Jur. 674, 32 E. C. L. 898.

See 14 Cent. Dig. tit. "Criminal Law," §§ 678, 679.

97. Caldwell *v.* State, 69 Ark. 322, 63 S. W. 59, 70 Ark. 74, 66 S. W. 150; Funderburk *v.* State, (Tex. Cr. App. 1901) 64 S. W. 1059.

98. State *v.* Williams, 152 Mo. 115, 53 S. W. 424, 75 Am. St. Rep. 441; Reg. *v.* Connell, 6 Cox C. C. 178. See State *v.* Manning, 168 Mo. 418, 68 S. W. 341.

Discharge of jury without verdict.— It is for the court to determine from the record the issue raised by a plea of former jeopardy alleging that the jury at the former trial were discharged without the defendant's consent. Lanphere *v.* State, 114 Wis. 198, 89 N. W. 128.

A so-called "special plea of former jeopardy" in the form of a motion to discharge the defendant and exonerate his bond, based on former proceedings in the same court, so

issue made by a demurrer to the plea, or by a replication setting up that there is no such record as that set forth in the plea.[99] Some of the cases hold that where a former conviction or acquittal and a plea of not guilty are pleaded at the same time[1] the former must be disposed of before the latter is submitted to the jury,[2] while others hold that the two issues may be tried and submitted at the same time for separate findings or verdicts.[3] Failure of the jury to find on a plea of former acquittal or conviction submitted at the same time as a plea of not guilty renders a conviction erroneous, and no judgment can be entered thereon.[4] The issues of not guilty and of former acquittal or conviction may be submitted to the same jury[5] or to a different jury.[6]

(VII) *JUDGMENT AND PLEADING OVER.* When the plea of former acquittal or conviction is sustained the defendant must be discharged as upon an acquittal.[7] Where the prosecution is for a felony, and the issue on the plea is decided against the defendant, the judgment, even at common law, is *respondeat ouster*, and the defendant pleads guilty or not guilty, or if he has pleaded over in the plea the jury are charged again to inquire of the second issue,[8] or in some jurisdictions, as has been shown, both issues may be submitted at the same time.[9] In the case of misdemeanors, at common law, the defendant could not plead over, but the judgment against him on the special plea was final and as upon a conviction;[10] but in most states if not in all he is now allowed to plead over in prosecutions for misdemeanors as well as in prosecutions for felonies.[11] Where a demurrer by the state

that no evidence is required, and only a question of law is presented, does not require any issue to be joined and may properly be disposed of by the court like any other motion. Peters *v.* U. S., 94 Fed. 127, 36 C. C. A. 105.

99. Reg. *v.* Connell, 6 Cox C. C. 178. And see State *v.* Cross, 44 W. Va. 315, 29 S. E. 527.

1. See *supra*, XI, B, 7, h, (III).

2. *Alabama.*— De Arman *v.* State, 77 Ala. 10; Moody *v.* State, 60 Ala. 78; Faulk *v.* State, 52 Ala. 415; Foster *v.* State, 39 Ala. 229; Henry *v.* State, 33 Ala. 389.

Arkansas.— Lee *v.* State, 26 Ark. 260, 7 Am. Rep. 611.

Georgia.— McWilliams *v.* State, 110 Ga. 290, 34 S. E. 1016.

Indiana.— Clem *v.* State, 42 Ind. 420, 13 Am. Rep. 369.

Louisiana.— State *v.* Judge, 42 La. Ann. 414, 7 So. 678.

Massachusetts.— Com. *v.* Merrill, 8 Allen 545.

North Carolina.— State *v.* Respass, 85 N. C. 534; State *v.* Pollard, 83 N. C. 597.

Pennsylvania.— Com. *v.* Demuth, 12 Serg. & R. 389.

United States.— Thompson *v.* U. S., 155 U. S. 271, 15 S. Ct. 73, 39 L. ed. 146.

England.— Rex *v.* Roche, 1 Leach C. C. 160.

See 14 Cent. Dig. tit. "Criminal Law," § 680.

Waiver of objection.— In Alabama, where this rule is established, it is held that if the plea of former acquittal and not guilty are tried and submitted to the jury at the same time failure of the defendant to object is a waiver of the irregularity in the case of a misdemeanor (Moody *v.* State, 60 Ala. 78; Faulk *v.* State, 52 Ala. 415), but not in the case of a felony (Faulk *v.* State, 52 Ala. 415; Foster *v.* State, 39 Ala. 229).

3. People *v.* Connor, 142 N. Y. 130, 36 N. E. 807 [*affirming* 65 Hun 392, 20 N. Y. Suppl. 209, 8 N. Y. Cr. 439]; Solliday *v.* Com., 28 Pa. St. 13; Davis *v.* State, 42 Tex. 494; State *v.* Hudkins, 35 W. Va. 247, 13 S. E. 367.

4. Moody *v.* State, 60 Ala. 78; Dominick *v.* State, 40 Ala. 680, 91 Am. Dec. 496; Solliday *v.* State, 28 Pa. St. 13; Com. *v.* Demuth, 12 Serg. & R. (Pa.) 389; State *v.* Hudkins, 35 W. Va. 247, 13 S. E. 367.

5. People *v.* Connor, 142 N. Y. 130, 36 N. E. 807 [*affirming* 65 Hun 392, 20 N. Y. Suppl. 209, 8 N. Y. Cr. 439]; State *v.* Hudkins, 35 W. Va. 247, 13 S. E. 367.

6. People *v.* Trimble, 60 Hun (N. Y.) 364, 15 N. Y. Suppl. 60 [*affirmed* in 131 N. Y. 118, 29 N. E. 1100].

7. 2 Hale P. C. 391. See State *v.* Ackerman, 64 N. J. L. 99, 45 Atl. 27; State *v.* Cross, 44 W. Va. 315, 29 S. E. 527.

8. Com. *v.* Wade, 17 Pick. (Mass.) 395; Com. *v.* Roby, 12 Pick. (Mass.) 496; Rex *v.* Vandercom, 2 East P. C. 519, 2 Leach C. C. 816; Coogan's Case, 2 East P. C. 1001, 1 Leach C. C. 449; Rex *v.* Roche, 1 Leach C. C. 160; Rex *v.* Wildey, 1 M. & S. 183.

9. See *supra*, XI, B, 7, h, (VI).

10. Rex *v.* Taylor, 3 B. & C. 502, 10 E. C. L. 231; Reg. *v.* Bird, 5 Cox C. C. 11; Rex *v.* Gibson, 8 East 107; Reg. *v.* Goddard, 2 Ld. Raym. 920; 1 Chitty Cr. L. 461. And see State *v.* Green, 16 Iowa 239; McGuire *v.* State, 35 Miss. 366, 72 Am. Dec. 124 (holding, however, that the judgment on sustaining a demurrer to the plea, or defendant's demurrer to a replication, is *respondeat ouster*); State *v.* Epps, 4 Sneed (Tenn.) 552.

11. *Colorado.*— Hughes *v.* People, 8 Colo. 536, 9 Pac. 50.

to a plea of former acquittal or conviction is overruled, the defendant is not entitled to discharge, but the state may reply;[12] but if the state does not reply the judgment must be that the defendant be discharged, for the demurrer admits the facts stated in the plea.[13] The judgment on the issue raised by a plea of former acquittal, conviction, or jeopardy should be entered on the records of the court,[14] but failure to enter a judgment against the defendant on such a plea does not invalidate a conviction on a plea of not guilty entered by him without objection under permission to plead over.[15]

8. Plea of Not Guilty — a. In General. If the defendant denies his guilt of the offense charged he must plead not guilty, or if he refuses to plead the court must direct such a plea to be entered for him.[16] In most jurisdictions, in the absence of a statute, a trial without any plea is a nullity,[17] unless the objection may be and is waived or cured by statute.[18] It has been held that by announcing

Massachusetts.— Com. *v.* Golding, 14 Gray 49; Com. *v.* Goddard, 13 Mass. 455.

New Jersey.—State *v.* Ackerman, 64 N. J. L. 99, 45 Atl. 27.

New York.— People *v.* Trimble, 131 N. Y. 118, 29 N. E. 1100 [*affirming* 60 Hun 364, 15 N. Y. Suppl. 60]; People *v.* Saunders, 4 Park. Cr. 196.

North Carolina.—Pollard *v.* State, 83 N. C. 597.

West Virginia.— See State *v.* Cross, 44 W. Va. 315, 29 S. E. 527.

Pennsylvania.— Foster *v.* Com., 8 Watts & S. 77; Barge *v.* Com., 3 Penr. & W. 262, 23 Am. Dec. 81.

Tennessee.— State *v.* Thurston, 3 Heisk. 67; Fulkner *v.* State, 3 Heisk. 33.

Wisconsin.— McFarland *v.* State, 68 Wis. 400, 32 N. W. 226, 60 Am. Rep. 867.

Contra, by statute, People *v.* Briggs, 1 Dak. 302, 46 N. W. 451.

See 14 Cent. Dig. tit. "Criminal Law," § 682.

12. State *v.* Nelson, 7 Ala. 610.

13. State *v.* Ackerman, 64 N. J. L. 99, 45 Atl. 27. See also State *v.* Cross, 44 W. Va. 315, 29 S. E. 527.

14. Rust *v.* State, 31 Tex. Cr. 75, 19 S. W. 763. See People *v.* Trimble, 131 N. Y. 118, 29 N. E. 1100 [*affirming* 60 Hun 364, 15 N. Y. Suppl. 60].

15. People *v.* Trimble, 131 N. Y. 118, 29 N. E. 1100 [*affirming* 60 Hun 364, 15 N. Y. Suppl. 60].

16. See *supra*, XI, B, 2.

Demurrer and plea at same time.— State *v.* McCoy, 111 Mo. 517, 20 S. W. 240.

Plea of not guilty after plea in abatement or specially in bar or demurrer see *supra*, XI, B, 3, c.

17. *Alabama.*— Bowen *v.* State, 98 Ala. 83, 12 So. 808; Jackson *v.* State, 91 Ala. 55, 8 So. 773, 24 Am. St. Rep. 860; Fisher *v.* State, 46 Ala. 717.

Arizona.— Territory *v.* Brash, (1890) 32 Pac. 260.

California.— People *v.* Gaines, 52 Cal. 479; People *v.* Corbett, 28 Cal. 328.

Colorado.— Ray *v.* People, 6 Colo. 231.

Illinois.— Parkinson *v.* People, 135 Ill. 401, 25 N. E. 764, 10 L. R. A. 91; Gould *v.* People, 89 Ill. 216; Hoskins *v.* People, 84 Ill. 87, 25 Am. Rep. 433; Gundt *v.* People, 65 Ill. 372; Miller *v.* People, 47 Ill. App. 472; Spicer *v.* People, 11 Ill. App. 294; Price *v.* People, 9 Ill. App. 36.

Indiana.— Johns *v.* State, 104 Ind. 557, 4 N. E. 153; Fletcher *v.* State, 54 Ind. 462.

Kansas.— State *v.* Wilson, 42 Kan. 587, 22 Pac. 622.

Louisiana.— State *v.* Hunter, 43 La. Ann. 157, 8 So. 624; State *v.* Ford, 30 La. Ann. 311.

Michigan.— Grigg *v.* People, 31 Mich. 471.

Mississippi.— Sartorious *v.* State, 24 Miss. 602.

Missouri.— State *v.* Williams, 117 Mo. 379, 22 S. W. 1104; State *v.* Koerner, 51 Mo. 174; State *v.* Hubbell, 55 Mo. App. 262.

North Carolina.— State *v.* Cunningham, 94 N. C. 824.

Tennessee.— Link *v.* State, 3 Heisk. 252; Hill *v.* State, 1 Yerg. 76, 24 Am. Dec. 441.

Texas.— Munson *v.* State, (App. 1899) 11 S. W. 114; Jefferson *v.* State, 24 Tex. App. 535, 7 S. W. 244; Shaw *v.* State, 17 Tex. App. 225; Huddleston *v.* State, 14 Tex. App. 73; Warren *v.* State, 13 Tex. App. 348; Ellison *v.* State, 6 Tex. App. 248; Parchman *v.* State, 3 Tex. App. 225; Smith *v.* State, 1 Tex. App. 408.

Washington.— Palmer *v.* U. S., 1 Wash. Terr. 5.

Wisconsin.— Davis *v.* State, 38 Wis. 487; Douglass *v.* State, 3 Wis. 820; Anderson *v.* State, 3 Pinn. 367.

United States.— Crain *v.* U. S., 162 U. S. 625, 16 S. Ct. 952, 40 L. ed. 1097.

See 14 Cent. Dig. tit. "Criminal Law," § 612 *et seq.* And see *supra*, XI, B, 1, b.

Contra, where the plea is omitted through inadvertence and a trial is had as though it had been entered. State *v.* Hayes, 67 Iowa 27, 24 N. W. 575; State *v.* Glave, 51 Kan. 330, 33 Pac. 8; U. S. *v.* Malloy, 31 Fed. 19. See also Arbuckle *v.* State, 80 Miss. 15, 31 So. 437; State *v.* Straubs, 16 Wash. 111, 47 Pac. 227.

Presumption that plea was entered.— Hinkle *v.* Com., 66 S. W. 1020, 23 Ky. L. Rep. 1979.

Plea on trial de novo on appeal from summary conviction see *supra*, X, E, 2, c, (II).

18. See *supra*, XI, B, 1, f.

himself ready for trial the defendant in effect enters a plea of not guilty.[19] Where a plea of not guilty has not been entered at the time of the prisoner's arraignment the court may order it to be entered thereafter *nunc pro tunc*.[20] The plea of not guilty is sufficient, although informal, if it is certain to a common intent.[21] Withdrawal of a plea of not guilty has been elsewhere treated.[22]

b. Defendants Jointly Indicted. Persons jointly indicted for the same crime have a right to plead severally not guilty, but a general plea of not guilty by all is a several plea as to each.[23]

c. Plea by Counsel. It seems that in a prosecution for a misdemeanor a plea of not guilty may be made by the defendant by counsel, even in the defendant's absence,[24] and there are cases sustaining a plea by counsel in prosecutions for a felony, both where the defendant was present[25] and where he was absent.[26] Other cases hold that one accused of a felony must plead in person, and a plea of not guilty by counsel, whether in the defendant's absence or presence, is a nullity.[27]

d. Joinder of Issue. The omission from the record of a *similiter* or joinder of issue by the prosecuting attorney does not vitiate a conviction on a plea of not guilty, for this plea legally puts the defendant on trial before the jury.[28]

e. Issues Under Plea of Not Guilty. A plea of not guilty is a denial of and puts in issue the whole of the charge, every allegation of the indictment, the criminal intent, and every statement of the witnesses against the defendant.[29] Under the general issue the defendant is entitled to show matters of justification and excuse.[30] The plea of not guilty puts in issue the place of the crime,[31] its degree,[32] the allegation that the name of the person injured was unknown to the grand jurors,[33] and each and every one of the several counts in the indictment.[34]

19. Avery *v.* People, 11 Ill. App. 332; Spicer *v.* People, 11 Ill. App. 294; People *v.* Frost, 5 Park. Cr. (N. Y.) 52.

20. Parkinson *v.* People, 135 Ill. 401, 25 N. E. 764, 10 L. R. A. 91; Long *v.* People, 102 Ill. 331 (where the plea was entered after trial); Waggoner *v.* State, 30 Ohio St. 575 (where the plea was entered after the jury had been sworn).

Time of pleading see *supra*, XI, B, 1, d.

21. Smith *v.* State, Peck (Tenn.) 165, holding that, although the language of the plea should be the language of the prisoner, "He saith," yet where the record ran, "He appeared upon his arraignment and put himself upon the country," it was sufficient.

Sufficiency of plea under California statute. — People *v.* Wallace, 101 Cal. 281, 35 Pac. 862.

22. See *supra*, XI, B, 3, f.

23. State *v.* Taylor, 1 Root (Conn.) 226; State *v.* Smith, 24 N. C. 402.

24. State *v.* Dean, Brayt. (Vt.) 26.

25. People *v.* Emerson, 130 Cal. 562, 62 Pac. 1069; People *v.* McCoy, 71 Cal. 395, 12 Pac. 272; Minich *v.* People, 8 Colo. 440, 9 Pac. 4.

26. State *v.* Andrews, 84 Iowa 88, 50 N. W. 549; State *v.* Jones, 70 Iowa 505, 30 N. W. 750. See also Rex *v.* Penprase, 4 B. & Ad. 573, 1 N. & M. 312, 24 E. C. L. 252.

27. Wilson *v.* State, 42 Miss. 639; McQuillen *v.* State, 8 Sm. & M. (Miss.) 587; Elick *v.* Territory, 1 Wash. Terr. 136.

28. *Florida.*— Dixon *v.* State, 13 Fla. 631.
Maryland.— Rawlings *v.* State, 2 Md. 201.
Missouri.— Hawkins *v.* State, 7 Mo. 190.
New Jersey.— Berrian *v.* State, 22 N. J. L. 9.
North Carolina.— State *v.* Carroll, 27 N. C. 139; State *v.* Christmas, 20 N. C. 545; State *v.* Lamon, 10 N. C. 175; State *v.* Fort, 4 N. C. 122.
Tennessee.— Smith *v.* State, Peck 165.
West Virginia.— State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.
See 14 Cent. Dig. tit. "Criminal Law," § 685.

29. Cameron *v.* State, 13 Ark. 712; State *v.* Whitney, 7 Oreg. 386; State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

30. *Florida.*— Hodge *v.* State, 29 Fla. 500, 10 So. 556; Adams *v.* State, 28 Fla. 511, 10 So. 106; Savage *v.* State, 18 Fla. 909.
Maryland.— Mills *v.* State, 76 Md. 274, 25 Atl. 229; Cooper *v.* State, 64 Md. 40, 20 Atl. 986.
Massachusetts.— Martin *v.* Com., 1 Mass. 347.
South Carolina.— State *v.* Farr, 12 Rich. 24.
Wisconsin.— Richards *v.* State, 82 Wis. 172, 51 N. W. 652.
England.— 4 Bl. Comm. 338; 2 Hale P. C. 258.
And see *supra*, XI, B, 7, a.
Insanity see *supra*, XI, B, 7, e.
Pardon see *supra*, XI, B, 7, f.
Former acquittal, conviction, or jeopardy see *supra*, XI, B, 7, h, (I).
Statute of limitations see *supra*, XI, B, 7, d.

31. People *v.* Aleck, 61 Cal. 137; People *v.* Bevans, 52 Cal. 470; State *v.* Buchanan, 130 N. C. 660, 41 S. E. 107.

32. State *v.* Whitney, 7 Oreg. 386.

33. Cameron *v.* State, 13 Ark. 712.

34. Edgerton *v.* Com., 5 Allen (Mass.) 514.

C. Nolle Prosequi and Discontinuance — 1. Nolle Prosequi — a. Definition. A *nolle prosequi* is a formal entry upon the record by the prosecuting officer, by which he declares that he will no further prosecute the case, either as to some of the counts of the indictment, or part of a divisible count, or as to some of the defendants, or altogether.[35]

b. Authority to Enter and Time of Entry — (I) *In General.* By the weight of authority, in the absence of a statutory provision to the contrary, but in some jurisdictions by leave of the court only,[36] a *nolle prosequi* may be entered by the prosecuting officer at any time before judgment, with or without defendant's consent,[37] although if it is entered without defendant's consent after the jury

35. Black L. Dict.; Clark Cr. Proc. 135.

36. See *infra*, XI, C, 1, b, (II).

37. *Alabama.*— Lacey *v.* State, 58 Ala. 385; Levison *v.* State, 54 Ala. 520.

Connecticut.— State *v.* Benham, 7 Conn. 414.

Georgia.— Durham *v.* State, 9 Ga. 306; Reynolds *v.* State, 3 Ga. 53.

Louisiana.— State *v.* Hornsby, 8 Rob. 583, 41 Am. Dec. 314.

Maine.— State *v.* Bean, 77 Me. 486; State *v.* Burke, 38 Me. 574; State *v.* Bruce, 24 Me. 71.

Massachusetts.— Com. *v.* Scott, 121 Mass. 33; Com. *v.* Wallace, 108 Mass. 12; Com. *v.* Smith, 98 Mass. 10; Com. *v.* Tuck, 20 Pick. 356; Com. *v.* Briggs, 7 Pick. 177; Com. *v.* Wheeler, 2 Mass. 172.

Michigan.— People *v.* Pline, 61 Mich. 247, 28 N. W. 83.

Mississippi.—Clarke *v.* State, 23 Miss. 261.

New Hampshire.— State *v.* Tufts, 56 N. H. 137; State *v.* Smith, 49 N. H. 155, 6 Am. Rep. 480.

New Jersey.— State *v.* Hickling, 45 N. J. L. 152.

New York.— People *v.* McLeod, 1 Hill 377, 404, 37 Am. Dec. 328, 25 Wend. 483, 572; People *v.* Porter, 4 Park. Cr. 524.

North Carolina.— State *v.* Thompson, 10 N. C. 613.

Pennsylvania.—Com. *v.* Seymour, 2 Brewst. 567.

South Carolina.— State *v.* Shirer, 20 S. C. 392; State *v.* McKee, 1 Bailey 651, 21 Am. Dec. 499.

Tennessee.— State *v.* Fleming, 7 Humphr. 152, 46 Am. Dec. 73.

Vermont.— State *v.* Roe, 12 Vt. 93.

Virginia.— Hughes *v.* Com., 17 Gratt. 565, 94 Am. Dec. 498; Lindsay *v.* Com., 2 Va. Cas. 345.

United States.— U. S. *v.* Coolidge, 25 Fed. Cas. No. 14,858, 2 Gall. 364; U. S. *v.* Shoemaker, 27 Fed. Cas. No. 16,279, 2 McLean 114; U. S. *v.* Watson, 28 Fed. Cas. No. 16,652, 7 Blatchf. 60.

England.— Reg. *v.* Allen, 1 B. & S. 850, 9 Cox C. C. 120, 8 Jur. N. S. 230, 31 L. J. M. C. 129, 5 L. T. Rep. N. S. 636, 101 E. C. L. 850; Reg. *v.* Dunn, 1 C. & K. 730, 47 E. C. L. 730.

See 14 Cent. Dig. tit. "Criminal Law," § 688 *et seq.*

Time of entry.— A *nolle prosequi* may be entered before the finding of an indictment (Gallagher *v.* Franklin County, 5 Pa. Co. Ct. 431); after an indictment has been found and before a jury has been impaneled and sworn (Durham *v.* State, 9 Ga. 306; Dilger *v.* Com., 88 Ky. 550, 11 S. W. 651, 11 Ky. L. Rep. 67; State *v.* Smith, 67 Me. 328; Com. *v.* Scott, 121 Mass. 33; Com. *v.* Smith, 98 Mass. 10; Com. *v.* Tuck, 20 Pick. (Mass.) 356; Com. *v.* Goodenough, Thach. Cr. Cas. (Mass.) 132; Clarke *v.* State, 23 Miss. 261; State *v.* Smith, 49 N. H. 155, 6 Am. Rep. 480; State *v.* McKee, 1 Bailey (S. C.) 651, 21 Am. Dec. 499; Hughes *v.* Com., 17 Gratt. (Va.) 565, 94 Am. Dec. 498; U. S. *v.* Schumann, 27 Fed. Cas. No. 16,235, 2 Abb. 523, 7 Sawy. 439; U. S. *v.* Stowell, 27 Fed. Cas. No. 16,409, 2 Curt. 153); after disagreement and discharge of a jury and before another trial (People *v.* Pline, 61 Mich. 247, 28 N. W. 83; State *v.* Shirer, 20 S. C. 392); after verdict and before judgment (State *v.* Klock, 48 La. Ann. 140, 18 So. 942; State *v.* Smith, 67 Me. 328; Com. *v.* Scott, 121 Mass. 33; Com. *v.* Tuck, 20 Pick. (Mass.) 356; State *v.* Smith, 49 N. H. 155, 6 Am. Rep. 480. *Contra*, State *v.* Moise, 48 La. Ann. 109, 18 So. 943, 35 L. R. A. 701; State *v.* Thompson, 95 N. C. 596. And see *infra*, XI, C, 1, d, (II)); after a rule *nisi* for a new trial (Reg. *v.* Leatham, 8 Cox C. C. 498, 3 E. & E. 658, 7 Jur. N. S. 674, 30 L. J. Q. B. 205, 3 L. T. Rep. N. S. 504, 9 Wkly. Rep. 33, 107 E. C. L. 658); after a verdict has been set aside and a new trial granted and before the new trial (State *v.* Rust, 31 Kan. 509, 3 Pac. 428; Com. *v.* Smith, 98 Mass. 10); after reversal of a conviction and before the new trial (Aaron *v.* State, 39 Ala. 75; Hughes *v.* Com., 17 Gratt. (Va.) 565, 94 Am. Dec. 498); or after appeal for a trial *de novo* and before commencement thereof (Com. *v.* McCluskey, 151 Mass. 488, 25 N. E. 72). Some of the cases seem to hold that a *nolle prosequi* cannot be entered without the defendant's consent after the jury have been impaneled and sworn and before verdict (State *v.* Davis, 4 Blackf. (Ind.) 345; State *v.* Klock, 48 La. Ann. 140, 18 So. 942; Com. *v.* Wade, 17 Pick. (Mass.) 395; State *v.* Smith, 49 N. H. 155, 6 Am. Rep. 480; Rider's Case, 3 City Hall Rec. (N. Y.) 93; State *v.* Thompson, 95 N. C. 596; U. S. *v.* Shoemaker, 27 Fed. Cas. No. 16,279, 2 McLean 114. And see State *v.* Bugg, 6 Rob. (La.) 63), if the defendant insists upon a verdict. Com. *v.* Kimhall, 7 Gray (Mass.) 328. This, however, was not the rule at common law, and the better opinion is that it may be so entered by leave of the court, which

has been impaneled and sworn, and the indictment is sufficient, jeopardy has attached, and in most states he cannot be again put upon trial for the same offense.[38]

(II) *LEAVE OF COURT.* At common law the matter of entering a *nolle prosequi* rests entirely within the discretion of the prosecuting officer, and leave of the court is not necessary;[39] and by the weight of authority this is still the rule, in the absence of a statute, where the entry is before the trial begins. Leave of the court, however, is sometimes expressly required by statute,[40] and in some states it has been held necessary, even in the absence of a statute, where the *nolle prosequi* is entered after the jury have been impaneled and sworn and before verdict,[41] or after a verdict,[42] or even before commencement of the trial.[43]

(III) *AUTHORITY OF COURT TO DIRECT.* In the absence of a statute the court has no power to enter or direct the prosecuting officer to enter a *nolle prosequi*,[44]

will not be granted, however, to the prejudice of the defendant. Newsom *v.* State, 2 Ga. 60; Wilson *v.* Com., 3 Bush 105; State *v.* Hornsby, 8 Rob. 583, 41 Am. Dec. 314; State *v.* Hodgkins, 42 N. H. 474; Com. *v.* Seymour, 2 Brewst. 567; Walton *v.* State, 3 Sneed 687; State *v.* Roe, 12 Vt. 93. And see State *v.* I. S. S., 1 Tyler 178.

In Georgia, by statute, a *nolle prosequi* cannot be entered after the jury have been sworn to try the case. Newsom *v.* State, 2 Ga. 60, holding that under a statute prohibiting a *nolle prosequi* after the case has been "submitted to a jury," a *nolle prosequi* cannot be entered after the defendant has been arraigned and has pleaded not guilty, and the jury have been impaneled and sworn, as the case is then "submitted."

Charging county with costs of prosecution. — Agnew *v.* Cumberland County, 12 Serg. & R. (Pa.) 94.

38. Reynolds *v.* State, 3 Ga. 53. See *supra*, IX, D, 3.

39. *Georgia.*— Durham *v.* State, 9 Ga. 306; Reynolds *v.* State, 3 Ga. 53. But see Stratham *v.* State, 41 Ga. 507.

Hawaii.— Rex *v.* Robertson, 6 Hawaii 718.

Louisiana.— State *v.* Hornsby, 8 Rob. 583, 41 Am. Dec. 314; State *v.* Bugg, 6 Rob. 63. And see State *v.* Moise, 48 La. Ann. 109, 18 So. 943, 35 L. R. A. 701.

Massachusetts.— Com. *v.* Cain, 102 Mass. 487; Com. *v.* Tuck, 20 Pick. 356; Com. *v.* Wheeler, 2 Mass. 172.

Mississippi.— Clarke *v.* State, 23 Miss. 261.

New Hampshire.— State *v.* Tufts, 56 N. H. 137.

New York.— People *v.* McLeod, 1 Hill 377, 37 Am. Dec. 328, 25 Wend. 483, 572.

North Carolina.— State *v.* Thompson, 10 N. C. 613.

United States.— U. S. *v.* Coolidge, 25 Fed. Cas. No. 14,858, 2 Gall. 364; U. S. *v.* Schumann, 27 Fed. Cas. No. 16,235, 2 Abb. 523, 7 Sawy. 439; U. S. *v.* Watson, 28 Fed. Cas. No. 16,652, 7 Blatchf. 60.

England.— Reg. *v.* Allen, 1 B. & S. 850, 9 Cox C. C. 120, 8 Jur. N. S. 230, 31 L. J. M. C. 129, 5 L. T. Rep. N. S. 636, 101 E. C. L. 850; 1 Coke Litt. 139*b*.

40. Statham *v.* State, 41 Ga. 507; Lindsay *v.* People, 63 N. Y. 143; People *v.* Bennett, 49 N. Y. 137; Gallagher *v.* Franklin County, 5 Pa. Co. Ct. 431 (leave of court in writing required by statute); Kelly *v.* State, (Tex. Cr. App. 1896) 38 S. W. 39.

Conclusiveness of consent of court under statute.— Lascelles *v.* State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216.

Statement of reasons.— In some states, by statute, the prosecuting officer is required to file a statement of the reasons for entering a *nolle prosequi*. Kelly *v.* State, (Tex. Cr. App. 1896) 38 S. W. 39.

41. *Georgia.*— Statham *v.* State, 41 Ga. 507.

Kentucky.— Wilson *v.* Com., 3 Bush 105. See Spalding *v.* Hill, 72 S. W. 307, 24 Ky. L. Rep. 1802.

Louisiana.— State *v.* Moise, 48 La. Ann. 109, 18 So. 943, 35 L. R. A. 701; State *v.* Hornsby, 8 Rob. 583, 41 Am. Dec. 314.

New Hampshire.— State *v.* Hodgkins, 42 N. H. 474.

New Jersey.— See State *v.* Hickling, 45 N. J. L. 152.

North Carolina.— State *v.* Moody, 69 N. C. 529.

Pennsylvania.—Com. *v.* Seymour, 2 Brewst. 567.

Vermont.— State *v.* Roe, 12 Vt. 93; State *v.* I. S. S., 1 Tyler 178.

See 14 Cent. Dig. tit. "Criminal Law," § 688 *et seq.*

42. State *v.* Klock, 48 La. Ann. 140, 18 So. 942.

43. Statham *v.* State, 41 Ga. 507; Rex *v.* Robertson, 6 Hawaii 718.

44. *Massachusetts.*— Com. *v.* Wheeler, 2 Mass. 172.

Missouri.— State *v.* Mathews, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135.

New Jersey.—State *v.* Hickling, 45 N. J. L. 152.

New York.— People *v.* Bennett, 49 N. Y. 137; People *v.* McLeod, 1 Hill 377, 404, 37 Am. Dec. 328, 25 Wend. 483, 572; People *v.* Harris, Edm. Sel. Cas. 454; People *v.* Beckwith, 2 N. Y. Cr. 29; People *v.* Porter, 4 Park. Cr. 524.

Texas.— State *v.* McLane, 31 Tex. 260.

England.— Reg. *v.* Dunn, 1 C. & K. 730, 47 E. C. L. 730.

See 14 Cent. Dig. tit. "Criminal Law," § 689 *et seq.*

but the court may advise a *nolle prosequi*, and it is unusual for the prosecuting officer to disregard such advice.[45]

(iv) *Private Prosecutor.* The private prosecutor cannot withdraw a prosecution without the consent of the prosecuting officer,[46] and the concurrence of the private prosecutor is not necessary to the entry of a *nolle prosequi* by the prosecuting officer.[47]

(v) *Grounds For Allowing.* The court may properly allow a *nolle prosequi* to be entered where the indictment has been lost and a new one is necessary,[48] where the indictment or information is defective,[49] where a misdemeanor has been compounded under a statute permitting it,[50] where it is desired to procure the evidence of one of several defendants, jointly indicted, in order to convict the others,[51] where no evidence can be produced by the state,[52] or where the evidence at most raises only a suspicion of guilt, and the case is apparently without merit and has been pending for a long time.[53] But the defendant is entitled to an acquittal, and a *nolle prosequi* will not be allowed merely because of a variance between the charge and the proof, or because of the insufficiency of the evidence.[54]

c. Allowance as to Co-Defendants. It is well settled that where several persons are jointly indicted a *nolle prosequi* may be allowed as to one or more, and a trial had on the merits as to the others.[55] This has frequently been permitted or done for the purpose of rendering one of two or more persons who have been jointly indicted a competent witness against the other or others.[56]

d. Allowance as to One of Several Indictments or Counts, or as to Part of Count — (i) *In General.* A *nolle prosequi* may be allowed as to one of two indictments,[57] or as to one or more of the several counts of an indictment, or as to

45. People *v.* Harris, Edm. Sel. Cas. (N. Y.) 454.

46. Virginia *v.* Dulany, 28 Fed. Cas. No. 16,959, 1 Cranch C. C. 82. And see People *v.* Prince, 1 Wheel. Cr. (N. Y.) 32.

47. Reg. *v.* Allen, 1 B. & S. 850, 9 Cox C. C. 120, 8 Jur. N. S. 230, 31 L. J. M. C. 129, 5 L. T. Rep. N. S. 636, 101 E. C. L. 850; Reg. *v.* Dunn, 1 C. & K. 730, 47 E. C. L. 730.

48. State *v.* Pierre, 38 La. Ann. 91.

49. Com. *v.* Wheeler, 2 Mass. 172; Walton *v.* State, 3 Sneed (Tenn.) 687.

50. State *v.* Frazier, 52 La. Ann. 1305, 27 So. 799; State *v.* Hunter, 14 La. Ann. 71; Gilmore's Case, 2 City Hall Rec. (N. Y.) 29, all holding, however, that the statutes allowing the prosecuting attorney to enter a *nolle prosequi* when the case has been compromised are merely permissive.

51. See *infra*, XI, C, 1, c.

52. U. S. *v.* Brooks, 44 Fed. 749, holding that the prosecuting attorney will be allowed to dismiss a prosecution after plea of not guilty, on his statement that he is unable to produce any evidence in support of the prosecution, although the defendant objects and insists upon a trial and verdict.

53. Williams *v.* State, 97 Ga. 398, 23 S. E. 822.

54. State *v.* Davis, 4 Blackf. (Ind.) 345; Com. *v.* Wade, 17 Pick. (Mass.) 395; U. S. *v.* Shoemaker, 27 Fed. Cas. No. 16,279, 2 McLean 114.

55. *Alabama.*— Aaron *v.* State, 39 Ala. 75.

California.— People *v.* Bruzzo, 24 Cal. 41.

Indiana.— State *v.* Woulfe, 58 Ind. 17; Baker *v.* State, 57 Ind. 255; Hall *v.* State, 8 Ind. 439.

Iowa.— State *v.* McComb, 18 Iowa 43.

Missouri.—State *v.* Beaucleigh, 92 Mo. 490, 4 S. W. 666; State *v.* Clump, 16 Mo. 385.

New York.— Lindsay *v.* People, 63 N. Y. 143.

North Carolina.— State *v.* Phipps, 76 N. C. 203.

Pennsylvania.— Com. *v.* Casey, 3 Pa. Dist. 413, 7 Kulp 265, 14 Pa. Co. Ct. 389.

South Carolina.— State *v.* Jackson, 7 S. C. 283, 24 Am. Rep. 476.

Texas.— Johnson *v.* State, 33 Tex. 570.

See 14 Cent. Dig. tit. "Criminal Law," § 693.

Distinction where there are several counts. — It seems, however, that where several are jointly indicted, and on a plea of guilty a *nolle prosequi* is entered as to some of them on one count, the others cannot be subsequently tried and convicted on that count (Walker *v.* State, 61 Ala. 30), and where two are jointly indicted on two counts, it is not proper to permit a *nolle prosequi* as to one of them on one count and as to the other on the other count (State *v.* Daubert, 42 Mo. 242).

Conspiracy.— The general rule applies of course to indictments for conspiracy, but with this difference. If only two are indicted, and a *nolle prosequi* is entered as to one of them, even after verdict, it leaves the indictment as if it charged the other alone, and since one person alone cannot be guilty of a conspiracy no judgment can be rendered against him on the verdict. State *v.* Jackson, 7 S. C. 283, 24 Am. Rep. 476.

56. See the cases cited in the preceding note; and *infra*, XII, G, 2, a, (v), (c).

57. State *v.* McNeill, 10 N. C. 183.

part of a count or indictment which is divisible,[58] even after defendant's motion to quash,[59] or after his demurrer because of a misjoinder of counts.[60]

(II) *AFTER VERDICT.* After a general verdict of guilty the prosecuting officer may enter a *nolle prosequi* as to one or more of several counts in the indictment and move for sentence on the remainder,[61] although the defendant has made a motion in arrest of judgment.[62] He may do the same after verdict as to any count as to which the jury has failed to respond,[63] or as to which they state that they cannot agree,[64] or upon which by implication they acquit the prisoner.[65]

e. Conditional Allowance. The accused cannot claim the benefit of a *nolle prosequi* conditioned on his payment of costs until he has paid them in full.[66]

f. Entry on Record and Setting Aside. In order that a prosecution may be effectually withdrawn by a *nolle prosequi*, so as to prevent retraction and subsequent prosecution on the charge, the withdrawal must be entered on the record.[67] It has been held that a *nolle prosequi* may be set aside after its entry by leave of the court so as to reinstate proceedings on the indictment, if no

58. *Alabama.*— Williams *v.* State, 130 Ala. 31, 30 So. 336; Walker *v.* State, 61 Ala. 30; Wooster *v.* State, 55 Ala. 217; Aaron *v.* State, 39 Ala. 75. The accused cannot complain because of an entry of a *nolle prosequi* as to one count of the indictment after the evidence is closed, as this is an acquittal. Barnett *v.* State, 54 Ala. 579.

Iowa.— State *v.* Struble, 71 Iowa 11, 32 N. W. 1; State *v.* McPherson, 9 Iowa 53.

Louisiana.— State *v.* Evans, 40 La. Ann. 216, 3 So. 838.

Maine.— State *v.* Bean, 77 Me. 486; State *v.* Smith, 67 Me. 328; State *v.* Pillsbury, 47 Me. 449; State *v.* Burke, 38 Me. 574.

Massachusetts.— Com. *v.* Uhrig, 167 Mass. 420, 45 N. E. 1047; Com. *v.* Andrews, 132 Mass. 263; Com. *v.* Dean, 109 Mass. 349 (holding that on an indictment charging rape there may be a *nolle prosequi* as to the charge of rape and prosecution for assault); Com. *v.* Wallace, 108 Mass. 12; Jennings *v.* Com., 105 Mass. 586; Com. *v.* Cain, 102 Mass. 487; Com. *v.* Jenks, 1 Gray 490; Com. *v.* Tuck, 20 Pick. 356; Com. *v.* Briggs, 7 Pick. 177.

Minnesota.— State *v.* Eno, 8 Minn. 220.

New York.— People *v.* Porter, 4 Park. Cr. 524.

North Carolina.— State *v.* Taylor, 84 N. C. 773.

Ohio.— Baker *v.* State, 12 Ohio St. 214; McGuire *v.* State, 2 Ohio Cir. Dec. 318.

Texas.— Dunham *v.* State, 9 Tex. App. 330.

United States.— U. S. *v.* Keen, 26 Fed. Cas. No. 15,510, 1 McLean 429; U. S. *v.* Peterson, 27 Fed. Cas. No. 16,037, 1 Woodb. & M. 305.

England.— Reg. *v.* Leatham, 8 Cox C. C. 498, 3 E. & E. 658, 7 Jur. N. S. 674, 30 L. J. Q. B. 205, 3 L. T. Rep. N. S. 504, 9 Wkly. Rep. 33, 107 E. C. L. 658.

See 14 Cent. Dig. tit. "Criminal Law," §§ 694, 695.

To cure duplicity.— State *v.* Bean, 77 Me. 486.

Aggravating circumstances.—A *nolle prosequi* may be entered as to aggravating circumstances alleged in an indictment. State *v.* Struble, 71 Iowa 11, 32 N. W. 1; State *v.* Evans, 40 La. Ann. 216, 3 So. 838; Com. *v.* Briggs, 7 Pick. (Mass.) 177 (prior conviction); Baker *v.* State, 12 Ohio St. 214 (intent to murder in indictment for assault with intent to murder).

In Tennessee it was held that on an indictment for assault with intent to murder the entry of a *nolle prosequi* or a dismissal of the indictment as to the felony was a dismissal of the whole indictment, and that the accused could not be tried thereon for simple assault. Grant *v.* State, 2 Coldw. 216; Brittain *v.* State, 7 Humphr. 159. But in a later case these cases were distinguished and it was held that the charge of felony might be stricken out by consent of the court and a trial had for the simple assault. Ferrell *v.* State, 2 Lea 25. See also Baker *v.* State, 12 Ohio St. 214.

59. State *v.* Buchanan, 23 N. C. 59. And see State *v.* Smith, 67 Me. 328; Com. *v.* Andrews, 132 Mass. 263; Com. *v.* Cain, 102 Mass. 487.

60. Gibbs *v.* State, 130 Ala. 101, 30 So. 393; Com. *v.* Cain, 102 Mass. 487.

61. *Louisiana.*— State *v.* Washington, 43 La. Ann. 919, 9 So. 927; State *v.* Crosby, 4 La. Ann. 434; State *v.* Banton, 4 La. Ann. 31.

Maine.— State *v.* Burke, 38 Me. 574; State *v.* Bruce, 24 Me. 71; State *v.* Whittier, 21 Me. 341, 38 Am. Dec. 272.

Massachusetts.— Com. *v.* Wallace, 108 Mass. 12; Jennings *v.* Com., 105 Mass. 586; Com. *v.* Jenks, 1 Gray 490.

Minnesota.— State *v.* Eno, 8 Minn. 220.

United States.— U. S. *v.* Peterson, 27 Fed. Cas. No. 16,037, 1 Woodb. & M. 305.

See 14 Cent. Dig. tit. "Criminal Law," § 695.

62. Com. *v.* Wallace, 108 Mass. 12; Com. *v.* Jenks, 1 Gray (Mass.) 490.

63. Aaron *v.* State, 39 Ala. 75; State *v.* McPherson, 9 Iowa 53; Com. *v.* Stedman, 12 Metc. (Mass.) 444; U. S. *v.* Keen, 26 Fed. Cas. No. 15,510, 1 McLean 429. But see Weinzorpflin *v.* State, 7 Blackf. (Ind.) 186.

64. Com. *v.* Stedman, 12 Metc. (Mass.) 444.

65. Jennings *v.* Com., 105 Mass. 586.

66. State *v.* Morgan, 33 Md. 44; Com. *v.* Jacoby, 11 York Leg. Rec. (Pa.) 162.

67. Williams *v.* State, 57 Ga. 478; Com. *v.* Tuck, 20 Pick. (Mass.) 356; Com. *v.* Wheeler, 2 Mass. 172; Wortham *v.* Com., 5 Rand. (Va.) 669. And see Statham *v.* State,

prejudice to the defendant results,[68] or if he consents;[69] but in other cases it has been held that a *nolle prosequi* once entered is absolute and cannot be rescinded,[70] unless it was entered by mistake.[71]

g. Proceedings After Entry. Although a *nolle prosequi* does not amount to an acquittal or entitle the defendant to an absolute discharge from future prosecution, unless he has been in jeopardy,[72] he is entitled to be released,[73] without entering into a recognizance to appear at any other time.[74]

2. Discontinuance — a. What Constitutes. A criminal prosecution as well as a civil suit may be discontinued by the act of the state, of the court, or of the attorney who prosecutes in behalf of the state.[75] A discontinuance is defined to be a gap or chasm in the proceeding after the suit is pending.[76] Its effect is to end the proceeding, and in the absence of a waiver no process or act affecting the accused can subsequently be based upon it.[77] What in any case shall, aside from statute, constitute a discontinuance is difficult to determine. It may result from unexplained delay in taking further steps in the case, or failure to take necessary steps,[78] failure of the prosecutor to appear,[79] the abolishing of the county to which the venue has been changed,[80] or from the continuance of the case by the clerk beyond the period allowed by statute.[81] But it has been held that a discontinuance does not necessarily result from failure to have the case docketed or called,[82] failure to issue process,[83] omission of the case from the docket or failure to proceed therein while it is pending in another court,[84] failure of the judge to appear or dispose of the case,[85] or his omission to continue it after verdict,[86] failure to hold

41 Ga. 507. But see Sloncen *v.* People, 58 Ill. App. 315.

A memorandum on the calendar of a court of a dismissal of a criminal prosecution by the court is not an entry on the record so as to prevent proceeding with the case. State *v.* Manley, 63 Iowa 344, 19 N. W. 211.

68. State *v.* Nutting, 39 Me. 359.

69. Parry *v.* State, 21 Tex. 746.

70. Kistler *v.* State, 64 Ind. 371; State *v.* Dix, 18 Ind. App. 472, 48 N. E. 261; Henry *v.* Com., 4 Bush (Ky.) 427.

71. People *v.* Curtis, 113 Cal. 68, 45 Pac. 180; State *v.* Phelan, 9 Baxt. (Tenn.) 241.

72. State *v.* Main, 31 Conn. 572; State *v.* Haskett, 3 Hill (S. C.) 95. And see State *v.* Thornton, 35 N. C. 256; State *v.* Thompson, 10 N. C. 613.

Former jeopardy see *supra*, IX, D, 3.

73. Com. *v.* McClusky, 151 Mass. 488, 25 N. E. 72.

74. State *v.* Thornton, 35 N. C. 256.

75. *Ex p.* Hall, 47 Ala. 675; Drinkard *v.* State, 20 Ala. 9; 1 Chitty Cr. L. 364.

Discontinuance before court of special sessions so as to give the grand jury jurisdiction. People *v.* Andrews, 50 Hun (N. Y.) 591, 3 N. Y. Suppl. 508.

76. *Ex p.* Hall, 47 Ala. 675; Drinkard *v.* State, 20 Ala. 9.

77. See *Ex p.* Stearnes, 104 Ala. 93, 16 So. 122; *Ex p.* Hall, 47 Ala. 675; Drinkard *v.* State, 20 Ala. 9; Virginia *v.* Eakin, 28 Fed. Cas. No. 16,960, 1 Cranch C. C. 83.

78. *Ex p.* Stearnes, 104 Ala. 93, 16 So. 122; Drinkard *v.* State, 20 Ala. 9; Virginia *v.* Eakin, 28 Fed. Cas. No. 16,960, 1 Cranch C. C. 83.

Failure to take any action at the next term of the court held after the accused has been committed on preliminary examination is a discontinuance (*Ex p.* Stearnes, 104 Ala. 93, 16 So. 122); but there is no discontinuance from mere failure to docket the case where a general order is entered continuing all business not disposed of (Miller *v.* State, 110 Ala. 69, 20 So. 392), or from failure to hold the next term of court at all (Farr *v.* State, 135 Ala. 71, 33 So. 660).

Where several are joined in one indictment, the entry of judgment against some of them is a discontinuance as to the others, without a formal entry of discontinuance. State *v.* Hinson, 4 Ala. 671.

79. People *v.* McIntyre, 1 Wheel. Cr. (N. Y.) 32.

80. *Ex p.* Hall, 47 Ala. 675.

81. State *v.* Meagher, 57 Vt. 398.

82. Miller *v.* State, 110 Ala. 69, 20 So. 392 (failure to docket the case at the term to which the defendant was bound over where there was a general order of the court at the close of the term continuing business not disposed of); Harrall *v.* State, 26 Ala. 52 (failure of the clerk, after a change of venue has been ordered, to transmit a transcript, and failure to have the cause entered at the next term on the docket of the court to which it is removed); *Ex p.* Williams, 26 Fla. 310, 8 So. 425 (failure to docket or call at a term of court a pending case which only awaited further sentence, where there was a general order continuing all cases not otherwise disposed of).

83. Scott *v.* State, 94 Ala. 80, 10 So. 505; Com. *v.* Gourd, 2 Va. Cas. 470.

84. *Ex p.* State, 115 Ala. 133, 22 So. 556; *Ex p.* State, 71 Ala. 363, failure of state court to proceed after erroneous removal to the federal court and before remand by the latter.

85. Glenn *v.* State, 46 Ind. 368.

86. Hill *v.* Com., 2 Va. Cas. 61.

the regular term of court after commitment on preliminary examination, and consequent failure to enter on the minutes an order continuing cases not disposed of,[87] failure to file an information at the term at which leave is given to file it,[88] or from the discharge of the defendant from his recognizance, where an indictment is pending and the case is continued.[89]

b. Waiver. The appearance of the defendant[90] or the procuring of a continuance by him[91] waives a discontinuance which might be implied from delay on the part of the prosecution in bringing the case on.

XII. EVIDENCE.

A. Burden of Proof and Presumptions — 1. Burden of Proof — a. General Rule. The general rule is that every man is presumed to be innocent until his guilt is proved beyond a reasonable doubt,[92] and in a criminal prosecution therefore the burden is on the state to prove every fact and circumstance which is essential to the guilt of the accused,[93] and to prove each item as though the whole issue rested on it,[94] except in so far as a statute establishes a different rule.[95] The burden of proof does not shift on the establishing of a *prima facie* case by the

87. Farr *v.* State, 135 Ala. 71, 33 So. 660 [*distinguishing Ex p.* Stearnes, 104 Ala. 93, 16 So. 122].

88. Com. *v.* Varner, 2 Va. Cas. 62.

89. State *v.* Howard, 15 Rich. (S. C.) 274.

90. *Ex p.* Hall, 47 Ala. 675; Clark *v.* State, 4 Ind. 268.

91. Clanton *v.* State, 96 Ala. 111, 11 So. 299.

92. Presumption of innocence see *infra*, XII, A, 2, a.

Proof beyond a reasonable doubt see *infra*, XII, I, 2, c.

93. *Alabama.*— Wharton *v.* State, 73 Ala. 366; Ogletree *v.* State, 28 Ala. 693.

Arizona.— Territory *v.* Turner, (1894) 37 Pac. 368.

Connecticut.— State *v.* Mosier, 25 Conn. 40.

Delaware.— State *v.* Fahey, 3 Pennew. 594, 54 Atl. 690; State *v.* Taylor, Houst. Cr. Cas. 436.

Georgia.— Jones *v.* State, 113 Ga. 271, 38 S. E. 851.

Idaho.— State *v.* Seymour, 7 Ida. 257, 61 Pac. 1033.

Indiana.— French *v.* State, 12 Ind. 670, 74 Am. Dec. 229.

Iowa.— State *v.* Morphy, 33 Iowa 270, 11 Am. Rep. 122.

Kansas.— State *v.* Grinstead, 62 Kan. 593, 64 Pac. 49 [*affirming* 10 Kan. App. 78, 61 Pac. 976].

Kentucky.— Ball *v.* Com., 81 Ky. 662, 5 Ky. L. Rep. 787; Farris *v.* Com., 14 Bush 362.

Louisiana.—State *v.* Anderson, 51 La. Ann. 1181, 25 So. 990.

Massachusetts.— Com. *v.* McKie, 1 Gray 61, 61 Am. Dec. 410.

Missouri.—State *v.* Hardelein, 169 Mo. 579, 70 S. W. 130; State *v.* Hickam, 95 Mo. 322, 8 S. W. 252, 6 Am. St. Rep. 54; State *v.* Wingo, 66 Mo. 181, 27 Am. Rep. 329; State *v.* Hirsch, 45 Mo. 429; State *v.* Melton, 8 Mo. 417.

New Hampshire.— State *v.* Bartlett, 43 N. H. 224, 80 Am. Dec. 154.

New York.— People *v.* Downs, 123 N. Y. 558, 25 N. E. 988; People *v.* Nileman, 8 N. Y. St. 300.

Ohio.— Fuller *v.* State, 12 Ohio St. 433.

Texas.— Henderson *v.* State, 14 Tex. 503; Huggins *v.* State, 42 Tex. Cr. 364, 60 S. W. 52; Duncan *v.* State, (Cr. App. 1900) 59 S. W. 267; Jones *v.* State, 13 Tex. App. 1; Dubose *v.* State, 10 Tex. App. 230; Shafer *v.* State, 7 Tex. App. 239; Chapman *v.* State, 1 Tex. App. 728.

Vermont.— State *v.* Patterson, 45 Vt. 308, 12 Am. Rep. 200.

Wyoming.— Gustavenson *v.* State, 10 Wyo. 300, 68 Pac. 1006.

United States.— U. S. *v.* Gooding, 12 Wheat. 460, 6 L. ed. 693; U. S. *v.* Woods, 28 Fed. Cas. No. 16,760, 4 Cranch C. C. 484.

See 14 Cent. Dig. tit. "Criminal Law," § 720 *et seq.*

Specific intent.— The burden is on the state to prove that defendant had the specific intent involved in the charge or to show facts from which it may be presumed.

Delaware.— State *v.* Di Guglielmo, (1903) 55 Atl. 350.

Massachusetts.—Com. *v.* McKie, 1 Gray 61, 61 Am. Dec. 410.

Montana.— State *v.* Judd, 20 Mont. 420, 51 Pac. 1033.

New Hampshire.— State *v.* Jones, 50 N. H. 369, 9 Am. Rep. 242.

Ohio.— Jones *v.* State, 51 Ohio St. 331, 38 N. E. 79.

Tennessee.— Coffee *v.* State, 3 Yerg. 283, 24 Am. Dec. 570.

See Burglary, 6 Cyc. 231; and other special titles.

94. Farris *v.* Com., 14 Bush (Ky.) 362; Henderson *v.* State, 14 Tex. 503; and other cases cited in the preceding note.

Instructions on burden of proof see *infra*, XIV, G, 8, b.

95. *Indiana.*— Sanders *v.* State, 94 Ind. 147.

state, but continues on the state throughout the trial and until the verdict is rendered, and defendant's guilt is established beyond a reasonable doubt.[96]

b. Constitutionality of Statutes. In the case of statutory crimes no constitutional provision is violated by a statute providing that proof by the state of some material fact shall be presumptive evidence of guilt and shall cast the burden of proof upon the accused.[97] The presumption of innocence[98] is merely a rule of evidence and does not create any vested right in the accused.[99]

c. Justification and Other Distinct Matters of Defense. Although the burden of proof is on the prosecution even as to negative matters, such as the absence of self-defense, the want of sufficient provocation, and the like,[1] yet by the weight of authority as to distinct and substantial matters of defense, consisting of facts

Minnesota.— State *v.* Gut, 13 Minn. 341; Bonfanti *v.* State, 2 Minn. 123.

Ohio.— Fuller *v.* State, 12 Ohio St. 433.

Oregon.— State *v.* Hansen, 25 Oreg. 391, 35 Pac. 976, 36 Pac. 296.

Pennsylvania.— Ortwein *v.* Com., 76 Pa. St. 414, 18 Am. Rep. 420.

Texas.— Ellis *v.* State, 30 Tex. App. 601, 18 S. W. 139.

Utah.— People *v.* Dillon, 8 Utah 92, 30 Pac. 150.

Wisconsin.— Revoir *v.* State, 82 Wis. 295, 52 N. W. 84.

United States.— U. S. *v.* Gooding, 12 Wheat. 460, 6 L. ed. 693.

96. *Alabama.*— Wharton *v.* State, 73 Ala. 366; Ogletree *v.* State, 28 Ala. 693.

California.— People *v.* Perini, 94 Cal. 573, 29 Pac. 1027.

Colorado.— Boykin *v.* People, 22 Colo. 496, 45 Pac. 419.

Connecticut.—State *v.* Schweitzer, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125; State *v.* Mosier, 25 Conn. 40.

Delaware.— State *v.* Taylor, Houst. Cr. Cas. 436.

Indiana.— Trogdon *v.* State, 133 Ind. 1, 32 N. E. 725.

Iowa.— State *v.* Brady, (1902) 91 N. W. 801.

Kansas.—State *v.* Conway, 56 Kan. 682, 44 Pac. 627; State *v.* Grinstead, 10 Kan. App. 74, 61 Pac. 975.

Kentucky.— Ball *v.* Com., 81 Ky. 662, 5 Ky. L. Rep. 787; Farris *v.* Com., 14 Bush 362.

Maine.— State *v.* Flye, 26 Me. 312.

Massachusetts.— Com. *v.* McKie, 1 Gray 61, 61 Am. Dec. 410; Com. *v.* Dana, 2 Metc. 329; Com. *v.* Kimball, 24 Pick. 366.

Michigan.—People *v.* McWhorter, 93 Mich. 641, 53 N. W. 780.

Missouri.— State *v.* Hardelein, 169 Mo. 579, 70 S. W. 130; State *v.* Hickam, 95 Mo. 322, 8 S. W. 252, 6 Am. St. Rep. 54; State *v.* Wingo, 66 Mo. 181, 27 Am. Rep. 329; State *v.* Melton, 8 Mo. 417.

Nebraska.— Davis *v.* State, 54 Nebr. 177, 74 N. W. 599; Gravely *v.* State, 38 Nebr. 871, 57 N. W. 751; Burger *v.* State, 34 Nebr. 397, 51 N. W. 1027.

Nevada.— State *v.* McCluer, 5 Nev. 132.

New York.— People *v.* Downs, 123 N. Y. 558, 23 N. E. 988; People *v.* Willett, 36 Hun 500.

North Carolina.—State *v.* Carland, 90 N. C. 668.

Ohio.— Jones *v.* State, 51 Ohio St. 331, 38 N. E. 79.

Pennsylvania.— Turner *v.* Com., 86 Pa. St. 54, 27 Am. Rep. 683; Fife *v.* Com., 29 Pa. St. 429.

Texas.— Horn *v.* State, 30 Tex. App. 541, 17 S. W. 1094; Jones *v.* State, 13 Tex. App. 1; Haynes *v.* State, 10 Tex. App. 480; Dubose *v.* State, 10 Tex. App. 230; Guffee *v.* State, 8 Tex. App. 187; Shafer *v.* State, 7 Tex. App. 239; Chapman *v.* State, 1 Tex. App. 728; Black *v.* State, 1 Tex. App. 368.

United States.— Agnew *v.* U. S., 165 U. S. 36, 17 S. Ct. 235, 41 L. ed. 624; Chaffee *v.* U. S., 18 Wall. 516, 21 L. ed. 908; U. S. *v.* Wright, 16 Fed. 112; U. S. *v.* Babcock, 24 Fed. Cas. No. 14,487, 3 Dill. 581; U. S. *v.* Woods, 28 Fed. Cas. No. 16,760, 4 Cranch C. C. 484.

See 14 Cent. Dig. tit. "Criminal Law," § 720 *et seq.*

97. *Indiana.*— State *v.* Beach, (1896) 43 N. E. 949.

Iowa.— Santo *v.* State, 2 Iowa 165, 63 Am. Dec. 487.

Kentucky.— Com. *v.* Minor, 88 Ky. 422, 11 S. W. 472, 10 Ky. L. Rep. 1008.

Massachusetts.— Com. *v.* Smith, 166 Mass. 370, 44 N. E. 503.

Ohio.— State *v.* Altoffer, 3 Ohio S. & C. Pl. Dec. 288, 2 Ohio N. P. 97.

Washington.—State *v.* Kyle, 14 Wash. 550, 45 Pac. 147.

Contra, In re Wong Hane, 108 Cal. 680, 41 Pac. 693, 49 Am. St. Rep. 138.

See 14 Cent. Dig. tit. "Criminal Law," § 718.

98. See *infra*, XII, A, 2, a.

99. A statute which in a prosecution for burglary casts the burden of proving the innocence of his entry on defendant (State *v.* Wilson, 9 Wash. 218, 37 Pac. 424; State *v.* Anderson, 5 Wash. 350, 31 Pac. 969), or which in prosecutions for violation of the liquor law enacts that evidence of sale or keeping shall be *prima facie* evidence that the sale or keeping was illegal (State *v.* Higgins, 13 R. I. 330, 43 Am. Rep. 26 note), is not unconstitutional as being inconsistent with the principle as to the presumption of innocence.

1. State *v.* Morphy, 33 Iowa 270, 11 Am. Rep. 122; State *v.* Hirsch, 45 Mo. 429.

either of justification or excuse or of exemption from criminal liability, which are wholly disconnected from the body of the particular offense charged and constitute distinct affirmative matter, the burden of proof is on defendant,[2] unless the fact relied upon otherwise appears in evidence to such an extent as to create a reasonable doubt of guilt.[3] Where, in the case of an affirmative defense, the evidence of defendant and that of the state raises a reasonable doubt of guilt, the burden is then on the state.[4] In other words, although the burden of showing a distinct affirmative defense is on defendant, he is entitled, where there is any evidence of such defense, to have it considered by the jury in determining whether on all the evidence in the case the state has established his guilt beyond a reasonable doubt.[5]

d. Facts Peculiarly Within Defendant's Knowledge. Where the subject-

Mitigating facts.— Wharton *v.* State, 73 Ala. 366; Guffee *v.* State, 8 Tex. App. 187; Lewis *v.* Lewis, 7 Tex. App. 567; Leonard *v.* State, 7 Tex. App. 417; Agnew *v.* U. S., 165 U. S. 36, 17 S. Ct. 235, 41 L. ed. 624.

2. *Alabama.*— Wharton *v.* State, 73 Ala. 366.

Arkansas.— Rayburn *v.* State, 69 Ark. 177, 63 S. W. 356; Cleary *v.* State, 56 Ark. 124, 19 S. W. 313; Buckingham *v.* State, 32 Ark. 218.

California.— People *v.* Boo Doo Hong, 122 Cal. 606, 55 Pac. 402.

Connecticut.—State *v.* Schweitzer, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125, adultery as an excuse for non-support of wife.

Delaware.— State *v.* Kavanaugh, (1902) 53 Atl. 333.

Florida.— Padgett *v.* State, 40 Fla. 451, 24 So. 145.

Georgia.— Pierce *v.* State, 53 Ga. 365.

Illinois.— Williams *v.* People, 121 Ill. 84, 11 N. E. 881.

Iowa.— State *v.* Morphy, 33 Iowa 270, 11 Am. Rep. 122; State *v.* Felter, 32 Iowa 49; State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753. And see State *v.* Bruce, 48 Iowa 530, 30 Am. Rep. 403.

Kansas.— State *v.* Wilson, 62 Kan. 621, 64 Pac. 23, 52 L. R. A. 679; State *v.* Grinstead, 10 Kan. App. 74, 61 Pac. 975.

Kentucky.— Com. *v.* Bull, 13 Bush 656.

Massachusetts.— Com. *v.* Boyer, 7 Allen 306 (divorce on an indictment for bigamy); Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711; Com. *v.* Dana, 2 Metc. 329; Com. *v.* Kimball, 24 Pick. 366.

Missouri.— State *v.* Wright, 134 Mo. 404, 35 S. W. 1145; State *v.* Hickam, 95 Mo. 322, 8 S. W. 252, 6 Am. St. Rep. 54; State *v.* Pagels, 92 Mo. 300, 4 S. W. 931.

Nevada.— State *v.* Davis, 14 Nev. 439, 33 Am. Rep. 563.

New York.— People *v.* Riordan, 117 N. Y. 71, 22 N. E. 455; People *v.* Schryver, 42 N. Y. 1, 1 Am. Rep. 480; Fleming *v.* People, 27 N. Y. 329.

North Carolina.— State *v.* Arnold, 35 N. C. 184. And see State *v.* Evans, 50 N. C. 250.

Pennsylvania.— Com. *v.* Zelt, 138 Pa. St. 615, 21 Atl. 7, 11 L. R. A. 602, authority.

Tennessee.— King *v.* State, 91 Tenn. 617, 20 S. W. 169; Dove *v.* State, 3 Heisk. 348.

Texas.— Zion *v.* State, (Cr. App. 1901) 61 S. W. 306; Donaldson *v.* State, 15 Tex. App. 25; Jones *v.* State, 13 Tex. App. 1; Lewis *v.* State, 7 Tex. App. 567; Leonard *v.* State, 7 Tex. App. 417; Hozier *v.* State, 6 Tex. App. 501; Ake *v.* State, 6 Tex. App. 398, 32 Am. Rep. 586.

Vermont.— State *v.* McCaffrey, 69 Vt. 85, 37 Atl. 234; State *v.* Abbey, 29 Vt. 60, 67 Am. Dec. 754.

United States.— Agnew *v.* U. S., 165 U. S. 36, 17 S. Ct. 235, 41 L. ed. 624; U. S. *v.* Wright, 16 Fed. 112; U. S. *v.* Babcock, 24 Fed. Cas. No. 14,487, 3 Dill. 581.

But see State *v.* Bartlett, 43 N. H. 224, 80 Am. Dec. 154.

See 14 Cent. Dig. tit. "Criminal Law," § 721 *et seq.*

Incapacity from youth see INFANTS.

Insanity see *infra*, XII, A, 2, e.

Drunkenness see *infra*, XII, A, 2, d.

Alibi see *infra*, XII, A, 1, i.

3. Com. *v.* McKie, 1 Gray (Mass.) 61, 61 Am. Dec. 410; State *v.* Bartlett, 43 N. H. 224, 80 Am. Dec. 154.

4. Leslie *v.* State, 35 Fla. 171, 17 So. 555; Dacey *v.* People, 116 Ill. 555, 6 N. E. 165; Bradley *v.* State, 31 Ind. 492, and cases in the note following.

5. *California.*— People *v.* Bushton, 80 Cal. 160, 22 Pac. 127, 549.

Florida.—Murphy *v.* State, 31 Fla. 166, 12 So. 453; Adams *v.* State, 28 Fla. 511, 10 So. 106.

Indiana.— Howard *v.* State, 50 Ind. 190.

Iowa.— State *v.* Beasley, 84 Iowa 83, 50 N. W. 570; State *v.* Hemrick, 62 Iowa 414, 17 N. W. 594.

Louisiana.— State *v.* Ardoin, 49 La. Ann. 1145, 22 So. 620, 62 Am. St. Rep. 678.

Massachusetts.— Com. *v.* Choate, 105 Mass. 451.

Missouri.— State *v.* Howell, 100 Mo. 628, 14 S. W. 4; State *v.* Johnson, 91 Mo. 439, 3 S. W. 868; State *v.* Jennings, 81 Mo. 185, 51 Am. Rep. 236.

New Mexico.—Trujillo *v.* Territory, 7 N. M. 43, 32 Pac. 154.

New York.— People *v.* Riordan, 117 N. Y. 71, 22 N. E. 455.

North Carolina.— State *v.* Reitz, 83 N. C. 634.

Pennsylvania.— Com. *v.* Gentry, 5 Pa. Dist. 703.

matter of a negative averment in the indictment, or a fact relied upon by defendant as a justification or excuse, relates to him personally or otherwise lies peculiarly within his knowledge, the general rule is that the burden of proof as to such averment or fact is on him.[6]

e. Matters Excepted in Statute Defining Crime. Where defendant who relies as matter of defense on an exception in a statute which is not in the enacting clause by which the offense is described and forbidden, he has the burden of proving that he is within the exception.[7]

f. Corpus Delicti. The prosecution has the burden of proving that a crime has been committed before the jury proceed to inquire as to who committed it,[8] and a conviction cannot be sustained unless the *corpus delicti* is clearly established.[9]

g. Time. The prosecution also has the burden of proving that the offense was committed after the passage of the statute or ordinance providing for its punishment,[10] and that it was committed within the statutory period of limitations,[11] and if this is not done a conviction will be reversed.[12] So also it is for the state to show that the crime was committed before the indictment was found, and where it fails to do so a conviction will be reversed.[13]

h. Jurisdiction and Venue. The burden is on the prosecution to prove that the offense was committed within the county where the venue is laid, and if there is no sufficient proof on this point a conviction cannot be sustained.[14] Where

Vermont.— State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

West Virginia.— State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561.

6. *Arkansas.*—Cleary *v.* State, 56 Ark. 124, 19 S. W. 313.

California.— People *v.* Boo Doo Hong, 122 Cal. 606, 55 Pac. 402.

Illinois.— Williams *v.* People, 121 Ill. 84, 11 N. E. 881.

Kansas.— State *v.* Wilson, 62 Kan. 621, 64 Pac. 23.

Kentucky.— Com. *v.* Bull, 13 Bush 656.

Missouri.— State *v.* Lipscomb, 52 Mo. 32.

New Hampshire.— State *v.* Keggon, 55 N. H. 19; State *v.* McGlynn, 34 N. H. 422.

New York.— Fleming *v.* People, 27 N. Y. 329; People *v.* Nyce, 34 Hun 298; People *v.* Bodine, 1 Edm. Sel. Cas. 36.

North Carolina.— State *v.* Evans, 50 N. C. 250; State *v.* Arnold, 35 N. C. 184.

Texas.— Ake *v.* State, 6 Tex. App. 398, 32 Am. Rep. 586.

Vermont.— State *v.* McCaffrey, 69 Vt. 85, 37 Atl. 234; State *v.* Abbey, 29 Vt. 60, 67 Am. Dec. 754.

Canada.— Reg. *v.* Bryant, 3 Manitoba 1; Reg. *v.* Salter, 8 N. Brunsw. 321.

See 14 Cent. Dig. tit. "Criminal Law," § 721.

7. State *v.* Sutton, 24 Mo. 377; Plainfield *v.* Watson, 57 N. J. L. 525, 31 Atl. 1040; State *v.* McCaffrey, 69 Vt. 85, 37 Atl. 234. But see State *v.* Read, 12 R. I. 135.

8. U. S. *v.* Searcey, 26 Fed. 435.

9. Younkins *v.* State, 2 Coldw. (Tenn.) 219; Tyner *v.* State, 5 Humphr. (Tenn.) 383.

Sufficiency of evidence of corpus delicti see *infra*, XII, I, 1, i, (II), (III).

10. Lawrenceville *v.* Crawford, 60 Ga. 162.

11. *Florida.*— Weinert *v.* State, 35 Fla. 229, 17 So. 570; Warrace *v.* State, 27 Fla. 362, 8 So. 748; Nelson *v.* State, 17 Fla. 195.

Indiana.— Dickinson *v.* State, 70 Ind. 247.

Louisiana.— State *v.* Anderson, 51 La. Ann. 1181, 25 So. 990.

Missouri.— State *v.* Schuerman, 70 Mo. App. 518.

North Carolina.— State *v.* Carpenter, 74 N. C. 230.

South Carolina.—State *v.* Waters, 1 Strobh. 59.

Texas.— Manning *v.* State, 35 Tex. 723; Jackson *v.* State, 34 Tex. 136; Duncan *v.* State, (Cr. App. 1900) 59 S. W. 267; Wolfe *v.* State, 25 Tex. App. 698, 9 S. W. 44; Jones *v.* State, 13 Tex. App. 1; Shafer *v.* State, 7 Tex. App. 239.

See 14 Cent. Dig. tit. "Criminal Law," § 724.

Circumstances suspending running of statute.— If the fact that an offense has not been made known to the prosecuting attorney until within one year is relied upon by the state to take a case out of the statute, the accused has the burden of proof to show that it came to the knowledge of such officer before the year. State *v.* Barfield, 36 La. Ann. 89; State *v.* Barrow, 31 La. Ann. 691. But where non-residence is relied on to extend the period, it is for the state to show the non-residence of the accused as part of its case. Com. *v.* Bates, 1 Pa. Super. Ct. 223, 12 Montg. Co. Rep. (Pa.) 41.

12. Warrace *v.* State, 27 Fla. 362, 8 So. 748; and other cases in the preceding note.

13. Turner *v.* State, 89 Ga. 424, 15 S. E. 488; Chambers *v.* State, 85 Ga. 220, 11 S. E. 653; Patton *v.* State, 80 Ga. 714, 6 S. E. 273; Com. *v.* Graves, 112 Mass. 282; State *v.* Hughes, 82 Mo. 86; Hardy *v.* State, (Tex. Cr. App. 1898) 44 S. W. 173; Zollicoffer *v.* State, (Tex. Cr. App. 1898) 43 S. W. 992.

14. *Alabama.*— Barnes *v.* State, 134 Ala. 36, 32 So. 670; Dentler *v.* State, 112 Ala. 70, 20 So. 592; Dorsey *v.* State, 111 Ala. 40, 20

jurisdiction depends on the character of the place where a crime is committed, as is often the case in prosecutions in the federal courts, the burden is on the prosecution to show the fact necessary to give jurisdiction.[15]

i. **Alibi.** There is an irreconcilable conflict in the cases as to the proof of an alibi. Some regard this as a distinct and affirmative defense, and consequently hold that the burden of proving it is upon the accused and that he must convince the jury that it was impossible for him to have been at the place at the time of the crime.[16] Other cases hold or seem to hold that he must satisfy the jury of the truth of the alibi by a preponderance of evidence.[17] By the weight of

So. 629; Randolph *v.* State, 100 Ala. 139, 14 So. 792; Tidwell *v.* State, 70 Ala. 33; Cawthorn *v.* State, 63 Ala. 157; Sparks *v.* State, 59 Ala. 82; Martin *v.* State, 62 Ala. 240; Green *v.* State, 41 Ala. 419.

Arkansas.— Jones *v.* State, 58 Ark. 390, 24 S. W. 1073; Frazier *v.* State, 56 Ark. 242, 19 S. W. 838; Walker *v.* State, 35 Ark. 386; Johnson *v.* State, 32 Ark. 181; Holeman *v.* State, 13 Ark. 105; Sullivant *v.* State, 8 Ark. 400.

California.—People *v.* Tarpey, 59 Cal. 371; People *v.* Roach, 48 Cal. 382.

Colorado.—Thornell *v.* People, 11 Colo. 305, 17 Pac. 904.

Florida.— McKinnie *v.* State, (1902) 32 So. 786; Cook *v.* State, 20 Fla. 802.

Georgia.— Jones *v.* State, 113 Ga. 271, 38 S. E. 851; Berry *v.* State, 92 Ga. 47, 17 S. E. 1006; Cloud *v.* State, 73 Ga. 126; Day *v.* State, 68 Ga. 827.

Illinois.— Huston *v.* People, 53 Ill. App. 501.

Indiana.— Harlan *v.* State, 134 Ind. 339, 33 N. E. 1102; Stazey *v.* State, 58 Ind. 514; Gastner *v.* State, 47 Ind. 144; Baker *v.* State, 34 Ind. 104; Clem *v.* State, 31 Ind. 480; Snyder *v.* State, 5 Ind. 194; Moody *v.* State, 7 Blackf. 424.

Kansas.— Hagan *v.* State, 4 Kan. 89.

Minnesota.—State *v.* Tosney, 26 Minn. 262, 3 N. W. 345, holding, however, that want of evidence as to venue was no ground for reversal under the circumstances.

Mississippi.— Thompson *v.* State, 51 Miss. 353; Vaughan *v.* State, 3 Sm. & M. 553.

Missouri.— State *v.* Young, 99 Mo. 284, 12 S. W. 642; State *v.* Stewart, (1888) 8 S. W. 216; State *v.* Britton, 80 Mo. 60; State *v.* Babb, 76 Mo. 501; State *v.* Meyer, 64 Mo. 190; State *v.* Prather, 41 Mo. App. 451; State *v.* Hopper, 21 Mo. App. 510; State *v.* Kindrick, 21 Mo. App. 507; State *v.* McKay, 20 Mo. App. 149.

New Mexico.— Territory *v.* Padilla, (1903) 71 Pac. 1084.

New York.— Larkin *v.* People, 61 Barb. 226.

Pennsylvania.— Com. *v.* Fagan, 2 Pa. Dist. 401, 12 Pa. Co. Ct. 613.

South Carolina.—See State *v.* Dent, 6 S. C. 383.

South Dakota.— State *v.* Clark First Nat. Bank, 3 S. D. 52, 51 N. W. 780.

Tennessee.— Yates *v.* State, 10 Yerg. 549; Ewell *v.* State, 6 Yerg. 364, 27 Am. Dec. 480. *Compare* Hines *v.* State, 9 Humphr. 720, where proof was dispensed with by the plea.

Texas.— Belcher *v.* State, 35 Tex. Cr. 168, 32 S. W. 770; Kelley *v.* State, (Cr. App. 1895) 31 S. W. 659; Whitlow *v.* State, (App. 1892) 18 S. W. 865; Griffin *v.* State, 26 Tex. App. 157, 9 S. W. 459, 8 Am. St. Rep. 460; Tucker *v.* State, 25 Tex. App. 653, 8 S. W. 813; Miles *v.* State, 23 Tex. App. 410, 5 S. W. 250; Jack *v.* State, 3 Tex. App. 72.

Virginia.— Anderson *v.* Com., 100 Va. 860, 42 S. E. 865; Butler *v.* Com., 81 Va. 159.

West Virginia.— State *v.* Hobbs, 37 W. Va. 812, 17 S. E. 380; State *v.* Mills, 33 W. Va. 455, 10 S. E. 808; Hoover *v.* State, 1 W. Va. 336.

United States.— U. S. *v.* Meagher, 37 Fed. 875.

See 14 Cent. Dig. tit. "Criminal Law," § 726.

Circumstances dispensing with proof of venue.— Proof of venue is not rendered unnecessary by failure to allege the venue in the indictment (Sparks *v.* State, 59 Ala. 82; Johnson *v.* State, 32 Ark. 181), or by the fact that the judge and jury may personally know the *locus in quo* to be within the county (Com. *v.* Clauss, 5 Pa. Dist. 658, 18 Pa. Co. Ct. 381; Miles *v.* State, 23 Tex. App. 410, 5 S. W. 250. But see State *v.* Dent, 6 S. C. 383); but the admission of the accused on arraignment that he is guilty of voluntary manslaughter when he is indicted for murder in a particular county dispenses with the necessity for proof of venue (Hines *v.* State, 9 Humphr. (Tenn.) 720).

15. On an indictment for murder or manslaughter brought in a court of the United States, if the crime was committed on board a vessel on the high seas or in a foreign port, the burden is on the prosecution to show that the vessel belonged to a citizen of the United States (U. S. *v.* Imbert, 26 Fed. Cas. No. 15,438, 4 Wash. 702); and if committed on land that the place where the crime was committed was within the jurisdiction of the United States (U. S. *v.* Meagher, 37 Fed. 875).

16. *Florida.*— Bacon *v.* State, 22 Fla. 51.

Georgia.— Boston *v.* State, 94 Ga. 590, 20 S. E. 98; Ware *v.* State, 67 Ga. 349.

Illinois.— Klein *v.* People, 113 Ill. 596.

Maine.— State *v.* Fenlason, 78 Me. 495, 7 Atl. 385.

Pennsylvania.— Briceland *v.* Com., 74 Pa. St. 463.

17. Garrity *v.* People, 107 Ill. 162; State *v.* Beasley, 84 Iowa 83, 50 N. W. 570; State *v.* Rivers, 68 Iowa 611, 27 N. W. 781;

authority, however, although defendant, where the case is otherwise made out against him, is bound to offer some evidence in support of his alibi, the state, in all cases where his presence at the time and place of the crime is necessary to render him responsible, must prove that he was there as part of its case, and if from all the evidence there exists a reasonable doubt of his presence he should be acquitted.[18]

2. PRESUMPTIONS — a. Of Innocence. The accused, however degraded or debased he may be, is presumed to be innocent of the particular offense charged until he is pronounced guilty on evidence which convinces the jury of his guilt

State *v.* Fry, 67 Iowa 475, 25 N. W. 738; State *v.* McCracken, 66 Iowa 569, 24 N. W. 43; State *v.* Hamilton, 57 Iowa 596, 11 N. W. 5; State *v.* Krewsen, 57 Iowa 588, 11 N. W. 7; State *v.* Red, 53 Iowa 69, 4 N. W. 831; State *v.* Jennings, 81 Mo. 185, 51 Am. Rep. 236. And see State *v.* White, 99 Iowa 46, 68 N. W. 564; State *v.* Maher, 74 Iowa 77, 37 N. W. 2.

18. *Alabama.*— Beavers *v.* State, 103 Ala. 36, 15 So. 616; Albritton *v.* State, 94 Ala. 76, 10 So. 426; Pate *v.* State, 94 Ala. 14, 10 So. 665.

Arizona.— Schultz *v.* Territory, (1898) 52 Pac. 352.

Arkansas.— Ware *v.* State, 59 Ark. 379, 27 S. W. 485; Blankenship *v.* State, 55 Ark. 244, 18 S. W. 54.

California.— People *v.* Roberts, 122 Cal. 377, 55 Pac. 137; People *v.* Worden, 113 Cal. 569, 45 Pac. 844; People *v.* Nelson, 85 Cal. 421, 24 Pac. 1006. But see People *v.* Lee Sare Bo, 72 Cal. 623, 14 Pac. 310.

Colorado.— McNamara *v.* People, 24 Colo. 61, 48 Pac. 541; Wisdom *v.* People, 11 Colo. 170, 17 Pac. 519.

Florida.— Murphy *v.* State, 31 Fla. 166, 12 So. 453; Adams *v.* State, 28 Fla. 511, 10 So. 106; Bacon *v.* State, 22 Fla. 51.

Illinois.— Waters *v.* People, 172 Ill. 367, 50 N. E. 148; Carlton *v.* People, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346; Sheehan *v.* People, 131 Ill. 22, 22 N. E. 818; Ackerson *v.* People, 124 Ill. 563, 16 N. E. 847; Hoge *v.* People, 117 Ill. 35, 6 N. E. 796; Miller *v.* People, 39 Ill. 457.

Indiana.— Howard *v.* State, 50 Ind. 190; West *v.* State, 48 Ind. 483; French *v.* State, 12 Ind. 670, 74 Am. Dec. 229.

Kansas.— State *v.* Conway, 55 Kan. 323, 40 Pac. 661, 56 Kan. 682, 44 Pac. 627; State *v.* Child, 40 Kan. 482, 20 Pac. 275.

Louisiana.— State *v.* Ardoin, 49 La. Ann. 1145, 22 So. 620, 62 Am. St. Rep. 678.

Maine.— State *v.* Fenlason, 78 Me. 495, 7 Atl. 385.

Massachusetts.— Com. *v.* Choate, 105 Mass. 451.

Michigan.— People *v.* Pichette, 111 Mich. 461, 69 N. W. 739; Stuart *v.* People, 42 Mich. 255, 3 N. W. 863.

Mississippi.— Pollard *v.* State, 53 Miss. 410, 24 Am. Rep. 703.

Missouri.— State *v.* Tatlow, 136 Mo. 678, 38 S. W. 552; State *v.* Harvey, 131 Mo. 339, 32 S. W. 1110; State *v.* Powers, 130 Mo. 475, 32 S. W. 984; State *v.* Taylor, 118 Mo. 153, 24 S. W. 449; State *v.* Woolard, 111 Mo. 248, 20 S. W. 27; State *v.* Howell, 100 Mo. 628, 14 S. W. 4; State *v.* Lewis, 69 Mo. 92.

Montana.— State *v.* McClellan, 23 Mont. 532, 59 Pac. 924, 75 Am. St. Rep. 558.

Nebraska.— Peyton *v.* State, 54 Nebr. 188, 74 N. W. 597; Henry *v.* State, 51 Nebr. 149, 70 N. W. 924, 66 Am. St. Rep. 450; Beck *v.* State, 51 Nebr. 106, 70 N. W. 498; Casey *v.* State, 49 Nebr. 403, 68 N. W. 643.

Nevada.— State *v.* Waterman, 1 Nev. 543.

New Jersey.—Sherlock *v.* State, 60 N. J. L. 31, 37 Atl. 435.

New Mexico.— Wilburn *v.* Territory, 10 N. M. 402, 62 Pac. 968; Borrego *v.* Territory, 8 N. M. 446, 46 Pac. 349; Trujillo *v.* Territory, 7 N. M. 43, 32 Pac. 154.

North Carolina.— State *v.* Reitz, 83 N. C. 634; State *v.* Jaynes, 78 N. C. 504; State *v.* Josey, 64 N. C. 56.

Ohio.— Walters *v.* State, 39 Ohio St. 215; Gawn *v.* State, 13 Ohio Cir. Ct. 116, 7 Ohio Cir. Dec. 19.

Oklahoma.— Wright *v.* Territory, 5 Okla. 78, 47 Pac. 1069; Shoemaker *v.* Territory, 4 Okla. 118, 43 Pac. 1059.

Oregon.— State *v.* Chee Gong, 16 Oreg. 534, 538, 19 Pac. 607.

Pennsylvania.— Watson *v.* Com., 95 Pa. St. 418, 422; Fife *v.* Com., 29 Pa. St. 429.

South Carolina.— State *v.* Atkins, 49 S. C. 481, 27 S. E. 484; State *v.* Nance, 25 S. C. 168; State *v.* Watson, 7 Rich. 63.

South Dakota.— State *v.* Thornton, 10 S. D. 349, 73 N. W. 196, 41 L. R. A. 530.

Tennessee.— Wiley *v.* State, 5 Baxt. 662; Chappel *v.* State, 7 Coldw. 92.

Texas.— Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122; Ayres *v.* State, 21 Tex. App. 399, 17 S. W. 253; Johnson *v.* State, 21 Tex. App. 368, 17 S. W. 252; Thornton *v.* State, 20 Tex. App. 519; Humphries *v.* State, 18 Tex. App. 302. See also Saenz *v.* State, (Cr. App. 1901) 63 S. W. 316.

Vermont.— State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

West Virginia.— State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561.

See 14 Cent. Dig. tit. "Criminal Law," § 751.

The rule in Georgia consists of two branches. The first is that to overcome proof of guilt strong enough to exclude all reasonable doubt the onus is on the accused to verify his alleged alibi, not beyond reasonable doubt, but to the reasonable satisfaction of the jury. The second is that nevertheless any evidence whatever of alibi is to be

beyond a reasonable doubt.[19] The presumption of innocence accompanies the accused until verdict and does not cease when the case is submitted to the jury.[20] It is not destroyed by the fact that the accused was in the company of one who committed the offense,[21] and no presumption arises against one alleged principal jointly indicted with others, because his co-defendants have been convicted on a separate trial.[22] But it has been held that in a prosecution for murder the possession of articles apparently taken from the deceased raises a *prima facie* presumption of guilt to be rebutted or explained away by the accused,[23] and in many jurisdictions it is held that the possession of stolen property may raise a presumption of guilt in prosecutions for burglary, larceny, and robbery.[24] No added presumption of innocence arises from the relation of the parties, as where a husband or parent is accused of the homicide of his wife or child, as the ordinary presumption of innocence is amply sufficient for all practical purposes.[25]

b. From Failure to Testify or Call Witnesses. There is no presumption of guilt against a defendant merely because he has not taken the stand as a witness in his own behalf.[26] His neglect or failure to call as witnesses those who could testify of their own knowledge as to material facts raises no presumption of law

considered on the general case with the rest of the testimony, and if a reasonable doubt of guilt is raised by the evidence as a whole the doubt must be given in favor of innocence. Cochran *v.* State, 113 Ga. 726, 39 S. E. 332; Boston *v.* State, 94 Ga. 590, 20 S. E. 98; Miles *v.* State, 93 Ga. 117, 19 S. E. 805, 44 Am. St. Rep. 140; Harrison *v.* State, 83 Ga. 129, 9 S. E. 542; Landis *v.* State, 70 Ga. 651, 48 Am. Rep. 588; Johnson *v.* State, 59 Ga. 142.

19. *Alabama.*— Rogers *v.* State, 117 Ala. 192, 23 So. 82; Waters *v.* State, 117 Ala. 108, 22 So. 490; Bryant *v.* State, 116 Ala. 445, 23 So. 40; Newsom *v.* State, 107 Ala. 133, 18 So. 206; Hawes *v.* State, 88 Ala. 37, 7 So. 302; State *v.* Murphy, 6 Ala. 845.

Arkansas.— McArthur *v.* State, 59 Ark. 431, 27 S. W. 628.

California.— People *v.* Arlington, 131 Cal. 231, 63 Pac. 347; People *v.* O'Brien, 130 Cal. 1, 62 Pac. 297; People *v.* Winthrop, 118 Cal. 85, 50 Pac. 390; People *v.* Sanders, 114 Cal. 216, 46 Pac. 153; People *v.* O'Brien, 106 Cal. 104, 39 Pac. 325; People *v.* Eppinger, 105 Cal. 36, 38 Pac. 538.

Connecticut.— State *v.* Smith, 65 Conn. 283, 31 Atl. 206.

Florida.— Long *v.* State, 42 Fla. 509, 28 So. 775; Reeves *v.* State, 29 Fla. 527, 10 So. 901.

Georgia.— Dorsey *v.* State, 110 Ga. 331, 35 S. E. 651; Campbell *v.* State, 100 Ga. 267, 28 S. E. 71.

Illinois.— Schintz *v.* People, 178 Ill. 320, 52 N. E. 903.

Indiana.— Aszman *v.* State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33 [*following* Castle *v.* State, 75 Ind. 146]; Line *v.* State, 51 Ind. 172; Long *v.* State, 46 Ind. 582.

Iowa.— Tweedy *v.* State, 5 Iowa 433.

Kansas.— Horne *v.* State, 1 Kan. 42, 81 Am. Dec. 409.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 320, 52 Am. Dec. 711.

Michigan.—People *v.* Potter, 89 Mich. 353, 50 N. W. 994; People *v.* De Forc, 64 Mich. 693, 31 N. W. 585, 8 Am. St. Rep. 863.

Mississippi.—Hemingway *v.* State, 68 Miss. 371, 8 So. 317.

Nebraska.— State *v.* Scheve, (1903) 93 N. W. 169, 59 L. R. A. 927; Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744.

New York.—People *v.* Baker, 96 N. Y. 340; People *v.* Nileman, 8 N. Y. St. 300; People *v.* Dixon, 3 Abb. Pr. 395, 4 Park. Cr. 651; People *v.* Thayer, 1 Park. Cr. 595.

Ohio.— Morehead *v.* State, 34 Ohio St. 212; Fuller *v.* State, 12 Ohio St. 433; State *v.* Thompson, Wright 617; State *v.* Turner, Wright 20.

Texas.— Huggins *v.* State, 42 Tex. Cr. 364, 60 S. W. 52; Blocker *v.* State, 9 Tex. App. 279; Smith *v.* State, 9 Tex. App. 150; Hutto *v.* State, 7 Tex. App. 44.

United States.— Agnew *v.* U. S., 165 U. S. 36, 17 S. Ct. 235, 41 L. ed. 624; Coffin *v.* U. S., 156 U. S. 432, 15 S. Ct. 394, 39 L. ed. 481; U. S. *v.* Gooding, 12 Wheat. 460, 6 L. ed. 693; U. S. *v.* Kenney, 90 Fed. 257; U. S. *v.* Montgomery, 26 Fed. Cas. No. 15,800, 3 Sawy. 544.

England.— McKinley's Case, 33 How. St. Tr. 275; Despard's Case, 28 How. St. Tr. 345.

See 14 Cent. Dig. tit. "Criminal Law," § 731; and the cases cited *supra*, XII, A, 1, a.

Constitutionality of statutes conflicting with this principle see *supra*, XII, A, 1, b.

Instructions on presumption of innocence see *infra*, XIV, G, 8, a.

20. People *v.* O'Brien, 106 Cal. 104, 39 Pac. 325.

21. State *v.* Farr, 33 Iowa 553.

22. Coxwell *v.* State, 66 Ga. 309.

23. Wilson *v.* U. S., 162 U. S. 613, 16 S. Ct. 895, 40 L. ed. 1090. See HOMICIDE.

24. See, generally, BURGLARY; LARCENY; ROBBERY.

25. Hawes *v.* State, 88 Ala. 37, 7 So. 302; State *v.* Soper, 148 Mo. 217, 49 S. W. 1007 [*overruling* State *v.* Leabo, 84 Mo. 168, 54 Am. Rep. 91].

26. Com. *v.* Hanley, 140 Mass. 457, 5 N. E. 468; U. S. *v.* Pendergast, 32 Fed. 198.

that if called they would have testified unfavorably to him, but the jury may consider his failure to produce or to endeavor to produce such evidence as a circumstance in determining his guilt.[27] This doctrine is to be cautiously applied, and only where it is manifest that the evidence is in the power of the accused to produce and is not accessible to the prosecution.[28] Either side may be permitted to show why a material witness is not produced on the trial.[29]

c. From Suppression or Fabrication of Evidence. The fabrication by defendant of false records and accounts,[30] his failure to produce records and books which are under his control and not within the reach of the state, and which are material to his defense,[31] his destruction or concealment of papers after his arrest,[32] or any attempt to destroy or withhold evidence[33] may justify an inference by the jury that such evidence if produced would have been unfavorable to him.

d. Of Sobriety. A presumption of sobriety arises where facts constituting a crime are proved, and defendant alleges that he was irresponsible because of drunkenness, and the burden of proof in such a case is upon him to show this by a fair preponderance of evidence,[34] or according to some of the cases beyond a reasonable doubt.[35]

e. Of Sanity — (i) *In General.* The presumption is that all men are of sound mind, and in a criminal prosecution therefore where defendant, admitting the actual commission of the act, claims that he was irresponsible because of insanity, the burden of proof as to the defense, at least to the extent of introducing some evidence where none otherwise appears, is on him.[36] The degree of

27. *Hawaii.*— Republic *v.* Anderson, 10 Hawaii 255.

Indiana.— Doty *v.* State, 7 Blackf. 427.

Iowa.— State *v.* Cousins, 58 Iowa 250, 12 N. W. 281; State *v.* Rosier, 55 Iowa 517, 8 N. W. 345.

Kansas.— State *v.* Grebe, 17 Kan. 458.

Maine.— State *v.* McAllister, 24 Me. 139.

Michigan.— People *v.* Hendrickson, 53 Mich. 525, 19 N. W. 169.

New York.— People *v.* Hovey, 92 N. Y. 554; Gordon *v.* People, 33 N. Y. 501; People *v.* Dyle, 21 N. Y. 578; People *v.* Sweeney, 41 Hun 332.

North Carolina.— State *v.* Smallwood, 75 N. C. 104.

Pennsylvania.— Com. *v.* McMahon, 145 Pa. St. 413, 22 Atl. 971.

Virginia.— Taylor *v.* Com., 90 Va. 109, 17 S. E. 812.

United States.— U. S. *v.* Schindler, 10 Fed. 547, 18 Blatchf. 227.

See 14 Cent. Dig. tit. "Criminal Law," § 732; and, generally, Evidence.

28. State *v.* Cousins, 58 Iowa 250, 12 N. W. 281; Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Ormsby *v.* People, 53 N. Y. 472.

The failure of the prosecution to call a witness to prove a fact material to its case raises no inference unfavorable to the state, unless it is shown that the evidence is within its reach. State *v.* Buckman, 74 Vt. 309, 52 Atl. 427; State *v.* Smith, 71 Vt. 331, 45 Atl. 219.

29. People *v.* Clark, 106 Cal. 32, 39 Pac. 53; People *v.* Chuey Ying Git, 100 Cal. 437, 34 Pac. 1080; State *v.* Brannum, 95 Mo. 19, 8 S. W. 218; Hoard *v.* State, 15 Lea (Tenn.) 318.

The threats of the prosecution to prosecute one of the witnesses for defendant for perjury may be shown to account for his absence. Com. *v.* Costello, 119 Mass. 214.

30. McMeen *v.* Com., 114 Pa. St. 300, 9 Atl. 878; U. S. *v.* Randall, 27 Fed. Cas. No. 16,118, Deady 524.

31. State *v.* Rosier, 55 Iowa 517, 8 N. W. 345; State *v.* Atkinson, 51 N. C. 65; U. S. *v.* Flemming, 18 Fed. 907.

32. Roberson *v.* State, 40 Fla. 509, 24 So. 474; Rex *v.* Ah Hoy, 7 Hawaii 749; State *v.* Baldwin, 70 Iowa 180, 30 N. W. 476; State *v.* Chamberlain, 89 Mo. 129, 1 S. W. 145.

33. State *v.* Dickson, 78 Mo. 438; Hubbard *v.* State, (Nebr. 1902) 91 N. W. 869; State *v.* Rozum, 8 N. D. 548, 80 N. W. 477.

34. *Arkansas.*— Casat *v.* State, 40 Ark. 511; Wood *v.* State, 34 Ark. 341, 36 Am. Rep. 13.

Connecticut.— State *v.* Johnson, 40 Conn. 136.

Delaware.— State *v.* Kavanaugh, (1902) 53 Atl. 335.

Louisiana.— State *v.* Hill, 46 La. Ann. 27, 14 So. 294, 49 Am. St. Rep. 316.

Massachusetts.— Com. *v.* McNamee, 112 Mass. 285.

Minnesota.— State *v.* Grear, 29 Minn. 221, 13 N. W. 140; State *v.* Gut, 13 Minn. 341; Bonfanti *v.* State, 2 Minn. 123.

Nebraska.— Davis *v.* State, 54 Nebr. 177, 74 N. W. 599.

North Carolina.— State *v.* Sewell, 48 N. C. 245.

Pennsylvania.— Com. *v.* Gentry, 5 Pa. Dist. 703.

Texas.— Riley *v.* State, (Cr. App. 1898) 44 S. W. 498.

United States.— U. S. *v.* Roudenbush, 27 Fed. Cas. No. 16,198, 1 Baldw. 514.

35. State *v.* Spencer, 21 N. J. L. 196.

36. *Alabama.*— Boswell *v.* State, 63 Ala. 307, 35 Am. Rep. 20.

proof required on the part of defendant varies in different jurisdictions. In a few of the cases it has been held that defendant must prove his insanity beyond a

Arkansas.— Cavaness *v.* State, 43 Ark. 331; Casat *v.* State, 40 Ark. 511; McKenzie *v.* State, 26 Ark. 334.

California.— People *v.* Hettick, 126 Cal. 425, 58 Pac. 918; People *v.* Ward, 105 Cal. 335, 38 Pac. 945; People *v.* Bemmerly, 98 Cal. 299, 33 Pac. 263; People *v.* Travers, 88 Cal. 233, 26 Pac. 88; People *v.* Hamilton, 62 Cal. 377; People *v.* Bell, 49 Cal. 485; People *v.* Coffman, 24 Cal. 230; People *v.* Myers, 20 Cal. 518.

Connecticut.— State *v.* Hoyt, 46 Conn. 330.

Delaware.— State *v.* Cole, 2 Pennew. 344, 45 Atl. 391; State *v.* Hand, 1 Marv. 545, 41 Atl. 192; State *v.* Reidell, 9 Houst. 470, 14 Atl. 550; State *v.* Danby, Houst. Cr. Cas. 166; State *v.* Hurley, Houst. Cr. Cas. 28.

Florida.— Davis *v.* State, (1902) 32 So. 822; Brown *v.* State, 40 Fla. 459, 25 So. 63; Armstrong *v.* State, 30 Fla. 170, 11 So. 618, 17 L. R. A. 484.

Georgia.— Keener *v.* State, 97 Ga. 388, 24 S. E. 28.

Idaho.— People *v.* Walter, 1 Ida. 386.

Illinois.— Montag *v.* People, 141 Ill. 75, 30 N. E. 337; Langdon *v.* People, 133 Ill. 382, 24 N. E. 874; Dacey *v.* People, 116 Ill. 555, 6 N. E. 165; Chase *v.* People, 40 Ill. 352; Fisher *v.* People, 23 Ill. 283. *Compare* Hopps *v.* People, 31 Ill. 385, 83 Am. Dec. 231.

Indiana.— Sanders *v.* State, 94 Ind. 147.

Iowa.— State *v.* Jones, 64 Iowa 349, 17 N. W. 911, 20 N. W. 470; State *v.* Geddis, 42 Iowa 264; State *v.* Felter, 32 Iowa 49.

Kentucky.— Moore *v.* Com., 92 Ky. 630, 18 S. W. 833, 13 Ky. L. Rep. 738; Ball *v.* Com., 81 Ky. 662, 5 Ky. L. Rep. 787; Kriel *v.* Com., 5 Bush 362; Graham *v.* Com., 16 B. Mon. 587; Phelps *v.* Com., 32 S. W. 470, 17 Ky. L. Rep. 706.

Louisiana.— State *v.* Scott, 49 La. Ann. 253, 21 So. 271, 36 L. R. A. 721; State *v.* Clements, 47 La. Ann. 1088, 17 So. 502; State *v.* De Rance, 34 La. Ann. 186, 44 Am. Rep. 426; State *v.* Coleman, 27 La. Ann. 691; State *v.* Burns, 25 La. Ann. 302.

Maine.— State *v.* Lawrence, 57 Me. 574.

Massachusetts.— Com. *v.* Heath, 11 Gray 303; Com. *v.* Eddy, 7 Gray 583.

Michigan.—People *v.* Finley, 38 Mich. 482; People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

Minnesota.—State *v.* Hanley, 34 Minn. 430, 26 N. W. 397; State *v.* Gut, 13 Minn. 341; State *v.* Brown, 12 Minn. 538; Bonfanti *v.* State, 2 Minn. 123.

Mississippi.— Ford *v.* State, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117.

Missouri.— State *v.* Palmer, 161 Mo. 152, 61 S. W. 651; State *v.* Duestrow, 137 Mo. 45, 38 S. W. 554, 39 S. W. 266; State *v.* Schaefer, 116 Mo. 96, 22 S. W. 447; State *v.* Lowe, 93 Mo. 547, 5 S. W. 889; State *v.* Smith, 53 Mo. 267; State *v.* Klinger, 43 Mo. 127; State *v.* McCoy, 34 Mo. 531, 86 Am. Dec. 121; Baldwin *v.* State, 12 Mo. 223; State *v.* Redemeier, 8 Mo. App. 1 [*affirmed* in 71 Mo. 173, 36 Am. Rep. 462].

Montana.— State *v.* Peel, 23 Mont. 358, 59 Pac. 169, 75 Am. St. Rep. 529.

Nevada.— State *v.* Lewis, 20 Nev. 333, 22 Pac. 241.

New Jersey.— State *v.* Hill, 65 N. J. L. 626, 47 Atl. 814; Graves *v.* State, 45 N. J. L. 203, 347, 46 Am. Rep. 778; State *v.* Spencer, 21 N. J. L. 196.

New Mexico.— Faulkner *v.* Territory, 6 N. M. 464, 30 Pac. 905.

New York.— O'Connell *v.* People, 87 N. Y. 377, 41 Am. Rep. 379; Brotherton *v.* People, 75 N. Y. 159; Walter *v.* People, 32 N. Y. 147; People *v.* McCann, 16 N. Y. 58, 69 Am. Dec. 642; O'Brien *v.* People, 48 Barb. 274; Walker *v.* People, 1 N. Y. Cr. 7; People *v.* Coleman, 1 N. Y. Cr. 1; People *v.* Robinson, 1 Park. Cr. 649.

North Carolina.— State *v.* Starling, 51 N. C. 366.

Ohio.— Bergin *v.* State, 31 Ohio St. 111; Bond *v.* State, 23 Ohio St. 349; Loeffner *v.* State, 10 Ohio St. 598.

Oklahoma.— Maas *v.* Territory, 10 Okla. 714, 63 Pac. 960, 53 L. R. A. 814.

Oregon.— State *v.* Hansen, 25 Oreg. 391, 35 Pac. 976, 36 Pac. 296.

Pennsylvania.— Com. *v.* Heidler, 191 Pa. St. 375, 43 Atl. 211; Com. *v.* Wireback, 190 Pa. St. 138, 42 Atl. 542, 70 Am. St. Rep. 625; Com. *v.* Bezek, 168 Pa. St. 603, 32 Atl. 109; Com. *v.* Gerade, 145 Pa. St. 289, 22 Atl. 464, 27 Am. St. Rep. 689; Com. *v.* Farkin, 2 Pars. Eq. Cas. 439; Com. *v.* Winnemore, 1 Brewst. 356; Com. *v.* Lynch, 3 Pittsb. 412.

South Carolina.— State *v.* Coleman, 20 S. C. 441.

Tennessee.— King *v.* State, 91 Tenn. 617, 20 S. W. 169; Stuart *v.* State, 1 Baxt. 178; Dove *v.* State, 3 Heisk. 348.

Texas.— Carlisle *v.* State, (Cr. App. 1900) 56 S. W. 365; Riley *v.* State, (Cr. App. 1898) 44 S. W. 498; Burt *v.* State, 38 Tex. Cr. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330; Boren *v.* State, 32 Tex. Cr. 637, 25 S. W. 775; Lovegrove *v.* State, 31 Tex. Cr. 491, 21 S. W. 191; Fisher *v.* State, 30 Tex. App. 502, 18 S. W. 90; Leache *v.* State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638.

Utah.— People *v.* Dillon, 8 Utah 92, 30 Pac. 150.

Virginia.— Baccigalupo *v.* Com., 33 Gratt. 807, 36 Am. Rep. 795.

West Virginia.— State *v.* Douglass, 28 W. Va. 297.

Wisconsin.— Revoir *v.* State, 82 Wis. 295, 52 N. W. 84, by express statutory provision.

United States.— Davis *v.* U. S., 160 U. S. 469, 16 S. Ct. 353, 40 L. ed. 499; U. S. *v.* Ridgeway, 31 Fed. 144.

reasonable doubt,[37] in others that it is enough for him to prove the same by a fair preponderance of evidence,[38] or to the satisfaction of the jury,[39] and in others that it is sufficient if all the evidence, both for the state and for defendant, creates or leaves in the minds of the jury a reasonable doubt as to defendant's sanity.[40]

England.— Reg. *v.* Layton, 4 Cox C. C. 149.

See 14 Cent. Dig. tit. "Criminal Law," § 742.

Deaf and dumb person.— It has been held that where a deaf and dumb person is charged with the commission of a crime, the burden is on the state to prove that he was of sound mind when he committed the deed. State *v.* Draper, Houst. Cr. Cas. (Del.) 291.

The mere fact of the commission of a crime is not sufficient to overcome the presumption of sanity. Davis *v.* State, (Fla. 1902) 32 So. 822.

An attempt to commit suicide raises no presumption of insanity, but may be considered with other evidence on the question. Coyle *v.* Com., 100 Pa. St. 573, 45 Am. Rep. 397.

Effect of commitment to or release from asylum.— Langdon *v.* People, 133 Ill. 382, 24 N. E. 874.

37. State *v.* Spencer, 21 N. J. L. 196; Rex *v.* Offord, 5 C. & P. 168, 24 E. C. L. 508. And see *infra*, XII, I, 2, e, (II).

38. *Arkansas.*— Cavaness *v.* State, 43 Ark. 331; Casat *v.* State, 40 Ark. 511.

California.— People *v.* Hettick, 126 Cal. 425, 58 Pac. 918; People *v.* Bell, 49 Cal. 485; People *v.* Wilson, 49 Cal. 13; People *v.* Coffman, 24 Cal. 230.

Delaware.— State *v.* Hand, 1 Marv. 545, 41 Atl. 192.

Iowa.— State *v.* Thiele, 119 Iowa 659, 94 N. W. 256; State *v.* Robbins, 109 Iowa 650, 80 N. W. 1061.

Kentucky.— Moore *v.* Com., 92 Ky. 630, 18 S. W. 833, 13 Ky. L. Rep. 738; Kaelin *v.* Com., 84 Ky. 254, 1 S. W. 594, 8 Ky. L. Rep. 293; Ball *v.* Com., 81 Ky. 662.

Maine.— State *v.* Lawrence, 57 Me. 574.

Massachusetts.— Com. *v.* Eddy, 7 Gray 583.

Missouri.— State *v.* Wright, 134 Mo. 404, 35 S. W. 1145.

North Carolina.— State *v.* Davis, 109 N. C. 780, 14 S. E. 55; State *v.* Payne, 86 N. C. 609; State *v.* Haywood, 61 N. C. 376.

Ohio.— Bond *v.* State, 23 Ohio St. 349.

Oregon.— State *v.* Hansen, 25 Oreg. 391, 35 Pac. 976, 36 Pac. 296.

Pennsylvania.— Com. *v.* Heidler, 191 Pa. St. 375, 43 Atl. 211; Com. *v.* Wireback, 190 Pa. St. 138, 42 Atl. 542, 70 Am. St. Rep. 625; Pannell *v.* Com., 86 Pa. St. 260.

Texas.— Gray *v.* State, (Cr. App. 1903) 74 S. W. 552; Carlisle *v.* State, (Cr. App. 1900) 56 S. W. 365; Riley *v.* State, (Cr. App. 1898) 44 S. W. 498; Boren *v.* State, 32 Tex. Cr. 637, 25 S. W. 775.

Virginia.— Boswell *v.* Com., 20 Gratt. 860.

West Virginia.— State *v.* Strauder, 11 W. Va. 745, 27 Am. Rep. 606.

See 14 Cent. Dig. tit. "Criminal Law," § 742. And see *infra*, XII, I, 2, e, (II).

39. *Alabama.*— Lide *v.* State, 133 Ala. 43, 31 So. 953.

Delaware.— State *v.* Cole, 2 Pennew. 344, 45 Atl. 391; State *v.* Danby, Houst. Cr. Cas. 166.

Iowa.— State *v.* Bruce, 48 Iowa 530, 30 Am. Rep. 403, reasonably satisfied.

Louisiana.— State *v.* Scott, 49 La. Ann. 253, 21 So. 271, 26 L. R. A. 721; State *v.* Coleman, 27 La. Ann. 691.

Maine.— State *v.* Parks, 93 Me. 208, 44 Atl. 899; State *v.* Lawrence, 57 Me. 574.

Missouri.— State *v.* Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; State *v.* Wright, 134 Mo. 404, 35 S. W. 1145 ("reasonable satisfaction"); State *v.* Redemeier, 71 Mo. 173, 36 Am. Rep. 462; State *v.* Smith, 53 Mo. 267; State *v.* Hundley, 46 Mo. 414; Baldwin *v.* State, 12 Mo. 223.

Pennsylvania.— Ortwein *v.* Com., 76 Pa. St. 414, 18 Am. Rep. 420.

Texas.— Carlisle *v.* State, (Cr. App. 1900) 56 S. W. 365 ("clearly to the satisfaction of the jury"); Burt *v.* State, 38 Tex. Cr. 397, 40 S. W. 1000, 43 S. W. 344.

England.— Reg. *v.* Lawton, 4 Cox C. C. 149.

Proof of insanity need not be conclusive.— Pannell *v.* Com., 86 Pa. St. 260.

40. *Alabama.*— State *v.* Marler, 2 Ala. 43, 36 Am. Dec. 398.

Florida.— Brown *v.* State, 40 Fla. 459, 25 So. 63; Hodge *v.* State, 26 Fla. 11, 7 So. 593.

Illinois.— Montag *v.* People, 141 Ill. 75, 30 N. E. 337; Langdon *v.* People, 133 Ill. 382, 24 N. E. 874; Dacey *v.* People, 116 Ill. 555, 6 N. E. 165; Chase *v.* People, 40 Ill. 352.

Indiana.— Plake *v.* State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408; McDougal *v.* State, 88 Ind. 24; Bradley *v.* State, 31 Ind. 492.

Kansas.— State *v.* Nixon, 32 Kan. 205, 4 Pac. 159; State *v.* Crawford, 11 Kan. 32.

Kentucky.— Smith *v.* Com., 1 Duv. 224.

Massachusetts.— Com. *v.* Gilbert, 165 Mass. 45, 42 N. E. 336; Com. *v.* Heath, 11 Gray 303.

Michigan.— People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

Mississippi.— Ford *v.* State, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117.

Montana.— State *v.* Peel, 23 Mont. 358, 59 Pac. 169, 75 Am. St. Rep. 529.

Nebraska.— Knights *v.* State, 58 Nebr. 225, 78 N. W. 508, 76 Am. St. Rep. 78; Snider *v.* State, 56 Nebr. 309, 76 N. W. 574.

New Hampshire.— State *v.* Bartlett, 43 N. H. 224, 80 Am. Dec. 154.

New York.— People *v.* Taylor, 138 N. Y. 398, 34 N. E. 275; Brotherton *v.* People, 75 N. Y. 159; People *v.* McCann, 16 N. Y. 38, 69 Am. Dec. 642.

(II) *Continuance of Insanity and Lucid Intervals.* Where insanity of a permanent or continuing character, as distinguished from temporary mania, is shown to have existed, it is presumed to have continued until sufficient evidence to rebut this presumption is introduced, and the state has the burden of proving that the crime was committed in a lucid interval.[41] This rule, however, does not apply to insanity other than to that of a nature liable to be permanent.[42] Where it is shown that defendant had lucid intervals, it will be presumed that the offense was committed in one of them.[43]

f. Of Character. Some of the courts have held that the law presumes that the accused is a man of good character, and if he offers no testimony to prove his character the jury is not at liberty to presume that his character is bad.[44] Other courts have held that nothing is presumed by law as to the character of the accused, and that in the absence of any proof on the subject the jury are not authorized to assume that it is either good or bad, but must base their verdict solely upon the evidence.[45]

g. Official Acts. The well-recognized presumptions as to the legality and proper performance of official acts apply in criminal proceedings.[46]

South Carolina.— State *v.* Coleman, 20 S. C. 441. But see State *v.* Stark, 1 Strobh. 479.

Wisconsin.— Revoir *v.* State, 82 Wis. 295, 52 N. W. 84, by express statutory provision. See 14 Cent. Dig. tit. "Criminal Law," § 742. And see *infra*, XII, I, 2, e, (II).

41. *California.*— People *v.* Francis, 38 Cal. 183.

Connecticut.— State *v.* Johnson, 40 Conn. 136.

Florida.— Armstrong *v.* State, 30 Fla. 170, 11 So. 618, 17 L. R. A. 484.

Illinois.— Langdon *v.* People, 133 Ill. 382, 24 N. E. 874.

Kansas.— State *v.* Reddick, 7 Kan. 143.

Missouri.— State *v.* Schaefer, 116 Mo. 96, 22 S. W. 447; State *v.* Lowe, 93 Mo. 547, 5 S. W. 889.

New Jersey.— State *v.* Spencer, 21 N. J. L. 196.

New York.— People *v.* Montgomery, 13 Abb. Pr. N. S. 207.

Ohio.— Wheeler *v.* State, 34 Ohio St. 394, 32 Am. Rep. 372.

Tennessee.— Overall *v.* State, 15 Lea 672.

Wisconsin.— State *v.* Wilner, 40 Wis. 304. See 14 Cent. Dig. tit. "Criminal Law," § 744; and, generally, Insane Persons.

42. *California.*— People *v.* Schmitt, 106 Cal. 48, 39 Pac. 204.

Illinois.— Langdon *v.* People, 133 Ill. 382, 24 N. E. 874.

Kentucky.— Montgomery *v.* Com., 88 Ky. 509, 11 S. W. 475, 11 Ky. L. Rep. 40.

Mississippi.— Ford *v.* State, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117.

Texas.— Hunt *v.* State, 33 Tex. Cr. 252, 26 S. W. 206; Smith *v.* State, 22 Tex. App. 316, 3 S. W. 684; Leache *v.* State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638.

Wisconsin.— Hempton *v.* State, 111 Wis. 127, 86 N. W. 596.

See 14 Cent. Dig. tit. "Criminal Law," § 744.

43. *Alabama.*— Ford *v.* State, 71 Ala. 385.

Mississippi.— Ford *v.* State, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117.

Texas.— Leache *v.* State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638.

United States.— U. S. *v.* Ridgeway, 31 Fed. 144.

England.— McNaughten's Case, 1 C. & K. 130 note *a*, 47 E. C. L. 130, 10 Cl. & F. 200, 8 Eng. Reprint 718, 8 Scott N. R. 595.

44. *District of Columbia.*— U. S. *v.* Neverson, 1 Mackey 152.

Iowa.— State *v.* Dockstader, 42 Iowa 436; State *v.* Kabrich, 39 Iowa 277.

Kansas.— See State *v.* Smith, 50 Kan. 69, 31 Pac. 784.

New York.— Ackley *v.* People, 9 Barb. 609.

North Carolina.— State *v.* O'Neal, 29 N. C. 251.

United States.— Mullen *v.* U. S., 106 Fed. 892, 46 C. C. A. 22.

45. Danner *v.* State, 54 Ala. 127, 25 Am. Rep. 662; Addison *v.* People, 193 Ill. 405, 62 N. E. 235. And see Newsom *v.* State, 107 Ala. 133, 18 So. 206.

The fact that defendant had been licensed to practice as an attorney does not raise a presumption of good character. Haynes *v.* State, 17 Ga. 465.

46. *Alabama.*—Davis *v.* State, 17 Ala. 415.

Indiana.— Mountjoy *v.* State, 78 Ind. 172 (signature of clerk to jurat); Woods *v.* State, 63 Ind. 353.

Kentucky.— Smith *v.* Com., 4 S. W. 798, 9 Ky. L. Rep. 215, swearing of sheriff and deputy before taking charge of jury.

Louisiana.— State *v.* Wright, 41 La. Ann. 600, 6 So. 135, service of correct copy of venire.

Mississippi.— Hightower *v.* State, 58 Miss. 636.

New York.— People *v.* Otto, 101 N. Y. 690, 5 N. E. 788, 4 N. Y. Cr. 149 (jurisdiction of magistrate and taking of preliminary steps); People *v.* Johnson, 46 Hun 667 (information on oath to support warrant of arrest).

North Carolina.— State *v.* Bridgers, 87 N. C. 562, presumption that magistrate was acting in his official capacity in conducting an examination of a person accused of crime.

Ohio.— State *v.* Wallahan, Tapp. 80, presumption that acting justice of the peace was duly commissioned.

Texas.— Wilson *v.* State, 16 Tex. App. 497,

h. Conflicting Presumptions. In criminal prosecutions the presumption of innocence is often opposed to some other presumption, as the presumption of sanity[47] and of a knowledge of the law,[48] both of which prevail. It is not the rule, however, that the presumption of innocence is stronger than any other presumption except that of sanity and of a knowledge of the law,[49] for it has been held that it may be overcome by the presumption of a proper performance of official duty,[50] or by the presumption in favor of the correctness of books of public account.[51] The question whether the presumption of innocence prevails over a conflicting presumption also arises in prosecutions for seducing or enticing a woman of chaste character,[52] rape,[53] adultery,[54] bigamy,[55] homicide,[56] and libel or slander.[57]

B. Competency, Relevancy, and Materiality — 1. In General. The rules of law determining the admissibility of evidence are substantially the same in civil and criminal cases.[58] But it has been said that the necessity for enforcing the rule that no evidence can be admissible which does not tend to prove or disprove the issue joined is much stronger in criminal than in civil cases.[59] To be admissible either for or against defendant, evidence must be of some fact in issue in the case, or of some fact relevant to a fact in issue, and it must not be so remote as to be immaterial.[60] The remoteness in point of time of facts sought to

presumption that ordinance was published as required by law.

Vermont.— State *v.* Potter, 52 Vt. 33 (record of certificate of marriage); State *v.* Hall, 25 Vt. 247.

See 14 Cent. Dig. tit. "Criminal Law," § 728; and, generally, EVIDENCE.

Reduction of evidence to writing.— Where a statute requires the testimony taken before a magistrate or coroner to be reduced to writing, it will be presumed in the absence of evidence to the contrary that the statute was complied with. Davis *v.* State, 17 Ala. 415; Woods *v.* State, 63 Ind. 353; Hightower *v.* State, 58 Miss. 636.

47. See *supra*, XII, A, 2, e.

48. See *supra*, II, E, 1, a.

49. Dunlop *v.* U. S., 165 U. S. 486, 17 S. Ct. 375, 41 L. ed. 799.

50. Dunlop *v.* U. S., 165 U. S. 486, 17 S. Ct. 375, 41 L. ed. 799.

51. Hemingway *v.* State, 68 Miss. 371, 8 So. 317. But see State *v.* Shelley, 166 Mo. 616, 66 S. W. 430, where it was held on an indictment for impersonating an elector that the presumption that the registration proceedings were regular could not overcome the presumption of innocence.

52. Some courts hold that the presumption of innocence prevails over the presumption of chastity (Com. *v.* Whittaker, 131 Mass. 224; West *v.* State, 1 Wis. 209), while others hold the contrary. Bradshaw *v.* State, 153 Ill. 156, 38 N. E. 652; State *v.* Wells, 48 Iowa 671. See ABDUCTION, 1 Cyc. 159; SEDUCTION.

53. People *v.* O'Brien, 130 Cal. 1, 62 Pac. 297. See RAPE.

54. Howard *v.* State, 75 Ala. 27. See ADULTERY, 1 Cyc. 960.

55. Green *v.* State, 21 Fla. 403, 58 Am. Rep. 670; Com. *v.* McGrath, 140 Mass. 296, 6 N. E. 515. See BIGAMY, 5 Cyc. 699.

56. See HOMICIDE.

57. McArthur *v.* State, 59 Ark. 431, 27 S. W. 628, holding that on a prosecution for charging a woman with fornication, it was error to charge that the presumption was in favor of her chastity, as it conflicted with the presumption of defendant's innocence. And see LIBEL AND SLANDER.

58. State *v.* Dart, 29 Conn. 153, 76 Am. Dec. 596; Com. *v.* Abbott, 130 Mass. 472; Kolle *v.* People, 9 Abb. Pr. (N. Y.) 16; Rex *v.* Burdett, 4 B. & Ald. 95, 22 Rev. Rep. 539, 6 E. C. L. 404; Reg. *v.* Murphy, 8 C. & P. 297, 34 E. C. L. 744; Rex *v.* Watson, 2 Stark. 116, 3 E. C. L. 341. See EVIDENCE.

59. Dyson *v.* State, 26 Miss. 362; Hudson *v.* State, 3 Coldw. (Tenn.) 355.

60. Stephen Dig. Ev. art. 2. And see, generally, EVIDENCE.

"The word 'relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other." Stephen Dig. Ev. art. 1.

Facts occurring after offense.— Evidence to show facts and circumstances which occur between the crime and the arrest of the accused has been excluded. Boulden *v.* State, 102 Ala. 78, 15 So. 341; State *v.* Ford, 37 La. Ann. 443 (excluding evidence of a proclamation offering a reward for the arrest of the perpetrator of the crime); State *v.* Ragsdale, 59 Mo. App. 590. But evidence of such facts and circumstances, in so far as they disclose a consciousness of guilt, are frequently received. State *v.* Shaw, 73 Vt. 149, 50 Atl. 863. See *infra*, XII, B, 4, h.

Evidence that a witness watched in anticipation of the accused committing the crime charged is incompetent. Williams *v.* State, 79 Miss. 555, 31 So. 197.

be proved may render them inadmissible,[61] and for the court to exclude evidence because of remoteness is not an abuse of discretion where it has no direct bearing on any issue;[62] but evidence which is relevant as directly tending to prove a fact in issue is not incompetent as immaterial merely because of remoteness in point of time.[63] Evidence cannot be rejected as incompetent, if admissible in its nature and relevant to the issues, because it is weak and inconclusive, and because the party might with greater diligence have procured more satisfactory proof.[64]

2. EVIDENCE AS TO FACTS CONCEDED. Evidence of facts which in themselves are relevant to the guilt of the accused are not inadmissible because he admits or offers to admit that such facts are true.[65]

3. EVIDENCE NOT PRESENTED TO GRAND JURY. Evidence tending to prove the guilt of the accused is not incompetent because it was not produced before the grand jury.[66]

4. CONNECTION OF ACCUSED WITH CRIME — a. Inclination or Intention to Commit. Evidence is relevant which shows that prior to the crime the accused had in mind and considered the probability or possibility of its commission.[67]

b. Conspiracy to Commit. A conspiracy among several, of which the accused is one, to commit a crime may be proved on his trial, although no conspiracy is charged.[68]

Evidence that the sheriff had guarded the jail fearing defendant might be lynched was rejected in Brown *v.* State, 105 Ga. 640, 31 S. E. 557, where there was no evidence of an excited state of the public mind.

The opinion of an appellate court on a former trial of the accused is not admissible. Abrams *v.* State, (Tex. Cr. App. 1897) 40 S. W. 798.

Tendency to prejudice jury.— A pertinent and relevant fact is not to be excluded merely because it may have a tendency collaterally to prejudice the jury against defendant. Kirby *v.* State, (Fla. 1902) 32 So. 836.

61. State *v.* Noble, 66 Iowa 541, 24 N. W. 34; Yates *v.* People, 32 N. Y. 509; People *v.* Kennedy, 32 N. Y. 141; State *v.* Odle, 2 Wheel. Cr. (N. Y.) 127.

62. Enlow *v.* State, 154 Ind. 664, 57 N. E. 539.

63. Keener *v.* State, 18 Ga. 194, 68 Am. Dec. 269; State *v.* Perigo, 70 Iowa 657, 28 N. W. 452.

64. *Iowa.*— State *v.* Porter, 34 Iowa 131.

Michigan.— People *v.* Hare, 57 Mich. 505, 24 N. W. 843.

New York.— People *v.* Gonzalez, 35 N. Y. 49.

Vermont.— State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

Wyoming.— Cornish *v.* Territory, 3 Wyo. 95, 3 Pac. 793.

See 14 Cent. Dig. tit. "Criminal Law," § 849.

65. People *v.* Fredericks, 106 Cal. 554, 39 Pac. 944; Trogdon *v.* State, 133 Ind. 1, 32 N. E. 725; State *v.* Valsin, 47 La. Ann. 115, 16 So. 768; Com. *v.* McCarthy, 119 Mass. 354; Com. *v.* Miller, 3 Cush. (Mass.) 243.

Illustrations.— The fact that defendant, in a prosecution for homicide, admits the killing does not render inadmissible the weapon which he used (State *v.* Jones, 89 Iowa 182, 56 N. W. 427) or the clothing worn by the deceased (State *v.* Winter, 72 Iowa 627, 34 N. W. 475); and the fact that defendant, in a prosecution for forgery, admits that certain notes are forged notes and that he passed them does not render the notes themselves inadmissible (Com. *v.* Miller, 3 Cush. (Mass.) 243).

66. State *v.* Munchrath, 78 Iowa 268, 43 N. W. 211; State *v.* McCoy, 20 Iowa 262; State *v.* Ostrander, 18 Iowa 435; State *v.* Bowers, 17 Iowa 46; Com. *v.* Edds, 14 Gray (Mass.) 406.

67. *Alabama.*— Price *v.* State, 107 Ala. 161, 18 So. 130.

Massachusetts.— Com. *v.* Castles, 9 Gray 121, 69 Am. Dec. 278.

Missouri.— State *v.* Cooper, 85 Mo. 256.

Pennsylvania.— Com. *v.* Corrigan, 1 Pittsb. 292.

South Carolina.— State *v.* Ford, 3 Strobh. 517 note.

See 14 Cent. Dig. tit. "Criminal Law," § 764.

Illustrations.— It may be shown that defendant stated to relatives of one whom he is accused of killing that the latter had heart disease and was liable to die at any time (Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364), that one accused of theft had praised the horse which he is accused of stealing (Stephens *v.* State, (Tex. Cr. App. 1894) 26 S. W. 728), that he had inquired about the value of property which was subsequently stolen (Kelly *v.* State, 31 Tex. Cr. 211, 20 S. W. 365), that he had discussed methods by which the crime could be consummated (State *v.* Hayward, 62 Minn. 474, 65 N. W. 63), or that he had attempted to commit similar crimes (People *v.* Fehrenbach, 102 Cal. 394, 36 Pac. 678). The fact that the intent of the defendant is apparent does not exclude other relevant evidence of his intent. Higgins *v.* State, 157 Ind. 57, 60 N. E. 685.

68. *Iowa.*— State *v.* McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599.

e. Previous Relations Between Accused and Person Injured or Others. Evidence of the relations existing between the accused and the person injured, prior to the crime,[69] including expressions of ill-will by the accused amounting to threats, is always admissible to prove the motive of the accused;[70] but as a rule evidence of the relations existing between the accused and persons not interested in or injured by the crime is irrelevant and inadmissible.[71]

d. Association of Accused With Criminals. It has been held that evidence is admissible to show that the accused at the time of the commission of the crime was associated with criminals banded together for and engaged in the commission of similar crimes.[72]

e. Identity of Accused — (i) *In General.* The evidence on the question of the identity of the prisoner is permitted to take a broad range.[73] Any fact which shows the acquaintance and familiarity of the witness testifying to the identity of defendant is admissible.[74] The identification by the witness need not be positive

Kentucky.— Dorsey *v.* Com., 17 S. W. 183, 13 Ky. L. Rep. 359.

Michigan.— People *v.* Seaman, 107 Mich. 348, 65 N. W. 203, 61 Am. St. Rep. 326.

Mississippi.— Lamar *v.* State, 63 Miss. 265.

Missouri.— State *v.* Swain, 68 Mo. 605.

New York.— People *v.* Wilson, 145 N. Y. 628, 40 N. E. 392.

Tennessee.— Hall *v.* State, 3 Lea 552.

See 14 Cent. Dig. tit. "Criminal Law," § 765.

69. People *v.* Fitzgerald, 20 N. Y. App. Div. 139, 46 N. Y. Suppl. 1020, 12 N. Y. Cr. 524; Breen *v.* People, 4 Park Cr. (N. Y.) 380.

70. Hammock *v.* State, 52 Ga. 397; State *v.* Edwards, 34 La. Ann. 1012; State *v.* Battle, 126 N. C. 1036, 35 S. E. 624.

In a prosecution for homicide or arson evidence may be admitted to show the existence of animosity between the defendant and the party injured. Hammack *v.* State, 52 Ga. 397. See Homicide.

71. Anderson *v.* State, 63 Ga. 675; Tabor *v.* State, 34 Tex. Cr. 631, 31 S. W. 662, 53 Am. St. Rep. 726; Childers *v.* State, (Tex. App. 1890) 13 S. W. 650.

72. State *v.* Bill, 51 N. C. 34; Hester *v.* Com., 85 Pa. St. 139. *Contra*, Cheney *v.* State, 7 Ohio 222. And see Whitney *v.* State, 154 Ind. 573, 57 N. E. 398. Evidence has been received on a trial for murder that the defendant was a "Mollie Maguire" and associated with that organization, and of the purpose and character of the same, to show a motive for the commission of the crime. McManus *v.* Com., 91 Pa. St. 57; Campbell *v.* Com., 84 Pa. St. 187; Carroll *v.* Com., 84 Pa. St. 107.

73. *Connecticut.*— State *v.* Stebbins, 29 Conn. 463, 79 Am. Dec. 223.

Maine.— State *v.* Witham, 72 Me. 531.

Massachusetts.— Com. *v.* Campbell, 155 Mass. 537, 30 N. E. 72, holding that evidence as to the defendant's personal appearance two years before and one year after the crime is admissible for the purpose of identifying him.

Michigan.— People *v.* Carey, 125 Mich. 535, 80 N. W. 1087, holding that it was competent for a witness to testify that a photograph taken at the time of the prisoner's arrest resembled one who committed the crime.

Nebraska.— Davis *v.* State, 51 Nebr. 301, 70 N. W. 984, holding that as tending to the identification of the defendant, where the crime was committed on a Thursday, it was competent to show that he had a superstitious belief that Thursday was a lucky day for him and that if he attempted anything on that day he would be successful.

Oregon.— State *v.* McDaniel, 39 Oreg. 161, 65 Pac. 520, holding that a letter which the deceased had been seen to read and pass to the accused, and which was found in his pocket, might on a trial for the homicide be admitted for the purpose of identifying the accused.

South Carolina.— State *v.* Martin, 47 S. C. 67, 25 S. E. 113.

See 14 Cent. Dig. tit. "Criminal Law," § 768.

Proof of prior identification.— Evidence is always relevant that a witness saw the defendant after his arrest and then identified him as the person whom he saw commit the crime (Yarbrough *v.* State, 105 Ala. 43, 16 So. 758; Beavers *v.* State, 103 Ala. 36, 15 So. 616; Armsby *v.* People, 2 Thomps. & C. (N. Y.) 157), and that he identified the person now on trial on his previous trial (Ruston *v.* State, 4 Tex. App. 432).

Standing in court for identification.— The accused cannot object if he is identified in court without being required to stand. State *v.* Johnson, 67 N. C. 55. On the other hand if he voluntarily stands for identification he is not entitled to a new trial on the ground that he has been compelled to testify against himself. People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161; Gallaher *v.* State, 28 Tex. App. 247, 12 S. W. 1087; Benson *v.* State, (Tex. Cr. App. 1902) 69 S. W. 165; Rex *v.* Watson, 2 Stark. 116, 3 E. C. L. 341. See *infra*, XII, B, 5, d.

74. State *v.* Bartlett, 55 Me. 200.

Cross-examination and contradiction of witness.—To refuse to permit the identifying witness to be cross-examined as to the length and character of his acquaintance with the accused is error (Olive *v.* State, 11 Nebr. 1, 7 N. W. 444); and he may be contradicted

and certain,[75] but it is enough for him to testify that he believes[76] or has an impression[77] that the accused is the person he saw commit the crime.[78]

(II) *Footprints.* Evidence of the comparison of footprints found near the scene of the crime with the measurements of the foot-wear of the accused is relevant to identify the accused.[79] On the other hand the accused may show that a man seen in the neighborhood of the footprints wore a boot which made similar marks to those traced to his house.[80] A witness who has measured the tracks and compared his measurement with the shoes of the accused may testify to the results and that a correspondence exists in size and shape,[81] but he cannot testify that he believes the tracks were made by the defendant, for this is mere opinion.[82]

(III) *Evidence Procured by Use of Bloodhounds.* Where human tracks were found leading from the place of the crime, evidence that shortly thereafter a dog, if it is proved that he had been trained to and tested in following human foot-tracks,[83] followed such tracks to the defendant's house is admissible.[84] And where the question is as to the recentness of tracks, evidence that a dog scented and followed them by scent for a distance is admissible.[85]

(IV) *Identification by Voice.* Evidence of identity consisting solely of the recognition of the voice of the accused by the witness is admissible. A witness may testify that the accused was present at the place of the crime, although he did not recognize his features, and may add that he knows it was the accused because he recognized the voice.[86]

where he alleges that he had previously identified defendant without laying a foundation by first examining him as to his statement out of court (Mixon *v.* State, 55 Miss. 525).

75. People *v.* Young, 102 Cal. 411, 36 Pac. 770.

76. People *v.* Rolfe, 61 Cal. 540; White *v.* Com., 4 Ky. L. Rep. 373; State *v.* Powers, 130 Mo. 475, 32 S. W. 984; State *v.* Cushenberry, 157 Mo. 168, 56 S. W. 737.

77. People *v.* Stanley, 101 Mich. 93, 59 N. W. 498; People *v.* Burt, 170 N. Y. 560, 62 N. E. 1099; State *v.* Lytle, 117 N. C. 799, 23 S. E. 476.

78. See also Woodward *v.* State, 4 Baxt. (Tenn.) 322, holding that the witness can only testify to the impression he had as to the identity of the accused at the time of the crime.

79. *Alabama.*— Morris *v.* State, 124 Ala. 44, 27 So. 336; Gilmore *v.* State, 99 Ala. 154, 13 So. 536; England *v.* State, 89 Ala. 76, 8 So. 146.

California.— People *v.* Rowell, 133 Cal. 39, 65 Pac. 127; People *v.* McCurdy, 68 Cal. 576, 10 Pac. 207.

Florida.— Gray *v.* State, 42 Fla. 174, 28 So. 53.

Michigan.— People *v.* Keep, 123 Mich. 231, 81 N. W. 1097.

North Carolina.— State *v.* Morris, 84 N. C. 756.

Tennessee.— Lipes *v.* State, 15 Lea 125, 54 Am. Rep. 402.

Texas.— Squires *v.* State, (Cr. App. 1899) 54 S. W. 770; Goldsmith *v.* State, 32 Tex. Cr. 112, 22 S. W. 405; Gibbs *v.* State, (Cr. App. 1892) 20 S. W. 919; Moody *v.* State, 27 Tex. App. 287, 11 S. W. 374; McGill *v.* State, 25 Tex. App. 499, 8 S. W. 661; Stone *v.* State, 12 Tex. App. 219.

See 14 Cent. Dig. tit. "Criminal Law," § 768.

It may be shown that the accused had purchased shoes of a size that would fit tracks discovered near the scene of the crime. State *v.* Reed, 89 Mo. 168, 1 S. W. 225.

80. People *v.* Myers, 70 Cal. 582, 12 Pac. 719.

81. Com. *v.* Pope, 103 Mass. 440; State *v.* Reitz, 83 N. C. 634.

82. Collins *v.* Com., 25 S. W. 743, 15 Ky. L. Rep. 691; State *v.* Green, 40 S. C. 328, 18 S. E. 933, 42 Am. St. Rep. 872.

83. Pedigo *v.* Com., 44 S. W. 143, 19 Ky. L. Rep. 1723, 42 L. R. A. 432.

84. Hodge *v.* State, 98 Ala. 10, 13 So. 385, 39 Am. St. Rep. 17; State *v.* Hall, 4 Ohio S. & C. Pl. Dec. 147, 3 Ohio N. P. 125. Evidence that bloodhounds of the same breed as those used to track the criminal, and which were trained by the same person, after being put upon a human trail left it to trail a sheep, has been held inadmissible. Simpson *v.* State, 111 Ala. 6, 20 So. 572.

85. State *v.* Brooks, 1 Ohio Dec. (Reprint) 407, 9 West. L. J. 109.

86. This rule is particularly applicable to crimes committed in the night, where it is physically impossible for a witness to see the accused, although he may be close to him. Fussell *v.* State, 93 Ga. 450, 21 S. E. 97; State *v.* Kepper, 65 Iowa 745, 23 N. W. 304; People *v.* Willett, 92 N. Y. 29; Com. *v.* Hayes, 2 Lanc. L. Rev. 48; Givens *v.* State, 35 Tex. Cr. 563, 34 S. W. 626; Stepp *v.* State, 31 Tex. Cr. 349, 20 S. W. 753; Davis *v.* State, 15 Tex. App. 594.

Putting voice in evidence.— The accused will not, unless he go upon the witness stand, be allowed to put his own voice in evidence by showing his natural voice by speaking aloud in court. Com. *v.* Scott, 123 Mass. 222, 25 Am. Rep. 81.

Evidence that a witness had mistaken the voice of another person at a different time,

(v) *Identification of Accomplice.* It is not error to permit a co-defendant of the accused, jointly indicted and present with him at the commission of the crime, to be identified during the trial of the accused.[87]

f. Instruments or Weapons Connected With Offense. Weapons or burglars' instruments found in the possession of the accused or near the place of the crime,[88] or a part of the fastening of a door of a house broken into,[89] or weapons or other articles which appear from other evidence to have been employed in the commission of the crime,[90] are admissible in evidence.[91]

g. Motive and Absence of Motive. Where it appears that a crime has been committed, and the evidence, being wholly circumstantial, points to the accused, evidence of motive is relevant.[92] Thus it is competent to show that the accused had a motive peculiar to himself to commit the crime charged.[93] But the jury should be very cautious with respect to the importance which they may attach to evidence of motive.[94] Where the defendant is indisputably shown to be the criminal, evidence of motive is immaterial.[95] The character of the facts relevant to prove motive will depend upon the character of the motive prompting the crime. Thus if the motive be revenge evidence of threats by the defendant would be relevant;[96] or if the motive be cupidity or avarice, evidence of the defendant's poverty would be received.[97] And generally evidence of the defendant's conduct prior to the crime is admissible to prove motive.[98]

h. Consciousness of Guilt — (i) *In General.* The conduct and general demeanor of the accused after the crime, his language, oral and written, his attitude and relations toward the crime, and his actions in the presence of those engaged in endeavoring to detect the criminal are always relevant.[99] His actions

the conditions not appearing to be the same, is irrelevant. State *v.* Hurst, 23 Mont. 484, 59 Pac. 911.

87. People *v.* Wilson, 141 N. Y. 185, 36 N. E. 230.

88. State *v.* Campbell, 7 N. D. 58, 72 N. W. 935.

89. Com. *v.* Hagan, 170 Mass. 571, 49 N. E. 922.

90. Siberry *v.* State, 133 Ind. 677, 33 N. E. 681; Com. *v.* Brown, 14 Gray (Mass.) 419; State *v.* Lett, 85 Mo. 52.

91. Evidence is admissible to show that a gun found contained wadding similar to that found in the yard of the deceased after his homicide (Simms *v.* State, 10 Tex. App. 131), and that shot contained in the prisoner's gun were like other shot lodged in and upon the person assaulted (Moughon *v.* State, 57 Ga. 102). Witnesses will be allowed to show how the weapon could have been used. Siberry *v.* State, 133 Ind. 677, 33 N. E. 681; State *v.* Roberts, 63 Vt. 139, 21 Atl. 424.

92. *Alabama.*— Flanagan *v.* State, 46 Ala. 703; Overstreet *v.* State, 46 Ala. 30; Baalam *v.* State, 17 Ala. 451.

Georgia.— Shaw *v.* State, 102 Ga. 660, 29 S. E. 477; McElhannon *v.* State, 99 Ga. 672, 26 S. E. 501.

Mississippi.— Bateman *v.* State, 64 Miss. 233, 1 So. 172.

New York.— Pierson *v.* People, 79 N. Y. 424, 35 Am. Rep. 524; People *v.* Robinson, 1 Park. Cr. 649.

North Carolina.— State *v.* Green, 92 N. C. 779.

Pennsylvania.— Com. *v.* Corrigan, 1 Pittsb. 292.

Texas.— Noftsinger *v.* State, 7 Tex. App. 301; Dill *v.* State, 1 Tex. App. 278.

See 14 Cent. Dig. tit. "Criminal Law," § 773; and see Homicide.

93. Com. *v.* Hudson, 97 Mass. 565.

94. Baalam *v.* State, 17 Ala. 451; Dill *v.* State, 1 Tex. App. 278.

95. Thurman *v.* State, 32 Nebr. 224, 49 N. W. 338; People *v.* Minisci, 12 N. Y. St. 719.

96. State *v.* Edwards, 34 La. Ann. 1012. See Homicide.

97. Inasmuch as motive is an inference for the jury, any facts which in the particular case prove or disprove it should be received. People *v.* Mead, 1 Wheel. Cr. (N. Y.) 36.

98. Boyd *v.* State, 19 Tex. App. 446.

99. *Alabama.*— Welsh *v.* State, 97 Ala. 1, 12 So. 275; McAdory *v.* State, 62 Ala. 154.

California.— People *v.* Hawkins, 127 Cal. 372, 59 Pac. 697; People *v.* Shem Ah Fook, 64 Cal. 380, 1 Pac. 347; People *v.* Abbott, (1884) 4 Pac. 769; People *v.* Welsh, 63 Cal. 167; People *v.* Stanley, 47 Cal. 113, 17 Am. Rep. 401.

Kansas.— State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318.

Michigan.— People *v.* Pyckett, 99 Mich. 613, 58 N. W. 621.

Missouri.— State *v.* Hill, 134 Mo. 663, 36 S. W. 223; State *v.* Mathews, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135.

North Carolina.— State *v.* Jacobs, 106 N. C. 695, 10 S. E. 1031.

Pennsylvania.— McCabe *v.* Com., (1886) 8 Atl. 45.

Texas.— Hart *v.* State, 15 Tex. App. 202, 49 Am. Rep. 188.

See 14 Cent. Dig. tit. "Criminal Law," § 778.

and behavior when confronted with the consequences, or with the scene or surroundings of the crime with which he is charged, are peculiarly relevant.[1]

(II) *Assuming Name.* Evidence that the accused after the offense changed his name and lived out of the state under an assumed name is relevant to show a consciousness of guilt.[2]

(III) *Flight, Concealment, or Escape and the Like*— (A) *In General.* The flight or concealment of the accused raises no presumption of law that he is guilty, but it is a fact which may be considered by the jury, and from which they may draw an inference, in connection with other circumstances and in the absence of an explanation of the reasons or motives which prompted it, that he is guilty, and evidence of flight or concealment is admissible,[3] whether the other evidence of

Illustrations.— It may be shown that the accused laughed and turned white when charged with the crime (Williams *v.* State, (Ark. 1891) 16 S. W. 816; State *v.* Nash, 7 Iowa 347; State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318; Lindsay *v.* People, 63 N. Y. 143), that he was nervous and showed a great deal of fear (State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318), was excited (Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28; Miller *v.* State, 18 Tex. App. 232), or mentally preoccupied (Noftsinger *v.* State, 7 Tex. App. 301); that he sometimes denied the crime and at other times remained silent or made equivocal replies (Com. *v.* Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235); that he drank to excess (People *v.* O'Neill, 112 N. Y. 355, 19 N. E. 796 [*affirming* 49 Hun 422, 4 N. Y. Suppl. 119, 6 N. Y. Cr. 274); that he offered to take a whipping if he would be let off (State *v.* De Berry, 92 N. C. 800); that he feigned insanity while in jail (Basham *v.* Com., 87 Ky. 440, 9 S. W. 284, 10 Ky. L. Rep. 434); that he trembled and showed confusion before and at the time of his arrest (Beavers *v.* State, 58 Ind. 530); or that he furnished the parties implicated with him money to leave the state (Jones *v.* State, 64 Ind. 473; State *v.* Hudson, 50 Iowa 157).

Caution should be observed in considering this evidence lest an inference of guilt be drawn from the fear and excitement which is natural to an innocent man suddenly confronted with a serious charge and overcome by the possible consequences to himself and family. State *v.* Lucey, 24 Mont. 297, 61 Pac. 994.

Attempt to commit suicide.— No inference of guilt arises from the fact that the accused while in confinement and before trial attempts suicide. State *v.* Coudotte, 7 N. D. 109, 72 N. W. 913.

1. State *v.* Hill, 134 Mo. 663, 36 S. W. 223; Handline *v.* State, 6 Tex. App. 347; and other cases in the note preceding.

2. *California.*— People *v.* Winthrop, 118 Cal. 85, 50 Pac. 390.

Idaho.— State *v.* Davis, 3 Ida. 159, 53 Pac. 678.

Illinois.— Barron *v.* People, 73 Ill. 256.

Iowa.— State *v.* Van Winkle, 80 Iowa 15, 45 N. W. 388.

Kansas.— State *v.* Stewart, 65 Kan. 371, 69 Pac. 335.

North Carolina.— State *v.* Whitson, 111 N. C. 695, 16 S. E. 332.

Vermont.— State *v.* Chase, 68 Vt. 405, 35 Atl. 336.

See 14 Cent. Dig. tit. "Criminal Law," § 778.

3. *Alabama.*— Sylvester *v.* State, 71 Ala. 17, 72 Ala. 201.

Arkansas.— Burris *v.* State, 38 Ark. 221.

California.— People *v.* Ashmead, 118 Cal. 508, 50 Pac. 681; People *v.* Giancoli, 74 Cal. 642, 16 Pac. 510; People *v.* Welsh, 63 Cal. 167; People *v.* Wong Ah Ngow, 54 Cal. 151, 35 Am. Rep. 69; People *v.* Stanley, 47 Cal. 113, 17 Am. Rep. 401.

Illinois.— Fox *v.* People, 95 Ill. 71.

Indiana.— Batten *v.* State, 80 Ind. 394.

Iowa.— State *v.* Minard, 96 Iowa 267, 65 N. W. 147; State *v.* Rodman, 62 Iowa 456, 17 N. W. 663; State *v.* Arthur, 23 Iowa 430.

Kentucky.— Baker *v.* Com., 17 S. W. 625, 13 Ky. L. Rep. 571.

Louisiana.— State *v.* Baptiste, 105 La. 661, 30 So. 147; State *v.* Middleton, 104 La. 233, 28 So. 914.

Maine.— State *v.* Frederic, 69 Me. 400.

Michigan.— Grand Rapids *v.* Williams, 112 Mich. 247, 70 N. W. 547, 67 Am. St. Rep. 396, 36 L. R. A. 137.

Missouri.— State *v.* Shipley, 171 Mo. 544, 74 S. W. 612; State *v.* Blitz, 171 Mo. 530, 71 S. W. 1027; State *v.* Adler, 146 Mo. 18, 47 S. W. 794; State *v.* Moore, 101 Mo. 316, 14 S. W. 182; State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330; State *v.* Griffin, 87 Mo. 608.

Nebraska.— George *v.* State, 61 Nebr. 669, 85 N. W. 840.

Ohio.— Grillo *v.* State, 9 Ohio Cir. Ct. 394.

Pennsylvania.— Com. *v.* Bezek, 168 Pa. St. 603, 32 Atl. 109; Com. *v.* McMahon, 145 Pa. St. 413, 23 Atl. 971.

Texas.— Sheffield *v.* State, 43 Tex. 378; Cage *v.* State, (Cr. App. 1900) 55 S. W. 63; Buchanan *v.* State, 41 Tex. Cr. 127, 52 S. W. 769; Holt *v.* State, 39 Tex. Cr. 282, 45 S. W. 1016, 46 S. W. 829; Waite *v.* State, 13 Tex. App. 169; Aiken *v.* State, 10 Tex. App. 610; Hardin *v.* State, 4 Tex. App. 355.

Vermont.— State *v.* Chase, 68 Vt. 405, 35 Atl. 336.

United States.— Starr *v.* U. S., 164 U. S. 627, 17 S. Ct. 223, 41 L. ed. 577; Allen *v.* U. S., 164 U. S. 492, 17 S. Ct. 154, 14 L. ed. 528; Alberty *v.* U. S., 162 U. S. 499, 16 S. Ct. 864, 40 L. ed. 1051; Hickory *v.* U. S., 160 U. S. 408, 16 S. Ct. 327, 40 L. ed. 474; U. S. *v.* Jackson, 29 Fed. 503.

guilt be direct or circumstantial.[4] It is also relevant to show the steps taken by officers and others to locate and apprehend the accused.[5]

(B) *Evidence to Explain Flight.* Evidence on the part of the accused must be received to explain his flight. Any fact is competent in his behalf which shows that the reasons and motives of his flight were consistent with his innocence.[6] He may show that he was insane when he absented himself,[7] that he fled on the advice of his friends,[8] that he intended and had arranged to leave the state before the crime,[9] or that he fled because of threats or fear of mob violence.[10] He cannot offer evidence to explain his flight unless the prosecution first proves the flight against him.[11]

(C) *Resisting or Avoiding Arrest.* Evidence of an attempt on the part of

See 14 Cent. Dig. tit. "Criminal Law," § 779.

Leaving county after crime.— Evidence is admissible to show that the accused left the county soon after the commission of the crime. Welsh *v.* State, 97 Ala. 1, 12 So. 275; Smith *v.* State, 58 Miss. 867.

Forfeiture of recognizance.— And it may be shown that the accused after giving bail for his appearance fled and forfeited the recognizance. Porter *v.* State, 2 Ind. 435; Saylor *v.* Com., 57 S. W. 614, 22 Ky. L. Rep. 472; State *v.* Wingfield, 34 La. Ann. 1200; State *v.* Lee, 17 Oreg. 488, 21 Pac. 455.

4. State *v.* Harris, 48 La. Ann. 1189, 20 So. 729; Hart *v.* State, 22 Tex. App. 563, 3 S. W. 741; Blake *v.* State, 3 Tex. App. 581 [*overruling* Williams *v.* State, 43 Tex. 182, 23 Am. Rep. 590]. But see State *v.* Melton, 37 La. Ann. 77.

5. *Alabama.*— Carden *v.* State, 84 Ala. 417, 4 So. 823.

California.— People *v.* Fine, 77 Cal. 147, 19 Pac. 269.

Louisiana.— State *v.* Harris, 48 La. Ann. 1189, 20 So. 729.

Missouri.— State *v.* Shipley, 171 Mo. 544, 74 S. W. 612.

Montana.— State *v.* Lucey, 24 Mont. 295, 61 Pac. 994.

New York.— People *v.* Ogle, 104 N. Y. 511, 11 N. E. 53 [*affirming* 4 N. Y. Cr. 349].

North Dakota.— State *v.* Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

Texas.— Henry *v.* State, (Cr. App. 1897) 43 S. W. 340.

See 14 Cent. Dig. tit. "Criminal Law," § 779.

6. *Georgia.*— Smith *v.* State, 106 Ga. 673, 32 S. E. 851, 71 Am. St. Rep. 286.

Indian Territory.— Bradburn *v.* U. S., 3 Indian Terr. 604, 64 S. W. 550.

Kentucky.—Kennedy *v.* Com., 14 Bush 340.

Missouri.— State *v.* Ma Foo, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414; State *v.* Jackson, 95 Mo. 623, 8 S. W. 749; State *v.* Mallon, 75 Mo. 355.

Texas.— Walters *v.* State, 17 Tex. App. 226, 50 Am. Rep. 128.

See 14 Cent. Dig. tit. "Criminal Law," § 779.

Flight alone is not relevant unless it is shown that it was caused by a desire to avoid arrest (State *v.* Marshall, 115 Mo. 383, 22 S. W. 452; State *v.* King, 78 Mo. 555), but it is not necessary to show that defendant was under bond or that he had no right to leave the country (Henry *v.* State, (Tex. Cr. App. 1897) 43 S. W. 340). The flight, to be of any value as evidence, must be a fleeing from the crime and not mere absence from one's usual place of abode. Com. *v.* Roland, 8 Phila. (Pa.) 606.

Unsanitary condition of the jail.— In Kennedy *v.* Com., 14 Bush (Ky.) 340, it was held that defendant could not show that his flight was prompted by apprehensions of danger to his health from the condition of the jail to which he was being conducted.

7. Peacock *v.* State, 50 N. J. L. 653, 14 Atl. 893.

8. State *v.* Phillips, 24 Mo. 475.

9. State *v.* Potter, 108 Mo. 424, 22 S. W. 89.

10. *Georgia.*— Golden *v.* State, 25 Ga. 527.

Indiana.— Batten *v.* State, 80 Ind. 394.

Iowa.— State *v.* Desmond, 109 Iowa 72, 80 N. W. 214.

Kentucky.— Plummer *v.* Com., 1 Bush 76; Webb *v.* Com., 4 Ky. L. Rep. 436.

Missouri.— State *v.* Ma Foo, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414; State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330; State *v.* Griffin, 87 Mo. 608; State *v.* Barham, 82 Mo. 67; State *v.* Phillips, 24 Mo. 475.

Texas.— Lewallen *v.* State, 33 Tex. Cr. 412, 26 S. W. 832; Arnold *v.* State, 9 Tex. App. 435.

But see State *v.* Chevallier, 36 La. Ann. 81.

Inadmissible evidence.— Evidence of uncommunicated threats (Taylor *v.* Com., 90 Va. 109, 17 S. E. 812), or of mob violence, where the accused fled immediately after the commission of the crime and the mob was not formed until later (Sanders *v.* State, 131 Ala. 1, 31 So. 564), or where his flight was not sufficiently soon after the communication of the threats of the mob to indicate that it was due to that cause (State *v.* McDevitt, 69 Iowa 549, 20 N. W. 459) is inadmissible for the purpose of rebutting the inference that the flight was due to a consciousness of guilt.

11. Coleman *v.* State, 87 Ala. 14, 6 So. 290; People *v.* Shaw, 111 Cal. 171, 43 Pac. 593; People *v.* Clark, 84 Cal. 573, 24 Pac. 313; State *v.* Hays, 23 Mo. 287.

The defendant cannot show that he voluntarily surrendered or failed to escape unless the state seeks to show his flight. Vaughn *v.* State, 130 Ala. 18, 30 So. 669. See *infra*, XII, E, 2, e.

the accused to escape or avoid arrest or of his resistance to arrest is relevant as tending to show consciousness of guilt;[12] and as an innocent person has as a general rule nothing to fear except the annoyance of confinement in jail, which may be avoided by his securing bail, resistance of arrest has been considered strong evidence of the consciousness of guilt.[13]

(D) *Escape or Attempt to Escape.* Evidence that the accused after his arrest escaped or attempted to escape,[14] or that he had tools in his possession for that purpose,[15] or that he offered a guard or other officer a bribe to permit him to escape,[16] is relevant and may be considered by the jury as tending to show consciousness of guilt.[17]

12. *Alabama.*— Horn *v.* State, 102 Ala. 144, 15 So. 278.

Illinois.— Jamison *v.* People, 145 Ill. 357, 34 N. E. 486.

Indiana.— Anderson *v.* State, 147 Ind. 445, 46 N. E. 901.

Kentucky.— Aiken *v.* Com., 68 S. W. 849, 24 Ky. L. Rep. 523; Nicely *v.* Com., 58 S. W. 995, 22 Ky. L. Rep. 900.

Michigan.— People *v.* Burns, 67 Mich. 537, 35 N. W. 154; Hall *v.* People, 39 Mich. 717; People *v.* Pitcher, 15 Mich. 397.

Missouri.— State *v.* Taylor, 118 Mo. 153, 24 S. W. 449; State *v.* Moore, 117 Mo. 395, 22 S. W. 1086; State *v.* Moore, 101 Mo. 316, 14 S. W. 182.

New York.— Ryan *v.* People, 79 N. Y. 593; People *v.* Moore, 26 Misc. 168, 56 N. Y. Suppl. 802.

Texas.—Williams *v.* State, (Cr. App. 1894) 25 S. W. 788; Cordova *v.* State, 6 Tex. App. 207.

Virginia.— Williams *v.* Com., 85 Va. 607, 8 S. E. 470.

See 14 Cent. Dig. tit. "Criminal Law," § 780.

Illegal arrest.— The resistance of the accused to what he knows to be an illegal arrest, solely on that ground, cannot be shown against him (Russell *v.* State, 37 Tex. Cr. 314, 39 S. W. 674), and he may be permitted to show, to excuse his resistance, that he did not know he was charged with crime or that officers were looking for him (People *v.* Murray, 72 Mich. 10, 40 N. W. 29).

13. State *v.* Taylor, 118 Mo. 153, 24 S. W. 449; State *v.* Moore, 101 Mo. 316, 14 S. W. 182.

14. *Alabama.*— Nelson *v.* State, 130 Ala. 83, 30 So. 728; Elmore *v.* State, 98 Ala. 12, 13 So. 427; Murrell *v.* State, 46 Ala. 89, 7 Am. Rep. 592.

Arkansas.— Burris *v.* State, 38 Ark. 221.

California.—People *v.* Sheldon, 68 Cal. 434, 9 Pac. 457.

District of Columbia.— Howgate *v.* U. S., 7 App. Cas. 217.

Georgia.— Revel *v.* State, 26 Ga. 275.

Indiana.— Anderson *v.* State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; Hittner *v.* State, 19 Ind. 48.

Iowa.— State *v.* Fitzgerald, 63 Iowa 268, 19 N. W. 202.

Kentucky.— Clark *v.* Com., 32 S. W. 131, 17 Ky. L. Rep. 540; Ryan *v.* Com., 5 Ky. L. Rep. 177.

Louisiana.— State *v.* Hobgood, 46 La. Ann. 855, 15 So. 406; State *v.* Dufour, 31 La. Ann. 804.

Massachusetts.— Com. *v.* Brigham, 147 Mass. 414, 18 N. E. 167.

Missouri.— State *v.* Foster, 136 Mo. 653, 38 S. W. 721; State *v.* Howell, 117 Mo. 307, 23 S. W. 263.

New York.— People *v.* McKeon, 64 Hun 504, 19 N. Y. Suppl. 486.

Texas.— Russell *v.* State, (Cr. App. 1898) 44 S. W. 159.

Vermont.— State *v.* Taylor, 70 Vt. 1, 39 Atl. 447, 67 Am. St. Rep. 648, 42 L. R. A. 673.

Virginia.— Anderson *v.* Com., 100 Va. 860, 42 S. E. 865.

Wisconsin.— Ryan *v.* State, 83 Wis. 486, 53 N. W. 836.

See 14 Cent. Dig. tit. "Criminal Law," § 783.

15. *Iowa.*— State *v.* Dunn, 116 Iowa 219, 89 N. W. 984.

Kentucky.— Barnes *v.* Com., 70 S. W. 827, 24 Ky. L. Rep. 1143; Clark *v.* Com., 32 S. W. 131, 17 Ky. L. Rep. 540.

Missouri.— State *v.* Duncan, 116 Mo. 288, 22 S. W. 699.

New Hampshire.— State *v.* Palmer, 65 N. H. 216, 20 Atl. 6.

West Virginia.—State *v.* Koontz, 31 W. Va. 127, 5 S. E. 328.

See 14 Cent. Dig. tit. "Criminal Law," § 783.

16. McRae *v.* State, 71 Ga. 96; Whaley *v.* State, 11 Ga. 123; Dean *v.* Com., 4 Gratt. (Va.) 541; U. S. *v.* Barlow, 24 Fed. Cas. No. 14,521, 1 Cranch C. C. 94.

17. Evidence of an attempt to escape is competent, although its proof necessarily tends to prove a distinct crime (State *v.* Wrand, 108 Iowa 73, 78 N. W. 788; People *v.* Petmecky, 2 N. Y. Cr. 450), and although the accused admits that he committed the crime with which he stands charged (State *v.* Garrison, 147 Mo. 548, 49 S. W. 508. See *supra*, XII, B, 2). And where the accused is under arrest on a charge of felony and is at the same time in jail under sentence for a misdemeanor, his escape from jail is relevant on his subsequent trial for the felony. People *v.* Keep, 123 Mich. 231, 81 N. W. 1097.

Evidence on behalf of accused.— Evidence that the accused had an opportunity to escape which he did not avail himself of (Kennedy *v.* State, 101 Ga. 559, 28 S. E. 979) or that after his escape he voluntarily returned and surrendered himself (People *v.* Cleveland, 107 Mich. 367, 65 N. W. 216; State *v.*

(E) *Interference With Witnesses or Jurors.* Evidence is relevant to show that the accused has threatened[18] or assaulted a witness,[19] has endeavored to prevail on him to abscond,[20] has procured his absence,[21] has endeavored to induce him to testify falsely,[22] or has attempted to bribe a juror.[23] But an attempt to suborn witnesses or jurors by another than the accused is not evidence against the accused unless he is proved to have been connected with it;[24] and acts and statements of third parties in the presence of the defendant, but not authorized by him, to persuade a witness to leave the country are inadmissible.[25]

(F) *Falsehoods to Avoid Suspicion.* The fact of the utterance of falsehoods by the accused to exculpate himself, the falsehoods being satisfactorily proved, is relevant to show a consciousness of guilt.[26]

(G) *Compromise or Offer to Compromise.* The same is true of evidence of a compromise or offer of compromise, whether accepted or not,[27] if it was voluntarily made.[28]

i. **Finding Property of Accused Near Place of Crime.** Evidence is relevant to show that property owned by the accused was found at or near the place of the crime within a reasonable time after its commission.[29]

Marshall, 115 Mo. 383, 22 S. W. 452) is relevant in his behalf.

18. State *v.* Rorabacher, 19 Iowa 154; Com. *v.* Smith, 162 Mass. 508, 39 N. E. 111; Adams *v.* People, 9 Hun (N. Y.) 89.

19. Love *v.* State, 35 Tex. Cr. 27, 29 S. W. 790.

20. Reid *v.* State, 20 Ga. 681; Cover *v.* Com., 6 Cent. Rep. (Pa.) 585; Ezell *v.* State, (Tex. Cr. App. 1902) 71 S. W. 283.

21. Com. *v.* Collins, 12 Bush (Ky.) 386; State *v.* Keith, 47 Minn. 559, 50 N. W. 691; Clark *v.* State, (Tex. Cr. App. 1897) 43 S. W. 522; State *v.* Barron, 37 Vt. 57.

22. Conway *v.* State, 118 Ind. 482, 21 N. E. 285; Com. *v.* Cooper, 5 Allen (Mass.) 495, 81 Am. Dec. 762; State *v.* Mahoney, 24 Mont. 281, 61 Pac. 647; Cogdell *v.* State, (Tex. Cr. App. 1901) 63 S. W. 645; Williams *v.* State, 22 Tex. App. 497, 4 S. W. 64.

23. People *v.* Marion, 29 Mich. 31; State *v.* Case, 93 N. C. 545, 53 Am. Rep. 471.

24. Com. *v.* Robbins, 3 Pick. (Mass.) 63; Lankster *v.* State, 42 Tex. Cr. 360, 59 S. W. 888.

25. People *v.* Dixon, 94 Cal. 255, 29 Pac. 504. And see State *v.* Huff, 161 Mo. 459, 61 S. W. 900, 1104.

26. *Alabama.*— Crawford *v.* State, 112 Ala. 1, 21 So. 214; Hicks *v.* State, 99 Ala. 169, 13 So. 375.

Arkansas.—Hamilton *v.* State, 62 Ark. 543, 36 S. W. 1054; Edmonds *v.* State, 34 Ark. 720.

California.— People *v.* Cuff, 122 Cal. 589, 55 Pac. 407.

Connecticut.— State *v.* Cronin, 64 Conn. 293, 29 Atl. 536.

Iowa.— State *v.* Williams, 66 Iowa 573, 24 N. W. 52; State *v.* Fletes, 51 Iowa 495, 1 N. W. 755.

Kentucky.— Logan *v.* Com., 29 S. W. 632, 16 Ky. L. Rep. 508.

Maine.— State *v.* Benner, 64 Me. 267.

Massachusetts.— Com. *v.* Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235; Com. *v.* Tolliver, 119 Mass. 312.

Mississippi.—McCann *v.* State, 13 Sm. & M. 471.

Pennsylvania.— Com. *v.* Johnson, 162 Pa. St. 63, 29 Atl. 280; Cathcart *v.* Com., 37 Pa. St. 108.

Texas.— Huffman *v.* State, 28 Tex. App. 174, 12 S. W. 588.

Vermont.— State *v.* Bradley, 64 Vt. 466, 24 Atl. 1053; State *v.* Williams, 27 Vt. 724.

United States.— Wilson *v.* U. S., 162 U. S. 613, 16 S. Ct. 895, 40 L. ed. 1090; U. S. *v.* Randall, 27 Fed. Cas. No. 16,118, Deady 524.

England.— Reg. *v.* Miller, 18 Cox C. C. 54; Reg. *v.* Thomas, 9 Cox C. C. 376, 1 L. & C. 313, 33 L. J. M. C. 22, 9 L. T. Rep. N. S. 488, 12 Wkly. Rep. 108.

See 14 Cent. Dig. tit. "Criminal Law," § 784.

27. Huggins *v.* State, 41 Ala. 393; Young *v.* State, 50 Ark. 501, 8 S. W. 828; State *v.* Rodrigues, 45 La. Ann. 1040, 13 So. 802.

28. *Georgia.*—McMath *v.* State, 55 Ga. 303.

Illinois.— Barr *v.* People, 113 Ill. 471.

Louisiana.— State *v.* Bruce, 33 La. Ann. 186.

Maine.— State *v.* Soper, 16 Me. 293, 33 Am. Dec. 665.

North Carolina.— State *v.* De Berry, 92 N. C. 800, holding that it may be shown that the prisoner sent a message to the prosecutor, proposing to take a whipping and to be let go.

Wisconsin.— Collins *v.* State, 115 Wis. 596, 92 N. W. 266, offer to compromise prosecution for larceny by returning the goods.

United States.— U. S. *v.* Hunter, 26 Fed. Cas. No. 15,424, 1 Cranch C. C. 317.

But see Wilson *v.* State, 73 Ala. 527 (where evidence of an offer of a compromise was excluded because it did not contain a confession of guilt); Frain *v.* State, 40 Ga. 529 (where it was made under threats and with hope of a reward, and was therefore excluded by statute); State *v.* Emerson, 48 Iowa 172 (where evidence of an offer to settle a civil action brought to recover stolen property was rejected in a prosecution for the larceny).

See 14 Cent. Dig. tit. "Criminal Law," § 785.

29. *Alabama.*— Thornton *v.* State, 113 Ala. 43, 21 So. 356, 59 Am. St. Rep. 97.

j. Condition of Clothes of Accused. Evidence is relevant to show the condition of the clothing of the accused after the commission of the crime.[30]

k. Ability and Opportunity. Evidence that the accused enjoyed a particular opportunity to commit the crime,[31] or had a knowledge of the habits of the person injured,[32] or possessed or claimed to possess the particular and peculiar strength, skill, or ability which would enable him to commit the crime, is relevant.[33]

l. Presence of Accused Near Place of Crime. It is also relevant to show that the accused was seen near the place of the crime, although he does not claim an alibi.[34] On the other hand it is error to refuse to permit the accused to show in rebuttal that he was in the habit of frequenting the place of the crime.[35]

m. Possession by Accused — (i) *Of Weapons.* It is relevant to show that the accused owned or had weapons in his possession prior to[36] or shortly after the commission of the crime.[37]

(ii) *Of Implements of Crime.* Evidence is relevant to show that the accused owned or had in his possession tools, implements, or any articles with which the particular crime was or might have been committed;[38] and a witness familiar with the use of such tools or implements may testify as to their probable use.[39]

(iii) *Of Property of Person Injured.* It is also relevant to show that the accused or an accomplice had money or other property in his possession which was the fruit of the crime.[40]

n. Incriminating Others — (i) *To Exculpate Accused.* The cases are not harmonious as to the relevancy of evidence incriminating outsiders in the crime

Georgia.— Franklin *v.* State, 69 Ga. 36, 47 Am. Rep. 748.

Iowa.— State *v.* Rainsbarger, 74 Iowa 196, 37 N. W. 153.

Kentucky.— Logan *v.* Com., 29 S. W. 632, 16 Ky. L. Rep. 508.

Missouri.— State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743.

North Carolina.— State *v.* Arthur, 13 N. C. 217.

Washington.— State *v.* Costello, 29 Wash. 366, 69 Pac. 1099; State *v.* Craemer, 12 Wash. 217, 40 Pac. 944.

See 14 Cent. Dig. tit. "Criminal Law," § 793.

The property may be exhibited to the jury with the evidence of a witness who can connect it with defendant as the owner. Franklin *v.* State, 69 Ga. 36, 47 Am. Rep. 748; Com. *v.* Scott, 123 Mass. 222, 25 Am. Rep. 81.

30. Campbell *v.* State, 23 Ala. 44; House *v.* State, (Tex. Cr. App. 1901) 69 S. W. 417; Baines *v.* State, 43 Tex. Cr. 490, 66 S. W. 847.

31. U. S. *v.* Randall, 27 Fed. Cas. No. 16,118, Deady 524. See also HOMICIDE; LARCENY.

32. State *v.* Seymour, 94 Iowa 699, 63 N. W. 661. See also HOMICIDE.

33. Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Moore *v.* State, 2 Ohio St. 500; State *v.* McDonald, 14 R. I. 270.

Illustrations.—Where a homicidal blow was such that it could only have been inflicted by a strong man, evidence of the physical strength of the accused is admissible. People *v.* Thiede, 11 Utah 241, 39 Pac. 837. And on a trial for violation of the election laws it is relevant to show the defendant's possession of power and patronage that might influence others, and his ability to produce the results desired at elections, and the fact that he did so. People *v.* McKane, 143 N. Y. 455, 38 N. E. 950.

34. State *v.* Maher, 74 Iowa 77, 37 N. W. 2; Lindsay *v.* People, 63 N. Y. 143; Angley *v.* State, 35 Tex. Cr. 427, 34 S. W. 116.

The testimony of an accomplice may be corroborated by evidence that the accused was seen near the *locus in quo*. Territory *v.* Kinney, 3 N. M. 97, 2 Pac. 357. See *infra*, XII, G, 3.

35. Saunders *v.* People, 38 Mich. 218.

36. Merrick *v.* State, 63 Ind. 327; State *v.* Rainsbarger, 74 Iowa 196, 37 N. W. 153; State *v.* Kinsauls, 126 N. C. 1095, 36 S. E. 31; Simms *v.* State, 10 Tex. App. 131.

37. *Alabama.*— Hodge *v.* State, 97 Ala. 37, 12 So. 164, 38 Am. St. Rep. 145.

Kentucky.— Nicely *v.* Com., 58 S. W. 995, 22 Ky. L. Rep. 900; State *v.* Fowler, 2 Ky. L. Rep. 150.

Michigan.— People *v.* Machen, 101 Mich. 400, 59 N. W. 664.

North Carolina.— State *v.* Kinsauls, 126 N. C. 1095, 36 S. E. 31.

Texas.— Reardon *v.* State, 4 Tex. App. 602.

38. *Alabama.*— Mitchell *v.* State, 94 Ala. 68, 10 So. 518.

Arkansas.— Starchman *v.* State, 62 Ark. 538, 36 S. W. 940.

Massachusetts.— Com. *v.* Choate, 105 Mass. 451.

Virginia.— Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364.

West Virginia.— State *v.* Edwards, 51 W. Va. 220, 41 S. E. 429, 59 L. R. A. 465.

See 14 Cent. Dig. tit. "Criminal Law," § 798.

39. Com. *v.* Brown, 121 Mass. 69.

40. Gates *v.* People, 14 Ill. 433; State *v.*

with which the accused stands charged. It has been held that he may show that another actually committed the crime[41] if the evidence incriminating the other is inconsistent with his own guilt.[42] But it is not admissible to show that another person is or was suspected[43] or has been indicted[44] for the crime.[45]

(II) *To Establish Guilt of Accused.* Where no conspiracy is charged or shown, evidence that a third person was connected with the crime is inadmissible against the accused,[46] unless the evidence shows an act on the part of the third person committed in the presence of the accused.[47]

o. Exculpating Third Persons. Where the theory of the accused is that the crime was committed by another, the prosecution may show any facts which would exculpate the latter.[48]

5. Compelling Accused to Criminate Himself — a. In General. The constitutions of the United States and of most of the states provide in somewhat varying language that no person accused of crime shall be compelled to be a witness against himself or to give evidence against himself, and these provisions render inadmissible all evidence incriminating the accused and obtained from him by compulsion.[49] A statute providing that involuntary confessions may be proved

Lull, 37 Me. 246; Lancaster *v.* State, (Tex. Cr. App. 1895) 31 S. W. 515. Thus it may be shown in a prosecution for homicide that a watch (Linsday *v.* People, 67 Barb. (N. Y.) 548; Morris *v.* State, 30 Tex. App. 95, 16 S. W. 757) or a bank-note (Com. *v.* Roddy, 184 Pa. St. 274, 39 Atl. 211) carried or owned by the deceased was subsequently seen in the possession of the accused. See also Burglary; Larceny.

A statement by the deceased that he had such a coin as was found in the defendant's possession is not admissible as a part of the *res gestæ*. Faulkner *v.* State, 43 Tex. Cr. 311, 65 S. W. 1093.

41. Brown *v.* State, 120 Ala. 342, 25 So. 182; People *v.* Mitchell, 100 Cal. 328, 34 Pac. 698 (although he has been acquitted); Sidney *v.* Com., 1 Ky. L. Rep. 120.

Hearsay.— Evidence by a witness that a third person told him that he committed the crime is incompetent as hearsay. Com. *v.* Chabbock, 1 Mass. 144; State *v.* Hack, 118 Mo. 92, 23 S. W. 1089; Rhea *v.* State, 10 Yerg. (Tenn.) 258.

42. State *v.* Beverly, 88 N. C. 632; State *v.* Baxter, 82 N. C. 602; State *v.* Burke, 82 N. C. 551; State *v.* Haynes, 71 N. C. 79; State *v.* White, 68 N. C. 158.

43. Brown *v.* State, 120 Ala. 342, 25 So. 182; People *v.* Thompson, 33 N. Y. App. Div. 177, 53 N. Y. Suppl. 497, 13 N. Y. Cr. 273; Rhea *v.* State, 10 Yerg. (Tenn.) 258.

An anonymous letter to the sheriff confessing the crime is not admissible in behalf of the accused. Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636.

44. Johnson *v.* State, (Tex. Cr. App. 1898) 43 S. W. 1007; Taylor *v.* Com., 90 Va. 109, 17 S. E. 812.

45. The flight of a third person (Levison *v.* State, 54 Ala. 520), or a threat by a third person to commit the crime (State *v.* Taylor, 136 Mo. 66, 37 S. W. 907), his bad character (Bennett *v.* State, 52 Ala. 370), his motive to commit the crime (Josephine *v.* State, 39 Miss. 613), or even his conviction of the crime (State *v.* Yandle, 166 Mo. 589, 66 S. W. 532) is irrelevant to exculpate the accused. Where the accused is permitted to prove that another person was arrested for the crime, the prosecution should be permitted to show the discharge of such person. Lovett *v.* State, 60 Ga. 257.

46. Amos *v.* State, 96 Ala. 120, 11 So. 424; Collins *v.* Com., 25 S. W. 743, 15 Ky. L. Rep. 691. Evidence that one not a witness, but supposed to be an accomplice, has been arrested (People *v.* O'Hare, 124 Mich. 515, 83 N. W. 279) or that he has fled from the state (People *v.* Lee Chuck, 78 Cal. 317, 20 Pac. 719) is not relevant to show the guilt of the accused. But the flight of an accomplice may be shown to explain why he is not called as a witness for the prosecution. People *v.* McQuade, 1 N. Y. Suppl. 155.

47. People *v.* Wilson, 66 Cal. 370, 5 Pac. 624.

48. People *v.* Clarke, 130 Cal. 642, 63 Pac. 138; People *v.* Smith, 106 Cal. 73, 39 Pac. 40; Smart *v.* Com., 11 S. W. 431, 10 Ky. L. Rep. 1035; People *v.* Doyle, 21 Mich. 221; Walker *v.* State, 17 Tex. App. 16. The prosecution may show, particularly where the incriminating evidence is all circumstantial, that another person who was in the vicinity of the crime could not have committed it. Bram *v.* U. S., 168 U. S. 532, 18 S. Ct. 183, 42 L. ed. 568.

49. *Alabama.*— Cooper *v.* State, 86 Ala. 610, 6 So. 110, 11 Am. St. Rep. 84, 4 L. R. A. 766.

Georgia.— Evans *v.* State, 106 Ga. 519, 32 S. E. 659, 71 Am. St. Rep. 276; Blackwell *v.* State, 67 Ga. 76, 44 Am. Rep. 717.

Mississippi.— Jordan *v.* State, 32 Miss. 382.

New York.— People *v.* McCoy, 45 How. Pr. 216.

Tennessee.— Stokes *v.* State, 5 Baxt. 619, 30 Am. Rep. 72.

Vermont.— State *v.* Slamon, 73 Vt. 212, 50 Atl. 1097, 87 Am. St. Rep. 711; State *v.* Hobbs, 2 Tyler 380.

if corroborated by other evidence does not violate such a constitutional provision ;[50] nor is the accused compelled to furnish evidence against himself where he voluntarily, although reluctantly, writes the name in an alleged forged instrument.[51]

b. Papers and Other Articles Taken From Accused. The exhibition of the blood-stained clothing of the accused in evidence on a trial for murder does not violate the constitutional provision protecting him from incriminating himself.[52] Papers and other articles voluntarily produced by the accused[53] or taken from his room in his absence and without his knowledge[54] may be put in evidence against him without violating his constitutional rights, as he is not thereby compelled to give evidence against himself.[55]

c. Physical Examination of Accused. When arrested the accused may be subjected to a compulsory physical examination to ascertain his identity ;[56] and witnesses who have examined him may, when the marks on his body are relevant, testify to what they saw, state whether he was deformed, and describe his personal appearance.[57]

d. Exposing Person of Accused to Jurors or Witnesses. It has been held[58] and also denied[59] that it is error for the court to compel the accused to exhibit his hand or other portion of his body to the jury as evidence of its condition, on the ground that this is compelling him to give evidence against himself. If the accused voluntarily does so he may be required to allow a physician to examine him, and the physician may then testify to the result of his examination.[60] Directing the defendant to stand up for identification is not compelling him to be a witness against himself,[61] and it is always proper to ask a witness to look about the court and point out the person who committed the crime,[62] or to point out the accused and ask the witness if he is the person who committed the crime.[63]

e. Compelling Accused to Make Footprints. As the accused cannot be compelled to give evidence against himself, it is error to compel him to submit to a

See 14 Cent. Dig. tit. "Criminal Law," § 871 *et seq.*

50. Brown *v.* State, 26 Tex. App. 308, 9 S. W. 613.

51. Sprouse *v.* Com., 81 Va. 374.

52. Drake *v.* State, 75 Ga. 413; State *v.* Baker, 33 W. Va. 319, 10 S. E. 639.

53. Com. *v.* Carbin, 143 Mass. 124, 8 N. E. 896.

54. State *v.* Griswold, 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 227; State *v.* Van Tassel, 103 Iowa 6, 72 N. W. 497; State *v.* Atkinson, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877.

55. Contents of books and papers.— A witness who has become familiar with the contents of books in the possession of the accused, with his knowledge and consent, may prove such contents without violating the constitutional rights of the accused to refuse to produce his books. State *v.* Boomer, 103 Iowa 106, 72 N. W. 424.

Illegal search warrant.— Evidence procured by use of an illegal search warrant is not inadmissible on the ground that it is evidence which the defendant has been compelled to furnish against himself, or because it has been illegally procured. State *v.* Flynn, 36 N. H. 64. See also *infra*, XII, B, 6.

56. O'Brien *v.* State, 125 Ind. 38, 25 N. E. 137, 9 L. R. A. 323; State *v.* Struble, 71 Iowa 11, 32 N. W. 1.

Removing prisoner's clothing.— Where the prisoner resists the officers, they may remove his clothing by force. O'Brien *v.* State, 125 Ind. 38, 25 N. E. 137, 9 L. R. A. 323; Leeper *v.* State, 29 Tex. App. 63, 14 S. W. 398.

57. O'Brien *v.* State, 125 Ind. 38, 25 N. E. 137, 9 L. R. A. 323; State *v.* Jones, 153 Mo. 457, 55 S. W. 80.

A physician who shaved the head of the accused in order to dress the wounds thereon may testify as to the condition of the wounds, whether the shaving of the head was voluntary or involuntary on the part of the accused. State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743.

58. Blackwell *v.* State, 67 Ga. 76, 44 Am. Rep. 717; State *v.* Jacobs, 50 N. C. 259.

59. State *v.* Ah Chuey, 14 Nev. 79, 33 Am. Rep. 530; State *v.* Garrett, 71 N. C. 85, 17 Am. Rep. 1, where the accused, alleging her hand to have been burned, was compelled by a coroner to unwrap and show it to him.

60. Gordon *v.* State, 68 Ga. 814; Thomas *v.* State, 33 Tex. Cr. 607, 28 S. W. 534.

61. People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161; State *v.* Reasby, 100 Iowa 231, 69 N. W. 451; People *v.* Gardner, 144 N. Y. 119, 38 N. E. 1003, 43 Am. St. Rep. 741, 28 L. R. A. 699. See also *supra*, XII, B, e, (I), note 73.

62. State *v.* Johnson, 67 N. C. 55 [*distinguishing* State *v.* Jacobs, 50 N. C. 259].

63. State *v.* Hall, 79 Iowa 674, 44 N. W. 914.

comparison of footprints in open court,[64] or to admit evidence that the prosecuting witness requested him to make tracks and that he declined.[65] It has also been held that a witness who was present when the accused was forcibly compelled out of court to place his foot in footprints cannot testify as to the results,[66] but there have been decisions to the contrary.[67] Where the accused voluntarily places his foot in the tracks or surrenders his shoes to the sheriff he cannot object to evidence that they seemed to fit;[68] and he may prove his offer to do this in his own favor.[69]

6. Evidence and Articles of Property Wrongfully Obtained. Although evidence, including documents and other articles, may have been obtained in a criminal case by unfair or illegal methods, it is as a general rule admissible if relevant, provided the accused is not thereby compelled to do any act which incriminates him, and a confession or incriminating admission is not extorted from him.[70] It has therefore been held that the fact that evidence was procured by a private detective by an illegal and unauthorized search of defendant's rooms is no ground for excluding it if it is otherwise competent.[71] There would seem to be no difference in the application of this principle between an unauthorized search of the person of the accused and an invasion or trespass upon his premises, and so it has been

64. Stokes *v.* State, 5 Baxt. (Tenn.) 619, 30 Am. Rep. 72, holding that it was error to allow the prosecuting attorney to bring a pan of mud into the court-room and request defendant to place his foot in it in order that the footprint made by his action might be compared with tracks in the vicinity of the crime.

65. Cooper *v.* State, 86 Ala. 610, 6 So. 110, 11 Am. St. Rep. 84, 4 L. R. A. 766.

66. Day *v.* State, 63 Ga. 667.

67. State *v.* Graham, 74 N. C. 646, 21 Am. Rep. 493; Walker *v.* State, 7 Tex. App. 245, 32 Am. Rep. 595.

Fitting shoes in track.— A distinction has been made where the officer having the accused in custody took off his shoe and fitted it in the track, the officer being allowed to testify as to the result under the rule that evidence of the result of searching a prisoner and taking articles from him is admissible. Myers *v.* State, 97 Ga. 76, 25 S. E. 252; State *v.* Graham, 74 N. C. 646, 21 Am. Rep. 493.

68. Potter *v.* State, 92 Ala. 37, 9 So. 402; Burks *v.* State, 92 Ga. 461, 17 S. E. 619; State *v.* Sexton, 147 Mo. 89, 48 S. W. 452.

69. Bouldin *v.* State, 8 Tex. App. 332. *Compare* Potter *v.* State, 92 Ala. 37, 9 So. 402.

70. *Alabama.*— Chastang *v.* State, 83 Ala. 29, 3 So. 304; Spicer *v.* State, 69 Ala. 159.

Connecticut.— State *v.* Griswold, 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 227.

Georgia.— Williams *v.* State, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269.

Illinois.— Siebert *v.* People, 143 Ill. 571, 32 N. E. 431; Gindrat *v.* People, 138 Ill. 103, 27 N. E. 1085.

Kansas.— State *v.* Everson, 63 Kan. 66, 64 Pac. 1034; State *v.* Miller, 63 Kan. 62, 64 Pac. 1033; State *v.* Stockman, 9 Kan. App. 422, 58 Pac. 1032.

Maine.— State *v.* Burroughs, 72 Me. 479.

Massachusetts.— Com. *v.* Smith, 166 Mass. 370, 44 N. E. 503; Com. *v.* Welch, 163 Mass. 372, 40 N. E. 103; Com. *v.* Brelsford, 161 Mass. 61, 36 N. E. 677; Com. *v.* Hurley, 158 Mass. 159, 33 N. E. 342; Com. *v.* Tibbetts, 157 Mass. 519, 32 N. E. 910; Com. *v.* Dana, 2 Metc. 329.

Michigan.— People *v.* Murphy, 93 Mich. 41, 52 N. W. 1042; People *v.* Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501.

Mississippi.— Wilkinson *v.* State, 77 Miss. 705, 27 So. 639.

Missouri.— State *v.* Pomeroy, 130 Mo. 489, 32 S. W. 1002; State *v.* Kaub, 15 Mo. App. 433.

Nebraska.— Geiger *v.* State, 6 Nebr. 545.

New Hampshire.— State *v.* Flynn, 36 N. H. 64.

New York.— People *v.* Spiegel, 143 N. Y. 107, 38 N. E. 284; People *v.* Coombs, 36 N. Y. App. Div. 284, 55 N. Y. Suppl. 276.

Oregon.— State *v.* McDaniel, 39 Oreg. 161, 65 Pac. 520.

Vermont.— State *v.* Mathers, 64 Vt. 101, 23 Atl. 590, 33 Am. St. Rep. 921, 15 L. R. A. 268.

Washington.— State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382.

See 14 Cent. Dig. tit. "Criminal Law," §§ 876, 877.

Eavesdropping.— The fact that incriminating evidence is obtained by the witness's eavesdropping does not exclude it if otherwise relevant. People *v.* Cotta, 49 Cal. 166; State *v.* Allen, 37 La. Ann. 685.

Impersonating counsel of the accused.— But evidence obtained by the prosecuting attorney by talking with the accused over the telephone and representing himself as her counsel is inadmissible. State *v.* Russell, 83 Wis. 330, 53 N. W. 441.

71. Williams *v.* State, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269; Gindrat *v.* People, 138 Ill. 103, 27 N. E. 1085; and other cases in the preceding note.

held ;[72] but there is a late decision to the contrary, in which a paper obtained by an unconstitutional search and seizure was excluded.[73]

7. TESTIMONY AS TO INTENT. Inasmuch as intent is a mental condition invisible to human eyes, it must ordinarily be implied from the actions and language of the person whose intent is in question,[74] but it has been held that where the intention of the accused is material he may testify directly as to the intention with which he did the act complained of.[75]

8. PARTICULAR DEFENSES — a. Insanity.[76] It is proper to allow considerable latitude in the testimony taken to prove insanity. The evidence is not confined to the mental condition of the accused at the instant of the act, although all facts in evidence must tend to show his mental condition at that time. The prior insanity of the accused[77] and his prior mental condition not too remote in point of time[78] are always relevant. The appearance and conduct of the accused while testifying,[79] the hideous and unnatural character of the crime and the absence of motive,[80] the fact that defendant had been subject to epileptic fits[81] or to insomnia and nervousness,[82] his mental condition subsequent to the crime,[83] his coolness and unconcern after its commission,[84] his efforts to escape,[85] his conversations, exclamations, and declarations,[86] letters,[87] and books written by him[88] within a reasonable

72. Williams *v.* State, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269.

Evidence that weapons were found on the defendant's person, although obtained in an unlawful search of him, is nevertheless admissible. Scott *v.* State, 113 Ala. 64, 21 So. 425; Shields *v.* State, 104 Ala. 35, 16 So. 85, 53 Am. St. Rep. 17; French *v.* State, 94 Ala. 93, 10 So. 553; Chastang *v.* State, 83 Ala. 29, 3 So. 304.

73. State *v.* Slamon, 73 Vt. 212, 50 Atl. 1097, 87 Am. St. Rep. 711.

74. State *v.* Strothers, 8 Ohio S. & C. Pl. Dec. 357, 7 Obio N. P. 228.

75. *Illinois.*— Wohlford *v.* People, 148 Ill. 296, 36 N. E. 107.

Indiana.— White *v.* State, 53 Ind. 595; Greer *v.* State, 53 Ind. 420.

Michigan.— People *v.* Quick, 51 Mich. 547, 18 N. W. 375.

Missouri.— State *v.* Palmer, 88 Mo. 568.

Nebraska.— Cummings *v.* State, 50 Nebr. 274, 69 N. W. 756.

New York.— Filkins *v.* People, 69 N. Y. 101, 25 Am. Rep. 143; Kerrains *v.* People, 60 N. Y. 221, 19 Am. Rep. 158.

Texas.— Matthews *v.* State, (Cr. App. 1897) 42 S. W. 375.

Virginia.— Jackson *v.* Com., 96 Va. 107, 30 S. E. 452.

United States.— U. S. *v.* Stone, 8 Fed. 232.

But see Brown *v.* State, 79 Ala. 51; Mettler *v.* People, 36 Ill. App. 324; Hamilton *v.* People, 57 Barb. (N. Y.) 625.

See 14 Cent. Dig. tit. "Criminal Law," § 858; and, generally, EVIDENCE.

76. See also EVIDENCE; INSANE PERSONS.

77. Wheeler *v.* State, 34 Ohio St. 394, 32 Am. Rep. 372; Dejarnette *v.* Com., 75 Va. 867; Vance *v.* Com., 2 Va. Cas. 132; Hempton *v.* State, 111 Wis. 127, 86 N. W. 596; Guitean's Case, 10 Fed. 161.

78. *California.*—People *v.* Hubert, 119 Cal. 216, 51 Pac. 329, 63 Am. St. Rep. 72.

Delaware.— State *v.* Harrigan, 9 Houst. 369, 31 Atl. 1052.

Georgia.— Choice *v.* State, 31 Ga. 424.

Iowa.— State *v.* Wright, 112 Iowa 436, 84 N. W. 541.

Kansas.— State *v.* Newman, 57 Kan. 705, 47 Pac. 881.

Kentucky.— Murphy *v.* Com., 92 Ky. 485, 18 S. W. 163, 13 Ky. L. Rep. 695.

Missouri.— State *v.* Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266.

New York.— People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730; People *v.* Hoch, 150 N. Y. 291, 44 N. E. 976.

Ohio.— State *v.* Snell, 5 Ohio S. & C. Pl. Dec. 670.

Texas.— Cannon *v.* State, 41 Tex. Cr. 467, 56 S. W. 351.

Wisconsin.— Cornell *v.* State, 104 Wis. 527, 80 N. W. 745.

See 14 Cent. Dig. tit. "Criminal Law," § 760; and, generally, INSANE PERSONS.

79. Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228.

80. Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228.

81. State *v.* Wright, 112 Iowa 436, 84 N. W. 541; Com. *v.* Winnemore, 1 Brewst. (Pa.) 356.

82. Boswell *v.* State, 63 Ala. 307, 35 Am. Rep. 20.

83. Moore *v.* Com., 92 Ky. 630, 18 S. W. 833, 13 Ky. L. Rep. 738; Webb *v.* State, 5 Tex. App. 596.

84. Green *v.* State, 64 Ark. 523, 43 S. W. 973; Hopps *v.* People, 31 Ill. 385, 83 Am. Dec. 231.

85. U. S. *v.* Shults, 27 Fed. Cas. No. 16,286, 6 McLean 121.

86. State *v.* Hays, 22 La. Ann. 39; Lake *v.* People, 1 Park. Cr. (N. Y.) 495.

87. Blume *v.* State, 154 Ind. 343, 56 N. E. 771.

88. State *v.* Kring, 64 Mo. 591; U. S. *v.* Sharp, 27 Fed. Cas. No. 16,264, Pet. C. C.

period of the crime, and generally his previous acts[89] are relevant to prove his insanity. But evidence that the accused[90] or a member of his family[91] was generally reputed prior to the crime to be of unsound mind is inadmissible as hearsay. Insanity in the family of the accused is relevant, if there is independent evidence to show that he is insane,[92] but not otherwise;[93] and the cause of the defendant's insanity is always relevant to show that it was not hereditary.[94]

b. Intoxication. Where the drunkenness of the defendant when the offense was committed is a material issue,[95] it may be shown that he was intoxicated at a time prior to the crime if not too remote,[96] or it may be shown that he was a habitual drunkard;[97] and it may also be shown how he acted on previous occasions when he was intoxicated, as bearing on his condition when he committed the crime.[98] But a witness will not be permitted to testify that his intoxication was or was not sufficient to prevent the formation of an intent, as that is a question for the jury.[99]

c. Alibi. On the question of alibi the relevant facts are the distance between the scene of the crime and the prisoner's alleged whereabouts at the time of its commission, and the time of the crime as compared with that of the alibi, allowing for difference in timepieces and in opinions respecting time and the means of travel.[1] The accused may testify that he conversed with persons at the place

118. See Flanagan *v.* State, 103 Ga. 619, 30 S. E. 550.

89. *Alabama.*— McLean *v.* State, 16 Ala. 672.

Delaware.— State *v.* West, Houst. Cr. 371.

Iowa.— State *v.* Mewherter, 46 Iowa 88.

Massachusetts.— Com. *v.* Pomeroy, 117 Mass. 143.

New Hampshire.— State *v.* Jones, 50 N. H. 369, 9 Am. Rep. 242.

New York.— People *v.* Miles, 143 N. Y. 383, 38 N. E. 456.

United States.— U. S. *v.* Shults, 27 Fed. Cas. No. 16,286, 6 McLean 121.

See 14 Cent. Dig. tit. "Criminal Law," § 760.

90. *California.*— People *v.* Pico, 62 Cal. 50.

Connecticut.— State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89.

Georgia.— Brinkley *v.* State, 58 Ga. 296.

Indiana.— Walker *v.* State, 102 Ind. 502, 1 N. E. 856.

Texas.— Ellis *v.* State, 33 Tex. Cr. 86, 24 S. W. 894.

See 14 Cent. Dig. tit. "Criminal Law," § 760.

91. Snell *v.* U. S., 16 App. Cas. (D. C.) 501; Cannon *v.* State, 41 Tex. Cr. 467, 56 S. W. 351.

92. *Arkansas.*— Shaeffer *v.* State, 61 Ark. 241, 32 S. W. 679.

California.— People *v.* Smith, 31 Cal. 466.

Delaware.— State *v.* Windsor, 5 Harr. 512.

Iowa.— State *v.* Felter, 25 Iowa 67.

Kentucky.— Murphy *v.* Com., 92 Ky. 485, 18 S. W. 163, 13 Ky. L. Rep. 695.

Michigan.— People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

New York.— Walsh *v.* People, 88 N. Y. 458.

North Carolina.— State *v.* Cunningham, 72 N. C. 469.

Pennsylvania.— Com. *v.* Winnemore, 1 Brewst. 356.

Tennessee.— Hagan *v.* State, 5 Baxt. 615.

United States.— Guiteau's Case, 10 Fed. 161.

England.— Reg. *v.* Tucket, 1 Cox C. C. 103.

See 14 Cent. Dig. tit. "Criminal Law," § 760.

93. Walsh *v.* People, 88 N. Y. 458.

94. State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89.

95. See *supra*, III, C.

96. People *v.* Monteith, 73 Cal. 7, 14 Pac. 373; Pierce *v.* State, 53 Ga. 365; Choice *v.* State, 31 Ga. 424; State *v.* Pierce, 65 Iowa 85, 21 N. W. 195; People *v.* Eastwood, 14 N. Y. 562; People *v.* Gaynor, 33 N. Y. App. Div. 98, 53 N. Y. Suppl. 86. But see State *v.* Gainor, 84 Iowa 209, 50 N. W. 947; Com. *v.* Cloonen, 151 Pa. St. 605, 25 Atl. 145.

97. Tatum *v.* State, 63 Ala. 147; Gallagher *v.* People, 120 Ill. 179, 11 N. E. 335; Real *v.* People, 42 N. Y. 270.

The defense cannot show that defendant had liquor in the house at the date of the crime (Com. *v.* Cloonen, 151 Pa. St. 605, 25 Atl. 145), or that he was easily affected by liquor (State *v.* Smith, 49 Conn. 376), or prove experiments made with liquor which is not positively identified with that drunk by the accused prior to the crime (People *v.* Slack, 90 Mich. 448, 51 N. W. 533).

98. Upstone *v.* People, 109 Ill. 169. But see Com. *v.* Cloonen, 151 Pa. St. 605, 25 Atl. 145.

Intoxication of companion.— Intoxication of defendant cannot be shown by evidence of the condition of one who was with him and had taken the same amount of liquor. Com. *v.* Cleary, 135 Pa. St. 64, 19 Atl. 1017, 8 L. R. A. 301.

99. White *v.* State, 103 Ala. 72, 16 So. 63; Armor *v.* State, 63 Ala. 173; Buckhannon *v.* Com., 86 Ky. 110, 5 S. W. 358, 9 Ky. L. Rep. 411.

1. Klein *v.* People, 113 Ill. 596.

where he claims to have been, and may give a general outline of what was said, but not the details.[2] And he may show any fact which tends to prove that he could not have been or was not present at the place and time of the offense.[3] In rebuttal the state may show that acquaintances of the accused who were at the place where he alleges he was did not see him,[4] and may describe by other witnesses incidents which the accused alleges he saw there,[5] and prove any other fact which tends to contradict the accused or to disprove the alleged alibi.[6]

9. Failure of Prosecution to Call Witness. It has been held that defendant cannot show that a witness has been subpœnaed by the state, but has not been called upon to testify,[7] or that a co-defendant has been subpœnaed.[8]

10. Complaint, Indictment, and Record as Evidence. The affidavit or complaint on which an information is based is not admissible as evidence against the defendant,[9] except on a collateral issue, as to show the day when it was made.[10] The same is true of the indictment and other pleadings in the case.[11] Nor in the absence of a statute can the state introduce in evidence the depositions made in defendant's absence before the magistrate on applying for a warrant,[12] or evidence that the examining court refused to admit defendant to bail,[13] or that defendant waived a preliminary examination.[14]

C. Evidence of Other Offenses — 1. General Rule. The general rule is that on a prosecution for a particular crime evidence which in any manner shows or tends to show that the accused has committed another crime wholly independent of that for which he is on trial, even though it be a crime of the same sort, is irrelevant and inadmissible;[15] but to this rule there are several exceptions.

2. People *v.* Hare, 57 Mich. 505, 21 N. W. 843; State *v.* Bedard, 65 Vt. 278, 26 Atl. 719.

3. State *v.* Delaney, 92 Iowa 467, 61 N. W. 189, holding that evidence that the accused could not have left his home on the night of the crime without arousing the inmates was admissible.

Drunkenness.— The defendant may show that at or about the time the crime was committed he was so intoxicated as to render it improbable that he could have been at the place of the crime. Ingalls *v.* State, 48 Wis. 647, 4 N. W. 785.

Evidence not tending to sustain alibi held inadmissible.— Wisdom *v.* People, 11 Colo. 170, 17 Pac. 519; State *v.* McCracken, 66 Iowa 569, 24 N. W. 43 (declarations of accused); State *v.* Powers, 130 Mo. 475, 32 S. W. 984.

4. State *v.* Phair, 48 Vt. 366.

5. People *v.* Gibson, 58 Mich. 368, 25 N. W. 316.

6. State *v.* Maher, 74 Iowa 77, 37 N. W. 2; State *v.* Scott, 19 N. C. 35; Goldsby *v.* U. S., 160 U. S. 70, 16 S. Ct. 216, 4 L. ed. 343. A witness will be permitted to testify in rebuttal that he saw defendant near the place of the crime (State *v.* Maher, 74 Iowa 77, 37 N. W. 2), but hearsay evidence that he was seen there is not admissible (Com. *v.* Ricker, 131 Mass. 581). Evidence that the accused was found hiding from arrest is not relevant to disprove an alibi. People *v.* Lee Chuck, 78 Cal. 317, 20 Pac. 719.

7. State *v.* Row, 81 Iowa 138, 46 N. W. 872.

8. State *v.* Mathews, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135.

9. Long *v.* State, 17 Tex. App. 128. *Compare* Irby *v.* State, 25 Tex. App. 203, 7 S. W. 705.

10. People *v.* Chuey Ying Git, 100 Cal. 437, 34 Pac. 1080.

11. Edmonds *v.* State, 34 Ark. 720, holding that one count of an indictment is not evidence to disprove the allegations of another. The prosecution, where one of two defendants has turned state's evidence, cannot put in evidence indictments against both to disprove that the defendant who turned state's evidence did so to be released. State *v.* Reavis, 71 Mo. 419.

12. State *v.* Hill, 2 Hill (S. C.) 607, 27 Am. Dec. 406.

13. Richardson *v.* State, 9 Tex. App. 612.

14. Thompson *v.* State, 21 Tex. App. 141, 17 S. W. 718.

15. *Alabama.*— Wickard *v.* State, 109 Ala. 45, 19 So. 491; Haley *v.* State, 63 Ala. 89; Mason *v.* State, 42 Ala. 532; Cochran *v.* State, 30 Ala. 542.

Arizona.— Youree *v.* Territory, (1892) 29 Pac. 894.

Arkansas.— Endaily *v.* State, 39 Ark. 278.

California.— People *v.* Carpenter, 136 Cal. 391, 68 Pac. 1027; People *v.* Williams, 127 Cal. 212, 59 Pac. 581; People *v.* Griner, 124 Cal. 19, 56 Pac. 625; People *v.* Arlington, 123 Cal. 356, 55 Pac. 1003; People *v.* Elliott, 119 Cal. 593, 51 Pac. 955; People *v.* Baird, 104 Cal. 462, 38 Pac. 310; People *v.* Tucker, 104 Cal. 440, 38 Pac. 195; People *v.* Jones, 32 Cal. 80.

Colorado.—Bigcraft *v.* People, 30 Colo. 298, 70 Pac. 417.

Georgia.— Taylor *v.* State, 110 Ga. 150, 35 S. E. 161; Whitaker *v.* State, 79 Ga. 87, 3 S. E. 403; Hatcher *v.* State, 18 Ga. 460.

Illinois.— Bishop *v.* People, 194 Ill. 365, 62 N. E. 785; Farris *v.* People, 129 Ill. 521, 21 N. E. 821, 16 Am. St. Rep. 283, 4 L. R. A. 582; Kribs *v.* People, 82 Ill. 425; Hopps *v.*

2. Exceptions to Rule — a. In General. The general rule does not apply where the evidence of another crime tends directly to prove defendant's guilt of

People, 31 Ill. 385, 83 Am. Dec. 231; Towne *v.* People, 89 Ill. App. 258.

Indiana.— Strong *v.* State, 86 Ind. 208, 44 Am. Rep. 292; Bonsall *v.* State, 35 Ind. 460; Todd *v.* State, 31 Ind. 514; Redman *v.* State, 1 Blackf. 96.

Iowa.— State *v.* Snyder, (1902) 91 N. W. 765; State *v.* Carter, 112 Iowa 15, 83 N. W. 715; State *v.* Rainsbarger, 71 Iowa 746, 31 N. W. 865.

Kansas.— State *v.* Kirby, 62 Kan. 436, 63 Pac. 752; State *v.* Reynolds, 5 Kan. 515, 47 Pac. 573.

Kentucky.— Snapp *v.* Com., 82 Ky. 173; Flint *v.* Com., 81 Ky. 186, 23 S. W. 346; Combs *v.* Com., 21 S. W. 353, 14 Ky. L. Rep. 703; Spurlock *v.* Com., 20 S. W. 1095, 14 Ky. L. Rep. 605; Cargill *v.* Com., (1890) 13 S. W. 916; Sewell *v.* Com., 3 Ky. L. Rep. 86.

Louisiana.— State *v.* Bates, 46 La. Ann. 849, 15 So. 204.

Massachusetts.— Com. *v.* Campbell, 155 Mass. 537, 30 N. E. 72; Com. *v.* Jackson, 132 Mass. 16; Com. *v.* Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705.

Michigan.— People *v.* Robertson, 129 Mich. 627, 89 N. W. 340; People *v.* Ascher, 126 Mich. 637, 86 N. W. 140; People *v.* Bennett, 122 Mich. 281, 81 N. W. 117; People *v.* Schweitzer, 23 Mich. 301; Hall *v.* People, 21 Mich. 456; Lightfoot *v.* People, 16 Mich. 507.

Minnesota.— State *v.* Fitchette, 88 Minn. 145, 92 N. W. 527; State *v.* Bourne, 86 Minn. 426, 90 N. W. 1105; State *v.* Hoyt, 13 Minn. 132.

Mississippi.— Brown *v.* State, 72 Miss. 997, 17 So. 278; Whitlock *v.* State, (1889) 6 So. 237; King *v.* State, 66 Miss. 502, 6 So. 188; Morris *v.* State, 8 Sm. & M. 762.

Missouri.— State *v.* Hale, 156 Mo. 102, 56 S. W. 881; State *v.* Young, 119 Mo. 495, 24 S. W. 1038; State *v.* Reed, 85 Mo. 194; State *v.* Turner, 76 Mo. 350; State *v.* Martin, 74 Mo. 547; State *v.* Goetz, 34 Mo. 85.

Nevada.— State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733.

New Hampshire.— State *v.* Davis, (1898) 41 Atl. 267; State *v.* Renton, 15 N. H. 169.

New Jersey.— Bullock *v.* State, 65 N. J. L. 557, 47 Atl. 62, 86 Am. St. Rep. 668; State *v.* Snover, 65 N. J. L. 289, 47 Atl. 583; State *v.* Jackson, 65 N. J. L. 105, 46 Atl. 767; Parks *v.* State, 59 N. J. L. 573, 36 Atl. 935; Meyer *v.* State, 59 N. J. L. 310, 36 Atl. 483.

New Mexico.— Roper *v.* Territory, 7 N. M. 255, 33 Pac. 1014.

New York.— People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193; People *v.* McLaughlin, 150 N. Y. 365, 44 N. E. 1017; People *v.* Butler, 62 N. Y. App. Div. 508, 71 N. Y. Suppl. 129.

North Carolina.— State *v.* McCall, 131 N. C. 798, 42 S. E. 894; State *v.* Frazier, 118 N. C. 1257, 24 S. E. 520.

Ohio.— Barton *v.* State, 18 Ohio 221; Cheney *v.* State, 7 Ohio 222.

Oregon.— State *v.* O'Donnell, 36 Oreg. 222, 61 Pac. 892; State *v.* Adams, 20 Oreg. 525, 26 Pac. 837.

Pennsylvania.— Com. *v.* Biddle, 200 Pa. St. 647, 50 Atl. 264; Com. *v.* Wilson, 186 Pa. St. 1, 40 Atl. 283; Com. *v.* Saulsbury, 152 Pa. St. 554, 25 Atl. 610.

Rhode Island.—State *v.* Letourneau, (1902) 51 Atl. 1048.

South Carolina.— State *v.* Odel, 3 Brev. 552.

Tennessee.— State *v.* Poe, 8 Lea 647; Kinchelow *v.* State, 5 Humphr. 9.

Texas.— Kessinger *v.* State, (Cr. App. 1903) 71 S. W. 597; Camarillo *v.* State, (Cr. App. 1902) 68 S. W. 795; Dyerle *v.* State, (Cr. App. 1902) 68 S. W. 174; Johnson *v.* State, (Cr. App. 1901) 62 S. W. 756; Denton *v.* State, (Cr. App. 1901) 60 S. W. 670; Johnson *v.* State, (Cr. App. 1901) 60 S. W. 667; Spriggins *v.* State, (Cr. App. 1900) 60 S. W. 54; McIber *v.* State, (Cr. App. 1900) 60 S. W. 50; Ballow *v.* State, 42 Tex. Cr. 263, 58 S. W. 1023; Woodward *v.* State, 42 Tex. Cr. 188, 58 S. W. 135; Walton *v.* State, 41 Tex. Cr. 454, 55 S. W. 566; Tidwell *v.* State, 40 Tex. Cr. 38, 47 S. W. 466, 48 S. W. 184; Callison *v.* State, 37 Tex. Cr. 211, 39 S. W. 300; Tyrrell *v.* State, (Cr. App. 1897) 38 S. W. 1011; Freedman *v.* State, 37 Tex. Cr. 115, 38 S. W. 993; Buck *v.* State, (Cr. App. 1897) 38 S. W. 772; Ware *v.* State, 36 Tex. Cr. 597, 38 S. W. 198; Cesure *v.* State, 1 Tex. App. 19.

Utah.— State *v.* Hilberg, 22 Utah 27, 61 Pac. 215.

Vermont.— State *v.* Leonard, 72 Vt. 102, 47 Atl. 395; State *v.* Kelly, 65 Vt. 531, 27 Atl. 203, 36 Am. St. Rep. 884.

Virginia.— Cole *v.* Com., 5 Gratt. 696; Walker *v.* Com., 1 Leigh 574.

Washington.— State *v.* Gottfreedson, 24 Wash. 398, 64 Pac. 523; State *v.* Hyde, 22 Wash. 551, 61 Pac. 719; State *v.* Bokien, 14 Wash. 403, 44 Pac. 889.

West Virginia.— State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676; Watts *v.* State, 5 W. Va. 532.

Wisconsin.— State *v.* Miller, 47 Wis. 530, 3 N. W. 31; Albricht *v.* State, 6 Wis. 74.

Wyoming.— Fields *v.* Territory, 1 Wyo. 78.

United States.— Boyd *v.* U. S., 142 U. S. 450, 12 S. Ct. 292, 35 L. ed. 1077; Waight *v.* U. S., 28 Fed. Cas. No. 17,042, 1 Hayw. & H. 189.

England.— Reg. *v.* Holt, Bell C. C. 280, 8 Cox C. C. 411, 6 Jur. N. S. 1121, 30 L. J. M. C. 11, 3 L. T. Rep. N. S. 310, 9 Wkly. Rep. 74; Reg. *v.* Flannagan, 15 Cox C. C. 403; Reg. *v.* Winslow, 8 Cox C. C. 397; Reg. *v.* McDonnell, 5 Cox C. C. 153; Reg. *v.* Taylor, 5 Cox C. C. 138; Rex *v.* Lloyd, 7 C. & P. 318, 32 E. C. L. 633; Rex *v.* Birdseye, 4 C. & P. 386, 19 E. C. L. 566; Rex *v.* Smith, 2 C. & P. 633, 12 E. C. L. 776.

See 14 Cent. Dig. tit. "Criminal Law," § 822.

Evidence of other offenses in prosecutions for particular crimes see Abduction, 1 Cyc.

the crime charged. Evidence which is relevant to defendant's guilt is not rendered inadmissible because it proves or tends to prove him guilty of another and distinct crime.[16] It often happens that two distinct offenses are so inseparably connected that the proof of one necessarily involves proving the other, and in such a case on a prosecution for one evidence proving it cannot be excluded because it also proves the other.[17] Evidence of another and distinct crime is admissible if it was committed as part of the same transaction and forms part of the *res gestæ*.[18]

b. Relevancy to Show Specific Facts — (i) *To Prove Identity.* It has been said that evidence of other crimes committed by the accused is relevant to prove his identity, but it is more correct to say that where the commission of a crime is proven, evidence to identify the accused as the person who committed it is not to be excluded solely because it proves or tends to prove that he was guilty of another and independent crime.[19]

158; ABORTION, 1 Cyc. 186; ARSON, 3 Cyc. 1007; BURGLARY, 6 Cyc. 235; EMBEZZLEMENT; FALSE PRETENSES; HOMICIDE; LARCENY; and other special titles.

Corroboration.— The fact that the evidence of another crime corroborates or tends to corroborate a witness who testifies to confessions of defendant does not render it admissible. People *v.* Schweitzer, 23 Mich. 301.

16. *Alabama.*— Ray *v.* State, 126 Ala. 9, 28 So. 634; Horn *v.* State, 102 Ala. 144, 15 So. 278.

California.— People *v.* Gleason, 127 Cal. 323, 59 Pac. 592; People *v.* Adams, 85 Cal. 231, 24 Pac. 629; People *v.* Rogers, 71 Cal. 565, 12 Pac. 679.

Florida.— Wallace *v.* State, 41 Fla. 547, 26 So. 713; Roberson *v.* State, 40 Fla. 509, 24 So. 474.

Illinois.— Williams *v.* People, 196 Ill. 173, 63 N. E. 681; Parkinson *v.* People, (1890) 24 N. E. 772; McDonald *v.* People, 25 Ill. App. 350.

Indiana.— Cross *v.* State, 138 Ind. 254, 37 N. E. 790; Frazier *v.* State, 135 Ind. 38, 34 N. E. 817; Fletcher *v.* State, 49 Ind. 124, 19 Am. Rep. 673.

Kansas.— State *v.* Cowen, 56 Kan. 470, 43 Pac. 687; State *v.* Folwell, 14 Kan. 105; McFarland *v.* State, 4 Kan. 68.

Louisiana.— State *v.* Fontenot, 48 La. Ann. 305, 19 So. 111; State *v.* Munco, 12 La. Ann. 625.

Massachusetts.—Com. *v.* Harrison, 11 Gray 308; Com. *v.* Call, 21 Pick. 515.

Michigan.— People *v.* Marble, 38 Mich. 117.

Minnesota.— State *v.* Madigan, 57 Minn. 425, 59 N. W. 490.

Missouri.— State *v.* Braunschweig, 38 Mo. 587.

New York.— People *v.* Van Tassel, 156 N. Y. 561, 51 N. E. 274; Hope *v.* People, 83 N. Y. 418, 38 Am. Rep. 460; Weed *v.* People, 56 N. Y. 628; Copperman *v.* People, 56 N. Y. 591; People *v.* Schooley, 89 Hun 391, 35 N. Y. Suppl. 429 [*affirmed* in 149 N. Y. 99, 43 N. E. 536]; Watson *v.* People, 64 Barb. 130; Stout *v.* People, 4 Park. Cr. 71; People *v.* Jones, 3 N. Y. Cr. 252.

Oregon.— State *v.* Baker, 23 Oreg. 441, 32 Pac. 161; State *v.* Roberts, 15 Oreg. 187, 13 Pac. 896.

Pennsylvania.— Shaffner *v.* Com., 72 Pa. St. 60, 13 Am. Rep. 649.

South Dakota.— State *v.* Halpin, (1902) 91 N. W. 605; State *v.* Phelps, 5 S. D. 480, 59 N. W. 471.

Texas.— English *v.* State, 34 Tex. Cr. 190, 30 S. W. 233; Jones *v.* State, 33 Tex. Cr. 492, 26 S. W. 1082, 47 Am. St. Rep. 46; Musgrave *v.* State, 28 Tex. App. 57, 11 S. W. 927; Perigo *v.* State, 25 Tex. App. 533, 8 S. W. 660; Blakely *v.* State, 24 Tex. App. 616, 7 S. W. 233, 5 Am. St. Rep. 912; Williams *v.* State, 15 Tex. App. 104.

Virginia.— Burr *v.* Com., 4 Gratt. 534.

Washington.— State *v.* Norris, 27 Wash. 453, 67 Pac. 983; State *v.* Craemer, 12 Wash. 217, 40 Pac. 944.

United States.— Moore *v.* U. S., 150 U. S. 57, 14 S. Ct. 26, 37 L. ed. 996.

England.— Reg. *v.* May, 1 Cox C. C. 236.

See 14 Cent. Dig. tit. "Criminal Law," § 823. And see BURGLARY, 6 Cyc. 235; HOMICIDE; LARCENY; and other special titles.

17. People *v.* Marble, 38 Mich. 117; State *v.* Roberts, 15 Oreg. 187, 13 Pac. 896; and other cases cited in the note preceding.

18. *Florida.*— Killins *v.* State, 28 Fla. 313, 9 So. 711.

Georgia.— Johnson *v.* State, 88 Ga. 203, 14 S. E. 208.

Iowa.— State *v.* Gainor, 84 Iowa 209, 50 N. W. 947.

Massachusetts.— Com. *v.* Scott, 123 Mass. 222, 25 Am. Rep. 81.

Michigan.— People *v.* Mead, 50 Mich. 228, 15 N. W. 95.

New York.— People *v.* Lewis, 16 N. Y. Suppl. 881.

Texas.— Hargrove *v.* State, 33 Tex. Cr. 431, 26 S. W. 993; Davis *v.* State, 32 Tex. Cr. 377, 23 S. W. 794; Wilkerson *v.* State, 31 Tex. Cr. 86, 19 S. W. 903.

19. *Alabama.*— Curtis *v.* State, 78 Ala. 12; Gassenheimer *v.* State, 52 Ala. 313; Mason *v.* State, 42 Ala. 532; Yarborough *v.* State, 41 Ala. 405.

Arkansas.— Reed *v.* State, 54 Ark. 621, 16 S. W. 819.

California.— People *v.* McGilver, 67 Cal. 55, 7 Pac. 49.

Illinois.— Cross *v.* People, 47 Ill. 152, 95 Am. Dec. 474.

(II) *To Show Knowledge.* Where the nature of the crime is such that guilty knowledge must be proved, evidence is admissible to prove that at another time and place not too remote the accused committed or attempted to commit a crime similar to that charged.[20]

(III) *To Show Intent.* Evidence of other crimes similar to that charged is relevant and admissible when it shows or tends to show a particular criminal intent which is necessary to constitute the crime charged. Any fact which

Indiana.— Frazer *v.* State, 135 Ind. 38, 34 N. E. 817.

Kentucky.— Tye *v.* Com., 3 Ky. L. Rep. 59.

Minnesota.— State *v.* Barrett, 40 Minn. 65, 41 N. W. 459.

Missouri.— State *v.* Balch, 136 Mo. 103, 37 S. W. 808.

New York.— People *v.* Schooley, 149 N. Y. 99, 43 N. E. 536 [*affirming* 89 Hun 391, 35 N. Y. Suppl. 429]; People *v.* Murphy, 135 N. Y. 450, 32 N. E. 138.

Ohio.— Coble *v.* State, 31 Ohio St. 100.

Pennsylvania.— Goersen *v.* Com., 99 Pa. St. 388.

Rhode Island.—State *v.* Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766.

Tennessee.— Links *v.* State, 13 Lea 701; State *v.* Becton, 7 Baxt. 138.

Texas.— Kelley *v.* State, 18 Tex. App. 262; Washington *v.* State, 8 Tex. App. 377; Satterwhite *v.* State, 6 Tex. App. 609.

United States.— U. S. *v.* Boyd, 45 Fed. 851.

England.— Rex *v.* Clewes, 4 C. & P. 221, 19 E. C. L. 485.

See 14 Cent. Dig. tit. "Criminal Law," § 824.

20. *Alabama.*— Lang *v.* State, 97 Ala. 41, 12 So. 183; Stanley *v.* State, 88 Ala. 154, 7 So. 273; Gassenheimer *v.* State, 52 Ala. 313; Mason *v.* State, 42 Ala. 532; Tharp *v.* State, 15 Ala. 749.

California.— People *v.* Neyce, 86 Cal. 393, 24 Pac. 1091; People *v.* Gray, 66 Cal. 271, 5 Pac. 240.

Delaware.— State *v.* Tindal, 5 Harr. 488.

Florida.— Langford *v.* State, 33 Fla. 233, 14 So. 815.

Illinois.— Du Bois *v.* People, 200 Ill. 157, 65 N. E. 658; Jackson *v.* People, 18 Ill. App. 508.

Indiana.— Thomas *v.* State, 103 Ind. 419, 2 N. E. 808; McCartney *v.* State, 3 Ind. 353, 56 Am. Dec. 510; Courtney *v.* State, 5 Ind. App. 356, 32 N. E. 335.

Kentucky.— Mount *v.* Com., 1 Duv. 90; Devoto *v.* Com., 3 Metc. 417; Com. *v.* Grief, 27 S. W. 814, 16 Ky. L. Rep. 198. *Compare* Snapp *v.* Com., 6 Ky. L. Rep. 34.

Maine.— State *v.* McAllister, 24 Me. 139.

Massachusetts.— Com. *v.* White, 145 Mass. 392, 14 N. E. 611; Com. *v.* Price, 10 Gray 472, 71 Am. Dec. 668; Com. *v.* Percival, Thach. Cr. Cas. 293; Com. *v.* Woodbury, Thach. Cr. Cas. 47.

Michigan.— People *v.* Seaman, 107 Mich. 348, 65 N. W. 203, 61 Am. St. Rep. 326; People *v.* Clarkson, 56 Mich. 164, 22 N. W. 258.

Missouri.— State *v.* Mix, 15 Mo. 153.

Nebraska.— Goldsberry *v.* State, (1902) 92 N. W. 906; Morgan *v.* State, 56 Nebr. 696, 77 N. W. 64; Berghoff *v.* State, 25 Nebr. 213, 41 N. W. 136; Cowan *v.* State, 22 Nebr. 519, 35 N. W. 405.

New Jersey.— State *v.* Robinson, 16 N. J. L. 507; State *v.* Van Houten, 3 N. J. L. 248, 4 Am. Dec. 407.

New York.— People *v.* Doody, 172 N. Y. 165, 64 N. E. 807 [*affirming* 72 N. Y. App. Div. 372, 76 N. Y. Suppl. 606]; People *v.* McClure, 148 N. Y. 95, 42 N. E. 523 [*reversing* 88 Hun 505, 34 N. Y. Suppl. 974]; Coleman *v.* People, 58 N. Y. 555; Weyman *v.* People, 4 Hun 511; Copperman *v.* People, 1 Hun 15; People *v.* Hopson, 1 Den. 574; People *v.* Lyon, 1 N. Y. Cr. 400.

North Carolina.— State *v.* Murphy, 84 N. C. 742; State *v.* Twitty, 9 N. C. 248.

Ohio.— Bainbridge *v.* State, 30 Ohio St. 264; Shriedly *v.* State, 23 Ohio St. 130; Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767.

Pennsylvania.— Com. *v.* Hutchinson, 6 Pa. Super. Ct. 405; Com. *v.* House, 41 Wkly. Notes Cas. 246; Com. *v.* Charles, 21 Pittsb. Leg. J. 11.

Rhode Island.— State *v.* Habib, 18 R. I. 558, 30 Atl. 462; State *v.* McDonald, 14 R. I. 270.

South Carolina.— State *v.* Crawford, 39 S. C. 343, 17 S. E. 799; State *v.* Williams, 2 Rich. 418, 45 Am. Dec. 741; State *v.* Petty, Harp. 59.

South Dakota.— State *v.* Stevens, (1902) 92 N. W. 420; State *v.* Phelps, 5 S. D. 480, 59 N. W. 471.

Tennessee.— Links *v.* State, 13 Lea 701; Wiley *v.* State, 3 Coldw. 362.

Texas.— Gray *v.* State, (Cr. App. 1903) 72 S. W. 169; Strang *v.* State, 32 Tex. Cr. 219, 22 S. W. 680; Morgan *v.* State, 31 Tex. Cr. 1, 18 S. W. 647; Brackenridge *v.* State, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360.

Virginia.— Hendrick *v.* Com., 5 Leigh 707; Martin *v.* Com., 2 Leigh 745.

United States.— Wolfson *v.* U. S., 101 Fed. 430, 102 Fed. 134, 41 C. C. A. 422; U. S. *v.* Russell, 19 Fed. 591; U. S. *v.* Roudenbush, 27 Fed. Cas. No. 16,198, Baldw. 514.

England.— Reg. *v.* Forster, 3 C. L. R. 681, 6 Cox C. C. 521, Dears. C. C. 456, 1 Jur. (N. S.) 407, 24 L. J. M. C. 134, 3 Wkly. Rep. 411.

See 14 Cent. Dig. tit. "Criminal Law," §§ 825–829; and see COUNTERFEITING. 11 Cyc. 318; EMBEZZLEMENT; FALSE PRETENSES; FORGERY; RECEIVING STOLEN GOODS; and other special titles.

Where a guilty knowledge is presumed from the character of the criminal act, evi-

proves or tends to prove the particular intent is competent, and cannot be excluded because it incidentally proves an independent crime.[21] Where the question is whether a certain act was intentional or accidental, evidence to show

dence of other crimes should not be received. People *v.* Lonsdale, 122 Mich. 388, 81 N. W. 277.

21. *Alabama.*— Stanley *v.* State, 88 Ala. 154, 7 So. 273; Lawrence *v.* State, 84 Ala. 424, 5 So. 33; Curtis *v.* State, 78 Ala. 12; Ross *v.* State, 62 Ala. 224; Yarborough *v.* State, 41 Ala. 405.

California.— People *v.* Cobler, 108 Cal. 538, 41 Pac. 401; People *v.* Bidleman, 104 Cal. 608, 38 Pac. 502; People *v.* Gray, 66 Cal. 271, 5 Pac. 240.

Idaho.— State *v.* McGann, (1901) 66 Pac. 823.

Illinois.— Henry *v.* People, 198 Ill. 162, 65 N. E. 120; Painter *v.* People, 147 Ill. 444, 35 N. E. 64.

Indiana.— Higgins *v.* State, 157 Ind. 57, 60 N. E. 685; Crum *v.* State, 148 Ind. 401, 47 N. E. 833; Thomas *v.* State, 103 Ind. 419, 2 N. E. 808; McCartney *v.* State, 3 Ind. 353, 56 Am. Dec. 510.

Iowa.— State *v.* Roscum, 119 Iowa 330, 93 N. W. 295; State *v.* King, 117 Iowa 484, 91 N. W. 768; State *v.* Desmond, 109 Iowa 72, 80 N. W. 214; State *v.* Harris, 100 Iowa 188, 69 N. W. 413; State *v.* Stice, 88 Iowa 27, 55 N. W. 17; State *v.* Merkley, 74 Iowa 695, 39 N. W. 111; State *v.* Jamison, 74 Iowa 613, 38 N. W. 509; State *v.* Walters, 45 Iowa 389.

Kansas.— State *v.* Burns, 35 Kan. 387, 11 Pac. 161; State *v.* Lowe, 6 Kan. App. 110, 50 Pac. 912.

Louisiana.— State *v.* Porter, 45 La. Ann. 661, 12 So. 832; State *v.* Deschamps, 42 La. Ann. 567, 7 So. 703, 21 Am. St. Rep. 392; State *v.* Vines, 34 La. Ann. 1079; State *v.* Thomas, 30 La. Ann. 600; State *v.* Patza, 3 La. Ann. 512.

Maryland.— Lamb *v.* State, 66 Md. 285, 7 Atl. 399; Bell *v.* State, 57 Md. 108.

Massachusetts.— Com. *v.* Lubinsky, 182 Mass. 142, 64 N. E. 966; Com. *v.* Sawtelle, 141 Mass. 140, 5 N. E. 312 (confessions); Com. *v.* Cotton, 138 Mass. 500; Com. *v.* Sinclair, 138 Mass. 493; Com. *v.* Shepard, 1 Allen 575; Com. *v.* Price, 10 Gray 472, 71 Am. Dec. 668; Com. *v.* Tuckerman, 10 Gray 173; Com. *v.* Eastman, 1 Cush. 189, 48 Am. Dec. 596.

Michigan.— People *v.* Henry, 129 Mich. 100, 88 N. W. 77; People *v.* Thacker, 108 Mich. 652, 66 N. W. 562; People *v.* Henssler, 48 Mich. 49, 11 N. W. 804.

Minnesota.— State *v.* Durnam, 73 Minn. 150, 75 N. W. 1127.

Missouri.— State *v.* Franke, 159 Mo. 535, 60 S. W. 1053; State *v.* Pennington, 124 Mo. 388, 27 S. W. 1106; State *v.* Jackson, 112 Mo. 585, 20 S. W. 674; State *v.* Sarony, 95 Mo. 349, 8 S. W. 407; State *v.* Beaucleigh, 92 Mo. 490, 4 S. W. 666.

New Jersey.— State *v.* Van Houten, 3 N. J. L. 672, 4 Am. Dec. 407.

New York.— People *v.* Dimick, 107 N. Y. 13, 14 N. E. 178; People *v.* Everhardt, 104 N. Y. 591, 11 N. E. 62; Shipply *v.* People, 86 N. Y. 375, 40 Am. Rep. 551; People *v.* Hughes, 91 Hun 354, 36 N. Y. Suppl. 493; People *v.* Evans, 69 Hun 222, 23 N. Y. Suppl. 717; Weed *v.* People, 3 Thomps. & C. 50; People *v.* Hopson, 1 Den. 574; People *v.* Lyon, 1 N. Y. Cr. 400.

North Carolina.— State *v.* Walton, 114 N. C. 783, 18 S. E. 945; State *v.* Murphy, 84 N. C. 742.

Ohio.— State *v.* Finney, 7 Ohio Dec. (Reprint) 22, 1 Cinc. L. Bul. 30. But see Coble *v.* State, 31 Ohio St. 100.

Pennsylvania.— Com. *v.* Birriolo, 197 Pa. St. 371, 47 Atl. 355; Kramer *v.* Com., 87 Pa. St. 299; Com. *v.* Shepherd, 2 Pa. Dist. 345.

Rhode Island.—State *v.* McDonald, 14 R. I. 270.

South Dakota.— State *v.* Phelps, 5 S. D. 480, 59 N. W. 471.

Tennessee.— Rafferty *v.* State, 91 Tenn. 655, 16 S. W. 728; Wiley *v.* State, 3 Coldw. 362; Williams *v.* State, 8 Humphr. 585.

Texas.— Cortez *v.* State, 43 Tex. Cr. 375, 66 S. W. 453; Lee *v.* State, (Tex. Cr. 1901) 65 S. W. 540; Collins *v.* State, 39 Tex. Cr. 30, 44 S. W. 846; Hurley *v.* State, 36 Tex. Cr. 73, 35 S. W. 371; Strang *v.* State, 32 Tex. Cr. 219, 22 S. W. 680; Burks *v.* State, 24 Tex. App. 326, 6 S. W. 300; Francis *v.* State, 7 Tex. App. 501; Street *v.* State, 7 Tex. App. 5.

Vermont.— State *v.* Valwell, 66 Vt. 558, 29 Atl. 1018.

Virginia.— Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364.

Wisconsin.— Zoldoske *v.* State, 82 Wis. 580, 52 N. W. 778.

United States.— U. S. *v.* Kenney, 90 Fed. 257; Spurr *v.* U. S., 87 Fed. 701, 31 C. C. A. 202; U. S. *v.* Watson, 35 Fed. 358; U. S. *v.* Flemming, 18 Fed. 907; U. S. *v.* Snyder, 14 Fed. 554, 4 McCrary 618.

England.— Makin *v.* Atty.-Gen., [1894] A. C. 57, 17 Cox C. C. 704, 58 J. P. 148, 63 L. J. P. C. 41, 69 L. T. Rep. N. S. 778, 6 Reports 373; Reg. *v.* Dale, 16 Cox C. C. 703; Reg. *v.* Regan, 4 Cox C. C. 335; Reg. *v.* Bailey, 2 Cox C. C. 311; Reg. *v.* Calder, 1 Cox C. C. 348; Rex *v.* Mogg, 4 C. & P. 363, 19 E. C. L. 555; Reg. *v.* Gray, 4 F. & F. 1102; Reg. *v.* Geering, 18 L. J. M. C. 215; Rex *v.* Voke, R. & R. 395.

See 14 Cent. Dig. tit. "Criminal Law," § 830. And see ARSON, 3 Cyc. 1007; COUNTERFEITING, 11 Cyc. 318; EMBEZZLEMENT; FALSE PRETENSES; FORGERY; HOMICIDE; LARCENY; RAPE; RECEIVING STOLEN GOODS; ROBBERY; and other special titles.

The period of time within which other crimes offered to show the intent must have occurred is within the judicial discretion. Spurr *v.* U. S., 87 Fed. 701, 31 C. C. A. 202.

that the accused intentionally committed similar acts before is relevant to show the intent.[22]

(IV) *To Show Malice.* So also, where malice is an element in the crime charged, as in murder, assault with intent to kill, arson, malicious mischief, and the like, evidence of another similar act by the accused is admitted to show malice.[23]

(V) *To Show Motive.* Evidence to show the motive prompting the commission of the crime is relevant and admissible notwithstanding it also shows the commission by the accused of another crime of a similar or dissimilar character.[24] Thus it may be shown that the crime charged was committed for the purpose of concealing another crime,[25] or to prevent the accused from being convicted of

22. State *v.* McDonald, 14 R. I. 270.

23. *Alabama.*— Crawford *v.* State, 86 Ala. 16, 5 So. 651.

Florida.— West *v.* State, 42 Fla. 244, 28 So. 430.

Georgia.— Bryant *v.* State, 97 Ga. 103, 25 S. E. 450.

Illinois.— Henry *v.* People, 198 Ill. 162, 65 N. E. 120.

Iowa.— State *v.* Soper, 118 Iowa 1, 91 N. W. 774.

Louisiana.— State *v.* Deschamps, 42 La. Ann. 567, 7 So. 703, 21 Am. St. Rep. 392; State *v.* Mulholland, 16 La. Ann. 376.

Mississippi.— Hale *v.* State, 72 Miss. 140, 16 So. 387.

Missouri.— State *v.* Callaway, 154 Mo. 91, 55 S. W. 444.

Ohio.— State *v.* Brooks, 1 Ohio Dec. (Reprint) 407, 9 West. L. J. 109, placing obstruction on railroad track.

South Carolina.—State *v.* Weldon, 39 S. C. 318, 17 S. E. 688, 24 L. R. A. 126.

Texas.— Hamilton *v.* State, 41 Tex. Cr. 644, 56 S. W. 926; Hall *v.* State, 31 Tex. Cr. 565, 21 S. W. 368.

See 14 Cent. Dig. tit. "Criminal Law," § 831. And see ARSON, 3 Cyc. 1007; HOMICIDE; MALICIOUS MISCHIEF; and other special titles.

24. *Alabama.*— Gassenheimer *v.* State, 52 Ala. 313.

Arizona.— Qualey *v.* Territory, (1902) 68 Pac. 546.

California.— People *v.* Walters, 98 Cal. 138, 32 Pac. 864; People *v.* Pool, 27 Cal. 572.

Georgia.— Jones *v.* State, 63 Ga. 395.

Indiana.— Cross *v.* State, 138 Ind. 254, 37 N. E. 790.

Iowa.— State *v.* Ward, (1902) 91 N. W. 898.

Kansas.— State *v.* Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322.

Kentucky.— Clark *v.* Com., 111 Ky. 443, 63 S. W. 740, 23 Ky. L. Rep. 1029; Maden *v.* Com., 4 Ky. L. Rep. 45.

Massachusetts.— Com. *v.* Choate, 105 Mass. 451.

Missouri.— State *v.* Craft, 164 Mo. 631, 65 S. W. 280; State *v.* Williamson, 106 Mo. 162, 17 S. W. 172.

Nebraska.— Smith *v.* State, 17 Nebr. 358, 22 N. W. 780.

New Mexico.— Territory *v.* McGinnis, 10 N. M. 269, 61 Pac. 208.

New York.— People *v.* Harris, 136 N. Y. 423, 33 N. E. 65; People *v.* Otto, 101 N. Y. 788, 5 N. E. 788, 4 N. Y. Cr. 149; Pontius *v.* People, 82 N. Y. 339 [*affirming* 21 Hun 328]; Coleman *v.* People, 58 N. Y. 555; People *v.* Coombs, 36 N. Y. App. Div. 284, 55 N. Y. Suppl. 276; People *v.* Williams, 58 Hun 278, 12 N. Y. Suppl. 249; Pierson *v.* People, 18 Hun 239; People *v.* Wood, 3 Park. Cr. 681.

North Dakota.— State *v.* Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

Ohio.— Brown *v.* State, 26 Ohio St. 176; Stahl *v.* State, 11 Ohio Cir. Ct. 23, 5 Ohio Cir. Dec. 29.

Oklahoma.— Beberstein *v.* Territory, 8 Okla. 467, 58 Pac. 641.

Pennsylvania.— McConkey *v.* Com., 101 Pa. St. 416; Com. *v.* Ferrigan, 44 Pa. St. 386; Com. *v.* Major, 24 Pa. Co. Ct. 199; Goersen *v.* Com., 99 Pa. St. 388, 106 Pa. St. 477, 51 Am. Rep. 534.

South Dakota.— State *v.* Phelps, 5 S. D. 480, 59 N. W. 471.

Texas.— Neely *v.* State, (Cr. App. 1900) 56 S. W. 625; Pryor *v.* State, 40 Tex. Cr. 643, 51 S. W. 375; Sullivan *v.* State, 31 Tex. Cr. 486, 20 S. W. 927, 37 Am. St. Rep. 826; Crass *v.* State, 31 Tex. Cr. 312, 20 S. W. 579; Blackwell *v.* State, 29 Tex. App. 194, 15 S. W. 597; Taylor *v.* State, 22 Tex. App. 529, 3 S. W. 753, 58 Am. Rep. 656; McCall *v.* State, 14 Tex. App. 353; Powell *v.* State, 13 Tex. App. 244.

Virginia.— O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121.

United States.— U. S. *v.* Snyder, 14 Fed. 554, 4 McCrary 618.

England.— Reg. *v.* Cooper, 3 Cox C. C. 547.

See 14 Cent. Dig. tit. "Criminal Law," § 832. And see HOMICIDE and other special titles.

Revenge.— It is relevant to show that one whom the accused is charged with killing was instrumental in procuring the indictment of the accused for another crime. Martin *v.* Com., 93 Ky. 189, 19 S. W. 580, 14 Ky. L. Rep. 95; State *v.* Palmer, 65 N. H. 216, 20 Atl. 6; Kunde *v.* State, 22 Tex. App. 65, 3 S. W. 325.

25. Pontius *v.* People, 21 Hun (N. Y.) 328 [*affirmed* in 82 N. Y. 339]; State *v.* Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518; McConkey *v.* Com., 101 Pa. St. 416. Thus where the accused is charged with killing a policeman, it may be shown that he was being pursued by the deceased in

another crime.[26] But evidence of another crime which has no connection with that for which the accused is on trial, and which therefore is not relevant to prove motive, cannot be introduced under the guise of proving motive.[27]

(VI) *To Show Scheme or System of Criminal Action.* Where the crime charged is part of a plan or system of criminal action, evidence of other crimes near to it in time and of similar character is relevant and admissible to show the knowledge and intent of the accused and that the act charged was not the result of accident or inadvertence.[28] This rule is often applied where the crime charged is one of a series of swindles or other crimes involving a fraudulent intent for the purpose of showing this intent.[29]

order that he might be arrested for the commission of another felony, and this felony and defendant's connection with it are relevant to show motive. People *v.* Wilson, 117 Cal. 688, 49 Pac. 1054; People *v.* Pool, 27 Cal. 572.

26. Cover *v.* Com., (Pa. 1887) 8 Atl. 196.

27. *Kentucky.*— Baker *v.* Com., 106 Ky. 212, 50 S. W. 54, 20 Ky. L. Rep. 1778.

Mississippi.— Cotton *v.* State, (1895) 17 So. 372; Kearney *v.* State, 68 Miss. 233, 8 So. 292.

New York.— People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193. See People *v.* Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851 [*reversing* 45 Hun 460].

North Carolina.— State *v.* Alston, 94 N. C. 930.

Texas.— Barkman *v.* State, (Cr. App. 1899) 52 S. W. 69; Somerville *v.* State, 6 Tex. App. 433.

See 14 Cent. Dig. tit. "Criminal Law," § 832.

The remoteness in point of time of the collateral crime does not exclude it as proof of motive, if from the evidence it is connected with the crime charged. State *v.* Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

28. *Alabama.*— Gassenheimer *v.* State, 52 Ala. 313; Mason *v.* State, 42 Ala. 532; Chambers *v.* State, 26 Ala. 59.

Arkansas.— Ford *v.* State, 34 Ark. 649.

California.— People *v.* Sternberg, 111 Cal. 3, 43 Pac. 198 (false registration of voters); People *v.* Bidleman, 104 Cal. 608, 38 Pac. 502.

Florida.— Wallace *v.* State, 41 Fla. 547, 26 So. 713.

Indiana.— Card *v.* State, 109 Ind. 415, 9 N. E. 591.

Iowa.— State *v.* Lee, 91 Iowa 499, 60 N. W. 119; State *v.* Burk, 88 Iowa 661, 56 N. W. 180.

Maryland.— Archer *v.* State, 45 Md. 33.

Massachusetts.— Com. *v.* Ferry, 146 Mass. 203, 15 N. E. 484; Com. *v.* White, 145 Mass. 392, 14 N. E. 611; Com. *v.* Scott, 123 Mass. 222, 25 Am. Rep. 81.

Michigan.— People *v.* Summers, 115 Mich. 537, 73 N. W. 818; People *v.* Jacks, 76 Mich. 218, 42 N. W. 1134.

Missouri.— State *v.* Mathews, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1136.

Nebraska.— Guthrie *v.* State, 16 Nebr. 667, 21 N. W. 455.

New Hampshire.— State *v.* Welch, 64 N. H. 525, 15 Atl. 146.

New York.— People *v.* Zucker, 20 N. Y. App. Div. 363, 46 N. Y. Suppl. 766; People *v.* Williams, 58 Hun 278, 12 N. Y. Suppl. 249.

North Dakota.— State *v.* Fallon, 2 N. D. 510, 52 N. W. 318.

Ohio.— Lindsey *v.* State, 38 Ohio St. 507.

Pennsylvania.— Com. *v.* Hutchinson, 19 Pa. Co. Ct. 360.

Tennessee.—Rafferty *v.* State, 91 Tenn. 655, 16 S. W. 728; Hall *v.* State, 3 Lea 552.

Texas.— Peterson *v.* State, (Cr. App. 1902) 70 S. W. 978; Holt *v.* State, 39 Tex. Cr. 282, 45 S. W. 1016, 46 S. W. 829; McCray *v.* State, 38 Tex. Cr. 609, 44 S. W. 170.

England.— Rex *v.* Ellis, 6 B. & C. 145, 9 D. & R. 174, 5 L. J. M. C. O. S. 1, 13 E. C. L. 76; Reg. *v.* Bailey, 2 Cox C. C. 311; Reg. *v.* Cobden, 3 F. & F. 833.

See 14 Cent. Dig. tit. "Criminal Law," §§ 833, 834. And see EMBEZZLEMENT; FALSE PRETENSES; FORGERY; LARCENY; HOMICIDE; and other special titles.

Character of doing business.—Where carrying on a particular business is absolutely forbidden, or a license is required, by statute, and the accused is tried for a violation thereof, it may be shown that at other times than that charged in the indictment he violated the law. Such evidence of other crimes is relevant to show his system of doing business and the intent present in the act with which he is charged.

Alabama.— Chambers *v.* State, 26 Ala. 59.

Maryland.— Archer *v.* State, 45 Md. 33.

New Hampshire.— State *v.* Welch, 64 N. H. 525, 15 Atl. 146.

Texas.— Skipwith *v.* State, (Cr. App. 1902) 68 S. W. 278; Matkins *v.* State, (Cr. App. 1900) 58 S. W. 108; Wilson *v.* State, (Cr. App. 1900) 55 S. W. 68; Myers *v.* State, (Cr. App. 1897) 39 S. W. 938; Pitner *v.* State, 37 Tex. Cr. 268, 39 S. W. 662.

Virginia.— Whitlock *v.* Com., 89 Va. 337, 15 S. E. 893.

See 14 Cent. Dig. tit. "Criminal Law," §§ 833, 834.

Conspiracy.— Where there was evidence of a conspiracy to commit the crime, proof of acts between the conspiracy and the crime is admissible, although involving the commission of another distinct crime. State *v.* Adams, 20 Kan. 311; State *v.* Greenwade, 72 Mo. 298; Hall *v.* State, 3 Lea (Tenn.) 552.

29. *Iowa.*— State *v.* Brady, 100 Iowa 191, 69 N. W. 290, 62 Am. St. Rep. 560, 36 L. R. A. 693.

Massachusetts.— Com. *v.* White, 145 Mass. 392, 14 N. E. 611.

(VII) *Continuing Offense.* So also where the offense charged is a continuing offense, evidence of other acts than that charged is admissible to explain or corroborate the evidence showing the act charged.[30]

3. Mode of Proving Other Crimes. Proof of other crimes to show motive, knowledge, or intent, etc., may be made by producing the record of a prior conviction,[31] or a confession of the accused,[32] or by circumstantial evidence or the direct evidence of a witness who saw the crime committed.[33]

D. Evidence of Character — 1. Of Accused — a. Evidence of Good Character For Accused — (I) *In General.* The accused is not compelled to rely altogether upon the presumption of his good character, but must be permitted to introduce affirmative evidence thereof, as tending to show that it is not probable that he would commit the crime charged,[34] even though he is not examined as a witness in his own behalf,[35] and by the weight of authority, although the evidence is

Minnesota.—State *v.* Wilson, 72 Minn. 522, 75 N. W. 715.

New York.— People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883; People *v.* Spielman, 20 Alb. L. J. 96.

Ohio.— Lindsey *v.* State, 38 Ohio St. 507.

See 14 Cent. Dig. tit. "Criminal Law," §§ 833, 834.

30. *California.*— People *v.* Bidleman, 104 Cal. 608, 38 Pac. 502.

Florida.— Toll *v.* State, 40 Fla. 169, 23 So. 942.

Indiana.— Townsend *v.* State, 147 Ind. 624, 47 N. E. 19, 62 Am. St. Rep. 477, 37 L. R. A. 294.

New York.— People *v.* McLaughlin, 2 N. Y. App. Div. 419, 37 N. Y. Suppl. 1005.

England.— Reg. *v.* Rearden, 4 F. & F. 76.

31. State *v.* Gorham, 67 Me. 247; State *v.* Neagle, 65 Me. 468; Com. *v.* McPike, 3 Cush. (Mass.) 181, 50 Am. Dec. 727; Crass *v.* State, 31 Tex. Cr. 312, 20 S. W. 579.

Explanation of plea of guilty.— Defendant should always be permitted to explain why he pleaded guilty to a similar offense, and his reasons ought to be considered by the jury in determining the weight of such evidence. U. S. *v.* Stickle, 15 Fed. 798.

Acquittal of former crime.— Where, although indicted for a similar crime, defendant was acquitted, the entire weight of the evidence of the other crime, introduced to show guilty knowledge, is destroyed. State *v.* Tindal, 5 Harr. (Del.) 488.

32. Com. *v.* Russell, 156 Mass. 196, 30 N. E. 763; State *v.* Jones, 171 Mo. 401, 71 S. W. 680, 94 Am. St. Rep. 786.

33. State *v.* McFarlain, 42 La. Ann. 803, 8 So. 600; Kunde *v.* State, 22 Tex. App. 65, 3 S. W. 325. See the cases cited *supra*, XII, C, 2.

34. *Alabama.*— Kilgore *v.* State, 74 Ala. 1; Carson *v.* State, 50 Ala. 134; Dupree *v.* State, 33 Ala. 380, 73 Am. Dec. 422; Rosenbaum *v.* State, 33 Ala. 354.

California.— People *v.* Shepardson, 49 Cal. 629.

District of Columbia.— U. S. *v.* Neverson, 1 Mackey 152; U. S. *v.* Bowen, 3 McArthur 64.

Illinois.— Mark *v.* Merz, 53 Ill. App. 458.

Indiana.— Hall *v.* State, 132 Ind. 317, 31 N. E. 536; McQueen *v.* State, 82 Ind. 72.

Iowa.— State *v.* Donovan, 61 Iowa 278, 16 N. W. 130; State *v.* Lindley, 51 Iowa 343, 1 N. W. 484, 33 Am. Rep. 139; State *v.* Northrup, 48 Iowa 583, 30 Am. Rep. 408; State *v.* Kinley, 43 Iowa 294; State *v.* Turner, 19 Iowa 144.

Kansas.— State *v.* Pipes, 65 Kan. 543, 70 Pac. 363; State *v.* Schleagel, 50 Kan. 325, 31 Pac. 1105.

Kentucky.— White *v.* Com., 80 Ky. 480.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

Michigan.— People *v.* Mead, 50 Mich. 228, 15 N. W. 95.

Minnesota.— State *v.* Beebe, 17 Minn. 241; State *v.* Dumphey, 4 Minn. 438.

Missouri.— State *v.* King, 78 Mo. 555; State *v.* Alexander, 66 Mo. 148; State *v.* O'Connor, 31 Mo. 389.

Nebraska.— Biester *v.* State, (1902) 91 N. W. 416.

New Jersey.— State *v.* Wells, 1 N. J. L. 424, 1 Am. Dec. 211.

New York.— Stover *v.* People, 56 N. Y. 315; Remsen *v.* People, 43 N. Y. 6; Ackley *v.* People, 9 Barb. 609.

North Carolina.— State *v.* Hice, 117 N. C. 782, 23 S. E. 357.

Ohio.— State *v.* Gardner, Tappan 124.

Pennsylvania.— Abernethey *v.* Com., 101 Pa. St. 322; Com. *v.* Weiland, 1 Brewst. 312; Com. *v.* Bloco, 1 Wilcox 39.

South Carolina.— State *v.* Ford, 3 Strobh. 517 note.

Texas.— Matthews *v.* State, 32 Tex. 117; Lann *v.* State, 25 Tex. App. 495, 8 S. W. 650, 8 Am. St. Rep. 445; Lee *v.* State, 2 Tex. App. 338; Coffee *v.* State, 1 Tex. App. 548; Johnson *v.* State, 1 Tex. App. 146.

West Virginia.— State *v.* Donohoo, 22 W. Va. 761.

United States.— U. S. *v.* Kenneally, 26 Fed. Cas. No. 15,522, 5 Biss. 122.

See 14 Cent. Dig. tit. "Criminal Law," § 840.

Admission of good character by state.— It is not error to reject evidence of good character where the county attorney admits that defendant's character is good. Beard *v.* State, (Tex. Cr. App. 1903) 71 S. W. 960.

35. State *v.* Hice, 117 N. C. 782, 23 S. E. 357.

direct and not merely circumstantial, particularly where the credibility of the witnesses is doubtful.[36]

(II) *Admissibility as Affected by Character or Grade of Crime.* The evidence of good character offered by the accused must relate particularly to that trait of character which is involved in the crime charged, so that the proof of good character will render it unlikely that he would be guilty of that particular crime.[37] Evidence of good character has been confined by one or two cases to crimes which involve some degree of moral turpitude, and has been declared inadmissible on a charge of statutory crime not *malum in se*,[38] but the force and effect of such evidence does not usually depend upon the grade of the crime.[39]

(III) *Character Subsequent to Commission of Crime.* Evidence of the good character of the accused must refer to a period prior to the commission of the crime; the accused cannot prove his good character since the date of the crime.[40]

b. Evidence of Bad Character For Prosecution — (I) *In General.* Evidence of the bad character or reputation of the accused cannot be introduced by the prosecution as part of its case, nor in rebuttal, unless the defendant has intro-

36. Hall *v.* State, 132 Ind. 317, 31 N. E. 536; People *v.* Mead, 50 Mich. 228, 15 N. W. 95; Stover *v.* People, 56 N. Y. 315; Remsen *v.* People, 43 N. Y. 6. But see State *v.* Beebe, 17 Minn. 241. See also *infra*, XII, D, 1, d.

37. *Alabama.*— Balkum *v.* State, 115 Ala. 117, 22 So. 532, 67 Am. St. Rep. 19; Hays *v.* State, 110 Ala. 60, 20 So. 322; Kilgore *v.* State, 74 Ala. 1.

Arizona.— Chung Sing *v.* U. S., (1894) 36 Pac. 205.

Arkansas.— Kee *v.* State, 28 Ark. 155.

California.— People *v.* Bezy, 67 Cal. 223, 7 Pac. 643; People *v.* Ashe, 44 Cal. 288; People *v.* Fair, 43 Cal. 137; People *v.* Stewart, 28 Cal. 395; People *v.* Josephs, 7 Cal. 129.

Delaware.— State *v.* Conlan, 3 Pennew. 218, 50 Atl. 95.

Indiana.— Carr *v.* State, 135 Ind. 1, 34 N. E. 533, 41 Am. St. Rep. 408, 20 L. R. A. 863; Walker *v.* State, 102 Ind. 502, 1 N. E. 856; State *v.* Bloom, 68 Ind. 54, 34 Am. Rep. 247; Baehner *v.* State, 25 Ind. App. 597, 58 N. E. 741.

Iowa.— State *v.* Dexter, 115 Iowa 678, 87 N. W. 417.

Louisiana.— State *v.* Parker, 7 La. Ann. 83.

Massachusetts.— Com. *v.* Nagle, 157 Mass. 554, 32 N. E. 861; Com. *v.* Worcester, Thach. Cr. Cas. 100.

Mississippi.— Westbrooks *v.* State, 76 Miss. 710, 25 So. 491.

Missouri.— State *v.* Anslinger, 171 Mo. 600, 71 S. W. 1041; State *v.* King, 78 Mo. 555; State *v.* Dalton, 27 Mo. 13; State *v.* Bradford, 79 Mo. App. 346.

Nebraska.— Basye *v.* State, 45 Nebr. 261, 63 N. W. 811.

Nevada.— State *v.* Pearce, 15 Nev. 188.

New Jersey.— State *v.* Sprague, 64 N. J. L. 419, 45 Atl. 788; State *v.* Snover, 63 N. J. L. 382, 43 Atl. 1059.

Pennsylvania.— Com. *v.* Bloes, 1 Wilcox 39; Com. *v.* Irwin, 1 Pa. L. J. Rep. 344, 2 Pa. L. J. 329.

Texas.— Lincecum *v.* State, 29 Tex. App. 328, 15 S. W. 818, 25 Am. St. Rep. 727; Johnson *v.* State, 17 Tex. App. 515.

Washington.— State *v.* Surry, 23 Wash. 655, 63 Pac. 557.

West Virginia.— State *v.* Madison, 49 W. Va. 96, 38 S. E. 492.

United States.— Edgington *v.* U. S., 164 U. S. 361, 17 S. Ct. 72, 41 L. ed. 467.

See 14 Cent. Dig. tit. "Criminal Law," § 841.

Larceny.— Thus in a prosecution for larceny, the defendant cannot introduce evidence of his reputation for truthfulness (Hays *v.* State, 100 Ala. 60, 20 So. 322), but the evidence should be confined to his reputation for honesty and integrity (Butler *v.* State, 91 Ala. 87, 9 So. 191; State *v.* Conlan, 3 Pennew. (Del.) 218, 50 Atl. 95; State *v.* Bloom, 68 Ind. 54, 34 Am. Rep. 247). See LARCENY.

Homicide.— In prosecutions for homicide some cases limit the evidence of reputation to peace and quietness (People *v.* Cowgill, 93 Cal. 596, 29 Pac. 228; People *v.* Bezy, 67 Cal. 223, 7 Pac. 643; Carr *v.* State, 135 Ind. 1, 34 N. E. 533, 41 Am. St. Rep. 408, 20 L. R. A. 863; Hall *v.* State, 132 Ind. 317, 31 N. E. 536; Kahlenbeck *v.* State, 119 Ind. 118, 21 N. E. 460; Walker *v.* State, 102 Ind. 502, 1 N. E. 856; Basye *v.* State, 45 Nebr. 261, 63 N. W. 811), but others permit general character to be proved (State *v.* Parker, 7 La. Ann. 83; Com. *v.* Winnemore, 1 Brewst. (Pa.) 356). See HOMICIDE.

38. Com. *v.* Nagle, 157 Mass. 554, 32 N. E. 861.

39. Cancemi *v.* State, 16 N. Y. 501; Harrington *v.* State, 19 Ohio St. 264. *Compare*, however, Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

40. *Alabama.*—Brown *v.* State, 46 Ala. 175.

California.— People v. McSweeney, (1894) 38 Pac. 743.

Iowa.— State *v.* Kinley, 43 Iowa 294, up to time of indictment.

Kentucky.— White *v.* Com., 80 Ky. 480.

Tennessee.— Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046.

Texas.— Hill *v.* State, 37 Tex. Cr. 415, 35 S. W. 660; Graham *v.* State, 29 Tex. App. 31, 13 S. W. 1013.

duced evidence to prove good character.[41] To permit this is reversible error.[42] To render evidence of bad character admissible in rebuttal the accused must have expressly and clearly put his character in issue.[43] But this protection of the accused from attack as to character does not apply where he goes upon the stand as a witness, for if it be provided by statute that he may be examined as any other witness, the prosecution may prove his bad character for veracity to impeach him as a witness, although he offers no evidence of good character.[44] Where defendant introduces evidence of good character, the prosecution may introduce evidence in rebuttal,[45] and may cross-examine the witnesses who testify as to his good character.[46] In some jurisdictions, by statute, the prosecution in such a case may prove a former conviction of an offense.[47]

See 14 Cent. Dig. tit. "Criminal Law," §§ 837, 840.

41. *Alabama.*— Harrison *v.* State, 37 Ala. 154.

California.— People *v.* Fair, 43 Cal. 137.

Delaware.— State *v.* Lodge, 9 Houst. 542, 33 Atl. 312.

Florida.— Mann *v.* State, 22 Fla. 600.

Georgia.— Pound *v.* State, 43 Ga. 88.

Iowa.— State *v.* Rainsharger, 71 Iowa 746, 31 N. W. 865.

Kansas.— State *v.* Thurtell, 29 Kan. 148.

Kentucky.— Young *v.* Com., 6 Bush 312; Calhoon *v.* Com., 64 S. W. 965, 23 Ky. L. Rep. 1188; Petty *v.* Com., 15 S. W. 1059, 12 Ky. L. Rep. 919.

Mississippi.— Dowling *v.* State, 5 Sm. & M. 664; Overstreet *v.* State, 3 How. 328.

Nebraska.— Carter *v.* State, 36 Nebr. 481, 54 N. W. 853.

New Hampshire.— State *v.* Lapage, 57 N. H. 245, 24 Am. Rep. 69.

New York.— People *v.* McKane, 143 N. Y. 455, 38 N. E. 950; People *v.* Benedict, 21 N. Y. Suppl. 58; People *v.* White, 14 Wend. 111.

North Carolina.— State *v.* Hare, 74 N. C. 591.

Ohio.— Hamilton *v.* State, 34 Ohio St. 82.

Rhode Island.— State *v.* Ellwood, 17 R. I. 763, 24 Atl. 782.

Texas.— Johnson *v.* State, 42 Tex. Cr. 618, 62 S. W. 756; Tooney *v.* State, 8 Tex. App. 452; Antle *v.* State, 6 Tex. App. 202.

United States.— U. S. *v.* Jourdine, 26 Fed. Cas. No. 15,499, 4 Cranch C. C. 338; U. S. *v.* Kenneally, 26 Fed. Cas. No. 15,522, 5 Biss. 122; U. S. *v.* Warner, 28 Fed. Cas. No. 16,642, 4 Cranch C. C. 342.

England.— 2 Hale P. C. 236.

Canada.— King *v.* Long, 11 Quebec Q. B. 328.

See 14 Cent. Dig. tit. "Criminal Law," § 839.

42. Pound *v.* State, 43 Ga. 88; and other cases cited in the note preceding.

43. People *v.* Fair, 43 Cal. 137.

The mere fact that character is incidentally alluded to in affidavits to procure a continuance does not let in evidence of bad character. Felsenthal *v.* State, 30 Tex. App. 675, 18 S. W. 644.

44. Drew *v.* State, 124 Ind. 9, 23 N. E. 1098; McDonald *v.* Com., 86 Ky. 10, 4 S. W. 687, 9 Ky. L. Rep. 230; State *v.* Cox, 67 Mo. 392. See WITNESSES.

45. *Iowa.*— State *v.* Foster, 91 Iowa 164, 59 N. W. 8.

Louisiana.— State *v.* Farrer, 35 La. Ann. 315.

Missouri.— State *v.* Williams, 77 Mo. 310, holding that in rebuttal the state may prove an admission by defendant that he has been in the penitentiary.

New York.— People *v.* McKane, 143 N. Y. 455, 38 N. E. 950.

Ohio.— Griffin *v.* State, 14 Ohio St. 55.

Texas.— Holsey *v.* State, 24 Tex. App. 35, 5 S. W. 523.

England.— See Reg. *v.* Rowton, 10 Cox C. C. 25, 11 Jur. N. S. 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436; Reg. *v.* Hughes, 1 Cox C. C. 44.

Incompetent evidence.— The prosecution cannot prove in rebuttal the character of defendant's associates (Cheney *v.* State, 7 Ohio 222; Holsey *v.* State, 24 Tex. App. 35, 5 S. W. 523), or defendant's tendency or disposition to commit offenses of a certain class (State *v.* Lapage, 57 N. H. 245, 24 Am. Rep. 69; State *v.* Renton, 15 N. H. 168), that he kept a house of bad character (People *v.* Christy, 65 Hun (N. Y.) 349, 20 N. Y. Suppl. 278, 8 N. Y. Cr. 480), that he was foolishly fond of women (Cauley *v.* State, 92 Ala. 71, 9 So. 456), that the sheriff nearly always had a warrant for his arrest (Murphy *v.* State, 108 Ala. 10, 18 So. 557), or his bad reputation in a neighborhood where he had never lived and where he was not generally known (Griffin *v.* State, 14 Ohio St. 55).

46. *Alabama.*— Thompson *v.* State, 100 Ala. 70, 14 So. 878.

Indiana.— McDonel *v.* State, 90 Ind. 320; Beauchamp *v.* State, 6 Blackf. 299.

Louisiana.— State *v.* West, 43 La. Ann. 1006, 10 So. 364.

Michigan.— People *v.* Mills, 94 Mich. 630, 54 N. W. 488.

Nebraska.— McCormick *v.* State, (1902) 92 N. W. 606.

North Carolina.— State *v.* Parks, 109 N. C. 813, 13 S. E. 939.

England.— Reg. *v.* Hughes, 1 Cox C. C. 44.

See 14 Cent. Dig. tit. "Criminal Law," §§ 839, 842.

47. Reg. *v.* Shrimpton, 3 C. & K. 373, 5 Cox C. C. 387, 2 Den. C. C. 319, 21 L. J. M. C. 37, T. & M. 628.

(ii) *Character Subsequent to Commission of Crime.* Evidence of bad character in rebuttal must refer to a period prior to the commission of the crime. Hence where the accused has proved his good character, the prosecution cannot prove his bad reputation since the date of the crime, as it is probable that his reputation may have been materially injured by the public discussion of it.[48]

c. Evidence to Prove Character — (i) *General Reputation or Disposition.* Evidence to prove the good or the bad character of the defendant must as a rule have reference to his general reputation in the place where he has lived or has been known[49] or was in the habit of dealing;[50] but evidence of his reputation elsewhere is relevant when not too remote.[51] By the weight of authority witnesses to prove character cannot testify to what they know of defendant, or as to his disposition, or give their opinion as to his character or disposition, from their personal observation or experience, but their testimony must be limited to general reputation.[52]

48. *Alabama.*— Griffith *v.* State, 90 Ala. 583, 8 So. 812; Brown *v.* State, 46 Ala. 175.

California.— People *v.* Fong Ching, 78 Cal. 169, 20 Pac. 396; People *v.* McSweeney, (1894) 38 Pac. 743.

Iowa.— State *v.* Kinley, 43 Iowa 294.

Kentucky.— White *v.* Com., 80 Ky. 480, 4 Ky. L. Rep. 373.

New Jersey.— State *v.* Sprague, 64 N. J. L. 419, 45 Atl. 788.

North Carolina.— State *v.* Johnson, 60 N. C. 151. *Compare* State *v.* Parks, 109 N. C. 813, 13 S. E. 939.

Tennessee.— Lea *v.* State, 94 Tenn. 495, 29 S. W. 900. And see Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046.

Virginia.— Carter *v.* Com., 2 Va. Cas. 169.

Contra, Com. *v.* Sacket, 22 Pick. (Mass.) 394.

See 14 Cent. Dig. tit. "Criminal Law," § 837.

49. *Alabama.*— Steele *v.* State, 83 Ala. 20, 3 So. 547; Sullivan *v.* State, 66 Ala. 48.

Arkansas.— Williams *v.* State, 66 Ark. 264, 50 S. W. 517.

California.— People *v.* Gordan, 103 Cal. 568, 37 Pac. 534.

Delaware.— State *v.* Briscoe, 3 Pennew. 7, 50 Atl. 271.

Florida.— Nelson *v.* State, 32 Fla. 244, 13 So. 361.

Georgia.— Keener *v.* State, 18 Ga. 194, 63 Am. Dec. 269.

Illinois.— Hirsehman *v.* People, 101 Ill. 568.

Iowa.— State *v.* Ward, 73 Iowa 532, 35 N. W. 617.

Louisiana.— State *v.* Donelon, 45 La. Ann. 744, 12 So. 922.

Nebraska.— Berneker *v.* State, 40 Nebr. 810, 59 N. W. 372.

New York.— Sawyer *v.* People, 1 N. Y. Cr. 249.

North Dakota.— State *v.* Thoemke, 11 N. D. 386, 92 N. W. 480.

Ohio.— Searles *v.* State, 6 Ohio Cir. Ct. 331.

Texas.— Gay *v.* State, 40 Tex. Cr. 242, 49 S. W. 612; Browder *v.* State, 30 Tex. App. 614, 18 S. W. 197; Holsey *v.* State, 24 Tex. App. 35, 5 S. W. 523.

Vermont.— State *v.* Emery, 59 Vt. 84, 7 Atl. 129.

See 14 Cent. Dig. tit. "Criminal Law," §§ 844, 845.

Remoteness of reputation.— Where the accused has been permitted to show his reputation for the later years of his life, it is not error to exclude his reputation from his boyhood down to the date of the crime. State *v.* Barr, 11 Wash. 481, 39 Pac. 1080, 48 Am. St. Rep. 890, 29 L. R. A. 154.

Army record.— The reputation of the accused as a soldier while in the army is not relevant either to prove or to disprove his good character. People *v.* Eckman, 72 Cal. 582, 14 Pac. 359; People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162; Burns *v.* State, 23 Tex. App. 641, 5 S. W. 140.

Position of trust.— Nor can it be shown to prove reputation, that he occupied a position of trust. Howard *v.* State, 37 Tex. Cr. 494, 36 S. W. 475, 66 Am. St. Rep. 812.

Rumor.— A witness cannot be asked if he knew the character of the defendant "from rumor" in his neighborhood. Haley *v.* State, 63 Ala. 83. *Compare* Hawes *v.* State, 88 Ala. 37, 7 So. 302; Jackson *v.* State, 78 Ala. 471.

50. State *v.* Henderson, 29 W. Va. 147, 1 S. E. 225.

51. State *v.* Espinozei, 20 Nev. 209, 19 Pac. 677; Fry *v.* State, 96 Tenn. 467, 35 S. W. 883.

Rebuttal.— Where the defendant introduces in evidence his character in certain communities, the state may rebut it by evidence of his bad character elsewhere. State *v.* Foster, 91 Iowa 164, 59 N. W. 8.

52. *California.*— People *v.* Ah Lee Doon, 97 Cal. 171, 31 Pac. 933.

Illinois.— Hirschman *v.* People, 101 Ill. 568.

Nebraska.— Berneker *v.* State, 40 Nebr. 810, 59 N. W. 372.

New York.— Sawyer *v.* People, 91 N. Y. 667; Sindram *v.* People, 88 N. Y. 196; Sawyer *v.* People, 1 N. Y. Cr. 249.

Vermont.— State *v.* Emery, 59 Vt. 84, 7 Atl. 129.

England.— Reg. *v.* Rowton, 10 Cox C. C. 25, 11 Jur. N. S. 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436.

(II) *Particular Acts.* Evidence of particular and specific acts of good conduct is not admissible to prove defendant's good character, but the evidence must be limited to proof of general character or reputation.[53] On the other hand the state as a general rule cannot in rebuttal of evidence of good character prove his specific acts of bad conduct.[54] According to the better opinion, where a witness for defendant testifies as to his good character, he may on cross-examination be asked whether he has not heard that defendant had committed or been accused of particular acts of misconduct;[55] but he cannot be asked questions to elicit his knowledge of particular acts as distinguished from what he has heard.[56]

(III) *Negative Evidence of Character.* Testimony of a witness that he has been acquainted with the accused for some time and under such circumstances that he would be likely to hear what was said about him and that he has never heard any one speak against his character is admissible.[57]

(IV) *Statutes Limiting Number of Witnesses.* Statutes sometimes pro-

Contra, State *v.* Sterrett, 68 Iowa 76, 25 N. W. 936; State *v.* Lee, 22 Minn. 407, 21 Am. Rep. 769.

53. *Alabama.*— Walker *v.* State, 91 Ala. 76, 9 So. 87; Hussey *v.* State, 87 Ala. 121, 6 So. 420; Jones *v.* State, 76 Ala. 8.

Illinois.— Hirschman *v.* People, 101 Ill. 568.

Indiana.— Stalcup *v.* State, 146 Ind. 270, 45 N. E. 334.

Kentucky.— White *v.* Com., 4 Ky. L. Rep. 373.

New Hampshire.— State *v.* Lapage, 57 N. H. 245, 24 Am. Rep. 69.

Texas.— Holsey *v.* State, 24 Tex. App. 35, 5 S. W. 523.

Wisconsin.— Carthaus *v.* State, 78 Wis. 560, 47 N. W. 629.

See 14 Cent. Dig. tit. "Criminal Law," § 845.

54. *Alabama.*— Davenport *v.* State, 85 Ala. 336, 5 So. 152; Steele *v.* State, 83 Ala. 20, 3 So. 547; Franklin *v.* State, 29 Ala. 14.

California.— People *v.* Lee Dick Lung, 129 Cal. 491, 62 Pac. 71; People *v.* Bishop, 81 Cal. 113, 22 Pac. 477; People *v.* Bezy, 67 Cal. 223, 7 Pac. 643.

Florida.— Nelson *v.* State, 32 Fla. 244, 13 So. 361; Reddick *v.* State, 25 Fla. 112, 433, 5 So. 704.

Illinois.— Gifford *v.* People, 87 Ill. 210; McCarty *v.* People, 51 Ill. 231, 99 Am. Dec. 542.

Indiana.— Stitz *v.* State, 104 Ind. 359, 4 N. E. 145; Engleman *v.* State, 2 Ind. 91, 52 Am. Dec. 494.

Iowa.— State *v.* Bysong, 112 Iowa 419, 84 N. W. 505; State *v.* Sterrett, 71 Iowa 386, 32 N. W. 387.

Louisiana.— State *v.* Donelon, 45 La. Ann. 744, 12 So. 922.

Massachusetts.— Com. *v.* O'Brien, 119 Mass. 342, 20 Am. Rep. 325; Rex *v.* Doaks, Quincy 90.

Mississippi.— Kearney *v.* State, 68 Miss. 233, 8 So. 292.

Missouri.— State *v.* Lockett, 168 Mo. 480, 68 S. W. 563; State *v.* Welsor, 117 Mo. 570, 21 S. W. 443; State *v.* Parker, 96 Mo. 382, 9 S. W. 728.

Nebraska.— Basye *v.* State, 45 Nebr. 261, 63 N. W. 811; Patterson *v.* State, 41 Nebr. 538, 59 N. W. 917; Olive *v.* State, 11 Nebr. 1, 7 N. W. 444.

New Jersey.— Bullock *v.* State, 65 N. J. L. 557, 47 Atl. 62, 86 Am. St. Rep. 668.

New York.— People *v.* Gibson, 4 N. Y. Suppl. 170, 6 N. Y. Cr. 390.

North Carolina.— State *v.* Laxton, 76 N. C. 216.

Oregon.— State *v.* Garrand, 5 Oreg. 156.

Pennsylvania.— Snyder *v.* Com., 85 Pa. St. 519; Com. *v.* Gibbons, 3 Pa. Super. Ct. 408.

Texas.— Williford *v.* State, 36 Tex. Cr. 414, 37 S. W. 761.

England.— Reg. *v.* Rowton, 10 Cox C. C. 25, 11 Jur. N. S. 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436.

See 14 Cent. Dig. tit. "Criminal Law," § 845.

55. *Alabama.*— Goodwin *v.* State, 102 Ala. 87, 15 So. 571; Thompson *v.* State, 100 Ala. 70, 14 So. 878; Ingram *v.* State, 67 Ala. 67.

Iowa.— State *v.* Arnold, 12 Iowa 479.

New York.— People *v.* Watson, 3 Silv. Supreme 560, 7 N. Y. Suppl. 532.

South Carolina.— State *v.* Dill, 48 S. C. 249, 26 S. E. 567.

England.— Reg. *v.* Wood, 5 Jur. 225.

Contra, Aiken *v.* People, 183 Ill. 215, 55 N. E. 695; Jones *v.* State, 118 Ind. 39, 20 N. E. 634.

See 14 Cent. Dig. tit. "Criminal Law," § 845.

56. Carson *v.* State, 128 Ala. 58, 29 So. 608; Moulton *v.* State, 88 Ala. 116, 6 So. 758, 6 L. R. A. 301; State *v.* McGee, 81 Iowa 17, 46 N. W. 764; Gordon *v.* State, 3 Iowa 410; State *v.* Donelon, 45 La. Ann. 744, 12 So. 922; State *v.* Sprague, 64 N. J. L. 419, 45 Atl. 788. *Contra,* State *v.* Jerome, 33 Conn. 265; People *v.* Mills, 94 Mich. 630, 54 N. W. 488.

57. *Alabama.*— Hussey *v.* State, 87 Ala. 121, 6 So. 420.

Arkansas.— Cole *v.* State, 59 Ark. 50, 26 S. W. 377.

Iowa.— State *v.* Nelson, 58 Iowa 208, 12 N. W. 253.

Minnesota.— State *v.* Lee, 22 Minn. 407, 21 Am. Rep. 769.

Missouri.— State *v.* Grate, 68 Mo. 22.

vide that the number of witnesses which the accused may call to prove his good character shall not exceed a certain limit, unless he shall provide for the payment of the fees for the witnesses called in excess thereof, and such statutes do not violate the constitutional provision that he shall have compulsory process to procure the attendance of his witnesses.[58]

d. Weight and Effect of Good Character. A lack of harmony will be found in the cases upon the question of the weight and effect of evidence of good character. Some of the cases hold that the jury has no right to consider the good character of the accused where, from the other evidence, they are satisfied of his guilt, and therefore that good character is to be considered by them only where they are in doubt as to guilt.[59] Others hold that evidence of good character should in every case be considered by the jury with the other evidence of guilt or innocence, irrespective of the apparently conclusive or inconclusive character of such other evidence,[60] and although there may be sufficient other evidence to

Ohio.— Gandolfo *v.* State, 11 Ohio St. 114.

West Virginia.— Lemons *v.* State, 4 W. Va. 755, 6 Am. Rep. 293.

England.—Reg. *v.* Rowton, 10 Cox C. C. 25, 11 Jur. N. S. 325, L. & C. 520, 34 L. J. M. C. 57, 11 L. T. Rep. N. S. 745, 13 Wkly. Rep. 436.

See 14 Cent. Dig. tit. "Criminal Law," § 843.

58. State *v.* Stout, 49 Ohio St. 270, 30 N. E. 437.

59. *Arkansas.*— Edmonds *v.* State, 34 Ark. 720.

Indiana.— Voght *v.* State, 145 Ind. 12, 43 N. E. 1049; Walker *v.* State, 136 Ind. 663, 36 N. E. 356. *Compare*, however, Holland *v.* State, 131 Ind. 568, 31 N. E. 359; Wagner *v.* State, 107 Ind. 71, 7 N. E. 896, 57 Am. Rep. 79; Kistler *v.* State, 54 Ind. 400.

New Jersey.— State *v.* Wells, 1 N. J. L. 486, 1 Am. Dec. 211.

Tennessee.— Bennett *v.* State, 8 Humphr. 118.

United States.— U. S. *v.* Means, 42 Fed. 599; U. S. *v.* Jones, 31 Fed. 718; U. S. *v.* Roudenbush, 27 Fed. Cas. No. 16,198, 1 Baldw. 514; U. S. *v.* Smith, 27 Fed. Cas. No. 16,322, 2 Bond 323.

England.— Turner's Case, 6 How. St. Tr. 565.

See 14 Cent. Dig. tit. "Criminal Law," § 846; and *infra*, XIV, G, 7.

60. *Alabama.*— Murphy *v.* State, 108 Ala. 10, 18 So. 557; Carson *v.* State, 50 Ala. 134; Hall *v.* State, 40 Ala. 698; Felix *v.* State, 18 Ala. 720.

California.— People *v.* Ashe, 44 Cal. 288. See also People *v.* French, 137 Cal. 218, 69 Pac. 1063. *Compare* People *v.* Josephs, 7 Cal. 129.

Delaware.— Daniels *v.* State, 2 Pennew. 586, 48 Atl. 196, 54 L. R. A. 286. See also State *v.* Lynn, 3 Pennew. 316, 51 Atl. 878. *Compare* State *v.* Smith, 9 Houst. 588, 33 Atl. 441.

Florida.— Mitchell *v.* State, 40 Fla. 188, 30 So. 803; Bacon *v.* State, 22 Fla. 51. *Compare* Long *v.* State, 11 Fla. 295.

Georgia.— Brazil *v.* State, 117 Ga. 32, 43 S. E. 460; Thornton *v.* State, 107 Ga. 683, 33 S. E. 673. See also Jackson *v.* State, 76 Ga. 551; Davis *v.* State, 10 Ga. 101. *Compare* Epps *v.* State, 19 Ga. 102.

Illinois.— Jupitz *v.* People, 34 Ill. 516; Guzinski *v.* People, 77 Ill. App. 275.

Iowa.— State *v.* Wolf, 112 Iowa 458, 84 N. W. 536; State *v.* House, 108 Iowa 68, 78 N. W. 859; State *v.* Gustafson, 50 Iowa 194; State *v.* Northrup, 48 Iowa 583, 30 Am. Rep. 408.

Kansas.— State *v.* Deuel, 63 Kan. 811, 66 Pac. 1037.

Louisiana.— State *v.* Garic, 35 La. Ann. 970.

Massachusetts.— Com. *v.* Leonard, 140 Mass. 473, 4 N. E. 96, 54 Am. Rep. 485.

Michigan.— People *v.* McArron, 121 Mich. 1, 79 N. W. 944; People *v.* Mead, 50 Mich. 228, 15 N. W. 95.

Minnesota.— State *v.* Beebe, 17 Minn. 241.

Mississippi.—Powers *v.* State, 74 Miss. 777, 21 So. 657. *Compare* Wesley *v.* State, 37 Miss. 327, 75 Am. Dec. 62.

Missouri.— State *v.* Crow, 107 Mo. 341, 17 S. W. 745; State *v.* Howell, 100 Mo. 628, 14 S. W. 4. *Compare* State *v.* McMurphy, 52 Mo. 251.

Nebraska.—Latimer *v.* State, 55 Nebr. 609, 76 N. W. 207, 70 Am. St. Rep. 403.

New York.— People *v.* Elliott, 163 N. Y. 11, 57 N. E. 103 [*reversing* 43 N. Y. App. Div. 621, 60 N. Y. Suppl. 1145]; Stover *v.* People, 56 N. Y. 315; Cancemi *v.* People, 16 N. Y. 501; People *v.* Friedland, 2 N. Y. App. Div. 332, 37 N. Y. Suppl. 974; People *v.* Pollock, 51 Hun 613, 4 N. Y. Suppl. 297; People *v.* Nileman, 8 N. Y. St. 300; Stephens *v.* People, 4 Park. Cr. 396. *Compare* People *v.* Sweeney, 133 N. Y. 609, 30 N. E. 1005 [*affirming* 13 N. Y. Suppl. 25]; Wagner *v.* People, 54 Barb. 367; People *v.* Cole, 4 Park. Cr. 35; People *v.* Hammill, 2 Park. Cr. 223; People *v.* Kirby, 1 Wheel. Cr. 64.

North Carolina.— State *v.* Henry, 50 N. C. 65.

Ohio.— Stewart *v.* State, 22 Ohio St. 477; Harrington *v.* State, 19 Ohio St. 264.

Oregon.— State *v.* Porter, 32 Oreg. 135, 49 Pac. 964.

Pennsylvania.—Hanney *v.* Com., 116 Pa. St. 322, 9 Atl. 339; Heine *v.* Com., 91 Pa. St.

warrant a finding of guilt, the good character of the accused may itself create a reasonable doubt of guilt on which the accused must be acquitted.[61]

2. Of Third Persons. As a general rule evidence of the character of third persons is irrelevant and inadmissible.[62] But to this rule there are certain exceptions. Thus in a prosecution for homicide, where the accused sets up self-defense, he may show that the deceased was a violent and dangerous man.[63] And in prosecutions for abduction, rape, and seduction the question whether the female was of chaste character often becomes material.[64]

3. Of Co-Defendants. The accused cannot show the good character of one jointly indicted with him.[65] The admission of evidence of previous bad character of one defendant cannot be assigned as error by his co-defendants.[66]

E. Declarations and Admissions — 1. By Accused — a. Confessions and Admissions Distinguished. The term "admission" is usually applied to civil transactions and to those statements of fact in criminal cases which do not directly involve an acknowledgment of the guilt of the accused or the criminal intent, while the term "confession" is generally restricted to acknowledgments of guilt.[67]

b. Admissibility in General. Statements and declarations by the accused before or after the commission of the crime, although not amounting to a confession, but from which, in connection with other evidence of surrounding circumstances, an inference of guilt might be drawn are admissible against him as admissions.[68]

145. *Compare* Com. *v.* Platt, 11 Phila. 415; Com. *v.* Smith, 6 Am. L. Reg. 257.

South Carolina.— State *v.* Tarrant, 24 S. C. 593. *Compare* State *v.* Edwards, 13 S. C. 30.

Texas.— Lee *v.* State, 2 Tex. App. 338.

Utah.— State *v.* Blue, 17 Utah 175, 53 Pac. 978.

Vermont.— State *v.* Totten, 72 Vt. 73, 47 Atl. 105.

West Virginia.— State *v.* Madison, 49 W. Va. 96, 38 S. E. 492.

Wisconsin.— Jackson *v.* State, 81 Wis. 127, 51 N. W. 89; State *v.* Leppere, 66 Wis. 355, 28 N. W. 376.

See 14 Cent. Dig. tit. "Criminal Law," § 846; and *infra*, XIV, G, 7.

61. *Alabama.*— Newsom *v.* State, 107 Ala. 133, 18 So. 206; Armor *v.* State, 63 Ala. 173; Williams *v.* State, 52 Ala. 411; Hall *v.* State, 40 Ala. 698; Felix *v.* State, 18 Ala. 720. *Compare* Springfield *v.* State, 96 Ala. 81, 11 So. 250, 38 Am. St. Rep. 85.

California.— People *v.* Lee, (1885) 8 Pac. 685.

Florida.— Bacon *v.* State, 22 Fla. 51.

Iowa.— State *v.* Lindley, 51 Iowa 343, 1 N. W. 484, 33 Am. Rep. 139; State *v.* Northrup, 48 Iowa 583, 30 Am. Rep. 408.

Kansas.— State *v.* Keefe, 54 Kan. 197, 38 Pac. 302.

New Jersey.— Baker *v.* State, 53 N. J. L. 45, 20 Atl. 858.

New York.— People *v.* Kerr, 6 N. Y. Suppl. 674, 6 N. Y. Cr. 406; People *v.* Lamb, 2 Keyes 360, 2 Abb. Pr. N. S. 148; Lowenberg *v.* People, 5 Park. Cr. 414; James' Case, 1 City Hall Rec. 132.

Pennsylvania.— Becker *v.* Com., (1887) 9 Atl. 510; Heine *v.* Com., 91 Pa. St. 145; Kilpatrick *v.* Com., 31 Pa. St. 198; Com. *v.* Carey, 2 Brewst. 404; Com. *v.* Shaub, 5 Lanc. Bar 121; Com. *v.* Stone, 6 Lack. Leg. N. 241; Com. *v.* Bargar, 2 L. T. Rep. N. S. 37.

Utah.— State *v.* Van Kuran, 25 Utah 8, 69 Pac. 60.

Washington.— Klehn *v.* Territory, 1 Wash. 584, 21 Pac. 31.

But see Wesley *v.* State, 37 Miss. 327, 75 Am. Dec. 62.

See 14 Cent. Dig. tit. "Criminal Law," § 846; and *infra*, XIV, G, 7.

62. Walls *v.* State, 125 Ind. 400, 25 N. E. 457; Omer *v.* Com., 95 Ky. 353, 25 S. W. 594, 15 Ky. L. Rep. 694; State *v.* Rose, 47 Minn. 47, 49 N. W. 404; State *v.* Staton, 114 N. C. 813, 19 S. E. 96, holding that the character of one who was neither a co-defendant nor a witness, but if anything a receiver of stolen goods from defendant, was irrelevant, and defendant was not entitled to show his good character.

63. See Homicide.

64. See Abduction, 1 Cyc. 159; Rape; Seduction.

65. Walls *v.* State, 125 Ind. 400, 25 N. E. 457; Omer *v* Com., 95 Ky. 353, 25 S. W. 594, 15 Ky. L. Rep. 694.

66. Aneals *v.* People, 134 Ill. 401, 25 N. E. 1022.

67. 1 Greenleaf Ev. § 170.

"Confessions" see *infra*, XII, H.

68. *Alabama.*— Pentecost *v.* State, 107 Ala. 81, 18 So. 146; Aikin *v.* State, 35 Ala. 399.

Arkansas.—Wells *v.* State, (1891) 16 S. W. 577.

California.— People *v.* Chrisman, 135 Cal. 282, 67 Pac. 136; People *v.* Harlan, 133 Cal. 16, 65 Pac. 9; People *v.* Cokahnour, 120 Cal. 253, 52 Pac. 505; People *v.* Hawes, 98 Cal. 648, 33 Pac. 791.

Connecticut.— State *v.* Cronin, 64 Conn. 293, 29 Atl. 536.

Dakota.— Territory *v.* Egan, 3 Dak. 119, 13 N. W. 568.

Florida.— Brown *v.* State, 42 Fla. 184, 27 So. 869.

c. Voluntary Character. Some of the authorities hold that the voluntary character of such admissions must be shown.[69] Others hold that procuring the admission by threat or promise does not exclude it if the influence used does not

Georgia.— Shaw *v.* State, 102 Ga. 660, 29 S. E. 477; Marable *v.* State, 89 Ga. 425, 15 S. E. 453.

Illinois.— Andrews *v.* People, 117 Ill. 195, 7 N. E. 265; Glenn *v.* People, 17 Ill. 105.

Indiana.— Keesier *v.* State, 154 Ind. 242, 56 N. E. 232; McDonel *v.* State, 90 Ind. 320.

Iowa.— State *v.* Mecum, 95 Iowa 433, 64 N. W. 286; State *v.* Gainor, 84 Iowa 209, 50 N. W. 947; State *v.* Lewis, 45 Iowa 20.

Kentucky.—Luby *v.* Com., 12 Bush 1; Howard *v.* Com., 69 S. W. 721, 24 Ky. L. Rep. 612.

Louisiana.— State *v.* Picton, 51 La. Ann. 624, 25 So. 375; State *v.* Johnson, 10 La. Ann. 456.

Maine.— New Gloucester *v.* Bridgham, 28 Me. 60.

Massachusetts.—Com. *v.* Chance, 174 Mass. 245, 54 N. E. 551, 75 Am. St. Rep. 306; Com. *v.* Williams, 171 Mass. 461, 50 N. E. 1035; Com. *v.* Kenney, 12 Metc. 235, 46 Am. Dec. 672.

Minnesota.— State *v.* Holden, 42 Minn. 350, 44 N. W. 123.

Missouri.—State *v.* Beaucleigh, 92 Mo. 490, 4 S. W. 666; State *v.* Elliott, 90 Mo. 350, 2 S. W. 411; State *v.* Watson, 31 Mo. 361; State *v.* Williams, 30 Mo. 364; State *v.* Barton, 19 Mo. 227; State *v.* Dean, 85 Mo. App. 473.

Nebraska.— Long *v.* State, 23 Nebr. 33, 36 N. W. 310.

Nevada.— State *v.* Carrick, 16 Nev. 120.

New Hampshire.—State *v.* Wright, 68 N. H. 351, 44 Atl. 519.

New Mexico.— U. S. *v.* De Amador, 6 N. M. 173, 27 Pac. 488.

New York.— People *v.* Smith, 172 N. Y. 210, 64 N. E. 814; People *v.* Cassidy, 133 N. Y. 612, 30 N. E. 1003 [*affirming* 14 N. Y. Suppl. 349]; People *v.* Bosworth, 64 Hun 72, 19 N. Y. Suppl. 114; Fowler *v.* People, 18 How. Pr. 493.

North Carolina.— State *v.* Bryson, 60 N. C. 476.

Ohio.— Neifeld *v.* State, 23 Ohio Cir. Ct. 246.

Oregon.— State *v.* Hansen, 25 Oreg. 391, 35 Pac. 976, 36 Pac. 296.

Pennsylvania.— McCabe *v.* Com., (1886) 8 Atl. 45; Com. *v.* Tack, 1 Brewst. 511.

Rhode Island.— State *v.* Mowry, 21 R. I. 376, 43 Atl. 871; State *v.* Littlefield, 3 R. I. 124.

South Carolina.— State *v.* Murphy, 48 S. C. 1, 25 S. E. 43.

Texas.— Mathis *v.* State, 39 Tex. Cr. 549, 47 S. W. 464; Willis *v.* State, (Cr. App. 1898) 44 S. W. 826; Lamater *v.* State, 38 Tex. Cr. 249, 42 S. W. 304; Brewer *v.* State, 32 Tex. Cr. 74, 22 S. W. 41, 40 Am. St. Rep. 760; Lewis *v.* State, 29 Tex. App. 201, 15 S. W. 642, 25 Am. St. Rep. 720; Langford *v.* State, 17 Tex. App. 445.

Utah.— State *v.* Neel, 23 Utah 541, 65 Pac. 494.

West Virginia.— State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676; State *v.* Hall, 31 W. Va. 505, 7 S. E. 422.

United States.— U. S. *v.* Larkin, 26 Fed. Cas. No. 15,561, 4 Cranch C. C. 617; U. S. *v.* Lumsden, 26 Fed. Cas. No. 15,641, 1 Bond 5.

Time of making.— Admissions of the accused are equally relevant as evidence, whether made before or after the date of the offense charged. Jones *v.* State, (Fla. 1902) 32 So. 793; Fowler *v.* People, 18 How. Pr. (N. Y.) 493.

Decoy letters.— McCarney *v.* People, 83 N. Y. 408, 38 Am. Rep. 456.

Secondary evidence.—Admissions of defendant are not secondary evidence because they relate to facts which might be proven by the testimony of a person who is not examined as a witness. Com. *v.* Kenney, 12 Metc. (Mass.) 235, 46 Am. Dec. 672.

Must imply criminality.— Acts and declarations of accused, to be admissible, must in themselves or in connection with other evidence imply criminality and not mere suspicion. State *v.* James, 90 N. C. 702.

Conclusions of witness not denied by defendant.— A witness cannot, under the guise of proving admissions, introduce his own conclusions as to the guilt of the accused, stated to him in the conversation, and then prove his failure to deny them. State *v.* Foley, 144 Mo. 600, 46 S. W. 733.

The accused should be permitted to state what was in his mind when the admission was made, and explain the intent with which the language was used. State *v.* Kirby, 62 Kan. 436, 63 Pac. 752.

69. *Alabama.*— Love *v.* State, 124 Ala. 82, 27 So. 217.

Delaware.— State *v.* Trusty, 1 Pennew. 319, 40 Atl. 766.

Kentucky.— Jackson *v.* Com., 100 Ky. 239, 38 S. W. 422, 1091, 18 Ky. L. Rep. 795, 66 Am. St. Rep. 336.

Massachusetts.— Com. *v.* Williams, 171 Mass. 461, 50 N. E. 1035; Com. *v.* Myers, 160 Mass. 530, 36 N. E. 481.

Missouri.— State *v.* Schmidt, 137 Mo. 266, 38 S. W. 938.

Nevada.— State *v.* Carrick, 16 Nev. 120.

New York.— Murphy *v.* People, 63 N. Y. 590. *Compare* People *v.* McCallum, 103 N. Y. 587, 9 N. E. 502.

Texas.— Russell *v.* State, 38 Tex. Cr. 590, 44 S. W. 159; Smith *v.* State, (Cr. App. 1897) 43 S. W. 794; Quintana *v.* State, 29 Tex. App. 401, 16 S. W. 258, 25 Am. St. Rep. 730; Burks *v.* State, 24 Tex. App. 326, 6 S. W. 300; Marshall *v.* State, 5 Tex. App. 273. *Compare* Ferguson *v.* State, 31 Tex. Cr. 93, 19 S. W. 901.

West Virginia.— State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676.

United States.— Bram *v.* U. S., 168 U. S. 532, 18 S. Ct. 183, 42 L. ed. 568.

See *infra*, XII, H.

amount to actual duress, whether the threat or promise is that of an officer or of a private individual.[70]

d. Right to Introduction of Entire Conversation. Where admissions of the accused are offered against him, he has a right to have the whole conversation admitted;[71] but evidence of an admission, if complete, is not to be excluded because the witness called to prove it did not hear the whole conversation.[72]

e. Admissions by Representatives of Accused and Others. An admission which would be competent if uttered by defendant is inadmissible when made by his relatives or others, unless made in his presence or expressly or impliedly authorized by him;[73] but the declaration of one who in the particular transaction is the agent of defendant, made within the scope of his authority, is competent against defendant as his admission.[74] Declarations or admissions by defendant's counsel, not expressly or impliedly authorized by him nor made in his presence, are not admissible;[75] but it has been held that the admission of a

70. People *v.* Knowlton, 122 Cal. 357, 55 Pac. 141; People *v.* Hickman, 113 Cal. 80, 45 Pac. 175; People *v.* Velarde, 59 Cal. 457; People *v.* Parton, 49 Cal. 632; State *v.* Red, 53 Iowa 69, 4 N. W. 831; McLain *v.* State, 18 Nebr. 154, 24 N. W. 720. See also People *v.* Joy, (Cal. 1901) 66 Pac. 964. A statement by the accused to a policeman in answer to his question, in which the officer stated to him the substance of declarations made by two other defendants jointly indicted, is not to be excluded because it is not proved that the statements of the others were voluntary. Collins *v.* State, 115 Wis. 596, 92 N. W. 266.

71. *Alabama.*— McAdory *v.* State, 62 Ala. 154.

Illinois.— Hanrahan *v.* People, 91 Ill. 142.

Iowa.— State *v.* Millmeier, 102 Iowa 692, 72 N. W. 275.

Kentucky.—Shotwell *v.* Com., 68 S. W. 403, 24 Ky. L. Rep. 255; Hart *v.* Com., 60 S. W. 298, 22 Ky. L. Rep. 1183; Cable *v.* Com., 26 S. W. 220, 14 Ky. L. Rep. 253.

Louisiana.— State *v.* Gilcrease, 26 La. Ann. 622.

Missouri.— State *v.* Kennade, 121 Mo. 405, 26 S. W. 347; State *v.* Wisdom, 119 Mo. 539, 24 S. W. 1047.

United States.— U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78.

See 14 Cent. Dig. tit. "Criminal Law," § 895.

Statements contained in newspaper article. — Where a newspaper article giving a full account of the crime was read by the accused, and he then said that it contained a correct account of his statements, it is proper on the trial to admit only as much of it as relates to his statements. People *v.* Coughlin, 67 Mich. 466, 35 N. W. 72.

Defendant calling out whole conversation.— It has been said that the state cannot be required to prove the whole conversation by its witnesses, if defendant is permitted to prove it. People *v.* Murphy, 39 Cal. 52; Yelm Jim *v.* Territory, 1 Wash. Terr. 63; Rounds *v.* State, 57 Wis. 45, 14 N. W. 865.

72. Com. *v.* Taylor, 129 Pa. St. 534, 18 Atl. 558; State *v.* Murphy, 48 S. C. 1, 25 S. E. 43.

73. *Alabama.*— Owens *v.* State, 74 Ala. 401; Nall *v.* State, 34 Ala. 262; Martin *v.* State, 28 Ala. 71; Jelks *v.* McRae, 25 Ala. 440.

California.— People *v.* Dixon, 94 Cal. 255, 29 Pac. 504; People *v.* Simonds, 19 Cal. 275.

Georgia.— Gaines *v.* State, 99 Ga. 703, 26 S. E. 760.

Kansas.— State *v.* Beatty, 45 Kan. 492, 25 Pac. 899.

Kentucky.—Ashcraft *v.* Com., 68 S. W. 847, 24 Ky. L. Rep. 488.

Louisiana.— State *v.* Robinson, 37 La. Ann. 673.

Massachusetts.— Com. *v.* Robbins, 3 Pick. 63, by husband of accused.

Michigan.— People *v.* McBride, 120 Mich. 166, 78 N. W. 1076.

Missouri.— State *v.* Jaeger, 66 Mo. 173, by wife of accused.

New York.— People *v.* McLaughlin, 13 Misc. 287, 35 N. Y. Suppl. 73; Lambert *v.* People, 6 Abb. N. Cas. 181.

Ohio.— Pratt *v.* State, 19 Ohio St. 277.

Pennsylvania.— Warren *v.* Com., 37 Pa. St. 45, by wife of accused.

Texas.—Menges *v.* State, 25 Tex. App. 710, 9 S. W. 49; Rushing *v.* State, 25 Tex. App. 607, 8 S. W. 807; Langford *v.* State, 9 Tex. App. 283, by wife of accused.

See 14 Cent. Dig. tit. "Criminal Law," § 897.

74. *Alabama.*— Dyer *v.* State, 88 Ala. 225, 7 So. 267.

Indiana.— Pierce *v.* State, 109 Ind. 535, 10 N. E. 302.

Iowa.— State *v.* Oder, 92 Iowa 767, 61 N. W. 190.

Kentucky.— Wait *v.* Com., 69 S. W. 697, 24 Ky. L. Rep. 604.

Mississippi.— Browning *v.* State, 33 Miss. 47.

See 14 Cent. Dig. tit. "Criminal Law," § 897.

Statements after termination of agency not admissible.— State *v.* Spengler, (Miss. 1898) 23 So. 33.

75. State *v.* Beatty, 45 Kan. 492, 25 Pac. 899; Clayton *v.* State, 4 Tex. App. 515. And see Marmutt *v.* State, (Tex. Cr. App. 1901) 63 S. W. 634.

fact made on the trial by counsel for defendant in open court and in his presence may be read in evidence,[76] if it is assented to by the prosecuting attorney.[77]

f. Relevancy of Silence — (i) *In General.* Where, on being accused of crime, with full liberty to speak, one remains silent, his failure to reply or to deny is relevant as tending to show his guilt.[78] His silence alone, however, raises no legal presumption of guilt. Its effect is for the jury, and from it, in connection with other facts and circumstances, they may infer that he is guilty.[79]

(ii) *Accused Must Have Heard and Understood Charges.* In order that silence may be received as an admission, it must be shown either that the accused did in fact hear what was said or that he was in a position to hear.[80] Whether in any case the accused heard the charge is a question of fact,[81] unless it is positively shown that he was within hearing distance and there is no evidence

76. People *v.* Garcia, 25 Cal. 531. But see Clayton *v.* State, 4 Tex. App. 515.

77. People *v.* Thomson, 103 Mich. 80, 61 N. W. 345.

78. *Alabama.*—Clarke *v.* State, 78 Ala. 474, 56 Am. Rep. 45; Garrett *v.* State, 76 Ala. 18; Spencer *v.* State, 20 Ala. 24; Johnson *v.* State, 17 Ala. 618.

Arkansas.— Williams *v.* State, (1891) 16 S. W. 816; Flanagin *v.* State, 25 Ark. 92.

California.— People *v.* Amaya, 134 Cal. 531, 66 Pac. 794; People *v.* Madden, 76 Cal. 521, 18 Pac. 402; People *v.* Ah Yute, 53 Cal. 613, 54 Cal. 89; People *v.* McCrea, 32 Cal. 98.

District of Columbia.— McUin *v.* U. S., 17 App. Cas. 323.

Florida.— Anthony *v.* State, (1902) 32 So. 818.

Georgia.— Ware *v.* State, 96 Ga. 349, 23 S. E. 410; Cobb *v.* State, 27 Ga. 648.

Illinois.— Ackerson *v.* People, 124 Ill. 563, 16 N. E. 847.

Indiana.— White *v.* State, 153 Ind. 689, 54 N. E. 763.

Iowa.— State *v.* Mushrush, 97 Iowa 444, 66 N. W. 746; State *v.* Pratt, 20 Iowa 267.

Maine.— State *v.* Reed, 62 Me. 129.

Massachusetts.— Com. *v.* Funai, 146 Mass. 570, 16 N. E. 458; Com. *v.* Galavan, 9 Allen 271. See Com. *v.* Coughlin, 182 Mass. 558, 66 N. E. 207, holding that it is competent to prove that defendant sought the lawyer retained by the prosecution and talked with him about his case, not denying the truth of the charge but confining himself to threats to the lawyer intended to prevent prosecution.

Mississippi.— Miller *v.* State, 68 Miss. 221, 8 So. 273; Spivey *v.* State, 58 Miss. 858.

Missouri.— State *v.* Hill, 134 Mo. 663, 36 S. W. 223; State *v.* Walker, 78 Mo. 380.

New Jersey.—Donnelly *v.* State, 26 N. J. L. 463.

New York.— Kelley *v.* People, 55 N. Y. 565, 14 Am. Rep. 342.

North Carolina.— State *v.* McCourry, 128 N. C. 594, 38 S. E. 883; State *v.* Crockett, 82 N. C. 599.

Ohio.— Haberty *v.* State, 8 Ohio Cir. Ct. 262.

Pennsylvania.—Ettinger *v.* Com., 98 Pa. St. 338.

South Carolina.— State *v.* Stone, Rice 147.

Tennessee.— Low *v.* State, 108 Tenn. 127, 65 S. W. 401.

Texas.— Wright *v.* State, 36 Tex. Cr. 427, 37 S. W. 732; Williford *v.* State, 36 Tex. Cr. 414, 37 S. W. 761; Brown *v.* State, 32 Tex. Cr. 119, 22 S. W. 596; Diebel *v.* State, (Cr. App. 1893) 24 S. W. 26.

Vermont.— State *v.* Magoon, 68 Vt. 289, 35 Atl. 310.

West Virginia.— State *v.* Hatfield, 48 W. Va. 561, 37 S. E. 626; State *v.* Belknap, 39 W. Va. 427, 19 S. E. 507.

Wisconsin.—Richards *v.* State, 82 Wis. 172, 51 N. W. 652.

See 14 Cent. Dig. tit. "Criminal Law," § 898.

Silence as to another crime.— The silence of the prisoner to a charge of a crime other than that for which he is on trial is not admissible to prove his guilt. State *v.* Shuford, 69 N. C. 486.

79. *Alabama.*— Martin *v.* State, 39 Ala. 523.

Arkansas.— Ford *v.* State, 34 Ark. 649.

California.— People *v.* McCrea, 32 Cal. 98.

Illinois.— Watt *v.* People, 126 Ill. 9, 18 N. E. 340, 1 L. R. A. 403.

Indian Territory.— Oxier *v.* U. S., 1 Indian Terr. 85, 38 S. W. 331.

Maine.— State *v.* Reed, 62 Me. 129.

Missouri.— State *v.* Walker, 78 Mo. 380.

Nebraska.— Musfelt *v.* State, 64 Nebr. 445, 90 N. W. 237.

North Carolina.— State *v.* Suggs, 89 N. C. 527; State *v.* Swink, 19 N. C. 9.

Vermont.— State *v.* Taylor, 70 Vt. 1, 39 Atl. 447, 67 Am. St. Rep. 648, 42 L. R. A. 673.

See 14 Cent. Dig. tit. "Criminal Law," § 898.

80. Simmons *v.* State, 115 Ga. 574, 41 S. E. 983; Moye *v.* State, 66 Ga. 740; Com. *v.* Galavan, 9 Allen (Mass.) 271; Kelley *v.* People, 55 N. Y. 565, 14 Am. Rep. 342; People *v.* Bissert, 72 N. Y. App. Div. 620, 75 N. Y. Suppl. 630 [*affirmed* in 172 N. Y. 643, 65 N. E. 1120]; Bookser *v.* State, 26 Tex. App. 593, 10 S. W. 219; Ingle *v.* State, 1 Tex. App. 307.

81. Davis *v.* State, 131 Ala. 10, 31 So. 569; State *v.* Middleham, 62 Iowa 150, 17 N. W. 446.

that his hearing was impaired.[82] A statement made in the presence of the accused is not admissible against him where he was unconscious,[83] or where the statement was in a language which he did not understand.[84]

(III) *Opportunity For, and Necessity Of, Denying Statements.* The silence of the accused is not competent evidence against him, as an admission of the truthfulness of statements of others made to him or in his presence, unless the statements were such as to call for a reply by him;[85] and it must also appear affirmatively that he had an opportunity or right under the circumstances of the case to deny the truthfulness of the charges made against him.[86]

(IV) *Silence Under Arrest.* Some of the courts have held that the fact that one is under arrest and in the custody of an officer when he is silent under accusation prevents his silence or the statements themselves from being admissible against him, on the ground that under such circumstances he is not called upon to speak.[87] Other courts have held such evidence to be admissible.[88]

(V) *Silence at Judicial Proceeding.* The doctrine of silence as an implied admission of the truth of statements made in one's presence does not apply to silence of the accused at a judicial proceeding or hearing.[89]

82. State *v.* Crafton, 89 Iowa 109, 56 N. W. 257; Hochrieter *v.* People, 2 Abb. Dec. (N. Y.) 363, 1 Keyes (N. Y.) 66.

83. People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730; Lanergan *v.* People, 39 N. Y. 39, 6 Transcr. App. (N. Y.) 84, 5 Abb. Pr. N. S. (N. Y.) 113, 6 Park. Cr. (N. Y.) 209; State *v.* Perkins, 10 N. C. 377.

84. Territory *v.* Big Knot on Head, 6 Mont. 242, 11 Pac. 670.

85. *Alabama.*— Jones *v.* State, 107 Ala. 93, 18 So. 237; Brister *v.* State, 26 Ala. 107; Lawson *v.* State, 20 Ala. 65, 56 Am. Dec. 182.

California.— People *v.* Young, 108 Cal. 8, 41 Pac. 281.

Georgia.— Brantley *v.* State, 115 Ga. 229, 41 S. E. 695.

Illinois.— Slattery *v.* People, 76 Ill. 217.

Indiana.— Conway *v.* State, 118 Ind. 482, 21 N. E. 285; Surber *v.* State, 99 Ind. 71.

Massachusetts.—Com. *v.* Brown, 121 Mass. 69.

Michigan.— People *v.* O'Brien, 68 Mich. 468, 36 N. W. 225.

Missouri.— State *v.* Murray, 126 Mo. 611, 29 S. W. 700; State *v.* Mullins, 101 Mo. 514, 14 S. W. 625; State *v.* Glahn, 97 Mo. 679, 11 S. W. 260.

New York.— People *v.* Smith, 172 N. Y. 210, 64 N. E. 814; People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730; People *v.* Willett, 92 N. Y. 29; Kelley *v.* People, 55 N. Y. 565, 14 Am. Rep. 342; Lanergan *v.* People, 39 N. Y. 39, 6 Transcr. App. 84, 5 Abb. Pr. N. S. 113, 6 Park. Cr. 209; Wright *v.* People, 1 N. Y. Cr. 462.

Ohio.— State *v.* Iden, 5 Ohio S. & C. Pl. Dec. 627.

Pennsylvania.— Ettinger *v.* Com., 98 Pa. St. 338.

South Carolina.— State *v.* Carroll, 30 S. C. 85, 8 S. E. 433, 14 Am. St. Rep. 883; State *v.* Edwards, 13 S. C. 30.

Tennessee.— Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046.

Texas.— Williford *v.* State, 36 Tex. Cr. 414, 37 S. W. 761; Sauls *v.* State, 30 Tex. App. 496, 17 S. W. 1066; Felder *v.* State, 23 Tex. App. 477, 5 S. W. 145, 59 Am. Rep. 777; Loggins *v.* State, 8 Tex. App. 434.

Vermont.— State *v.* Magoon, 68 Vt. 289, 35 Atl. 310.

See 14 Cent. Dig. tit. "Criminal Law," § 899.

86. Broyles *v.* State, 47 Ind. 251; Denton *v.* State, (Tex. Cr. App. 1901) 60 S. W. 670.

87. *Iowa.*— State *v.* Weaver, 57 Iowa 730, 11 N. W. 675. *Compare* State *v.* Dillon, 74 Iowa 653, 38 N. W. 525.

Louisiana.— State *v.* Carter, 106 La. 407, 30 So. 895; State *v.* Estoup, 39 La. Ann. 906, 3 So. 124; State *v.* Diskin, 34 La. Ann. 919, 44 Am. Rep. 448.

Massachusetts.— Com. *v.* McDermott, 123 Mass. 440, 25 Am. Dec. 120; Com. *v.* Walker, 13 Allen 570; Com. *v.* Kenney, 12 Metc. 235, 46 Am. Dec. 672.

Rhode Island.— State *v.* Epstein, (1903) 55 Atl. 204.

Texas.—Gardner *v.* State, (Cr. App. 1896) 34 S. W. 945.

88. State *v.* Murray, 126 Mo. 611, 29 S. W. 700; Kelley *v.* People, 55 N. Y. 565, 14 Am. Rep. 342; Murphy *v.* State, 36 Ohio St. 628; Green *v.* State, 97 Tenn. 50, 36 S. W. 700. *Compare*, however, State *v.* Howard, 102 Mo. 142, 14 S. W. 937; State *v.* Young, 99 Mo. 666, 12 S. W. 879.

89. *Alabama.*— Weaver *v.* State, 77 Ala. 26.

Georgia.— Bell *v.* State, 93 Ga. 557, 19 S. E. 244.

Louisiana.— State *v.* Smith, 30 La. Ann. 457.

Massachusetts.— Com. *v.* Walker, 13 Allen 570.

Michigan.— People *v.* Hillhouse, 80 Mich. 580, 45 N. W. 484.

Missouri.— State *v.* Mullins, 101 Mo. 514, 14 S. W. 625. And see State *v.* Hale, 156 Mo. 102, 56 S. W. 881.

Nebraska.— Comstock *v.* State, 14 Nebr. 205, 15 N. W. 355.

g. Accusation Denied by Accused. Statements charging the accused with the crime and positively denied by him are never admissible merely because made in his presence.[90]

h. Words Uttered in Sleep or While Drunk. Words uttered by the accused while asleep are not competent evidence against him, since he is unconscious of what he says,[91] and it is for the jury to determine whether the accused was awake or asleep when he spoke.[92] Declarations or admissions of the accused are not rendered inadmissible by the fact that he was drunk when he made them, but such fact may be taken into consideration in determining their weight.[93]

i. Admissions by Telephone. The admissions and declarations of the accused are not incompetent because they were received over a telephone, where the witness receiving them can testify that he knew and recognized his voice.[94]

j. Privileged Communications Overheard. Admissions in conversations which would ordinarily be privileged communications, because had by the accused with his attorney[95] or with his wife,[96] are competent evidence against him where a third person was present. The latter's presence destroys the privilege and he may testify to the whole conversation.[97]

k. On What Points Received — (i) *In General.* The declarations and admissions of the accused are relevant as to all matters material to the issue.[98] Thus they are admissible to prove the *corpus delicti*, where it is shown *prima facie*,[99] and to show guilty knowledge,[1] capacity to commit the crime,[2] marriage when that

New York.— People *v.* Willett, 92 N. Y. 29, 1 N. Y. Cr. 355; Kelley *v.* People, 55 N. Y. 565, 14 Am. Rep. 342.

Rhode Island.— State *v.* Boyle, 13 R. I. 537.

South Carolina.— State *v.* Senn, 32 S. C. 392, 11 S. E. 292.

United States.— U. S. *v.* Brown, 24 Fed. Cas. No. 14,660, 4 Cranch C. C. 508.

See 14 Cent. Dig. tit. "Criminal Law," § 900.

Statements at coroner's inquest.— State *v.* Mullins, 101 Mo. 514, 14 S. W. 625; People *v.* Willett, 92 N. Y. 29, 1 N. Y. Cr. 355.

Statements at preliminary examination.— State *v.* Smith, 30 La. Ann. 457; State *v.* Hale, 156 Mo. 102, 56 S. W. 881.

90. Low *v.* State, 108 Tenn. 127, 65 S. W. 401; Kendrick *v.* State, 9 Humphr. (Tenn.) 722; Reg. *v.* Welsh, 3 F. & F. 275. An incidental denial of guilt by the accused will not exclude a long conversation containing it. Com. *v.* Robinson, 165 Mass. 426, 43 N. E. 121.

91. People *v.* Robinson, 19 Cal. 40; State *v.* Morgan, 35 W. Va. 260, 13 S. E. 385.

92. State *v.* Morgan, 35 W. Va. 260, 13 S. E. 385.

93. Eskridge *v.* State, 25 Ala. 30; State *v.* Bryan, 74 N. C. 351.

94. People *v.* Ward, 3 N. Y. Cr. 483; Stepp *v.* State, 31 Tex. Cr. 349, 20 S. W. 753.

95. Cotton *v.* State, 87 Ala. 75, 6 So. 396.

96. Liles *v.* State, 30 Ala. 24, 68 Am. Dec. 108; Gannon *v.* People, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147; State *v.* Miller, 100 Mo. 606, 13 S. W. 832, 1051.

97. Reynolds *v.* State, 147 Ind. 3, 46 N. E. 31; Com. *v.* Griffin, 110 Mass. 181; People *v.* Lewis, 16 N. Y. Suppl. 881; State *v.* Center, 35 Vt. 378. See also WITNESSES.

98. *Alabama.*— Hodge *v.* State, 97 Ala. 37, 12 So. 164, 38 Am. St. Rep. 145.

Georgia.— Williams *v.* State, 69 Ga. 11; Fraser *v.* State, 55 Ga. 325.

Indiana.— Walker *v.* State, 136 Ind. 663, 36 N. E. 356.

Massachusetts.— Com. *v.* Waterman, 122 Mass. 43.

Missouri.— State *v.* Shannon, 33 Mo. 596.

New York.— Murphy *v.* People, 63 N. Y. 590; People *v.* O'Connell, 78 Hun 323, 29 N. Y. Suppl. 195.

Wisconsin.—Hardtke *v.* State, 67 Wis. 552, 30 N. W. 723.

See 14 Cent. Dig. tit. "Criminal Law," § 911.

99. U. S. *v.* Jones, 10 Fed. 469, 20 Blatchf. 235.

1. *Alabama.*— Perkins *v.* State, 60 Ala. 7.

Connecticut.— State *v.* Cronin, 64 Conn. 293, 29 Atl. 536; State *v.* Smith, 5 Day 175, 5 Am. Dec. 132.

Massachusetts.— Com. *v.* Crowe, 165 Mass. 139, 42 N. E. 563.

Minnesota.— State *v.* Hogard, 12 Minn. 293.

New Hampshire.— State *v.* Bullard, 16 N. H. 139.

Texas.— Bell *v.* State, 33 Tex. Cr. 163, 25 S. W. 769.

Compare Com. *v.* Clark, 130 Pa. St. 641, 18 Atl. 988.

See 14 Cent. Dig. tit. "Criminal Law," § 912.

2. State *v.* Kring, 74 Mo. 612; People *v.* Tripp, 4 N. Y. Leg. Obs. 344.

Sanity.— The admission of the accused after the crime that he was sane when it was committed (State *v.* Kring, 74 Mo. 612), while not conclusive, because of the common delusion of insane persons that they are sane (State *v.* Reidell, 9 Houst. (Del.) 470, 14 Atl. 550), or his statement that he was simulating insanity (Cogswell *v.* Com., 32 S. W. 935, 17 Ky. L. Rep. 822), is competent

fact is material,[3] identity of accused,[4] or that he fled from justice,[5] attempted to break jail,[6] or assisted a fellow prisoner to escape.[7]

(II) *Other Crimes.* Admissions of the accused relevant to the crime for which he is on trial are not to be excluded because they involve a confession of other crimes, where the confession is inseparably connected with the admissions.[8] Evidence that the accused has admitted the commission of other crimes is also competent, where the fact of their commission is relevant, as for the purpose of showing guilty knowledge[9] or intent,[10] etc., but not otherwise.[11]

l. Conclusiveness of Admissions on Prosecution. The admissions of the accused are not conclusive on the prosecution when used against the prisoner.[12]

m. Declarations or Admissions in Legal Proceedings — (I) *At Coroner's Inquest.* The testimony of the accused, taken at the coroner's inquest on the body of the person he is charged to have murdered, voluntarily given before his arrest, although after he had been charged, and after being cautioned that he was not obliged to testify, is competent against him as an admission.[13] This rule is applied generally to voluntary admissions by the accused on a coroner's inquest, whether or not he is under arrest.[14]

(II) *Before Grand Jury.* Under the constitutional provision that no one shall be compelled to incriminate himself, the accused cannot be compelled to testify as a witness before the grand jury, but where he voluntarily appears as a witness, his testimony then taken, although under oath, if not amounting to a confession, may subsequently be used against him.[15]

(III) *At Former Trial or Inquiry.* Statements made by the accused in testifying voluntarily on a former trial of himself[16] or of some other per-

against him. It may also be shown that the accused admitted that he had set up insanity as a defense before and had been acquitted. Smith *v.* State, 55 Ark. 259, 18 S. W. 237.

The age of defendant may be proved by his admission. People *v.* Tripp, 4 N. Y. Leg. Obs. 344.

To prove color or race.— Bell *v.* State, 33 Tex. Cr. 163, 25 S. W. 769. See Miscegenation.

3. *Arkansas.*— Halbrook *v.* State, 34 Ark. 511, 36 Am. Rep. 17.

Illinois.— Tucker *v.* People, 117 Ill. 88, 7 N. E. 51.

Iowa.— State *v.* Nadal, 69 Iowa 478, 29 N. W. 451.

Maine.— State *v.* Hodgskins, 19 Me. 155, 36 Am. Dec. 742.

North Carolina.— State *v.* Behrman, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449.

Ohio.— Stanglein *v.* State, 17 Ohio St. 453.

United States.— Miles *v.* U. S., 103 U. S. 304, 26 L. ed. 481.

See Bigamy, 5 Cyc. 700.

4. Jackson *v.* Com., 100 Ky. 239, 38 S. W. 422, 1091, 18 Ky. L. Rep. 795, 66 Am. St. Rep. 336; State *v.* Foster, 36 La. Ann. 877; Com. *v.* Gay, 162 Mass. 458, 38 N. E. 1121; State *v.* Ellwood, 17 R. I. 763, 24 Atl. 782.

5. Thomas *v.* State, 100 Ala. 53, 14 So. 621.

6. State *v.* Jackson, 95 Mo. 623, 8 S. W. 749.

7. Campbell *v.* State, 23 Ala. 44.

8. Gore *v.* People, 162 Ill. 259, 44 N. E. 500.

9. Com. *v.* Edgerly, 10 Allen (Mass.) 184; Rex *v.* Harris, 7 C. & P. 429, 32 E. C. L. 691. See *supra*, XII, C, 2, b, (II).

10. State *v.* Long, 103 Ind. 481, 3 N. E. 169; State *v.* Hayward, 62 Minn. 474, 65 N. W. 63. *Compare* People *v.* Corbin, 56 N. Y. 363, 15 Am. Rep. 427. See *supra*, XII, C, 2, b, (III).

11. Henderson *v.* Com., 27 S. W. 808, 16 Ky. L. Rep. 289; State *v.* Shuford, 69 N. C. 486. See *supra*, XII, C, 1.

12. State *v.* Wisdom, 119 Mo. 539, 24 S. W. 1047; State *v.* Hayes, 78 Mo. 307; Lowenberg *v.* People, 5 Park. Cr. (N. Y.) 414.

13. State *v.* Gilman, 51 Me. 206.

14. *Indiana.*— Snyder *v.* State, 59 Ind. 105.

Iowa.— State *v.* Van Tassel, 103 Iowa 6, 72 N. W. 497.

Missouri.— State *v.* Mullins, 101 Mo. 514, 14 S. W. 625.

New York.— People *v.* Thayer, 1 Park. Cr. 595.

Pennsylvania.— Williams *v.* Com., 29 Pa. St. 102.

Wisconsin.— Mack *v.* State, 48 Wis. 271, 4 N. W. 449.

See 14 Cent. Dig. tit. "Criminal Law," § 921.

15. People *v.* Sexton, 132 Cal. 37, 64 Pac. 107; State *v.* Broughton, 29 N. C. 96, 45 Am. Dec. 507; State *v.* Robinson, 32 Oreg. 43, 48 Pac. 357; Gardner *v.* State, (Tex. Cr. App. 1894) 28 S. W. 470.

16. *California.*— People *v.* Kelley, 47 Cal. 125.

Connecticut.— State *v.* Duffy, 57 Conn. 525, 18 Atl. 791.

Georgia.— Dumas *v.* State, 63 Ga. 600.

Kansas.— State *v.* Oliver, 55 Kan. 711, 41 Pac. 954.

Maine.— State *v.* Witham, 72 Me. 531.

son,[17] or before a fire marshal authorized by statute to inquire into the origin of fires,[18] or before a legislative committee of investigation,[19] are received against the accused as his admissions.[20]

(IV) *In Affidavits For Continuance or Change of Venue.* Statements of facts voluntarily made under oath by the accused on a motion for a continuance [21] or for a change of venue [22] may, when relevant, be proved against him as admissions on his trial.

(V) *On Preliminary Examination.* The admissions voluntarily made, contained in the testimony of defendant or his statement on his preliminary examination, if properly reduced to writing and signed by him and certified by the proper officer, as required by statute, although not amounting to a confession, are evidence against him;[23] and it seems that they may be proved by parol on his trial,

Massachusetts.— Com. *v.* Reynolds, 122 Mass. 454.

Missouri.— State *v.* Glahn, 97 Mo. 679, 11 S. W. 260; State *v.* Jefferson, 77 Mo. 136; State *v.* Eddings, 71 Mo. 545, 36 Am. Rep. 496.

New York.— People *v.* McMahon, 15 N. Y. 384.

Pennsylvania.— Williams *v.* Com., 29 Pa. St. 102.

Tennessee.— Rafferty *v.* State, 91 Tenn. 655, 16 S. W. 728.

Wisconsin.— Dickerson *v.* State, 48 Wis. 288, 4 N. W. 321.

See 14 Cent. Dig. tit. "Criminal Law," § 921.

17. *California.*—People *v.* Mitchell, 94 Cal. 550, 29 Pac. 1106.

Georgia.— Burnett *v.* State, 87 Ga. 622, 13 S. E. 552.

Louisiana.— State *v.* Thomas, 28 La. Ann. 827.

Michigan.— People *v.* Gallagher, 75 Mich. 512, 42 N. W. 1063. But *compare* People *v.* Moyer, 77 Mich. 571, 43 N. W. 928.

New York.— People *v.* McMahon, 15 N. Y. 384.

Texas.— Harris *v.* State, 37 Tex. Cr. 441, 36 S. W. 88.

Compare Josephine *v.* State, 39 Miss. 613.

See 14 Cent. Dig. tit. "Criminal Law," § 921.

18. Reg. *v.* Coote, L. R. 4 P. C. 599, 12 Cox C. C. 557, 42 L. J. P. C. 45, 29 L. T. Rep. N. S. 111, 9 Moore P. C. N. S. 463, 21 Wkly. Rep. 553, 17 Eng. Reprint 587.

19. Rex *v.* Merceron, 2 Stark. 366, 3 E. C. L. 447.

20. Statements in civil proceedings see *infra*, XII, E, 1, m, (VII).

21. *Arkansas.*— Coker *v.* State, 20 Ark. 53.

Florida.— Newton *v.* State, 21 Fla. 53.

Georgia.— Pledger *v.* State, 77 Ga. 242, 3 S. E. 320.

Indiana.— Behler *v.* State, 112 Ind. 140, 13 N. E. 272; Greenley *v.* State, 60 Ind. 141.

Massachusetts.— Com. *v.* Starr, 4 Allen 301.

Mississippi.— Nelms *v.* State, 58 Miss. 362.

Missouri.— State *v.* Young, 99 Mo. 666, 12 S. W. 879.

North Carolina.— State *v.* Bishop, 98 N. C. 773, 4 S. E. 357.

Compare Farrell *v.* People, 103 Ill. 17; Adams *v.* State, 16 Tex. App. 162.

See 14 Cent. Dig. tit. "Criminal Law," § 923.

22. Boles *v.* State, 24 Miss. 445. *Contra*, Behler *v.* State, 112 Ind. 140, 13 N. E. 272, distinguishing between affidavits for a continuance and those for a change of venue, on the grounds that in the latter no evidentiary facts are stated.

23. *Georgia.*— Griggs *v.* State, 59 Ga. 738. *Compare*, however, Cicero *v.* State, 54 Ga. 156.

Kansas.— State *v.* Miller, 35 Kan. 328, 10 Pac. 865.

Mississippi.— Hill *v.* State, 64 Miss. 431, 1 So. 494.

Nevada.— State *v.* Rover, 13 Nev. 17.

New York.— People *v.* Banker, 2 Park. Cr. 26.

North Carolina.— State *v.* Rowe, 98 N. C. 629, 4 S. E. 506; State *v.* Ellis, 97 N. C. 447, 2 S. E. 525.

Texas.—Jackson *v.* State, 29 Tex. App. 458, 16 S. W. 247.

Contra, State *v.* Marshall, 36 Mo. 400.

See 14 Cent. Dig. tit. "Criminal Law," § 921.

Formalities.—A statute providing that certain formalities shall be complied with by the magistrate taking the examination of the accused as regards a statement made by him pending the examination does not apply to voluntary statements by the accused made to the magistrate before or after the examination. Hardy *v.* U. S., 186 U. S. 224, 22 S. Ct. 889, 46 L. ed. 1137. And unless the statute absolutely requires it (State *v.* Hatcher, 29 Oreg. 309, 44 Pac. 584) it seems that the written examination of the accused need not be signed by the committing magistrate (People *v.* Johnson, 1 Wheel. Cr. (N. Y.) 193).

Waiving statement on preliminary examination.— The right to waive a statutory privilege of making an exculpatory statement implies that the statement if made must be voluntary. Hence it must appear that the accused was informed by the magistrate of his right to waive making the statement. State *v.* O'Brien, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399; State *v.* Hatcher, 29 Oreg. 309, 44 Pac. 584.

Statutes excluding evidence given by the accused on the preliminary examination, or

although the justice certifies that he declined to answer, since whatever the prisoner has said is evidence though the justice may have neglected his duty.[24]

(VI) *Offer to Plead or Plea of Guilty.* A voluntary offer by the accused before trial to plead guilty on terms to the offense charged is competent as his admission,[25] but a withdrawn plea of guilty in place of which a plea of not guilty has been substituted by leave of the court is not competent as an admission.[26]

(VII) *Statements in Civil Proceedings.* The admissions of the accused, when testifying in a civil action or proceeding, are received against him in a subsequent criminal prosecution.[27] Statements made by the accused in testifying voluntarily before a commissioner in bankruptcy as to his trade dealings are admissible against him.[28]

n. Whole Conversation to Be Considered by Jury. The conversation containing the admission by accused must be considered by the jury in its entirety.[29] They are not bound, however, to believe the whole statement, but may reject as much of it as they disbelieve.[30]

2. Self-Serving Declarations and Conduct — a. In General. The statements and declarations of the accused in his own favor, unless they are a part of the *res gestæ*, or unless they are made evidence by the prosecution in producing the conversation in which they are contained, are not competent in his favor on the trial.[31] They are excluded not because they might never contribute to the ascertainment of the truth, but because if received they would most commonly con-

in any legal proceeding on his subsequent criminal trial, perjury excepted, exist in some states. Kirby *v.* Com., 77 Va. 681, 46 Am. Rep. 747; State *v.* Hall, 31 W. Va. 505, 7 S. E. 422.

24. Reg. *v.* Wilkinson, 8 C. & P. 662, 34 E. C. L. 949.

25. Com. *v.* Callahan, 108 Mass. 421.

26. People *v.* Ryan, 82 Cal. 617, 23 Pac. 121.

A former plea of guilty is competent against the accused on a subsequent trial for another crime, where the plea of guilty in effect admits certain facts which are necessary to the proof of the latter. Com. *v.* Ayers, 115 Mass. 137; Com. *v.* Hazeltine, 108 Mass. 479.

27. Abbott *v.* People, 75 N. Y. 602; Barber *v.* People, 17 Hun (N. Y.) 366 (proceedings supplementary to execution); Crow *v.* State, (Tex. Cr. App. 1903) 72 S. W. 392 (holding that in a prosecution for bigamy the petition of defendant for a divorce from his first wife is admissible against him); State *v.* Hopkins, 13 Wash. 5, 42 Pac. 627.

Admissions in pleadings by counsel.— Formal allegations and statements in pleadings in a civil action signed by counsel only are not received as the admissions of the accused in a criminal proceeding, unless the counsel was expressly authorized by accused to make such statements. Farmer *v.* State, 100 Ga. 41, 28 S. E. 26; Reg. *v.* Simmonds, 4 Cox C. C. 277.

28. People *v.* Weiger, 100 Cal. 352, 34 Pac. 826; Reg. *v.* Sloggett, 7 Cox C. C. 139, Dears. C. C. 656, 2 Jur. N. S. 764, 25 L. J. M. C. 93, 4 Wkly. Rep. 487.

29. State *v.* Curtis, 70 Mo. 594; State *v.* Swink, 19 N. C. 9.

30. State *v.* Carlisle, 57 Mo. 102; State *v.* Mahon, 32 Vt. 241; State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676.

31. *Alabama.*—Harkness *v.* State, 129 Ala. 71, 30 So. 73; Dent *v.* State, 105 Ala. 14, 17 So. 94; Toliver *v.* State, 94 Ala. 111, 10 So. 428; Chamblee *v.* State, 78 Ala. 466.

Arkansas.— McCoy *v.* State, 46 Ark. 141; Golden *v.* State, 19 Ark. 590.

California.— People *v.* Rodley, 131 Cal. 240, 63 Pac. 351; People *v.* Prather, 120 Cal. 660, 53 Pac. 259.

Connecticut.—State *v.* Swift, 57 Conn. 496, 18 Atl. 664.

District of Columbia.— U. S. *v.* Neverson, 1 Mackey 152.

Georgia.— Dixon *v.* State, 116 Ga. 186, 42 S. E. 357; Fraser *v.* State, 112 Ga. 13, 37 S. E. 114; Sullivan *v.* State, 101 Ga. 800, 29 S. E. 16; Boston *v.* State, 94 Ga. 590, 21 S. E. 603; Surles *v.* State, 89 Ga. 167, 15 S. E. 38; Lewis *v.* State, 72 Ga. 164, 53 Am. Rep. 835.

Illinois.— Carle *v.* People, 200 Ill. 494, 66 N. E. 32, 93 Am. St. Rep. 208.

Indiana.— Spittorff *v.* State, 108 Ind. 171, 8 N. E. 911; Dukes *v.* State, 11 Ind. 557, 71 Am. Dec. 370; Douglass *v.* State, 18 Ind. App. 289, 48 N. E. 9.

Iowa.— State *v.* Schaffar, 70 Iowa 371, 30 N. W. 639.

Kansas.— State *v.* Gillespie, 62 Kan. 469, 63 Pac. 742, 84 Am. St. Rep. 411.

Kentucky.— Walling *v.* Com., 38 S. W. 429, 18 Ky. L. Rep. 812.

Louisiana.— State *v.* Harris, 107 La. 196, 31 So. 646.

Maryland.— Archer *v.* State, 45 Md. 33.

Massachusetts.— Com. *v.* Cosseboom, 155 Mass. 298, 29 N. E. 463; Com. *v.* Williams, 105 Mass. 62; Com. *v.* Hyde, Thach. Cr. Cas. 19.

Missouri.— State *v.* Blitz, 171 Mo. 530, 71 S. W. 1027; State *v.* Hathorn, 166 Mo. 229, 65 S. W. 756; State *v.* Good, 132 Mo. 114, 33 S. W. 790; State *v.* Holcomb, 86 Mo. 371; State *v.* Van Zant, 71 Mo. 541.

sist of falsehoods fabricated for the occasion, and would mislead oftener than they would enlighten.[32]

b. When Admitted as Part of Whole Conversation. When statements constituting admissions are received against defendant, he may prove his self-serving statements in connection therewith, by reason of the rule admitting the whole conversation.[33] Thus, where the prosecution proves that the witness charged the accused with the crime, the accused has a right to prove that he denied the accusation.[34] But the accused cannot prove in explanation self-serving declarations contained in other conversations.[35]

c. Statements at Preliminary Examination. The voluntary statements of the accused in his own favor at the preliminary examination are not admissible on a subsequent trial as evidence for him.[36] But it is sometimes provided by statute that the voluntary declaration of the accused, made to and certified by a magistrate, shall be evidence before the grand and petit jury.[37]

d. Explanation of Matters in Evidence and Res Gestæ. As a general rule the accused is not permitted, in order to explain his intention in doing an act already proved, to show his self-serving declarations, not a part of the *res gestæ*, as to his reason for or intent in such act.[38] The jury are the judges of the purpose and intent of defendant's action, and ordinarily they should not consider his explanatory statements unless a part of the *res gestæ*.[39] Declarations of the accused, however, are admissible in his favor if they formed part of a conversation proved by the state, or if they are part of the *res gestæ*.[40]

Nebraska.— Smith *v.* State, 61 Nebr. 296, 85 N. W. 49.

Nevada.— State *v.* Ferguson, 9 Nev. 106.

New York.— McKee *v.* People, 36 N. Y. 113, 1 Transcr. App. 1, 3 Abb. Pr. N. S. 216, 34 How. Pr. 230; People *v.* Lopez, 2 Edm. Sel. Cas. 262; Robetaille's Case, 5 City Hall Rec. 171.

North Carolina.— State *v.* Ward, 103 N. C. 419, 8 S. E. 814; State *v.* McNair, 93 N. C. 628; State *v.* Reitz, 83 N. C. 634; State *v.* Ricketts, 74 N. C. 187.

Pennsylvania.— Rudy *v.* Com., 128 Pa. St. 500, 18 Atl. 344; Com. *v.* Frew, 3 Pa. Co. Ct. 492.

South Carolina.— State *v.* Green, 61 S. C. 12, 39 S. E. 185.

Tennessee.— Colquit *v.* State, 107 Tenn. 381, 64 S. W. 713.

Texas.—Rogers *v.* State, (Cr. App. 1902) 71 S. W. 18; Cox *v.* State, (Cr. App. 1902) 69 S. W. 145; Clay *v.* State, 41 Tex. Cr. 653, 56 S. W. 629; Padron *v.* State, 41 Tex. Cr. 548, 55 S. W. 827; Bratt *v.* State, (Cr. App. 1897) 41 S. W. 624; Golin *v.* State, 37 Tex. Cr. 90, 38 S. W. 794; McCulloch *v.* State, 35 Tex. Cr. 268, 33 S. W. 230.

Utah.— State *v.* Carrington, 15 Utah 480, 50 Pac. 526.

Vermont.— State *v.* Daley, 53 Vt. 442, 38 Am. Rep. 694.

Virginia.— Snodgrass *v.* Com., 89 Va. 679, 17 S. E. 238.

Washington.—State *v.* Power, 24 Wash. 34, 63 Pac. 1112.

Wisconsin.— Baker *v.* State, 80 Wis. 416, 50 N. W. 518.

United States.— U. S. *v.* Craig, 25 Fed. Cas. No. 14,883, 4 Wash. 729; U. S. *v.* Imsand, 26 Fed. Cas. No. 15,439, 1 Woods 581; U. S. *v.* Milburn, 26 Fed. Cas. No. 15,764, 2 Cranch C. C. 501.

Canada.— Reg. *v.* Ferguson, 16 N. Brunsw. 612.

See 14 Cent. Dig. tit. "Criminal Law," § 928.

32. State *v.* Howard, 82 N. C. 623.

33. *Alabama.*—Burns *v.* State, 49 Ala. 370. But see Addison *v.* State, 48 Ala. 478.

California.— People *v.* Estrado, 49 Cal. 171; People *v.* Farrell, 31 Cal. 576.

Georgia.— Walker *v.* State, 28 Ga. 254.

Indiana.— Morrow *v.* State, 48 Ind. 432; McCulloch *v.* State, 48 Ind. 109.

Louisiana.— State *v.* Travis, 39 La. Ann. 356, 1 So. 817.

Missouri.— State *v.* Napier, 65 Mo. 462; State *v.* Branstetter, 65 Mo. 149.

North Carolina.— State *v.* Patterson, 63 N. C. 520.

Texas.— Shackelford *v.* State, 43 Tex. 138; Lancaster *v.* State, (Cr. App. 1895) 31 S. W. 515; Rogers *v.* State, 26 Tex. App. 404, 9 S. W. 762; Bonnard *v.* State, 25 Tex. App. 173, 7 S. W. 862, 8 Am. St. Rep. 431; Shrivers *v.* State, 7 Tex. App. 450.

Vermont.— State *v.* Mahon, 32 Vt. 241.

34. Sager *v.* State, 11 Tex. App. 110.

35. State *v.* Rutledge, 37 La. Ann. 378; State *v.* Johnson, 35 La. Ann. 968; State *v.* Gunter, 30 La. Ann. 536; Alfred *v.* State, 37 Miss. 296; People *v.* Green, 1 Park. Cr. (N. Y.) 11; Wood *v.* State, 28 Tex. App. 61, 12 S. W. 405.

36. State *v.* Dufour, 31 La. Ann. 804; Nelson *v.* State, 2 Swan (Tenn.) 237; Reg. *v.* Haines, 1 F. & F. 86.

37. See State *v.* Toby, 31 La. Ann. 756.

38. State *v.* Moore, 156 Mo. 204, 56 S. W. 883; Meyers *v.* U. S., 5 Okla. 173, 48 Pac. 186.

39. Oder *v.* Com., 80 Ky. 32.

40. *Alabama.*— Allen *v.* State, 73 Ala. 23; Riddle *v.* State, 49 Ala. 389; Burns *v.* State,

e. Conduct of Accused. The conduct or the appearance of the accused after the crime, so far as it indicates facts which would naturally be expected if he were innocent, is not competent in his favor.[41] He cannot show that he appeared surprised when informed of the murder and astonished when charged with its commission,[42] that he refused to compromise the matter with the prosecuting witness,[43] that his conduct in jail has been exemplary,[44] or that he had refused to escape when at large and when he might easily have done so,[45] or according to some cases that after hearing of the crime he voluntarily surrendered himself to the authorities or offered to surrender himself.[46] Evidence that after a mortal wound was inflicted defendant offered to wait on the dying man[47] or went for a physician[48] is incompetent as self-serving.[49]

f. Denials by Accused. The denial of the accused when questioned that he had made a confession or admission is not competent evidence in his favor.[50]

49 Ala. 370; McLean *v.* State, 16 Ala. 672. *Compare* Addison *v.* State, 48 Ala. 478.

Arkansas.— Atkins *v.* State, 16 Ark. 568.

California.— People *v.* Estrado, 49 Cal. 171; People *v.* Farrell, 31 Cal. 576; People *v.* Strong, 30 Cal. 151.

Georgia.— Walker *v.* State, 28 Ga. 254.

Illinois.— Bennett *v.* People, 96 Ill. 602.

Indiana.— Morrow *v.* State, 48 Ind. 432; Hamilton *v.* State, 36 Ind. 280, 10 Am. Rep. 22.

Kentucky.— Miller *v.* Com., 89 Ky. 653, 10 S. W. 137, 10 Ky. L. Rep. 672.

Louisiana.— State *v.* Rutledge, 37 La. Ann. 378; State *v.* Thomas, 30 La. Ann. 600.

Massachusetts.—Com. *v.* O'Connor, 11 Gray 94; Com. *v.* Robinson, 1 Gray 555.

Missouri.— State *v.* Young, 119 Mo. 495, 24 S. W. 1038; State *v.* Napier, 65 Mo. 462; State *v.* Branstetter, 65 Mo. 149.

New York.—People *v.* De Graff, 6 N. Y. St. 412.

North Carolina.— State *v.* Patterson, 63 N. C. 520.

Texas.— Shackelford *v.* State, 43 Tex. 138; Phillips *v.* State, 19 Tex. App. 158; Sager *v.* State, 11 Tex. App. 110; Shrivers *v.* State, 7 Tex. App. 450.

Vermont.— State *v.* Mahon, 32 Vt. 241.

West Virginia.— State *v.* Abbott, 8 W. Va. 741.

See 14 Cent. Dig. tit. "Criminal Law," §§ 813, 816, 933. See also HOMICIDE and other special titles.

Illustrations.—Thus the defendant has been permitted to explain his presence at the place of the crime by his declarations showing an innocent purpose in going there (State *v.* Young, 119 Mo. 495, 24 S. W. 1038), and to explain his possession of incriminating articles by declarations showing his purpose in purchasing the same, made at the time of the purchase (Com. *v.* O'Connor, 11 Gray (Mass.) 94). See also Com. *v.* Robinson, 1 Gray (Mass.) 555).

Right of accused to introduce entire conversation see *supra*, XII, E, 1, d.

41. Henry *v.* State, 107 Ala. 22, 19 So. 23; Campbell *v.* State, 23 Ala. 44; People *v.* Rathbun, 21 Wend. (N. Y.) 509; Harvey *v.* State, 35 Tex. Cr. 545, 34 S. W. 623.

42. Campbell *v.* State, 23 Ala. 44.

43. Williams *v.* State, 52 Ala. 411.

44. State *v.* Fontenot, 48 La. Ann. 305, 19 So. 111.

45. *Alabama.*— Jordan *v.* State, 81 Ala. 20, 1 So. 577. And see Vaughn *v.* State, 130 Ala. 18, 30 So. 669.

California.—People *v.* Montgomery, 53 Cal. 576.

Massachusetts.— Com. *v.* Hersey, 2 Allen 173.

New York.— People *v.* Rathbun, 21 Wend. 509; Gardiner *v.* People, 6 Park. Cr. 155.

Texas.— Harvey *v.* State, 35 Tex. Cr. 545, 34 S. W. 623.

Vermont.— State *v.* Wilkins, 66 Vt. 1, 28 Atl. 323.

See 14 Cent. Dig. tit. "Criminal Law," § 930.

46. Vaughn *v.* State, 130 Ala. 18, 30 So. 669; Linnehan *v.* State, 120 Ala. 293, 25 So. 6; Dorsey *v.* State, 110 Ala. 38, 20 So. 450; Johnson *v.* State, 94 Ala. 35, 10 So. 667; Jordan *v.* State, 81 Ala. 20, 1 So. 577; State *v.* Moncla, 39 La. Ann. 868, 2 So. 814; State *v.* Taylor, 134 Mo. 109, 35 S. W. 92; State *v.* Smith, 114 Mo. 406, 21 S. W. 827; State *v.* Musick, 101 Mo. 260, 14 S. W. 212; Walker *v.* State, 13 Tex. App. 618. *Contra*, U. S. *v.* Crow, 25 Fed. Cas. No. 14,895, 1 Bond 51, holding that the fact that the accused on learning that he was suspected returned from a great distance and demanded a full investigation was relevant. See also Boston *v.* State, 94 Ga. 590, 21 S. E. 603.

See 14 Cent. Dig. tit. "Criminal Law," § 931.

47. State *v.* Whitson, 111 N. C. 695, 16 S. E. 332.

48. State *v.* Strong, 153 Mo. 548, 55 S. W. 78.

49. See HOMICIDE.

50. Ray *v.* State, 50 Ala. 104. The declarations of a prisoner cannot be proved in his favor, for the purpose of bringing out the reply of the witness to whom they were made, unless they constitute a part of a conversation put in evidence by the state. Campbell *v.* State, 23 Ala. 44. The effect of statements made by a party against his interest cannot be avoided by contradictory statements. U. S. *v.* Gleason, 25 Fed. Cas. No. 15,216, Woolw. 128.

g. Showing Falsity of Statements of Accused. Self-serving statements made by or for the accused out of court, explaining suspicious circumstances, may be proved against him, and their falsity may then be shown. The fact of their falsity admits them as indicating an attempt to explain away incriminating circumstances by falsehoods.[51]

3. Declarations of Person Injured — a. In General. The person injured by the crime, whether alive or dead, is in no sense a party to the prosecution, and his statements and declarations therefore are not evidence either for or against the accused unless made in his presence and not denied by him, or unless they are admissible as part of the *res gestæ*, as dying declarations, or as threats.[52] Such testimony is generally inadmissible as hearsay,[53] although it is sometimes received to confirm[54] or to impeach or contradict the testimony of the person injured.[55] Declarations of the person injured are admissible in evidence if they were so connected with the crime as to constitute part of the *res gestæ*.[56]

51. *Alabama.*— Gilmore *v.* State, 126 Ala. 20, 28 So. 595; Walker *v.* State, 49 Ala. 398.

Colorado.—More *v.* People, 19 Colo. 255, 35 Pac. 179.

Florida.— Smith *v.* State, 29 Fla. 408, 10 So. 894.

Massachusetts.— Com. *v.* Goodwin, 14 Gray 55.

Michigan.—People *v.* Arnold, 43 Mich. 303, 5 N. W. 385, 38 Am. Rep. 182.

Missouri.—State *v.* Robinson, 117 Mo. 649, 23 S. W. 1066.

New Hampshire.— State *v.* Wentworth, 37 N. H. 196.

New York.— People *v.* Wilkinson, 14 N. Y. Suppl. 827.

North Carolina.— State *v.* Bishop, 98 N. C. 773, 4 S. E. 357.

South Carolina.— State *v.* Clark, 4 Strobh. 311.

United States.— Wilson *v.* U. S., 162 U. S. 613, 16 S. Ct. 895, 40 L. ed. 1090.

See 14 Cent. Dig. tit. "Criminal Law," § 935.

52. *Alabama.*— Bolling *v.* State, 98 Ala. 80, 12 So. 782; Dodd *v.* State, 92 Ala. 61, 9 So. 467; Jackson *v.* State, 52 Ala. 305.

California.— People *v.* Shattuck, 109 Cal. 673, 42 Pac. 315.

Colorado.— Graves *v.* State, 18 Colo. 170, 32 Pac. 63.

Indiana.— Shields *v.* State, 149 Ind. 395, 49 N. E. 351; Wheeler *v.* State, 14 Ind. 573.

Iowa.— State *v.* Stubbs, 49 Iowa 203.

Kansas.— State *v.* Newland, 27 Kan. 764.

Massachusetts.— Com. *v.* Sanders, 14 Gray 394, 77 Am. Dec. 335.

Michigan.— People *v.* Elco, (1903) 94 N. W. 1069.

Montana.— State *v.* Judd, 20 Mont. 420, 51 Pac. 1033.

New Jersey.— State *v.* Zellers, 7 N. J. L. 220.

New York.— Davis *v.* People, 2 Thomps. & C. 212; People *v.* Finnegan, 1 Park. Cr. 147.

Ohio.— Benedict *v.* State, 44 Ohio St. 679, 11 N. E. 125.

Oregon.— State *v.* Deal, 41 Oreg. 437, 70 Pac. 532.

Texas.— Catlett *v.* State, (Cr. App. 1901) 61 S. W. 485; McGlasson *v.* State, 38 Tex. Cr. 351, 43 S. W. 93; Gaines *v.* State, (Cr. App. 1896) 37 S. W. 331; Cunningham *v.* State, 27 Tex. App. 479, 11 S. W. 485.

See 14 Cent. Dig. tit. "Criminal Law," § 937. See also Homicide and other special titles.

53. Graves *v.* People, 18 Colo. 170, 32 Pac. 63; Anderson *v.* State, 14 Tex. App. 49; and other cases in the note preceding.

54. State *v.* Byrne, 47 Conn. 465. And see Dunn *v.* State, 45 Ohio St. 249, 12 N. E. 826.

55. *Georgia.*— Belt *v.* State, 103 Ga. 12, 29 S. E. 451.

Illinois.— Austine *v.* People, 110 Ill. 248.

Iowa.— State *v.* Emeigh, 18 Iowa 122.

Louisiana.— State *v.* Maitremme, 14 La. Ann. 830.

Massachusetts.— Com. *v.* Densmore, 12 Allen 535.

Consent of the prosecuting witness.—Where it is necessary to show absence of consent on the part of the person injured at the time of the crime, his or her statements contemporaneous with or subsequent to the crime tending to prove or disprove consent are received. State *v.* Perigo, 80 Iowa 37, 45 N. W. 399; King *v.* Com., 20 S. W. 224, 14 Ky. L. Rep. 254. See Larceny; Rape.

Denial of statement.—If the injured person denies that she made a certain statement which is stated to her in the question, the accused must be permitted to prove the statement which she denies making. Carroll *v.* State, 74 Miss. 688, 22 So. 295, 60 Am. St. Rep. 539.

56. *Alabama.*— Johnson *v.* State, 102 Ala. 1, 16 So. 99; Harris *v.* State, 96 Ala. 24, 11 So. 255; Martin *v.* State, 77 Ala. 1.

Arkansas.— Edmonds *v.* State, 34 Ark. 720.

Colorado.— Solander *v.* People, 2 Colo. 48.

District of Columbia.— Snowden *v.* U. S., 2 App. Cas. 89; U. S. *v.* Nardello, 4 Mackey 503.

Florida.— Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

Georgia.— Von Pollintz *v.* State, 92 Ga. 16, 18 S. E. 301, 44 Am. St. Rep. 72; Wilkerson *v.* State, 91 Ga. 729, 17 S. E. 990, 44 Am. St. Rep. 63; Thomas *v.* State, 67 Ga. 460; John-

b. Persons Incompetent to Testify. The statements of the injured person, although otherwise competent, will be excluded if he is incompetent by reason of infancy or imbecility to testify as a witness.[57]

c. To Show Health or Physical Condition. The statements or representations of the person injured as to his ills, pains, and symptoms, whether arising from disease or from injury by accident or violence, are evidence of his physical condition, although not evidence to charge the accused as the cause thereof.[58] Thus the declarations to a physician of the symptoms and effect of a malady or exclamations of present pain,[59] whether or not made for the purpose of securing medical treatment, have been held admissible.[60]

d. As to Identity of Accused. The declaration of the person injured identifying the accused when brought into his presence is competent,[61] although the accused was then under arrest and handcuffed.[62] But statements made by the injured person to an officer describing or identifying the person who committed

son *v.* State, 65 Ga. 94; McMath *v.* State, 55 Ga. 303; O'Connell *v.* State, 55 Ga. 296.

Illinois.— Bow *v.* People, 160 Ill. 438, 43 N. E. 593; Wilson *v.* People, 94 Ill. 299.

Iowa.— State *v.* Peffers, 80 Iowa 580, 46 N. W. 662; McMurrin *v.* Rigby, 80 Iowa 322, 45 N. W. 877; State *v.* Driscoll, 72 Iowa 583, 34 N. W. 428; State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753.

Kentucky.—Norfleet *v.* Com., 33 S. W. 938, 17 Ky. L. Rep. 1137.

Louisiana.— State *v.* Euzebe, 42 La. Ann. 727, 7 So. 784.

Maine.— State *v.* Wagner, 61 Me. 178.

Massachusetts.— Com. *v.* Hackett, 2 Allen 136; Com. *v.* McPike, 3 Cush. 181, 50 Am. Dec. 727.

Michigan.— People *v.* O'Brien, 92 Mich. 17, 52 N. W. 84; People *v.* Gage, 62 Mich. 271, 28 N. W. 835, 4 Am. St. Rep. 854; People *v.* Brown, 53 Mich. 531, 19 N. W. 172; Driscoll *v.* People, 47 Mich. 413, 11 N. W. 221; Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781.

Minnesota.— State *v.* Horan, 32 Minn. 394, 20 N. W. 905, 50 Am. Rep. 583.

Mississippi.— Brown *v.* State, 72 Miss. 997, 17 So. 278; Gibson *v.* State, (1894) 16 So. 298.

Missouri.— State *v.* Thompson, 132 Mo. 301, 34 S. W. 31; State *v.* David, 131 Mo. 380, 33 S. W. 28; State *v.* Moore, 117 Mo. 395, 22 S. W. 1086; State *v.* Sloan, 47 Mo. 604.

Montana.— State *v.* Biggerstaff, 17 Mont. 510, 43 Pac. 709.

Nevada.— State *v.* Ah Loi, 5 Nev. 99.

North Carolina.— State *v.* Mace, 118 N. C. 1244, 24 S. E. 798.

Ohio.— Dickson *v.* State, 39 Ohio St. 73.

Oregon.— State *v.* Henderson, 24 Oreg. 100, 32 Pac. 1030.

Rhode Island.— State *v.* Murphy, 16 R. I. 528, 17 Atl. 998.

South Carolina.— State *v.* Talbert, 41 S. C. 526, 19 S. E. 852.

Tennessee.— Kirby *v.* State, 7 Yerg. 259.

Texas.— King *v.* State, 34 Tex. Cr. 228, 29 S. W. 1086; Weathersby *v.* State, 29 Tex. App. 278, 15 S. W. 823; Means *v.* State, 10 Tex. App. 16, 38 Am. Rep. 640; Black *v.* State, 8 Tex. App. 329.

Utah.— People *v.* Callaghan, 4 Utah 49, 6 Pac. 49.

Vermont.— State *v.* Howard, 32 Vt. 380, 78 Am. Dec. 609.

Virginia.— Tilley *v.* Com., 89 Va. 136, 15 S. E. 526; Puryear *v.* Com., 83 Va. 51, 1 S. E. 512; Cluverius *v.* Com., 81 Va. 787; Kirby *v.* Com., 77 Va. 681, 46 Am. Rep. 747.

See 14 Cent. Dig. tit. "Criminal Law," §§ 811, 814, 819. See also HOMICIDE and other special titles.

57. *Indiana.*— Weldon *v.* State, 32 Ind. 81.

New York.—People *v.* Quong Kun, 34 N. Y. Suppl. 260; People *v.* McGee, 1 Den. 19.

Ohio.— Hornbeck *v.* State, 35 Ohio St. 277, 35 Am. Rep. 608.

Texas.— Smith *v.* State, 41 Tex. 352.

England.— Reg. *v.* Nicholas, 2 C. & K. 246, 2 Cox C. C. 136, 61 E. C. L. 246; Brazier's Case, 1 East P. C. 443.

See RAPE.

58. People *v.* Williams, 3 Park. Cr. (N. Y.) 84.

59. Johnson *v.* State, 17 Ala. 618; State *v.* Gedicke, 43 N. J. L. 86. *Compare* Smith *v.* State, 53 Ala. 486.

60. *Indiana.*— Rhodes *v.* State, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429.

Maryland.— Hays *v.* State, 40 Md. 633.

Massachusetts.— Com. *v.* Fenno, 134 Mass. 217. But see Com. *v.* Leach, 156 Mass. 99, 30 N. E. 163.

Michigan.— People *v.* Aikin, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512.

New Jersey.— State *v.* Gedicke, 43 N. J. L. 86.

New York.— People *v.* Robinson, 2 Park. Cr. 235.

Oregon.— State *v.* Mackey, 12 Oreg. 154, 6 Pac. 648.

Vermont.— State *v.* Fournier, 68 Vt. 262, 35 Atl. 178; State *v.* Howard, 32 Vt. 380, 78 Am. Dec. 209.

England.— Reg. *v.* Johnson, 2 C. & K. 354, 61 E. C. L. 354.

See 14 Cent. Dig. tit. "Criminal Law," § 940. See also ABORTION, 1 Cyc. 185; HOMICIDE; RAPE.

61. People *v.* Wallin, 55 Mich. 497, 22 N. W. 15.

62. State *v.* Hamilton, 27 La. Ann. 400.

the crime is hearsay, and the officer cannot testify that relying thereon he sought for and arrested the accused.[63]

e. To Show Intent or Purpose of Person Injured. On the question whether the declarations or statements of the person injured are competent to explain his intent in doing some relevant act the cases are irreconcilably at variance. Some hold that where the intent and purpose of the person injured in being present at the place of the crime are relevant, he may prove his declarations made in starting forth or in journeying to such place,[64] while others hold the contrary.[65]

f. Statements Exculpating Accused. The declarations of the person injured, where they are not part of the *res gestæ*, nor dying declarations, are not competent in exculpation of the accused.[66]

g. Declarations in Presence of Accused. The statements and declarations of the person injured made in the presence of the accused, which charge him directly with the crime, or which are in any way relevant to his guilt, and which he failed to deny, are competent evidence against him.[67]

63. Chilton *v.* State, 105 Ala. 98, 16 So. 797; People *v.* McNamara, 94 Cal. 509, 29 Pac. 953; People *v.* Johnson, 91 Cal. 265, 27 Pac. 663; Com. *v.* Fagan, 108 Mass. 471; Mallory *v.* State, 37 Tex. Cr. 482, 36 S. W. 751, 66 Am. St. Rep. 808.

The accused cannot prove statements by the person injured describing one who committed the crime and then show that he does not correspond therewith. People *v.* McCrea, 32 Cal. 98.

The person injured can testify that he described the person committing the crime to others who went in search of him. Rippey *v.* State, 29 Tex. App. 37, 14 S. W. 448.

64. Hunter *v.* State, 40 N. J. L. 495; Black *v.* State, 9 Tex. App. 328; State *v.* Goodrich, 19 Vt. 116, 47 Am. Dec. 676.

65. Kirby *v.* State, 9 Yerg. (Tenn.) 383, 30 Am. Dec. 420; Adams *v.* State, (Tex. Cr. App. 1901) 64 S. W. 1055; Johnson *v.* State, 22 Tex. App. 206, 2 S. W. 609; State *v.* Power, 24 Wash. 34, 63 Pac. 1112. See HOMICIDE.

66. *Alabama.*— Jernigan *v.* State, 81 Ala. 58, 1 So. 72 (holding that the unsworn statements of the injured person are not competent to disprove any fact in the case of the prosecution); Sylvester *v.* State, 71 Ala. 17.

California.—People *v.* McLanghlin, 44 Cal. 435.

Georgia.— Green *v.* State, 112 Ga. 638, 37 S. E. 885 (holding that a statement by the person injured that defendant had no cause to harm him was incompetent); Ratteree *v.* State, 53 Ga. 570; Armistead *v.* State, 18 Ga. 704.

Illinois.— Siebert *v.* People, 143 Ill. 571, 32 N. E. 431 (threats by deceased to commit suicide); Moeck *v.* People, 100 Ill. 242, 39 Am. Rep. 38; Adams *v.* People, 47 Ill. 376.

Indiana.— Stephenson *v.* State, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 261, holding, in a prosecution for homicide, that statements of the deceased that he had assaulted the accused in the first instance were inadmissible.

Iowa.— State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753; State *v.* Delong, 12 Iowa 453. And see State *v.* Emeigh, 18 Iowa 122.

Massachusetts.— See Com. *v.* Nott, 135 Mass. 269.

Minnesota.— State *v.* Shettleworth, 18 Minn. 208.

Missouri.— State *v.* Jackson, 17 Mo. 544, 59 Am. Dec. 281, holding, in a prosecution for assault with intent to murder, that a statement of the person assaulted that he thought another person more to blame than defendant was not admissible.

Texas.—Tomerlin *v.* State, (Cr. App. 1894) 26 S. W. 66, holding, in a prosecution for homicide, that statements of deceased that the shooting was an accident and that he and the prisoner had been good friends were inadmissible.

But see People *v.* Doyle, 58 Hun (N. Y.) 535, 12 N. Y. Suppl. 836 (declarations to show gift of property in prosecution for larceny); People *v.* Gehmele, 1 Sheld. (N. Y.) 251 (holding admissible threats of deceased to commit suicide).

See 14 Cent. Dig. tit. "Criminal Law," § 947. And see HOMICIDE; RAPE; and other special titles.

Insanity.— In a prosecution for homicide the statement of the deceased that defendant was insane is incompetent. People *v.* Schmitt, 106 Cal. 48, 39 Pac. 204; Taylor *v.* State, 83 Ga. 647, 10 S. E. 442; State *v.* Spencer, 21 N. J. L. 196.

67. *Alabama.*—Simmons *v.* State, 129 Ala. 41, 29 So. 929.

California.— People *v.* Piggott, 126 Cal. 509, 59 Pac. 31. See People *v.* Estrado, 49 Cal. 171.

Georgia.— Franklin *v.* State, 69 Ga. 36, 47 Am. Rep. 748.

Indiana.— Hall *v.* State, 132 Ind. 317, 31 N. E. 536.

Iowa.— State *v.* Dillon, 74 Iowa 653, 38 N. W. 525; State *v.* Nash, 7 Iowa 347; State *v.* Gillick, 7 Iowa 287.

Louisiana.— State *v.* Diskin, 34 La. Ann. 919, 44 Am. Rep. 448.

Mississippi.— Kendrick *v.* State, 55 Miss. 436.

Missouri.— State *v.* Devlin, 7 Mo. App. 32.

New York.— People *v.* Meyers, 7 N. Y. St. 217.

h. Dying Declarations. In prosecutions for homicide the dying declarations of the deceased as to any of the circumstances which resulted in his injury are admissible, if made when he was in actual danger of death and when he had given up all hope of recovery;[68] and under some circumstances they are admissible in prosecutions for abortion.[69] As a general rule, however, the dying declarations of the person injured are not admissible in prosecutions for any other offense than homicide, unless made so by statute, or unless they would be competent if the declarant were living.[70]

4. Declarations of Third Persons — a. In General. The conversations and statements of third persons not made in defendant's presence or hearing, and not constituting a part of the *res gestæ*, are not competent either for or against him, but are excluded as hearsay.[71] It is otherwise, however, where such statements are so closely connected with the crime as to constitute part of the *res gestæ*.[72]

b. At Preliminary Examination. It is not error to exclude questions requir-

North Carolina.— State *v.* Finley, 118 N. C. 1161, 24 S. E. 495.

Tennessee.— Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046.

Texas.— Farris *v.* State, (Cr. App. 1900) 56 S. W. 336.

See 14 Cent. Dig. tit. "Criminal Law," § 949. And see Homicide; Rape; and other special titles.

68. See Homicide.

69. See Abortion, 1 Cyc. 185.

70. *Alabama.*— Johnson *v.* State, 50 Ala. 456, holding the dying declarations of a child inadmissible in a prosecution for carnal knowledge or abuse.

Georgia.— Wooten *v.* Wilkins, 39 Ga. 223, 99 Am. Dec. 456.

Massachusetts.— Com. *v.* Homer, 153 Mass. 343, 26 N. E. 872.

New Jersey.— State *v.* Meyer, 64 N. J. L. 382, 45 Atl. 779.

New York.— People *v.* Davis, 56 N. Y. 95; Wilson *v.* Boerem, 15 Johns. 286.

Ohio.— State *v.* Harper, 35 Ohio St. 78, 35 Am. Rep. 596.

Pennsylvania.— Railing *v.* Com., 110 Pa. St. 100, 1 Atl. 314.

England.— Reg. *v.* Hind, Bell C. C. 253, 8 Cox C. C. 300, 6 Jur. N. S. 514, 29 L. J. M. C. 147, 2 L. T. Rep. N. S. 255, 8 Wkly. Rep. 421; Rex *v.* Lloyd, 4 C. & P. 233, 19 E. C. L. 491, prosecution for robbery.

See Abortion, 1 Cyc. 185.

71. *Alabama.*— Carroll *v.* State, 130 Ala. 99, 30 So. 394; Gordon *v.* State, 129 Ala. 113, 30 So. 30; Hays *v.* State, 110 Ala. 60, 20 So. 322; Evans *v.* State, 109 Ala. 11, 19 So. 535; Tolbert *v.* State, 87 Ala. 27, 6 So. 284.

Arkansas.— Hall *v.* State, 64 Ark. 121, 40 S. W. 578.

California.— People *v.* Warren, 134 Cal. 202, 66 Pac. 212; People *v.* Wallace, 89 Cal. 158, 26 Pac. 650; People *v.* Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75; People *v.* Griffin, 52 Cal. 616.

Connecticut.— State *v.* Beaudet, 53 Conn. 536, 4 Atl. 237, 55 Am. Rep. 155.

Georgia.— Miller *v.* State, 97 Ga. 653, 25 S. E. 366.

Indiana.— Good *v.* State, 61 Ind. 69; Binns *v.* State, 57 Ind. 46, 26 Am. Rep. 48.

Kansas.— State *v.* Hewes, 60 Kan. 765, 57 Pac. 959; State *v.* Keefe, 54 Kan. 197, 38 Pac. 302.

Kentucky.— Powers *v.* Com., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 22 Ky. L. Rep. 1807, 53 L. R. A. 245; Howard *v.* Com., 110 Ky. 356, 61 S. W. 756, 22 Ky. L. Rep. 1845; Franklin *v.* Com., 105 Ky. 237, 48 S. W. 986, 20 Ky. L. Rep. 1137; Feltner *v.* Com., 64 S. W. 959, 23 Ky. L. Rep. 1110; Twyman *v.* Com., 33 S. W. 409, 17 Ky. L. Rep. 1038; Sanders *v.* Com., 18 S. W. 528, 13 Ky. L. Rep. 820.

Massachusetts.— Com. *v.* Chance, 174 Mass. 245, 54 N. E. 551, 75 Am. St. Rep. 306; Com. *v.* Tobin, 160 Mass. 156, 35 N. E. 454; Com. *v.* Harwood, 4 Gray 41, 64 Am. Dec. 49.

Michigan.— People *v.* Lyons, 49 Mich. 78, 13 N. W. 365.

Mississippi.— Penn *v.* State, 62 Miss. 450.

Missouri.— State *v.* O'Connor, 105 Mo. 121, 16 S. W. 510; State *v.* Patrick, (1891) 15 S. W. 290; Fanny *v.* State, 6 Mo. 122.

New York.— People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193.

South Carolina.— State *v.* Dukes, 40 S. C. 481, 19 S. E. 134.

Tennessee.— Britton *v.* State, 4 Coldw. 173.

Texas.— McClure *v.* State, (Cr. App. 1899) 53 S. W. 111; Aud *v.* State, 36 Tex. Cr. 76, 35 S. W. 671; Kennedy *v.* State, 19 Tex. App. 618.

Vermont.— State *v.* Totten, 72 Vt. 73, 47 Atl. 105; State *v.* Badger, 69 Vt. 216, 37 Atl. 293.

United States.— U. S. *v.* Burr, 25 Fed. Cas. No. 14,694.

England.— Reg. *v.* Hirst, 18 Cox C. C. 374.

See 14 Cent. Dig. tit. "Criminal Law," § 950. See also Homicide and other special titles.

72. *Alabama.*— Dismukes *v.* State, 83 Ala. 287, 3 So. 671.

Arkansas.—Appleton *v.* State, 61 Ark. 590, 33 S. W. 1066.

California.—People *v.* Murphy, 45 Cal. 137.

District of Columbia.— U. S. *v.* Schneider, 21 D. C. 381.

Georgia.— Johnson *v.* State, 88 Ga. 203, 14 S. E. 208; Barrow *v.* State, 80 Ga. 191, 5 S. E. 64; Kirk *v.* State, 73 Ga. 620.

Illinois.— Lander *v.* People, 104 Ill. 248.

Indiana.— Surber *v.* State, 99 Ind. 71.

ing the witness to repeat his testimony given on the preliminary examination,[73] but if he is permitted to relate detached parts of his testimony then given, the stenographer should be allowed to show all that he said to explain discrepancies.[74]

c. To Prosecuting Officer. A witness should not be permitted to recite a message sent by him to the prosecuting attorney, stating to the latter what the witness would swear to on the trial.[75]

d. Transactions With Accused Relating to Subject of Crime. A statement of a person in whose possession property alleged to have been stolen was found that he received it from defendant is not competent,[76] but on a trial for receiving stolen property defendant may prove the declarations of the person from whom he alleges that he bought it, made at the time, upon the issue of his guilty knowledge, its weight being for the jury.[77]

e. Corroborative Statements. Declarations of a witness out of court are not competent for the purpose of corroborating his testimony,[78] but when they contradict his testimony they may be proved in rebuttal;[79] and a witness may testify to the fact, although not to the language and details, of a conversation which he had out of court with a third person, defendant not being present.[80]

f. Accusations and Expressions of Hostility Toward Accused. A statement by a third person that defendant is guilty is incompetent as being merely an opinion, unless made in his presence and acquiesced in by him.[81] The same rule applies to threats of a mob to lynch the accused,[82] statements or declarations of third persons which show or tend to show their hostility toward him, based upon a belief in his guilt,[83] and to other evidence of declarations which show that third persons believed the accused guilty.[84]

Iowa.— State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590.

Kentucky.— Rapp *v.* Com., 14 B. Mon. 614.

Louisiana.—State *v.* Desroches, 48 La. Ann. 428, 19 So. 250; State *v.* Moore, 38 La. Ann. 66; State *v.* Horton, 33 La. Ann. 289.

Maine.— State *v.* Wagner, 61 Me. 178.

Maryland.— Robinson *v.* State, 57 Md. 14.

Massachusetts.— Com. *v.* Crowley, 165 Mass. 569, 43 N. E. 509.

Michigan.— People *v.* Palmer, 105 Mich. 568, 63 N. W. 656; People *v.* Stanley, 101 Mich. 93, 59 N. W. 498; People *v.* Foley, 64 Mich. 148, 31 N. W. 94.

Missouri.— State *v.* Kaiser, 124 Mo. 651, 28 S. W. 182; State *v.* Duncan, 116 Mo. 288, 22 S. W. 699.

New Jersey.— Castner *v.* Sliker, 33 N. J. L. 95.

Tennessee.— Morton *v.* State, 91 Tenn. 437, 19 S. W. 225.

Texas.— Johnson *v.* State, 30 Tex. App. 419, 17 S. W. 1070, 28 Am. St. Rep. 930; Weathersby *v.* State, 29 Tex. App. 278, 15 S. W. 823; Cook *v.* State, 22 Tex. App. 511, 3 S. W. 749; Washington *v.* State, 19 Tex. App. 521, 53 Am. Rep. 387; Jeffries *v.* State, 9 Tex. App. 598.

Washington.— State *v.* Robinson, 12 Wash. 491, 41 Pac. 884.

United States.— Alexander *v.* U. S., 138 U. S. 353, 11 S. Ct. 350, 34 L. ed. 954.

See 14 Cent. Dig. tit. "Criminal Law," §§ 812, 815, 821. See also HOMICIDE and other special titles.

73. State *v.* Brown, 33 S. C. 151, 11 S. E. 641.

74. Holtz *v.* State, 76 Wis. 99, 44 N. W. 1107.

75. Sanders *v.* State, 105 Ala. 4, 16 So. 935.

76. Harris *v.* State, 73 Ala. 495; Sullivan *v.* People, 6 Colo. App. 458, 41 Pac. 840. See LARCENY.

77. People *v.* Dowling, 84 N. Y. 478 [*overruling* Wills *v.* People, 3 Park. Cr. (N. Y.) 473; People *v.* Rando, 3 Park. Cr. (N. Y.) 335]. See RECEIVING STOLEN GOODS.

78. Childs *v.* State, 55 Ala. 25.

79. State *v.* Porter, 74 Iowa 623, 38 N. W. 514.

Where a witness cannot remember a date, what he said out of court has been received to fix the date. People *v.* Zimmerman, 65 Cal. 307, 4 Pac. 20.

80. Hunt *v.* People, 3 Park. Cr. (N. Y.) 569. *Compare* Griffin *v.* State, 26 Ga. 493; Howser *v.* Com., 51 Pa. St. 332.

Conversations of third persons with the witness out of court are competent to show what it was that called his attention to a fact testified to by the witness. State *v.* Fox, 25 N. J. L. 566.

Where a conversation between the prisoner and a witness is in evidence, another conversation between the witness and a third person rehearsing the first is competent. Griffin *v.* State, 26 Ga. 493.

81. Campbell *v.* State, 30 Tex. App. 645, 18 S. W. 409. See *supra*, XII, E, 1, f.

82. State *v.* Sneed, 88 Mo. 138. And see State *v.* McCoy, 111 Mo. 517, 20 S. W. 240.

83. Barr *v.* People, 113 Ill. 471; Madden *v.* State, 65 Miss. 176, 3 So. 328; State *v.* McCoy, 111 Mo. 517, 20 S. W. 240.

84. Jones *v.* State, 54 Ohio St. 1, 42 N. E. 699; Owen *v.* State, 16 Lea (Tenn.) 1.

g. Plea of Guilty by Third Persons. Where the character of a house is relevant, as under a charge for keeping a disorderly house, it may be shown that inmates of the house had on a prior occasion pleaded guilty.[85]

h. Where Third Person Is Deceased. A declaration or statement by a third person shortly before his death as to the crime charged against the accused is not competent because the witness is deceased. Such statements are not competent as dying declarations.[86]

i. Books and Writings. The mere fact that statements or declarations of third persons are contained in books or written instruments to which the accused is not a party, and which were not brought to his knowledge, does not render the statements or declarations competent against him. They are hearsay evidence and inadmissible, unless they can be brought under some exception to the rule excluding hearsay.[87]

j. Letters Addressed to Accused. Letters written by the person injured or by third persons, addressed to the accused and received by him, but never answered or acted on by him, are not admissible against him unless they are part of the *res gestæ*.[88] Nor is his failure to answer them an admission of the truth of the statements contained in them. In this respect they differ from oral accusations, because otherwise the accused would be at the mercy of any letter writer whose name or address he did not know.[89]

k. By Persons Incompetent to Testify. Declarations and statements made in the presence of the accused are not incompetent because made by persons who are themselves incompetent witnesses.[90]

l. Self-Incriminating Declarations. The declarations of a person other than the accused, confessing that he committed the crime, are not competent for the accused, for, although the latter may exculpate himself by proving if he can that someone with whom he was not connected committed the crime with which he is

85. State *v.* Barnard, 64 Mo. 260.

86. Mora *v.* People, 19 Colo. 255, 35 Pac. 179; Davis *v.* Com., 95 Ky. 19, 23 S. W. 585, 15 Ky. L. Rep. 396, 44 Am. St. Rep. 201; Com. *v.* Densmore, 12 Allen (Mass.) 535; Poteete *v.* State, 9 Baxt. (Tenn.) 261, 40 Am. Rep. 90. And see HOMICIDE.

87. A foreign certificate of the marriage of defendant (People *v.* Imes, 110 Mich. 250, 68 N. W. 157), a ship's manifest containing a description of the accused, furnished by a passenger (U. S. *v.* Wilson, 60 Fed. 890), the log-book of a ship, kept by the master (U. S. *v.* Sharp, 27 Fed. Cas. No. 16,264, Pet. C. C. 118), a report of the condition of a building in process of erection (People *v.* Buddensieck, 4 N. Y. Cr. 230), and a letter written to the complainant by a person who had personal and professional relations with the accused (People *v.* Dorthy, 156 N. Y. 237, 50 N. E. 800) have been rejected. But entries in books kept by clerks under the control of defendant (Wait *v.* Com., 69 S. W. 697, 24 Ky. L. Rep. 604) or in books to which he had complete access (Territory *v.* Meyer, (Ariz. 1890) 24 Pac. 183; Humphrey *v.* People, 18 Hun (N. Y.) 393; State *v.* McCauley, 17 Wash. 88, 49 Pac. 221, 51 Pac. 382); entries made in the books of a public department by a person authorized to do so in performance of his duty (Faust *v.* U. S., 163 U. S. 452, 16 S. Ct. 1112, 41 L. ed. 224) or by a party who has since died, and against his interest (State *v.* Wooderd, 20 Iowa 541) have been accepted under the exceptions to the rule excluding hearsay evidence.

Newspapers containing accounts of a crime and of the arrest of the accused are incompetent. People *v.* Chun Heong, 86 Cal. 329, 24 Pac. 1021; Millirons *v.* State, 34 Tex. Cr. 12, 28 S. W. 685.

88. People *v.* Colburn, 105 Cal. 648, 38 Pac. 1105; People *v.* Fitzgerald, 156 N. Y. 253, 50 N. E. 846; Willett *v.* People, 27 Hun (N. Y.) 469; People *v.* Luke, 9 N. Y. St. 638; People *v.* Green, 1 Park. Cr. (N. Y.) 11; Packer *v.* U. S., 106 Fed. 906, 46 C. C. A. 35.

Where the letter was never received by the accused the rule of course is very much stronger. Com. *v.* Edgerly, 10 Allen (Mass.) 184; Payne *v.* Com., 31 Gratt. (Va.) 855; Rex *v.* Huet, 2 Leach C. C. 956.

89. People *v.* Green, 1 Park. Cr. (N. Y.) 11. If defendant has acted upon the information contained in the letter, or if he has answered it, so much of the letter as prompted his action or received his answer is competent, and where he invited the sending of the letter, it is competent against him. People *v.* Colburn, 105 Cal. 648, 38 Pac. 1105; State *v.* Stair, 87 Mo. 268, 56 Am. Rep. 449. Letters to the accused from persons entirely disconnected with the transaction are not admissible as original evidence in his behalf. State *v.* Crowder, 41 Kan. 101, 21 Pac. 208.

90. Martin *v.* State, 39 Ala. 523; People *v.* McCrea, 32 Cal. 98; Richards *v.* State, 82 Wis. 172, 51 N. W. 652.

charged, he cannot do so by hearsay;[91] and this rule is not changed by the fact that the declarant is dead,[92] or even by the fact that he confessed on his death-bed.[93]

m. Proof of Age. A witness may testify in a criminal prosecution as to his own age, although all the information he may have on that point has been derived from the statements of others;[94] but a third person cannot testify as to defendant's or another's age from information received from persons who are not dead.[95]

n. Warnings. Evidence that someone not connected with the accused warned the injured person that a crime was about to be committed is incompetent.[96] But where, in a prosecution for homicide or assault, the question of premeditation arises, conversations by the accused with third persons are relevant to show the information on which he acted.[97]

F. Acts and Declarations of Conspirators and Co-Defendants — 1. Admissibility in General — a. General Rule. The general rule is that when two or more persons conspire to commit any offense and the conspiracy is proved,[98] everything said, done, or written by one of them is admissible against the others, if it was said, done, or written during the existence of the conspiracy and in the execution or furtherance of the common purpose, but not otherwise.[99] Acts

91. *Alabama.*— Welsh *v.* State, 96 Ala. 92, 11 So. 450; Owensby *v.* State, 82 Ala. 63, 2 So. 764; Alston *v.* State, 63 Ala. 178; Snow *v.* State, 58 Ala. 372; Snow *v.* State, 54 Ala. 138.

Georgia.— Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814; Moughon *v.* State, 57 Ga. 102.

Kansas.— State *v.* Smith, 35 Kan. 618, 11 Pac. 908.

Louisiana.— State *v.* West, 45 La. Ann. 928, 13 So. 173.

Missouri.— State *v.* Hack, 118 Mo. 92, 23 S. W. 1089; State *v.* Duncan, 116 Mo. 288, 22 S. W. 699; State *v.* Evans, 55 Mo. 460; State *v.* Levy, 90 Mo. App. 643.

New York.— People *v.* Schooley, 149 N. Y. 99, 43 N. E. 536; Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636; People *v.* Greenfield, 23 Hun 454.

North Carolina.— State *v.* Gee, 92 N. C. 756; State *v.* Beverly, 88 N. C. 632; State *v.* Baxter, 82 N. C. 602; State *v.* White, 68 N. C. 158; State *v.* Duncan, 28 N. C. 236.

Oregon.— State *v.* Fletcher, 24 Oreg. 295, 33 Pac. 575.

Tennessee.— Peck *v.* State, 86 Tenn. 259, 6 S. W. 389; Rhea *v.* State, 10 Yerg. 258.

Texas.— Horton *v.* State, (Cr. App. 1893) 24 S. W. 28; Holt *v.* State, 9 Tex. App. 571.

United States.—U. S. *v.* McMahon, 26 Fed. Cas. No. 15,699, 4 Cranch C. C. 573; U. S. *v.* Miller, 26 Fed. Cas. No. 15,773, 4 Cranch C. C. 104.

See 14 Cent. Dig. tit. "Criminal Law," § 981. See also Homicide and other special titles.

92. State *v.* West, 45 La. Ann. 14, 12 So. 7.

93. West *v.* State, 76 Ala. 98; Davis *v.* Com., 95 Ky. 19, 23 S. W. 585, 15 Ky. L. Rep. 396, 44 Am. St. Rep. 201.

94. *Alabama.*—Cherry *v.* State, 68 Ala. 29; Bain *v.* State, 61 Ala. 75; Weed *v.* State, 55 Ala. 13.

Arkansas.— Pounders *v.* State, 37 Ark. 399; Edgar *v.* State, 37 Ark. 219.

Massachusetts.—Com. *v.* Phillips, 162 Mass. 504, 39 N. E. 109.

Missouri.— State *v.* Marshall, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63.

Texas.— Reed *v.* State, (Cr. App. 1895) 29 S. W. 1074.

West Virginia.— State *v.* Cain, 9 W. Va. 559.

See 14 Cent. Dig. tit. "Criminal Law," § 978. And see Evidence.

95. State *v.* Parker, 106 N. C. 711, 11 S. E. 517.

96. Hairston *v.* State, (Miss. 1891) 10 So. 479.

97. People *v.* Shea, 8 Cal. 538; Miller *v.* State, 32 Tex. Cr. 319, 20 S. W. 1103.

98. Proof of the conspiracy see *infra*, XII, F, 3.

99. *Alabama.*— Crittenden *v.* State, 134 Ala. 145, 32 So. 273; Stevens *v.* State, 133 Ala. 28, 32 So. 270; McAlpine *v.* State, 117 Ala. 93, 23 So. 130; Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133.

Arkansas.— Bennett *v.* State, 62 Ark. 516, 36 S. W. 947; Casey *v.* State, 37 Ark. 67.

California.— People *v.* Rodley, 131 Cal. 240, 63 Pac. 351; People *v.* Lane, 101 Cal. 513, 36 Pac. 16; People *v.* Collins, 64 Cal. 293, 30 Pac. 847; People *v.* Geiger, 49 Cal. 643.

Colorado.— Solander *v.* People, 2 Colo. 48.

Florida.— Mercer *v.* State, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135.

Georgia.— Green *v.* State, 109 Ga. 536, 35 S. E. 97; Horton *v.* State, 66 Ga. 690.

Idaho.— State *v.* Corcoran, 7 Ida. 220, 61 Pac. 1034.

Illinois.— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Wilson *v.* People, 94 Ill. 299.

Indiana.— Card *v.* State, 109 Ind. 415, 9 N. E. 591; Williams *v.* State, 47 Ind. 568.

Iowa.— State *v.* Lewis, 96 Iowa 286, 65 N. W. 295; State *v.* Stevens, 67 Iowa 557, 25 N. W. 777; State *v.* Hudson, 50 Iowa 157.

Kentucky.— Howard *v.* Com., 110 Ky. 356, 61 S. W. 756, 22 Ky. L. Rep. 1845; Miller *v.* Com., 78 Ky. 15, 39 Am. Rep. 194; Cor-

and declarations done or made before the conspiracy was formed are not competent.[1]

b. Absence of Accused. If a conspiracy is shown to have existed, the objection that the accused was not present when the act or declaration in its furtherance was done or uttered by the co-conspirator is of no force.[2] Where a conspiracy is not shown, however, statements made by one of two joint defendants

nelius *v.* Com., 15 B. Mon. 539; McIntosh *v.* Com., 64 S. W. 951, 23 Ky. L. Rep. 1222.

Louisiana.— State *v.* Banks, 40 La. Ann. 736, 5 So. 18; State *v.* Ford, 37 La. Ann. 443.

Maine.—State *v.* Soper, 16 Me. 293, 33 Am. Dec. 665.

Massachusetts.—Com. *v.* Mulrey, 170 Mass. 103, 49 N. E. 91; Com. *v.* Blood, 141 Mass. 571, 6 N. E. 769; Com. *v.* Ratcliffe, 130 Mass. 36; Com. *v.* Scott, 123 Mass. 222, 25 Am. Rep. 81.

Michigan.— People *v.* Saunders, 25 Mich. 119.

Minnesota.— State *v.* Beebe, 17 Minn. 241.

Mississippi.— Mask *v.* State, 32 Miss. 405.

Missouri.— State *v.* Duffy, 124 Mo. 1, 27 S. W. 358; State *v.* Phillips, 117 Mo. 389, 22 S. W. 1079; State *v.* Minton, 116 Mo. 605, 22 S. W. 808; State *v.* Ross, 29 Mo. 32.

Montana.— State *v.* Stevenson, 26 Mont. 332, 67 Pac. 1001; State *v.* Dotson, 26 Mont. 305, 67 Pac. 938.

New Hampshire.—State *v.* Larkin, 49 N. H. 39.

New Mexico.—Borrego *v.* Territory, 8 N. M. 446, 46 Pac. 349.

New York.— People *v.* Sharp, 45 Hun 460; Farrell *v.* People, 21 Hun 485; People *v.* Kerr, 6 N. Y. Suppl. 674, 6 N. Y. Cr. 406; People *v.* Murphy, 3 N. Y. Cr. 338.

North Carolina.— State *v.* Davis, 87 N. C. 514.

Ohio.— Seville *v.* State, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516; Fouts *v.* State, 7 Ohio St. 471; Corbett *v.* State, 5 Ohio Cir. Ct. 155.

Pennsylvania.— Com. *v.* Bubnis, 197 Pa. St. 542, 47 Atl. 748; Com. *v.* O'Brien, 140 Pa. St. 555, 21 Atl. 385; Kehoe *v.* Com., 85 Pa. St. 127; Com. *v.* Westervelt, 11 Phila. 461.

Tennessee.— Owen *v.* State, 16 Lea 1; Allen *v.* State, 12 Lea 424.

Texas.— Yeary *v.* State, (Cr. App. 1902) 66 S. W. 1106; Hudson *v.* State, (Cr. App. 1902) 66 S. W. 668; Segrest *v.* State, (Cr. App. 1900) 57 S. W. 845; Trevino *v.* State, (Cr. App. 1897) 41 S. W. 609; Mixon *v.* State, 36 Tex. Cr. 66, 35 S. W. 394; Thompson *v.* State, 35 Tex. Cr. 511, 34 S. W. 629; Post *v.* State, 10 Tex. App. 598.

Vermont.— State *v.* Thibeau, 30 Vt. 100.

Virginia.— Sands *v.* Com., 21 Gratt. 871.

Washington.— State *v.* Payne, 10 Wash. 545, 39 Pac. 157.

United States.— Fitzpatrick *v.* U. S., 178 U. S. 304, 20 S. Ct. 944, 44 L. ed. 1078; Wiborg *v.* U. S., 163 U. S. 632, 16 S. Ct. 1127, 41 L. ed. 289; American Fur Co. *v.* U. S., 2 Pet. 358, 7 L. ed. 450; U. S. *v.* Gooding, 12 Wheat. 460, 6 L. ed. 693; U. S. *v.* Cassidy, 67 Fed. 698; U. S. *v.* Lancaster, 44 Fed. 896, 10 L. R. A. 333; U. S. *v.* Babcock, 24 Fed. Cas. No. 14,487, 3 Dill. 581; U. S. *v.* Goldberg, 25 Fed. Cas. No. 15,223, 7 Biss. 175; U. S. *v.* Hamilton, 26 Fed. Cas. No. 15,288; U. S. *v.* Hartwell, 26 Fed. Cas. No. 15,318, 3 Cliff. 221; U. S. *v.* Hertz, 26 Fed. Cas. No. 15,357; U. S. *v.* Hinman, 26 Fed. Cas. No. 15,370, Baldw. 292; U. S. *v.* Stevens, 27 Fed. Cas. No. 16,392, 2 Hask. 164.

England.— Reg. *v.* Blake, 6 Q. B. 126, 8 Jur. 145, 666, 13 L. J. M. C. 131, 51 E. C. L. 126; Hardy's Case, 24 How. St. Tr. 199, 451; Rex *v.* Watson, 2 Stark. 116, 3 E. C. L. 341; Rex *v.* Stone, 1 East P. C. 79, 99, 6 T. R. 527, 3 Rev. Rep. 253.

See 14 Cent. Dig. tit. "Criminal Law," §§ 984, 989. See also *infra*, XII, F, 1, h; and CONSPIRACY, 8 Cyc. 679.

Evidence of passing other counterfeit money admissible.— State *v.* Spalding, 19 Conn. 233, 48 Am. Dec. 158.

1. *Alabama.*— Langford *v.* State, 130 Ala. 74, 30 So. 503.

California.— People *v.* Irwin, 77 Cal. 494, 20 Pac. 56.

Illinois.— Wilson *v.* People, 94 Ill. 299.

Indiana.— Ford *v.* State, 112 Ind. 373, 14 N. E. 241. *Compare* Walton *v.* State, 88 Ind. 9.

Iowa.— State *v.* Grant, 86 Iowa 216, 53 N. W. 120.

Missouri.— State *v.* Moberly, 121 Mo. 604, 26 S. W. 364.

New York.— People *v.* Kief, 126 N. Y. 661, 27 N. E. 556 [*affirming* 58 Hun 337, 11 N. Y. Suppl. 926, 12 N. Y. Suppl. 896].

Texas.— Martin *v.* State, (Cr. App. 1895) 30 S. W. 222; Preston *v.* State, 4 Tex. App. 186.

See 14 Cent. Dig. tit. "Criminal Law," § 989 *et seq.* And see CONSPIRACY, 8 Cyc. 680.

2. *Alabama.*— Bonner *v.* State, 107 Ala. 97, 18 So. 226.

Arkansas.— Fort *v.* State, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163; Lawson *v.* State, 32 Ark. 220.

California.— People *v.* Dixon, 94 Cal. 255, 29 Pac. 504.

Delaware.— State *v.* Clark, 9 Houst. 536, 33 Atl. 310.

Indiana.— Jones *v.* State, 64 Ind. 473; Nevill *v.* State, 60 Ind. 308; Rice *v.* State, 7 Ind. 332.

Kentucky.— Mosley *v.* Com., 72 S. W. 344, 24 Ky. L. Rep. 1811; Allen *v.* Com., 12 S. W. 582, 11 Ky. L. Rep. 555.

Louisiana.— State *v.* Adams, 40 La. Ann. 213, 3 So. 733.

Massachusetts.— Com. *v.* Brown, 14 Gray 419.

Minnesota.— State *v.* Evans, 88 Minn. 262, 92 N. W. 976.

in the absence of the other, while admissible against the person making the same, are not admissible against the other.[3]

c. Threats. Threats by one of several conspirators, if the circumstances bring them within the rule, are received against his co-conspirators.[4]

d. Conspirators Not Indicted or Not on Trial. The declarations and acts of a co-conspirator, which are otherwise competent against the accused, under the general rule, are not inadmissible solely because such co-conspirator has not been indicted,[5] or because, having been indicted jointly with the accused, he is separately tried.[6] The question is, not who has been indicted or who is being tried, but who with a community of purpose participated in the crime.[7]

e. Acts and Declarations Accompanying Crime. The declarations and acts of any participant in a crime, present at its commission, are competent against all then present. It is sometimes intimated that declarations uttered under such circumstances are received against the accused as the statement of a co-conspirator, but the true rule is that these declarations by one are admissible against all under the rule in relation to *res gestæ*.[8]

f. Acts and Declarations of Agents of Conspirators. The acts and declara-

Missouri.— State *v.* Gatlin, 170 Mo. 354, 70 S. W. 885.

North Carolina.— State *v.* Anderson, 92 N. C. 732.

Ohio.— Goins *v.* State, 46 Ohio St. 457, 21 N. E. 476.

Texas.— Rix *v.* State, 33 Tex. Cr. 353, 26 S. W. 505; Williams *v.* State, 24 Tex. App. 17, 5 S. W. 655; Heard *v.* State, 9 Tex. App. 1.

United States.— U. S. *v.* McKee, 26 Fed. Cas. No. 15,686, 3 Dill. 551.

See 14 Cent. Dig. tit. "Criminal Law," § 990. And see CONSPIRACY, 8 Cyc. 679.

A co-conspirator testifying against the others may state a conversation which he had with the person injured previously to the crime and in preparation for it, although in the absence of the others. Com. *v.* Biddle, 200 Pa. St. 640, 50 Atl. 262.

3. Fitzpatrick *v.* U. S., 178 U. S. 304, 20 S. Ct. 944, 44 L. ed. 1078; Sparf *v.* U. S., 156 U. S. 51, 15 S. Ct. 273, 39 L. ed. 343.

4. *Georgia.*—Sanders *v.* State, 113 Ga. 267, 38 S. E. 841.

Illinois.— Gardner *v.* People, 4 Ill. 83.

Indiana.— Voght *v.* State, 145 Ind. 12, 43 N. E. 1049.

Iowa.— State *v.* McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599.

Missouri.— State *v.* Phillips, 117 Mo. 389, 22 S. W. 1079.

North Carolina.— State *v.* Mace, 118 N. C. 1244, 24 S. E. 798.

Texas.— Cline *v.* State, 33 Tex. Cr. 482, 27 S. W. 128; Blain *v.* State, 33 Tex. Cr. 236, 26 S. W. 63; Bell *v.* State, (Cr. App. 1894) 24 S. W. 644; Armstead *v.* State, 22 Tex. App. 51, 2 S. W. 627.

See 14 Cent. Dig. tit. "Criminal Law," § 991. And see HOMICIDE.

Considerable latitude in the evidence connecting the person who utters the threats with the accused as conspirators is allowed from the necessity of the case and because the deeds of violence evidenced by the threats are arranged for with great secrecy. Chadwell *v.* Com., 69 S. W. 1082, 24 Ky. L. Rep. 818; Powers *v.* Com., 61 S. W. 735, 22 Ky. L. Rep. 1807, 53 L. R. A. 245.

5. *Arkansas.*— Gill *v.* State, 59 Ark. 422, 27 S. W. 598.

Connecticut.— State *v.* Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23.

Georgia.— Slaughter *v.* State, 113 Ga. 284, 38 S. E. 854, 84 Am. St. Rep. 242.

Ohio.— State *v.* Jacobs, 10 Ohio S. & C. Pl. Dec. 252, 7 Ohio N. P. 261.

Texas.— San Antonio Gas Co. *v.* State, 22 Tex. Civ. App. 118, 54 S. W. 289; Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746.

United States.— U. S. *v.* Cole, 25 Fed. Cas. No. 14,832, 5 McLean 513.

See 14 Cent. Dig. tit. "Criminal Law," § 993. And see CONSPIRACY, 8 Cyc. 680.

6. *Alabama.*— Blount *v.* State, 49 Ala. 381.

California.—People *v.* Fehrenbach, 102 Cal. 394, 36 Pac. 678; People *v.* Geiger, 49 Cal. 643; People *v.* Trim, 39 Cal. 75.

Illinois.— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

Iowa.— State *v.* Wackernagel, 118 Iowa 12, 91 N. W. 761.

New York.— People *v.* McKane, 80 Hun 322, 30 N. Y. Suppl. 95.

See 14 Cent. Dig. tit. "Criminal Law," § 993.

7. Taylor *v.* State, 3 Tex. App. 169.

8. *Alabama.*— Smith *v.* State, 52 Ala. 407.

Kentucky.— Riggs *v.* Com., 33 S. W. 413, 17 Ky. L. Rep. 1015; Hatfield *v.* Com., 12 S. W. 309, 11 Ky. L. Rep. 468; Morris *v.* Com., 11 S. W. 295, 10 Ky. L. Rep. 1004.

Minnesota.— State *v.* Wilson, 72 Minn. 522, 75 N. W. 715.

Missouri.— State *v.* Duffy, 124 Mo. 1, 27 S. W. 358.

Montana.— Territory *v.* Campbell, 9 Mont. 16, 22 Pac. 121.

New Hampshire.— State *v.* Pike, 51 N. H. 105.

See 14 Cent. Dig. tit. "Criminal Law," § 994.

Riot.— One who participates in and incites a riot as a member of a mob is liable for all

tions of the agents and the employees of one of several conspirators are admissible against all, where such acts and declarations were made during the progress of the conspiracy and in furtherance of its purpose.[9]

g. Acts and Declarations Not in Furtherance of Common Purpose. Only those declarations of a conspirator are binding on his fellows which were made in furtherance of the common design or object of the conspiracy. Declarations and statements uttered during the pendency of the plot, which are only narrative or anticipatory, are inadmissible except as against the declarant or as against a conspirator in whose presence they were made.[10]

h. As Against Persons Subsequently Joining Conspiracy. Where a person enters into a conspiracy after its formation, the acts and declarations of the other conspirators before he entered are admissible against him, where he adopts the conspiracy in its original design and purpose, but if he does not so adopt it they are not admissible against him.[11]

i. Acts and Declarations Before Complete Fulfilment of Purpose. Acts or declarations of conspirators are not always excluded because they were done or made after the commission of the crime. If for any reason, as for escape or concealment, the common purpose continues, declarations in furtherance thereof are admissible, although the crime which was the object of the conspiracy has been consummated.[12]

j. Acts and Declarations Before Dividing or Disposing of Proceeds of Crime. Where the conspiracy has for its purpose not only the commission of a crime, but also a division of the profits or the realization of the benefits which are to result therefrom, as in conspiracy to commit larceny or embezzlement, the declarations

acts committed by any one in the mob present at that time, and the declarations and threats of any one in the mob uttered in his presence are receivable against him. McRae *v.* State, 71 Ga. 96; State *v.* McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599; Gordon's Case, 21 How. St. Tr. 486. See RIOT.

9. State *v.* Grant, 86 Iowa 216, 53 N. W. 120.

10. *Alabama.*— Stewart *v.* State, 26 Ala. 44.

Arkansas.— Bennett *v.* State, 62 Ark. 516, 36 S. W. 947.

California.— People *v.* Stanley, 47 Cal. 113, 17 Am. Rep. 401.

Illinois.— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Samples *v.* People, 121 Ill. 547, 13 N. E. 536.

Iowa.— State *v.* McGee, 81 Iowa 17, 46 N. W. 764.

Mississippi.— Gillum *v.* State, 62 Miss. 547; Browning *v.* State, 30 Miss. 656.

New York.— People *v.* Gorham, 16 Hun 93.

Ohio.— Rufer *v.* State, 25 Ohio St. 464; Clawson *v.* State, 14 Ohio St. 234; Fonts *v.* State, 7 Ohio St. 471; Donald *v.* State, 21 Ohio Cir. Ct. 124, 11 Ohio Cir. Dec. 483.

South Carolina.—State *v.* Simons, 4 Strobh. 266.

Texas.— Woods *v.* State, (Cr. App. 1900) 60 S. W. 244; Wicker *v.* State, 28 Tex. App. 448, 13 S. W. 748; Bookser *v.* State, 26 Tex. App. 593, 10 S. W. 219.

See 14 Cent. Dig. tit. "Criminal Law," § 996. See also *supra*, XII, F, 1, a; and CONSPIRACY, 8 Cyc. 680.

11. *Massachusetts.*— Com. *v.* Rogers, 181 Mass. 184, 63 N. E. 421.

Missouri.— State *v.* Crab, 121 Mo. 554, 26 S. W. 548.

Tennessee.— Owens *v.* State, 16 Lea 1.

Texas.— Stevens *v.* State, 42 Tex. Cr. 154, 59 S. W. 545; Harris *v.* State, 31 Tex. Cr. 411, 20 S. W. 916; Smith *v.* State, 21 Tex. App. 96, 17 S. W. 560; Loggins *v.* State, 8 Tex. App. 434. *Compare* Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746.

Virginia.— Sands *v.* Com., 21 Gratt. 871.

Wisconsin.— Baker *v.* State, 80 Wis. 416, 50 N. W. 518; Holtz *v.* State, 76 Wis. 99, 44 N. W. 1107.

See 14 Cent. Dig. tit. "Criminal Law," § 999. And see CONSPIRACY, 8 Cyc. 681.

12. *California.*— People *v.* Howard, 135 Cal. 266, 67 Pac. 148. *Compare* People *v.* Irwin, 77 Cal. 494, 20 Pac. 56.

Georgia.— Carter *v.* State, 106 Ga. 372, 32 S. E. 345, 71 Am. St. Rep. 262 (holding admissible the acts and declarations of conspirators during the pendency of a common purpose and effort to conceal a crime already perpetrated); Byrd *v.* State, 68 Ga. 661.

Iowa.— State *v.* Soper, 118 Iowa 1, 91 N. W. 774.

Kentucky.— Powers *v.* Com., 70 S. W. 644, 1050, 24 Ky. L. Rep. 1007, 1186.

Massachusetts.— Com. *v.* Smith, 151 Mass. 491, 24 N. E. 677; Com. *v.* Scott, 123 Mass. 222, 25 Am. Rep. 81.

Michigan.— People *v.* Parker, 67 Mich. 222, 34 N. W. 720, 11 Am. St. Rep. 578.

New York.— People *v.* Hall, 51 N. Y. App. Div. 57, 64 N. Y. Suppl. 433, 15 N. Y. Cr. 29.

Texas.— Small *v.* State, (Cr. App. 1897) 40 S. W. 790; Shelton *v.* State, 11 Tex. App. 36.

See 14 Cent. Dig. tit. "Criminal Law," § 1000.

by one conspirator made after the crime but before the subsequent arrangements are complete, are competent as against his co-conspirators.[13]

2. ACTS AND DECLARATIONS MADE AFTER ACCOMPLISHMENT OF OBJECT — a. In General. From what has been said with reference to the necessity of the acts being done or the declarations being made during the pendency of the conspiracy, it follows as a general rule that acts done or confessions or declarations made after the consummation thereof by one conspirator are not competent evidence as against his co-conspirators,[14] except to corroborate or explain other incriminating

13. *Alabama.*— Scott *v.* State, 30 Ala. 503.
Connecticut.—State *v.* Grady, 34 Conn. 118.
Kansas.— State *v.* Cole, 22 Kan. 474.
Massachusetts.— Com. *v.* Smith, 151 Mass. 491, 24 N. E. 677.
Minnesota.— State *v.* Thaden, 43 Minn. 253, 45 N. W. 447.
Missouri.— State *v.* Pratt, 121 Mo. 566, 26 S. W. 556.
Montana.— State *v.* Byers, 16 Mont. 565, 41 Pac. 708.
Pennsylvania.— Com. *v.* Zuern, 16 Pa. Super. Ct. 588.
Texas.— Franks *v.* State, 36 Tex. Cr. 149, 35 S. W. 977; Mixon *v.* State, (Cr. App. 1895) 31 S. W. 408; O'Neal *v.* State, 14 Tex. App. 582.
Wisconsin.— Baker *v.* State, 80 Wis. 416, 50 N. W. 518.
See 14 Cent. Dig. tit. "Criminal Law," § 1001.

14. *Alabama.*— James *v.* State, 115 Ala. 83, 22 So. 565; Everage *v.* State, 113 Ala. 102, 21 So. 404; Gore *v.* State, 58 Ala. 391.
Arkansas.— Rowland *v.* State, 45 Ark. 132.
California.— People *v.* Opie, 123 Cal. 294, 55 Pac. 989; People *v.* Collum, 122 Cal. 186, 54 Pac. 589; People *v.* Oldham, 111 Cal. 648, 44 Pac. 312; People *v.* Brady, (1894) 36 Pac. 949; People *v.* Dilwood, 94 Cal. 89, 29 Pac. 420; People *v.* Aleck, 61 Cal. 137; People *v.* English, 52 Cal. 212.
Colorado.— Wisdom *v.* People, 11 Colo. 170, 17 Pac. 519.
Georgia.— Howard *v.* State, 109 Ga. 137, 34 S. E. 330; Collins *v.* State, 88 Ga. 347, 14 S. E. 474.
Hawaii.— Rex *v.* Marks, 1 Hawaii 81.
Indiana.— O'Neil *v.* State, 42 Ind. 346; Reilley *v.* State, 14 Ind. 217.
Iowa.— State *v.* Phillips, 118 Iowa 660, 92 N. W. 876; State *v.* Penney, 113 Iowa 691, 84 N. W. 509; State *v.* Grant, 86 Iowa 216, 53 N. W. 120; State *v.* Struble, 71 Iowa 11, 32 N. W. 1; State *v.* Green, 20 Iowa 424.
Kansas.— State *v.* Young, 55 Kan. 349, 40 Pac. 659; State *v.* Rogers, 54 Kan. 683, 39 Pac. 219; State *v.* Bogue, 52 Kan. 79, 34 Pac. 410; State *v.* Johnson, 40 Kan. 266, 19 Pac. 749.
Kentucky.— Shelby *v.* Com., 91 Ky. 563, 16 S. W. 461, 13 Ky. L. Rep. 178; Miller *v.* Com., 78 Ky. 15, 39 Am. Rep. 194; Porter *v.* Com., 61 S. W. 16, 22 Ky. L. Rep. 1657; Twyman *v.* Com., 33 S. W. 409, 17 Ky. L. Rep. 1038; Lewis *v.* Com., 11 S. W. 27, 10 Ky. L. Rep. 893, 895; Cloud *v.* Com., 7 Ky. L. Rep. 818.
Louisiana.— State *v.* Sims, 106 La. 453, 31 So. 71; State *v.* Buchanan, 35 La. Ann. 89; State *v.* Carroll, 31 La. Ann. 860.
Minnesota.— State *v.* Palmer, 79 Minn. 428, 82 N. W. 685.
Mississippi.— Grogan *v.* State, 63 Miss. 147; Simmons *v.* State, 61 Miss. 243; Lynes *v.* State, 36 Miss. 617.
Missouri.— State *v.* Schaeffer, 172 Mo. 335, 72 S. W. 518; State *v.* Kennedy, 154 Mo. 268, 55 S. W. 293; State *v.* Beaucleigh, 92 Mo. 490, 4 S. W. 666; State *v.* McGraw, 87 Mo. 161; State *v.* Barham, 82 Mo. 67; State *v.* Ross, 29 Mo. 32.
Montana.— State *v.* English, 14 Mont. 399, 36 Pac. 815.
Nebraska.— Priest *v.* State, 10 Nebr. 393, 6 N. W. 468.
Nevada.— State *v.* Soule, 14 Nev. 453; State *v.* Ah Tom, 8 Nev. 213.
New Hampshire.—State *v.* Larkin, 49 N. H. 39.
New York.— People *v.* Kief, 126 N. Y. 661, 27 N. E. 556; People *v.* Murphy, 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661; People *v.* Davis, 56 N. Y. 95; People *v.* Kief, 58 Hun 337, 11 N. Y. Suppl. 926, 12 N. Y. Suppl. 896; Stone *v.* People, 13 Hun 263.
North Carolina.— State *v.* Earwood, 75 N. C. 210; State *v.* Dean, 35 N. C. 63.
Ohio.— Dilcher *v.* State, 42 Ohio St. 173; Sharpe *v.* State, 29 Ohio St. 263; Griffin *v.* State, 14 Ohio St. 55; Aidt *v.* State, 2 Ohio Cir. Ct. 18.
Oregon.— State *v.* Hinkle, 33 Oreg. 93, 54 Pac. 155.
Pennsylvania.— Heine *v.* Com., 91 Pa. St. 145; Com. *v.* Zuern, 16 Pa. Super. Ct. 588; Com. *v.* Kirkpatrick, 15 Leg. Int. 268.
South Carolina.— State *v.* Green, 40 S. C. 328, 18 S. E. 933, 42 Am. St. Rep. 872; State *v.* Anderson, 24 S. C. 109; State *v.* Dodson, 14 S. C. 628; State *v.* Boise, 1 McMull. 191.
Tennessee.— Owen *v.* State, 16 Lea 1; Snowden *v.* State, 7 Baxt. 482; Riggs *v.* State, 6 Coldw. 517; Strady *v.* State, 5 Coldw. 300.
Texas.— Steed *v.* State, 43 Tex. Cr. 567, 67 S. W. 328; Faulkner *v.* State, 43 Tex. Cr. 311, 65 S. W. 1093; Ezell *v.* State, (Cr. App. 1901) 65 S. W. 370; McKenzie *v.* State, (Cr. App. 1898) 44 S. W. 166; Dawson *v.* State, 38 Tex. Cr. 9, 40 S. W. 731; Price *v.* State, (Cr. App. 1897) 40 S. W. 596; Schwen *v.* State, 37 Tex. Cr. 368, 35 S. W. 172; Avery *v.* State, 10 Tex. App. 199.
Utah.— People *v.* Farrell, 11 Utah 414, 40 Pac. 703.
Vermont.— State *v.* Fuller, 39 Vt. 74; State *v.* Thibeau, 30 Vt. 100.

evidence, as where the latter have made statements which could only be true upon the theory that the declarations or confessions are true.[15]

b. In Presence of Co-Conspirator. Statements and declarations by one conspirator, however, although made after the consummation of the conspiracy or the commission of the crime, are competent against the other where they were uttered in his presence and he by implication or otherwise assented thereto.[16] But the circumstances must have been such as to call for a denial by the accused and to give him an opportunity to make it.[17]

c. Confessions of Co-Defendants. While confessions or admissions of guilt made by one of several persons who are jointly indicted and tried for an offense are admissible against him, they are not admissible against his co-defendants, unless made in their presence and assented to by them.[18]

d. Dying Declaration. The dying confession of an accomplice is incompetent

Virginia.— Oliver *v.* Com., 77 Va. 590; Hunter *v.* Com., 7 Gratt. 641, 56 Am. Dec. 121.

United States.— Brown *v.* U. S., 150 U. S. 93, 14 S. Ct. 37, 37 L. ed. 1010; *In re* Martin, 16 Fed. Cas. No. 9,151, 5 Blatchf. 303; U. S. *v.* Hamilton, 26 Fed. Cas. No. 15,288; U. S. *v.* White, 28 Fed. Cas. No. 16,675, 5 Cranch C. C. 38.

England.— Rex *v.* Turner, 1 Moody C. C. 347.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1002, 1004. And see CONSPIRACY, 8 Cyc. 680.

Letters written by a conspirator after the crime are not competent. U. S. *v.* Gardiner, 25 Fed. Cas. No. 15,186*a*, 2 Hayw. & H. 89.

The declarations and admissions of an alleged principal, uttered after the commission of the crime, are inadmissible against an accessary before the fact. Howard *v.* State, 109 Ga. 137, 34 S. E. 330. See also Gill *v.* State, 59 Ark. 422, 27 S. W. 598; State *v.* Newport, 4 Harr. (Del.) 567; Simms *v.* State, 10 Tex. App. 131; U. S. *v.* Hartwell, 26 Fed. Cas. No. 15,318, 3 Cliff. 221.

15. *Alabama.*— Levison *v.* State, 54 Ala. 520.

Iowa.— State *v.* Knight, 19 Iowa 94.

Kentucky.— Armstrong *v.* Com., 29 S. W. 342, 16 Ky. L. Rep. 494.

South Carolina.— State *v.* Ford, 3 Strobh. 517 note.

United States.— U. S. *v.* Harries, 26 Fed. Cas. No. 15,309, 2 Bond 311.

16. *Alabama.*— Scott *v.* State, 30 Ala. 503.

California.— People *v.* Mallon, 103 Cal. 513, 37 Pac. 512 [*distinguishing* People v. Ah Yute, 54 Cal. 89]; People *v.* Estrado, 49 Cal. 171; People *v.* Cotta, 49 Cal. 166.

Florida.— Anthony *v.* State, (1902) 32 So. 818.

Georgia.— Davis *v.* State, 114 Ga. 104, 39 S. E. 906.

Illinois.— Gilman *v.* People, 178 Ill. 19, 52 N. E. 967.

Indiana.— Conway *v.* State, 118 Ind. 482, 21 N. E. 285.

Iowa.— State *v.* McIntosh, 109 Iowa 209, 80 N. W. 349; State *v.* Bowers, 17 Iowa 46.

Kansas.— State *v.* Flowers, 58 Kan. 702, 50 Pac. 938.

Massachusetts.— Com. *v.* Call, 21 Pick. 515.

Michigan.— People *v.* Dow, 64 Mich. 717, 31 N. W. 597, 8 Am. St. Rep. 873.

Mississippi.— Mask *v.* State, 32 Miss. 405.

Missouri.— State *v.* Walker, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133.

New York.— McGuire *v.* People, 3 Hun 213, 5 Thomps. & C. 682.

Ohio.— Murphy *v.* State, 36 Ohio St. 628.

Tennessee.— Green *v.* State, 97 Tenn. 50, 36 S. W. 700; Deathridge *v.* State, 1 Sneed 75.

Texas.— Holden *v.* State, 18 Tex. App. 91; Allen *v.* State, 8 Tex. App. 360.

Vermont.— State *v.* Wilkins, 66 Vt. 1, 28 Atl. 323.

See 14 Cent. Dig. tit. "Criminal Law," § 1003. And see *supra*, XII, E, 1, f.

17. Bell *v.* State, 93 Ga. 557, 19 S. E. 244; People *v.* Willett, 92 N. Y. 29. See *supra*, XII, E, 1, f, (III).

18. *Alabama.*— Rowland *v.* State, 55 Ala. 210. And see Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133.

Delaware.— State *v.* Jones, 1 Houst. Cr. 317.

Florida.— Jenkins *v.* State, 35 Fla. 737, 18 So. 182, 48 Am. St. Rep. 267; Anderson *v.* State, 24 Fla. 139, 3 So. 884.

Illinois.— Ackerson *v.* People, 124 Ill. 563, 16 N. E. 847; Smith *v.* People, 115 Ill. 17, 3 N. E. 733.

Iowa.— State *v.* Wolf, 112 Iowa 458, 84 N. W. 536; State *v.* Miller, 81 Iowa 72, 46 N. W. 751.

Kentucky.— Lunsford *v.* Com., 63 S. W. 781, 23 Ky. L. Rep. 709; Frost *v.* Com., 9 B. Mon. 362; Cable *v.* Com., 20 S. W. 220, 14 Ky. L. Rep. 253.

Louisiana.— State *v.* Robinson, 52 La. Ann. 616, 27 So. 124; State *v.* Reed, 49 La. Ann. 704, 21 So. 732; State *v.* Thibodeaux, 48 La. Ann. 600, 19 So. 680; State *v.* Johnson, 47 La. Ann. 1225, 17 So. 789.

Massachusetts.— Com. *v.* Rogers, 181 Mass. 184, 63 N. E. 421; Com. *v.* Mullen, 150 Mass. 394, 23 N. E. 51; Com. *v.* Keating, 133 Mass. 572; Com. *v.* Ingraham, 7 Gray 46; Com. *v.* Briggs, 5 Pick. 429.

Michigan.— People *v.* Mannausau, 60 Mich. 15, 26 N. W. 797; People *v.* Stevens, 47 Mich. 411, 11 N. W. 220.

Missouri.— State *v.* Minton, 116 Mo. 605, 22 S. W. 808; State *v.* Hildebrand, 105 Mo.

against the accused, inasmuch as dying declarations are admissible only where the death of the declarant is the subject of the trial.[19]

e. Acts or Declarations Forming Part of Res Gestæ. Acts done and declarations made by one conspirator after the commission of a crime are admissible against his co-conspirators where they are so connected with the crime as to constitute a part of the *res gestæ*.[20]

f. Possession of Articles Tending to Identify. While declarations and acts of one conspirator made after the commission of the crime are excluded as against co-conspirators, evidence of the finding of the fruits of the crime in the possession of one of the conspirators,[21] or evidence that the accused when arrested had in his possession property proved to have been in the possession of an accomplice or co-conspirator at the time of the crime,[22] is competent.

g. Flight or Escape of Co-Conspirator. Evidence that an accomplice or co-conspirator has fled or escaped since the commission of the crime is not admissible against the accused.[23]

h. Declarations of Co-Defendant Inadmissible For Accused. As a general rule, the declarations of one of several persons, who are tried for the same offense, whether inculpating the declarant or exculpating the other defendant, are not competent in favor of the latter.[24] This rule does not apply, however, when

318, 16 S. W. 948; State *v.* McKinzie, 102 Mo. 620, 15 S. W. 149; State *v.* Melrose, 98 Mo. 594, 12 S. W. 250; State *v.* Talbott, 73 Mo. 347.

Nebraska.— Dutcher *v.* State, 16 Nebr. 30, 19 N. W. 612.

Nevada.— State *v.* McLane, 15 Nev. 345.

North Carolina.— State *v.* Stanton, 118 N. C. 1182, 24 S. E. 536; State *v.* Oxendine, 107 N. C. 783, 12 S. E. 573; State *v.* Brite, 73 N. C. 26.

Pennsylvania.— Fife *v.* Com., 29 Pa. St. 429.

South Carolina.— State *v.* Mitchell, 49 S. C. 410, 27 S. E. 424; State *v.* Dodson, 16 S. C. 453; State *v.* Workman, 15 S. C. 540.

Tennessee.— Givens *v.* State, 103 Tenn. 648, 55 S. W. 1107.

Texas.— Cleavinger *v.* State, 43 Tex. Cr. 273, 65 S. W. 89; Thomas *v.* State, 43 Tex. Cr. 20, 62 S. W. 919; McHenry *v.* State, 42 Tex. Cr. 542, 61 S. W. 311; Short *v.* State, (Cr. App. 1901) 61 S. W. 305; Pryor *v.* State, 40 Tex. Cr. 643, 51 S. W. 375; Wright *v.* State, 37 Tex. Cr. 627, 40 S. W. 491; Conde *v.* State, 35 Tex. Cr. 98, 34 S. W. 286, 60 Am. St. Rep. 22 [*overruling* 33 Tex. Cr. 10, 24 S. W. 415]; Perigo *v.* State, 25 Tex. App. 533, 8 S. W. 660.

Virginia.— Jones *v.* Com., 31 Gratt. 836.

Washington.— State *v.* Tommy, 19 Wash. 270, 53 Pac. 157; State *v.* McCullum, 18 Wash. 394, 51 Pac. 1044; State *v.* Coss, 12 Wash. 673, 42 Pac. 127.

Wisconsin.— Kollock *v.* State, 88 Wis. 663, 60 N. W. 817.

See 14 Cent. Dig. tit. "Criminal Law," § 1005.

19. People *v.* Hall, 94 Cal. 595, 30 Pac. 7. And see *supra*, XII, E, 4, h.

20. *Connecticut.*—State *v.* Shields, 45 Conn. 256.

Iowa.— State *v.* Mushrush, 97 Iowa 444, 66 N. W. 746; State *v.* Struble, 71 Iowa 11, 32 N. W. 1.

Michigan.— People *v.* Cleveland, 107 Mich. 367, 65 N. W. 216.

Texas.— Pace *v.* State, (Cr. App. 1892) 20 S. W. 762; Phelps *v.* State, 15 Tex. App. 45.

Wisconsin.— Ryan *v.* State, 83 Wis. 486, 53 N. W. 836.

See 14 Cent. Dig. tit. "Criminal Law," § 1007. And see *supra*, XII, E, 4, a.

Evidence held inadmissible as res gestæ.— People *v.* Newton, 96 Mich. 586, 56 N. W. 69; Riggs *v.* State, 6 Coldw. (Tenn.) 517.

21. Gregg *v.* State, (Tex. App. 1889) 12 S. W. 732; Clark *v.* State, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817.

22. State *v.* Wilson, 72 Minn. 522, 75 N. W. 715.

Foot-tracks.— Angley *v.* State, 35 Tex. Cr. 427, 34 S. W. 116.

23. *California.*— People *v.* Stanley, 47 Cal. 113, 17 Am. Rep. 401.

Kentucky.— Mullins *v.* Com., 3 Ky. L. Rep. 686.

Missouri.— State *v.* Barham, 82 Mo. 67.

New York.— People *v.* Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851 [*reversing* 45 Hun 460].

Texas.— Landers *v.* State, (Cr. App. 1901) 63 S. W. 557; McKenzie *v.* State, 32 Tex. Cr. 568, 25 S. W. 426, 40 Am. St. Rep. 795.

See 14 Cent. Dig. tit. "Criminal Law," § 1009.

Attempt to escape.—Where the accused and two others are jointly indicted, it is error to admit evidence showing that the others had endeavored to break jail, if the accused took no part therein. State *v.* Weaver, 165 Mo. 1, 65 S. W. 308, 88 Am. St. Rep. 406.

24. *Georgia.*— Robison *v.* State, 114 Ga. 445, 40 S. E. 253; Kelly *v.* State, 82 Ga. 441, 9 S. E. 171; Lyon *v.* State, 22 Ga. 399.

Illinois.— Crosby *v.* People, 137 Ill. 325, 27 N. E. 49.

Kansas.— State *v.* Hendricks, 32 Kan. 559, 4 Pac. 1050.

such declarations are a part of the *res gestæ*, for in such a case they are admissible on that ground.[25]

3. PROOF OF THE CONSPIRACY — a. Necessity For. The combination or conspiracy must be established *prima facie*, at least, by evidence *aliunde* in order that acts, statements, or confessions of one alleged conspirator can be proved against the other, and if no combination or conspiracy is proved it is error to admit such evidence.[26] If a conspiracy is not established the declaration is competent only against the declarant,[27] unless the accused was present and acquiesced therein.[28]

b. Order of Proof. While the general rule is that the existence of a conspiracy must be proved to the satisfaction of the court before the declarations or acts are

Kentucky.— See Pearce *v.* Com., 8 S. W. 893, 10 Ky. L. Rep. 178.

Missouri.— State *v.* Martin, 124 Mo. 514, 28 S. W. 12.

Pennsylvania.— Respublica *v.* Langcake, 1 Yeates 415.

Tennessee.— Sible *v.* State, 3 Heisk. 137.

Texas.— Bailey *v.* State, 42 Tex. Cr. 289, 59 S. W. 900; Thompson *v.* State, 35 Tex. Cr. 511, 34 S. W. 629; Cooper *v.* State, 29 Tex. App. 8, 13 S. W. 1011, 25 Am. St. Rep. 712.

United States.— U. S. *v.* Douglass, 25 Fed. Cas. No. 14,989, 2 Blatchf. 207.

See 14 Cent. Dig. tit. "Criminal Law," § 1010.

25. Wright *v.* State, 10 Tex. App. 476.

26. *Alabama.*— Turner *v.* State, 124 Ala. 59, 27 So. 272; Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133.

Arizona.— Territory *v.* Turner, (1894) 37 Pac. 368.

Arkansas.— Gill *v.* State, 59 Ark. 422, 27 S. W. 598; Rowland *v.* State, 45 Ark. 132; Casey *v.* State, 37 Ark. 67.

California.— People *v.* Kelly, 133 Cal. 1, 64 Pac. 1091; People *v.* Dixon, 94 Cal. 255, 29 Pac. 504.

Delaware.— State *v.* Clark, 9 Houst. 536, 33 Atl. 310.

District of Columbia.— U. S. *v.* Gunnell, 5 Mackey 196.

Georgia.— Horton *v.* State, 66 Ga. 690.

Illinois.— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

Indiana.— Belcher *v.* State, 125 Ind. 419, 25 N. E. 545; Walls *v.* State, 125 Ind. 400, 25 N. E. 457; Card *v.* State, 109 Ind. 415, 9 N. E. 591.

Iowa.— State *v.* Dunn, 116 Iowa 219, 89 N. W. 984; State *v.* Nash, 7 Iowa 347.

Kansas.— See State *v.* Peterson, 38 Kan. 204, 16 Pac. 263.

Kentucky.— Pedigo *v.* Com., 103 Ky. 41, 44 S. W. 143, 19 Ky. L. Rep. 1723, 82 Am. St. Rep. 566, 42 L. R. A. 432; Jones *v.* Com., 2 Duv. 554; Cornelius *v.* Com., 15 B. Mon. 539; Poff *v.* Com., 25 S. W. 883, 15 Ky. L. Rep. 820; McGraw *v.* Com., 20 S. W. 279, 14 Ky. L. Rep. 344; Bowling *v.* Com., 3 Ky. L. Rep. 610.

Louisiana.— State *v.* Banks, 40 La. Ann. 736, 5 So. 18; State *v.* Ford, 37 La. Ann. 443.

Massachusetts.— Com. *v.* Devaney, 182 Mass. 33, 64 N. E. 402; Com. *v.* Ratcliffe, 130 Mass. 36; Com. *v.* Waterman, 122 Mass. 43.

Michigan.— Hamilton *v.* People, 29 Mich. 195; People *v.* Saunders, 25 Mich. 119.

Minnesota.— State *v.* Beebe. 17 Minn. 241.

Mississippi.— Garrard *v.* State, 50 Miss. 147; Street *v.* State, 43 Miss. 1.

Missouri.— State *v.* Weaver, 165 Mo. 1, 65 S. W. 308, 88 Am. St. Rep. 406; State *v.* May, 142 Mo. 135, 43 S. W. 637; State *v.* Daubert, 42 Mo. 242.

Nevada.— State *v.* McNamara, 3 Nev. 70.

New York.— People *v.* Van Tassel. 156 N. Y. 561, 51 N. E. 274; People *v.* Willis, 24 Misc. 537, 54 N. Y. Suppl. 129.

North Carolina.— State *v.* George, 29 N. C. 321; State *v.* Poll, 8 N. C. 442, 9 Am. Dec. 655.

Ohio.— Goins *v.* State, 46 Ohio St. 457, 21 N. E. 476; Limerick *v.* State, 14 Ohio Cir. Ct. 207, 7 Ohio Cir. Dec. 664.

Pennsylvania.— Holton *v.* New Castle Northern R. Co., 8 Pa. Co. Ct. 430; Com. *v.* Kirkpatrick, 15 Leg. Int. 268.

Rhode Island.— State *v.* Gordon, 1 R. I. 179.

South Carolina.— State *v.* Ford, 3 Strobh. 517 note.

Tennessee.— Owen *v.* State, 16 Lea 1.

Texas.— Wright *v.* State, 43 Tex. 170; Nelson *v.* State, 43 Tex. Cr. 553, 67 S. W. 320; Wicks *v.* State, 28 Tex. App. 448, 13 S. W. 748; Martin *v.* State, 25 Tex. App. 557, 8 S. W. 682; Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746.

Vermont.— State *v.* Thibeau, 30 Vt. 100.

Virginia.— Williamson *v.* Com., 4 Gratt. 547.

West Virginia.— State *v.* Cain, 20 W. Va. 679; Carskadon *v.* Williams. 7 W. Va. 1.

See 14 Cent. Dig. tit. "Criminal Law," § 1012. And see CONSPIRACY, 8 Cyc. 682.

27. State *v.* Williams, 129 N. C. 581, 40 S. E. 84; and other cases cited in the note preceding.

28. Rhodes *v.* State, 39 Tex. Cr. 332, 45 S. W. 1009.

Detective.— When a witness has been engaged as a detective, it is error to put in evidence his statement to others as those of a co-conspirator. State *v.* Kilburn, 16 Utah 187, 52 Pac. 277.

admitted in evidence,[29] yet many cases hold that the order of proof is discretionary with the court, and that under particular circumstances the acts and declarations may be admitted before the conspiracy is sufficiently proved.[30] This course is especially proper in a case where the establishing of the conspiracy depends upon proving a large number of facts, or upon circumstantial evidence, where it is inferred from numerous apparently independent facts and circumstances.[31] The prosecution ought to be required to promise to introduce evidence to connect the accused with the conspiracy,[32] and the right to admit evidence out of the regular order should be exercised with great caution.[33] The jury ought to be directed to disregard such acts and declarations unless the prosecution shall subsequently prove a conspiracy.[34]

c. Competency — (1) *In General.* Direct and positive evidence is not essential to prove the conspiracy. Its existence may be and usually must be inferred from facts and circumstances, including the acts and relations of the parties, which indicate that they are merely parts of some complete whole, and that a common plan or conspiracy exists.[35]

29. *Alabama.*— Amos *v.* State, 96 Ala. 120, 11 So. 424.

Arkansas.— Casey *v.* State, 37 Ark. 67.

Georgia.— Horton *v.* State, 66 Ga. 690.

Indiana.— Belcher *v.* State, 125 Ind. 419, 25 N. E. 545; Ford *v.* State, 112 Ind. 373, 14 N. E. 241; Card *v.* State, 109 Ind. 415, 9 N. E. 591.

Kentucky.— McGraw *v.* Com., 20 S. W. 279, 14 Ky. L. Rep. 344.

Ohio.— Tarbox *v.* State, 38 Ohio St. 581.

See 14 Cent. Dig. tit. "Criminal Law," § 1012 *et seq.* And see CONSPIRACY, 8 Cyc. 682.

30. *Arkansas.*— Lawson *v.* State, 32 Ark. 220.

California.— People *v.* Daniels, 105 Cal. 262, 38 Pac. 720.

Illinois.— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

Iowa.— State *v.* McGee, 81 Iowa 17, 46 N. W. 764.

Massachusetts.— Com. *v.* Rogers, 181 Mass. 184, 63 N. E. 421; Com. *v.* Waterman, 122 Mass. 43.

Mississippi.— Browning *v.* State, 30 Miss. 656.

Missouri.— State *v.* Flanders, 118 Mo. 227, 23 S. W. 1086; State *v.* Nell, 79 Mo. App. 243.

Nevada.— State *v.* Ward, 19 Nev. 297, 10 Pac. 133.

New York.— People *v.* McKane, 80 Hun 322, 30 N. Y. Suppl. 95.

South Carolina.— State *v.* Cardoza, 11 S. C. 195.

Texas.— Smith *v.* State, 21 Tex. App. 107, 17 S. W. 552; Avery *v.* State, 10 Tex. App. 199; Baker *v.* State, 7 Tex. App. 612; Myers *v.* State, 6 Tex. App. 1.

West Virginia.— State *v.* Prater, 52 W. Va. 132, 43 S. E. 230; State *v.* Cain, 20 W. Va. 679.

Wyoming.— Haines *v.* Territory, 3 Wyo. 167, 13 Pac. 8.

See 14 Cent. Dig. tit. "Criminal Law," § 1013. And see CONSPIRACY, 8 Cyc. 682.

31. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; State *v.* Winner, 17 Kan. 298; State *v.* Bolden, 109 La. 484, 33 So. 571.

32. State *v.* Grant, 86 Iowa 216, 53 N. W. 120.

33. State *v.* Daubert, 42 Mo. 239.

34. Loggins *v.* State, 12 Tex. App. 65.

35. *Alabama.*— Hunter *v.* State, 112 Ala. 77, 21 So. 65.

Georgia.— Fisher *v.* State, 73 Ga. 595.

Illinois.— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

Indiana.— McKee *v.* State, 111 Ind. 378, 12 N. E. 510.

Michigan.— People *v.* Pitcher, 15 Mich. 397.

Mississippi.— Street *v.* State, 43 Miss. 1.

Missouri.— State *v.* Walker, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133.

New Mexico.— Territory *v.* De Gutman, 8 N. M. 92, 42 Pac. 68.

New York.— Kelley *v.* People, 55 N. Y. 565, 14 Am. Rep. 342.

North Carolina.— State *v.* Anderson, 92 N. C. 732.

Pennsylvania.— Com. *v.* Shaub, 5 Lanc. Bar 121.

Vermont.— State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201.

United States.—Mussel Slough Case, 5 Fed. 680, 6 Sawy. 612; U. S. *v.* Sacia, 2 Fed. 754; U. S. *v.* Graff, 26 Fed. Cas. No. 15,244, 14 Blatchf. 381.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1014, 1017. And see CONSPIRACY, 8 Cyc. 683.

The conspiracy may be established by evidence having no relation to defendants, by acts of different persons at different times and places, by the writings and speeches of such persons, or by any other circumstances which tend to prove its existence. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

Ill feeling toward the deceased on the part of a person who is not being tried is incompetent for the purpose of connecting the defendant with the homicide. Rufer *v.* State, 25 Ohio St. 464. See also McAnally *v.* State, 74 Ala. 9.

(II) *Res Gestæ.* Declarations forming a part of the *res gestæ* are admissible.[36]

(III) *Relations of the Parties.* Evidence of the relations of the persons alleged to be conspirators, their associating themselves together in an enterprise not connected with the crime, but near it in point of time, and their being frequently seen together are competent as tending to prove the conspiracy.[37]

(IV) *Possession of Fruits of Crime.* The fact that each of several defendants jointly indicted was found to possess stolen goods which were missed from the place of the crime is competent to establish a conspiracy and to implicate the accused in the crime.[38]

(V) *Declarations Showing When Conspiracy Was Begun.* Threats against the party injured by one of the defendants, prior to the crime, although not connected therewith, are competent to show when the conspiracy was begun.[39] And the same is true of declarations long prior to the crime, of which some were and some were not made in defendant's presence.[40]

(VI) *Other Offenses.* The fact that the evidence offered to prove a conspiracy also proves that the same persons were engaged in a conspiracy to commit other crimes of a like character does not exclude it.[41]

d. Weight and Sufficiency — (I) *In General.* To render admissible against the accused evidence of the acts and declarations of an alleged co-conspirator, only *prima facie* evidence of a conspiracy is necessary.[42] Mere declarations by alleged conspirators,[43] and even the testimony of such persons[44] to the fact of a

A conversation by a conspirator not shown to refer to the question of the conspiracy is not competent evidence. Holly *v.* Com., 36 S. W. 532, 18 Ky. L. Rep. 441.

36. People *v.* Gregory, 120 Cal. 16, 52 Pac. 41; People *v.* Bentley, 77 Cal. 7, 18 Pac. 799, 11 Am. St. Rep. 225; People *v.* Bentley, 75 Cal. 407, 17 Pac. 436; Clawson *v.* State, 14 Ohio St. 234; U. S. *v.* McKee, 26 Fed. Cas. No. 15,685, 3 Dill. 546.

37. *California.*— People *v.* Childs, 127 Cal. 363, 59 Pac. 768.

Florida.— Roberson *v.* State, 40 Fla. 509, 24 So. 474.

Illinois.— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

New York.— People *v.* Fitzgerald, 20 N. Y. App. Div. 139, 46 N. Y. Suppl. 1020, 12 N. Y. Cr. 524.

Texas.— Zumwalt *v.* State, 5 Tex. App. 521.

38. Fisher *v.* State, 73 Ga. 595. See Larceny.

39. State *v.* Mace, 118 N. C. 1244, 24 S. E. 798.

40. People *v.* Gregory, 120 Cal. 16, 52 Pac. 41.

41. Tarbox *v.* State, 38 Ohio St. 581. See *supra*, XII, C, 2.

42. *Alabama.*— Johnson *v.* State, 87 Ala. 39, 6 So. 400; Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133.

California.— People *v.* Fehrenbach, 102 Cal. 394, 36 Pac. 678.

Indiana.— Freese *v.* State, 159 Ind. 597, 65 N. E. 915; Card *v.* State, 109 Ind. 415, 9 N. E. 591; Walton *v.* State, 88 Ind. 9.

Kentucky.— Chadwell *v.* Com., 69 S. W. 1082, 24 Ky. L. Rep. 818.

Massachusetts.— Com. *v.* Crowninshield, 10 Pick. 497.

Missouri.— State *v.* Walker, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133.

New York.— Ormsby *v.* People, 53 N. Y. 472; Farrell *v.* People, 21 Hun 485.

Ohio.— Goins *v.* State, 46 Ohio St. 457, 21 N. E. 476; Limerick *v.* State, 14 Ohio Cir. Ct. 207, 7 Ohio Cir. Dec. 664.

Pennsylvania.— Com. *v.* Zuern, 16 Pa. Super. Ct. 588.

South Carolina.— State *v.* Brown, 34 S. C. 41, 12 S. E. 662.

Texas.— Hays *v.* State, (Cr. App. 1900) 57 S. W. 835; Kunde *v.* State, 22 Tex. App. 65, 3 S. W. 325; Avery *v.* State, 10 Tex. App. 199.

West Virginia.— State *v.* Cain, 20 W. Va. 679.

Wisconsin.— Baker *v.* State, 80 Wis. 416, 50 N. W. 518.

Wyoming.— Haines *v.* Territory, 3 Wyo. 167, 13 Pac. 8.

United States.— Taylor *v.* U. S., 89 Fed. 954, 32 C. C. A. 449; U. S. *v.* Cole, 25 Fed. Cas. No. 14,832, 5 McLean 513; U. S. *v.* Stevens, 27 Fed. Cas. No. 16,392, 2 Hask. 164.

See 14 Cent. Dig. tit. "Criminal Law," § 1017. And see Conspiracy, 8 Cyc. 683.

The conspiracy may be proved by facts extricated from the criminal transaction itself, and if they fairly tend to prove a conspiracy they are a sufficient foundation for the admission of the acts and declarations of each conspirator as against the other. State *v.* Prater, 52 W. Va. 132, 43 S. E. 230.

Least degree of concert or collusion sufficient.— Hannon *v.* State, 5 Tex. App. 549. See also Com. *v.* Mulrey, 170 Mass. 103, 49 N. E. 91.

43. Casey *v.* State, 37 Ark. 67; Shelby *v.* Com., 91 Ky. 563, 16 S. W. 461, 13 Ky. L. Rep. 178; State *v.* Cain, 20 W. Va. 679; U. S. *v.* McKee, 26 Fed. Cas. No. 15,686, 3 Dill. 551.

44. Dye *v.* State, 130 Ind. 87, 29 N. E. 771; Bowling *v.* Com., 3 Ky. L. Rep. 610.

conspiracy is not *prima facie* proof of its existence unless the testimony is corroborated.

(II) *Province of Court and Jury.* If the evidence of the conspiracy satisfies the court, it may admit the declarations, but if the evidence is open to two constructions, or even where a *prima facie* case is made out, it is the duty of the court to instruct the jury that they have a right to and should reject the evidence of the acts and declarations, if in their opinion upon all the evidence the conspiracy is not satisfactorily proved.[45]

4. Discretion of Court. The extent to which the declarations of conspirators are admissible against others involved in the same conspiracy is to a great extent within the discretion of the trial court.[46]

5. Conviction or Acquittal of Co-Defendant — a. Effect of Conviction. Where two persons have been jointly indicted for the same offense, but separately tried, a judgment of conviction against one of them is not competent on the trial of the other, inasmuch as his conviction is no evidence either of joint action or of the guilt of the accused.[47] The same rule applies where two are separately indicted and tried for the same crime.[48]

b. Effect of Acquittal. The acquittal of one shown to have been engaged in a criminal conspiracy does not exclude his statements against a fellow conspirator made either before or after his acquittal.[49]

6. Motive of Accomplice. When the accused and his accomplice have confessed in each other's presence the joint commission of the crime, evidence tending to show a motive on the part of the accomplice is admissible against the accused.[50]

G. Testimony of Accomplices and Co-Defendants — 1. Who Are Accomplices — a. In General. An accomplice, within the rules of evidence hereafter treated, is one who is in some way concerned in the commission of a crime. The term includes all who are concerned in the crime whether as principals in the first or second degree or as accessaries.[51] The test by which to determine whether

45. *California.*— People *v.* Fehrenbach, 102 Cal. 394, 36 Pac. 678.

Colorado.— Solander *v.* People, 2 Colo. 48.

Georgia.— Horton *v.* State, 66 Ga. 690.

Massachusetts.— Com. *v.* McDonald, 147 Mass. 527, 18 N. E. 402; Com. *v.* Brown, 14 Gray 419.

North Carolina.— State *v.* Dula, 61 N. C. 211.

Oregon.— State *v.* Moore, 32 Oreg. 65, 48 Pac. 468.

Texas.— Luttrell *v.* State, 31 Tex. Cr. 493, 21 S. W. 248; Crook *v.* State, 27 Tex. App. 198, 11 S. W. 444.

It is the province of the court to determine whether the existence of the conspiracy has been sufficiently established. State *v.* Thompson, 69 Conn. 720, 38 Atl. 868; Com. *v.* Zuern, 16 Pa. Super. Ct. 588.

46. Wiborg *v.* U. S., 163 U. S. 632, 16 S. Ct. 1127, 41 L. ed. 289; Clune *v.* U. S., 159 U. S. 590, 16 S. Ct. 125, 40 L. ed. 269, 270.

47. *California.*— People *v.* Bearss, 10 Cal. 68.

Iowa.— State *v.* Fertig, 98 Iowa 139, 67 N. W. 87.

Kentucky.— Clark *v.* Com., 14 Bush 166.

New York.— People *v.* Mullins, 5 N. Y. App. Div. 172, 39 N. Y. Suppl. 361; People *v.* Kief, 126 N. Y. 661, 27 N. E. 556 [*affirming* 58 Hun 337, 11 N. Y. Suppl. 926, 12 N. Y. Suppl. 896].

Oregon.— State *v.* Bowker, 26 Oreg. 309, 38 Pac. 124.

Texas.— Bell *v.* State, 33 Tex. Cr. 163, 25 S. W. 769; Harper *v.* State, 11 Tex. App. 1.

See 14 Cent. Dig. tit. "Criminal Law," § 987.

48. Kazer *v.* State, 5 Ohio 280.

49. Musser *v.* State, 157 Ind. 423, 61 N. E. 1; Holt *v.* State, 39 Tex. Cr. 282, 45 S. W. 1016, 46 S. W. 829.

50. Stone *v.* State, 105 Ala. 60, 17 So. 114.

51. *District of Columbia.*— U. S. *v.* Neverson, 1 Mackey 152.

Illinois.— Cross *v.* People, 47 Ill. 152, 95 Am. Dec. 474.

Indiana.— Johnson *v.* State, 2 Ind. 652.

Iowa.—State *v.* Eau, 90 Iowa 534, 58 N. W. 898; State *v.* Reader, 60 Iowa 527, 15 N. W. 423.

New York.— People *v.* McGuire, 135 N. Y. 639, 32 N. E. 146; People *v.* Dunn, 53 Hun 381, 6 N. Y. Suppl. 805, 7 N. Y. Cr. 173. And see People *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616.

Oregon.— State *v.* Roberts, 15 Oreg. 187, 13 Pac. 896.

Tennessee.— Harris *v.* State, 7 Lea 124.

Texas.— Smith *v.* State, 37 Tex. Cr. 488, 36 S. W. 586; McKenzie *v.* State, (Cr. App. 1895) 32 S. W. 543; Hines *v.* State, 27 Tex. App. 104, 10 S. W. 448; Ortis *v.* State, 18 Tex. App. 282; Irvin *v.* State, 1 Tex. App. 301.

one is an accomplice is to ascertain whether he could be indicted for the offense for which the accused is being tried.[52] Whether a witness is an accomplice is a question of fact to be determined by the jury under instruction from the court as to the law.[53]

b. Innocent Agent. The fact that an agent or employee of defendant, acting under his orders, did an act which aided defendant to commit the crime does not make him an accomplice if he had no knowledge of the criminal purpose of defendant.[54]

c. Knowledge or Concealment of Crime. The fact that one who is a witness at the trial knew of the crime or for a time concealed the fact of its commission does not make him an accomplice if he did not aid or participate in the crime.[55] The fact that the person knowing of a crime conceals its commission for his own safety and not to shield the criminal raises a presumption that he is not an accomplice.[56] A person who knows or has reasonable grounds to suppose that a crime is about to be committed, but who does not aid in or advise its commission and is not present thereat, is not an accomplice.[57]

d. Accessaries. All the courts agree that an accessary before the fact is an accomplice within the rule requiring corroboration of the testimony of an accomplice.[58] The cases, however, are not harmonious upon the question whether an accessary after the fact is an accomplice within this rule. It has been held in some jurisdictions that he is,[59] and in others that he is not.[60] Where a statute abrogates the difference between an accessary before the fact and the principal, it by implication preserves the distinction between accessaries before and after the fact, and according to the decisions last referred to the accessary after the fact is not an accomplice.[61]

See 14 Cent. Dig. tit. "Criminal Law," § 1082. And see *supra*, V.

Accessaries before and after the fact see *infra*, XII, G, 1, d.

Criminal intent a necessary element.—U. S. *v.* Henry, 26 Fed. Cas. No. 15,351, 4 Wash. 428.

An accomplice when participation admitted. —State *v.* Scott, 28 Oreg. 331, 42 Pac. 1; Irvin *v.* State, 1 Tex. App. 301; U. S. *v.* Sykes, 58 Fed. 1000.

52. *Arkansas.*— Redd *v.* State, 63 Ark. 457, 40 S. W. 374.

California.—People *v.* Collum, 122 Cal. 186, 54 Pac. 589.

Iowa.— State *v.* Jones, 115 Iowa 113, 88 N. W. 196.

Kentucky.— Sizemore *v.* Com., 6 S. W. 123, 1 Ky. L. Rep. 1; White *v.* Com., 5 Ky. L. Rep. 318.

New Mexico.— Territory *v.* Baker, 4 N. M. 236, 13 Pac. 30.

53. See *infra*, XII, G, 1, j.

54. Cross *v.* People, 47 Ill. 152, 95 Am. Dec. 474; Harless *v.* U. S., 1 Indian Terr. 447, 45 S. W. 133; Com. *v.* Follansbee, 155 Mass. 274, 29 N. E. 471.

55. *Arkansas.*— Green *v.* State, 51 Ark. 189, 10 S. W. 266; Melton *v.* State, 43 Ark. 367.

Georgia.— Allen *v.* State, 74 Ga. 769; Lowery *v.* State, 72 Ga. 649.

New York.— People *v.* Ricker, 51 Hun 643, 4 N. Y. Suppl. 70, 7 N. Y. Cr. 19.

Texas.— Martin *v.* State, (Cr. App. 1902) 70 S. W. 973; Webb *v.* State, (Cr. App. 1901) 60 S. W. 961; Prewett *v.* State, (Cr. App. 1899) 53 S. W. 879; Garza *v.* State, (Cr. App. 1899) 49 S. W. 103; Parker *v.* State, 40 Tex. Cr. 119, 49 S. W. 80; Alford *v.* State, 31 Tex. Cr. 299, 20 S. W. 553; Elizando *v.* State, 31 Tex. Cr. 237, 20 S. W. 560; Smith *v.* State, 23 Tex. App. 357, 5 S. W. 219, 59 Am. Rep. 773.

United States.— Bird *v.* U. S., 187 U. S. 118, 23 S. Ct. 42, 47 L. ed. 100.

See 14 Cent. Dig. tit. "Criminal Law," § 1083. And see *supra*, V.

56. McFalls *v.* State, 66 Ark. 16, 48 S. W. 492; Webb *v.* State, (Tex. Cr. App. 1901) 60 S. W. 961.

57. *Arkansas.*— Melton *v.* State, 43 Ark. 367.

New York.— People *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616.

Oregon.— State *v.* Roberts, 15 Oreg. 187, 13 Pac. 896.

Tennessee.— Harris *v.* State, 7 Lea 124.

Texas.— Rucker *v.* State, 7 Tex. App. 549.

See 14 Cent. Dig. tit. "Criminal Law," § 1083. And see *supra*, V.

58. Watson *v.* State, 9 Tex. App. 237; Edwards *v.* Territory, 1 Wash. Terr. 195. But a witness is not an accessary to a homicide because he talked approvingly of robbing the deceased, where there is no evidence that he assisted in the homicide. People *v.* McGuire, 155 N. Y. 639, 32 N. E. 146.

59. Polk *v.* State, 36 Ark. 117; Gatlin *v.* State, 40 Tex. Cr. 116, 49 S. W. 87; Hunnicutt *v.* State, 18 Tex. App. 498, 51 Am. Rep. 330.

60. State *v.* Umble, 115 Mo. 452, 22 S. W. 378; People *v.* Chadwick, 7 Utah 134, 25 Pac. 737.

61. State *v.* Jones, 115 Iowa 113, 88 N. W. 196.

e. Detectives and Informers. One who as a detective associates with criminals solely for the purpose of discovering and making known their crimes, and who acts throughout with this purpose and without any criminal intent, is not an accomplice,[62] and it is immaterial that he encourages or aids in the commission of the crime.[63]

f. In Specific Crimes — (i) *Sale of Intoxicating Liquors.* The purchaser of liquor sold in violation of a statute is not an accomplice of the seller;[64] but it has been said that his testimony should be received with caution and distrust.[65]

(ii) *Receiving Stolen Goods.* A thief is not an accomplice of one who receives the goods knowing them to have been stolen, for the larceny and the receiving of the goods are separate and distinct offenses;[66] but it has been held that the receiver is an accomplice of the thief within the rule requiring corroboration,[67] provided of course guilty knowledge on his part is shown.[68]

(iii) *Abortion.*[69] By the weight of authority a woman upon whom an abortion has been committed is not an accomplice of the one committing the abortion, so as to require her testimony to be corroborated, unless it is so provided by statute,[70] but it has been said that where her moral guilt is clear her testimony should be received with caution,[71] and in some states by statute she is required to be corroborated.[72]

(iv) *Adultery, Fornication, and Incest.* One of the participants in the act of fornication or adultery,[73] or in the act of incest, if the participation is

62. *Alabama.*— Harrington *v.* State, 36 Ala. 236.

California.— People *v.* Bolanger, 71 Cal. 17, 11 Pac. 799; People *v.* Barrie, 49 Cal. 342; People *v.* Farrell, 30 Cal. 316.

Iowa.— State *v.* Brownlee, 84 Iowa 473, 51 N. W. 25; State *v.* McKean, 36 Iowa 343, 14 Am. Rep. 530.

Massachusetts.— Com. *v.* Baker, 155 Mass. 287, 29 N. E. 512.

Missouri.— State *v.* Beaucleigh, 92 Mo. 490, 4 S. W. 666.

Nevada.— State *v.* Douglas, 26 Nev. 196, 65 Pac. 802.

New York.— People *v.* Noelke, 94 N. Y. 137, 46 Am. Rep. 128; People *v.* Levoy, 72 N. Y. App. Div. 55, 76 N. Y. Suppl. 783; People *v.* Molins, 7 N. Y. Cr. 51, 10 N. Y. Suppl. 130.

Pennsylvania.— Campbell *v.* Com., 84 Pa. St. 187.

Texas.— Wright *v.* State, 7 Tex. App. 574, 32 Am. Rep. 599.

England.— Reg. *v.* Mullins, 3 Cox C. C. 526; Reg. *v.* Dowling, 3 Cox C. C. 509.

See 14 Cent. Dig. tit. "Criminal Law," § 1086. And see *supra*, V, C, 3, c; V, D, 3.

63. Campbell *v.* Com., 84 Pa. St. 187. But see Dever *v.* State, 37 Tex. Cr. 396, 30 S. W. 1071.

64. *Alabama.*— Harrington *v.* State, 36 Ala. 236.

Massachusetts.— Com. *v.* Downing, 4 Gray 29.

Minnesota.— State *v.* Baden, 37 Minn. 212, 34 N. W. 24.

New York.— People *v.* Smith, 28 Hun 626, 1 N. Y. Cr. 72.

Texas.— Sears *v.* State, 35 Tex. Cr. 442, 34 S. W. 124.

See Intoxicating Liquors.

65. Com. *v.* Downing, 4 Gray (Mass.) 29.

66. Springer *v.* State, 102 Ga. 447, 30 S. E. 971; State *v.* Kuhlman, 152 Mo. 100, 53 S. W. 416, 75 Am. St. Rep. 438; State *v.* Rachman, 68 N. J. L. 120, 53 Atl. 1046; People *v.* Cook, 5 Park. Cr. (N. Y.) 351. See Larceny; Receiving Stolen Goods.

67. People *v.* Barrie, 49 Cal. 342; Roberts *v.* State, 55 Ga. 220; Young *v.* State, (Tex. Cr. App. 1898) 44 S. W. 835; Walker *v.* State, (Tex. Cr. App. 1896) 37 S. W. 423; Crutchfield *v.* State, 7 Tex. App. 65.

68. Unsell *v.* State, (Tex. Cr. App. 1898) 45 S. W. 902. See Larceny; Receiving Stolen Goods.

69. **Accomplices in abortion** see Abortion, 1 Cyc. 175, 191.

70. *Colorado.*— Solander *v.* People, 2 Colo. 48.

Iowa.— State *v.* Smith, 99 Iowa 26, 68 N. W. 428, 61 Am. St. Rep. 219.

New York.— People *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616; People *v.* Bliven, 14 N. Y. St. 495, 6 N. Y. Cr. 365.

Pennsylvania.— Com. *v.* Bell, 4 Pa. Super. Ct. 187.

Texas.— Miller *v.* State, 37 Tex. Cr. 575, 40 S. W. 313.

See 14 Cent. Dig. tit. "Criminal Law," § 1089. And see Abortion, 1 Cyc. 175, 191.

71. Frazer *v.* People, 54 Barb. (N. Y.) 306; Watson *v.* State, 9 Tex. App. 237.

72. People *v.* Josselyn, 39 Cal. 393; Wandell *v.* State, (Tex. Cr. App. 1894) 25 S. W. 27. See Abortion, 1 Cyc. 175, 191.

73. *Alabama.*— Campbell *v.* State, 133 Ala. 158, 32 So. 635.

Arkansas.— Bond *v.* State, 63 Ark. 504, 39 S. W. 554, 58 Am. St. Rep. 129.

voluntary and with guilty knowledge, is an accomplice;[74] but it is otherwise if the participation is not voluntary and with guilty knowledge.[75]

(v) *Escape and Rescue of Prisoners.* A prisoner aided to escape by outside persons is not an accomplice of the persons who furnished him with the means of escape,[76] but one who while he is a prisoner assists in liberating others and then escapes is an accomplice in the crime of rescue.[77]

(vi) *Gaming.* According to some authorities persons engaged in a game of chance are not accomplices of one another,[78] while according to others they are.[79] One who joins in a game of tenpins with others who are betting upon it, but without betting himself, is not an accomplice.[80] The stakeholder of an election bet is not an accomplice, although such a bet is forbidden by law.[81]

(vii) *Sale of Lottery Tickets.* One who purchases a lottery ticket is not an accomplice of the seller, where the latter is charged with the selling only.[82]

(viii) *Perjury and Subornation.* In perjury all persons having a knowledge of the falsity of the statements and aiding in the crime are accomplices.[83] It has been decided that the person solicited to commit perjury is not an accomplice of the suborner, and although it is proper to consider the fact that he has committed perjury in weighing his evidence, yet this will not, if the jury believe him, prevent the conviction of the suborner.[84] There are decisions, however, to the contrary.[85]

(ix) *Forgery and Uttering.* Persons who participate in forging an instrument are accomplices of the one who utters it.[86]

(x) *Bribery.* One who gives an officer a bribe to permit a breach of the law is an accomplice of the officer who is bribed,[87] even where a statute makes bribery or an offer to bribe and the acceptance of a bribe distinct offenses.[88]

g. Coercion. One who by threats and coercion and through fear reasonably

Georgia.— Keller *v.* State, 102 Ga. 506, 31 S. E. 92.

Oregon.— State *v.* Scott, 28 Oreg. 331, 42 Pac. 1.

Texas.— Spencer *v.* State, 31 Tex. 64; Hamilton *v.* State, 36 Tex. Cr. 372, 37 S. W. 431; Merritt *v.* State, 12 Tex. App. 203; Rutter *v.* State, 4 Tex. App. 57.

See 14 Cent. Dig. tit. "Criminal Law," § 1090. And see Adultery, 1 Cyc. 959; Fornication.

74. State *v.* De Masters, (N. D. 1902) 90 N. W. 852; State *v.* Kellar, 8 N. D. 563, 80 N. W. 476, 73 Am. St. Rep. 776; Shelly *v.* State, 95 Tenn. 152, 31 S. W. 492, 49 Am. St. Rep. 926; Blanchette *v.* State, 29 Tex. App. 46, 14 S. W. 392; Dodson *v.* State, 24 Tex. App. 514, 6 S. W. 548; Freeman *v.* State, 11 Tex. App. 92, 40 Am. Rep. 787. But see Whittaker *v.* Com., 95 Ky. 632, 27 S. W. 83, 16 Ky. L. Rep. 173. See also Incest.

75. Smith *v.* State, 108 Ala. 1, 19 So. 306, 54 Am. St. Rep. 140; State *v.* Kouhns, 103 Iowa 720, 73 N. W. 353; Mullinix *v.* State, (Tex. Cr. App. 1894) 26 S. W. 504. See Incest.

76. Ash *v.* State, 81 Ala. 76, 1 So. 558; Peeler *v.* State, 3 Tex. App. 533. See Escape.

77. Hillian *v.* State, 50 Ark. 523, 8 S. W. 834. See Rescue.

78. Com. *v.* Bossie, 100 Ky. 151, 37 S. W. 844, 18 Ky. L. Rep. 624 (holding that each person engaged in the game is guilty of an individual offense); Day *v.* State, 27 Tex. App. 143, 11 S. W. 36; Stone *v.* State, 3 Tex. App. 675. See Gaming.

One who is permitted to play a game of chance upon the premises of another is not an accomplice, where the owner of the premises is prosecuted for permitting a game thereon. Cain *v.* Com., 6 Ky. L. Rep. 517; Green *v.* Com., 6 Ky. L. Rep. 217.

79. English *v.* State, 35 Ala. 428; Davidson *v.* State, 33 Ala. 350. *Compare* Smith *v.* State, 37 Ala. 472.

Dealer in "stud-poker" an accomplice of players.— State *v.* Light, 17 Oreg. 358, 21 Pac. 132.

80. Bass *v.* State, 37 Ala. 469.

81. Schwartz *v.* State, 38 Tex. Cr. 26, 40 S. W. 976.

82. People *v.* Emerson, 6 N. Y. Cr. 157, 5 N. Y. Suppl. 374.

83. Smith *v.* State, 37 Tex. Cr. 488, 36 S. W. 586; Anderson *v.* State, 20 Tex. App. 312.

84. U. S. *v.* Thompson, 31 Fed. 331, 12 Sawy. 438.

85. People *v.* Evans, 40 N. Y. 1; Blakely *v.* State, 24 Tex. App. 616, 7 S. W. 233, 5 Am. Rep. 912. See Perjury.

86. Preston *v.* State, 40 Tex. Cr. 72, 48 S. W. 581. See Forgery.

87. People *v.* Bissert, 72 N. Y. App. Div. 620, 75 N. Y. Suppl. 630 [*affirmed* in 172 N. Y. 643, 65 N. E. 1120]; Ruffin *v.* State, 36 Tex. Cr. 565, 38 S. W. 169.

88. People *v.* Winant, 24 Misc. (N. Y.) 361, 53 N. Y. Suppl. 695.

Taking money to withhold evidence.— The one who pays and the one who receives money to withhold evidence are not accomplices

excited thereby that he is in immediate danger of life and limb is compelled to participate in a crime is not an accomplice.[89]

h. Witness Against Whom Indictment Is Dismissed. Where several persons are indicted and the indictment is dismissed as to one of them, who testifies for the state, he is an accomplice, although he denies his guilt, and his testimony must be corroborated.[90] But it has been held that a separate indictment pending against the witness, and under which he has been granted immunity by the prosecuting attorney, cannot be proved against him to show that he is an accomplice, as nothing but a plea of guilty or a conviction on such indictment would establish that fact.[91]

i. Opinion of Accomplice. The opinion of one accomplice that he does not consider another person an accomplice is not competent evidence.[92]

j. Question For Jury. The question whether the participation of a witness in the crime makes him an accomplice is one of fact for the jury to determine from all the circumstances, but under instructions from the court as to the necessity for a criminal intent and other elements which are necessary to constitute one an accomplice.[93]

2. Admissibility of Accomplice Testimony — a. For the State — (I) *General Rule.* Subject to the qualifications hereinafter enumerated, the general rule is that an accomplice is competent to testify as a witness for the prosecution.[94]

(II) *Compelling Accomplice to Testify.* And where a statute provides

within the meaning of the Minnesota statute. State *v.* Quinlan, 40 Minn. 55, 41 N. W. 299.

89. Green *v.* State, 51 Ark. 189, 10 S. W. 266; People *v.* Miller, 66 Cal. 468, 6 Pac. 99; Burns *v.* State, 89 Ga. 527, 15 S. E. 748; Beal *v.* State, 72 Ga. 200.

90. Williams *v.* State, 42 Tex. 392; Barrara *v.* State, 42 Tex. 260. But see Downard *v.* Com., 17 S. W. 439, 13 Ky. L. Rep. 472, holding that where a state's witness was indicted with the defendants but a *nolle prosequi* was entered as to him because no evidence appeared implicating him in the crime he was not an accomplice.

91. Craft *v.* State, 3 Kan. 450.

92. People *v.* Creegan, 121 Cal. 554, 53 Pac. 1082.

93. *Alabama.*— Childress *v.* State, 86 Ala. 77, 5 So. 775.

California.— People *v.* Compton, 123 Cal. 403, 56 Pac. 44. See also People *v.* Curlee, 53 Cal. 604.

District of Columbia.— U. S. *v.* Neverson, 1 Mackey 152.

Iowa.— State *v.* Lucas, 57 Iowa 501, 10 N. W. 868; State *v.* Schlagel, 19 Iowa 169.

Massachusetts.— Com. *v.* Glover, 111 Mass. 395; Com. *v.* Ford, 111 Mass. 394; Com. *v.* Elliot, 110 Mass. 104.

Montana.— State *v.* Spotted Hawk, 22 Mont. 33, 55 Pac. 1026.

North Dakota.— State *v.* Kellar, 8 N. D. 563, 80 N. W. 476, 73 Am. St. Rep. 776; State *v.* Haynes, 7 N. D. 352, 75 N. W. 267.

Texas.— Mosely *v.* State, (Cr. App. 1902) 67 S. W. 103; Preston *v.* State, 41 Tex. Cr. 300, 53 S. W. 127, 881; Diaz *v.* State, (Cr. App. 1899) 53 S. W. 632; Ransom *v.* State, (Cr. App. 1899) 49 S. W. 582; Preston *v.* State, 40 Tex. Cr. 72, 48 S. W. 581; Rios *v.* State. (Cr. App. 1898) 48 S. W. 505; Hankins *v.* State, (Cr. App. 1898) 47 S. W. 992; Herring *v.* State, (Cr. App. 1897) 42 S. W. 301; Delavan *v.* State, (Cr. App. 1895) 29 S. W. 385; Williams *v.* State, 33 Tex. Cr. 128, 25 S. W. 629, 28 S. W. 958, 47 Am. St. Rep. 21.

Wisconsin.— Porath *v.* State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954.

Only a preponderance of the evidence is necessary to show that a state's witness was an accomplice. State *v.* Smith, 102 Iowa 656, 72 N. W. 279.

94. *Colorado.*— Solander *v.* People, 2 Colo. 48.

Connecticut.— State *v.* Wolcott, 21 Conn. 272.

Florida.— Keech *v.* State, 15 Fla. 591; Sumpter *v.* State, 11 Fla. 247.

Georgia.— Phillips *v.* State, 34 Ga. 502.

Illinois.— Gray *v.* People, 26 Ill. 344.

Indiana.— Johnson *v.* State, 2 Ind. 652.

Iowa.— Ray *v.* State, 1 Greene 316, 48 Am. Dec. 379.

Louisiana.— State *v.* Crowley, 33 La. Ann. 782; State *v.* Cook, 20 La. Ann. 145.

Mississippi.— George *v.* State, 39 Miss. 570.

Nebraska.— State *v.* Sneff, 22 Nebr. 481, 35 N. W. 219.

New York.— People *v.* Lohman, 2 Barb. 216; People *v.* O'Neil, 10 N. Y. St. 1; People *v.* Costello, 1 Den. 83; People *v.* Whipple, 9 Cow. 707.

North Carolina.— State *v.* Wier, 12 N. C. 363.

Pennsylvania.— Com. *v.* Yingst, 18 Pa. Co. Ct. 647.

South Carolina.— State *v.* Coppenburg, 2 Strobh. 273.

Texas.— Underwood *v.* State, 38 Tex. Cr. 193, 41 S. W. 618; McCoy *v.* State, 27 Tex. App. 415, 11 S. W. 454; Jones *v.* State, 3 Tex. App. 575; Myers *v.* State, 3 Tex. App. 8.

Vermont.— State *v.* Colby, 51 Vt. 291.

that the testimony of an accomplice shall in no instance be used against him in a criminal prosecution for the same offense, he may be compelled to testify.[95]

(III) *Promise of Immunity.* The fact that an accomplice expects a lighter sentence for his testimony or has been promised mitigation of punishment or a full pardon does not affect his competency as a witness, although such facts may be considered by the jury in determining his credibility.[96] The reception of an accomplice as a witness for the prosecution under promise of immunity is not in the discretion of the public prosecutor,[97] but is to be determined by the court in its discretion.[98]

(IV) *Accomplices Jointly Indicted* — (A) *In General.* At common law persons jointly indicted and jointly tried are not competent witnesses against one another,[99] but in some jurisdictions this rule has been changed by statute.[1]

(B) *Separate Trial.* Where separate trials are awarded persons who are jointly indicted, any one of them may testify as a witness for the state, upon the trial of the other;[2] and this rule applies, by the weight of authority, although the case of the witness has not been disposed of. He may testify, although

Virginia.— Smith *v.* Com., 90 Va. 759, 19 S. E. 843; Oliver *v.* Com., 77 Va. 590; Brown *v.* Com., 2 Leigh 769.

United States.— U. S. *v.* Ybanez, 53 Fed. 536; Steinham *v.* U. S., 22 Fed. Cas. No. 13,355, 2 Paine 168; U. S. *v.* Lee, 26 Fed. Cas. No. 15,588, 4 McLean 103; U. S. *v.* Lancaster, 26 Fed. Cas. No. 15,556, 2 McLean 431; U. S. *v.* Troax, 28 Fed. Cas. No. 16,540, 3 McLean 224.

England.— Rex *v.* Long, 6 C. & P. 179, 25 E. C. L. 382; Tongue's Case, Kel. 17; Wild's Case, 1 Leach C. C. 17 note *a*; 1 Hale P. C. 303; 2 Hawkins P. C. c. 46, § 18.

See 14 Cent. Dig. tit. "Criminal Law," § 1099.

95. State *v.* Quarles, 13 Ark. 307. See also Baker *v.* State, 57 Ind. 255; Territory *v.* Corbett, 3 Mont. 50; State *v.* Smith, 86 N. C. 705. But see Baker *v.* U. S., 1 Minn. 207.

96. Barr *v.* People, 30 Colo. 522, 71 Pac. 392; State *v.* Riney, 137 Mo. 102, 38 S. W. 718; State *v.* Magone, 32 Oreg. 206, 51 Pac. 452. But see State *v.* Miller, 100 Mo. 606, 13 S. W. 832, 1051.

97. Wight *v.* Rindskopf, 43 Wis. 344. But see U. S. *v.* Hartwell, 26 Fed. Cas. No. 15,319.

98. U. S. *v.* Hinz, 35 Fed. 272, 13 Sawy. 266. And see Linsday *v.* People, 63 N. Y. 143 [*affirming* 5 Hun 104, 67 Barb. 548]; People *v.* Whipple, 9 Cow. (N. Y.) 707. In Ray *v.* State, 1 Greene (Iowa) 316, 48 Am. Dec. 379, it was said that the prosecution ought to show that it has no other witness than the accomplice, that he is less guilty than the accused, and that his testimony can be corroborated.

99. *Kentucky.*— Edgerton *v.* Com., 7 Bush 142.

Louisiana.— State *v.* Mason, 38 La. Ann. 476.

Michigan.— People *v.* Wright, 38 Mich. 744, 31 Am. Rep. 331.

Ohio.— State *v.* Foy, Tapp. 103.

Oregon.— State *v.* Drake, 11 Oreg. 396, 4 Pac. 1204.

England.— Reg. *v.* Payne, L. R. 1 C. C. 349, 12 Cox C. C. 118, 41 L. J. M. C. 65, 26 L. T. Rep. N. S. 41, 20 Wkly. Rep. 390; Reg. *v.* Gerber, T. & M. 647.

See 14 Cent. Dig. tit. "Criminal Law," § 1104 *et seq.*

1. Smith *v.* People, 115 Ill. 17, 3 N. E. 733. *Compare* State *v.* Drake, 11 Oreg. 396, 4 Pac. 1204. A statute which in terms makes a defendant in a criminal trial a competent witness at his own request, but not otherwise, has been construed to permit him to testify voluntarily against one with whom he was jointly indicted and jointly tried. State *v.* Stewart, 51 Iowa 312, 1 N. W. 646; State *v.* Barrows, 76 Me. 401, 49 Am. Rep. 609; Com. *v.* Brown, 130 Mass. 279; Wolfson *v.* U. S., 101 Fed. 430, 41 C. C. A. 422. If he testifies in his own behalf, his testimony may be considered as against his co-defendants. Smith *v.* People, 115 Ill. 17, 3 N. E. 733.

2. *Alabama.*— Marler *v.* State, 67 Ala. 55, 42 Am. Rep. 95.

Colorado.— Barr *v.* People, 30 Colo. 522, 71 Pac. 392.

Florida.— Williams *v.* State, 42 Fla. 205, 27 So. 898; Bishop *v.* State, 41 Fla. 522, 26 So. 703.

Indiana.— Conway *v.* State, 118 Ind. 482, 21 N. E. 285.

Louisiana.— State *v.* Prudhomme, 25 La. Ann. 522.

Mississippi.— Evans *v.* State, 61 Miss. 157; George *v.* State, 39 Miss. 570.

New Jersey.— Noyes *v.* State, 41 N. J. L. 418.

New York.— People *v.* Satterlee, 5 Hun 167.

North Carolina.— State *v.* Weaver, 93 N. C. 595. *Compare* State *v.* Dunlop, 65 N. C. 288.

Ohio.— Mitchell *v.* State, 21 Ohio Cir. Ct. 24, 11 Ohio Cir. Dec. 446.

Virginia.— Smith *v.* Com., 90 Va. 759, 19 S. E. 843.

Wyoming.—McGinness *v.* State, 4 Wyo. 115, 31 Pac. 978, 51 Pac. 492.

England.— Winsor *v.* Reg., L. R. 1 Q. B. 390, 7 B. & S. 490, 10 Cox C. C. 327, 12 Jur. N. S. 561, 35 L. J. M. C. 161, 14 L. T. Rep. N. S. 567, 14 Wkly. Rep. 695.

he has been neither acquitted nor convicted, and without an entry of a *nolle prosequi*.[3]

(c) *After Nolle Prosequi.* Inasmuch as the objection to the competency of a defendant jointly indicted and tried with others was on the ground that he had a personal interest in and was a party to the prosecution, the entry of a *nolle prosequi* as to him renders him a competent witness against the co-defendant.[4]

(d) *After Conviction or Plea of Guilty.* One of several persons jointly indicted, who has been convicted or who has plead guilty, is a competent witness for the prosecution.[5]

(v) *Accomplice Separately Indicted.* An accomplice separately indicted and separately tried is a competent witness against the other defendants.[6]

b. For Defendant — (i) *Persons Jointly Indicted* — (a) *In General.* The rule is that one of several accomplices jointly indicted and jointly tried is not a

See 14 Cent. Dig. tit. "Criminal Law," § 1105.

3. *Indiana.*—Conway *v.* State, 118 Ind. 482, 21 N. E. 285.

Louisiana.—State *v.* Hamilton, 35 La. Ann. 1043.

Maine.— State *v.* Barrows, 76 Me. 401, 49 Am. Rep. 629.

Massachusetts.— Com. *v.* Brown, 130 Mass. 279.

Minnesota.—State *v.* Thaden, 43 Minn. 325, 45 N. W. 614.

Nebraska.— Carroll *v.* State, 5 Nebr. 31.

New Jersey.— Noyes *v.* State, 41 N. J. L. 418; State *v.* Brien, 32 N. J. L. 414.

New York.— Wixson *v.* People, 5 Park. Cr. 119; People *v.* Donnelly, 1 Abb. Pr 459, 2 Park. Cr. 182.

Ohio.— Brown *v.* State, 18 Ohio St. 496; Allen *v.* State, 10 Ohio St. 287.

Texas.— Day *v.* State, 27 Tex. App. 143, 11 S. W. 36.

United States.— Benson *v.* U. S., 146 U. S. 325, 13 S. Ct. 60, 36 L. ed. 991.

But see State *v.* Mathews, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135; State *v.* Chyo Chiagk, 92 Mo. 395, 4 S. W. 704.

See 14 Cent. Dig. tit. "Criminal Law," § 1106.

The plea of not guilty by the witness to a joint indictment does not render him incompetent. State *v.* Barrows, 76 Me. 401, 49 Am. Rep. 629.

A statute permitting the court to discharge one of several jointly indicted, in order that he may testify against his fellow, does not exclude the testimony of an accomplice who is not discharged. State *v.* Smith, 8 S. D. 547, 67 N. W. 619; Edwards *v.* State, 2 Wash. 291, 26 Pac. 258.

4. *California.*— People *v.* Bruzzo, 24 Cal. 41.

Illinois.— Love *v.* People, 160 Ill. 501, 43 N. E. 710, 32 L. R. A. 139.

Indiana.— Baker *v.* State, 57 Ind. 255.

Missouri.— State *v.* Steifel, 106 Mo. 129, 17 S. W. 227; State *v.* Walker, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; State *v.* Chyo Goom, 92 Mo. 418, 4 S. W. 712; State *v.* Beaucleigh, 92 Mo. 490, 4 S. W. 666; State *v.* Clump, 16 Mo. 385.

New Jersey.— State *v.* Graham, 41 N. J. L. 15, 32 Am. Rep. 174.

New York.— Linsday *v.* People, 63 N. Y. 143 [*affirming* 5 Hun 104, 67 Barb. 548].

North Carolina.— State *v.* Phipps, 76 N. C. 203.

Texas.— Johnson *v.* State, 33 Tex. 570; Underwood *v.* State, 38 Tex. Cr. 193, 41 S. W. 618.

England.— Reg. *v.* Owen, 9 C. & P. 83, 38 E. C. L. 60.

See 14 Cent. Dig. tit. "Criminal Law," § 1107. And see *supra*, XI, C, 1, c.

5. *Alabama.*— Woodley *v.* State, 103 Ala. 23, 15 So. 820.

Georgia.— Thornton *v.* State, 25 Ga. 301.

Illinois.— Loehr *v.* People, 132 Ill. 504, 24 N. E. 68.

Kentucky.— Patterson *v.* Com., 86 Ky. 313, 99 Ky. 610, 5 S. W. 765, 9 Ky. L. Rep. 481.

Louisiana.— State *v.* Asbury, 49 La. Ann. 1741, 23 So. 322.

Massachusetts.— Com. *v.* Smith, 12 Metc. 238.

Mississippi.— Lee *v.* State, 51 Miss. 566; Keithler *v.* State, 10 Sm. & M. 192.

Missouri.— State *v.* Young, 153 Mo. 445, 55 S. W. 82.

Oregon.— State *v.* Magone, 32 Oreg. 206, 51 Pac. 452.

Virginia.— Brown *v.* Com., 86 Va. 935, 11 S. E. 799.

England.— Reg. *v.* Gallagher, 13 Cox C. C. 61, 32 L. T. Rep. N. S. 406; Reg. *v.* Williams, 1 Cox C. C. 289; Reg. *v.* King, 1 Cox C. C. 232.

See 14 Cent. Dig. tit. "Criminal Law," § 1108.

The accomplice who has pleaded guilty is competent to testify without judgment being entered against him (State *v.* Jackson, 106 Mo. 174, 17 S. W. 301), and it seems that he ought to be remanded to await sentence until after he has testified (State *v.* Russell, 33 La. Ann. 135). See also Lee *v.* State, 51 Miss. 566; Brown *v.* Com., 86 Va. 935, 11 S. E. 799.

6. *Michigan.*— Annis *v.* People, 13 Mich. 511.

Missouri.— State *v.* Black, 143 Mo. 166, 44 S. W. 340; State *v.* Stewart, 142 Mo. 412, 44 S. W. 240; State *v.* Riney, 137 Mo. 102, 38 S. W. 718; State *v.* Umble, 115 Mo. 452, 22 S. W. 378.

competent witness for his co-defendants,[7] unless he is made so by statute.[8] In some jurisdictions it is held that a statute permitting a defendant in a criminal case to become at his own request a witness in the case does not make him a competent witness for a co-defendant with whom he is jointly indicted and tried,[9] but in others it is held that when he voluntarily becomes a witness, he is a witness for all purposes, and that his testimony is competent for a co-defendant.[10]

(B) *Separate Trial.* In some jurisdictions the fact that persons jointly indicted are tried separately is regarded as sufficient to make them competent witnesses for one another.[11] This was the English rule at common law, and is the rule by statute in some states.[12] In other jurisdictions the fact that a separate trial is had does not make one of several accomplices jointly indicted a competent witness for the other, unless the case against him has been disposed of, in which case he is competent.[13] An accomplice jointly indicted with the accused,

New York.— People *v.* Whipple, 9 Cow. 707; People *v.* Donnelly, 2 Park. Cr. 182.

Virginia.— Byrd *v.* Com., 2 Va. Cas. 490.

United States.— Benson *v.* U. S., 146 U. S. 325, 13 S. Ct. 60, 36 L. ed. 991; U. S. *v.* Henry, 26 Fed. Cas. No. 15,351, 4 Wash. 428.

See 14 Cent. Dig. tit. "Criminal Law," § 1010.

7. *Indiana.*— Lemasters *v.* State, 10 Ind. 391.

Kentucky.— Lisle *v.* Com., 82 Ky. 250; Cummins *v.* Com., 81 Ky. 465.

Louisiana.— State *v.* Breaux, 104 La. 540, 29 So. 222.

Maryland.— Davis *v.* State, 38 Md. 15.

Mississippi.— Holman *v.* State, 72 Miss. 108, 16 So. 294.

Missouri.— State *v.* Martin, 74 Mo. 547; State *v.* Edwards, 19 Mo. 674.

Ohio.— State *v.* Foy, Tapp. 103.

Oregon.— State *v.* Drake, 11 Oreg. 396, 4 Pac. 1204.

Pennsylvania.— State *v.* Leach, Add. 352.

Texas.— Moore *v.* State, 15 Tex. App. 1.

See 14 Cent. Dig. tit. "Criminal Law," § 1113 *et seq.*

If an indictment against several charges them with separate and distinct offenses, and not with the joint commission of the same offense, it seems that defendants are competent witnesses for each other before acquittal or conviction. Strawhern *v.* State, 37 Miss. 422.

8. State *v.* Gigher, 23 Iowa 318; State *v.* Nash, 10 Iowa 81; State *v.* Chyo Chiagk, 92 Mo. 395, 4 S. W. 704.

A statute permitting defendants to testify in their own behalf, but limiting the right where a severance is had to the person on trial, does not modify a statute which forbids the introduction of accomplices as witnesses for each other. Jenkins *v.* State, 30 Tex. App. 379, 17 S. W. 938.

A statute allowing defendant to make a statement to the jury, under oath, of his defense does not make him a competent witness in behalf of another defendant jointly indicted, before the case against the witness has been disposed of. Ballard *v.* State, 31 Fla. 266, 12 So. 865.

The Kentucky statute (Cr. Code, § 234, and act of May 1, 1886, § 3) prohibiting persons indicted for conspiracy from testifying in behalf of one another was repealed by the act of March 23, 1894. Kidwell *v.* Com., 97 Ky. 538, 31 S. W. 131, 17 Ky. L. Rep. 79.

9. State *v.* Angel, 52 La. Ann. 485, 27 So. 214; State *v.* Franks, 51 S. C. 259, 28 S. E. 908; State *v.* Peterson, 35 S. C. 279, 14 S. E. 617.

10. Harris *v.* State, 78 Ala. 482; Com. *v.* Brown, 130 Mass. 279; Richards *v.* State, 91 Tenn. 723, 20 S. W. 533, 30 Am. St. Rep. 907.

11. *California.*— People *v.* Newberry, 20 Cal. 439; People *v.* Labra, 5 Cal. 183.

Georgia.— Jones *v.* State, 1 Ga. 610.

Indiana.— State *v.* Spencer, 15 Ind. 249; Hunt *v.* State, 10 Ind. 69; Marshall *v.* State, 8 Ind. 498; Everet *v.* State, 6 Ind. 495.

Kansas.— State *v.* Bogue, 52 Kan. 79, 34 Pac. 410.

Ohio.— Allen *v.* State, 10 Ohio St. 287.

Tennessee.— Poteete *v.* State, 9 Baxt. 261, 40 Am. Rep. 90. *Compare*, however, State *v.* Mooney, 1 Yerg. 431.

Virginia.— Lazier *v.* Com., 10 Gratt. 708.

Wyoming.— McGinness *v.* State, 4 Wyo. 115, 31 Pac. 978, 53 Pac. 492.

See 14 Cent. Dig. tit. "Criminal Law," § 1116.

12. State *v.* Mathews, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135.

13. *Arkansas.*— Foster *v.* State, 45 Ark. 328; Brown *v.* State, 24 Ark. 620; Collier *v.* State, 20 Ark. 36; Moss *v.* State, 17 Ark. 327, 65 Am. Dec. 433.

Iowa.— State *v.* Nash, 7 Iowa 347.

Kentucky.— Chandler *v.* Com., 1 Bush 41; Cornelius *v.* Com., 3 Metc. 481.

Massachusetts.— Com. *v.* Marsh, 10 Pick. 57.

Michigan.— People *v.* Van Alstine, 57 Mich. 69, 23 N. W. 594; Grimm *v.* People, 14 Mich. 300.

Minnesota.— State *v.* Dumphey, 4 Minn. 438; Baker *v.* U. S., 1 Minn. 207.

Missouri.— State *v.* Roberts, 15 Mo. 28.

New Hampshire.—State *v.* Young, 39 N. H. 283; State *v.* Bean, 36 N. H. 122.

New York.— McIntyre *v.* People, 9 N. Y. 38; People *v.* Donnelly, 1 Abb. Pr. 459; People *v.* Williams, 19 Wend. 377; People *v.* Bill, 10 Johns. 95; People *v.* McIntyre, 1 Park. Cr. 371.

but acquitted,[14] or convicted,[15] is a competent witness for him. Where there is but little evidence against one jointly indicted, his case should be presented to the jury, and if acquitted he is then competent.[16]

(II) *Persons Separately Indicted.* One accomplice, separately indicted, is a competent witness for the other,[17] unless there is a statute to the contrary.[18] Under a statute excluding accomplices testifying for one another, although separately indicted and tried, an accomplice is competent after he has been acquitted.[19]

3. Credibility and Corroboration of Accomplices — a. Necessity For Corroboration in General. In the absence of a statute the credibility of an accomplice is for the jury, as is the case with all evidence.[20] No common-law rule forbids a conviction upon the uncorroborated testimony of an accomplice, if his evidence satisfies the jury of the guilt of the accused beyond a reasonable doubt. Hence, although the uncorroborated testimony of an accomplice should be received and considered by the jury with caution, and the court should and usually does instruct

North Carolina.— State *v.* Smith, 24 N. C. 402; State *v.* Mills, 13 N. C. 420.

Oregon.— Latshaw *v.* Territory, 1 Oreg. 140.

Pennsylvania.— Kehoe *v.* Com., 85 Pa. St. 127; Staup *v.* Com., 74 Pa. St. 458; Shay *v.* Com., 36 Pa. St. 305.

Texas.— Warfield *v.* State, 35 Tex. 736; Brooks *v.* State, (Cr. App. 1900) 56 S. W. 924.

United States.— U. S. *v.* Reid, 12 How. 361, 13 L. ed. 1023; U. S. *v.* Rutherford, 27 Fed. Cas. No. 16,210, 2 Cranch C. C. 528.

See 14 Cent. Dig. tit. "Criminal Law," § 1116 *et seq.*

14. State *v.* Hunt, 91 Mo. 491, 3 S. W. 868; Bowerhan's Case, 4 City Hall Rec. (N. Y.) 136; Perry *v.* State, (Tex. Cr. App. 1896) 34 S. W. 618; U. S. *v.* Davidson, 25 Fed. Cas. No. 14,922, 4 Cranch C. C. 576.

New trial for newly discovered evidence.— The fact that a witness becomes competent by reason of his acquittal does not constitute newly discovered evidence, where his acquittal occurs after the conviction of his co-defendant, so as to furnish ground for an application for a new trial. Sawyer *v.* Merrill, 10 Pick. (Mass.) 16; State *v.* Bean, 36 N. H. 122; People *v.* Vermilyea, 7 Cow. (N. Y.) 369; U. S. *v.* Gilbert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19.

15. *Alabama.*— South *v.* State, 86 Ala. 617, 6 So. 52.

Delaware.— State *v.* Turner, Houst. Cr. 76.

Maine.— State *v.* Jones, 51 Me. 125.

Mississippi.— Strawhern *v.* State, 37 Miss. 422.

Missouri.— State *v.* Loney, 82 Mo. 82.

England.— Reg. *v.* Arundel, 4 Cox C. C. 260; Reg. *v.* Archer, 3 Cox C. C. 228.

Necessity for judgment or sentence.— It has been held that an accomplice who has pleaded guilty or been convicted must have been sentenced, since, if judgment is suspended, he is still a defendant. State *v.* Young, 39 N. H. 283; State *v.* Bruner, 65 N. C. 499; State *v.* Queen, 65 N. C. 464; Kehoe *v.* Com., 85 Pa. St. 127. But see Garrett *v.* State, 6 Mo. 1; Reg. *v.* George, C. & M. 111, 41 E. C. L. 66.

It is the duty of the court under such circumstances to permit the accused to have the benefit of the testimony of the convict by at once passing judgment and sentence upon him. Delozier *v.* State, 1 Head (Tenn.) 45; Reg. *v.* Jackson, 6 Cox C. C. 525.

Before payment of fine.— It has been held that one who has been convicted and sentenced to pay a fine is not incompetent because he has not paid it, as the prosecution as to him is at an end. Strawhern *v.* State, 37 Miss. 422; State *v.* Stotts, 26 Mo. 307. *Contra*, Ellege *v.* State, 24 Tex. 78; Tilley *v.* State, 21 Tex. 200.

16. Fitzgerald *v.* State, 14 Mo. 413.

17. McKenzie *v.* State, 24 Ark. 636; U. S. *v.* Hanway, 26 Fed. Cas. No. 15,299, 2 Wall. Jr. 139; U. S. *v.* Henry, 26 Fed. Cas. No. 15,351, 4 Wash. 428.

Joint trial.— It has been held that accomplices separately indicted are competent witnesses for each other, although jointly tried. U. S. *v.* Hunter, 26 Fed. Cas. No. 15,425, 1 Cranch C. C. 446. But see State *v.* Blennerhassett, Walk. (Miss.) 7.

18. Where a statute provides that accomplices, whether indicted in the same or different indictments, cannot be witnesses for one another, a person indicted, who takes the depositions of witnesses before they are indicted, is entitled to the use of such depositions on his trial. Doughty *v.* State, 18 Tex. App. 179, 51 Am. Rep. 303.

19. Woods *v.* State, 26 Tex. App. 490, 10 S. W. 108.

20. *Arkansas.*— Gill *v.* State, 59 Ark. 422, 27 S. W. 598.

California.— People *v.* Bonney, 98 Cal. 278, 33 Pac. 98.

Illinois.— Gray *v.* People, 26 Ill. 344.

Kentucky.— White *v.* Com., 5 Ky. L. Rep. 318.

Louisiana.— State *v.* Prudhomme, 25 La. Ann. 522.

Maine.— State *v.* Litchfield, 58 Me. 267.

Michigan.— People *v.* Hare, 57 Mich. 505, 24 N. W. 843; People *v.* Jenness, 5 Mich. 305.

Mississippi.— George *v.* State, 39 Miss. 570.

Nebraska.— State *v.* Sneff, 22 Nebr. 481, 35 N. W. 219.

them to that effect, they may in the absence of a statutory provision to the contrary convict upon the evidence of an accomplice alone, although uncorroborated.[21] In many jurisdictions, however, statutes expressly provide that no conviction shall be had upon the testimony of an accomplice, unless it is corroborated in some material part by other evidence tending to connect defendant with the commission of the offense.[22]

New York.— People *v.* O'Neil, 109 N. Y. 251, 16 N. E. 68 [*affirming* 48 Hun 36]; People *v.* Kerr, 6 N. Y. Suppl. 674, 6 N. Y. Cr. 406; Quay *v.* Eagle, 2 City Hall Rec. 1; Francis' Case, 1 City Hall Rec. 121; McNiff's Case, 1 City Hall Rec. 8.

Virginia.— Brown *v.* Com., 2 Leigh 769.

United States.— U. S. *v.* Lancaster, 26 Fed. Cas. No. 15,556, 2 McLean 431; U. S. *v.* McKee, 26 Fed. Cas. No. 15,685, 3 Dill. 546. See also U. S. *v.* Reeves, 38 Fed. 404.

See 14 Cent. Dig. tit. "Criminal Law," § 1124.

21. *Colorado.*—Wisdom *v.* People, 11 Colo. 170, 17 Pac. 519.

Connecticut.— State *v.* Williamson, 42 Conn. 261; State *v.* Stebbins, 29 Conn. 463, 79 Am. Dec. 223.

Delaware.— State *v.* Horner, 1 Marv. 504, 26 Atl. 73, 41 Atl. 139.

District of Columbia.— U. S. *v.* Bicksler, 1 Mackey 341; U. S. *v.* Neverson, 1 Mackey 152.

Florida.— Jenkins *v.* State, 31 Fla. 196, 12 So. 677; Bacon *v.* State, 22 Fla. 51.

Hawaii.— Republic *v.* Edwards, 11 Hawaii 571; Republic *v.* Parsons, 10 Hawaii 601; Rex *v.* Wo Sow, 7 Hawaii 734.

Illinois.— Rider *v.* People, 110 Ill. 11; Collins *v.* People, 98 Ill. 584, 38 Am. Rep. 105.

Indiana.— Ayers *v.* State, 88 Ind. 275; Johnson *v.* State, 65 Ind. 269; Nevill *v.* State, 60 Ind. 308.

Kansas.— State *v.* Patterson, 52 Kan. 335, 34 Pac. 784.

Louisiana.—State *v.* Thompson, 47 La. Ann. 1597, 18 So. 621; State *v.* Russell, 33 La. Ann. 135.

Maine.— State *v.* Cunningham, 31 Me. 355.

Massachusetts.— Com. *v.* Clune, 162 Mass. 206, 38 N. E. 435; Com. *v.* Wilson, 152 Mass. 12, 25 N. E. 16; Com. *v.* Ford, 111 Mass. 394.

Michigan.— People *v.* Nunn, 120 Mich. 530, 79 N. W. 800; People *v.* Gallagher, 75 Mich. 512, 42 N. W. 1063.

Minnesota.— State *v.* McCartey, 17 Minn. 76.

Missouri.— State *v.* Kennedy, 154 Mo. 268, 55 S. W. 293; State *v.* Sprague, 149 Mo. 409, 50 S. W. 901; State *v.* Black, 143 Mo. 166, 44 S. W. 340; State *v.* Harkins, 100 Mo. 666, 13 S. W. 830.

Nebraska.— Lawhead *v.* State, 46 Nebr. 607, 65 N. W. 779; Lamb *v.* State, 40 Nebr. 312, 58 N. W. 963.

New Jersey.— State *v.* Goldman, 65 N. J. L. 394, 47 Atl. 641; State *v.* Hyer, 39 N. J. L. 598.

New Mexico.— Territory *v.* Kinney, 3 N. M. 97, 2 Pac. 357.

New York.— Stape *v.* People, 21 Hun 399; Maine *v.* People, 9 Hun 113; People *v.* Costello, 1 Den. 83; Wixson *v.* People, 5 Park. Cr. 119.

North Carolina.— State *v.* Stroud, 95 N. C. 626; State *v.* Hardin, 19 N. C. 407; State *v.* Haney, 19 N. C. 390. See also State *v.* Miller, 97 N. C. 484, 2 S. E. 363.

Ohio.— State *v.* McCoy, 52 Ohio St. 157, 39 N. E. 316; Allen *v.* State, 10 Ohio St. 287.

Pennsylvania.— Com. *v.* Sayars, 21 Pa. Super. Ct. 75.

South Carolina.— State *v.* Green, 48 S. C. 136, 26 S. E. 234; State *v.* Wingo, 11 S. C. 275 note.

Vermont.— State *v.* Dana, 59 Vt. 614, 10 Atl. 727.

Virginia.— Woods *v.* Com., 86 Va. 929, 11 S. E. 798.

West Virginia.—State *v.* Betsall, 11 W. Va. 703.

Wisconsin.— Porath *v.* State, 90 Wis. 527, 63 N. W. 1061, 48 Am. Rep. 954; Ingalls *v.* State, 48 Wis. 647, 4 N. W. 785.

United States.— U. S. *v.* Ybanez, 53 Fed. 536; U. S. *v.* Flemming, 18 Fed. 907; U. S. *v.* Harries, 26 Fed. Cas. No. 15,309, 2 Bond 311; U. S. *v.* Smith, 27 Fed. Cas. No. 16,322, 2 Bond 323. See also U. S. *v.* McKee, 26 Fed. Cas. No. 15,685, 3 Dill. 546.

England.— Reg. *v.* Boyes, B. & S. 311, 9 Cox C. C. 32, 30 L. J. Q. B. 301, 101 E. C. L. 311; Rex *v.* Jones, 2 Camph. 131, 11 Rev. Rep. 680; Reg. *v.* Dunne, 5 Cox C. C. 507; Rex *v.* Neal, 7 C. & P. 168, 32 E. C. L. 555; Rex *v.* Hastings, 7 C. & P. 152, 32 E. C. L. 547; Rex *v.* Durham, 2 Leach C. C. 538; Rex *v.* Atwood, 2 Leach C. C. 521.

See 14 Cent. Dig. tit. "Criminal Law," § 1124 *et seq.*

22. *Alabama.*— Marler *v.* State, 67 Ala. 55, 42 Am. Rep. 95; Bird *v.* State, 36 Ala. 279.

Arizona.— Territory *v.* Neligh, (1886) 10 Pac. 367.

Arkansas.— Scott *v.* State, 63 Ark. 310, 38 S. W. 339; Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885.

California.— People *v.* Smith, 98 Cal. 218, 33 Pac. 58; People *v.* Gibson, 53 Cal. 601; People *v.* Ames, 39 Cal. 403.

Georgia.— Johnson *v.* State, 92 Ga. 577, 20 S. E. 8.

Iowa.— Upton *v.* State, 5 Iowa 465.

Kentucky.— Bowling *v.* Com., 79 Ky. 604.

Minnesota.—State *v.* Lawlor, 28 Minn. 216, 9 N. W. 698.

Montana.— State *v.* Calder, 23 Mont. 504, 59 Pac. 903.

New York.— People *v.* Courtney, 28 Hun 589; People *v.* Ryland, 28 Hun 568; Lindsay *v.* People, 5 Hun 104, 67 Barb. 548 [*affirmed* in 63 N. Y. 143].

b. Accomplice Giving Evidence Against Two. Where an accomplice gives evidence against two persons jointly tried, the corroboration of his testimony, as to the guilt of one of them does not obviate the necessity for corroboration of his testimony against the other.[23]

c. Directing Verdict Where Accomplice Is Not Corroborated. Under a statute which provides that a conviction cannot be had on the uncorroborated testimony of an accomplice, the court should, in the absence of corroboration, direct an acquittal.[24] And even if there be no statute, if the evidence of the accomplice is contradictory and uncorroborated in important particulars, the court may and perhaps should instruct the jury not to convict.[25]

d. Order of Corroboration as to Time. The testimony of an accomplice for the state need not be first attacked by the defense to admit corroboration, but the corroborative testimony may and usually of necessity must be given as part of the prosecution's case.[26]

e. Character, Scope, and Sufficiency of Corroboration — (i) *In General.* It is not essential that the corroborative evidence shall cover every material point testified to by the accomplice, or be sufficient alone to warrant a verdict of guilty. If he is corroborated as to some material fact or facts, the jury may from that infer that he speaks the truth as to all.[27]

Ohio.— State *v.* Snell, 5 Ohio S. & C. Pl. Dec. 670.

Texas.— Johnson *v.* State, 33 Tex. 570; Smith *v.* State, (Cr. App. 1896) 38 S. W. 201; Smith *v.* State, 27 Tex. App. 196, 11 S. W. 113; Pool *v.* State, 25 Tex. App. 661, 8 S. W. 817; Crowell *v.* State, 24 Tex. App. 404, 6 S. W. 318; Hunnicutt *v.* State, 18 Tex. App. 498, 51 Am. Rep. 330; House *v.* State, 15 Tex. App. 522. See also Schoenfeldt *v.* State, 30 Tex. App. 695, 18 S. W. 640; Tipton *v.* State, 30 Tex. App. 530, 17 S. W. 1097.

Utah.— State *v.* Spencer, 15 Utah 149, 49 Pac. 302.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1860–1863, 1775.

Although the jury believe the evidence of the accomplice to be true, and to establish defendant's guilt beyond a reasonable doubt, a verdict of guilty will not be sustained unless his evidence is corroborated. State *v.* Carr, 28 Oreg. 389, 42 Pac. 215.

Such a statute does not apply unless the jury believe on all the evidence that the witness is an accomplice. Ross *v.* State, 74 Ala. 532.

Misdemeanors.— A general statute requiring corroboration of the testimony of an accomplice applies to misdemeanors as well as felonies. State *v.* Davis, 38 Ark. 581. But in some states the statute does not apply to misdemeanors. Rountree *v.* State, 88 Ga. 457, 14 S. E. 712; Porter *v.* State, 76 Ga. 658; Wall *v.* State, 75 Ga. 474; Askea *v.* State, 75 Ga. 356; Crisson *v.* State, 51 Ga. 597. See Truss *v.* State, 13 Lea (Tenn.) 311.

23. U. S. *v.* Neverson, 1 Mackey (D. C.) 152; Reg. *v.* Stubbs, 7 Cox C. C. 48, Dears. C. C. 555, 1 Jur. N. S. 1115, 25 L. J. M. C. 16, 4 Wkly. Rep. 85; Reg. *v.* Jenkins, 1 Cox C. C. 177. *Compare*, however, Reg. *v.* Dawber, 3 Stark. 34, 3 E. C. L. 583.

24. People *v.* Strybe, (Cal. 1894) 36 Pac. 3; Craft *v.* Com., 80 Ky. 349; White *v.* Com., 5 Ky. L. Rep. 318.

25. State *v.* Lowber, Houst. Cr. (Del.) 324; Com. *v.* Price, 10 Gray (Mass.) 472, 71 Am. Dec. 668. See *infra*, XII, G, 3, f.

26. State *v.* Banks, 40 La. Ann. 736, 5 So. 18; Mosher *v.* People, 19 Hun (N. Y.) 625.

27. *Alabama.*— Lumpkin *v.* State, 68 Ala. 56; Smith *v.* State, 59 Ala. 104; Montgomery *v.* State, 40 Ala. 684.

California.— People *v.* Clough, 73 Cal. 348, 15 Pac. 5; People *v.* Kunz, 73 Cal. 313, 14 Pac. 836; People *v.* Thompson, 50 Cal. 480; People *v.* Cloonan, 50 Cal. 449.

District of Columbia.— U. S. *v.* Neverson, 1 Mackey 152.

Georgia.— Dixon *v.* State, 116 Ga. 186, 42 S. E. 357; Chapman *v.* State, 112 Ga. 56, 37 S. E. 102; Evans *v.* State, 78 Ga. 351.

Iowa.— State *v.* Blain, 118 Iowa 466, 92 N. W. 650; State *v.* Jones, 115 Iowa 113, 88 N. W. 196; State *v.* Allen, 57 Iowa 431, 10 N. W. 805; State *v.* Hennessy, 55 Iowa 299, 7 N. W. 641; State *v.* Schlagel, 19 Iowa 169.

Kansas.— Craft *v.* State, 3 Kan. 450.

Kentucky.— Craft *v.* Com., 4 Ky. L. Rep. 182.

Louisiana.— State *v.* Callahan, 47 La. Ann. 444, 17 So. 50.

Massachusetts.—Com. *v.* Holmes, 127 Mass. 424, 34 Am. Rep. 391; Com. *v.* Drake, 124 Mass. 21.

Minnesota.— State *v.* Clements, 82 Minn. 434, 85 N. W. 229; State *v.* Lawlor, 28 Minn. 216, 9 N. W. 698.

Montana.— State *v.* Stevenson, 26 Mont. 332, 67 Pac. 1001; State *v.* Calder, 23 Mont. 504, 59 Pac. 903; Territory *v.* Corbett, 3 Mont. 50.

New York.— People *v.* Ogle, 104 N. Y. 511, 11 N. E. 53, 4 N. Y. Cr. 349; People *v.* Courtney, 28 Hun 589; People *v.* Ryland, 28 Hun 568; People *v.* Everhardt, 4 N. Y. St. 518, 5 N. Y. Cr. 91; People *v.* Davis, 21 Wend. 309.

Pennsylvania.—Ettinger *v.* Com., 98 Pa. St. 338; Com. *v.* Goldberg, 4 Pa. Super. Ct. 142.

(II) *Connecting Accused With the Crime.* It is necessary, however, that the evidence corroborating an accomplice shall connect or tend to connect defendant with the commission of the crime. Corroborative evidence is insufficient where it merely casts a grave suspicion on the accused. It must not only show the commission of the offense and circumstances thereof, but must also implicate the accused in it.[28] Hence corroboration relating exclusively to the *corpus delicti* and the circumstances thereof will not sustain a conviction.[29]

(III) *Circumstantial Evidence.* The corroborative evidence need not be direct, but may be circumstantial,[30] and where the accomplice is strongly corroborated by facts and circumstances connecting the accused with the crime a conviction will be sustained.[31] But where the circumstances when proved, taken sepa-

South Dakota.— State *v.* Hicks, 6 S. D. 325, 60 N. W. 66.

Texas.— Wilkerson *v.* State, (Cr. App. 1899) 57 S. W. 956; Jones *v.* State, 3 Tex. App. 575.

Utah.— State *v.* Collett, 20 Utah 290, 58 Pac. 684; State *v.* Spencer, 15 Utah 149, 49 Pac. 302; State *v.* Lee, 2 Utah 441.

Vermont.— State *v.* Dana, 59 Vt. 614, 10 Atl. 727; State *v.* Howard, 32 Vt. 380, 78 Am. Dec. 609.

United States.— U. S. *v.* Howell, 56 Fed. 21; U. S. *v.* Lancaster, 44 Fed. 896, 10 L. R. A. 333; U. S. *v.* Troax, 28 Fed. Cas. No. 16,540, 3 McLean 224.

England.— Reg. *v.* Gallagher, 15 Cox C. C. 291; Rex *v.* Addis, 6 C. & P. 388, 25 E. C. L. 488.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1128, 1861.

No general rule exists as to the *quantum* of evidence corroborating an accomplice's testimony necessary to warrant a conviction. Bell *v.* State, 73 Ga. 572.

The corroboration may consist of the confession of the accused (Partee *v.* State, 67 Ga. 570; Schoenfeldt *v.* State, 30 Tex. App. 695, 18 S. W. 640; U. S. *v.* Lancaster, 44 Fed. 896, 10 L. R. A. 333), but not of evidence of other crimes (Long *v.* State, (Tex. Cr. App. 1898) 47 S. W. 363), or of the statement by the accused repeated to the accomplice that he intended to commit other crimes (Kinchelow *v.* State, 5 Humphr. (Tenn.) 9).

28. *Alabama.*— Marler *v.* State, 67 Ala. 55, 42 Am. Rep. 95.

Arkansas.— Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885.

California.— People *v.* Hoagland, 138 Cal. 338, 71 Pac. 359; People *v.* Compton, 123 Cal. 403, 56 Pac. 44; People *v.* Lynch, 122 Cal. 501, 55 Pac. 248; People *v.* Melvane, 39 Cal. 614; People *v.* Ames, 39 Cal. 403.

Connecticut.— State *v.* Maney, 54 Conn. 178, 6 Atl. 401; State *v.* Wolcott, 21 Conn. 272.

Georgia.— Solomon *v.* State, 113 Ga. 192, 38 S. E. 332; Taylor *v.* State, 110 Ga. 150, 35 S. E. 161; Middleton *v.* State, 52 Ga. 527; Childers *v.* State, 52 Ga. 106.

Iowa.— State *v.* McKinzie, 18 Iowa 573; State *v.* Pepper, 11 Iowa 347; State *v.* Willis, 9 Iowa 582; Upton *v.* State, 5 Iowa 465.

Kentucky.— Craft *v.* Com., 4 Ky. L. Rep. 182.

Massachusetts.— Com. *v.* Hayes, 140 Mass. 366, 5 N. E. 264; Com. *v.* Holmes, 127 Mass. 424, 34 Am. Rep. 391.

New York.— People *v.* Bissert, 172 N. Y. 643, 65 N. E. 1120; People *v.* Everhardt, 104 N. Y. 591, 11 N. E. 62; People *v.* O'Neil, 48 Hun 36 [*affirmed* in 109 N. Y. 251, 16 N. E. 68]; Linsday *v.* People, 67 Barb. 548; People *v.* Elliott, 5 N. Y. Cr. 204 [*reversed* in 106 N. Y. 288, 12 N. E. 602]; People *v.* Courtney, 1 N. Y. Cr. 64.

North Dakota.— State *v.* Coudotte, 7 N. D. 109, 72 N. W. 913; State *v.* Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686.

Oregon.— State *v.* Odell, 8 Oreg. 30.

Pennsylvania.— Watson *v.* Com., 95 Pa. St. 418.

South Dakota.— State *v.* Levers, 12 S. D. 265, 81 N. W. 294.

Tennessee.— Robison *v.* State, 16 Lea 146.

Texas.— Chambers *v.* State, (Cr. App. 1898) 44 S. W. 495; Johnson *v.* State, (Cr. App. 1896) 37 S. W. 327; Roach *v.* State, 8 Tex. App. 478; Hoyle *v.* State, 4 Tex. App. 239; Jones *v.* State, 3 Tex. App. 575.

England.— Reg. *v.* Dyke, 8 C. & P. 261, 34 E. C. L. 723; Reg. *v.* Farler, 8 C. & P. 106, 34 E. C. L. 635.

See 14 Cent. Dig. tit. "Criminal Law," § 1129.

Province of court and jury.— If the trial judge is satisfied that there is evidence tending to connect defendant with the commission of the crime, he must send the case to the jury, whose province it is to determine whether the corroboration is sufficient. People *v.* Mayhew, 150 N. Y. 346, 44 N. E. 971; People *v.* Everhardt, 104 N. Y. 591, 11 N. E. 62. See also *infra*, XIV, F, 4, a, (IX).

29. Hudspeth *v.* State, 50 Ark. 534, 9 S. W. 1; Bowling *v.* Com., 3 Ky. L. Rep. 610.

30. *Alabama.*— Jefferson *v.* State, 110 Ala. 89, 20 So. 434.

California.— People *v.* Sternberg, 111 Cal. 3, 43 Pac. 198.

Iowa.— State *v.* Jones, 115 Iowa 113, 88 N. W. 196.

Missouri.— State *v.* Kennedy, 154 Mo. 268, 55 S. W. 293.

New York.— People *v.* Mayhew, 150 N. Y. 346, 44 N. E. 971; People *v.* Baker, 27 N. Y. App. Div. 597, 50 N. Y. Suppl. 771.

Pennsylvania.— Cox *v.* Com., 125 Pa. St. 94, 17 Atl. 227.

Texas.— Looman *v.* State, 37 Tex. Cr. 276, 39 S. W. 571.

See 14 Cent. Dig. tit. "Criminal Law," § 1130 *et seq.*

31. State *v.* Stanley, 48 Iowa 221; State *v.* Thornton, 26 Iowa 79; Smith's Case, 1

rately or collectively, are consistent with the innocence of the accused, there is no corroboration, and a verdict of conviction based thereon will be set aside.[32] What facts constitute a sufficient corroboration of an accomplice in any particular case depends of course upon the character of the crime and the character of his testimony, keeping in view the rule that corroboration must tend to connect the accused with the crime.[33]

(iv) *Association of Accused With Accomplice.* Evidence which shows no more than that the defendant and the accomplice were seen together shortly before the crime is not such corroboration as the law requires,[34] but evidence that they were seen together in the vicinity of the crime, and were afterward together, with the fruits of the crime in their possession, is sufficient corroboration.[35]

(v) *Presence of Accused at Place of Crime.* The fact that the accused shortly before the crime was seen going toward the place of its commission,[36] or that he was seen near there at or about the time of its commission,[37] does not alone constitute corroboration.[38] But being seen near the place of the crime in

City Hall Rec. (N. Y.) 133; and other cases cited in the note preceding.

32. Blois *v.* State, 92 Ga. 584, 20 S. E. 12; State *v.* Graff, 47 Iowa 384; State *v.* Clemens, 38 Iowa 257; State *v.* Moran, 34 Iowa 453.

33. As to the sufficiency of corroboration by particular facts see the following cases:

Alabama.— Jefferson *v.* State, 110 Ala. 89, 20 So. 434.

California.— People *v.* Sternberg, 111 Cal. 3, 43 Pac. 198; People *v.* Strybe, (1894) 36 Pac. 3; People *v.* Koening, 99 Cal. 574, 34 Pac. 238.

Connecticut.— State *v.* Stebbins, 29 Conn. 463, 79 Am. Dec. 223.

Georgia.— Blois *v.* State, 92 Ga. 584, 20 S. E. 12.

Iowa.— State *v.* Hall, 97 Iowa 400, 66 N. W. 725; State *v.* Clouser, 69 Iowa 313, 28 N. W. 615; State *v.* Wart, 51 Iowa 587, 2 N. W. 405; State *v.* Graff, 47 Iowa 384; State *v.* Clemens, 38 Iowa 257; State *v.* Moran, 34 Iowa 453.

Kansas.— State *v.* Kellerman, 14 Kan. 135.

Massachusetts.— Com. *v.* Drake, 124 Mass. 21; Com. *v.* Bosworth, 22 Pick. 397.

Michigan.— People *v.* O'Brien, 68 Mich. 468, 36 N. W. 225.

Montana.— Territory *v.* Mahaffey, 3 Mont. 112.

New York.— People *v.* O'Neil, 109 N. Y. 251, 16 N. E. 68 [*affirming* 48 Hun 36]; People *v.* Elliott, 106 N. Y. 288, 12 N. E. 602; People *v.* Everhardt, 104 N. Y. 591, 11 N. E. 62; People *v.* Sherman, 103 N. Y. 513, 9 N. E. 178; People *v.* Ryland, 97 N. Y. 126, 1 N. Y. Cr. 123; Linsday *v.* People, 63 N. Y. 143 [*affirming* 5 Hun 104, 67 Barb. 548]; People *v.* Christian, 78 Hun 28, 29 N. Y. Suppl. 271; People *v.* White, 62 Hun 114, 16 N. Y. Suppl. 571; People *v.* Kerr, 6 N. Y. Suppl. 674, 6 N. Y. Cr. 406.

North Dakota.— State *v.* Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

Oregon.— State *v.* Scott, 28 Oreg. 331, 42 Pac. 1.

Pennsylvania.— Cox *v.* Com., 125 Pa. St. 94, 17 Atl. 227; Ettinger *v.* Com., 98 Pa. St. 338.

South Carolina.—State *v.* Smalls, 11 S. C. 262; State *v.* Cardoza, 11 S. C. 195.

South Dakota.— State *v.* Hicks, 6 S. D. 325, 60 N. W. 66.

Tennessee.—Kinchelow *v.* State, 5 Humphr. 9.

Texas.— Garrett *v.* State, 41 Tex. 530; Williamson *v.* State, 37 Tex. Cr. 437, 35 S. W. 992; Roguemore *v.* State, 28 Tex. App. 55, 11 S. W. 834; Stouard *v.* State, 27 Tex. App. 1, 10 S. W. 442; Buchanan *v.* State, 25 Tex. App. 546, 8 S. W. 665; Jones *v.* State, 7 Tex. App. 457.

Wyoming.— McNeally *v.* State, 5 Wyo. 59, 36 Pac. 824.

See 14 Cent. Dig. tit. "Criminal Law," § 1131.

Bribery of witness.— State *v.* Brin, 30 Minn. 522, 16 N. W. 406.

Endeavor to get accomplice to flee.— People *v.* McLean, 84 Cal. 480, 24 Pac. 32.

Contradictory testimony of defendant.— State *v.* Brin, 30 Minn. 522, 16 N. W. 406.

Animosity of accused toward party injured. — Bonner *v.* State, 107 Ala. 97, 18 So. 226; Com. *v.* Chase, 147 Mass. 597, 18 N. E. 565.

Possession of fruits of crime.— Malachi *v.* State, 89 Ala. 134, 8 So. 104.

Statement by accused that accomplice had nothing to do with crime.— Com. *v.* O'Brien, 12 Allen (Mass.) 183.

34. People *v.* Larsen, (Cal. 1893) 34 Pac. 514; State *v.* Mikesell, 70 Iowa 176, 30 N. W. 474; People *v.* Courtney, 1 N. Y. Cr. 64.

35. State *v.* Russell, 90 Iowa 493, 58 N. W. 890. And see *infra*, XII, G, 3, e, (v).

36. Smith *v.* Com., 17 S. W. 182, 13 Ky. L. Rep. 369.

37. State *v.* Willis, 9 Iowa 582; State *v.* Odell, 8 Oreg. 30.

38. But evidence that the accused was seen near the place of the crime is admissible, its force and weight being for the jury to determine (Lindsay *v.* People, 5 Hun (N. Y.) 104, 67 Barb. (N. Y.) 548 [*affirmed* in 63 N. Y. 143]; and, if coupled with suspicious circumstances, as for example the lateness of the hour or the lack of apparent business on the part of the accused, it may go to the jury as corroboration of the accomplice (Fort

the company of the accomplice,[39] particularly if coupled with evidence of a subsequent flight,[40] is such corroboration as with the evidence of an accomplice will sustain a conviction.

(VI) *Possession of Stolen Property.* Evidence that the stolen property was found or seen in the possession of the accused is sufficient, in the absence of explanation, to corroborate the testimony of an accomplice that the accused is guilty of larceny or robbery,[41] or of burglary;[42] and the felonious intent and guilty knowledge in receiving stolen goods, testified to by an accomplice, are corroborated by the actual possession of the goods.[43]

(VII) *Confessions or Admissions of Defendant.* A confession or admission of the accused is admissible to corroborate an accomplice,[44] and if the confession is supported by clear evidence of the *corpus delicti* it will if believed sufficiently corroborate the evidence of an accomplice.[45]

(VIII) *Previous Declarations of Witness.* The declarations or statements of an accomplice out of court, and not under oath, cannot be proved for the purpose of corroborating his testimony.[46] It cannot be shown that he had pleaded guilty to the offense for which he is jointly indicted with the accused.[47]

(IX) *Testimony of Wife of Accomplice.* The testimony of the wife of an accomplice, if otherwise unobjectionable, is sufficient corroboration of his testimony.[48]

(X) *Corroboration by Other Accomplices.* The testimony of one accomplice cannot be accepted as sufficient corroboration of the testimony of another.[49] There can be no conviction upon the testimony of accomplices alone,

v. State, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163; Com. *v.* Elliot, 110 Mass. 104).

39. People *v.* Barker, 114 Cal. 617, 46 Pac. 601; State *v.* Russell, 90 Iowa 493, 58 N. W. 890; State *v.* Townsend, 19 Oreg. 213, 23 Pac. 968; Morrow *v.* State, (Tex. Cr. App. 1894) 26 S. W. 395. But *compare* Smith *v.* State, (Tex. Cr. App. 1896) 38 S. W. 200.

40. Ross *v.* State, 74 Ala. 532.

41. *California.*— People *v.* Armstrong, 114 Cal. 570, 46 Pac. 611; People *v.* Grundell, 75 Cal. 301, 17 Pac. 214; People *v.* Cleveland, 49 Cal. 577.

Georgia.— McCrory *v.* State, 101 Ga. 779, 28 S. E. 921; Roberts *v.* State, 80 Ga. 772, 6 S. E. 587.

Missouri.— State *v.* Koplan, 167 Mo. 298, 66 S. W. 967.

Texas.— Wright *v.* State, (Cr. App. 1898) 44 S. W. 151; Hansom *v.* State, 27 Tex. App. 140, 11 S. W. 37; Jernigan *v.* State, 10 Tex. App. 546.

England.— Reg. *v.* Birkett, 8 C. & P. 732, 34 E. C. L. 989.

See 14 Cent. Dig. tit. "Criminal Law," § 1133. And see LARCENY; ROBBERY.

42. Boswell *v.* State, 92 Ga. 581, 17 S. E. 805; Pritchett *v.* State, 92 Ga. 33, 18 S. E. 350; Ford *v.* State, 70 Ga. 722; Buchannan *v.* State, (Tex. Cr. App. 1894) 24 S. W. 895. See BURGLARY, 6 Cyc. 246.

43. Com. *v.* Savory, 10 Cush. (Mass.) 535. See RECEIVING STOLEN GOODS.

44. Crittenden *v.* State, 134 Ala. 145, 32 So. 273; State *v.* Hennessy, 55 Iowa 299, 7 N. W. 641.

Misrepresentations, contradictions, and silence of defendant when accusing statements are made will usually have the same effect as a confession under the rule of the text. Com. *v.* Chase, 147 Mass. 597, 18 N. E. 565; Ettinger *v.* Com., 98 Pa. St. 338.

45. *Alabama.*— Snoddy *v.* State, 75 Ala. 23.

California.— People *v.* Solomon, (1899) 58 Pac. 55; People *v.* Cleveland, 49 Cal. 577.

Georgia.— Schaefer *v.* State, 93 Ga. 177, 18 S. E. 552; Partee *v.* State, 67 Ga. 570.

Iowa.— State *v.* Chauvet, 111 Iowa 687, 83 N. W. 717, 82 Am. St. Rep. 539, 51 L. R. A. 630.

Kentucky.— Patterson *v.* Com., 86 Ky. 313, 99 Ky. 610, 5 S. W. 765, 9 Ky. L. Rep. 481.

New York.— McDowell's Case, 5 City Hall Rec. 94.

Texas.— Schoenfeldt *v.* State, 30 Tex. App. 695, 18 S. W. 640.

United States.— U. S. *v.* Lancaster, 44 Fed. 896, 10 L. R. A. 333.

See 14 Cent. Dig. tit. "Criminal Law," § 1134.

46. State *v.* Scott, 15 S. C. 434; Clay *v.* State, 40 Tex. Cr. 556, 51 S. W. 212; Conway *v.* State, 33 Tex. Cr. 327, 26 S. W. 401; U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78. *Compare,* however, State *v.* Twitty, 9 N. C. 449.

47. Branson *v.* State, 99 Ga. 194, 24 S. E. 404.

48. *Alabama.*— Woods *v.* State, 76 Ala. 35, 52 Am. Rep. 315.

Arkansas.— Edmonson *v.* State, 51 Ark. 115, 10 S. W. 21.

Iowa.— State *v.* Moore, 25 Iowa 128, 95 Am. Dec. 776.

Kentucky.— Blackhurn *v.* Com., 12 Bush 181.

Texas.— Dill *v.* State, 1 Tex. App. 278.

See 14 Cent. Dig. tit. "Criminal Law," § 1137.

49. *Arkansas.*— Edmonson *v.* State, 51 Ark. 115, 10 S. W. 21.

California.— People *v.* Creegan, 121 Cal. 554, 53 Pac. 1082.

however many there may be, if uncorroborated, and the court should instruct to that effect.[50]

f. Province of Jury. If the evidence offered in corroboration of an accomplice, if true, tends to connect the accused with the commission of the crime, whether it sufficiently corroborates such accomplice is for the jury to determine; but if the evidence offered in corroboration in no wise tends to connect the accused with the crime, or is consistent with the hypothesis of his innocence, the court may refuse to permit the evidence to go to the jury and direct an acquittal.[51]

H. Confessions — 1. What Are Confessions — a. Definition and Classification. A confession, as distinguished from an admission, is a declaration made at any time by a person, voluntarily and without compulsion or inducement, stating or acknowledging that he has committed or participated in the commission of a crime.[52] The chief importance of determining whether a given statement is or is not a confession arises from the fact that if it is a confession it must have been voluntarily made, and as a rule the accused must have been cautioned,[53] while if it is not the state need not show caution, and in many jurisdictions need not show

Connecticut.—State *v.* Williamson, 42 Conn. 261.

Iowa.— Johnson *v.* State, 4 Greene 65.

Kentucky.— Porter *v.* Com., 61 S. W. 16, 22 Ky. L. Rep. 1657.

Montana.— State *v.* Spotted Hawk, 22 Mont. 33, 55 Pac. 1026.

New York.— People *v.* O'Neil, 109 N. Y. 251, 16 N. E. 68.

Texas.—Gonzales *v.* State, 9 Tex. App. 374.

United States.— U. S. *v.* Hinz, 35 Fed. 272, 13 Sawy. 266.

England.— Rex *v.* Noakes, 5 C. & P. 326, 24 E. C. L. 588.

See 14 Cent. Dig. tit. "Criminal Law," § 1137.

50. Howard *v.* Com., 110 Ky. 356, 61 S. W. 756, 22 Ky. L. Rep. 1845.

Who is an accomplice.— In consequence of the rule of the text it becomes necessary to determine whether the person testifying in corroboration is an accomplice. The same rules apply here as in determining whether the witness to be corroborated is an accomplice. See *supra*, XII, G, 1. One charged with a similar crime, not connected with that charged against defendant (U. S. *v.* Van Leuven, 65 Fed. 78), or one who has aided the accused to elude punishment, but not to escape capture or custody (People *v.* Dunn, 53 Hun (N. Y.) 381, 6 N. Y. Suppl. 805, 7 N. Y. Cr. 173), is competent, not being an accomplice. The wife of an accomplice who knew that a crime was to be committed and protested against it is not an accessary before the fact at common law, and her subsequent concealment of the offense to protect her husband does not make her an accessary after the fact, where a statute exempts husbands and wives from being regarded as such because of mere concealment. Edmonson *v.* State, 51 Ark. 115, 10 S. W. 21.

51. *Arkansas.*— Kent *v.* State, 64 Ark. 247, 41 S. W. 849.

California.— People *v.* Kunz, 73 Cal. 313, 14 Pac. 836.

Iowa.— State *v.* Dietz, 67 Iowa 220, 25 N. W. 141; State *v.* Cox, 10 Iowa 351. See also State *v.* Moore, 81 Iowa 578, 47 N. W. 772.

Kentucky.— Craft *v.* Com., 81 Ky. 250, 5 Ky. L. Rep. 53, 50 Am. Rep. 160.

Louisiana.— State *v.* De Hart, 109 La. 570, 33 So. 605.

Massachusetts.— Com. *v.* Brooks, 9 Gray 299.

Michigan.— People *v.* Shaver, 107 Mich. 562, 65 N. W. 538.

New York.— People *v.* Bosworth, 64 Hun 72, 19 N. Y. Suppl. 114.

See 14 Cent. Dig. tit. "Criminal Law," § 1138. And see *supra*, XII, G, 3, c; *infra*, XIV, F, 4, a, (IX).

52. *California.*— People *v.* Miller, 122 Cal. 84, 54 Pac. 523; People *v.* Hickman, 113 Cal. 80, 45 Pac. 175; People *v.* Strong, 30 Cal. 151, 157, where it was said: "A confession, in criminal law, is the voluntary declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation he had in the same."

Kentucky.— Collins *v.* Com., 26 S. W. 1, 15 Ky. L. Rep. 835.

Nebraska.— Taylor *v.* State, 37 Nebr. 788, 56 N. W. 623.

Ohio.— Moore *v.* State, 2 Ohio St. 500.

Oregon.— State *v.* Porter, 32 Oreg. 135, 49 Pac. 964.

Texas.— Runnells *v.* State, 42 Tex. Cr. 555, 61 S. W. 479.

Vermont.— State *v.* Carr, 53 Vt. 37.

See 14 Cent. Dig. tit. "Criminal Law," § 1139.

Confession and admission distinguished.— A confession is an admission of guilt, meant to be such (State *v.* Carr, 53 Vt. 37), while an admission denotes the acknowledgment of the existence of any fact, not meant by the person acknowledging it to indicate his guilt. State *v.* Crowder, 41 Kan. 101, 21 Pac. 208; State *v.* Picton, 51 La. Ann. 624, 25 So. 375; Musgrave *v.* State, 28 Tex. App. 57, 11 S. W. 927. See also *supra*, XII, E, 1, a.

53. See *infra*, XII, H, 2.

its voluntary character.[54] Confessions are divided into judicial confessions, which are chiefly those made in court at a trial or at an inquest or before an examining magistrate, and extrajudicial confessions, which are those made out of court to any person.[55]

b. Particular Statements and Acts — (i) *In General.* Statements made by one accused of a crime, which merely tend to show a connection on the part of such person with the crime committed, and are not acknowledgments of guilt, are not to be regarded as confessions.[56] Nor are exculpating statements in any sense confessions within the rule requiring confessions to be voluntarily made and the accused to have been cautioned.[57] The submission of a defendant to a medical examination of the person is not a confession, although the result is to disclose facts of a criminative character.[58]

(ii) *Prior Plea of Guilty and Demurrer.* Where a judgment on a plea of guilty in a prior trial is reversed, the plea is a confession to be proved by the record;[59] and the same rule applies to a plea of guilty on preliminary examination.[60] A demurrer to an indictment, however, although it admits the facts alleged for the purpose of its determination, is not a confession.[61]

(iii) *Signature of Accused to Prove Handwriting.* The signature of the accused attached to a writing of record, as an application for an attachment, is not a confession of guilt, and hence may be introduced as a standard for comparing handwriting, although he was in custody and was not warned when he signed it.[62]

(iv) *Confession Written by Another and Signed by Accused.* Where the prisoner's confession was reduced to writing and signed by him after being read to him, it is as much his as though he had himself written it, since by adopting the language he makes it his own.[63]

54. See *supra*, XII, E, 1, c.

55. Speer *v.* State, 4 Tex. App. 474. And see *infra*, XII, H, 2, j.

56. *California.*— People *v.* Le Roy, 65 Cal. 613, 4 Pac. 649; People *v.* Parton, 49 Cal. 632.

Georgia.— Taylor *v.* State, 110 Ga. 150, 35 S. E. 161; Powell *v.* State, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277; Boston *v.* State, 94 Ga. 590, 20 S. E. 98.

Iowa.— State *v.* Red, 53 Iowa 69, 4 N. W. 831.

Missouri.— State *v.* Jackson, 95 Mo. 623, 8 S. W. 749.

South Carolina.— State *v.* Carson, 36 S. C. 524, 15 S. E. 588.

Texas.— Banks *v.* State, 13 Tex. App. 182.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1139, 1140.

Illustrations.— A statement made by one arrested for an assault that he was sorry he did not kill the person assaulted is not a confession (Corporal *v.* State, (Tex. Cr. App. 1893) 24 S. W. 96); and the same is true of a statement with reference to the future commission of an offense (Banks *v.* State, 13 Tex. App. 182), of statements of several defendants accused of the same crime, in which each accuses the other of being the guilty party without inculpating himself (State *v.* Carson, 36 S. C. 524, 15 S. E. 588), of a statement that the accused was casually present at the commission of a crime, but took no part in it (Boston *v.* State, 94 Ga. 590, 20 S. E. 98), and of a statement by the accused that he knows who committed the crime, that he was present at its commission, and knows the means by which it was accomplished (Bell *v.* State, 93 Ga. 557, 19 S. E. 244; People *v.* Elliott, 8 N. Y. St. 223).

57. Harrison *v.* State, 55 Ala. 239; People *v.* Ashmead, 118 Cal. 508, 50 Pac. 681; Ferguson *v.* State, 31 Tex. Cr. 93, 19 S. W. 901; Quintana *v.* State, 29 Tex. App. 401, 16 S. W. 258, 25 Am. St. Rep. 730; Weathersby *v.* State, 29 Tex. App. 278, 15 S. W. 823.

58. Spicer *v.* State, 69 Ala. 159.

59. Com. *v.* Ervine, 8 Dana (Ky.) 30.

Where the court refuses to receive a plea of guilty or a special plea in bar which admits the facts charged, the plea cannot be received as a confession of guilt. Com. *v.* Lannan, 13 Allen (Mass.) 563; State *v.* Meyers, 99 Mo. 107, 12 S. W. 516.

Explaining plea.— Where a plea of guilty is introduced as a confession, defendant must be allowed to show why he entered it, that he was not in fact guilty, that the present charge had not been preferred against him, and that he did not expect the plea would be used against him. Murmutt *v.* State, (Tex. Cr. App. 1902) 67 S. W. 508.

60. Green *v.* State, 40 Fla. 474, 24 So. 537; State *v.* Briggs, 68 Iowa 416, 27 N. W. 358; Com. *v.* Brown, 150 Mass. 330, 23 N. E. 49; Rice *v.* State, 22 Tex. App. 654, 3 S. W. 791.

61. Ross *v.* State, 9 Mo. 696.

62. Hunt *v.* State, 33 Tex. Cr. 252, 26 S. W. 206.

63. Com. *v.* Coy, 157 Mass. 200, 32 N. E. 4.

2. ADMISSIBILITY — a. In General. A confession of guilt by the accused is admissible against him if it was free and voluntary,[64] but not otherwise. It must not have been induced by the expectation of any promised benefit, nor by the fear of any threatened injury. If it was prompted by either of these motives, rather than by a desire on the part of the accused to relieve his conscience or to state the truth, it is regarded as involuntary and incompetent.[65]

b. After Proof of Facts Confessed. The confessions of an accused person should not be excluded because the facts themselves have been proved by the direct testimony of witnesses who were present when they transpired.[66]

64. Mose *v.* State, 36 Ala. 211; Walker *v.* State, 136 Ind. 663, 36 N. E. 356; Rutherford *v.* Com., 2 Metc. (Ky.) 387; Com. *v.* Johnson, 162 Pa. St. 63, 29 Atl. 280; and other cases in the notes following.

Incomplete confessions.— A full confession is admissible, notwithstanding that if the accused had not been interrupted he might have added something favorable to himself (Levison *v.* State, 54 Ala. 520), but an incomplete confession which the accused is prevented from finishing by some person having authority over him is not admissible (William *v.* State, 39 Ala. 532).

The confession of a person before a magistrate ought to be in his own words, but if it is in the form of questions and answers it is still admissible. People *v.* Smith, 1 Wheel. Cr. (N. Y.) 54.

Where parts of a confession were not understood by the persons to whom they were made, because in a foreign language, the entire confession is inadmissible. State *v.* Buster, 23 Nev. 346, 47 Pac. 194.

65. *Alabama.*—McAlpine *v.* State, 116 Ala. 93, 23 So. 130; Perkins *v.* State, 66 Ala. 457; Brister *v.* State, 26 Ala. 107.

Arkansas.— Young *v.* State, 50 Ark. 501, 8 S. W. 828; Runnels *v.* State, 28 Ark. 121.

California.—People *v.* Mortier, 58 Cal. 262.

Colorado.— Beery *v.* U. S., 2 Colo. 186.

Delaware.— State *v.* Darnell, Houst. Cr. 321.

Florida.— Holland *v.* State, 39 Fla. 178, 22 So. 298.

Georgia.— Dixon *v.* State, 113 Ga. 1039, 39 S. E. 846; Roberts *v.* State, 75 Ga. 863; Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410.

Hawaii.—Rex *v.* Kamakana, 3 Hawaii 313; Rex *v.* Marks, 1 Hawaii 81.

Illinois.— Miller *v.* People, 39 Ill. 457.

Indiana.— Hauk *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465.

Kentucky.— Rutherford *v.* Com., 2 Metc. 387; Collins *v.* Com., 25 S. W. 743, 15 Ky. L. Rep. 691; Rector *v.* Com., 4 Ky. L. Rep. 323.

Louisiana.— State *v.* Garvey, 25 La. Ann. 191; State *v.* Nelson, 3 La. Ann. 497.

Maine.— State *v.* Grover, 96 Me. 363, 52 Atl. 757; State *v.* Gilman, 51 Me. 206; State *v.* Grant, 22 Me. 171.

Maryland.— Green *v.* State, 96 Md. 384, 54 Atl. 104.

Massachusetts.— Com. *v.* Mitchell, 117 Mass. 431; Com. *v.* Knapp, 9 Pick. 496, 20 Am. Dec. 491.

Michigan.—People *v.* Taylor, 93 Mich. 638, 53 N. W. 777; People *v.* Foley, 64 Mich. 148, 31 N. W. 94; People *v.* Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501.

Minnesota.— State *v.* Staley, 14 Minn. 105.

Mississippi.— Matthis *v.* State, 80 Miss. 491, 32 So. 6; Cady *v.* State, 44 Miss. 332; Serpentine *v.* State, 1 How. 256.

Missouri.— State *v.* Hopkirk, 84 Mo. 278; State *v.* Jones, 54 Mo. 478.

Nebraska.— Burlingim *v.* State, 61 Nebr. 276, 85 N. W. 76; Basye *v.* State, 45 Nebr. 261, 63 N. W. 811.

Nevada.— State *v.* Carrick, 16 Nev. 120.

New Jersey.— State *v.* Guild, 10 N. J. L. 163, 18 Am. Dec. 404.

New York.— People *v.* Wentz, 37 N. Y. 303; People *v.* McMahon, 15 N. Y. 384; O'Brien *v.* People, 48 Barb. 274.

North Carolina.— State *v.* Edwards, 126 N. C. 1051, 35 S. E. 540; State *v.* Howard, 92 N. C. 772; State *v.* Patrick, 48 N. C. 443.

Ohio.— Spears *v.* State, 2 Ohio St. 583; Morrison *v.* State, 5 Ohio 438.

Pennsylvania.— Com. *v.* Hanlon, 3 Brewst. 461; Com. *v.* Wyman, 3 Brewst. 338.

South Carolina.— State *v.* Kirby, 1 Strobh. 155; State *v.* Crank, 2 Bailey 66, 23 Am. Dec. 117.

Texas.—McKenzie *v.* State, (Cr. App. 1895) 32 S. W. 543; Nichols *v.* State, 32 Tex. Cr. 391, 23 S. W. 680; Carr *v.* State, 24 Tex. App. 562, 7 S. W. 328, 5 Am. St. Rep. 905; Bryant *v.* State, 18 Tex. App. 107.

Vermont.— State *v.* Walker, 34 Vt. 296.

Virginia.— Thompson *v.* Com., 20 Gratt. 724; Shifflet *v.* Com., 14 Gratt. 652; Smith *v.* Com., 10 Gratt. 734.

Washington.— State *v.* Munson, 7 Wash. 239, 34 Pac. 932.

United States.— Hopt *v.* Utah, 110 U. S. 574, 4 S. Ct. 202, 28 L. ed. 262; U. S. *v.* Charles, 25 Fed. Cas. No. 14,786, 2 Cranch C. C. 76; U. S. *v.* Nott, 27 Fed. Cas. No. 15,900, 1 McLean 499.

England.— Reg. *v.* Dingley, 1 C. & K. 637, 47 E. C. L. 637; Reg. *v.* Hewett, C. & M. 534, 41 E. C. L. 291; Reg. *v.* Taylor, 8 C. & P. 733, 34 E. C. L. 990; Rex *v.* Kingston, 4 C. & P. 387, 19 E. C. L. 567.

Canada.— Reg. *v.* Pah-cah-pah-ne-capi, 4 Can. Cr. Cas. 93, 2 North West Terr. 126; Reg. *v.* Jackson, 2 Can. Cr. Cas. 149.

See 14 Cent. Dig. tit. "Criminal Law," § 1146.

Voluntary character of confessions see *infra*, XII, H, 2, h.

66. Austin *v.* State, 14 Ark. 555.

c. Motive of Confession. If the confession was free and voluntary, the motive which prompted it is as a general rule immaterial as affecting its admissibility.[67] Thus a voluntary confession is not inadmissible because it was made to free another person from suspicion,[68] or with a view of compromising the matter with the injured party.[69]

d. Confession Contained in Prayer. A confession contained in a prayer by the accused, testified to by one who overheard it, is competent, and its admission is not contrary to public policy.[70]

e. Proof of Entire Conversation. Where a confession is introduced by the state, the accused has the right to require that the whole of the conversation containing it shall go to the jury,[71] although if the witness does not recollect all the conversation he may state what he does recollect, and its weight and sufficiency is for the jury.[72] Where the prosecution puts in evidence a confession which is part of a conversation, the accused is entitled to prove as part of his case the entire conversation.[73]

f. As Regards Persons to Whom Confession Is Made.[74] A confession is admissible if affirmatively shown to have been voluntary, whether made to a private individual or to a person in authority,[75] although in the latter case the voluntary character should be very stringently examined into.[76] Thus the fact alone that the confession was made to the police officer who arrested the accused,[77] or to the sheriff who had him in charge,[78] is not sufficient, if the confession was voluntary, to render it inadmissible. So also confessions to the examining magistrate,[79] to

67. State *v.* Staley, 14 Minn. 105. See also Cady *v.* State, 44 Miss. 332.

68. People *v.* Smalling, 94 Cal. 112, 29 Pac. 421.

69. State *v.* Bruce, 33 La. Ann. 186. But see Austine *v.* People, 51 Ill. 236, where a promise was made by a justice of the peace that the matter would be dropped, and the confession was excluded.

70. Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814.

71. *California.*— People *v.* Gelabert, 39 Cal. 663; People *v.* Navis, 3 Cal. 106.
Georgia.— Long *v.* State, 22 Ga. 40.
Kentucky.— Berry *v.* Com., 10 Bush 15; Mullins *v.* Com., 3 Ky. L. Rep. 686.
Mississippi.— McCann *v.* State, 13 Sm. & M. 471; Coon *v.* State, 13 Sm. & M. 246.
Texas.— Riley *v.* State, 4 Tex. App. 538.
Virginia.— Brown *v.* Com., 9 Leigh 633, 33 Am. Dec. 263.
United States.— U. S. *v.* Prior, 27 Fed. Cas. No. 16,092, 5 Cranch 37; U. S. *v.* Smith, 27 Fed. Cas. No. 16,342*a*.
Canada.— Reg. *v.* Jones, 28 U. C. Q. B. 416.
See 14 Cent. Dig. tit. "Criminal Law," § 1150.
Waiver of objection.— State *v.* Lipscomb, 160 Mo. 125, 60 S. W. 1081.

72. Kendall *v.* State, 65 Ala. 492; State *v.* Hopkirk, 84 Mo. 278.

73. *Alabama.*— Parke *v.* State, 48 Ala. 266; Chambers *v.* State, 26 Ala. 59.
Arkansas.— Frazier *v.* State, 42 Ark. 70.
California.— People *v.* Yeaton, 75 Cal. 415, 17 Pac. 544.
Georgia.— Peterson *v.* State, 47 Ga. 524.
Kentucky.— Mullins *v.* Com., 3 Ky. L. Rep. 686.
Louisiana.— State *v.* Johnson, 47 La. Ann. 1225, 17 So. 789; State *v.* Wedemeyer, 11 La. Ann. 49.
Texas.— Jones *v.* State, 13 Tex. 168, 62 Am. Dec. 550; Harrison *v.* State, 20 Tex. App. 387, 54 Am. Rep. 529.
See 14 Cent. Dig. tit. "Criminal Law," § 1151.

74. **Privileged communications to attorney, physician, priest, wife, etc.,** see WITNESSES.

75. State *v.* Simon, 15 La. Ann. 568.

76. State *v.* Dodson, 14 S. C. 628. See *infra*, XII, H, 2, h, (v).

77. *Delaware.*— State *v.* Quinn, 2 Pennew. 339, 45 Atl. 544.
Iowa.— State *v.* Sopher, 70 Iowa 494, 30 N. W. 917; State *v.* McLaughlin, 44 Iowa 82.
Louisiana.— State *v.* Demareste, 41 La. Ann. 617, 6 So. 136; State *v.* Mulholland, 16 La. Ann. 376; State *v.* George, 15 La. Ann. 145.
Missouri.— State *v.* McClain, 137 Mo. 307, 38 S. W. 906; State *v.* Moore, 117 Mo. 395, 22 S. W. 1086; State *v.* Guy, 69 Mo. 430; State *v.* Carlisle, 57 Mo. 102; State *v.* Simon, 50 Mo. 370.
New Jersey.— State *v.* Hill, 65 N. J. L. 626, 47 Atl. 814.
New York.— People *v.* Wentz, 37 N. Y. 303.
Pennsylvania.— Com. *v.* Mosler, 4 Pa. St. 264.
England.— Reg. *v.* Attwood, 5 Cox C. C. 322.
Canada.— Reg. *v.* Tufford, 8 U. C. C. P. 81.
See 14 Cent. Dig. tit. "Criminal Law," § 1153 *et seq.*

78. Sands *v.* State, 80 Ala. 201; Republic *v.* Hang Cheong, 10 Hawaii 94; Spiars *v.* State, (Tex. Cr. App. 1902) 69 S. W. 533.

79. State *v.* McLaughlin, 44 Iowa 82; State *v.* Monie, 26 La. Ann. 513; Wolf *v.* Com., 30 Gratt. (Va.) 833.

the trial judge,[80] or to the prosecuting attorney[81] are not incompetent, provided they were voluntary, and provided the accused was warned or cautioned when this is required.[82] Voluntary confessions made to the members of the same church can be given in evidence, their admission not being an infringement of the rights of conscience.[83]

g. Caution or Warning — (I) *Necessity For.* The fact that a voluntary confession is made without the accused having been cautioned or warned that it might be used against him does not render it incompetent,[84] unless a statute invalidates a confession made where the accused is not first cautioned. In Texas, by statute, a confession made by a prisoner while in custody is inadmissible, unless he was warned that what he should say might be used against him,[85] and there are similar provisions in other states.[86] It is not the duty of a police officer, in the absence of a statute, to caution a prisoner as to the consequences of making a statement, if the statement is voluntary, but merely to refrain from inducing him to make a statement.[87]

(II) *Time of Giving.* Under a statute requiring caution to render a confession admissible, the confession must have been made within such reasonable time after the caution as to indicate that defendant remembered and was impressed with the caution.[88] An interval of an hour, or even of a day or two, between the caution and the confession does not exclude the latter,[89] but if the accused is young the caution should be repeated when the confession is made.[90]

(III) *Language.* Where a statute requires that defendant shall be cautioned or informed that anything he may say may be used against him, or that his refusal to answer questions cannot be used against him, it is not necessary that the officer or magistrate shall employ the precise words of the statute in giving the caution or information.[91] Under a statute excluding a confession unless the accused was cautioned that it might be used against him, a caution that so much of the statement of the accused as is inculpatory[92] or anything he may

80. State *v.* Chambers, 45 La. Ann. 36, 11 So. 944.

81. Walker *v.* State, 136 Ind. 663, 36 N. E. 356; People *v.* Howes, 81 Mich. 396, 45 N. W. 961; State *v.* Chisenhall, 106 N. C. 676, 11 S. E. 518.

82. Warning or caution see *infra*, XII, H, 2, g.

83. Com. *v.* Drake, 15 Mass. 161.

84. *Alabama.*— Golson *v.* State, 124 Ala. 8, 26 So. 975.

Mississippi.— Simon *v.* State, 36 Miss. 636; Dick *v.* State, 30 Miss. 593.

Pennsylvania.— Com. *v.* Mosler, 4 Pa. St. 264.

South Carolina.— State *v.* Baker, 58 S. C. 111, 36 S. E. 501; State *v.* Workman, 15 S. C. 540.

England.— Reg. *v.* Gillis, 11 Cox C. C. 69, 14 Wkly. Rep. 845; Reg. *v.* Priest, 2 Cox C. C. 378; Reg. *v.* Arnold, 8 C. & P. 621, 34 E. C. L. 926; Reg. *v.* Kerr, 8 C. & P. 176, 34 E. C. L. 675.

85. Adams *v.* State, 34 Tex. 526; Young *v.* State, (Tex. Cr. App. 1902) 69 S. W. 153; Petty *v.* State, (Tex. Cr. App. 1901) 65 S. W. 917; Gay *v.* State, 40 Tex. Cr. 242, 49 S. W. 612; Hamlin *v.* State, 39 Tex. Cr. 579, 47 S. W. 656; Hurst *v.* State, (Tex. Cr. App. 1897) 40 S. W. 264; Craig *v.* State, 30 Tex. App. 619, 18 S. W. 297; Walker *v.* State, 28 Tex. App. 112, 12 S. W. 503; Nolen *v.* State, 14 Tex. App. 474, 46 Am. Rep. 247.

Acts amounting to confession.— Under the statute excluding confessions by defendant when uncautioned, his actions equivalent to a confession are excluded where he is not cautioned. Fulcher *v.* State, 28 Tex. App. 465, 13 S. W. 750; Nolen *v.* State, 14 Tex. App. 474, 46 Am. Rep. 247.

Caution by another than the witness.—A warning by the sheriff to defendant, in the presence and hearing of his deputy, is equivalent to a warning by the deputy, so as to render a confession to the latter admissible in evidence. Baldwin *v.* State, (Tex. Cr. App. 1894) 28 S. W. 951.

86. See State *v.* De Graff, 113 N. C. 688, 18 S. E. 507.

87. Reg. *v.* Watts, 1 Cox C. C. 75; Reg. *v.* Dickinson, 1 Cox C. C. 27.

88. Barth *v.* State, 39 Tex. Cr. 381, 46 S. W. 228, 73 Am. St. Rep. 935; Baker *v.* State, 25 Tex. App. 1, 8 S. W. 23, 8 Am. St. Rep. 427. See also Perry *v.* State, (Tex. Cr. App. 1901) 61 S. W. 400.

89. Maldox *v.* State, 41 Tex. 205; Adams *v.* State, 35 Tex. Cr. 285, 33 S. W. 354; Baldwin *v.* State, (Tex. Cr. App. 1894) 28 S. W. 951.

90. Perry *v.* State, (Tex. Cr. App. 1901) 61 S. W. 400.

91. State *v.* De Graff, 113 N. C. 688, 18 S. E. 507; State *v.* Rogers, 112 N. C. 874, 17 S. E. 297; Ransom *v.* State, (Tex. Cr. App. 1902) 70 S. W. 960.

92. Kirby *v.* State, 23 Tex. App. 13, 5 S. W. 165.

say[93] may be used against him, is sufficient; but a warning that anything he may say can be used either for or against him is not in accordance with the statute, as it holds out an inducement to speak.[94]

(IV) *Collateral Facts.* Statements of collateral facts not involving a direct admission of guilt are admissible regardless of the fact that the accused was not previously cautioned,[95] unless a statute expressly requires that he shall be first cautioned that what he says may be used against him.[96]

(V) *Effect.* The general effect of a caution to the prisoner, whether given by an officer, by the court, or by a private person, that what he says will or may be used against him on his trial is to render admissible any confession made by him thereafter,[97] even though inducements to confess may previously have been offered, if it does not appear that the prisoner was influenced by such inducements.[98]

h. Voluntary Character — (I) *In General.* As has been shown, a confession, to be admissible against defendant, must have been voluntary.[99] Whether a confession is voluntary depends largely upon the facts of the particular case. If it is obtained by reason of oral threats of harm, by promises of benefit, or by actions of those in control of the prisoner which are equivalent to such threats or promises, it is involuntary and incompetent, and in determining whether it was obtained by such means the sex, age, disposition, education, and previous training of the prisoner, his mental qualities, his physical health, and his surroundings are elements to be considered.[1]

93. Hill *v.* State, (Tex. Cr. App. 1902) 70 S. W. 754; Baines *v.* State, 43 Tex. Cr. 490, 66 S. W. 847.

94. Perry *v.* State, (Tex. Cr. App. 1901) 61 S. W. 400; Pryor *v.* State, 40 Tex. Cr. 643, 51 S. W. 375; Guin *v.* State, (Tex. Cr. App. 1899) 50 S. W. 350.

95. Com. *v.* Robinson, 165 Mass. 426, 43 N. E. 121.

96. Marshall *v.* State, 5 Tex. App. 273.

97. *Alabama.*—Calloway *v.* State, 103 Ala. 27, 15 So. 821.

Indiana.— Hamilton *v.* State, 3 Ind. 552.

Michigan.— People *v.* Simpson, 48 Mich. 474, 12 N. W. 662.

New Jersey.— Roesel *v.* State, 62 N. J. L. 216, 41 Atl. 408.

Pennsylvania.— Rizzolo *v.* Com., 126 Pa. St. 54, 17 Atl. 520.

Tennessee.— Maples *v.* State, 3 Heisk. 408.

Texas.— Fields *v.* State, 41 Tex. 25; Waite *v.* State, 13 Tex. App. 169; Harris *v.* State, 6 Tex. App. 97.

Utah.— U. S. *v.* Kirkwood, 5 Utah 123, 13 Pac. 234.

Virginia.— Venable *v.* Com., 24 Gratt. 639.

England.— Reg. *v.* Holmes, 1 C. & K. 248, 1 Cox C. C. 9, 47 E. C. L. 248; Reg. *v.* Baldry, 5 Cox C. C. 523, 2 Den. C. C. 430, 16 Jur. 599, 21 L. J. M. C. 130; Reg. *v.* Attwood, 5 Cox C. C. 322; Reg. *v.* Chambers, 3 Cox C. C. 92.

See 14 Cent. Dig. tit. "Criminal Law," § 1161.

The theory of some of the early English cases, which held that a statement made to a prisoner that his confession would be used against him on the trial, was an inducement to him to confess (Reg. *v.* Harris, 1 Cox C. C. 106; Reg. *v.* Furley, 1 Cox C. C. 76) has been expressly disapproved by the later decisions (Reg. *v.* Baldry, 5 Cox C. C. 523, 2 Den. C. C. 430, 16 Jur. 599, 21 L. J. M. C. 130).

98. *Mississippi.*— Jones *v.* State, 58 Miss. 349.

New York.— People *v.* Mackinder, 80 Hun 40, 29 N. Y. Suppl. 842.

North Carolina.— State *v.* Gregory, 50 N. C. 315.

Tennessee.—Beggarly *v.* State, 8 Baxt. 520; Maples *v.* State, 3 Heisk. 408.

Texas.— Paris *v.* State, 35 Tex. Cr. 82, 31 S. W. 855; Rice *v.* State, 22 Tex. App. 654, 3 S. W. 791.

Vermont.— State *v.* Carr, 37 Vt. 191.

See 14 Cent. Dig. tit. "Criminal Law," § 1162.

99. See *supra*, XII, H, 2, a.

1. *Alabama.*— Christian *v.* State, 133 Ala. 109, 32 So. 64; Newell *v.* State, 115 Ala. 54, 22 So. 572; Burton *v.* State, 107 Ala. 108, 18 So. 284; Maull *v.* State, 95 Ala. 1, 11 So. 218; McNeezer *v.* State, 63 Ala. 169; Grant *v.* State, 55 Ala. 201.

District of Columbia.— Hardy *v.* U. S., 3 App. Cas. 35.

Florida.— Green *v.* State, 40 Fla. 474, 24 So. 537.

Georgia.— Bohanan *v.* State, 92 Ga. 28, 18 S. E. 302.

Indiana.— Walker *v.* State, 136 Ind. 663, 36 N. E. 356.

Kentucky.— Dugan *v.* Com., 102 Ky. 241, 43 S. W. 418, 19 Ky. L. Rep. 1273.

Louisiana.— State *v.* Edwards, 106 La. 674, 31 So. 308; State *v.* Auguste, 50 La. Ann. 488, 23 So. 612.

Maryland.— Ross *v.* State, 67 Md. 286, 10 Atl. 218.

Massachusetts.— Com. *v.* Flood, 152 Mass. 529, 25 N. E. 971.

Mississippi.— Blalack *v.* State, 79 Miss. 517, 31 So. 105.

Missouri.— State *v.* Vaughan, 152 Mo. 73, 53 S. W. 420; State *v.* Schmidt, 136 Mo. 644, 38 S. W. 719.

(II) *Confessions After Unsuccessful Threats or Promises.* It is not necessary to prove, in the absence of suspicious circumstances, that from the moment of the prisoner's arrest to that of his confession no inducement was offered or promise made.[2] A confession will be received, if it was in fact voluntary, although it appears that prior thereto and even after his arrest, the accused had been threatened or promises had been made, without success, for the purpose of procuring a confession;[3] but it must appear that the confession was not made because of the inducements previously offered.[4]

(III) *Effect of Prior Involuntary Confession.* Although a confession may have been obtained by such means as would exclude it, a subsequent confession of the same or like facts may and should be admitted if it appears to the court from the length of time intervening or other facts in evidence that the influence of the promise or threat had been removed.[5] But where a confession has been obtained under circumstances rendering it involuntary and incompetent,

Nebraska.— Reinoehl *v.* State, 62 Nebr. 619, 87 N. W. 355; Hills *v.* State, 61 Nebr. 589, 85 N. W. 836, 57 L. R. A. 155.

New Jersey.— Bullock *v.* State, 65 N. J. L. 557, 47 Atl. 62, 86 Am. St. Rep. 668; State *v.* Abbatto, 64 N. J. L. 658, 47 Atl. 10.

New York.— People *v.* Meyer, 162 N. Y. 357, 56 N. E. 758, 14 N. Y. Cr. 487; People *v.* McGloin, 1 N. Y. Cr. 105.

North Carolina.—State *v.* Sanders, 84 N. C. 728.

Pennsylvania.— Com. *v.* Sheets, 197 Pa. St. 69, 46 Atl. 753.

South Carolina.— State *v.* Carroll, 30 S. C. 85, 8 S. E. 433, 14 Am. St. Rep. 883.

Tennessee.— State *v.* Rigsby, 6 Lea 554.

Utah.— State *v.* Bates, 25 Utah 1, 69 Pac. 70.

Wisconsin.— Cornell *v.* State, 104 Wis. 527, 80 N. W. 745.

United States.— Bram *v.* U. S., 168 U. S. 532, 18 S. Ct. 183, 42 L. ed. 568; Jackson *v.* U. S., 102 Fed. 473, 42 C. C. A. 452.

See 14 Cent. Dig. tit. "Criminal Law," § 1163.

Confessions should not be rejected because the state has not shown beyond a reasonable doubt that they were made without the slightest hope of benefit or the remotest fear of injury, and a request to so charge is properly refused. Price *v.* State, 114 Ga. 855, 40 S. E. 1015.

2. Hopt *v.* Utah, 110 U. S. 574, 4 S. Ct. 202, 28 L. ed. 262.

3. *Alabama.*— McAdory *v.* State, 62 Ala. 154; Levison *v.* State, 54 Ala. 520; Mose *v.* State, 36 Ala. 211.

California.— People *v.* Jim Ti, 32 Cal. 60.

Connecticut.— State *v.* Potter, 18 Conn. 166.

District of Columbia.— Hardy *v.* U. S., 3 App. Cas. 35.

Georgia.— Sarah *v.* State, 28 Ga. 576.

Iowa.— State *v.* Chambers, 39 Iowa 179; State *v.* Ostrander, 18 Iowa 435.

Massachusetts.— Com. *v.* Howe, 132 Mass. 250; Com. *v.* Crocker, 108 Mass. 464.

Mississippi.— Jones *v.* State, 58 Miss. 349; Lynes *v.* State, 36 Miss. 617; Peter *v.* State, 4 Sm. & M. 31.

Missouri.— State *v.* Hopkirk, 84 Mo. 278; State *v.* Jones, 54 Mo. 478.

New York.— People *v.* Mackinder, 80 Hun 40, 29 N. Y. Suppl. 842.

North Carolina.—State *v.* Gregory, 50 N. C. 315; State *v.* Patrick, 48 N. C. 443.

Tennessee.— Beggarly *v.* State, 8 Baxt. 520.

Texas.— Paris *v.* State, 35 Tex. Cr. 82, 31 S. W. 855; Walker *v.* State, 7 Tex. App. 245, 32 Am. Rep. 595.

Virginia.— Moore *v.* Com., 2 Leigh 701.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1162, 1166.

4. Banks *v.* State, 84 Ala. 430, 4 So. 382; Porter *v.* State, 55 Ala. 95; Ward *v.* State, 50 Ala. 120; State *v.* Drake, 113 N. C. 624, 18 S. E. 166, and other cases cited under the section following.

5. *Alabama.*— Levison *v.* State, 54 Ala. 520.

Connecticut.—State *v.* Willis, 71 Conn. 293, 41 Atl. 820.

District of Columbia.— Hardy *v.* U. S., 3 App. Cas. 35; U. S. *v.* Nardello, 4 Mackey 503.

Georgia.— Dixon *v.* State, 116 Ga. 186, 42 S. E. 357.

Louisiana.— State *v.* Stuart, 35 La. Ann. 1015; State *v.* Hash, 12 La. Ann. 895.

Massachusetts.— Com. *v.* Myers, 160 Mass. 530, 36 N. E. 481.

Mississippi.— Simmons *v.* State, 61 Miss. 243; Simon *v.* State, 36 Miss. 636.

New Hampshire.— State *v.* Howard, 17 N. H. 171.

New Jersey.— State *v.* Guild, 10 N. J. L. 163, 18 Am. Dec. 404.

New York.— Milligan's Case, 6 City Hall Rec. 69.

North Carolina.— State *v.* Fisher, 51 N. C. 478; State *v.* Scates, 50 N. C. 420; State *v.* Gregory, 50 N. C. 315.

Ohio.— Jackson *v.* State, 39 Ohio St. 37.

Tennessee.— State *v.* Henry, 6 Baxt. 539; Maples *v.* State, 3 Heisk. 408; Strady *v.* State, 5 Coldw. 300.

Texas.— Paris *v.* State, 35 Tex. Cr. 82, 31 S. W. 855; Reeves *v.* State, (Cr. App. 1893) 24 S. W. 518.

Vermont.— State *v.* Carr, 37 Vt. 191.

Virginia.— Thompson *v.* Com., 20 Gratt. 724.

England.— Reg. *v.* Collier, 3 Cox C. C. 57; Rex *v.* Clewes, 4 C. & P. 221, 19 E. C. L. 485.

a presumption exists that any subsequent confession arose from a continuance of the prior influence, and this presumption must be overcome before the subsequent confession can be received in evidence.[6] The controlling influence which produced the prior confession is presumed to continue until its cessation is affirmatively shown, and evidence to overcome or rebut this presumption must be very clear, strong, and satisfactory. If there be any doubt on this point the confession must be excluded.[7]

(IV) *Different Offenses.* If a prisoner confesses to one crime upon threats or promises of an officer, and afterward, without any threat or promise, confesses a different crime, as in the case of two larcenies, the latter confession is admissible in evidence.[8]

(V) *Confessions While in Custody.* A confession otherwise shown to have been voluntary is not rendered incompetent by the fact that the accused was under arrest or in custody at the time, and that it was made in answer to questions put to him by the officer having him in custody,[9] even though the arrest

See 14 Cent. Dig. tit. "Criminal Law," §§ 1162, 1164.

6. *Alabama.*— Redd *v.* State, 69 Ala. 255; McAdory *v.* State, 62 Ala. 154; Dinah *v.* State, 39 Ala. 359; Bob *v.* State, 32 Ala. 560.

Arkansas.— Williams *v.* State, 69 Ark. 599, 65 S. W. 103; Love *v.* State, 22 Ark. 336.

Florida.— Murray *v.* State, 25 Fla. 528, 6 So. 498; Coffee *v.* State, 25 Fla. 501, 6 So. 493, 23 Am. St. Rep. 525.

Illinois.— Robinson *v.* People, 159 Ill. 115, 42 N. E. 375 [*distinguishing* Bartley *v.* People, 156 Ill. 234, 40 N. E. 831].

Iowa.— State *v.* Chambers, 39 Iowa 179.

Louisiana.— State *v.* Hash, 12 La. Ann. 895.

Massachusetts.— Com. *v.* Knapp, 10 Pick. 477, 20 Am. Dec. 534.

Mississippi.— Simmons *v.* State, 61 Miss. 243; Cady *v.* State, 44 Miss. 332; Simon *v.* State, 37 Miss. 288; Peter *v.* State, 4 Sm. & M. 31.

Missouri.— State *v.* Brown, 73 Mo. 631; State *v.* Jones, 54 Mo. 478.

New Jersey.— State *v.* Guild, 10 N. J. L. 163, 18 Am. Dec. 404.

New York.— Stag's Case, 5 City Hall Rec. 177; Bowerhan's Case, 4 City Hall Rec. 136; Williams' Case, 1 City Hall Rec. 149.

North Carolina.— State *v.* Drake, 82 N. C. 592; State *v.* Lowhorne, 66 N. C. 638; State *v.* Roberts, 12 N. C. 259.

Ohio.— Nichols *v.* State, 1 Ohio Dec. (Reprint) 55, 1 West. L. J. 394.

Oregon.— State *v.* Wintzingerode, 9 Oreg. 153.

Pennsylvania.— Com. *v.* Harman, 4 Pa. St. 269; Com. *v.* Frew, 3 Pa. Co. Ct. 492.

Texas.—Gallagher *v.* State, (Cr. App. 1893) 24 S. W. 288; Clayton *v.* State, 31 Tex. Cr. 489, 21 S. W. 255; Walker *v.* State, 7 Tex. App. 245, 32 Am. Rep. 595.

Virginia.— Thompson *v.* Com., 20 Gratt. 724.

United States.— U. S. *v.* Chapman, 25 Fed. Cas. No. 14,783; U. S. *v.* Charles, 25 Fed. Cas. No. 14,786, 2 Cranch C. C. 76; U. S. *v.* Cooper, 25 Fed. Cas. No. 14,864.

England.— Rex *v.* Cooper, 5 C. & P. 535, 24 E. C. L. 694; Reg. *v.* Sherrington, 2 Lew. C. C. 123; Rex *v.* Meynell, 2 Lew. C. C. 122.

See 14 Cent. Dig. tit. "Criminal Law," § 1164.

7. *Alabama.*— Banks *v.* State, 84 Ala. 430, 4 So. 382; Porter *v.* State, 55 Ala. 95; Wyatt *v.* State, 25 Ala. 9.

Colorado.— Beery *v.* U. S., 2 Colo. 186.

Florida.— Coffee *v.* State, 25 Fla. 501, 6 So. 493, 23 Am. St. Rep. 525.

Kentucky.— Mathis *v.* Com., 13 S. W. 360, 11 Ky. L. Rep. 882.

Louisiana.— State *v.* Washington, 40 La. Ann. 669, 4 So. 864.

Massachusetts.— Com. *v.* Cullen, 111 Mass. 435.

North Carolina.— State *v.* Drake, 113 N. C. 624, 18 S. E. 166; State *v.* Lowhorne, 66 N. C. 638.

Vermont.— State *v.* Carr, 37 Vt. 191.

England.— Reg. *v.* Doherty, 13 Cox C. C. 23; Rex *v.* Richards, 5 C. & P. 318, 24 E. C. L. 584.

See 14 Cent. Dig. tit. "Criminal Law," § 1164.

8. U. S. *v.* Kurtz, 26 Fed. Cas. No. 15,547, 4 Cranch C. C. 682.

A confession of a crime differing from that charged will be received where it is so intimately connected with the crime charged as to be a part of the *res gestæ*. State *v.* McDaniel, 39 Oreg. 161, 65 Pac. 520. See *supra*, XII, C.

9. *Alabama.*— McQueen *v.* State, 94 Ala. 50, 10 So. 433; McElroy *v.* State, 75 Ala. 9; Spicer *v.* State, 69 Ala. 159; Mcinaka *v.* State, 55 Ala. 47; King *v.* State, 40 Ala. 314.

Arkansas.— Youngblood *v.* State, 35 Ark. 35; Meyer *v.* State, 19 Ark. 156.

California.— People *v.* Gonzales, 136 Cal. 666, 69 Pac. 487; People *v.* Miller, 135 Cal. 69, 67 Pac. 12; People *v.* Abbott, (1884) 4 Pac. 769; People *v.* Long, 43 Cal. 444.

District of Columbia.— U. S. *v.* Nardello, 4 Mackey 503.

Florida.— Green *v.* State, 40 Fla. 191, 23 So. 851.

Georgia.— Fuller *v.* State, 109 Ga. 809, 35 S. E. 298; Cobb *v.* State, 27 Ga. 648; Stephen *v.* State, 11 Ga. 225.

Idaho.— State *v.* Davis, 6 Ida. 159, 53 Pac. 678; State *v.* Ellington, 4 Ida. 529, 43 Pac. 60.

or custody may have been under invalid process or without any process or legal right,[10] unless the circumstances of the illegal restraint are such as to show that the confession was obtained by duress.[11] The fact that when the confession was made the hands and feet of defendant were tied,[12] or that he was handcuffed or in chains,[13] or had been placed in the stocks for safe-keeping,[14] does not exclude a confession which appears to have been free and voluntary.[15]

(VI) *CONFESSIONS AFTER BEING SUSPECTED.* *A fortiori* the fact that a confession was made by a person while he was under suspicion and before arrest does not render the confession incompetent.[16] A statutory requirement that the accused shall be cautioned when in custody does not apply to such a person.[17]

(VII) *EXHORTATION TO TELL THE TRUTH.* In some of the cases an exhortation to the prisoner to the effect that he had better tell the truth, or that it would be better for him if he told the truth, has been held to render a confession inadmissible, as implying a promise of benefit to the accused if he confessed;[18] but

Iowa.— State *v.* Peterson, 110 Iowa 647, 82 N. W. 329; State *v.* Novak, 109 Iowa 717, 79 N. W. 465; State *v.* Jordan, 87 Iowa 86, 54 N. W. 63.

Kansas.— State *v.* Ingram, 16 Kan. 14.

Kentucky.— Brown *v.* Com., 49 S. W. 545, 20 Ky. L. Rep. 1552.

Louisiana.— State *v.* Berry, 50 La. Ann. 1309, 24 So. 329; State *v.* Jones, 47 La. Ann. 1524, 18 So. 515; State *v.* Alphonse, 34 La. Ann. 9.

Massachusetts.— Com. *v.* Devaney, 182 Mass. 33, 64 N. E. 402; Com. *v.* Chance, 174 Mass. 245, 54 N. E. 551, 75 Am. St. Rep. 306; Com. *v.* Sheehan, 163 Mass. 170, 39 N. E. 791; Com. *v.* Preece, 140 Mass. 276, 5 N. E. 494.

Michigan.— People *v.* Gastro, 75 Mich. 127, 42 N. W. 937.

Missouri.— State *v.* Shackelford, 148 Mo. 493, 50 S. W. 105; State *v.* McClain, 137 Mo. 307, 38 S. W. 906; State *v.* Rush, 95 Mo. 199, 8 S. W. 221; State *v.* Carlisle, 57 Mo. 102; State *v.* Simon, 50 Mo. 370.

Nebraska.— Coil *v.* State, 62 Nebr. 15, 86 N. W. 925; Furst *v.* State, 31 Nebr. 403, 47 N. W. 1116; Anderson *v.* State, 25 Nebr. 550, 41 N. W. 357.

New Jersey.— State *v.* Hernia, 68 N. J. L. 299, 53 Atl. 85; Roesel *v.* State, 62 N. J. L. 216, 41 Atl. 408.

New York.— People *v.* Kennedy, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557; People *v.* Druse, 103 N. Y. 655, 8 N. E. 733, 5 N. Y. Cr. 10; People *v.* McCallam, 103 N. Y. 587, 9 N. E. 502; People *v.* McGloin, 91 N. Y. 241; People *v.* Rogers, 18 N. Y. 9, 72 Am. Dec. 484; People *v.* Chacon, 3 N. Y. Cr. 418; Hartung *v.* People, 4 Park. Cr. 319.

North Carolina.— State *v.* Flemming, 130 N. C. 688, 41 S. E. 549; State *v.* Conly, 130 N. C. 683, 41 S. E. 534; State *v.* Howard, 92 N. C. 772; State *v.* Suggs, 89 N. C. 527; State *v.* Jefferson, 28 N. C. 305.

Oregon.— State *v.* McDaniel, 39 Oreg. 161, 65 Pac. 520.

Pennsylvania.— Com. *v.* Mosler, 4 Pa. St. 264; Com. *v.* Rockwell, 19 Pa. Co. Ct. 631, 6 Pa. Dist. 768; Com. *v.* Hanlon, 8 Phila. 423.

South Carolina.— State *v.* Cook, 15 Rich. 29; State *v.* Gossett, 9 Rich. 428.

Tennessee.— Honeycutt *v.* State, 8 Baxt. 371; Wiley *v.* State, 3 Coldw. 362.

Texas.— Wilson *v.* State, 32 Tex. 112; Bargna *v.* State, (Cr. App. 1902) 68 S. W. 997; Shafer *v.* State, 7 Tex. App. 239.

Vermont.— State *v.* Bradley, 67 Vt. 465, 32 Atl. 238; State *v.* Gorham, 67 Vt. 365, 31 Atl. 845.

Washington.— State *v.* Newton, 29 Wash. 373, 70 Pac. 31.

Wisconsin.— Yanke *v.* State, 51 Wis. 464, 8 N. W. 276; Keenan *v.* State, 8 Wis. 132.

United States.— Bram *v.* U. S., 168 U. S. 532, 18 S. Ct. 183, 42 L. ed. 568; Hopt *v.* Utah, 110 U. S. 574, 4 S. Ct. 202, 28 L. ed. 262.

England.— Rogers *v.* Hawken, 19 Cox C. C. 122, 62 J. P. 279, 67 L. J. Q. B. 526, 78 L. T. Rep. N. S. 655.

See 14 Cent. Dig. tit. "Criminal Law," § 1167.

10. Balbo *v.* People, 80 N. Y. 484 [*affirming* 19 Hun 424]; Rex *v.* Thornton, 1 Moody C. C. 27; 1 Greenleaf Ev. § 230.

11. Hoober *v.* State, 81 Ala. 51, 1 So. 574.

12. Franklin *v.* State, 28 Ala. 9; Austin *v.* State, 14 Ark. 555; State *v.* Patterson, 73 Mo. 695; State *v.* Rogers, 112 N. C. 874, 17 S. E. 297.

13. State *v.* Whitfield, 109 N. C. 876, 13 S. E. 726.

14. State *v.* Nelson, 3 La. Ann. 497.

15. See State *v.* Auguste, 50 La. Ann. 488, 23 So. 612.

16. People *v.* Kief, 58 Hun (N. Y.) 337, 11 N. Y. Suppl. 926, 12 N. Y. Suppl. 896; Boyett *v.* State, 26 Tex. App. 689, 9 S. W. 275; Allen *v.* State, 12 Tex. App. 190; U. S. *v.* Graff, 26 Fed. Cas. No. 15,244, 14 Blatchf. 381.

17. Boyett *v.* State, 26 Tex. App. 689, 9 S. W. 275.

18. *Kentucky.*— Hudson *v.* Com., 2 Duv. 531.

Maryland.— Biscoe *v.* State, 67 Md. 6, 8 Atl. 571.

New York.— People *v.* Phillips, 42 N. Y. 200.

Pennsylvania.—Rizzolo *v.* Com., 126 Pa. St. 54, 17 Atl. 520.

Vermont.— State *v.* Walker, 34 Vt. 296.

England.— Reg. *v.* Fennell, 7 Q. B. D. 147, 14 Cox C. C. 607, 45 J. P. 666, 50 L. J. M. C. 126, 44 L. T. Rep. N. S. 687, 29 Wkly. Rep. 742; Reg. *v.* Jarvis, L. R. 1 C. C. 96, 10 Cox

other cases hold that an exhortation of this character does not exclude a confession otherwise admissible.[19]

(VIII) *CONFESSIONS IN ANSWER TO QUESTIONS.* The fact that a confession is elicited by a more or less persistent questioning by police officers or others is not enough to exclude it, if it be voluntary, for the fact that a confession is not spontaneous, while relevant as to its credibility, does not affect its competency.[20] But the custom of police officers to persistently question the accused when under arrest is not to be encouraged, for the reason that he is rarely questioned with fairness.[21]

(IX) *QUESTIONS ASSUMING GUILT.* A confession otherwise competent is not rendered incompetent by the fact that it was elicited by questions assuming the prisoner's guilt.[22]

C. C. 574, 37 L. J. M. C. 1, 17 L. T. Rep. N. S. 178, 16 Wkly. Rep. 111; Reg. *v.* Garner, 2 C. & K. 920, 3 Cox C. C. 175, 1 Den. C. C. 329, 12 Jur. 944, 18 L. J. M. C. 1, 3 New Sess. Cas. 329, T. & M. 7, 61 E. C. L. 920; Reg. *v.* Rose, 18 Cox C. C. 717, 67 L. J. Q. B. 289, 78 L. T. Rep. N. S. 119; Reg. *v.* Doherty, 13 Cox C. C. 23.

See 14 Cent. Dig. tit. "Criminal Law," § 1172.

19. *Alabama.*— Huffman *v.* State, 130 Ala. 89, 30 So. 394; Dodson *v.* State, 86 Ala. 60, 5 So. 485; King *v.* State, 40 Ala. 314; Aaron *v.* State, 37 Ala. 106. But see Kelly *v.* State, 72 Ala. 244.

District of Columbia.— Hardy *v.* U. S., 3 App. Cas. 35.

Georgia.— Minton *v.* State, 99 Ga. 254, 25 S. E. 626.

Kansas.— State *v.* Kornstett, 62 Kan. 221, 61 Pac. 805.

Louisiana.— State *v.* Meekins, 41 La. Ann. 543, 6 So. 822. But see State *v.* Alexander, 109 La. 557, 33 So. 600.

Minnesota.— State *v.* Staley, 14 Minn. 105.

Missouri.— State *v.* Armstrong, 167 Mo. 257, 66 S. W. 961; State *v.* Lipscomb, 160 Mo. 125, 60 S. W. 1081; Hawkins *v.* State, 7 Mo. 190.

Ohio.— Fouts *v.* State, 8 Ohio St. 98.

Texas.—Anderson *v.* State, (Cr. App. 1899) 54 S. W. 581; Jackson *v.* State, 29 Tex. App. 458, 16 S. W. 247.

United States.— Lucasey *v.* U. S., 15 Fed. Cas. No. 8,588*a*, 2 Hayw. & H. 86.

England.— Reg. *v.* Reeve, L. R. 1 C. C. 362, 12 Cox C. C. 179, 41 L. J. M. C. 92, 26 L. T. Rep. N. S. 403, 20 Wkly. Rep. 631; Reg. *v.* Sleeman, 2 C. L. R. 129, 6 Cox C. C. 245, Dears. C. C. 249, 17 Jur. 1082, 23 L. J. M. C. 19, 2 Wkly. Rep. 97; Reg. *v.* Parker, 8 Cox C. C. 465, 7 Jur. N. S. 586, L. & C. 42, 30 L. J. M. C. 144, 4 L. T. Rep. N. S. 451, 9 Wkly. Rep. 699; Rex *v.* Wild, 1 Moody C. C. 452; Rex *v.* Row, R. & R. 114.

See 14 Cent. Dig. tit. "Criminal Law," § 1172.

A distinction is made by the English cases between a simple caution to the accused to tell the truth and an admonition to speak the truth, coupled with an expression importing that it would be better for him to do so. In the latter case the confession is involuntary under the implied promise that he would be benefited if he confessed. Reg. *v.* Baldry, 5 Cox C. C. 523, 2 Den. C. C. 430, 16 Jur. 599, 21 L. J. M. C. 130.

20. *District of Columbia.*— Hardy *v.* U. S., 3 App. Cas. 35.

Iowa.— State *v.* Penney, 113 Iowa 691, 84 N. W. 509.

Louisiana.— State *v.* Mulholland, 16 La. Ann. 376.

Maryland.— Young *v.* State, 90 Md. 579, 45 Atl. 531.

New York.— Cox *v.* People, 80 N. Y. 500; People *v.* Wentz, 37 N. Y. 303.

South Carolina.— State *v.* Freeman, 1 Speers 57.

Texas.— Aiken *v.* State, (Cr. App. 1901) 64 S. W. 57; Tidwell *v.* State, 40 Tex. Cr. 38, 47 S. W. 466, 48 S. W. 184.

Virginia.— Hite *v.* Com., 96 Va. 489, 31 S. E. 895.

United States.— U. S. *v.* Matthews, 26 Fed. Cas. No. 15,741*b*.

England.— Rogers *v.* Hawken, 19 Cox C. C. 122, 62 J. P. 279, 67 L. J. Q. B. 526, 78 L. T. Rep. N. S. 655; Gibney's Case, Jebb C. C. 15; Rex *v.* Thornton, 1 Moody C. C. 27.

Canada.— Reg. *v.* Elliott, 3 Can. Cr. Cas. 95, 31 Ont. 14.

See 14 Cent. Dig. tit. "Criminal Law," § 1172.

21. Reg. *v.* Mick, 3 F. & F. 822; Reg. *v.* Stokes, 17 Jur. 192. It is in the discretion of the judge to admit or reject the answers given to such questions, and they should be rejected if it appears that a trap was laid for the prisoner. Reg. *v.* Histed, 19 Cox C. C. 16.

22. *Alabama.*— White *v.* State, 133 Ala. 122, 32 So. 139; Carroll *v.* State, 23 Ala. 28, 58 Am. Dec. 282. But see State *v.* Clarissa, 11 Ala. 57.

District of Columbia.— Hardy *v.* U. S., 3 App. Cas. 35.

Louisiana.— State *v.* Berry, 50 La. Ann. 1309, 24 So. 329.

Minnesota.— State *v.* Staley, 14 Minn. 105.

Mississippi.— Sam *v.* State, 33 Miss. 347.

New York.— People *v.* McGloin, 91 N. Y. 241; People *v.* Wentz, 37 N. Y. 303.

Pennsylvania.— McClain *v.* Com., 110 Pa. St. 263, 1 Atl. 45; Com. *v.* Wyman, 3 Brewst. 338.

Texas.— Campbell *v.* State, 42 Tex. Cr. 27, 57 S. W. 288; Greer *v.* State, (Cr. App. 1898) 45 S. W. 12.

(x) *Exhortation to Confess as a Religious Duty.* An appeal to a man's religious feelings which induces him to confess his guilt does not invalidate his confession, as such a consideration is not likely to render his confession false.[23]

i. Promises and Similar Inducements — (i) *In General.* Confessions made by the accused under the promise or encouragement of any hope or favor made or held out to him by officers or other persons in authority, or by a private person in their presence, are not voluntary, and are therefore inadmissible,[24] provided the confession is so connected with the inducement as to be the consequence of it, but not otherwise.[25]

(ii) *Character and Sufficiency in General.* The promise of a benefit to the accused which will exclude a confession induced by it must have been positive in its terms or clearly implied and of such a character as would be likely to produce a false confession.[26] A mere suggestion to the accused that he should confess is not a promise which will exclude his confession;[27] but it is not necessary that the promise shall have been of some particular and specific advantage or favor. It is enough if in general terms it suggested an advantage to be gained

England.— Rex *v.* Thornton, 1 Moody C. C. 27.

See 14 Cent. Dig. tit. "Criminal Law," § 1173.

23. Stafford *v.* State, 55 Ga. 591; Matthews *v.* State, 9 Lea (Tenn.) 128, 42 Am. Rep. 667; Rex *v.* Wild, 1 Moody C. C. 452; Gillam's Case, 3 Russ. Cr. 405; Rex *v.* Warner, 3 Russ. Cr. 395.

24. *Arkansas.*— White *v.* State, 70 Ark. 24, 65 S. W. 937.

California.— People *v.* Martin, 12 Cal. 409.

Delaware.— State *v.* Bostick, 4 Harr. 563.

District of Columbia.— U. S. *v.* Nardello, 4 Mackey 503.

Kentucky.— Rutherford *v.* Com., 2 Metc. 387.

Massachusetts.— Com. *v.* Chabbock, 1 Mass. 144.

Missouri.— Hector *v.* State, 2 Mo. 165, 22 Am. Dec. 454.

Nebraska.— Bubster *v.* State, 33 Nebr. 663, 50 N. W. 953.

New Hampshire.— State *v.* Howard, 17 N. H. 171.

New Jersey.— State *v.* Guild, 10 N. J. L. 163, 18 Am. Dec. 404.

New York.— Milligan's Case, 6 City Hall Rec. 69; Tucker's Case, 5 City Hall Rec. 164; Bowerhan's Case, 4 City Hall Rec. 136; Jackson's Case, 1 City Hall Rec. 28.

Ohio.— Spears *v.* State, 2 Ohio St. 583.

Pennsylvania.— Com. *v.* Hanlon, 8 Phila. 423; Com. *v.* Springs, 2 Leg. Gaz. 93.

South Carolina.— State *v.* Kirby, 1 Strobh. 155.

Tennessee.— Wiley *v.* State, 3 Coldw. 362.

Texas.— Warren *v.* State, 29 Tex. 369; Rains *v.* State, 33 Tex. Cr. 294, 26 S. W. 398.

Vermont.— State *v.* Phelps, 11 Vt. 116, 34 Am. Dec. 672.

United States.— U. S. *v.* Pumphreys, 27 Fed. Cas. No. 16,097, 1 Cranch C. C. 74; U. S. *v.* Pocklington, 27 Fed. Cas. No. 16,060, 2 Cranch C. C. 293.

See 14 Cent. Dig. tit. "Criminal Law," § 1175. And see *supra*, XII, H, 2, a, h.

Where there is a reasonable presumption that a confession was procured by promises it is inadmissible. May *v.* State, 38 Nebr. 211, 56 N. W. 804. See also *supra*, XII, H, 2, h, (II), (III).

By person in authority or private person see *infra*, XII, H, 2, i, (V), (VI).

25. State *v.* Potter, 18 Conn. 166.

26. *Connecticut.*—State *v.* Potter, 18 Conn. 166.

Louisiana.— State *v.* Alphonse, 34 La. Ann. 9; State *v.* Havelin, 6 La. Ann. 167.

Maine.— State *v.* Grant, 22 Me. 171.

Massachusetts.— Com. *v.* Sego, 125 Mass. 210; Com. *v.* Tuckerman, 10 Gray 173.

Minnesota.— State *v.* Staley, 14 Minn. 105.

Nebraska.— Strong *v.* State, 63 Nebr. 440, 88 N. W. 772.

New York.— People *v.* Smith, 3 How. Pr. 226.

Pennsylvania.— Fife *v.* Com., 29 Pa. St. 429.

Texas.— Cannada *v.* State, 29 Tex. App. 537, 16 S. W. 341; Jackson *v.* State, 29 Tex. App. 458, 16 S. W. 247; Searcy *v.* State, 28 Tex. App. 513, 13 S. W. 782, 19 Am. St. Rep. 851; Rice *v.* State, 22 Tex. App. 654, 3 S. W. 791.

England.— Rex *v.* Dunn, 4 C. & P. 543, 19 E. C. L. 641.

See 14 Cent. Dig. tit. "Criminal Law," § 1176.

Illustrations.— A confession is not rendered inadmissible by a statement by a jailer to the prisoner that if the commonwealth should use any of them as witnesses, he supposed it would prefer to use her (Fife *v.* Com., 29 Pa. St. 429), or by advice to plead guilty (Williams *v.* State, (Tex. Cr. App. 1901) 65 S. W. 1059), or advice, if guilty, to confess the crime (Com. *v.* Morey, 1 Gray (Mass.) 461), or by telling the prisoner that he did not think it would be any worse for him if he confessed (State *v.* Grover, 96 Me. 363, 52 Atl. 757).

Exhortation and questioning merely see *supra*, XII, H, 2, h, (VII)-(X).

27. Steele *v.* State, 83 Ala. 20, 3 So. 547; State *v.* Bradford, 156 Mo. 91, 56 S. W. 898; Thompson *v.* State, 19 Tex. App. 593.

by the confession.[28] It must appear of course that the promises were made and heard before the confession was uttered.[29]

(iii) *Promise of Mitigation of Punishment, Immunity, Pardon, and the Like.* A confession is inadmissible if indueed by a promise, express or implied, that if the accused would confess, efforts would be made to mitigate his punishment,[30] by a promise of immunity from prosecution or punishment,[31] by the promise of the prosecuting witness or the prosecuting officer to discontinue

28. *Alabama.*— Gregg *v.* State, 106 Ala. 44, 17 So. 321; Owen *v.* State, 78 Ala. 425, 56 Am. Rep. 40; Redd *v.* State, 69 Ala. 255; Lacey *v.* State, 56 Ala. 385.

Arkansas.— Corley *v.* State, 50 Ark. 305, 7 S. W. 255.

California.— People *v.* Johnson, 41 Cal. 452.

Georgia.— Green *v.* State, 88 Ga. 516, 15 S. E. 10, 30 Am. St. Rep. 167; Byrd *v.* State, 68 Ga. 661; Stephen *v.* State, 11 Ga. 225.

Illinois.— Gates *v.* People, 14 Ill. 433.

Massachusetts.— Com. *v.* Taylor, 5 Cush. 605.

Missouri.— Couley *v.* State, 12 Mo. 462.

New York.— People *v.* Robertson, 1 Wheel. Cr. 66.

England.— Rex *v.* Kingston, 4 C. & P. 387, 19 E. C. L. 567.

See 14 Cent. Dig. tit. "Criminal Law," § 1176.

Ilustrations.— Thus telling the prisoner that it will be worse for him if he does not confess (Reg. *v.* Coley, 10 Cox C. C. 536; 2 East P. C. 659), that it will be better for him if he does (Redd *v.* State, 69 Ala. 255; 2 East P. C. 659), or saying to him, "You had better tell all you know" (Rex *v.* Kingston, 4 C. & P. 387, 19 E. C. L. 567), or "It would have been better if you had told at first" (Rex *v.* Walkley, 6 C. & P. 175, 25 E. C. L. 380), or "I should be obliged to you if you would tell us what you know about it, if you will not, we of course can do nothing" (Rex *v.* Partridge, 7 C. & P. 551, 32 E. C. L. 754), or "You had better not add a lie to the crime of theft" (Rex *v.* Shepherd, 7 C. & P. 579, 32 E. C. L. 768), or "Tell me where the things are and I will be favorable to you" (Rex *v.* Thompson, 1 Leach C. C. 325), or "You had better tell all about it, it will save trouble" (Reg. *v.* Cheverton, 2 F. & F. 833), have been held to constitute such promises as to exclude a confession produced by them.

29. *Alabama.*— Murdock *v.* State, 68 Ala. 567.

Georgia.— Williams *v.* State, 94 Ga. 400, 20 S. E. 334.

Massachusetts.— Com. *v.* Corcoran, 182 Mass. 465, 65 N. E. 821.

Oregon.— State *v.* Leonard, 3 Oreg. 157.

Pennsylvania.— Com. *v.* Johnson, 162 Pa. St. 63, 29 Atl. 280.

Texas.— Thompson *v.* State, 19 Tex. App. 593.

30. *Alabama.*— Owen *v.* State, 78 Ala. 425, 56 Am. Rep. 40; Redd *v.* State, 69 Ala. 255; Joe *v.* State, 38 Ala. 422.

Arkansas.— Corley *v.* State, 50 Ark. 305, 7 S. W. 255.

California.— People *v.* Johnson, 41 Cal. 452; People *v.* Smith, 15 Cal. 408.

Louisiana.— State *v.* Von Sachs, 30 La. Ann. 942.

Massachusetts.— Com. *v.* Taylor, 5 Cush. 605, holding inadmissible a confession which was made after the accused had been told by the officer that he could make no promises, but if the accused made any disclosures that would benefit the government he would use his influence to have it go in his favor.

Mississippi.— Harvey *v.* State, (1896) 20 So. 837.

Missouri.— Couley *v.* State, 12 Mo. 462.

New York.— People *v.* Robertson, 1 Wheel. Cr. 66.

Texas.— Warren *v.* State, 29 Tex. 369.

United States.— U. S. *v.* Pocklington, 27 Fed. Cas. No. 16,060, 2 Cranch C. C. 293.

Compare, however, Nobles *v.* State, 98 Ga. 73, 26 S. E. 64, 38 L. R. A. 577, holding that where the accused voluntarily inquired of an officer as to the probable result of making a confession and was told that in the opinion of the officer it might result in a diminished punishment a confession then given was voluntary.

See 14 Cent. Dig. tit. "Criminal Law," § 1176.

31. Gregg *v.* State, 106 Ala. 44, 17 So. 321; Corley *v.* State, 50 Ark. 305, 7 S. W. 255; People *v.* Smith, 15 Cal. 408; Byrd *v.* State, 68 Ga. 661. *Compare*, however, State *v.* White, 17 Kan. 487 (holding that a confession was voluntary where the only moving cause was an exhortation to the accused by an officer to make a clean breast of the matter and a statement that he would do what he could to get him out of it); Com. *v.* Howe, 2 Allen (Mass.) 153 (holding that a promise by the employer of the accused to remain silent as to the crime, and to keep him at work if he would settle with the person injured did not exclude a confession).

A confession made with a view of compromising or settling the matter on the basis that the accused should not be prosecuted is not admissible. Austine *v.* People, 51 Ill. 236. But a confession of guilt is not inadmissible because coupled with a proposition by the accused to settle or compromise the charge, where the offer of settlement was not induced by another. Hecox *v.* State, 105 Ga. 625, 31 S. E. 592.

A confession made under a promise that the defendant might be used as a state witness is incompetent. State *v.* Johnson, 30 La. Ann. 881; Thorn's Case, 4 City Hall Rec. (N. Y.) 81.

the prosecution,[32] or by a promise of pardon if the confession was induced thereby, but not otherwise.[33]

(iv) *Promise of Collateral Benefit.* The fact that a confession is obtained by the promise of some collateral benefit does not exclude it, if it is voluntary and otherwise admissible.[34] This is true for example of a confession made for the purpose of earning a reward for the apprehension of the criminal,[35] and of confessions on a promise by the jailer or other officer to unchain or untie the accused and permit him to associate with other prisoners,[36] to permit him to see his wife who was confined in a separate cell,[37] or to protect him from other persons implicated in the crime.[38]

(v) *Inducements by Persons in Authority.* A distinction is made as to their voluntary character between confessions which are procured by a promise or other inducement made or offered by a person who is so related to the accused as to be able to exercise power or authority over him, and confessions in response to promises by persons having no authority over him. The rule is that confessions made to persons in authority are presumed to have been produced by any promises they may have made to induce the confessions.[39] Persons in authority include

32. *Alabama.*— Gregg *v.* State, 106 Ala. 44, 17 So. 321; Murdock *v.* State, 68 Ala. 567.

California.— People *v.* Williams, 133 Cal. 165, 65 Pac. 323.

Delaware.— State *v.* Jackson, 3 Pennew. 15, 50 Atl. 270; State *v.* Bostick, 4 Harr. 563.

Georgia.— Byrd *v.* State, 68 Ga. 661.

Kentucky.— Rector *v.* Com., 4 Ky. L. Rep. 323.

Mississippi.— Draughn *v.* State, 76 Miss. 574, 25 So. 153.

Tennessee.— Boyd *v.* State, 2 Humphr. 39.

England.— Reg. *v.* Mansfield, 14 Cox C. C. 639.

Compare Ward *v.* People, 3 Hill (N. Y.) 395, holding that if, after the promise of the prosecuting witness but before the confession was made, the accused was warned by an officer that the offense could not be settled the confession was admissible.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1176, 1178.

33. Holsenbake *v.* State, 45 Ga. 43; Com. *v.* Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; State *v.* Squires, 48 N. H. 364.

34. *Alabama.*— Stone *v.* State, 105 Ala. 60, 17 So. 114; McIntosh *v.* State, 52 Ala. 355.

Georgia.— Price *v.* State, 114 Ga. 855, 40 S. E. 1015.

Iowa.— State *v.* Fortner, 43 Iowa 494.

Kentucky.— Rutherford *v.* Com., 2 Metc. 387.

Missouri.— State *v.* Hopkirk, 84 Mo. 278.

New Hampshire.— State *v.* Wentworth, 37 N. H. 196.

New York.— Cox *v.* People, 80 N. Y. 500.

North Carolina.— State *v.* Hardee, 83 N. C. 619.

England.— Rex *v.* Green, 6 C. & P. 655, 25 E. C. L. 623.

See 14 Cent. Dig. tit. "Criminal Law," § 1179.

35. McKinney *v.* State, 134 Ala. 134, 32 So. 726; McIntosh *v.* State, 52 Ala. 355; State *v.* Wentworth, 37 N. H. 196.

36. State *v.* Cruse, 74 N. C. 491; State *v.* Tatro, 50 Vt. 483.

37. Rex *v.* Lloyd, 6 C. & P. 393, 25 E. C. L. 490.

38. Hunt *v.* State, 135 Ala. 1, 33 So. 329.

39. *Alabama.*—Hoober *v.* State, 81 Ala. 51, 1 So. 574.

California.— People *v.* Thompson, 84 Cal. 598, 24 Pac. 384; People *v.* Barric, 49 Cal. 342.

Georgia.— Green *v.* State, 88 Ga. 516, 15 S. E. 10, 30 Am. St. Rep. 167; Byrd *v.* State, 68 Ga. 661.

Kentucky.— Collins *v.* Com., 25 S. W. 743, 15 Ky. L. Rep. 691.

Louisiana.— State *v.* Nelson, 3 La. Ann. 497.

Massachusetts.— Com. *v.* Myers, 160 Mass. 530, 36 N. E. 481; Com. *v.* Curtis, 97 Mass. 574; Com. *v.* Knapp, 9 Pick. 496, 20 Am. Dec. 491.

Minnesota.— State *v.* Staley, 14 Minn. 105.

Mississippi.— Jones *v.* State, 58 Miss. 349; Cady *v.* State, 44 Miss. 332.

New Hampshire.— State *v.* York, 37 N. H. 175.

New York.— People *v.* McMahon, 15 N. Y. 384.

Ohio.— Searles *v.* State, 6 Ohio Cir. Ct. 331.

Oregon.— State *v.* Wintzingerode, 9 Oreg. 153.

South Carolina.— State *v.* Carson, 36 S. C. 524, 15 S. E. 588.

Tennessee.— Deathridge *v.* State, 1 Sneed 75.

Texas.— Clayton *v.* State, 31 Tex. Cr. 489, 21 S. W. 255; Searcy *v.* State, 28 Tex. App. 513, 13 S. W. 782, 19 Am. St. Rep. 851; Rice *v.* State, 22 Tex. App. 654, 3 S. W. 791.

Vermont.— State *v.* Day, 55 Vt. 510.

England.—Reg. *v.* Thompson, [1893] 2 Q. B. 12, 17 Cox C. C. 641, 57 J. P. 312, 62 L. J. M. C. 93, 69 L. T. Rep. N. S. 22, 5 Reports 392, 41 Wkly. Rep. 525; Reg. *v.* Rose, 18 Cox C. C. 717, 67 L. J. Q. B. 289, 78 L. T. Rep. N. S. 119.

See 14 Cent. Dig. tit. "Criminal Law," § 1181.

the officer having the accused in custody,[40] the prosecuting officer and his assistants or agents,[41] the private prosecutor or person injured,[42] and the magistrate before whom the accused appears.[43] But one who lives in the jailer's family and sometimes has a key to the jail but who is not a sworn officer[44] and private detectives generally[45] are not persons in authority within the rule. And as private prosecutors are unknown to the practice of the federal courts, it has there been held that the prosecuting witness is not a person in authority.[46]

(VI) *Inducements by Persons Not in Authority.* An inducement to a confession held out by a private person in the presence of one in authority, and not expressly contradicted or rejected by the person in authority, will exclude a confession based upon it.[47] Some of the cases hold that inducements otherwise held out by a person not in authority do not render a confession incompetent, but that it is admissible in evidence and its weight is for the jury;[48] while other courts hold that such a confession is incompetent and should be excluded if it appears to the court that it was the effect of the inducements.[49]

Person supposed to have authority.— A confession induced by the promise of a person whom the prisoner reasonably supposed to have authority is admissible, although such person did not in fact have any authority. People *v.* Walcott, 51 Mich. 612, 17 N. W. 78; Reg. *v.* Frewin, 6 Cox C. C. 530.

40. *Alabama.*— Newman *v.* State, 49 Ala. 9.

California.— People *v.* Thompson, 84 Cal. 598, 24 Pac. 384.

Delaware.— State *v.* Bostick, 4 Harr. 563.

Kentucky.— Collins *v.* Com., 25 S. W. 743, 15 Ky. L. Rep. 691.

Minnesota.— State *v.* Staley, 14 Minn. 105.

New Hampshire.— State *v.* York, 37 N. H. 175.

Virginia.— Vaughan *v.* Com., 17 Gratt. 576.

See 14 Cent. Dig. tit. "Criminal Law," § 1181.

41. Simmons *v.* State, 61 Miss. 243; People *v.* Kurtz, 42 Hun 335; Searles *v.* State, 6 Ohio Cir. Ct. 331; Neeley *v.* State, 27 Tex. App. 315, 11 S. W. 376.

42. Sullivan *v.* State, 66 Ark. 506, 51 S. W. 828; State *v.* Mims, 43 La. Ann. 532, 9 So. 113; State *v.* Smith, 72 Miss. 420, 18 So. 482; Deathridge *v.* State, 1 Sneed (Tenn.) 75. *Compare* Ward *v.* People, 3 Hill (N. Y.) 395.

43. U. S. *v.* Cooper, 25 Fed. Cas. No. 14,864.

In England persons in authority include the prosecutor (Rex *v.* Thompson, 1 Leach C. C. 325; Cass' Case, 1 Leach C. C. 328 note *a*), the prosecutor's wife (Rex *v.* Upchurch, 1 Moody C. C. 465) or his attorney (1 Phillips Ev. 407), or an attorney who is investigating (Reg. *v.* Croydon, 2 Cox C. C. 67), or some person assisting a constable (Rex *v.* Enoch, 5 C. & P. 539, 24 E. C. L. 696; 1 Phillips Ev. 407) or the prosecutor (Rex *v.* Stacey, 3 Russ. Cr. 464) in the apprehension or detention of the prisoner, or a magistrate acting in the business (Rex *v.* Pressly, 6 C. & P. 183, 25 E. C. L. 384; 1 Phillips Ev. 407), or other magistrate (Rex *v.* Clewes, 4 C. & P. 221, 19 E. C. L. 485), or magistrate's clerk (Reg. *v.* Drew, 8 C. & P. 140, 34 E. C. L. 654), or a jailer (Rex *v.* Gilham, 1 Moody C. C. 186), or a person having authority over the prisoner, as the captain of a vessel and one of his crew (Rex *v.* Parratt, 4 C. & P. 570, 19 E. C. L. 654), or a master or mistress and a servant (Reg. *v.* Taylor, 8 C. & P. 733, 34 E. C. L. 990. See Reg. *v.* Moore, 3 C. & K. 153, 5 Cox C. C. 555, 2 Den. C. C. 522, 16 Jur. 621, 21 L. J. M. C. 199, 12 Eng. L. & Eq. 583, wife of one in whose house a crime is committed), or a person having authority in the matter (Rex *v.* Stacey, 3 Russ. Cr. 464; 1 Phillips Ev. 407), or a person in the presence of one in authority, with his assent, whether direct or implied (Reg. *v.* Garner, 2 C. & K. 920, 3 Cox C. C. 175, 1 Den. C. C. 329, 12 Jur. 944, 18 L. J. M. C. 1, 3 New Sess. Cas. 329, T & M. 7, 61 E. C. L. 920; Reg. *v.* Laugher, 2 C. & K. 225, 2 Cox C. C. 134, 61 E. C. L. 225; Reg. *v.* Luckhurst, 2 C. L. R. 129, 6 Cox C. C. 243, Dears. C. C. 245, 17 Jur. 1082, 23 L. J. M. C. 18, 2 Wkly. Rep. 97, 22 Eng. L. & Eq. 604; Rex *v.* Pountney, 7 C. & P. 302, 32 E. C. L. 625).

44. Shifflet *v.* Com., 14 Gratt. (Va.) 652.

45. Dumas *v.* State, 63 Ga. 600; Early *v.* Com., 86 Va. 921, 11 S. E. 795; U. S. *v.* Stone, 8 Fed. 232.

46. U. S. *v.* Stone, 8 Fed. 232.

47. Morehead *v.* State, 9 Humphr. (Tenn.) 635; Reg. *v.* Millen, 3 Cox C. C. 507; Reg. *v.* Laugher, 2 C. & K. 225, 2 Cox C. C. 134, 61 E. C. L. 225. And see Johnson *v.* State, 76 Ga. 76.

48. *Kentucky.*— Young *v.* Com., 8 Bush 366.

Michigan.— Ulrich *v.* People, 39 Mich. 245.

New York.— People *v.* Burns, 2 Park. Cr. 34.

South Carolina.— State *v.* Gossett, 9 Rich. 428; State *v.* Kirby, 1 Strobh. 378; State *v.* Kirby, 1 Strobh. 155.

Virginia.— Early *v.* Com., 86 Va. 921, 11 S. E. 795; Shifflet *v.* Com., 14 Gratt. 652; Smith *v.* Com., 10 Gratt. 734.

United States.— U. S. *v.* Stone, 8 Fed. 232.

England.— Reg. *v.* Taylor, 8 C. & P. 733, 34 E. C. L. 990; Rex *v.* Spencer, 7 C. & P. 776, 32 E. C. L. 867; Rex *v.* Tyler, 1 C. & P. 129, 12 E. C. L. 85.

49. *Alabama.*—Anderson *v.* State, 104 Ala. 83, 16 So. 108.

(vii) *Neglect of Accused to Perform Conditions.* Where one of several co-defendants turns state's evidence, on a promise of immunity by the prosecuting attorney, but fails to keep his part of the agreement, his confession made under such promise may then be used against him on his trial.[50]

j. Judicial Confessions — (i) *At Coroner's Inquest.* Although there are some decisions to the contrary,[51] most of the courts have held that a confession of the accused voluntarily given when he was a witness at the coroner's inquest, although under oath, is admissible against him on his trial for the homicide of the person upon whose body the inquest was held, where he was not actually under arrest at the time, and where he was cautioned that he need not testify and that what he should say might be used against him, when such caution is required.[52]

(ii) *At Fire Inquest.* The rule also applies to defendant's testimony or statements under oath where he was summoned as a witness on a fire inquest, under a statute, and his confession, if any, contained therein is competent on his trial for setting the fire.[53]

(iii) *At Preliminary Examination.* The voluntary, unsworn statements of the prisoner constituting a confession, taken at the preliminary examination after he has been warned that what he says may be used against him, when this is required, are admissible.[54] So in most jurisdictions where he voluntarily becomes a witness for himself on his preliminary examination, and is cautioned that what

Connecticut. — State *v.* Potter, 18 Conn. 166.

Georgia. — Johnson *v.* State, 61 Ga. 305, under a statute. See Johnson *v.* State, 76 Ga. 76.

Massachusetts. — Com. *v.* Knapp, 9 Pick. 496, 20 Am. Dec. 491.

Ohio. — Spears *v.* State, 2 Ohio St. 583.

England. — Rex *v.* Thomas, 6 C. & P. 353, 25 E. C. L. 470.

50. Com. *v.* Knapp, 10 Pick. (Mass.) 477, 20 Am. Dec. 534; State *v.* Moran, 15 Oreg. 262, 14 Pac. 419.

In Texas the bad faith of the accused does not permit the introduction of his confession where the statute requiring him to be cautioned was not complied with. Lauderdale *v.* State, 31 Tex. Cr. 46, 19 S. W. 679, 37 Am. St. Rep. 788; Neeley *v.* State, 27 Tex. App. 315, 11 S. W. 376; Womack *v.* State, 16 Tex. App. 178; Lopez *v.* State, 12 Tex. App. 27.

51. *Louisiana.* — State *v.* Garvey, 25 La. Ann. 191.

Mississippi. — Farkas *v.* State, 60 Miss. 847.

Montana. — State *v.* O'Brien, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399.

North Carolina. — State *v.* Young, 60 N. C. 126; State *v.* Broughton, 29 N. C. 96, 45 Am. Dec. 507.

South Carolina. — State *v.* Senn, 32 S. C. 392, 11 S. E. 292.

England. — Rex *v.* Lewis, 6 C. & P. 161, 25 E. C. L. 373.

See 14 Cent. Dig. tit. "Criminal Law," § 1185.

52. *Alabama.* — Wilson *v.* State, 110 Ala. 1, 20 So. 415, 55 Am. St. Rep. 17.

California. — People *v.* Martinez, 66 Cal. 278, 5 Pac. 261; People *v.* Taylor, 59 Cal. 640.

Connecticut. — State *v.* Coffee, 56 Conn. 399, 16 Atl. 151.

Florida. — Jenkins *v.* State, 35 Fla. 737, 18 So. 182, 48 Am. St. Rep. 267; Newton *v.* State, 21 Fla. 53.

Kansas. — State *v.* Taylor, 36 Kan. 329, 13 Pac. 550.

Missouri. — State *v.* David, 131 Mo. 380, 33 S. W. 28.

Nebraska. — Clough *v.* State, 7 Nebr. 320.

New York. — People *v.* Chapleau, 121 N. Y. 266, 24 N. E. 469; People *v.* Mondon, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709; People *v.* McGloin, 91 N. Y. 241; Teachout *v.* People, 41 N. Y. 7 [*distinguishing* People *v.* McMahon, 15 N. Y. 384]; Hendrickson *v.* People, 10 N. Y. 13, 9 How. Pr. 155, 61 Am. Dec. 721; People *v.* Kief, 58 Hun 337, 11 N. Y. Suppl. 926.

Ohio. — State *v.* Leuth, 5 Ohio Cir. Ct. 94.

Pennsylvania. — See Com *v.* Cutaiar, 5 Pa. Dist. 403.

Texas. — Kirby *v.* State, 23 Tex. App. 13, 5 S. W. 165.

Wisconsin. — Emery *v.* State, 92 Wis. 146, 65 N. W. 848; Schloeffler *v.* State, 3 Wis. 823.

England. — Reg. *v.* Wiggins, 10 Cox C. C. 562; Reg. *v.* Colmer, 9 Cox C. C. 506; Reg. *v.* Owen, 9 C. & P. 83, 38 E. C. L. 60.

See 14 Cent. Dig. tit. "Criminal Law," § 1185.

Involuntary confessions. — Confessions at a coroner's inquest are not admissible where the testimony was not voluntary, or where there was no caution as required by statute. State *v.* Matthews, 66 N. C. 106.

53. Com. *v.* Wesley, 166 Mass. 248, 44 N. E. 228; Com. *v.* Bradford, 126 Mass. 42; Com. *v.* King, 8 Gray (Mass.) 501.

54. *Louisiana.* — State *v.* Bruce, 33 La. Ann. 186.

New York. — People *v.* Johnson, 2 Wheel. Cr. 361; People *v.* Maxwell, 1 Wheel. Cr. 163; Steel's Case, 5 City Hall Rec. 5.

North Carolina. — State *v.* Needham, 78 N. C. 474.

he says may be used against him, any confession contained in his testimony, although under oath, is competent on his trial.[55]

(IV) *Before Grand Jury.* Where one against whom a charge is being investigated by the grand jurors voluntarily appears and testifies under oath before them, his confession then made may be given in evidence against him after indictment,[56] but the rule is otherwise where one accused of crime is taken before the grand jury by its directions and not of his own volition.[57]

(V) *At Former Trial.* The testimony of defendant voluntarily given on his previous trial is competent against him as a confession,[58] notwithstanding a statute prohibiting a former conviction being alluded to on a subsequent trial.[59]

(VI) *At Trial of Civil Action.* And voluntary testimony given in a civil action may be proved against the witness in a criminal proceeding.[60]

(VII) *At Previous Examination or Trial of Another.* A statement under oath, made by the accused when he testified, before he was charged with the crime, at the preliminary examination or trial of another person, is admissible against him.[61] He has the right, however, to remain silent on the ground that his answer might tend to incriminate him, and if he is compelled to answer after

Oregon.— State *v.* Hatcher, 29 Oreg. 309, 44 Pac. 584.

South Carolina.— State *v.* Branham, 13 S. C. 389.

Tennessee.— Alfred *v.* State, 2 Swan 581.

Texas.— Shaw *v.* State, 32 Tex. Cr. 155, 22 S. W. 588.

England.— Reg. *v.* Carpenter, 2 Cox C. C. 228; Rex *v.* Webb, 4 C. & P. 564, 19 E. C. L. 651; Rex *v.* Ellis, R. & M. 432, 21 E. C. L. 789.

See 14 Cent. Dig. tit. "Criminal Law," § 1186.

55. *California.*— People *v.* Kelley, 47 Cal. 125. *Compare* People *v.* Gibbons, 43 Cal. 557.

Florida.— Green *v.* State, 40 Fla. 474, 24 So. 537.

Michigan.— People *v.* Butler, 111 Mich. 483, 69 N. W. 734.

Mississippi.— Steele *v.* State, 76 Miss. 387, 24 So. 910.

Missouri.— State *v.* Lewis, 73 Mo. App. 619.

North Carolina.—State *v.* Melton, 120 N. C. 591, 26 S. E. 933; State *v.* Needham, 78 N. C. 474; State *v.* Cowan, 29 N. C. 239.

Pennsylvania.— Com. *v.* Clark, 130 Pa. St. 641, 18 Atl. 988.

Texas.— Aiken *v.* State, (Cr. App. 1901) 64 S. W. 57; Preston *v.* State, 41 Tex. Cr. 300, 53 S. W. 127, 881; Salas *v.* State, 31 Tex. Cr. 485, 21 S. W. 44.

Washington.— State *v.* Lyts, 25 Wash. 347, 65 Pac. 530.

Wisconsin.— State *v.* Glass, 50 Wis. 218, 6 N. W. 500, 36 Am. Rep. 845.

United States.— Wilson *v.* U. S., 162 U. S. 613, 16 S. Ct. 895, 40 L. ed. 1090.

England.— Reg. *v.* Bate, 11 Cox C. C. 686; Reg. *v.* Chidley, 8 Cox C. C. 365; Rex *v.* Bartlett, 7 C. & P. 832, 32 E. C. L. 896.

See 14 Cent. Dig. tit. "Criminal Law," § 1186.

Contra.— State *v.* Pierce, 2 Mart. (La.) 252; State *v.* Welch, 36 W. Va. 690, 15 S. E. 419; State *v.* Hall, 31 W. Va. 505, 7 S. E. 422 (under a statute); U. S. *v.* Brown, 40 Fed. 457; U. S. *v.* Bascadore, 24 Fed. Cas. No. 14,536, 2 Cranch C. C. 30; U. S. *v.* Duffy, 25 Fed. Cas. No. 14,998, 1 Cranch C. C. 164.

Involuntary confessions.— Confessions at a preliminary examination are incompetent where the accused was compelled to testify, or where there was no caution as required by statute. State *v.* Matthews, 66 N. C. 106; Com. *v.* Harman, 4 Pa. St. 269.

Where defendant is an ignorant person, unused to judicial proceedings, his confession at the preliminary examination, made without his being cautioned or advised as to his legal rights, is incompetent. State *v.* Andrews, 35 Oreg. 388, 58 Pac. 765.

In North Carolina by statute the accused must have been cautioned. State *v.* Spier, 86 N. C. 600; State *v.* Needham, 78 N. C. 474; State *v.* Rorie, 74 N. C. 148. See also State *v.* Conrad, 95 N. C. 666, holding that the requirement of the statute does not apply to a statement made to a magistrate before the examination has begun and while the accused is under no judicial constraint.

56. State *v.* Carroll, 85 Iowa 1, 51 N. W. 1159; Grimsinger *v.* State, (Tex. Cr. App. 1901) 69 S. W. 583; Giles *v.* State, 43 Tex. Cr. 561, 67 S. W. 411; Thomas *v.* State, 35 Tex. Cr. 178, 32 S. W. 771; U. S. *v.* Kirkwood, 5 Utah 123, 13 Pac. 234.

Secrecy of grand jury.— A grand juror testifying to such a confession does not violate the doctrine as to the secrecy of the grand-jury room or the oaths of the jurors. State *v.* Carroll, 85 Iowa 1, 51 N. W. 1159; Giles *v.* State, 43 Tex. Cr. 561, 67 S. W. 411. See Grand Juries.

57. State *v.* Clifford, 86 Iowa 550, 53 N. W. 299, 41 Am. St. Rep. 518.

58. State *v.* Sorter, 52 Kan. 531, 34 Pac. 1036.

59. Preston *v.* State, 41 Tex. Cr. 300, 53 S. W. 127, 881.

60. State *v.* Hopkins, 13 Wash. 5, 42 Pac. 627.

61. *California.*— People *v.* Mitchell, 94 Cal. 550, 29 Pac. 1106.

Georgia.— Burnett *v.* State, 87 Ga. 622, 13 S. E. 552.

thus objecting, the answer elicited, having been obtained by compulsion, is not competent as a confession.[62]

k. Threats and Fear — (i) *In General.* The general rule is that a confession obtained by or made under the influence of threats or fear, being involuntary, is inadmissible, not only by statute in many jurisdictions, but also at common law.[63]

(ii) *Character and Sufficiency of Fear.* If the confession was induced by threats the degree of fear inspired is not material,[64] but the fear must be something more than that which is produced by the fact that the accused has been charged with crime and has been arrested or taken into custody, or by the fear that he may be punished for the crime.[65]

(iii) *Character and Time of Threats.* It has been said that the threats which will operate to exclude a confession must be of such a character as to render it doubtful whether the confession should be relied upon as worthy of credit.[66]

Louisiana.— State *v.* Lewis, 39 La. Ann. 1110, 3 So. 343.

New York.— People *v.* Burt, 51 N. Y. App. Div. 106, 64 N. Y. Suppl. 417, 15 N. Y. Cr. 43; People *v.* Thayer, 1 Park. Cr. 595.

South Carolina.—State *v.* Vaigneur, 5 Rich. 391.

Texas.— Robinson *v.* State, (Cr. App. 1901) 63 S. W. 869.

Wisconsin.— Dickerson *v.* State, 48 Wis. 288, 4 N. W. 321.

Contra, Jackson *v.* State, 56 Miss. 311; U. S. *v.* Duffy, 25 Fed. Cas. No. 14,998, 1 Cranch C. C. 164.

See 14 Cent. Dig. tit. "Criminal Law," § 1187.

62. Shoeffler *v.* State, 3 Wis. 823; Reg. *v.* Garbett, 2 C. & K. 474, 2 Cox C. C. 448, 1 Den. C. C. 236, 61 E. C. L. 474.

63. *Alabama.*— Redd *v.* State, 69 Ala. 255; Young *v.* State, 68 Ala. 569.

Arkansas.— Yates *v.* State, 47 Ark. 172, 1 S. W. 65.

California.— People *v.* Ah How, 34 Cal. 218; People *v.* Smith, 15 Cal. 408.

Delaware.— State *v.* Bostick, 4 Harr. 563.

District of Columbia.— Hardy *v.* U. S., 3 App. Cas. 35; U. S. *v.* Nardello, 4 Mackey 503.

Georgia.— Johnson *v.* State, 76 Ga. 76; Johnson *v.* State, 63 Ga. 355.

Illinois.— Miller *v.* People, 39 Ill. 457; Gates *v.* People, 14 Ill. 433.

Indiana.— Smith *v.* State, 10 Ind. 106.

Kentucky.— Rutherford *v.* Com., 2 Metc. 387.

Louisiana.— State *v.* Alexander, 109 La. 557, 33 So. 600; State *v.* Gilbert, 2 La. Ann. 244.

Massachusetts.— Com. *v.* Sego, 125 Mass. 210.

Minnesota.— State *v.* Staley, 14 Minn. 105.

Missouri.— Hector *v.* State, 2 Mo. 166, 22 Am. Dec. 454.

Nebraska.— May *v.* State, 38 Nebr. 211, 56 N. W. 804.

New Hampshire.— State *v.* Howard, 17 N. H. 171.

New York.— People *v.* Cassidy, 14 N. Y. Suppl. 349; Tucker's Case, 5 City Hall Rec. 164; Bowerhan's Case, 4 City Hall Rec. 136; Thorn's Case, 4 City Hall Rec. 81; Williams' Case, 1 City Hall Rec. 149.

North Carolina.— State *v.* Davis, 125 N. C. 612, 34 S. E. 198.

Ohio.— Spears *v.* Ohio, 2 Ohio St. 583.

Pennsylvania.— Com. *v.* Hanlon, 8 Phila. 423.

Tennessee.— Wiley *v.* State, 3 Coldw. 362.

Texas.— Greer *v.* State, 31 Tex. 129; Warren *v.* State, 29 Tex. 369.

Vermont.— State *v.* Phelps, 11 Vt. 116, 34 Am. Dec. 672.

Washington.— State *v.* Webster, 21 Wash. 63, 57 Pac. 361.

Wisconsin.— Shoeffler *v.* State, 3 Wis. 823.

United States.— U. S. *v.* Charles, 25 Fed. Cas. No. 14,786, 2 Cranch C. C. 76; U. S. *v.* Nott, 27 Fed. Cas. No. 15,900, 1 McLean 499; U. S. *v.* Pumphreys, 27 Fed. Cas. No. 16,097, 1 Cranch C. C. 74.

See 14 Cent. Dig. tit. "Criminal Law," § 1189.

64. Stephen *v.* State, 11 Ga. 225.

65. Com. *v.* Preece, 140 Mass. 276, 5 N. E. 494; Com. *v.* Smith, 119 Mass. 305; Com. *v.* Mitchell, 117 Mass. 431; People *v.* Thoms, 3 Park. Cr. (N. Y.) 256; Honeycutt *v.* State, 8 Baxt. (Tenn.) 371; State *v.* Coella, 3 Wash. 99, 28 Pac. 28.

The fear of legal punishment for the crime does not render the confession incompetent. Gentry *v.* State, 24 Tex. App. 80, 5 S. W. 660. Nor will a statement on the part of a magistrate or other officer that the accused will be punished or committed render a confession involuntary. People *v.* McCallam, 103 N. Y. 587, 9 N. E. 502, 3 N. Y. Cr. 189; State *v.* Cowan, 29 N. C. 239; Shifflet *v.* Com., 14 Gratt. (Va.) 652.

Circumstances showing fear.— The fact that the accused was confined in a dark cell (State *v.* McCullum, 18 Wash. 394, 51 Pac. 1044), that he was beaten and bitten by dogs (Simon *v.* State, 37 Miss. 288), or that he was placed in irons in the police station (U. S. *v.* Nardello, 4 Mackey (D. C.) 503), or had a chain about his limbs or person (Young *v.* State, 68 Ala. 569; State *v.* George, 50 N. C. 233), or a rope around his neck (State *v.* Young, 52 La. Ann. 478, 27 So. 50; State *v.* Revells, 34 La. Ann. 381, 44 Am. Rep. 436) are circumstances material to show the presence of fear.

66. State *v.* Freeman, 12 Ind. 100. If the officer having the accused in custody asks

A confession obtained by a threat to bring a civil action is competent.[67] It has been held that a confession by one defendant, made on seeing an accomplice whipped, is admissible against him;[68] but elsewhere it has been held that a confession made on witnessing torture inflicted on a co-defendant to induce him to confess is inadmissible.[69] The fact that the officer who had the accused in charge was armed,[70] that in making the arrest he pointed a pistol at the accused and advised him to give up,[71] or that fire-arms were deposited in the room where the confession was made[72] does not render a confession incompetent. Threats uttered after the confession was made do not exclude it.[73]

(iv) *Fear and Threats of Mob Violence.* It has been held that the mere fact that the accused feared mob violence when he made a confession does not exclude it, where such fear was not inspired by threats, express or implied.[74] But a confession is not admissible where it appears that it was made under threats to deliver the accused to a mob,[75] or under threats or representations, express or implied, that a confession was the only way to escape from the mob.[76] And where the confession was made when the accused was surrounded by or under the control of a mob, within hearing of their angry expressions of hatred, and in view of their preparation to put him to death or to injure him, it is incompetent, although no express threat was made by any member of the mob.[77]

I. Deception or Promise of Secrecy. The fact that a confession was procured by the employment of falsehood by a police officer, detective, or other person does not alone exclude it;[78] nor does the employment of any artifice, deception, or

him to tell the truth, this is not a threat. Com. *v.* Preece, 140 Mass. 276, 5 N. E. 494. See also *supra*, XII, H, 2, h, (VII). But a threat to put the accused in the dark room (People *v.* Rankin, 2 Wheel. Cr. (N. Y.) 467) or to put him "where the dogs would not bother him" (Beckham *v.* State, 100 Ala. 15, 14 So. 859) has been held enough to render a confession inadmissible.

67. Cropper *v.* U. S., Morr. (Iowa) 259.

68. Frank *v.* State, 39 Miss. 705.

69. State *v.* Lawson, 61 N. C. 47. See also Brister *v.* State, 26 Ala. 107.

70. Hornsby *v.* State, 94 Ala. 55, 10 So. 522; McElroy *v.* State, 75 Ala. 9.

71. State *v.* De Graff, 113 N. C. 688, 18 S. E. 507; Wilson *v.* State, 3 Heisk. (Tenn.) 232.

72. State *v.* Watt, 47 La. Ann. 630, 17 So. 164.

73. Kollenberger *v.* People, 9 Colo. 233, 11 Pac. 101; Simpson *v.* State, 4 Humphr. (Tenn.) 456; Grimsinger *v.* State, (Tex. Cr. App. 1901) 69 S. W. 583.

74. *Alabama.*— Redd *v.* State, 68 Ala. 492; Rice *v.* State, 47 Ala. 38.

Kansas.— State *v.* Ingram, 16 Kan. 14.

Kentucky.— Laughlin *v.* Com., 37 S. W. 590, 18 Ky. L. Rep. 640.

Louisiana.— State *v.* Perkins, 31 La. Ann. 192.

Mississippi.— Cady *v.* State, 44 Miss. 332.

Missouri.— State *v.* Ware, 62 Mo. 597.

North Carolina.—State *v.* Houston, 76 N. C. 256. And see State *v.* Howard, 92 N. C. 772.

Tennessee.— Honeycutt *v.* State, 8 Baxt. 371.

See 14 Cent. Dig. tit. "Criminal Law," § 1190.

75. Redd *v.* State, 69 Ala. 255; Miller *v.* State, 94 Ga. 1, 21 S. E. 128; Wigginton *v.* Com., 92 Ky. 282, 17 S. W. 634, 13 Ky. L. Rep. 641; Whitley *v.* State, 78 Miss. 255, 28 So. 852, 53 L. R. A. 40.

76. *Alabama.*— Young *v.* State, 68 Ala. 569.

Kentucky.— Taylor *v.* Com., 42 S. W. 1125, 19 Ky. L. Rep. 836.

Louisiana.— State *v.* Revells, 34 La. Ann. 381, 44 Am. Rep. 436.

Mississippi.— Simon *v.* State, 37 Miss. 288; Serpentine *v.* State, 1 How. 256.

Missouri.— State *v.* Moore, 160 Mo. 443, 61 S. W. 199.

North Carolina.— State *v.* Dildy, 72 N. C. 325; State *v.* George, 50 N. C. 233.

Tennessee.— Self *v.* State, 6 Baxt. 244.

See 14 Cent. Dig. tit. "Criminal Law," § 1190.

77. *Alabama.*— Young *v.* State, 68 Ala. 569.

Georgia.— Irwin *v.* State, 54 Ga. 39.

Mississippi.— Williams *v.* State, 72 Miss. 117, 16 So. 296 [*overruling* to this extent Cady *v.* State, 44 Miss. 332].

North Carolina.— State *v.* Parish, 78 N. C. 492; State *v.* Dildy, 72 N. C. 325. *Compare* State *v.* Howard, 92 N. C. 772.

Tennessee.— Self *v.* State, 6 Baxt. 244.

See 14 Cent. Dig. tit. "Criminal Law," § 1190.

Confession after cessation of danger.— But where the accused, having been subjected to violence by bystanders when arrested, subsequently confessed when in jail to officers and to persons not officers, it was held that the confession was competent. People *v.* Meyer, 162 N. Y. 357, 56 N. E. 758, 14 N. Y. Cr. 487.

78. *Alabama.*— Burton *v.* State, 107 Ala. 108, 18 So. 284; Stone *v.* State, 105 Ala. 60, 17 So. 114; King *v.* State, 40 Ala. 314.

fraud exclude it, if the artifice or fraud employed was not calculated to procure an untrue statement.[79] The fact that a confession was obtained by a promise of secrecy does not render it incompetent, if there was no motive to produce a false statement.[80]

m. Mental Incapacity — (I) *In General.* The mental weakness of the accused does not alone exclude his confession, although a confession by a weak-minded person is to be received with caution;[81] but if the fact of mental incapacity was coupled with circumstances calculated to inspire fear the confession is not admissible.[82] The great excitement of the accused when arrested does not exclude a confession.[83]

(II) *Intoxication.* The fact that defendant was more or less intoxicated when he confessed does not exclude the confession if he had sufficient mental capacity to know what he was saying, and this is the rule, by the weight of authority, although the liquor may have been furnished him by the person having him in custody for the express purpose of procuring a confession.[84] But confessions by one who was so drunk that he did not understand what he was saying are not competent.[85]

n. Confessions by Children. Whether the confession of a child is competent depends not so much upon his age as upon the circumstances of the case, includ-

Georgia.— Sanders *v.* State, 113 Ga. 267, 38 S. E. 841; Marable *v.* State, 89 Ga. 425, 15 S. E. 453.

Kentucky.— Rutherford *v.* Com., 2 Metc. 387.

Michigan.— People *v.* Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501.

Missouri.— State *v.* Rush, 95 Mo. 199, 8 S. W. 221.

Nebraska.— Heldt *v.* State, 20 Nebr. 492, 30 N. W. 626, 57 Am. Rep. 835.

North Carolina.— State *v.* Mitchell, 61 N. C. 447.

Pennsylvania.— Com. *v.* Goodwin, 186 Pa. St. 218, 40 Atl. 412, 65 Am. St. Rep. 852; Com. *v.* Wilson, 186 Pa. St. 1, 40 Atl. 283; Com. *v.* Hanlon, 3 Brewst. 461.

Canada.— Reg. *v.* MacDonald, 2 Can. Cr. Cas. 221; Rex *v.* Todd, 13 Manitoba 364.

See 14 Cent. Dig. tit. "Criminal Law," § 1196.

79. *District of Columbia.*— Hardy *v.* U. S., 3 App. Cas. 35.

Minnesota.— State *v.* Staley, 14 Minn. 105.

Missouri.— State *v.* Fredericks, 85 Mo. 145; State *v.* Hopkirk, 84 Mo. 278; State *v.* Phelps, 74 Mo. 128; State *v.* Jones, 54 Mo. 478.

North Carolina.— State *v.* Harrison, 115 N. C. 706, 20 S. E. 175.

Ohio.— Price *v.* State, 18 Ohio St. 418.

Pennsylvania.— Com. *v.* Cressinger, 193 Pa. St. 326, 44 Atl. 433.

See 14 Cent. Dig. tit. "Criminal Law," § 1196.

80. *Delaware.*— State *v.* Darnell, Houst. Cr. 321.

Iowa.— State *v.* Novak, 109 Iowa 717, 79 N. W. 465.

Kentucky.— Rutherford *v.* Com., 2 Metc. 387.

Texas.— Lawson *v.* State, (Cr. App. 1899) 50 S. W. 345.

England.— Rex *v.* Thomas, 7 C. & P. 345, 32 E. C. L. 648.

81. Williams *v.* State, 69 Ark. 599, 65 S. W. 103; People *v.* Miller, 135 Cal. 69, 67 Pac. 12; Butler *v.* Com., 2 Duv. (Ky.) 435; State *v.* Summons, 1 Ohio Dec. (Reprint) 416, 9 West. L. J. 407.

82. Flagg *v.* People, 40 Mich. 706.

83. People *v.* Cokahnour, 120 Cal. 253, 52 Pac. 505; Balls *v.* State, (Tex. Cr. App. 1897) 40 S. W. 801; Carlisle *v.* State, 37 Tex. Cr. 108, 38 S. W. 991.

84. *Alabama.*— Eskridge *v.* State, 25 Ala. 30.

Arkansas.— Lester *v.* State, 32 Ark. 727.

California.— People *v.* Ramirez, 56 Cal. 533, 38 Am. Rep. 73.

Iowa.— State *v.* Feltes, 51 Iowa 495, 1 N. W. 755.

Louisiana.— State *v.* Berry, 50 La. Ann. 1309, 24 So. 329.

Missouri.— State *v.* Hopkirk, 84 Mo. 278; Whitney *v.* State, 8 Mo. 165.

Tennessee.— Leach *v.* State, 99 Tenn. 584, 42 S. W. 195; Williams *v.* State 12 Lea 211.

Texas.— Lienpo *v.* State, 28 Tex. App. 179, 12 S. W. 588.

England.— Rex *v.* Spilsbury, 7 C. & P. 187, 32 E. C. L. 565.

But see McCabe *v.* Com., (Pa. 1886) 8 Atl. 45, holding incompetent a confession by one who was under the influence of liquor supplied by the officer.

See 14 Cent. Dig. tit. "Criminal Law," § 1199.

Effect of intoxication upon weight of confession.—The fact of intoxication may be considered by the jury as lessening the weight of the confession, for although the saying *in vino veritas* is of ancient acceptance, it is well known that boastful propensities and the inclination for lying are in many men stimulated by the indulgence in intoxicants. State *v.* Berry, 50 La. Ann. 1309, 24 So. 329; State *v.* Grear, 28 Minn. 426, 10 N. W. 472, 41 Am. Rep. 296; State *v.* Bryan, 74 N. C. 351; White *v.* State, 32 Tex. Cr. 625, 25 S. W. 784.

85. Com. *v.* Howe, 9 Gray (Mass.) 110.

ing his education and intelligence. The confession of a child, even when he was under fourteen years of age, if he is proved to have been *doli capax*, is admissible.[86] Sometimes the competency of the confession is measured by the capacity of the child to testify as a witness, and if he is incompetent as a witness his confession is incompetent.[87] The age of a person under maturity is relevant in determining the voluntary character of his confession, for circumstances of compulsion or threats which would not exclude the confession of an adult may render the confession of a child involuntary and incompetent.[88]

o. Involuntary Confessions Disclosing Other Incriminating Evidence. Where an involuntary confession discloses incriminating evidence which is subsequently on investigation proved to be true, or where the confession leads to the discovery of facts which in themselves are incriminating, so much of the confession as discloses the incriminating evidence and relates directly thereto is admissible.[89] And the facts discovered in consequence of such involuntary confession may be proved.[90] Thus in a prosecution for murder evidence of the discovery in a certain place of the remains[91] or clothing of the deceased[92] or of the weapon by which he was

86. *Alabama.*— Martin *v.* State, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844.

Delaware.— State *v.* Bostick, 4 Harr. 563.

Illinois.— Bartley *v.* People, 156 Ill. 234, 40 N. E. 831.

Massachusetts.— Com. *v.* Preece, 140 Mass. 276, 5 N. E. 494; Com. *v.* Smith, 119 Mass. 305.

New Jersey.— State *v.* Guild, 10 N. J. L. 163, 18 Am. Dec. 404; State *v.* Aaron, 4 N. J. L. 231, 7 Am. Dec. 592.

Pennsylvania.— Com. *v.* Dillon, 4 Dall. 116, 1 L. ed. 765.

Texas.— Grayson *v.* State, 40 Tex. Cr. 573, 51 S. W. 246.

England.— Rex *v.* Thornton, 1 Moody C. C. 27.

See 14 Cent. Dig. tit. "Criminal Law," § 1200.

Confession as a witness.— But where a defendant, a boy of thirteen years of age, dull and without counsel, was put on the stand as a witness against another defendant, was given no caution and told that he might make a voluntary statement that could be used for or against him, it was held that his confession under such circumstances was incompetent. Ford *v.* State, 75 Miss. 101, 21 So. 524.

87. Grayson *v.* State, 40 Tex. Cr. 573, 51 S. W. 246.

88. *Alabama.*— Hoober *v.* State, 81 Ala. 51, 1 So. 574.

Idaho.— State *v.* Mason, 4 Ida. 543, 43 Pac. 63.

Mississippi.— Ford *v.* State, 75 Miss. 101, 21 So. 524.

Tennessee.— State *v.* Doherty, 2 Overt. 80.

England.— Rex *v.* Simpson, 1 Moody C. C. 410.

See 14 Cent. Dig. tit. "Criminal Law," § 1201.

89. *Alabama.*—Gregg *v.* State, 106 Ala. 44, 17 So. 321; Anderson *v.* State, 104 Ala. 83, 16 So. 108; Sampson *v.* State, 54 Ala. 241.

California.— People *v.* Hoy Yen, 34 Cal. 176; People *v.* Ah Ki, 20 Cal. 177.

Georgia.— Daniels *v.* State, 78 Ga. 98, 6 Am. St. Rep. 238; Jones *v.* State, 75 Ga. 825.

Iowa.— State *v.* Height, 117 Iowa 650, 91 N. W. 935, 94 Am. St. Rep. 323, 59 L. R. A. 437.

Kentucky.— Jane *v.* Com., 2 Metc. 30.

Mississippi.— Garrard *v.* State, 50 Miss. 147; Jordan *v.* State, 32 Miss. 382.

New Hampshire.— State *v.* Due, 27 N. H. 256.

New York.— Duffy *v.* People, 5 Park. Cr. 321.

North Carolina.— State *v.* Moore, 2 N. C. 482.

Pennsylvania.— Laros *v.* Com., 84 Pa. St. 200.

South Carolina.—State *v.* Vaigneur, 5 Rich. 391.

Tennessee.— Clemons *v.* State, 4 Lea 23; White *v.* State, 3 Heisk. 338.

Texas.— Strait *v.* State, 43 Tex. 486; Parker *v.* State, 40 Tex. Cr. 119, 49 S. W. 80; Walker *v.* State, 28 Tex. App. 112, 12 S. W. 503; Massey *v.* State, 10 Tex. App. 645; Davis *v.* State, 2 Tex. App. 588.

Contra, State *v.* Jones, 46 La. Ann. 1395, 16 So. 369.

See 14 Cent. Dig. tit. "Criminal Law," § 1202 *et seq.*

90. *Georgia.*— Rusher *v.* State, 94 Ga. 363, 21 S. E. 593, 47 Am. St. Rep. 175.

Illinois.— Gates *v.* People, 14 Ill. 433.

Kentucky.— Jane *v.* Com., 2 Metc. 30; Taylor *v.* Com., 42 S. W. 1125, 19 Ky. L. Rep. 836.

Louisiana.— State *v.* George, 15 La. Ann. 145.

Nebraska.— Walrath *v.* State, 8 Nebr. 80.

New York.— Duffy *v.* People, 26 N. Y. 588; Jackson's Case, 1 City Hall Rec. 28.

Tennessee.— Rice *v.* State, 3 Heisk. 215.

United States.— U. S. *v.* Hunter, 26 Fed. Cas. No. 15,424, 1 Cranch C. C. 317.

England.— Rex *v.* Warickshall, 2 East P. C. 658, 1 Leach C. C. 298.

See 14 Cent. Dig. tit. "Criminal Law," § 1206.

91. State *v.* Motley, 7 Rich. (S. C.) 327.

92. State *v.* Willis, 71 Conn. 293, 41 Atl. 820; Spearman *v.* State, 34 Tex. Cr. 279, 30 S. W. 229.

killed,[93] with so much of an involuntary confession as relates directly to such facts,[94] is admissible. And in a prosecution for larceny, that portion of the involuntary confession of the accused disclosing the hiding place of the stolen property, and all he says in conveying the information which is directly connected with the discovery, is admissible, although his statement that he stole such property may be inadmissible.[95]

p. Written Confessions — (i) *Parol Evidence.* Where the confession has been committed to writing the writing must be produced as the best evidence, unless its absence is accounted for.[96] If the record cannot be found,[97] or if it is inadmissible by reason of irregularities,[98] parol proof of its contents is competent. And although the confession of the accused has been taken down in writing, parol evidence of other confessions at other times is competent.[99] If it appears that a confession at the preliminary examination was not committed to writing, the justice or any one present who heard it may prove it orally.[1]

(ii) *Signature and Authentication.* A confession in writing, if otherwise proved to have been made by the accused, is competent, although not signed by him;[2] but a writing purporting to be a confession before a justice cannot be admitted unless its genuineness is proved.[3]

(iii) *Foreign Language.* A written confession in English is not incompetent because the prisoner talks another language only, if, sentence by sentence, the written confession was translated into his own language in his presence and hearing, and by him admitted to be understood and to be correct.[4]

(iv) *Whole Confession to Be Read.* It is sometimes as a matter of practice directed that in reading a written confession the names of other defendants

93. Com. *v.* James, 99 Mass. 438.

94. State *v.* Douglass, 20 W. Va. 770.

95. *Arkansas.*— Yates *v.* State, 47 Ark. 172, 1 S. W. 65.

Kansas.— State *v.* Mortimer, 20 Kan. 93.

Kentucky.— Rector *v.* Com., 4 Ky. L. Rep. 323.

Louisiana.— State *v.* Garvey, 28 La. Ann. 925, 26 Am. Rep. 123.

Mississippi.— Belote *v.* State, 36 Miss. 96, 72 Am. Dec. 163.

Tennessee.— McGlotblin *v.* State, 2 Coldw. 223; Deathridge *v.* State, 1 Sneed 75.

Texas.— Bunyon *v.* State, (Cr. App. 1900) 56 S. W. 339; Fielder *v.* State, 40 Tex. Cr. 184, 49 S. W. 376; Smith *v.* State, 34 Tex. Cr. 124, 29 S. W. 775; Rains *v.* State, 33 Tex. Cr. 294, 26 S. W. 398.

See 14 Cent. Dig. tit. "Criminal Law," § 1202 *et seq.*

Confession accompanied by surrender of stolen property.— Fredrick *v.* State, 3 W. Va. 695. Evidence that defendant offered to conduct parties who had him under arrest to the hiding place of the stolen goods, that he did so, and that the goods were discovered is admissible, although this action was induced by a promise or threat. Banks *v.* State, 84 Ala. 430, 4 So. 382; State *v.* Winston, 116 N. C. 990, 21 S. E. 37.

96. State *v.* Eaton, 3 Harr. (Del.) 554; Peter *v.* State, 4 Sm. & M. (Miss.) 31; Williams *v.* State, 38 Tex. Cr. 128, 41 S. W. 645; Bailey *v.* State, 26 Tex. App. 706, 9 S. W. 270.

Presumption.— Where it does not appear whether or not a confession was reduced to writing, parol evidence of it is incompetent, since it will be presumed that it is in writing. Wright *v.* State, 50 Miss. 332.

A plea of guilty may be proved orally, although it is the statutory duty of magistrates to keep a record of the preliminary examination of persons charged with felony. Rector *v.* Com., 4 Ky. L. Rep. 323.

97. Hightower *v.* State, 58 Miss. 636.

98. Wright *v.* State, 50 Miss. 332; Guy *v.* State, 9 Tex. App. 161.

99. Com. *v.* Dower, 4 Allen (Mass.) 297; State *v.* Wells, 1 N. J. L. 424, 1 Am. Dec. 211; State *v.* Leuth, 5 Ohio Cir. Ct. 94; Grimsinger *v.* State, (Tex. Cr. App. 1901) 69 S. W. 583.

1. State *v.* Smith, 9 Houst. (Del.) 588, 33 Atl. 441; State *v.* Johnson, 5 Harr. (Del.) 507; State *v.* Brister, Houst. Cr. (Del.) 150; State *v.* Vincent, Houst. Cr. (Del.) 11; Wright *v.* State, 50 Miss. 332; State *v.* Irwin, 2 N. C. 112.

2. State *v.* Haworth, 24 Utah 398, 68 Pac. 155.

Letters as a confession.— Oakley *v.* State, 135 Ala. 15, 33 So. 23.

3. Brez *v.* State, 39 Tex. 95; Powell *v.* State, 37 Tex. 348; Salas *v.* State, 31 Tex. Cr. 485, 21 S. W. 44.

Inculpating interlineations made with a pen, discovered in a typewritten confession signed by defendant before a magistrate, will exclude it at the trial in the absence of evidence showing when or by whom the interlineations were made. U. S. *v.* Williams, 103 Fed. 938.

4. State *v.* Demareste, 41 La. Ann. 617, 6 So. 136.

Competency of interpreter.— Where the confession was made to an interpreter, it is proper before introducing the transcript thereof to prove by the interpreter under oath

be omitted,[5] but the better opinion is that all names and every word must be read just as it is, and the court should instruct the jury that the confession is not evidence against any one except the person making it.[6]

q. Confessions Under Oath. The general rule is that what a party says in relation to an offense is admissible in evidence against him, whether on oath or not, if such statement appears to have been made voluntarily, and not under threat or duress or in consequence of any inducement.[7]

r. Determination of Admissibility — (i) *Presumption as to Voluntary Character.* In some jurisdictions the prosecution is required to show affirmatively that a confession is voluntary before it will be admitted,[8] although even where this is required if no timely objection is interposed the confession will be admitted without the introduction of evidence showing that it was voluntary.[9] In other jurisdictions the presumption is that a confession, like every act or utterance which is the result of human agency, is voluntary in the absence of evidence to the contrary.[10] It is well settled, however, that there is a presumption of law that the influence of threats or promises once made continued to operate until such presumption is rebutted by proof clearly showing that it had ceased to operate.[11]

(ii) *Facts Admissible.* In determining whether a confession was voluntary, the age, situation, experience, intelligence, character, and disposition of the accused, and the circumstances under which the confession was made, are relevant.[12] It is not error to permit a witness to testify that a confession was volun-

that he fully interpreted between the prosecuting attorney and the prisoner. State *v.* Abbotto, 64 N. J. L. 658, 47 Atl. 10.

5. 1 Phillips Ev. 108; 2 Russell Crimes 365. And see Fife *v.* Com., 29 Pa. St. 429.

6. Rex *v.* Clewes, 4 C. & P. 221, 19 E. C. L. 485.

7. *Massachusetts.*— Com. *v.* Wesley, 166 Mass. 248, 44 N. E. 228.

Pennsylvania.— Com. *v.* Clark, 130 Pa. St. 641, 18 Atl. 988.

Texas.— Salas *v.* State, 31 Tex. Cr. 485, 21 S. W. 44.

Wisconsin.— Shoeffler *v.* State, 3 Wis. 823.

United States.— U. S. *v.* Brown, 40 Fed. 457.

Judicial confessions under oath see *supra*, XII, H, 2, j.

8. *Alabama.*— Jackson *v.* State, 83 Ala. 76, 3 So. 847; Amos *v.* State, 83 Ala. 1, 3 So. 749, 3 Am. St. Rep. 682; Washington *v.* State, 53 Ala. 29.

California.— People *v.* Soto, 49 Cal. 67.

Iowa.— State *v.* Storms, 113 Iowa 385, 85 N. W. 610, 86 Am. St. Rep. 380.

Louisiana.— State *v.* Johnson, 30 La. Ann. 881; State *v.* Garvey, 28 La. Ann. 925, 26 Am. Rep. 123.

Maryland.— Nicholson *v.* State, 38 Md. 140.

Michigan.— People *v.* Swetland, 77 Mich. 53, 43 N. W. 779; People *v.* Stewart, 75 Mich. 21, 42 N. W. 662.

Virginia.— Thompson *v.* Com., 20 Gratt. 724.

England.— Reg. *v.* Warringham, 2 Den. C. C. 447 note, 15 Jur. 318.

See 14 Cent. Dig. tit. "Criminal Law," § 1212.

9. Eberhardt *v.* State, 47 Ga. 598; State *v.* Madison, 47 La. Ann. 30, 16 So. 566; State *v.* Davis, 34 La. Ann. 351; People *v.* Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501.

10. *Florida.*— Dixon *v.* State, 13 Fla. 636.

Massachusetts.— Com. *v.* Culver, 126 Mass. 464.

Missouri.— State *v.* Meyers, 99 Mo. 107, 12 S. W. 516; State *v.* Patterson, 73 Mo. 695.

New Jersey.— State *v.* Hernia, 68 N. J. L. 299, 53 Atl. 85.

New York.— People *v.* Cassidy, 133 N. Y. 612, 30 N. E. 1003.

Ohio.— Rufer *v.* State, 25 Ohio St. 464.

South Carolina.— State *v.* Howard, 35 S. C. 197, 14 S. E. 481.

Texas.— Williams *v.* State, 19 Tex. App. 276.

See 14 Cent. Dig. tit. "Criminal Law," § 1212.

11. *Michigan.*— People *v.* Stewart, 75 Mich. 21, 42 N. W. 662.

Mississippi.— Van Buren *v.* State, 24 Miss. 512; Peter *v.* State, 4 Sm. & M. 31.

New Jersey.— State *v.* Guild, 10 N. J. L. 163, 18 Am. Dec. 404.

Tennessee.— State *v.* Field, Peck 140.

Texas.— Barnes *v.* State, 36 Tex. 356.

Repetition of confession.—Although a confession may have been originally inadmissible because involuntary, it may become admissible by subsequent repetition by the accused when his mind was perfectly free from the undue influence which induced the original confession. *Prima facie* the undue influence will be considered as continuing, although the presumption may be repelled by strong and clear evidence. McGlothlin *v.* State, 2 Coldw. (Tenn.) 223; Deathridge *v.* State, 1 Sneed (Tenn.) 75; Thompson *v.* Com., 20 Gratt. (Va.) 724.

12. *Alabama.*— Williams *v.* State, 103 Ala. 33, 15 So. 662.

tary, as being an opinion or conclusion, if the circumstances of the confession are in evidence.[13]

(III) *Sufficiency of Evidence and Reasonable Doubt.* It is necessary in laying a foundation for the admission of a confession to prove affirmatively such facts as will exclude the hypothesis that it was procured by hope or fear,[14] and the accused should have the benefit of any reasonable doubt existing on this point.[15]

(IV) *Rights of Accused.* Where the state introduces evidence which shows or tends to show that the confession was voluntary, the accused must be permitted to introduce evidence of any fact showing or tending to show that it was involuntary.[16] He may call and examine, to aid in determining the admissibility of the confession, a witness who knows of the circumstances surrounding its making or of his physical or mental condition when it was made.[17] The witnesses who testify to the circumstances showing that a confession was voluntary may be cross-examined by the accused on the same point, and it is error to refuse to permit him to do so.[18] Counsel for the accused may also impeach the testimony of the witness testifying to the voluntary character of the confession by proving his former statements to the contrary.[19]

(V) *Order of Proof.* The court should determine, prior to permitting the confession to go to the jury, whether it was or was not voluntary.[20] Hence defendant is entitled to show before the admissibility of the confession is deter-

Iowa.— See State *v.* Sullivan, 51 Iowa 142, 50 N. W. 572.

Missouri.— State *v.* Fredericks, 85 Mo. 145.

New York.—People *v.* Gaffney, 1 Sheld. 304.

South Carolina.— State *v.* Kirby, 1 Strobh. 155.

Texas.— Cain *v.* State, 18 Tex. 387.

See 14 Cent. Dig. tit. "Criminal Law," § 1214.

13. People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161; State *v.* Holden, 42 Minn. 350, 44 N. W. 123.

14. Snider *v.* State, 56 Nebr. 309, 76 N. W. 574. See also Bracken *v.* State, 111 Ala. 68, 20 So. 636; Goodwin *v.* State, 102 Ala. 87, 15 So. 571; State *v.* Jones, 171 Mo. 401, 71 S. W. 680, 94 Am. St. Rep. 786; State *v.* Anderson, 96 Mo. 241, 9 S. W. 636.

Circumstantial evidence.— Where there is nothing in the evidence to suggest hope or fear, the fact that a confession was freely made may appear from the facts and circumstances. Gilmore *v.* State, 126 Ala. 20, 28 So. 595; Burlingim *v.* State, 61 Nebr. 276, 85 N. W. 76.

Testimony of officer.— It is not necessary that the officer to whom the confession was made shall testify in terms that it was not made under the influence of fear or threats, but it is sufficient if he shall testify to this in effect. State *v.* Newton, 29 Wash. 373, 70 Pac. 31.

15. Williams *v.* State, 72 Miss. 117, 16 So. 296; Ellis *v.* State, 65 Miss. 44, 3 So. 188, 7 Am. St. Rep. 634.

16. *Alabama.*— Jackson *v.* State, 83 Ala. 76, 3 So. 847.

California.— People *v.* Soto, 49 Cal. 67.

Indiana.— Palmer *v.* State, 136 Ind. 393, 36 N. E. 130.

Massachusetts.— Com. *v.* Culver, 126 Mass. 464.

Missouri.— State *v.* Kinder, 96 Mo. 548, 10 S. W. 77; State *v.* Anderson, 96 Mo. 241, 9 S. W. 636.

New Jersey.— Roesel *v.* State, 62 N. J. L. 216, 41 Atl. 408.

Ohio.— Lefevre *v.* State, 50 Ohio St. 584, 35 N. E. 52.

See 14 Cent. Dig. tit. "Criminal Law," § 1216.

17. State *v.* Hill, 65 N. J. L. 626, 47 Atl. 814.

The accused may show that he was forced to make an offer of compromise, and that it was refused (State *v.* Platte, 34 La. Ann. 1061) or that his language was misunderstood and that he did not say what has been put in evidence (State *v.* Brown, 1 Mo. App. 86).

18. *Louisiana.*— State *v.* Miller, 42 La. Ann. 1186, 8 So. 309, 21 Am. St. Rep. 418.

Nebraska.— Willis *v.* State, 43 Nebr. 102, 61 N. W. 254.

New Jersey.— State *v.* Hill, 65 N. J. L. 626, 47 Atl. 814.

Ohio.— Rufer *v.* State, 25 Ohio St. 464.

United States.— White *v.* U. S., 29 Fed. Cas. No. 17,558, 1 Hayw. & H. 127.

See 14 Cent. Dig. tit. "Criminal Law," § 1217.

19. State *v.* Peter, 14 La. Ann. 521. See also Com. *v.* Culver, 126 Mass. 464.

20. *Alabama.*—Bradford *v.* State, 104 Ala. 68, 16 So. 107, 53 Am. St. Rep. 24; Miller *v.* State, 40 Ala. 54.

California.— People *v.* Soto, 49 Cal. 67.

Florida.— Green *v.* State, 40 Fla. 474, 24 So. 537; Metzger *v.* State, 18 Fla. 481.

Georgia.— Smith *v.* State, 88 Ga. 627, 15 S. E. 675.

Louisiana.— State *v.* Berry, 50 La. Ann. 1309, 24 So. 329; State *v.* Peter, 14 La. Ann. 521; State *v.* Nelson, 3 La. Ann. 497.

Minnesota.— State *v.* Staley, 14 Minn. 105.

mined that it was involuntary, and according to better opinion permitting him to show the facts afterward and then striking out the confession is not sufficient.[21]

(vi) *Province of Court and Jury.* Whether confessions offered in evidence were voluntary is a question relating to the admissibility of evidence, and as such is generally exclusively for the court.[22] The court may, even after it has admitted a confession as evidence, rule it out if satisfied by any subsequent evidence that it was not a free and voluntary one,[23] and if there is a conflict of evidence and the court is not satisfied that the confession was voluntary, the confession may be submitted to the jury, under instructions to disregard it if upon all the evidence they believe that it was involuntary.[24]

Mississippi.— Ellis *v.* State, 65 Miss. 44, 3 So. 188, 7 Am. St. Rep. 634.

New Jersey.— State *v.* Young, 67 N. J. L. 223, 51 Atl. 939; Roesel *v.* State, 62 N. J. L. 216, 41 Atl. 408.

Pennsylvania.— Fife *v.* Com., 29 Pa. St. 429.

South Carolina.— State *v.* Moorman, 27 S. C. 22, 2 S. E. 621.

See 14 Cent. Dig. tit. "Criminal Law," § 1218.

21. Biscoe *v.* State, 67 Md. 6, 8 Atl. 571; People *v.* Fox, 121 N. Y. 449, 24 N. E. 923 [*affirming* 3 N. Y. Suppl. 359]; Rufer *v.* State, 25 Ohio St. 464. *Contra,* State *v.* Feltes, 51 Iowa 495, 1 N. W. 755; State *v.* Rush, 95 Mo. 199, 8 S. W. 221. The admission of a confession as voluntary is not error where nothing appears at the time to show the contrary, although subsequent to its admission the evidence shows it to have been involuntary. Murphy *v.* People, 63 N. Y. 590.

22. *Alabama.*— Hunt *v.* State, 135 Ala. 1, 33 So. 329; Huffman *v.* State, 130 Ala. 89, 30 So. 394; Brown *v.* State, 124 Ala. 76, 27 So. 250; Burton *v.* State, 107 Ala. 108, 18 So. 284; Goodwin *v.* State, 102 Ala. 87, 15 So. 571; Bob *v.* State, 32 Ala. 560.

Arkansas.— Wallace *v.* State, 28 Ark. 531; Runnels *v.* State, 28 Ark. 121.

District of Columbia.— Travers *v.* U. S., 6 App. Cas. 450; Hardy *v.* U. S., 3 App. Cas. 35; Brady *v.* U. S., 1 App. Cas. 246; U. S. *v.* Nardello, 4 Mackey 503.

Florida.— Kirby *v.* State, (1902) 32 So. 836; Murray *v.* State, 25 Fla. 528, 6 So. 498; Simon *v.* State, 5 Fla. 285.

Indiana.— Hauk *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; Brown *v.* State, 71 Ind. 470.

Iowa.— State *v.* Storms, 113 Iowa 385, 85 N. W. 610, 86 Am. St. Rep. 380; State *v.* Fidment, 35 Iowa 541.

Kentucky.— Hudson *v.* Com., 2 Duv. 531.

Maryland.— Nicholson *v.* State, 38 Md. 140.

Massachusetts.— Com. *v.* Nott, 135 Mass. 269; Com. *v.* Morrell, 99 Mass. 542; Com. *v.* Knapp, 10 Pick. 477, 20 Am. Dec. 534.

Michigan.— People *v.* Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501.

Minnesota.— State *v.* Holden, 42 Minn. 350, 44 N. W. 123; State *v.* Staley, 14 Minn. 105.

Mississippi.— Draughn *v.* State, 76 Miss. 574, 25 So. 153.

Missouri.— State *v.* McKenzie, 144 Mo. 40, 45 S. W. 1117; State *v.* Duncan, 64 Mo. 262.

New Hampshire.— State *v.* Squires, 48 N. H. 364.

New Jersey.— State *v.* Gruff, 68 N. J. L. 287, 53 Atl. 88; State *v.* Hernia, 68 N. J. L. 299, 53 Atl. 85; State *v.* Young, 67 N. J. L. 223, 51 Atl. 939; Roesel *v.* State, 62 N. J. L. 216, 41 Atl. 408.

North Carolina.— State *v.* Efler, 85 N. C. 585; State *v.* Vann, 82 N. C. 631.

Oklahoma.— Kirk *v.* Territory, 10 Okla. 46, 60 Pac. 797.

South Carolina.— State *v.* Moorman, 27 S. C. 22, 2 S. E. 621; State *v.* Workman, 15 S. C. 540.

Utah.— State *v.* Bates, 25 Utah 1, 69 Pac. 70.

England.— Reg. *v.* Moore, 3 C. & K. 153, 5 Cox C. C. 555, 2 Den. C. C. 523, 16 Jur. 621, 21 L. J. M. C. 199.

See 14 Cent. Dig. tit. "Criminal Law," § 1219.

Exceptions to the general rule.— The rule stated in the text is sustained by the cases in most jurisdictions, but in Georgia, and in some of the earlier New York cases, it has been held that while it is the right of the court to decide primarily on the admissibility of a confession it is also its duty to instruct the jury that it is for them to determine ultimately whether such confession was voluntary. Price *v.* State, 114 Ga. 855, 40 S. E. 1015; Irby *v.* State, 95 Ga. 467, 20 S. E. 218; Thomas *v.* State, 84 Ga. 613, 10 S. E. 1016; Carr *v.* State, 84 Ga. 250, 10 S. E. 626; Holsenbake *v.* State, 45 Ga. 43; Stag's Case, 5 City Hall Rec. (N. Y.) 177; Steel's Case, 5 City Hall Rec. (N. Y.) 5; Bowerhan's Case, 4 City Hall Rec. (N. Y.) 136.

23. Metzger *v.* State, 18 Fla. 481; Biscoe *v.* State, 67 Md. 6, 8 Atl. 571; Ellis *v.* State, 65 Miss. 44, 3 So. 188, 7 Am. St. Rep. 634.

24. *Georgia.*— Bailey *v.* State, 80 Ga. 359, 9 S. E. 1072.

Iowa.— State *v.* Storms, 113 Iowa 385, 85 N. W. 610, 86 Am. St. Rep. 380.

Massachusetts.— Com. *v.* Burrough, 162 Mass. 513, 39 N. E. 184; Com. *v.* Cuffee, 108 Mass. 285.

Michigan.— People *v.* Robinson, 86 Mich. 415, 49 N. W. 260; People *v.* Howes, 81 Mich. 396, 45 N. W. 961.

Mississippi.— Garrard *v.* State, 50 Miss. 147.

Missouri.— State *v.* Moore, 160 Mo. 443, 61 S. W. 199.

New Jersey.— Roesel *v.* State, 62 N. J. L. 216, 41 Atl. 408.

3. Corroboration — a. Necessity For. A naked confession is one which is not corroborated by independent proof of the *corpus delicti*. Upon such a confession made in open court, as for example by a plea of guilty, if voluntary, a conviction and sentence may be had,[25] and there are cases which hold that the voluntary confession of a prisoner, although extrajudicial, is sufficient to sustain a conviction.[26] But according to the weight of authority a conviction upon an extrajudicial confession will not be sustained without corroboration.[27] In some states statutes expressly provide that one may not be convicted on his uncorroborated confession.[28]

b. What Are Corroborating Circumstances. Circumstances which corroborate the confession are such as serve to strengthen it and render it more probable; such in short as may serve to impress the jury with the belief that it is true.[29]

c. Proof of Corpus Delicti — (i) *Necessity.* A confession not corroborated by independent evidence of the *corpus delicti* is not according to the general rule sufficient to support a conviction.[30] A conviction based on a confession will

New York.— People *v.* Cassidy, 133 N. Y. 612, 30 N. E. 1003 [*affirming* 14 N. Y. Suppl. 349].

Ohio.— Burdge *v.* State, 53 Ohio St. 512, 42 N. E. 594.

Pennsylvania.— Com. *v.* Epps, 193 Pa. St. 512, 44 Atl. 570; Com. *v.* Shew, 190 Pa. St. 23, 42 Atl. 377; Volkavitch *v.* Com., (1888) 12 Atl. 84.

Texas.—Williams *v.* State, (Cr. App. 1901) 65 S. W. 1059; Rains *v.* State, 33 Tex. Cr. 294, 26 S. W. 398.

United States.— Wilson *v.* U. S., 162 U. S. 613, 16 S. Ct. 895, 40 L. ed. 1090.

See 14 Cent. Dig. tit. "Criminal Law," § 1219.

25. White *v.* State, 49 Ala. 344; Dantz *v.* State, 87 Ind. 398; Anderson *v.* State, 26 Ind. 89; People *v.* Bennett, 37 N. Y. 117, 4 Transcr. App. (N. Y.) 32, 4 Abb. Pr. N. S. (N. Y.) 89, 93 Am. Dec. 551; State *v.* Cowan, 29 N. C. 239.

26. *Alabama.*— White *v.* State, 49 Ala. 344.

Georgia.— Stephen *v.* State, 11 Ga. 225.

New York.— People *v.* Bennett, 37 N. Y. 117, 4 Transcr. App. 32, 4 Abb. Pr. N. S. 89, 93 Am. Dec. 551; People *v.* McFall, 1 Wheel. Cr. 107.

North Carolina.— State *v.* Cowan, 29 N. C. 239.

Vermont.— State *v.* Gilbert, 36 Vt. 145, holding that a confession alone will warrant a conviction of a misdemeanor.

England.— Reg. *v.* Sullivan, 16 Cox C. C. 347; Reg. *v.* Burton, 6 Cox C. C. 293, Dears. C. C. 282, 18 Jur. 157, 23 L. J. M. C. 52, 2 Wkly. Rep. 230; Rex *v.* Lambe, 2 Leach C. C. 625; Wheeling's Case, 1 Leach C. C. 349; Rex *v.* Tippet, R. & R. 379; Rex *v.* Falkner, R. & R. 357; Rex *v.* Eldridge, R. & R. 326; Reg. *v.* Unkles, Ir. R. 8 C. L. 50.

See 14 Cent. Dig. tit. "Criminal Law," § 1222. And see *infra*, XII, H, 3, c.

27. *Colorado.*— Roberts *v.* People, 11 Colo. 231, 17 Pac. 637.

Idaho.— State *v.* Keller, (1902) 70 Pac. 1051.

Illinois.— Bergen *v.* People, 17 Ill. 426, 65 Am. Dec. 672.

Kentucky.— Collins *v.* Com., 25 S. W. 743, 15 Ky. L. Rep. 691.

Mississippi.— Richardson *v.* State, 80 Miss. 115, 31 So. 544.

Missouri.— State *v.* Scott, 39 Mo. 424.

Montana.— Territory *v.* McClin, 1 Mont. 394.

North Carolina.— State *v.* Long, 2 N. C. 455.

Texas.— Strait *v.* State, 43 Tex. 486.

See 14 Cent. Dig. tit. "Criminal Law," § 1222. And see *infra*, XII, H, 3, c.

28. See Crowder *v.* State, 56 Ga. 44; Murray *v.* State, 43 Ga. 256; Nesbit *v.* State, 43 Ga. 238; Cunningham *v.* Com., 9 Bush (Ky.) 149; State *v.* New, 22 Minn. 76; People *v.* McGloin, 91 N. Y. 241; People *v.* Kelly, 37 Hun (N. Y.) 160.

29. State *v.* Guild, 10 N. J. L. 163, 18 Am. Dec. 404. See also Osborn *v.* Com., 20 S. W. 223, 14 Ky. L. Rep. 246; State *v.* Hansen, 25 Oreg. 391, 35 Pac. 976, 36 Pac. 296.

30. *Alabama.*— Hunt *v.* State, 135 Ala. 1, 33 So. 329; Harden *v.* State, 109 Ala. 50, 19 So. 494; Johnson *v.* State, 59 Ala. 37; Matthews *v.* State, 55 Ala. 187, 28 Am. Rep. 698.

California.— People *v.* Thrall, 50 Cal. 415.

Delaware.— State *v.* Hand, 1 Marv. 545, 41 Atl. 192.

Georgia.— Johnson *v.* State, 86 Ga. 90, 13 S. E. 282; Johnson *v.* State, (1890) 12 S. E. 471.

Illinois.— South *v.* People, 98 Ill. 261.

Michigan.— People *v.* Lane, 49 Mich. 340, 13 N. W. 622.

Mississippi.— Jenkins *v.* State, 41 Miss. 582; Brown *v.* State, 32 Miss. 433; Stringfellow *v.* State, 26 Miss. 157, 59 Am. Dec. 247.

Missouri.—State *v.* Scott, 39 Mo. 424; Robinson *v.* State, 12 Mo. 592.

Nebraska.— Chezem *v.* State, 56 Nebr. 496, 76 N. W. 1056; Davis *v.* State, 51 Nebr. 301, 70 N. W. 984.

New York.— People *v.* Badgley, 16 Wend. 53; People *v.* Ruloff, 3 Park. Cr. 401; People *v.* Porter, 2 Park. Cr. 14; Steel's Case, 5 City Hall Rec. 5; *In re* Hope, 1 City Hall Rec. 150.

stand, however, although it is uncorroborated by any other evidence, if the *corpus delicti* be proved.[31]

(II) *Sufficiency.* The *corpus delicti* need not be proved beyond a reasonable doubt.[32] In other words the corroborative evidence need not be such as would be required to convict the accused independently of the confession.[33]

(III) *Order of Proof.* It has been held that proof of the *corpus delicti* should precede the admission of the confession, although if the confession be admitted, and evidence which would have been sufficient to authorize its admission is subsequently introduced, the error is cured.[34]

4. Conclusiveness of Confessions. The accused is not estopped to deny and disprove the statements in his confession. He may show that when he confessed he was intoxicated,[35] and may disprove by independent evidence of any sort any incriminating fact confessed by him.[36] The rule that a confession is to be considered in its entirety does not compel the jury to give the same belief to every part of it. The jury may attach such credit to any part of it as they deem it worthy of, and may reject any portion of it which they do not believe. All of it

North Carolina.— State *v.* Lewis, 60 N. C. 300.

Pennsylvania.— Gray *v.* Com., 101 Pa. St. 380, 47 Am. Rep. 733; Com. *v.* Hanlon, 8 Phila. 401.

Texas.— Cox *v.* State, (Cr. App. 1902) 69 S. W. 145; Dunn *v.* State, 34 Tex. Cr. 257, 30 S. W. 227; Brady *v.* State, 32 Tex. Cr. 264, 22 S. W. 924; Hill *v.* State, 11 Tex. App. 132.

Virginia.— Smith *v.* State, 21 Gratt. 809.

United States.— U. S. *v.* Mayfield, 59 Fed. 118; U. S. *v.* Boese, 46 Fed. 917.

See 14 Cent. Dig. tit. "Criminal Law," § 1225. And see *supra*, XII, H, 3, a.

A conviction of bigamy based merely upon a confession of the first marriage will not be sustained without further proof thereof and of its legality. People *v.* Lambert, 5 Mich. 349, 72 Am. Dec. 49; People *v.* Humphrey, 7 Johns. (N. Y.) 314.

31. *Alabama.*— Martin *v.* State, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844; Mose *v.* State, 36 Ala. 211.

California.— People *v.* Tarbox, 115 Cal. 57, 46 Pac. 896.

Delaware.— State *v.* Miller, 9 Houst. 564, 32 Atl. 137.

Georgia.— Wimberly *v.* State, 105 Ga. 188, 31 S. E. 162; Williams *v.* State, 69 Ga. 11; Daniel *v.* State, 63 Ga. 339; Holsenbake *v.* State, 45 Ga. 43. See also Cochran *v.* State, 113 Ga. 726, 39 S. E. 332; Davis *v.* State, 105 Ga. 808, 32 S. E. 158.

Illinois.— Bartley *v.* People, 156 Ill. 234, 40 N. E. 831.

Kentucky.— Mullins *v.* Com., 20 S. W. 1035, 14 Ky. L. Rep. 569; Brown *v.* Com., 7 Ky. L. Rep. 217.

New Jersey.— State *v.* Guild, 10 N. J. L. 163, 18 Am. Dec. 404.

Texas.— Attaway *v.* State, 35 Tex. Cr. 403, 34 S. W. 112.

See 14 Cent. Dig. tit. "Criminal Law," § 1225.

32. *California.*— People *v.* Jones, 123 Cal. 65, 55 Pac. 698; People *v.* Harris, 114 Cal. 575, 46 Pac. 602.

Florida.— Gantling *v.* State, 41 Fla. 587, 26 So. 737; Holland *v.* State, 39 Fla. 178, 22 So. 298.

Minnesota.— State *v.* Laliyer, 4 Minn. 368.

Mississippi.— Heard *v.* State, 59 Miss. 545.

New York.— People *v.* Fanning, 131 N. Y. 659, 30 N. E. 569; People *v.* McGloin, 91 N. Y. 241; People *v.* Badgley, 16 Wend. 53.

Pennsylvania.— Gray *v.* Com., 101 Pa. St. 380, 47 Am. Rep. 733.

Rhode Island.— State *v.* Jacobs, 21 R. I. 259, 43 Atl. 31.

United States.— U. S. *v.* Williams, 28 Fed. Cas. No. 16,707, 1 Cliff. 5.

See 14 Cent. Dig. tit. "Criminal Law," § 1226.

33. State *v.* Leuth, 5 Ohio Cir. Ct. 94. The evidence need not be such as to alone establish the *corpus delicti* beyond a reasonable doubt, but is sufficient if, when considered in connection with the confession, it satisfies the jury beyond a reasonable doubt that the offense was committed, and that defendant committed it. Flower *v.* U. S., 116 Fed. 241, 53 C. C. A. 271. See also Ryan *v.* State, 100 Ala. 94, 14 So. 868; Westbrook *v.* State, 91 Ga. 11, 16 S. E. 100; Anderson *v.* State, 72 Ga. 98; Campbell *v.* People, 159 Ill. 9, 42 N. E. 123, 50 Am. St. Rep. 134.

Homicide and arson.— People *v.* Simonsen, 107 Cal. 345, 40 Pac. 440; Murray *v.* State, 43 Ga. 256; People *v.* Deacons, 109 N. Y. 374, 16 N. E. 676.

34. Anthony *v.* State, (Fla. 1902) 32 So. 818; Gantling *v.* State, 41 Fla. 587, 26 So. 737.

35. Lester *v.* State, 32 Ark. 727; Simmons *v.* State, 61 Miss. 243. *Compare supra*, XII, H, 2, m, (II).

36. Com. *v.* Howe, 9 Gray (Mass.) 110; People *v.* Fox, 3 N. Y. Suppl. 359.

Contradictory statements.— The accused, however, cannot show that subsequently to his confession he made statements contradictory thereof. State *v.* Jones, 47 La. Ann. 1524, 18 So. 515; Craig *v.* State, 30 Tex. App. 619, 18 S. W. 297. On the other hand it is not error to admit evidence offered by

must be carefully weighed by the jury, and upon all the circumstances surrounding the case they must determine how much of it they will receive and how much they will reject.[37]

5. Credibility and Weight of Confessions. Three different theories of the credibility and weight of confessions have been proposed and sustained by the authorities. It has been said that a confession freely and voluntarily made is entitled to the highest credit and to great weight as evidence.[38] Other authorities have gone to the opposite extreme and have said that confessions are to be received with the greatest caution,[39] or with great distrust,[40] and that as matter of law confessions are entitled to very little weight.[41] But the rule generally laid down is that the weight and credibility of a confession as evidence are to be determined by the jury upon the same principles that they determine the weight and credibility of any evidence, that is, upon the consideration of all the circumstances connected therewith.[42]

I. Weight and Sufficiency — 1. Weight, Credibility, and Conclusiveness — a. Positive and Negative Evidence. As between witnesses of equal credibility contradicting one another, ordinarily a witness who testifies to the affirmative is entitled to credit in preference to one who testifies to the negative. The basis of

the prosecution to contradict a statement contained in the confession of the accused. State *v.* Abbatto, 64 N. J. L. 658, 47 Atl. 10.

37. *Alabama.*— Eiland *v.* State, 52 Ala. 322; Parke *v.* State, 48 Ala. 266; Brister *v.* State, 26 Ala. 107.

Delaware.— State *v.* West, Houst. Cr. 371.

Florida.— Kirby *v.* State, (1902) 32 So. 836.

Georgia.— Cook *v.* State, 114 Ga. 523, 40 S. E. 703; Hudgins *v.* State, 26 Ga. 350; Licett *v.* State, 23 Ga. 57.

Louisiana.— State *v.* Wedemeyer, 11 La. Ann. 49.

Mississippi.— McCann *v.* State, 13 Sm. & M. 471; Coon *v.* State, 13 Sm. & M. 246.

Missouri.— State *v.* Hollenscheit, 61 Mo. 302.

Nebraska.— Furst *v.* State, 31 Nebr. 403, 47 N. W. 1116.

Tennessee.— Crawford *v.* State, 4 Coldw. 190; Young *v.* State, 2 Yerg. 292. See also Tipton *v.* State, Peck 308.

Texas.— McHenry *v.* State, 40 Tex. 46; Nicks *v.* State, 40 Tex. Cr. 1, 48 S. W. 186; Riley *v.* State, 4 Tex. App. 538; Brown *v.* State, 2 Tex. App. 139.

Vermont.— State *v.* McDonnell, 32 Vt. 491.

Virginia.— Brown *v.* Com., 9 Leigh 633, 33 Am. Dec. 263.

Wisconsin.— Griswold *v.* State, 24 Wis. 144.

United States.— U. S. *v.* Williams, 103 Fed. 938; U. S. *v.* Prior, 27 Fed. Cas. No. 16,092, 5 Cranch C. C. 37; U. S. *v.* Smith, 27 Fed. Cas. No. 16,342*a*.

See 14 Cent. Dig. tit. "Criminal Law," § 1228. And see *infra*, XII, H, 5.

The rule that confessions are to be taken together never should be construed to prevent the jury from disregarding such facts as are inconsistent with reason or with the other proof. Bower *v.* State, 5 Mo. 364, 32 Am. Dec. 325.

Self-defense.— The confession of the accused that he killed the deceased in self-defense is not conclusive, and where the circumstances may sustain it a charge on murder is justified. Little *v.* State, 39 Tex. Cr. 354, 47 S. W. 984.

38. State *v.* Brown, 48 Iowa 382; Territory *v.* McClin, 1 Mont. 394; Rex *v.* Warickshall, 2 East P. C. 658, 1 Leach C. C. 298.

39. 4 Bl. Comm. 357. And see the following cases:

California.— People *v.* Sternberg, 111 Cal. 11, 43 Pac. 201.

Florida.— Marshall *v.* State, 32 Fla. 462, 14 So. 92.

Georgia.— Coney *v.* State, 90 Ga. 140, 15 S. E. 746.

Michigan.— People *v.* Borgetto, 99 Mich. 336, 58 N. W. 328.

Missouri.— State *v.* Glahn, 97 Mo. 679, 11 S. W. 260.

North Carolina.— State *v.* Hardee, 83 N. C. 619.

Pennsylvania.— Com. *v.* Hanlon, 8 Phila. 401.

Texas.— Cain *v.* State, 18 Tex. 387.

United States.—U. S. *v.* Coons, 25 Fed. Cas. No. 14,860, 1 Bond 1; U. S. *v.* Montgomery, 26 Fed. Cas. No. 15,800, 3 Sawy. 544.

See 14 Cent. Dig. tit. "Criminal Law," § 1229.

40. State *v.* Fields, Peck (Tenn.) 140.

41. Keithler *v.* State, 10 Sm. & M. (Miss.) 192; People *v.* Jones, 2 Edm. Sel. Cas. (N. Y.) 86.

42. *Alabama.*— Goodwin *v.* State, 102 Ala. 87, 15 So. 571; Long *v.* State, 86 Ala. 36, 5 So. 443; State *v.* Welch, 7 Port. 463.

California.— People *v.* Whelan, 117 Cal. 559, 49 Pac. 583.

Delaware.— State *v.* Smith, 9 Houst. 588, 33 Atl. 441.

Florida.— Gantling *v.* State, 40 Fla. 237, 23 So. 857.

Georgia.— Stallings *v.* State, 47 Ga. 572.

Indiana.— Hauk *v.* State, 147 Ind. 238, 46 N. E. 127, 47 N. E. 465.

this rule is the fact that the negative witness may have forgotten what might have actually occurred, while it is impossible to remember what never happened.[43] But an instruction which having this rule in view in effect tells the jury to believe the affirmative evidence regardless of its character or the surrounding circumstances is error.[44]

b. Conflicting Evidence. The rule requiring the jury to be convinced beyond a reasonable doubt of the guilt of the accused[45] does not require the evidence to be free from conflict;[46] nor does it require them to attempt the impossible task of reconciling the irreconcilable, and they are at liberty to reject that which is inconsistent with belief.[47] And the fact that the number of witnesses who testify to certain facts exceeds the number of those who testify to the contrary does not impose upon the jury any obligation to believe that side which has a numerical superiority.[48]

c. Uncontroverted Evidence. The jury are not bound to believe testimony because it is uncontradicted and not directly impeached.[49] The jury may consider the inherent improbabilities of the statements of the witness, and they may be of such a character as to justify them in disregarding his testimony, although uncontradicted by direct testimony. He may be contradicted by the facts that he states as completely as by adverse testimony, and there may be so many omissions and improbabilities in his evidence as to discredit his whole story.[50]

d. Number of Witnesses Required. The general rule at common law is that the testimony of a single witness, if relevant and deemed credible by the jury, is sufficient for a conviction;[51] but to this rule there are very many exceptions created by the circumstances of the witness testifying, by the nature of the crime, or by positive statutory enactment, as in the case of perjury,[52] treason,[53] and certain other offenses.[54]

Iowa.— State *v.* Jordan, 87 Iowa 86, 54 N. W. 63; State *v.* Feltes, 51 Iowa 495, 1 N. W. 555.

Kentucky.— Blackburn *v.* Com., 12 Bush 181.

Massachusetts.— Com. *v.* Cuffee, 108 Mass. 285; Com. *v.* Howe, 9 Gray 110; Com. *v.* Knapp, 10 Pick. 477, 20 Am. Dec. 534.

Minnesota.— State *v.* Staley, 14 Minn. 105.

Mississippi.— Thompson *v.* State, 73 Miss. 584, 19 So. 204; Bobo *v.* State, (1894) 16 So. 755.

Missouri.— State *v.* Martin, 28 Mo. 530.

Montana.— State *v.* Gleim, 17 Mont. 17, 41 Pac. 998, 52 Am. St. Rep. 655, 31 L. R. A. 294.

Nevada.— State *v.* Simas, 25 Nev. 432, 62 Pac. 242.

New York.— People *v.* Brow, 90 Hun 509, 35 N. Y. Suppl. 1009.

North Carolina.— State *v.* Patterson, 68 N. C. 292.

Ohio.— Blackburn *v.* State, 23 Ohio St. 146.

Pennsylvania.— McCabe *v.* Com., (1886) 8 Atl. 45.

South Carolina.— State *v.* Cannon, 52 S. C. 452, 30 S. E. 589; State *v.* Derrick, 44 S. C. 344, 22 S. E. 337.

Tennessee.— Leach *v.* State, 99 Tenn. 584, 42 S. W. 195.

Texas.— Morrison *v.* State, 41 Tex. 516; Conner *v.* State, 34 Tex. 659; Harris *v.* State, 1 Tex. App. 74.

Vermont.— State *v.* Gorham, 67 Vt. 365, 31 Atl. 845.

United States.— U. S. *v.* Stone, 8 Fed. 232.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1229, 1868.

43. White *v.* State, (Tex. Cr. App. 1899) 50 S. W. 1015; McReynolds *v.* State, 4 Tex. App. 327; State *v.* Hawkins, 23 Wash. 289, 63 Pac. 258; Best Prin. Ev. 280; Starkie Ev. (4th ed.) 867; Wills Circ. Ev. (3d ed.) 224. See, generally, WITNESSES.

44. State *v.* Dean, 71 Wis. 678, 38 N. W. 341.

45. See *infra*, XII, I, 2, c.

46. Goddard *v.* People, 42 Ill. App. 487.

47. McDaniel *v.* State, 5 Tex. App. 475.

48. Kinnebrew *v.* State, 80 Ga. 232, 5 S. E. 56; State *v.* Musick, 71 Mo. 401.

49. Com. *v.* Loewe, 162 Mass. 518, 39 N. E. 192; People *v.* Duncan, 104 Mich. 460, 62 N. W. 556.

50. Quock Ting *v.* U. S., 140 U. S. 417, 11 S. Ct. 733, 851, 35 L. ed. 501; U. S. *v.* Candler, 65 Fed. 308.

51. 3 Bl. Comm. 370; Foster Crown L. 233; 2 Hawkins P. C. c. 25, § 131; c. 46, § 2; Starkie Ev. 827. And see Com. *v.* Stebbins, 8 Gray (Mass.) 492; McLain *v.* Com., 99 Pa. St. 86; Com. *v.* Pioso, 18 Lanc. L. Rev. (Pa.) 185; State *v.* Kane, 1 McCord (S. C.) 482.

52. See PERJURY.

53. See TREASON.

54. Capital crimes.— Under Conn. Gen. St. c. 13, § 8, which provides that no one shall be convicted of a capital crime without the testimony of at least two witnesses or its equivalent, it was held that each important fact need not be so proved, but that it was enough if the evidence as a whole equaled

e. Admissions of Counsel. The conviction of the accused cannot be had upon the admissions of criminality made by his counsel not constituting a plea of guilty, and it is therefore error to charge that counsel have admitted a felonious intent.[55]

f. Testimony of Accused. The credibility of the accused as a witness in his own behalf is determined by general rules. The fact that the evidence against him is strong and his story improbable does not necessarily render his testimony incredible.[56] The credibility of his testimony is for the jury to determine under all the circumstances, as in the case of other witnesses, and they may disbelieve such portion as they consider false.[57] They may consider the fact that he is testifying to exculpate himself.[58]

g. Failure to Disprove or Explain Incriminating Facts. The failure of defendant when he is a witness to deny incriminating testimony,[59] or his failure to deny or satisfactorily explain such incriminating evidence where he can readily do so,[60] tends to establish its truth.[61]

h. Conclusiveness of Evidence of Flight or Attempted Escape. Although the flight or attempted escape of the accused is a circumstance against him,[62] a conviction will not be sustained where it is based wholly upon the fact that shortly after the crime the accused left the state to avoid arrest, particularly where he gives a reasonable explanation for doing so, as for example that he was unable to give bond for his appearance.[63]

i. Circumstantial Evidence — (i) *In General.* Owing to the methods of criminals of shrouding their actions in secrecy and of performing them when no eye-witnesses are present, it is often necessary in criminal trials to resort to circumstantial evidence. Such evidence alone will support a conviction even of a capital crime, if it produces a belief in the minds of the jury that the accused is guilty beyond a reasonable doubt.[64] In all cases of circumstantial evidence any

that of two witnesses. State *v.* Smith, 49 Conn. 376.

55. People *v.* Hall, 86 Mich. 132, 48 N. W. 869; Nels *v.* State, 2 Tex. 280. See also Noah's Case, 3 City Hall Rec. (N. Y.) 13.

56. State *v.* Baldwin, 70 Iowa 180, 30 N. W. 476; State *v.* Kelly, 57 Iowa 644, 11 N. W. 635.

57. State *v.* Stewart, 9 Nev. 120.

58. State *v.* Miller, 93 Mo. 263, 6 S. W. 57; State *v.* Cooper, 71 Mo. 436; Com. *v.* Burton, 1 Leg. Chron. (Pa.) 66.

An instruction that the jury should give the same weight to defendant's testimony as to that of any other witness is properly refused. People *v.* Hiltel, 131 Cal. 577, 63 Pac. 919.

59. State *v.* Good, 132 Mo. 114, 33 S. W. 790.

60. Com. *v.* Finnerty, 148 Mass. 162, 19 N. E. 215; Davis *v.* State, 15 Tex. App. 594.

61. Although the neglect or refusal of the accused when a witness to testify will not create any presumption against him, yet where he goes on the stand he is competent for all purposes, and if he could by his own testimony if innocent explain an incriminating fact and fails to do so the same presumption arises that would arise on such a failure by any other witness. Stover *v.* People, 56 N. Y. 315.

62. See *supra*, XII, B, 4, h, (III).

63. France *v.* State, 68 Ark. 529, 60 S. W. 236; State *v.* Ah Kung, 17 Nev. 361, 30 Pac. 995.

64. *Alabama.*— Oakley *v.* State, 135 Ala. 29, 33 So. 693; Martin *v.* State, 125 Ala. 64, 28 So. 92; Welch *v.* State, 124 Ala. 41, 27 So. 307.

California.— People *v.* Hiltel, 131 Cal. 577, 63 Pac. 919; People *v.* Daniels, (1893) 34 Pac. 233; People *v.* Flynn, 73 Cal. 511, 15 Pac. 102; People *v.* Cronin, 34 Cal. 191.

Delaware.— State *v.* Evans, 1 Marv. 477, 41 Atl. 136.

Georgia.— Andrews *v.* State, 116 Ga. 83, 42 S. E. 476; Brantley *v.* State, 115 Ga. 833, 42 S. E. 251; Newman *v.* State, 26 Ga. 633.

Illinois.— Carlton *v.* People, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 400.

Indiana.— Epps *v.* State, 102 Ind. 539, 1 N. E. 491.

Iowa.— State *v.* Minor, 106 Iowa 748, 77 N. W. 330; State *v.* Elsham, 70 Iowa 531, 31 N. W. 66; State *v.* Reno, 67 Iowa 587, 25 N. W. 818; State *v.* Moelchen, 53 Iowa 310, 5 N. W. 186; State *v.* Banks, 43 Iowa 595.

Kansas.— State *v.* Hunter, 50 Kan. 302, 32 Pac. 37.

Kentucky.— Thomas *v.* Com., 20 S. W. 226, 14 Ky. L. Rep. 288.

Mississippi.— Cook *v.* State, (1900) 28 So. 833; James *v.* State, 45 Miss. 572.

Missouri.— State *v.* Avery, 113 Mo. 475, 21 S. W. 193.

Nebraska.— Cunningham *v.* State, 56 Nebr. 691, 77 N. W. 60.

Nevada.—State *v.* Slingerland, 19 Nev. 135, 7 Pac. 280.

fact or circumstance which tends to prove or to explain the facts or circumstances in issue[65] is to be considered, and the evidence of circumstances is permitted to take a wide range, and to include everything, however remote, which will aid the jury in reaching a verdict.[66]

(II) *To Prove Corpus Delicti.* It is not necessary that the *corpus delicti* should be established by direct and positive proof. It may be proved as well by circumstantial evidence, if on all the evidence the jury are satisfied of defendant's guilt beyond a reasonable doubt.[67] The expression *corpus delicti*, literally translated, body of the offense, may be defined in its primary sense as the fact that a crime has been actually committed.[68] The *corpus delicti* is made up of two elements: First, certain facts proved and forming its basis, and second, the existence of a criminal agency, of which the facts proved are the result.[69] The words are sometimes employed with a secondary meaning to indicate the subject of the crime and its visible effect, such as the body of the person murdered or the ruins of a house burned.[70]

(III) *Sufficiency to Sustain Conviction.* No general rule can be laid down as to the quantity of circumstantial evidence which in any case will suffice. All the circumstances proved must be consistent with each other, consistent with the hypothesis that the accused is guilty, and at the same time inconsistent with the hypothesis that he is innocent, and with every other rational hypothesis except that of guilt.[71]

Pennsylvania.— Com. *v.* Kirkpatrick, 15 Leg. Int. 268.

South Carolina.— State *v.* Atkinson, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877.

Tennessee.— Bill *v.* State, 5 Humphr. 155.

Texas.— Roberts *v.* State, 17 Tex. App. 82.

See 14 Cent. Dig. tit. "Criminal Law," § 1259 *et seq.* And see *infra*, XII, I, 1, i, (III).

65. *Arkansas.*— Austin *v.* State, 14 Ark. 555.

Georgia.— Keener *v.* State, 18 Ga. 194, 63 Am. Dec. 269.

Iowa.— State *v.* Lyon, 10 Iowa 340.

Mississippi.—McCann *v.* State, 13 Sm. & M. 471.

Nevada.— State *v.* Rhoades, 6 Nev. 352.

North Carolina.— State *v.* Hastings, 86 N. C. 596; State *v.* Swink, 19 N. C. 9.

Pennsylvania.— Johnson *v.* Com., 115 Pa. St. 369, 9 Atl. 78.

66. Johnson *v.* State, 14 Ga. 55; State *v.* Cowell, 12 Nev. 337.

67. *Alabama.*— Holland *v.* State, 39 Fla. 178, 22 So. 298; Anderson *v.* State, 24 Fla. 139, 3 So. 884.

Georgia.— Lee *v.* State, 76 Ga. 498.

Iowa.— State *v.* House, 108 Iowa 68, 78 N. W. 859; State *v.* Millmeier, 102 Iowa 692, 72 N. W. 275; State *v.* Keeler, 28 Iowa 551.

Kentucky.— Johnson *v.* Com., 81 Ky. 325.

Maryland.— Norwood *v.* State, 45 Md. 68.

Minnesota.— State *v.* Laliyer, 4 Minn. 368.

Nebraska.— Chezem *v.* State, 56 Nebr. 496, 76 N. W. 1056.

Texas.— Brown *v.* State, 1 Tex. App. 154.

Vermont.— State *v.* Davidson, 30 Vt. 377, 73 Am. Dec. 312.

England.—Reg. *v.* Cheverton, 2 F. & F. 833.

See 14 Cent. Dig. tit. "Criminal Law," § 1269.

68. Webster Dict. [*quoted* in White *v.* State, 49 Ala. 344, 347]; Starkie Ev. 575 [*quoted* in People *v.* Palmer, 109 N. Y. 110, 113, 16 N. E. 529, 4 Am. St. Rep. 423]. And see State *v.* Millmeier, 102 Iowa 692, 698, 72 N. W. 275, where it is said: "But, in applying it, courts and text writers have not at all times agreed as to what is meant by the 'body of the offense.' In our opinion, the term means, when applied to any particular offense, that the particular crime charged has actually been committed by some one."

69. *California.*— People *v.* Jones, 123 Cal. 65, 55 Pac. 698. See also People *v.* Simonsen, 107 Cal. 345, 40 Pac. 440.

Iowa.— State *v.* Millmeier, 102 Iowa 692, 72 N. W. 275.

Mississippi.— Pitts *v.* State, 43 Miss. 472.

New York.— Ruloff *v.* People, 18 N. Y. 179.

Texas.— Gay *v.* State, 42 Tex. 450, 60 S. W. 771; Lovelady *v.* State, 14 Tex. App. 545 [*citing* Wharton Cr. Ev. § 325].

70. Burrill L. Dict. [*citing* Burrill Circumstantial Ev. 119 note *b*]; Webster Dict. [*quoted* in White *v.* State, 49 Ala. 344, 347].

71. *Alabama.*— Bryant *v.* State, 116 Ala. 445, 23 So. 40; Howard *v.* State, 108 Ala. 571, 18 So. 813; *Ex p.* Acree, 63 Ala. 234.

Arkansas.— Green *v.* State, 51 Ark. 189, 10 S. W. 266.

California.— People *v.* Ward, 105 Cal. 335, 38 Pac. 945; People *v.* Nelson, 85 Cal. 421, 24 Pac. 1006.

Delaware.— State *v.* Fisher, 1 Pennew. 303, 41 Atl. 208; State *v.* Miller, 9 Houst. 564, 32 Atl. 137; State *v.* Taylor, Houst. Cr. 436; State *v.* Goldsborough, Houst. Cr. 302.

Florida.— Kennedy *v.* State, 31 Fla. 428, 12 So. 858; Coleman *v.* State, 26 Fla. 61, 7 So. 367.

Georgia.— Andrews *v.* State, 116 Ga. 83, 42 S. E. 476; Laws *v.* State, 114 Ga. 10, 39

(iv) *Caution.* Circumstantial evidence as a basis for a conviction of crime ought to be acted upon with great caution, particularly where the crime is very heinous or peculiar in its circumstances. The greatness of the crime naturally leads to an anxiety for its punishment, and this, together with the peculiar character of the facts, may lead witnesses to distort, mistake, or exaggerate facts, and the jury to draw incorrect inferences from them. But the caution with which circumstantial evidence should be received does not mean that it is incapable of producing a high degree of proof, equal to that to be derived from direct evidence, but only that the jury should in dealing with such evidence guard against the peculiar dangers inherent in it.[72]

(v) *Strength of Circumstantial, as Compared With Direct, Evidence.* No rule of law requires the court to instruct that circumstantial evidence is inferior to direct and positive evidence.[73] The two kinds of evidence are in effect the same if equally convincing.[74] The test of the sufficiency of the circumstantial evidence is not whether it produces the same conviction as the positive testi-

S. E. 883; Williams *v.* State, 113 Ga. 721, 39 S. E. 487; Cummings *v.* State, 110 Ga. 293, 35 S. E. 117; Hamilton *v.* State, 96 Ga. 301, 22 S. E. 528.

Illinois.— Carlton *v.* People, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346.

Indiana.— Wantland *v.* State, 145 Ind. 38, 43 N. E. 931.

Iowa.— State *v.* Hart, 94 Iowa 749, 64 N. W. 278; State *v.* Clifford, 86 Iowa 550, 53 N. W. 299, 41 Am. St. Rep. 518; State *v.* Maxwell, 42 Iowa 208.

Kansas.— State *v.* Asbell, 57 Kan. 398, 46 Pac. 770; State *v.* Hunter, 50 Kan. 302, 32 Pac. 37.

Louisiana.— State *v.* Vinson, 37 La. Ann. 792.

Massachusetts.— Com. *v.* Costley, 118 Mass. 1.

Michigan.— People *v.* Aiken, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512; People *v.* Foley, 64 Mich. 148, 31 N. W. 94.

Mississippi.— Webb *v.* State, 73 Miss. 456, 19 So. 238.

Missouri.— State *v.* Dent, 170 Mo. 398, 70 S. W. 881; State *v.* David, 131 Mo. 380, 33 S. W. 28.

Montana.— Territory *v.* Rehberg, 6 Mont. 467, 13 Pac. 132.

Nebraska.— Smith *v.* State, 61 Nebr. 296, 85 N. W. 49; Morgan *v.* State, 51 Nebr. 672, 71 N. W. 788; Kaiser *v.* State, 35 Nebr. 704, 53 N. W. 610; Bradshaw *v.* State, 17 Nebr. 147, 22 N. W. 361.

New Mexico.— Territory *v.* Lermo, 8 N. M. 566, 46 Pac. 16.

New York.—People *v.* Cunningham, 6 Park. Cr. 398; Stephens *v.* People, 4 Park. Cr. 396.

Ohio.— State *v.* Summons, 1 Ohio Dec. (Reprint) 416, 9 West. L. J. 407; State *v.* Walshenkerg, 3 Ohio Leg. N. 53.

South Carolina.— State *v.* Atkinson, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877; State *v.* Davenport, 38 S. C. 348, 17 S. E. 37.

Tennessee.— Lancaster *v.* State, 91 Tenn. 267, 18 S. W. 777.

Texas.— Barnes *v.* State, 41 Tex. 342; Williams *v.* State, 41 Tex. 209; Perkins *v.* State, 32 Tex. 109; Kelley *v.* State, (Cr. App. 1902) 70 S. W. 20; Baldez *v.* State, 37 Tex. Cr. 413, 35 S. W. 664; Finlan *v.* State, (App. 1890) 13 S. W. 866; Black *v.* State, 1 Tex. App. 368.

Wisconsin.— Buel *v.* State, 104 Wis. 132, 80 N. W. 78.

United States.— U. S. *v.* Reder, 69 Fed. 965; U. S. *v.* McKenzie, 35 Fed. 826, 13 Sawy. 337; U. S. *v.* Douglass, 25 Fed. Cas. No. 14,989, 2 Blatchf. 207; U. S. *v.* Martin, 26 Fed. Cas. No. 15,731, 2 McLean 256.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1261, 1884–1887.

Moral certainty.— The test of the sufficiency of circumstantial evidence is often said to be whether it is of such a nature as to exclude to a moral certainty every rational hypothesis except that of guilt. Kastner *v.* State, 58 Nebr. 767, 79 N. W. 713; Hester *v.* State, (Tex. Cr. App. 1899) 51 S. W. 932; State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676. It is not every hypothesis, but every "reasonable" hypothesis but that of guilt, which the circumstantial evidence must exclude. Walker *v.* State, 134 Ala. 86, 32 So. 703; King *v.* State, 120 Ala. 329, 25 So. 178. If the evidence is consistent with the theory of defendant's innocence, the verdict of guilty ought to be set aside. Black *v.* State, 112 Ga. 29, 37 S. E. 108.

To warrant a conviction on circumstantial evidence each fact necessary to the conclusion must be proved by competent evidence beyond a reasonable doubt. All the facts must be consistent with each other, and with the main fact sought to be proved, and the circumstances taken together must be of a conclusive nature, leading to a satisfactory conclusion, and producing a reasonable and moral certainty that the accused and no other person committed the offense charged. Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711. See also as to proof of each independent fact in the same satisfactory manner State *v.* Crabtree, 170 Mo. 642, 71 S. W. 127. The jury must be so convinced that each of them would venture to act on the decision in matters of the highest concern to himself. Pickens *v.* State, 115 Ala. 42, 22 So. 551.

72. Pitts *v.* State, 43 Miss. 472.

73. Cook *v.* State, (Miss. 1900) 28 So. 833.

74. Moughon *v.* State, 57 Ga. 102.

mony of a single eye-witness,[75] but whether it produces moral conviction to the exclusion of every reasonable doubt.[76]

2. Sufficiency and Degree of Proof — a. In General. The test of the sufficiency of evidence to establish the guilt of the accused is, whether it is sufficient to satisfy the jury of his guilt beyond a reasonable doubt.[77] The evidence for the prosecution should not be held insufficient solely because it is, when disconnected, weak and inconclusive, if taken together it may satisfy the jury beyond a reasonable doubt.[78]

b. Inferences by the Jury. The jury may from all the testimony taken together draw all legitimate inferences[79] that probably or reasonably arise from the circumstances proved, although such inferences do not always necessarily follow the facts.[80] A conviction based on reasonable inferences from the evidence cannot be set aside as unsupported by evidence.[81]

c. Reasonable Doubt — (i) *General Rule.* In criminal cases a verdict of guilty cannot be based upon a mere preponderance of proof. The jury are required, particularly where the evidence is circumstantial or contradictory, to be satisfied upon all the evidence beyond a reasonable doubt that the accused is guilty.[82] In this respect criminal cases differ from civil, for in the latter no presumption is indulged in favor of either litigant, so that he who produces the pre-

75. Banks *v.* State, 72 Ala. 522; Matthews *v.* State, 55 Ala. 65; Faulk *v.* State, 52 Ala. 415; State *v.* Coleman, 22 La. Ann. 455.

76. Mickle *v.* State, 27 Ala. 20.

The same degree of certainty is required where the evidence is direct as where it is circumstantial; that is, belief beyond a reasonable doubt. State *v.* Dugan, 12 Mont. 300, 30 Pac. 79; State *v.* Ryan, 12 Mont. 297, 30 Pac. 78.

Secondary evidence.— Circumstantial evidence is not secondary evidence, so that in order to introduce it a party must prove that there is no direct evidence. The prosecution may choose between direct evidence and circumstantial evidence to prove the same facts, and the question is one of weight rather than one of competency. State *v.* Stewart, 31 N. C. 342. But see Chisolm *v.* State, 45 Ala. 66; Dixon *v.* State, 15 Tex. App. 480.

77. Burrell *v.* State, 18 Tex. 713.

Reasonable doubt see *infra*, XII, I, 2, c.

78. Howard *v.* State, 108 Ala. 571, 18 So. 813.

79. State *v.* Bickel, 7 Mo. App. 572.

80. Gannon *v.* People, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147.

81. State *v.* Atkinson, 93 N. C. 519.

82. *Alabama.*— Brown *v.* State, 121 Ala. 9, 25 So. 744; McLeroy *v.* State, 120 Ala. 274, 25 So. 247; Pickens *v.* State, 115 Ala. 42, 22 So. 551.

California.— People *v.* Kerrick, 52 Cal. 446.

Delaware.— State *v.* Dill, 9 Houst. 495, 18 Atl. 763.

Georgia.— Glover *v.* State, 114 Ga. 828, 40 S. E. 998.

Illinois.— Marlatt *v.* People, 104 Ill. 364; Miller *v.* People, 39 Ill. 457; Reins *v.* People, 30 Ill. 256; Stanley *v.* People, 104 Ill. App. 294.

Indiana.— Clark *v.* State, 159 Ind. 60, 64 N. E. 589; Musser *v.* State, 157 Ind. 423, 61 N. E. 1; Stewart *v.* State, 44 Ind. 237; Hipp *v.* State, 5 Blackf. 149, 33 Am. Dec. 463; Hiler *v.* State, 4 Blackf. 552.

Iowa.— State *v.* Porter, 64 Iowa 237, 20 N. W. 168; Tweedy *v.* State, 5 Iowa 433.

Kentucky.— Williams *v.* Com., 80 Ky. 313, 4 Ky. L. Rep. 3; Payne *v.* Com., 1 Metc. 370.

Louisiana.— State *v.* Bazile, 50 La. Ann. 21, 23 So. 8.

Mississippi.— Strother *v.* State, 74 Miss. 447, 21 So. 147; Shubert *v.* State, 66 Miss. 446, 6 So. 238.

Montana.— State *v.* Felker, 27 Mont. 451, 71 Pac. 668; State *v.* Schnepel, 23 Mont. 523, 59 Pac. 927.

Nebraska.—Atkinson *v.* State, 58 Nebr. 356, 78 N. W. 621; Vandeventer *v.* State, 38 Nebr. 592, 57 N. W. 397; Morrison *v.* State, 13 Nebr. 527, 14 N. W. 475.

Nevada.— State *v.* Mandich, 24 Nev. 336, 54 Pac. 516.

New Jersey.— Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811.

New York.— People *v.* Shanley, 30 Misc. 290, 62 N. Y. Suppl. 389, 14 N. Y. Cr. 263; Blake's Case, 1 City Hall Rec. 99.

Ohio.— State *v.* Gardiner, Wright 392.

Oregon.— State *v.* Ah Lee, 7 Oreg. 237.

Pennsylvania.— Com. *v.* Winnemore, 1 Brewst. 356; Com. *v.* Hanlon, 8 Phila. 401; Com. *v.* Irving, 1 Leg. Chron. 69.

Texas.— Munden *v.* State, 37 Tex. 353; White *v.* State, 36 Tex. 347; Conner *v.* State, 34 Tex. 659; Dorsey *v.* State, 34 Tex. 651; Gazley *v.* State, 17 Tex. App. 267.

Virginia.— Goldman *v.* Com., 100 Va. 865, 42 S. E. 923; Branch *v.* Com., 100 Va. 837, 41 S. E. 862.

West Virginia.— State *v.* Abbott, 8 W. Va. 741.

United States.— U. S. *v.* Jackson, 29 Fed. 503; U. S. *v.* Searcey, 26 Fed. 435; U. S. *v.* Keller, 19 Fed. 633; U. S. *v.* Johnson, 26 Fed. Cas. No. 15,483.

ponderance of evidence wins, while in the former the accused starts with the presumption that he is innocent, which must be overcome, in addition to the evidence introduced in his behalf.[83]

(II) *Definition of.* The meaning of the term "reasonable doubt" has been a topic of much discussion, and innumerable attempts have been made to define it. What a reasonable doubt is does not seem easy of explanation, for those who possess the most unusual facility in the use of language have found it difficult to formulate or convey to others their idea of the meaning of these words. Many of the cases point out the terseness and seeming simplicity of the phrase and the inutility of attempting a definition which must necessarily consist in a restatement of the proposition in different words, which are not more easily understood, and which render the original expression only more obscure.[84]

England.— Reg. *v.* Smith, 10 Cox C. C. 82, 11 Jur. N. S. 695, L. & C. 607, 34 L. J. M. C. 153, 12 L. T. Rep. N. S. 608, 13 Wkly. Rep. 816.

See 14 Cent. Dig. tit. "Criminal Law," § 1267.

83. See Evidence.

84. People *v.* Stubenvoll, 62 Mich. 329, 28 N. W. 883.

Definitions of reasonable doubt.— The doubt to be reasonable must have something to rest upon. It must be a substantial doubt arising upon the evidence or from a lack of evidence, such as an honest, sensible, and fair-minded man might with reason entertain consistent with a conscientious desire on his part to ascertain the truth. A vague conjecture or an inference of the possibility of the innocence of the accused is not a reasonable doubt. A doubt is not reasonable that in the face of overwhelming or even strong evidence assumes that the accused may possibly be innocent. There must be sincerity and common sense in the doubt, for the mental operations of all sane men are governed by the same rules, whether in the jury-box or out of it; and the jurors should be convinced as jurors by the same proof that would convince them as men, and upon which they would act in the management of the gravest and most important matters and in arranging their most serious affairs and concerns. Giles *v.* State, 6 Ga. 276; Toops *v.* State, 92 Ind. 13; Stout *v.* State, 90 Ind. 1; Arnold *v.* State, 23 Ind. 170; State *v.* Pierce, 65 Iowa 85, 21 N. W. 195; State *v.* Bridges, 29 Kan. 138; State *v.* Kearley, 26 Kan. 77; McGuire *v.* People, 44 Mich. 286, 6 N. W. 669, 38 Am. Rep. 265; State *v.* Dineen, 10 Minn. 407; State *v.* Gleim, 17 Mont. 17, 41 Pac. 998, 52 Am. St. Rep. 655, 31 L. R. A. 294; Lawhead *v.* State, 46 Nebr. 607, 65 N. W. 779; People *v.* Hughes, 137 N. Y. 29, 32 N. E. 1105; People *v.* Wayman, 128 N. Y. 585, 27 N. E. 1070; Miles *v.* U. S., 103 U. S. 304, 26 L. ed. 481. On the other hand they should doubt as jurors what they would doubt as men. U. S. *v.* Heath, 20 D. C. 272; Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; State *v.* Rounds, 76 Me. 123; Fanton *v.* State, 50 Nebr. 351, 69 N. W. 953, 36 L. R. A. 158. If they have an abiding and conscientious conviction of the prisoner's guilt then they are convinced beyond a reasonable doubt. See the cases above cited. But *compare* Williams *v.* State, 73 Miss. 820, 19 So. 826. A reasonable doubt has also been defined as "a doubt for which a reason can be given" (Jones *v.* State, 120 Ala. 303, 25 So. 204; Walker *v.* State, 117 Ala. 42, 23 So. 149; Hodge *v.* State, 97 Ala. 37, 12 So. 164, 38 Am. St. Rep. 145; Cohen *v.* State, 50 Ala. 108; People *v.* Guidici, 100 N. Y. 503, 3 N. E. 493), although it has also been said that the jurors need not be able to give a reason for their doubt (People *v.* Ah Sing, 51 Cal. 372; Siberry *v.* State, 133 Ind. 677, 33 N. E. 681; Densmore *v.* State, 67 Ind. 306, 33 Am. Rep. 96; People *v.* McCann, 16 N. Y. 58, 69 Am. Dec. 642). Again it is said that the facts must satisfy a reasonable mind after a full comparison and consideration of the evidence (Wood *v.* State, 31 Fla. 221, 12 So. 539; People *v.* Guidici, 100 N. Y. 503, 3 N. E. 493); that it must have something to rest upon such as a sensible and honest man would reasonably entertain (Fletcher *v.* State, 90 Ga. 468, 17 S. E. 100); that it must be a doubt growing out of the evidence and the circumstances of the case (Malone *v.* State, 49 Ga. 210; State *v.* Kruger, 7 Ida. 178, 61 Pac. 463; State *v.* Davidson, 44 Mo. App. 513; State *v.* McCune, 16 Utah 170, 51 Pac. 818); that it must have a foundation in reason (Conrad *v.* State, 132 Ind. 254, 31 N. E. 805; People *v.* Barker, 153 N. Y. 111, 47 N. E. 31); that it must be a substantial doubt arising from insufficiency of evidence, not a mere possibility (State *v.* Wells, 111 Mo. 533, 20 S. W. 232) or probability of innocence (Bain *v.* State, 74 Ala. 38; State *v.* David, 131 Mo. 380, 33 S. W. 28); that it must be an honest, substantial misgiving generated by an insufficiency of proof (Carpenter *v.* State, 62 Ark. 286, 36 S. W. 900; People *v.* Ross, 115 Cal. 233, 46 Pac. 1059; Woodruff *v.* State, 31 Fla. 320, 12 So. 653; Lovett *v.* State, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705; Burney *v.* State, 100 Ga. 65, 25 S. E. 911; Little *v.* People, 157 Ill. 153, 42 N. E. 389; Lyons *v.* People, 137 Ill. 602, 27 N. E. 677; Carroll *v.* People, 136 Ill. 456, 27 N. E. 18; Siberry *v.* State, 133 Ind. 677, 33 N. E. 681; Densmore *v.* State, 67 Ind. 306, 33 Am. Rep. 96; State *v.* Blue, 136 Mo. 41, 37 S. W. 796; State *v.* David, 131 Mo. 380, 33 S. W.

(III) *Applies to Misdemeanors as Well as to Felonies.* The rule requiring belief in defendant's guilt to the exclusion of every reasonable doubt is as applicable to misdemeanors as to felonies.[85]

(IV) *In the Mind of One Juror.* The proposition that the jury must be convinced beyond a reasonable doubt does not justify an instruction that a reasonable doubt must be entertained by or arise in the mind of every one of them,[86] or that an acquittal is not warranted unless a reasonable doubt is entertained by all of them.[87] The law contemplates, and indeed demands that every one of the jurors must join in the conclusion that the accused is guilty beyond a reasonable doubt, although each individual mind has to arrive at this conclusion separately, and each juror having in view the oath he has taken must have his own mind convinced beyond a reasonable doubt upon all the evidence before he can conscientiously consent to the verdict of guilty.[88] But the fact that one of the jurors entertains a reasonable doubt does not bind the jury to acquit, and the jury should be so instructed.[89] Under such circumstances all that the jury can do is to report an agreement impossible.[90]

(V) *As to Each Particular Fact.* Most of the courts have held that where the prosecution relies upon circumstantial evidence it is not necessary that each circumstance relied upon shall be proved beyond a reasonable doubt, but all the circumstances should be considered, and if those actually proved taken together are sufficient to satisfy the jury beyond a reasonable doubt, they should not acquit merely because one or more of the circumstances relied upon by the prosecution was not proved.[91] Others have held that where certain facts are

28; People *v.* Pallister, 138 N. Y. 601, 33 N. E. 741; U. S. *v.* Newton, 52 Fed. 275). But negative definitions are more frequent and perhaps safer and more helpful. Hence a mere whim or a groundless surmise (Welsh *v.* State, 96 Ala. 92, 11 So. 450), a vague conjecture (Fletcher *v.* State, 90 Ga. 468, 17 S. E. 100), a whimsical or vague doubt (State *v.* Magnell, 3 Pennew. (Del.) 307, 51 Atl. 606; State *v.* Bodekee, 34 Iowa 520; Com. *v.* Drum, 58 Pa. St. 9), a desire for more evidence of guilt (Shepperd *v.* State, 94 Ala. 102, 10 So. 663), a captious doubt or misgiving, suggested by an ingenious counsel, or arising from a merciful disposition, or kindly feeling toward the prisoner, or from sympathy for him or for his family is not a reasonable doubt (U. S. *v.* Newton, 52 Fed. 275). See also *infra*, XIV, G, 9.

85. *Alabama.*— State *v.* Murphy, 6 Ala. 845.

Arkansas.— State *v.* King, 20 Ark. 166.

Georgia.— Wasden *v.* State, 18 Ga. 264.

Indiana.— Stewart *v.* State, 44 Ind. 237.

Kentucky.— Sowder *v.* Com., 8 Bush 432.

Massachusetts.— Com. *v.* Certain Intoxicating Liquors, 115 Mass. 142, 105 Mass. 595.

Nebraska.— Vandeventer *v.* State, 38 Nebr. 592, 57 N. W. 397.

New York.— People *v.* Davis, 1 Wheel. Cr. 235.

North Carolina.— State *v.* Hicks, 125 N. C. 636, 34 S. E. 247; State *v.* Cochran, 13 N. C. 63.

Ohio.— Fuller *v.* State. 12 Ohio St. 433.

See 14 Cent. Dig. tit. "Criminal Law," § 1267.

86. State *v.* Sloan, 55 Iowa 217, 7 N. W. 516.

87. Stitz *v.* State, 104 Ind. 359, 4 N. E. 145.

88. Little *v.* People, 157 Ill. 153, 42 N. E. 389; Rhodes *v.* State, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429; Castle *v.* State, 75 Ind. 146; State *v.* Sloan, 55 Iowa 217, 7 N. W. 516; State *v.* Stewart, 52 Iowa 284, 3 N. W. 99; State *v.* Witt, 34 Kan. 488, 8 Pac. 769.

89. Pickens *v.* State, 115 Ala. 42, 22 So. 551; Boyd *v.* State, 33 Fla. 316, 14 So. 836; Davis *v.* State, 51 Nebr. 301, 70 N. W. 984.

90. See also Castle *v.* State, 75 Ind. 146; State *v.* Hamilton, 57 Iowa 596, 11 N. W. 5; State *v.* De Witt, 34 Kan. 488, 8 Pac. 769.

91. *Alabama.*— Murphy *v.* State, 108 Ala. 10, 18 So. 557.

Arkansas.— Lackey *v.* State, 67 Ark. 416, 55 S. W. 213.

Georgia.— Houser *v.* State, 58 Ga. 78.

Illinois.— Kossakowski *v.* People, 177 Ill. 563, 53 N. E. 115; Williams *v.* People, 166 Ill. 132, 46 N. E. 749; Keating *v.* People, 160 Ill. 480, 43 N. E. 724; Bressler *v.* People, 117 Ill. 422, 8 N. E. 62; Davis *v.* People, 114 Ill. 86, 29 N. E. 192.

Indiana.— Sumner *v.* State, 5 Blackf. 579, 36 Am. Dec. 561.

Iowa.— State *v.* Hayden, 45 Iowa 11.

Missouri.— State *v.* Schoenwald, 31 Mo. 147.

Nebraska.— Kastner *v.* State, 58 Nebr. 767, 79 N. W. 713; Morgan *v.* State, 51 Nebr. 672, 71 N. W. 788; Bradshaw *v.* State, 17 Nebr. 147, 22 N. W. 361.

North Carolina.—State *v.* Shines, 125 N. C. 730, 34 S. E. 552.

Pennsylvania.— Rudy *v.* People, 128 Pa. St. 500, 18 Atl. 344.

Texas.— Barr *v.* State, 10 Tex. App. 507.

essential to guilt a reasonable doubt as to any of these facts will require an acquittal.[92]

(VI) *INTENT.* Where a particular intent is a necessary ingredient of the crime, and the jury have a reasonable doubt as to the intent, they should acquit. The prosecution must prove the intent beyond a reasonable doubt.[93]

(VII) *GRADE OR DEGREE OF CRIME.* Where the indictment charges a crime in two or more degrees, and the evidence leaves the degree or grade in doubt, the jury should convict of the lowest grade, if they have a reasonable doubt as to the grade.[94]

(VIII) *IDENTITY OF ACCUSED.* The prosecution must identify the person on trial as the person who actually committed the crime to the satisfaction of the jury and beyond a reasonable doubt.[95] But there is no rule of law that testimony identifying a party should be subjected to the closest scrutiny. The identification is not an expression of an opinion, but the statement of a fact.[96] A conviction may be sustained, although a witness declines to swear positively and testifies that he believes the accused is the person whom he saw commit the crime.[97]

(IX) *NAME OF PERSON.* Where defendant is indicted under his own name and also under an alias, it is not necessary to prove that he was known and called by both. It is sufficient if it be proved that he was known by either.[98]

92. *California.*— People *v.* Ah Chung, 54 Cal. 398.

Florida.— Gavin *v.* State, 42 Fla. 553, 29 So. 405.

Nevada.— State *v.* Maher, 25 Nev. 465, 62 Pac. 236.

North Carolina.— State *v.* Messimer, 75 N. C. 385.

Ohio.— State *v.* Snell, 5 Ohio S. & C. Pl. Dec. 670.

Oklahoma.— Hodge *v.* Territory, 12 Okla. 108, 69 Pac. 1077; Mahaffey *v.* Territory, 11 Okla. 213, 66 Pac. 342.

Texas.— Harrison *v.* State, 6 Tex. App. 42; Black *v.* State, 1 Tex. App. 368.

Proof of a single circumstance inconsistent with the guilt of the accused does not justify his acquittal, and a refusal to so charge is not error. People *v.* Willett, 105 Mich. 110, 62 N. W. 1115; State *v.* Johnson, 37 Minn. 493, 35 N. W. 373. And where it is held that every essential fact of the crime must be proved beyond a reasonable doubt, it is also held that such a degree of proof is not applicable to incidental or subsidiary facts. Hauk *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 157.

93. *Delaware.*— State *v.* Seymour, Houst. Cr. 508.

Georgia.— Guilford *v.* State, 24 Ga. 315.

Iowa.— State *v.* Porter, 34 Iowa 131.

Michigan.— Roberts *v.* People, 19 Mich. 401.

Tennessee.— Coffee *v.* State, 3 Yerg. 283, 24 Am. Dec. 570.

See 14 Cent. Dig. tit. "Criminal Law," § 1271. And see BURGLARY, 6 Cyc. 243; and other special titles.

The intent may be shown by circumstances. — People *v.* Hiltel, 131 Cal. 577, 63 Pac. 919; Roberts *v.* People, 19 Mich. 401; State *v.* Lane, 64 Mo. 319; Gomez *v.* State, 15 Tex. App. 327. See also BURGLARY, 6 Cyc. 244; and other special titles.

94. *Georgia.*— Jennings *v.* State, 59 Ga. 307.

Indiana.— Newport *v.* State, 140 Ind. 299, 39 N. E. 926.

Kentucky.— Payne *v.* Com., 1 Metc. 370.

Michigan.— People *v.* Cahoon, 88 Mich. 456, 50 N. W. 384 [*distinguishing* People *v.* Partridge, 86 Mich. 243, 49 N. W. 149].

New York.— People *v.* Lamb, 2 Abb. Pr. N. S. 148.

See 14 Cent. Dig. tit. "Criminal Law," § 1272. And see HOMICIDE; and other special titles.

95. *Alabama.*— Williams *v.* State, 130 Ala. 31, 30 So. 336.

Massachusetts.— Com. *v.* Cunningham, 104 Mass. 545.

Missouri.— State *v.* Jones, 71 Mo. 591.

New York.—People *v.* Smith, 7 N. Y. Suppl. 841, 7 N. Y. Cr. 425.

North Carolina.—State *v.* Telfair, 109 N. C. 878, 13 S. E. 726.

Tennessee.— Bill *v.* State, 5 Humphr. 155.

Texas.— Garcia *v.* State, 23 Tex. App. 712, 5 S. W. 186; Griffith *v.* State, 9 Tex. App. 372.

See 14 Cent. Dig. tit. "Criminal Law," § 1273.

If the only identifying evidence is that of an accomplice who states that one of the persons who committed the crime was a man who was by the others called by a name similar to that of the accused the identification is not sufficient. Gillian *v.* State, 3 Tex. App. 132.

Although it may be positively proved that one of two or more persons committed the crime, yet if it is uncertain which is the guilty party all must be acquitted. People *v.* Woody, 45 Cal. 289; Campbell *v.* People, 16 Ill. 17, 61 Am. Dec. 49.

96. State *v.* Powers, 72 Vt. 168, 47 Atl. 830.

97. Com. *v.* Cunningham, 104 Mass. 545; State *v.* Franke, 159 Mo. 535, 60 S. W. 1053.

98. Evans *v.* State, 62 Ala. 6.

(x) *Incorporation.* Incorporation need not be proved beyond a reasonable doubt. Thus where the person injured by the crime is alleged to have been a corporation, a failure to prove this allegation will not justify the granting of a new trial.[99] And generally proof that an association was engaged in carrying on a business under a corporate name, and possessed at least a corporate existence *de facto*, is sufficient without producing a certificate of incorporation or a copy thereof.[1]

(xi) *Age.* The prosecution has the burden of proving that defendant was of an age to be criminally responsible for his act, and this it must do beyond a reasonable doubt.[2]

d. Venue — (i) *Sufficiency of Proof.* It has been held that the venue need not be proved beyond a reasonable doubt, but that it is sufficient if from all the evidence it may reasonably be inferred.[3]

(ii) *Failure to Prove.* If, however, the prosecution offers no proof of venue, or offers evidence of the venue which is clearly insufficient, it is the duty of the court to instruct the jury that the venue has not been proved and to direct an acquittal.[4]

(iii) *Circumstantial Evidence.* It is not necessary that the venue as laid should be proved by direct or positive evidence. It may be proved like any other fact by proof of other facts and circumstances from which it may be inferred.[5]

The identity of the name of a person is a *prima facie* presumption of identity of person, which becomes conclusive if not rebutted. Com. *v.* Beckley, 3 Metc. (Mass.) 330; State *v.* McGuire, 87 Mo. 642; State *v.* Moore, 61 Mo. 276; State *v.* Kelsoe, 11 Mo. App. 91.

99. Murphy *v.* State, 36 Ohio St. 628.

1. *California.*— People *v.* Barric, 49 Cal. 342; People *v.* Hughes, 29 Cal. 257; People *v.* Frank, 28 Cal. 507.

Colorado.— Miller *v.* People, 13 Colo. 166, 21 Pac. 1025.

Florida.— Thalheim *v.* State, 38 Fla. 169, 20 So. 938; Duncan *v.* State, 29 Fla. 439, 10 So. 815.

Indiana.— Norton *v.* State, 74 Ind. 337; Smith *v.* State, 28 Ind. 321.

Kansas.— State *v.* Thompson, 23 Kan. 338, 33 Am. Rep. 165.

Missouri.— By statute in this state. State *v.* Jackson, 90 Mo. 156, 2 S. W. 128; State *v.* Phelan, 66 Mo. App. 548.

New York.—People *v.* Davis, 21 Wend. 309; People *v.* Caryl, 3 Park. Cr. 326.

North Carolina.—State *v.* Turner, 119 N. C. 841, 25 S. E. 810.

Oregon.— State *v.* Savage, 36 Oreg. 191, 60 Pac. 610, 61 Pac. 1128.

Wisconsin.— Golonbieski *v.* State, 101 Wis. 333, 77 N. W. 189; State *v.* Cole, 19 Wis. 129, 88 Am. Dec. 678.

See 14 Cent. Dig. tit. "Criminal Law," § 1276. And see Corporations, 10 Cyc. 1233.

2. Wilcox *v.* State, 32 Tex. Cr. 284, 22 S. W. 1109. See also Foltz *v.* State, 33 Ind. 215; State *v.* Cougot, 121 Mo. 458, 26 S. W. 566.

3. *Arkansas.*—Wilson *v.* State, 62 Ark. 497, 36 S. W. 842, 54 Am. St. Rep. 303.

California.— People *v.* Monroe, 138 Cal. 97, 70 Pac. 1072; People *v.* Manning, 48 Cal. 335.

Florida.— McKinnie *v.* State, (1902) 32 So. 786; Smith *v.* State, 29 Fla. 408, 10 So. 894; Warrace *v.* State, 27 Fla. 362, 8 So. 748; Bryan *v.* State, 19 Fla. 864.

Georgia.— Malone *v.* State, 116 Ga. 272, 42 S. E. 468; Womble *v.* State, 107 Ga. 666, 33 S. E. 630. But see Jones *v.* State, 113 Ga. 271, 38 S. E. 851.

Missouri.— State *v.* Horner, 48 Mo. 520; State *v.* Burns, 48 Mo. 438; State *v.* Knolle, 90 Mo. App. 238.

Nevada.— People *v.* Gleason, 1 Nev. 173.

Texas.— Lyon *v.* State, (Cr. App. 1896) 34 S. W. 947; Boggs *v.* State, (Cr. App. 1894) 25 S. W. 770.

Virginia.— Richardson *v.* Com., 80 Va. 124.

See 14 Cent. Dig. tit. "Criminal Law," § 1278.

4. Burks *v.* State, 120 Ala. 386, 24 So. 931; Cox *v.* State, 68 Ark. 462, 60 S. W. 27; Dobson *v.* State, (Ark. 1891) 17 S. W. 3 [*distinguishing* Forehand *v.* State, 53 Ark. 46, 13 S. W. 728]; Holmes *v.* State, 20 Ark. 168; Smith *v.* State, 69 Ga. 768; Ryan *v.* State, 22 Tex. App. 699, 3 S. W. 547; Moore *v.* State, 2 Tex. App. 350. The positive testimony of one credible witness, not positively contradicted, is sufficient proof of venue (Speight *v.* State, 80 Ga. 512, 5 S. E. 506; Laydon *v.* State, 52 Ind. 459); but evidence that the crime occurred in a particular town or village is insufficient where it does not appear that such town or village is in the state and county (Cooper *v.* State, 106 Ga. 119, 32 S. E. 23; State *v.* King, 111 Mo. 576, 20 S. W. 299).

5. *Alabama.*— Tinney *v.* State, 111 Ala. 74, 20 So. 597.

Arkansas.— Bloom *v.* State, 68 Ark. 336, 58 S. W. 41; Wallis *v.* State, 54 Ark. 611, 16 S. W. 821.

California.— People *v.* Smith, 121 Cal. 355, 53 Pac. 802.

Colorado.— Brooke *v.* People, 23 Colo. 375, 48 Pac. 502.

Georgia.— Robson *v.* State, 83 Ga. 166, 9 S. E. 610; Dumas *v.* State, 62 Ga. 58.

Where no witness expressly states that the crime was committed in the county as charged, but there are references in the evidence to various localities and landmarks at or near the scene of the crime, known by or probably familiar to the jury, and from which they may have reasonably concluded that the offense was committed in the county alleged, the venue is sufficiently proved.[6] Venue may be inferred by the jury from proof of an act which is the logical and ordinary outcome of the commission of a crime in the county.[7]

(iv) *Public Places and Streets.* From proof that a crime was committed on a street or other public place well known to be within the limits of a town or city the jury may infer that the crime was committed within the limits of such town or city, and as the court will take judicial knowledge of the county in which it is located the venue is sufficiently proved.[8] Proof that the crime was committed in a certain city, village, or town has been held to be sufficient proof of venue under the same rule of judicial notice of geographical facts.[9] The contrary has also been held.[10]

(v) *Private House or Building.* Where one witness testifies that the crime was committed at, in, or near a certain building, and another witness testifies that the building is in the county alleged in the indictment, the venue is sufficiently proved.[11] Proof that the crime was committed at or near the store or residence of a person named, without evidence to show that the building named is

Illinois.— Van Dusen *v.* People, 78 Ill. 645.
Indiana.— Harlan *v.* State, 134 Ind. 339, 33 N. E. 1102; Burst *v.* State, 89 Ind. 133; Croy *v.* State, 32 Ind. 384.
Kansas.— State *v.* Thomas, 58 Kan. 805, 51 Pac. 228.
Massachusetts.— Com. *v.* Costley, 118 Mass. 1.
Minnesota.— State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458.
Mississippi.— Moore *v.* State, 55 Miss. 432.
Missouri.— State *v.* Sanders, 106 Mo. 188, 17 S. W. 223; State *v.* Chamberlain, 89 Mo. 129, 1 S. W. 145; State *v.* Jackson, 86 Mo. 18; State *v.* Bailey, 73 Mo. App. 576; State *v.* Roach, 64 Mo. App. 413; State *v.* Snyder, 44 Mo. App. 429.
Nebraska.— Hawkins *v.* State, 60 Nebr. 380, 83 N. W. 198; Weinecke *v.* State, 34 Nebr. 14, 51 N. W. 307.
New Mexico.— Territory *v.* Hicks, 6 N. M. 596, 30 Pac. 872.
Oklahoma.— Harvey *v.* Territory, 11 Okla. 156, 65 Pac. 837.
South Carolina.— Florence *v.* Berry, 61 S. C. 237, 39 S. E. 389; State *v.* Chaney, 9 Rich. 438; State *v.* Gossett, 9 Rich. 428.
Texas.— Tolston *v.* State, (Cr. App. 1897) 42 S. W. 988; Abrigo *v.* State, 29 Tex. App. 143, 15 S. W. 408; Hoffman *v.* State, 12 Tex. App. 406.
Washington.— State *v.* Michel, 20 Wash. 162, 54 Pac. 995; State *v.* Whiteman, 9 Wash. 402, 37 Pac. 659.
See 14 Cent. Dig. tit. "Criminal Law," § 1279.

6. McCune *v.* State, 42 Fla. 192, 27 So. 867, 89 Am. St. Rep. 227.

7. Thus proof of possession or uttering in a county, with guilty knowledge, is enough to sustain a conviction of forgery or counterfeiting in such county. Johnson *v.* State, 35 Ala. 370; State *v.* Morgan, 35 La. Ann. 293; Spencer *v.* Com., 2 Leigh (Va.) 751; State *v.* Poindexter, 23 W. Va. 805; U. S. *v.* Britton, 24 Fed. Cas. No. 14,650, 2 Mason 464. See Forgery. And proof of the discovery of a body, with mortal injuries, in a river, where the conditions show that it must have been thrown by the hand of a man, is sufficient proof of venue. Com. *v.* Costley, 118 Mass. 1. See Homicide.

8. *California.*—People *v.* McGregar, 88 Cal. 140, 26 Pac. 97.
Illinois.— Sullivan *v.* People, 114 Ill. 24, 28 N. E. 381.
Indiana.— Cluck *v.* State, 40 Ind. 263.
Massachusetts.— Com. *v.* Ackland, 107 Mass. 211.
Missouri.— State *v.* Nolle, 96 Mo. App. 524, 70 S. W. 504; State *v.* Knolle, 90 Mo. App. 238; State *v.* Roach, 64 Mo. App. 413; State *v.* Fitzporter, 16 Mo. App. 282; State *v.* Ruth, 14 Mo. App. 226.
See 14 Cent. Dig. tit. "Criminal Law," § 1281.
Landmarks and well-known localities which are familiar to the jury and from which they may reasonably conclude that the offense was committed in the county alleged have been held sufficient proof of venue, even where there is no direct evidence that the places named are in the county. Leslie *v.* State, 35 Fla. 184, 17 So. 559; Duncan *v.* State, 29 Fla. 439, 10 So. 815; Andrews *v.* State, 21 Fla. 598.

9. State *v.* Farley, 87 Iowa 22, 53 N. W. 1089; State *v.* Burns, 30 La. Ann. 679; People *v.* Waller, 70 Mich. 237, 38 N. W. 261; State *v.* Grear, 29 Minn. 221, 13 N. W. 140.

10. Moore *v.* People, 150 Ill. 405, 37 N. E. 909 [*distinguishing* Sullivan *v.* People, 114 Ill. 24, 23 N. E. 381]; Deck *v.* State, 47 Ind. 245; State *v.* Quaite, 20 Mo. App. 405.

11. Porter *v.* People, 158 Ill. 370, 41 N. E. 886; State *v.* Benson, 22 Kan. 471.

in the county,[12] or at a certain house described by its street and number,[13] without evidence to show that the building named is in the county, is not proof of venue.[14]

(VI) *Defendant's Evidence to Show Place of Crime.* A defendant who claims that the crime was not committed within the state or county is not compelled to establish this solely by affirmative evidence, but he may rely upon and is entitled to the benefit which he may derive from any evidence offered by the state to prove the venue.[15]

e. Defenses — (I) *General Rule.* It is safe to say as a general rule that the doctrine of reasonable doubt applies only to criminative, and not to exculpatory, facts.[16] Hence defendant is not required to establish such fact or facts in mitigation beyond a reasonable doubt. It is sufficient if he satisfy the jury of their truth by credible or preponderating evidence,[17] or if the exculpatory facts, taken in connection with the incriminating evidence, raise a reasonable doubt of the guilt of the prisoner.[18]

(II) *Insanity.* There is a direct conflict in the cases as to the degree of proof necessary to establish the defense of insanity.[19] A few of the cases have held that defendant must establish his insanity beyond a reasonable doubt.[20] Others have held that he need not do so beyond a reasonable doubt, but that he must do so by a preponderance of the evidence or to the reasonable satisfaction of the jury.[21]

12. *Florida.*— Smith *v.* State, 42 Fla. 236, 27 So. 868.

Georgia.— Futch *v.* State, 90 Ga. 472, 16 S. E. 102; Gosha *v.* State, 56 Ga. 36.

Indiana.— Harlan *v.* State, 134 Ind. 339, 33 N. E. 1102.

Kentucky.— Wilkey *v.* Com., 47 S. W. 219, 20 Ky. L. Rep. 578.

Texas.— Stewart *v.* State, 31 Tex. Cr. 153, 19 S. W. 908; Bell *v.* State, 1 Tex. App. 81.

13. State *v.* Schuerman, 70 Mo. App. 518.

14. If, however, the owner or resident of the house which was the place of the crime testifies that it is in the county alleged in the indictment the venue is proved. State *v.* Hill, 96 Mo. 357, 10 S. W. 28; Pike *v.* State, 8 Lea (Tenn.) 577; Sancedo *v.* State, (Tex. Cr. App. 1902) 69 S. W. 142; Stone *v.* State, 27 Tex. App. 576, 11 S. W. 637.

15. State *v.* Buchanan, 130 N. C. 660, 41 S. E. 107.

16. State *v.* Neal, 120 N. C. 613, 27 S. E. 81, 58 Am. St. Rep. 810; Dyson *v.* State, 13 Tex. App. 402.

17. Howell *v.* State, 61 Nebr. 391, 85 N. W. 289; State *v.* Pierce, 8 Nev. 291; State *v.* Ellick, 60 N. C. 450, 86 Am. Dec. 442.

18. Tweedy *v.* State, 5 Iowa 433.

19. Presumption and burden of proof see *supra*, XII, A, 2, e.

20. *Alabama.*— State *v.* Brinyea, 5 Ala. 241; State *v.* Marler, 2 Ala. 43, 36 Am. Dec. 398.

Delaware.— State *v.* Thomas, Houst. Cr. 511; State *v.* Pratt, Houst. Cr. 249; State *v.* Hurley, Houst. Cr. 28.

Louisiana.—State *v.* De Rancé, 34 La. Ann. 186, 44 Am. Rep. 426.

New Jersey.— State *v.* Spencer, 21 N. J. L. 196.

New York.— Walker *v.* People, 88 N. Y. 81 [*affirming* 26 Hun 67]; Pienovi's Case, 3 City Hall Rec. 123; Sellick's Case, 1 City Hall Rec. 185.

Pennsylvania.— Ortwein *v.* Com., 76 Pa. St. 414, 18 Am. Rep. 420; Meyers *v.* Com., 24 Pittsb. Leg. J. 90.

South Carolina.—State *v.* Coleman, 20 S. C. 441.

England.— Reg. *v.* Stokes, 3 C. & K. 185. See 14 Cent. Dig. tit. "Criminal Law," § 1286. And see *supra*, XII, A, 2, e, (I).

21. *Alabama.*— Maxwell *v.* State, 89 Ala. 150, 7 So. 824; Gunter *v.* State, 83 Ala. 96, 3 So. 600; Parsons *v.* State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193; Ford *v.* State, 71 Ala. 385; Boswell *v.* State, 63 Ala. 307, 35 Am. Rep. 20.

Arkansas.— Bolling *v.* State, 54 Ark. 588, 16 S. W. 658; Williams *v.* State, 50 Ark. 511, 9 S. W. 5; Coates *v.* State, 50 Ark. 330, 7 S. W. 304.

California.— People *v.* Allender, 117 Cal. 81, 48 Pac. 1014; People *v.* Ward, 105 Cal. 335, 38 Pac. 945; People *v.* Bemmerly, 98 Cal. 299, 33 Pac. 263; People *v.* McDonnell, 47 Cal. 134; People *v.* Coffman, 24 Cal. 230; People *v.* Myers, 20 Cal. 518.

Connecticut.— State *v.* Hoyt, 46 Conn. 330.

Georgia.— Keener *v.* State, 97 Ga. 388, 24 S. E. 28; Fogarty *v.* State, 80 Ga. 450, 5 S. E. 782. *Compare* Lee *v.* State, 116 Ga. 563, 42 S. E. 759; Danforth *v.* State, 75 Ga. 614, 58 Am. Rep. 480.

Idaho.— State *v.* Larkins, 5 Ida. 200, 47 Pac. 945; People *v.* Walter, 1 Ida. 386.

Iowa.— State *v.* Robbins, 109 Iowa 650, 80 N. W. 1061; State *v.* Trout, 74 Iowa 545, 38 N. W. 405, 7 Am. St. Rep. 499; State *v.* Hemrick, 62 Iowa 414, 17 N. W. 594; State *v.* Bruce, 48 Iowa 530, 30 Am. Rep. 403; State *v.* Felter, 32 Iowa 49.

Kentucky.— Moore *v.* Com., 92 Ky. 630, 18 S. W. 833, 13 Ky. L. Rep. 738; Ball *v.* Com., 81 Ky. 662, 5 Ky. L. Rep. 787; Wright *v.*

Others have held that while he has the burden of introducing some evidence to rebut the presumption of sanity yet if on all the evidence the jury have a reasonable doubt as to his sanity they must acquit.[22] The barbarity and natural atrocity of the crime does not alone in law justify the jury in finding that the accused was insane at the date of its commission.[23] The order on a commission in lunacy committing the accused to an insane asylum while relevant is neither conclusive[24]

Com., 72 S. W. 340, 24 Ky. L. Rep. 1838; Phelps *v.* Com., 32 S. W. 470, 17 Ky. L. Rep. 706.

Louisiana.— State *v.* Scott, 49 La. Ann. 253, 21 So. 271, 36 L. R. A. 721; State *v.* Burns, 25 La. Ann. 302.

Maine.— State *v.* Parks, 93 Me. 208, 44 Atl. 899.

Massachusetts.— Com. *v.* Heath, 11 Gray 303; Com. *v.* Rogers, 7 Metc. 500, 41 Am. Dec. 458.

Minnesota.— State *v.* Gut, 13 Minn. 341; Bonfanti *v.* State, 2 Minn. 123.

Missouri.— State *v.* Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; State *v.* Dreher, 137 Mo. 11, 38 S. W. 567; State *v.* Bell, 136 Mo. 120, 37 S. W. 823; State *v.* Schaefer, 116 Mo. 96, 22 S. W. 447; State *v.* Klinger, 43 Mo. 127; State *v.* Huting, 21 Mo. 464.

Nevada.— State *v.* Lewis, 20 Nev. 333, 22 Pac. 241.

New Jersey.— Genz *v.* State, 58 N. J. L. 482, 34 Atl. 816; Graves *v.* State, 45 N. J. L. 347, 46 Am. Rep. 778 [*overruling* in effect State *v.* Spencer, 21 N. J. L. 196].

North Carolina.— State *v.* Davis, 109 N. C. 780, 14 S. E. 55; State *v.* Vann, 82 N. C. 631; State *v.* Willis, 63 N. C. 26; State *v.* Starling, 51 N. C. 366.

Ohio.—Kelch *v.* State, 55 Ohio 146, 45 N. E. 6. 60 Am. St. Rep. 680, 39 L. R. A. 737; Bergin *v.* State, 31 Ohio St. 111; Bond *v.* State, 23 Ohio St. 349; Loeffner *v.* State, 10 Ohio St. 598; Cottell *v.* State, 5 Ohio Cir. Dec. 472, 12 Ohio Cir. Ct. 467.

Pennsylvania.— Com. *v.* Bezek, 168 Pa. St. 603, 32 Atl. 109; Com. *v.* Gerade, 145 Pa. St. 289, 22 Atl. 464, 27 Am. St. Rep. 689; Meyers *v.* Com., 83 Pa. St. 131. *Compare* Com. *v.* Winnemore, 1 Brewst. 356.

South Carolina.— State *v.* Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879; State *v.* Bundy, 24 S. C. 439, 58 Am. Rep. 263; State *v.* Paulk, 18 S. C. 514.

Tennessee.— Dove *v.* State, 3 Heisk. 348.

Texas.— Williams *v.* State, 37 Tex. Cr. 348, 39 S. W. 687; Lovegrove *v.* State, 31 Tex. Cr. 491, 21 S. W. 191; Rather *v.* State, 25 Tex. App. 623, 9 S. W. 69; Leache *v.* State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; Johnson *v.* State, 10 Tex. App. 571.

Utah.— People *v.* Dillon, 8 Utah 92, 30 Pac. 150.

Virginia.— Dejarnette *v.* Com., 75 Va. 867; Baccigalupo *v.* Com., 33 Gratt. 807, 36 Am. Rep. 795; Boswell *v.* Com., 20 Gratt. 860.

West Virginia.— State *v.* Strauder, 11 W. Va. 745, 27 Am. Rep. 606.

See 14 Cent. Dig. tit. "Criminal Law," § 1286. And see *supra*, XII, A, 2, e, (I).

22. *Delaware.*— State *v.* Reidell, 9 Houst. 470, 14 Atl. 550.

Florida.— Armstrong *v.* State, 30 Fla. 170, 11 So. 618, 17 L. R. A. 484; Armstrong *v.* State, 27 Fla. 366, 9 So. 1, 26 Am. St. Rep. 72; Hodge *v.* State, 26 Fla. 11, 7 So. 593.

Illinois.— Montag *v.* People, 141 Ill. 75, 30 N. E. 337; Langdon *v.* People, 133 Ill. 382, 24 N. E. 874; Dacey *v.* People, 116 Ill. 555, 6 N. E. 165. *Compare* Fisher *v.* People, 23 Ill. 283.

Indiana.— Freese *v.* State, 159 Ind. 597, 65 N. E. 915; Plummer *v.* State, 135 Ind. 308, 34 N. E. 968; Plake *v.* State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408; Grubb *v.* State, 117 Ind. 277, 20 N. E. 257, 725; Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99; Bradley *v.* State, 31 Ind. 492.

Kansas.— State *v.* Nixon, 32 Kan. 205, 4 Pac. 159; State *v.* Mahn, 25 Kan. 182; State *v.* Crawford, 11 Kan. 32.

Michigan.— People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

Mississippi.— Caffey *v.* State, (1898) 24 So. 315; King *v.* State, 74 Miss. 576, 21 So. 235; Cunningham *v.* State, 56 Miss. 269, 21 Am. Rep. 360; Newcomb *v.* State, 37 Miss. 383.

Nebraska.— Howell *v.* State, 61 Nebr. 391, 85 N. W. 289; Wright *v.* People, 4 Nebr. 407.

New Hampshire.— State *v.* Bartlett, 43 N. H. 224, 80 Am. Dec. 154.

New Mexico.— Faulkner *v.* Territory, 6 N. M. 464, 30 Pac. 905.

New York.— Moett *v.* People, 85 N. Y. 373; Brotherton *v.* People, 75 N. Y. 159; People *v.* McCann, 16 N. Y. 58, 69 Am. Dec. 642; *In re* Macfarland, 8 Abb. Pr. N. S. 57; People *v.* Coleman, 1 N. Y. Cr. 1; People *v.* Tripler, 1 Wheel. Cr. 48. See also People *v.* Taylor, 138 N. Y. 398, 34 N. E. 275; People *v.* Osmond, 138 N. Y. 80, 33 N. E. 739; People *v.* McElvaine, 125 N. Y. 596, 26 N. E. 929; People *v.* Kemmler, 119 N. Y. 580, 24 N. E. 9; People *v.* Nolan, 115 N. Y. 660, 21 N. E. 1060; People *v.* Beno Ville, 3 Abb. N. Cas. 195.

Tennessee.— King *v.* State, 91 Tenn. 617, 20 S. W. 169.

United States.— Davis *v.* U. S., 160 U. S. 469, 16 S. Ct. 353, 40 L. ed. 499; U. S. *v.* Faulkner, 35 Fed. 730; U. S. *v.* Sickles, 27 Fed. Cas. No. 16,287*a*, 2 Hayw. & H. 319.

See 14 Cent. Dig. tit. "Criminal Law," § 1286. And see *supra*, XII, A, 2, e, (I).

23. U. S. *v.* Lee, 4 Mackey (D. C.) 489, 54 Am. Rep. 293; Ball's Case, 2 City Hall Rec. (N. Y.) 85; State *v.* Coleman, 20 S. C. 441; State *v.* Stark, 1 Strobh. (S. C.) 479.

24. Goodwin *v.* State, 96 Ind. 550.

nor ordinarily even *prima facie* evidence[25] that the accused was insane at the date of the commission of the crime.[26]

XIII. TIME[1] OF TRIAL.

A. Right to Speedy Trial — 1. AT COMMON LAW. In England from the very earliest time a prisoner, in theory at least, enjoyed the right to a speedy trial, which was procured him by the commission of jail delivery, which issued to the justices of assize, and twice every year resulted in the jails being cleared and the prisoners confined therein being convicted and punished, or freed from custody.[2]

2. UNDER CONSTITUTIONAL AND STATUTORY PROVISIONS. It is usual for state constitutions and statutes to provide for the accused a speedy and public trial. By a speedy trial is meant one that can be had as soon after indictment as the prosecution can with reasonable diligence prepare for, regard being had to the terms of court.[3] It cannot be said, however, that in all the possible vicissitudes of human affairs the accused should have a public trial at the next term of the court, but only that the prosecution should be prevented from oppressing him by holding the proceedings suspended over him indefinitely.[4]

3. POWER OF COURT TO FIX DAY OF TRIAL. In the absence of statute specifying the day on which criminal cases must be tried, the day during the term[5] upon which a prisoner may be tried is in the discretion of the court.[6] The

25. Pflueger *v.* State, 46 Nebr. 493, 64 N. W. 1094.

26. **The presumption,** if any there be, arising from a committal to an asylum may be rebutted by any evidence of subsequent sanity, and a discharge from the asylum is not conclusive of a restoration to sanity. State *v.* Davis, 27 S. C. 609, 4 S. E. 567.

1. Time for preliminary examination see *supra*, X, D, 1, g.

Time of service of copy of indictment see *infra*, XIV, A, 8, c.

2. The justice had under his commission not only the power to discharge acquitted prisoners, but also those against whom upon proclamation no evidence should appear upon which to find an indictment. 2 Hawkins P. C. c. 6, § 6.

3. *Alabama.*— State *v.* Kreps, 8 Ala. 951.

Florida.— *Ex p.* Warris, 28 Fla. 371, 9 So. 718.

Georgia.— Durham *v.* State, 9 Ga. 306.

Illinois.— See Gardner *v.* Baker, 79 Ill. 448.

Mississippi.— *Ex p.* Jefferson, 62 Miss. 223.

Montana.— U. S. *v.* Fox, 3 Mont. 512.

New York.— People *v.* Rulloff, 5 Park. Cr. 77.

Texas.— *Ex p.* Cox, 12 Tex. App. 665; Fernandez *v.* State, 4 Tex. App. 419.

Virginia.— Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364; Com. *v.* Adcock, 8 Gratt. 661.

Washington.— Thompson *v.* Territory, 1 Wash. Terr. 547.

See 14 Cent. Dig. tit. "Criminal Law," § 1292.

A speedy trial is one had according to the rules and regulations of law, as distinguished from a trial vexatiously, capriciously, and oppressively delayed. Stewart *v.* State, 13 Ark. 720; People *v.* Shufelt, 61 Mich. 237, 28 N. W. 79; Nixon *v.* State, 2 Sm. & M. (Miss.) 497, 41 Am. Dec. 601.

A statute authorizing a nolle prosequi to be entered where there is a material variance between the proof and the indictment, unless the accused assents to an amendment, is not unconstitutional upon the ground that it denies the accused a speedy trial. State *v.* Kreps, 8 Ala. 951.

The practice of filing away indictments is not to be indulged in where the accused has been served with process, and for the court to permit this over his objection on the application of the commonwealth's attorney, after the case had been adjourned over the term, with permission to reinstate it on the commonwealth's motion, is error. Jones *v.* Com., 71 S. W. 643, 24 Ky. L. Rep. 1434.

4. The criminal courts are under an obligation to proceed with reasonable despatch, according to the circumstances of the case. *Ex p.* Turman, 26 Tex. 708, 84 Am. Dec. 598.

A prisoner infected by smallpox cannot insist on being tried at the next term of court. Com. *v.* Allegheny County, 7 Watts (Pa.) 366.

5. **Adjournment of court during term.**— While the judge, court having been regularly convened, has ample power to adjourn to some future time during the term, although not beyond it, in the absence of a statute authorizing it, the clerk cannot act for the judge in adjourning court. See COURTS, 11 Cyc. 733. Hence where the judge fails to appear and open court the term is lost, and a conviction obtained as of such term is a nullity. People *v.* Sanchez, 24 Cal. 17; *In re* McClasky, 52 Kan. 34, 34 Pac. 459; *In re* Terrill, 52 Kan. 29, 34 Pac. 457, 39 Am. St. Rep. 327; State *v.* Roberts, 8 Nev. 239; People *v.* Bradwell, 2 Cow. (N. Y.) 445.

6. *Alabama.*— Goley *v.* State, 87 Ala. 57, 6 So. 287; *Ex p.* Chandler, 114 Ala. 8, 22 So. 285.

California.— People *v.* Rader, 136 Cal. 253,

power which the court has to fix a day for the trial extends to the next term of that court.[7]

4. Discharge of Accused[8] — **a. Statutory Provisions.** In the majority of the states statutory provisions exist which provide that a person committed in a criminal proceeding and not admitted to bail shall, in case he is not tried within a period of time specified by the statute, due demand by him for a speedy trial having been made, be discharged from custody.[9] The words "person committed" in such a statute mean one who is in actual custody, and not out on bail.[10] It is the general rule that one desiring to take advantage of such a statute has the burden of proof to show that he is within its provisions.[11] On the other hand it is incumbent upon the prosecution to show that any delay which has occurred in trying the accused was within some exception mentioned in the statute.[12]

b. Discretion of Court. Under a statute which in effect provides that the

68 Pac. 707, where trial was set for a holiday.

Iowa.— State *v.* Maher, 74 Iowa 77, 37 N. W. 2.

Pennsylvania.— Com. *v.* Winnemore, 2 Brewst. 378.

Texas.— Hardin *v.* State, 40 Tex. Cr. 208, 49 S. W. 607; Shehane *v.* State, 13 Tex. App. 533.

Virginia.— See Hall *v.* Com., 89 Va. 171, 15 S. E. 517.

United States.— U. S. *v.* Kessel, 63 Fed. 433.

See 14 Cent. Dig. tit. "Criminal Law," § 1294.

Place on the docket.— After the case is regularly reached on the docket it has a preference over other cases following it unless for good and sufficient reason it is passed or adjourned, but the accused cannot be compelled to go to trial until his case is properly reached on the docket in the due course of the court's proceedings, for the accused has a right not only to his day in court, but to know when that day is and prepare for it. Thomas *v.* State, 36 Tex. 315.

7. Maxwell *v.* State, 89 Ala. 150, 7 So. 824.

8. Discharge for want of prosecution as bar to other prosecution see *supra*, IX, H, 2, b.

9. *Alabama.*— State *v.* Phil, 1 Stew. 31.

Arkansas.— Dillard *v.* State, 65 Ark. 404, 46 S. W. 533, construing Sandels & H. Dig. § 2161. See also Stewart *v.* State, 13 Ark. 720.

California.— *In re* Begerow, 133 Cal. 349, 65 Pac. 828, 85 Am. St. Rep. 178 (construing Pen. Code, § 1382); People *v.* Buckley, 116 Cal. 146, 47 Pac. 1009; People *v.* Morino, 85 Cal. 515, 24 Pac. 892; *Ex p.* Ross, 82 Cal. 109, 22 Pac. 1086.

Colorado.— Van Buren *v.* People, 7 Colo. App. 136, 42 Pac. 599.

Georgia.— Walker *v.* State, 89 Ga. 482, 15 S. E. 553; Brown *v.* State, 85 Ga. 713, 11 S. E. 831 (construing Code, § 4648); Adams *v.* State, 65 Ga. 516.

Illinois.— Brady *v.* People, 51 Ill. App. 112, construing Cr. Code, § 438.

Indiana.— State *v.* Kuhn, 154 Ind. 450, 57 N. E. 106, construing Burns Rev. St. (1894) § 1852; Horner Rev. St. (1897) § 1783.

Kansas.— *In re* McMicken, 39 Kan. 406, 18 Pac. 473, construing Cr. Code, §§ 220, 222.

Missouri.— State *v.* Mollineaux, 149 Mo. 646, 51 S. W. 462 (construing Rev. St. (1889) § 4222); Fanning *v.* State, 14 Mo. 386.

Nebraska.— Davis *v.* State, 51 Nebr. 301, 70 N. W. 984; Korth *v.* State, 46 Nebr. 631, 65 N. W. 792.

New York.— People *v.* Jefferds, 5 Park. Cr. 518.

Ohio.— State *v.* Barrett, 5 Ohio S. & C. Pl. Dec. 581; Johnson *v.* State, 6 Ohio Dec. (Reprint) 1208, 12 Am. L. Rec. 538, 42 Ohio St. 207.

Pennsylvania.— Respublica *v.* Arnold, 3 Yeates 263; Com. *v.* Philadelphia County Prison, 4 Brewst. 320.

South Carolina.— State *v.* Fasket, 5 Rich. 255; State *v.* Holmes, 3 Strobh. 272.

Tennessee.— State *v.* Sims, 1 Overt. 253.

Virginia.— Hall *v.* Com., 78 Va. 678; Com. *v.* Cawood, 2 Va. Cas. 527.

Washington.— State *v.* Hansen, 10 Wash. 235, 38 Pac. 1023.

See 14 Cent. Dig. tit. "Criminal Law," § 1297.

A defendant is "brought to trial," within the meaning of the statute, where after the evidence is in a juror becomes disabled and the jury is discharged. *Ex p.* Ross, 82 Cal. 109, 22 Pac. 1086.

Sentence after time has expired.— A statute providing that the accused must be brought to trial within the time specified, and entitling him to a discharge if he is not, does not invalidate sentence pronounced after the time has expired on a verdict rendered before it expired. State *v.* Watson, 95 Mo. 411, 8 S. W. 383.

10. Hammond *v.* State, 39 Nebr. 252, 58 N. W. 92; State *v.* Williams, 35 S. C. 160, 14 S. E. 309; State *v.* Holmes, 3 Strobh. (S. C.) 272; Logan *v.* State, 3 Brev. (S. C.) 415; State *v.* Bnyck, 2 Bay (S. C.) 563.

Bail generally see BAIL, 5 Cyc. 1.

11. State *v.* Endsley, 19 Utah 478, 57 Pac. 430.

12. State *v.* Sims, 1 Overt. (Tenn.) 253.

defendant shall not be detained in jail more than two consecutive terms without trial, except in certain specified cases, he is absolutely entitled to a speedy trial, and the court has no discretion to deny him that right.[13]

c. Necessity For Demand For Trial. A demand for a trial, a resistance to a postponement, or some other effort to secure a speedy trial must be shown to entitle the accused to a discharge under the statute by reason of the delay of the prosecution.[14]

d. Motion For Discharge. A demand or motion for a dismissal or discharge because of delay in the trial must be made before the trial begins.[15]

e. Effect of Discharge. A discharge by the court for failure to prosecute under a statute is an acquittal of the crime, and may be pleaded in bar to a subsequent prosecution.[16]

f. Delay caused by Accused — (i) *In General.* If the delay in coming to trial is caused by the accused, he cannot receive a discharge for delay.[17]

(ii) *Obtaining New Trial.* Where the accused has been promptly tried and convicted, and on his own motion the conviction is set aside and a new trial

13. The statute is imperative, and if the accused shows that he comes within its provisions, and the trial has not been postponed on his own application, he should be discharged.

California.— People *v.* Morino, 85 Cal. 515, 24 Pac. 892.

Colorado.— *In re* Garvey, 7 Colo. 502, 4 Pac. 758.

Georgia.— Walker *v.* State, 89 Ga. 482, 15 S. E. 553; Durham *v.* State, 9 Ga. 306.

Illinois.— Ochs *v.* People, 124 Ill. 399, 16 N. E. 662.

Indiana.— State *v.* Kuhn, 154 Ind. 450, 57 N. E. 106.

Kansas.— *In re* McMicken, 39 Kan. 406, 18 Pac. 473.

See 14 Cent. Dig. tit. "Criminal Law," § 1297.

14. *Arkansas.*— Dillard *v.* State, 65 Ark. 404, 46 S. W. 533; Stewart *v.* State, 13 Ark. 720.

Georgia.— Hunley *v.* State, 105 Ga. 636, 31 S. E. 543; Watts *v.* State, 26 Ga. 231; Price *v.* State, 25 Ga. 133.

Illinois.— Gallagher *v.* People, 88 Ill. 335.

Iowa.—State *v.* Enke, 85 Iowa 35, 51 N. W. 1146.

Kansas.— *In re* Edwards, 35 Kan. 99, 10 Pac. 539.

See 14 Cent. Dig. tit. "Criminal Law," § 1297.

A prisoner admitted to bail is not entitled to be discharged for want of prosecution, unless he shall appear and demand a trial. Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 303, 54 Am. St. Rep. 447, 35 L. R. A. 176. Although the accused has forfeited his recognizance he is entitled, if there be a proper jury in attendance, to have his demand for trial put on the minutes. Hall *v.* State, 21 Ga. 148. A motion to discharge the accused on his own recognizance, where he was on bail, based upon the delay of the prosecuting attorney in trying the accused, was refused in U. S. *v.* Thorne, 15 Fed. 739.

If he makes a demand and the jury is impaneled and qualified to try the prisoner and he is not tried, he is then entitled to be absolutely discharged. Kerese *v.* State, 10 Ga. 95.

The demand for trial must be made before the jury is discharged for the term (Moreland *v.* State, 51 Ga. 192; Jordan *v.* State, 18 Ga. 532); and the benefit of it is not lost by the entry of a *nolle prosequi* without defendant's consent, or by a mistrial on a new indictment (Brown *v.* State, 85 Ga. 713, 11 S. E. 831).

The prisoner must usually show that the demand was made in accordance with the terms of the statute (Couch *v.* State, 28 Ga. 64) in the court in which the case is pending (Hunley *v.* State, 105 Ga. 636, 31 S. E. 543).

15. People *v.* Hawkins, 127 Cal. 372, 59 Pac. 697; People *v.* Bennett, 114 Cal. 56, 45 Pac. 1013; *Ex p.* Fennessy, 54 Cal. 101.

16. This is the rule under a statute declaring the accused to be "entitled to be discharged as far as relates to such offense." State *v.* Wear, 145 Mo. 162, 46 S. W. 1099; *Ex p.* McGehan, 22 Ohio St. 442. The same rule of course would apply where the statute provides that the prisoner shall be absolutely discharged and acquitted. Durham *v.* State, 9 Ga. 306; Denny *v.* State, 6 Ga. 491; McGuire *v.* Wallace, 109 Ind. 284, 10 N. E. 111; Com. *v.* Adcock, 8 Gratt. (Va.) 661; Vance *v.* Com., 2 Va. Cas. 162.

If, however, the statute merely provides that the accused shall be discharged or "set at liberty" in case he is not promptly tried, no implication arises that an acquittal is intended, and his discharge cannot be pleaded in bar. *In re* Garvey, 7 Colo. 502, 4 Pac. 758; State *v.* Garthwaite, 23 N. J. L. 143. See also Cummins *v.* People, 4 Colo. App. 71, 34 Pac. 734. And in some cases the statute expressly provides that the discharge shall not be a bar. *In re* Begerow, 136 Cal. 292, 68 Pac. 773, 56 L. R. A. 528; *Ex p.* Clarke, 54 Cal. 412.

17. Moreland *v.* State, 51 Ga. 192; State *v.* Steen, 115 Mo. 474, 22 S. W. 461; State *v.* Marshall, 115 Mo. 383, 22 S. W. 452; State *v.* Nugent, 8 Mo. App. 563; Green *v.* Com., 1 Rob. (Va.) 731.

ordered, he will not be entitled to a discharge under the statute because of the delay of the prosecution in trying him the second time, as the delay was caused by his efforts to reverse his conviction.[18]

g. Excuse For State's Delay — (i) *In General.* Delay on the part of the state in trying one accused of crime may be excused, especially if such delay is for unavoidable reasons.[19]

Application for discharge must show that the delay did not happen through the prisoner's acts, and that it was not caused by lack of time to try the case. Korth *v.* State, 46 Nebr. 631, 65 N. W. 792.

Failure of defendant to object to postponements, or his objection to an immediate trial, is equivalent to a delay granted at his request. People *v.* Benc, 130 Cal. 159, 62 Pac. 404; People *v.* Cline, 74 Cal. 575, 16 Pac. 391; State *v.* Arthur, 21 Iowa 322.

Such delay results where defendant keeps away the state's witnesses by threats (Respublica *v.* Arnold, 3 Yeates (Pa.) 263; Com. *v.* Philadelphia County Prison, 4 Brewst. (Pa.) 320); where the principal absconds, and the accessary being about to be put on trial refuses to be tried without the principal (Com. *v.* Allegheny County, 16 Serg. & R. (Pa.) 304); where the acoused moves to quash the indictment, and the court holds the motion under advisement during the term (*Ex p.* Walton, 2 Whart. (Pa.) 501); where defendant consents to a continuance (Healy *v.* People, 177 Ill. 306, 52 N. E. 426; State *v.* O'Connor, 6 Kan. App. 770, 50 Pac. 949), or being indicted jointly with others he asks for a separate trial, and this being granted, the trial of the other defendants extends beyond the statutory period (People *v.* Matson, 129 Ill. 591, 22 N. E. 456).

Procuring federal injunction.— Where the accused obtained a federal injunction staying his trial in the state court, and prohibiting certain records from being used against him, he cannot, after the injunction is dissolved, claim the benefit of a statute which provides that one not brought to trial within a certain time after indictment shall be forever discharged. Wadley *v.* Com., 98 Va. 803, 35 S. E. 452.

18. *California.*— People *v.* Lundin, 120 Cal. 308, 52 Pac. 807.

Georgia.— Silvey *v.* State, 84 Ga. 44, 10 S. E. 591.

Illinois.— Marzen *v.* People, 190 Ill. 81, 60 N. E. 102.

New Jersey.—Patterson *v.* State, 50 N. J. L. 421, 14 Atl. 125.

Pennsylvania.— Com. *v.* County Prison, 97 Pa. St. 211.

Virginia.— Smith *v.* Com., 85 Va. 924, 9 S. E. 148; Com. *v.* Adcock, 8 Gratt. 661; Vance *v.* Com., 2 Va. Cas. 162.

West Virginia.— State *v.* Strauder, 11 W. Va. 745, 27 Am. Rep. 606.

See 14 Cent. Dig. tit. "Criminal Law," § 1300.

Although three terms intervene pending an appeal, the accused is not entitled to be discharged under a statute which provides that if any person indicted shall not be brought to trial before the end of the third term he shall be discharged. State *v.* Bulling, 105 Mo. 204, 15 S. W. 367, 16 S. W. 830.

Where the statute provides that the accused must be brought to trial within sixty days after the indictment, and he has his conviction set aside and a new trial ordered, the running of the sixty days commences from the date of the order. *In re* Murphy, 7 Wash. 257, 34 Pac. 834.

19. See *infra*, note 20 *et seq.*

Illustrations.— The fact that the court is engaged in the trial of another case having precedence over that of the accused (People *v.* Benc, 130 Cal. 159, 62 Pac. 404; People *v.* Vasalo, 120 Cal. 168, 52 Pac. 305; People *v.* Henry, 77 Cal. 445, 19 Pac. 830), that the prosecuting attorney was engaged in the public service as a member of the assembly (Kibler *v.* Com., 94 Va. 804, 26 S. E. 858), that the term failed and no court was had because the judge was too sick to hold court (State *v.* Huting, 21 Mo. 464), or that the commonwealth could not procure witnesses in time, where due diligence is shown on its part (Com. *v.* Brummer, 8 Phila. (Pa.) 607) may excuse the delay of the prosecution; but the fact that the county attorney and sheriff had heard and believed that defendant had left the state (State *v.* Radoicich, 66 Minn. 294, 69 N. W. 25), or that witnesses could not be found, where no diligence is shown in searching for them (People *v.* Buckley, 116 Cal. 146, 47 Pac. 1009), does not show good cause for delay.

Where the trial court, because of bad weather, backwardness of crops, and a belief that public interests would be promoted by so doing, adjourned the term *sine die,* when a prisoner was in jail, over the objection of his counsel, the court on habeas corpus, without venturing to determine whether these were sufficient reasons to warrant the action taken, intimated that the trial judge assumed a very grave responsibility and one that should never be assumed save under such extraordinary circumstances as pestilence or public necessity which rendered it proper to subordinate private rights to the public welfare. *Ex p.* Caples, 58 Miss. 358.

Where a statute enumerates certain excuses for omitting to try a prisoner, it will not be presumed to intend to exclude others of the same nature not enumerated, for by fair implication they may be comprised within the spirit of the statute. Com. *v.* Adcock, 8 Gratt. (Va.) 661.

Appeal by state.— An appeal by the state from the granting of a new trial, pending which two terms elapse without a trial, does not constitute inexcusable delay on the part of the state, or deny the defendant his right

(II) *Disagreement of Jury.* A trial resulting in a disagreement of the jury does not constitute a failure to prosecute or entitle the accused to his discharge under the statute.[20]

(III) *Impossibility of Procuring Jury.* The fact that the panel was exhausted before the jury was obtained at a regular term may be shown by the state as an excuse for a failure to bring on a trial within the time prescribed.[21]

(IV) *Failure of Term.* If there is no term by reason of circumstances over which the prosecution has no control it is excused for the delay.[22]

h. Computation of the Terms. The term at which the accused is indicted is not counted, where the statute provides that he must be brought to trial within a specified number of terms, or before the expiration of the second, third, or some following term.[23] Delay for a certain number of terms of the court after he is held means regular and entire terms of the court and not parts or fractions of terms.[24]

i. Failure to Indict.[25] In the absence of a statute establishing a different rule, where no indictment or information is filed against a defendant held for a crime, during the term at which he was held to answer, and the grand jury is in session

to a speedy trial, where he was twice brought to trial within the period prescribed. State *v.* Conrow, 13 Mont. 552, 35 Pac. 240, construing Mont. Cr. Prac. Act, § 303.

20. Little *v.* State, 54 Ga. 24; Gillespie *v.* People, 176 Ill. 238, 52 N. E. 250; State *v.* Spergen, 1 McCord (S. C.) 563.

Mass. Gen. St. c. 171, § 30, giving the prisoner the right to be tried at the next term of the court after six months have expired from the time when he was imprisoned, does not give him the absolute right to have an acquittal or conviction or to be discharged; but if he is tried before that term and the jury disagree his demand for another trial is addressed to the discretion of the court. *In re* Glover, 109 Mass. 340.

21. *Ex p.* Stanley, 4 Nev. 113. For it has been held that a delay in trial will not entitle the accused to a discharge unless at the term when the demand for a trial was made, and at the next term there were jurors impaneled and qualified to try the prisoner. Roebuck *v.* State, 57 Ga. 154. See also State *v.* Aaron, 4 N. J. L. 231, 7 Am. Dec. 592.

Failure to call a jury.— It is not a sufficient excuse for the state that no jury was called at a regular term of the court, unless the state shall also show a good reason for not calling the jury. State *v.* Brodie, 7 Wash. 442, 35 Pac. 137.

22. Clark *v.* Com., 29 Pa. St. 129.

It must appear that the terms were actually held at which he might have been indicted, and the state is in default. Byrd *v.* State, 1 How. (Miss.) 163. The words "term of the court" mean a grand jury term at which an indictment could be found. Jones *v.* Com., 19 Gratt. (Va.) 478.

The word "term," in a statute providing that the accused shall be tried at or before a certain term, means not the time when the court should be held, but the actual session of the court. *Ex p.* Santee, 2 Va. Cas. 363.

The destruction by fire of the court-house, and of so much of the city as made it impossible for the court to find a suitable room, is an excuse not proceeding to trial. *Ex p.* Larkin, 11 Nev. 90.

23. *Arkansas.*— Stewart *v.* State, 13 Ark. 720.

Colorado.— Van Buren *v.* People, 7 Colo. App. 136, 42 Pac. 599.

Illinois.— Gillespie *v.* People, 176 Ill. 238, 52 N. E. 250; Grady *v.* People, 125 Ill. 122, 16 N. E. 654; Ochs *v.* People, 124 Ill. 399, 16 N. E. 662 [*affirming* 25 Ill. App. 379]; Watson *v.* People, 27 Ill. App. 493.

Missouri.— State *v.* Cox, 65 Mo. 29; Robinson *v.* State, 12 Mo. 592.

Nebraska.— Whitener *v.* State, 46 Nebr. 144, 64 N. W. 704; Hammond *v.* State, 39 Nebr. 252, 58 N. W. 92.

Virginia.— Davis *v.* Com., 89 Va. 132, 15 S. E. 388; Bell *v.* Com., 8 Gratt. 600; Bell's Case, 7 Gratt. 646.

See 14 Cent. Dig. tit. "Criminal Law," § 1304.

New indictment.— An unbailed prisoner must be discharged after two terms have elapsed after the finding of the original indictment. The time cannot be computed with reference to a subsequent indictment, where he has been continuously in jail. Brooks *v.* People, 88 Ill. 327.

24. Sands *v.* Com., 20 Gratt. (Va.) 800.

The presumption being that regular terms are referred to, the accused is not entitled to a discharge because the state fails to try him at the next special term subsequent to the regular term at which he demands a trial (Stripland *v.* State, 115 Ga. 578, 41 S. E. 987), although the general rule is that where the legislature has provided an extra or special criminal term, the case which was continued at the preceding regular term may be tried at the special term (Oneal *v.* State, 47 Ga. 229; Oshoga *v.* State, 3 Pinn. (Wis.) 56, 3 Chandl. (Wis.) 57).

25. Excusing failure to indict.—It is sometimes provided by statute that the prosecution shall not be dismissed where good cause for not doing so is shown. *Ex p.* Bull, 42 Cal. 196.

during such time, he is entitled to be discharged.[26] It has been decided that if the grand jury is in session it must be shown that it heard evidence or acted upon the accusation against him.[27] The accused must show that the charge against him was fully investigated.[28]

B. Time For Preparation of Defense — 1. Reasonable Time Allowed. The accused is entitled absolutely to a reasonable time to prepare his defense.[29] Some statutes specify that he shall have a certain number of days after plea to prepare for trial.[30]

2. Time Allowed Counsel. In the absence of statute the time allowed counsel to prepare for trial is in the sound discretion of the court.[31]

3. Trial at Term at Which Accused Is Arrested. The case of the accused may be set for trial at the same term of court during which he was arrested if he is given sufficient time to employ counsel and prepare for trial.[32] So a trial

26. *Alabama.*— Young *v.* State, 131 Ala. 51, 31 So. 373.

Mississippi.— *Ex p.* Jefferson, 62 Miss. 223; *Ex p.* Caples, 58 Miss. 358.

Nebraska.— Cerny *v.* State, 62 Nebr. 626, 87 N. W. 336; State *v.* Miller, 43 Nebr. 860, 62 N. W. 238.

Texas.— Bennett *v.* State, 27 Tex. 701.

United States.— *In re* Esselborn, 8 Fed. 904, 20 Blatchf. 1.

See 14 Cent. Dig. tit. "Criminal Law," § 1301.

But if at a subsequent term of the court an information is filed and defendant pleads guilty and is convicted an arrest of judgment is properly denied. Cerny *v.* State, 62 Nebr. 626, 87 N. W. 336; Leisenberg *v.* State, 60 Nebr. 628, 84 N. W. 6.

Original indictment.— A provision compelling the dismissal of a defendant against whom an indictment has been ignored does not apply to an indictment which was quashed on demurrer, and the case resubmitted to the grand jury, who failed for several terms to reindict the defendant. *Ex p.* Job, 17 Nev. 184, 30 Pac. 699.

27. This will not be presumed. People *v.* Hessing, 28 Ill. 410.

28. *Ex p.* Jefferson, 62 Miss. 223.

29. This rule applies to all crimes however heinous.

Illinois.— Dunn *v.* People, 109 Ill. 635.

Indiana.— Kennedy *v.* State, 81 Ind. 379; Lindville *v.* State, 3 Ind. 580.

Louisiana.—State *v.* Pool, 50 La. Ann. 449, 23 So. 503; State *v.* Boyd, 37 La. Ann. 781; State *v.* Wilson, 33 La. Ann. 261; State *v.* Baptiste, 26 La. Ann. 134.

Pennsylvania.— Com. *v.* Winnemore, 2 Brewst. 378.

South Carolina.— State *v.* Briggs, 1 Brev. 8; State *v.* Lewis, 1 Bay 1.

Texas.— King *v.* State, (Cr. App. 1900) 56 S. W. 926; Lockwood *v.* State, 32 Tex. Cr. 137, 22 S. W. 413.

See 14 Cent. Dig. tit. "Criminal Law," § 1305.

30. In Iowa the statute gives the accused three days to prepare for trial if demanded. This right is waived by a motion for a continuance (State *v.* Harris, 100 Iowa 188, 69 N. W. 413), by an insistence on an earlier trial (State *v.* King, 97 Iowa 440, 66 N. W. 735), or by a continuance coupled with a promise to be ready for trial on a subsequent day (State *v.* Jordan, 87 Iowa 86, 54 N. W. 63). A provision that the accused shall not be tried until the expiration of five days "after his arrest," means the arrest which consists in being taken into custody before the justice, and not a rearrest after the information is filed. State *v.* Humason, 5 Wash. 499, 32 Pac. 111.

Waiver.— The objection that defendant was not given time to prepare is waived by going to trial without applying for time, or asserting that he was unprepared (People *v.* Winthrop, 118 Cal. 85, 50 Pac. 390; Fletcher *v.* State, 37 Tex. Cr. 193, 39 S. W. 116; Butler *v.* State, 36 Tex. Cr. 483, 38 S. W. 787), and if the evidence is strong an objection that the trial follows within a week or ten days after the commission of the crime has no merit (Freeman *v.* State, (Miss. 1901) 29 So. 75). See also People *v.* Calton, 5 Utah 451, 16 Pac. 902.

31. Charlon *v.* State, 106 Ga. 400, 32 S. E. 347; Rex *v.* Rogers, 3 Burr. 1809.

A reasonable time according to the circumstances should be allowed, and where this is refused a new trial will be granted. Jones *v.* State, 115 Ga. 814, 42 S. E. 271; Hunt *v.* State, 102 Ga. 569, 27 S. E. 670.

The constitutional guarantee that the accused shall have the assistance of counsel is not a barren right but one of inestimable value to him, and he should not be deprived of it by compelling counsel to go to trial unprepared, on the spur of the moment, and without an opportunity of studying the case. If the accused is to have the assistance of counsel, counsel must have adequate time to prepare to render such assistance. State *v.* Pool, 50 La. Ann. 449, 23 So. 503; State *v.* Brooks, 39 La. Ann. 239, 1 So. 421; State *v.* Simpson, 38 La. Ann. 23; State *v.* Ferris, 16 La. Ann. 424.

32. Shipley *v.* State, 50 Ark. 49, 6 S. W. 226; Allen *v.* State, 9 Ga. 492; State *v.* Asbell, 57 Kan. 398, 46 Pac. 770; State *v.* Lund, 49 Kan. 580, 31 Pac. 146; Noe *v.* State, 4 How. (Miss.) 330.

One held by a justice for a felony may be tried at a term of the court then in session (Page *v.* Com., 27 Gratt. (Va.) 954); or if an information is filed, the warrant issued

on an indictment for a felony may be fixed for the same term of the court at which the indictment was found.[33]

4. SECOND TRIAL AT SAME TERM. Where the jury disagrees and are discharged it is not error for the court to proceed to another trial of the accused at the same term with another jury.[34]

XIV. TRIAL.[35]

A. Preliminary Proceedings — 1. CONSOLIDATING OR TRYING INDICTMENTS TOGETHER. Congress has enacted that where several charges against the same person, for the same act, or for connected acts, are contained in two or more indictments they may be consolidated.[36] And there is a similar statute in force in Colorado.[37] It has been said that trying a defendant upon two indictments at once, even with his consent, is irregular, and that such a practice should be condemned.[38] The trial by the same jury of two indictments for conspiracy found at different sessions of the court has been allowed;[39] but where after a trial for a misdemeanor the judge before charging the jury called up another similar case for trial and submitted both at once to the same jury, it was held that the court committed error.[40] There is no impropriety in trying a prisoner at the same time for different offenses charged in the same indictment, if the offenses are of the same grade and subject to the same punishment.[41] A case may be tried on a second indictment when the first was invalid,[42] or dismissed before the trial.[43]

2. NOTICE OF TRIAL. Whether or not the defendant must be served with written notice of the time of trial depends largely upon special statutes and rules of court regulating practice.[44]

thereon is returnable forthwith, and the information must be tried at that term unless the case is continued for sufficient cause (*In re* Jourdan, 54 Kan. 496, 38 Pac. 556; *In re* Vance, 54 Kan. 495, 38 Pac. 557). Under Iowa Rev. § 4723, it appears that a person indicted without first having been bound over to the grand jury cannot without his consent be tried at the term at which the indictment was found. State *v.* Harris, 33 Iowa 356.

33. Holly *v.* Com., 36 S. W. 532, 18 Ky. L. Rep. 441.

34. *Arizona.*— Territory *v.* Davis, (1886) 10 Pac. 359.

Connecticut.— State *v.* Allen, 47 Conn. 121.

Delaware.— State *v.* Updike, 4 Harr. 581.

Indiana.— Pierce *v.* State, 67 Ind. 354.

Massachusetts.— Com. *v.* Burke, 16 Gray 32.

Missouri.— State *v.* Scott, 45 Mo. 302.

United States.— U. S. *v.* White, 28 Fed. Cas. No. 16,675, 5 Cranch C. C. 38.

See 14 Cent. Dig. tit. "Criminal Law," § 1296.

One convicted of felony may be afterward tried at the same term for a separate offense (Richardson *v.* State, 43 Tex. 539), or for the same offense if his conviction be set aside (Craft *v.* Com., 24 Gratt. (Va.) 602).

35. Trial in civil cases see TRIAL.

36. U. S. Rev. St. (1878) § 1024 [U. S. Comp. St. (1901) p. 720]; Williams *v.* U. S., 168 U. S. 382, 18 S. Ct. 92, 42 L. ed. 509; Logan *v.* U. S., 144 U. S. 263, 12 S. Ct. 617, 36 L. ed. 429 [*reversing* 45 Fed. 872]; U. S. *v.* Durhee, 25 Fed. Cas. No. 15,008. See also McElroy *v.* U. S., 164 U. S. 76, 17 S. Ct. 31, 41 L. ed. 355.

37. Short *v.* People, 27 Colo. 175, 60 Pac. 350; Parker *v.* People, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803.

Consolidation by request.— Where a number of indictments have been consolidated for trial, in order to accommodate the defendants named therein, they cannot be heard to complain of the action of the court induced by their request. Parker *v.* People, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803.

38. McClellan *v.* State, 32 Ark. 609.

39. Withers *v.* Com., 5 Serg. & R. (Pa.) 59.

40. State *v.* Devlin, 25 Mo. 174.

41. People *v.* Gates, 13 Wend. (N. Y.) 311. See also Com. *v.* Dupes, 14 Pa. Co. Ct. 238.

42. State *v.* Daniel, 31 La. Ann. 91.

43. State *v.* Andrews, 76 Mo. 101.

44. Collier *v.* State, 20 Ark. 36.

Failure to serve notice of a special term when required may be waived by failing to object at the trial. State *v.* Kavanaugh, 133 Mo. 452, 33 S. W. 33, 34 S. W. 842. It has been held also that where the statute does not require notice, holding such a special term without notice is not error (Collier *v.* State, 20 Ark. 36), although usually, even in the absence of statute, the prisoner should have notice of his trial to enable him to prepare (Collier *v.* State, 20 Ark. 36; State *v.* Townsend, 44 La. Ann. 569, 10 So. 926).

Validity of notice.— See State *v.* Washington, 37 La. Ann. 828.

Sufficiency of oral notice.— See State *v.* Cassidy, 7 La. Ann. 273.

To whom given.— A notice need not necessarily be given to the defendant's counsel, but may be given to the defendant himself. May *v.* State, 38 Nebr. 211, 56 N. W. 804.

3. DOCKETING CASE. The clerk's failure to docket the case, where defendant is out on bail, is the omission to perform a ministerial duty only and does not operate as a discontinuance.[45]

4. FURNISHING BILL OF PARTICULARS. If a valid indictment omits details necessary for defendant to know the judge has a discretion,[46] which is, except for gross abuse, not reviewable,[47] to direct, upon application, that the prosecution shall furnish a bill of particulars.[48]

5. FURNISHING LIST OF GRAND JURORS. In the absence of statute a defendant has no right to a list of the grand jurors by whom he was indicted.[49]

6. SEPARATE TRIAL OF JOINT DEFENDANTS — a. In General. In the absence of a statute conferring on one jointly indicted the right to a separate trial, it is in the discretion of the court to grant separate trials to defendants jointly indicted. They are not entitled to this of right, and separate trials will be granted only when the court in its opinion sees good cause therefor.[50]

b. Statutory Provisions. A statute giving a right to a severance is imperative. The court must grant the severance without condition or limitation, and a refusal to do so is reversible error.[51]

45. *Ex p.* State, 115 Ala. 123, 22 So. 115.

46. People *v.* McKinney, 10 Mich. 54; State *v.* Bacon, 41 Vt. 526, 98 Am. Dec. 616.

47. Com. *v.* Wood, 4 Gray (Mass.) 11; Com. *v.* Giles, 1 Gray (Mass.) 466.

48. The bill of particulars should set forth in detail such dates, times, places, and other facts as will fully inform the defendant of the crime charged against him. The prosecuting officer is then restricted in his evidence to the particulars thus specified. Com. *v.* Snelling, 15 Pick. (Mass.) 321; Reg. *v.* Bootyman, 5 C. & P. 300, 24 E. C. L. 576; Rex *v.* Hodgson, 3 C. & P. 422, 14 E. C. L. 642; Reg. *v.* Esdaile, 1 F. & F. 213. But see People *v.* Alviso, 55 Cal. 230.

Requisites and sufficiency of bill of particulars see INDICTMENTS AND INFORMATIONS.

49. Fouts *v.* State, 8 Ohio St. 98.

50. *Alabama.*— Jackson *v.* State, 104 Ala. 1, 16 So. 523; Parmer *v.* State, 41 Ala. 416; Wade *v.* State, 40 Ala. 74.

Florida.— Ballard *v.* State, 31 Fla. 266, 12 So. 865.

Georgia.— Stewart *v.* State, 58 Ga. 577; Caldwell *v.* State, 34 Ga. 10.

Hawaii.— Rex *v.* Wo Sow, 7 Hawaii 734.

Illinois.— Henry *v.* People, 198 Ill. 162, 65 N. E. 120; Gillespie *v.* People, 176 Ill. 238, 52 N. E. 250; Doyle *v.* People, 147 Ill. 394, 35 N. E. 372; Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

Indiana.— Douglass *v.* State, 72 Ind. 385; Lawrence *v.* State, 10 Ind. 453.

Iowa.— State *v.* Jamison, 110 Iowa 337, 81 N. W. 594; State *v.* Gigher, 23 Iowa 318.

Louisiana.— State *v.* Adam, 105 La. 737, 30 So. 101; State *v.* Desroche, 47 La. Ann. 651, 17 So. 209; State *v.* Taylor, 45 La. Ann. 605, 12 So. 927; State *v.* Johnson, 34 La. Ann. 48.

Maine.— State *v.* Conley, 39 Me. 78; State *v.* Soper, 16 Me. 293, 33 Am. Dec. 665.

Massachusetts.— Com. *v.* Seeley, 167 Mass. 163, 45 N. E. 91; Com. *v.* Powers, 109 Mass. 353; Com. *v.* Thompson, 108 Mass. 461; Com. *v.* Hills, 10 Cush. 530.

Michigan.—People *v.* Fuhrmann, 103 Mich. 593, 61 N. W. 865.

Minnesota.—State *v.* Thaden, 43 Minn. 325, 45 N. W. 614.

Mississippi.— Stewart *v.* State, 64 Miss. 626, 2 So. 73.

New Jersey.— Roesel *v.* State, 62 N. J. L. 216, 41 Atl. 408.

New York.— Armsby *v.* People, 2 Thomps. & C. 157; People *v.* Howell, 4 Johns. 296; People *v.* Stockham, 1 Park. Cr. 424; Shaw's Case, 1 City Hall Rec. 177.

North Carolina.—State *v.* Finley, 118 N. C. 1161, 24 S. E. 495; State *v.* Smith, 24 N. C. 402.

Ohio.— Whitehead *v.* State, 10 Ohio St. 449; Bixbee *v.* State, 6 Ohio 86.

Pennsylvania.— Com. *v.* Place, 153 Pa. St. 314, 26 Atl. 620; Com. *v.* Manson, 2 Ashm. 31; Com. *v.* Hughes, 11 Phila. 430.

Rhode Island.— State *v.* Ballou, 20 R. I. 607, 40 Atl. 861.

South Carolina.— State *v.* Mitchell, 49 S. C. 410, 27 S. E. 424; State *v.* Dodson, 14 S. C. 628; State *v.* McGrew, 13 Rich. 316; State *v.* McLendon, 5 Strobh. 85; State *v.* Yancey, 3 Brev. 306.

Texas.— Brooks *v.* State, 42 Tex. Cr. 347, 60 S. W. 53.

Vermont.— State *v.* Fournier, 68 Vt. 262, 35 Atl. 178.

Virginia.— *In re* Curran, 7 Gratt. 619.

West Virginia.—State *v.* Prater, 52 W. Va. 132, 43 S. E. 230.

Wisconsin.— Emery *v.* State, 101 Wis. 627, 78 N. W. 145.

United States.— U. S. *v.* Ball, 163 U. S. 662, 16 S. Ct. 1192, 41 L. ed. 300; U. S. *v.* Kelly, 26 Fed. Cas. No. 15,516, 4 Wash. 528; U. S. *v.* White, 28 Fed. Cas. No. 16,682, 4 Mason 158.

England.— Reg. *v.* Richards, 1 Cox C. C. 62.

Canada.— Reg. *v.* Weir, 3 Can. Cr. Cas. 351.

See 14 Cent. Dig. tit. "Criminal Law," § 1380.

51. *Alabama.*— Andy *v.* State, 87 Ala. 23, 6 So. 53.

Colorado.— Davis *v.* People, 22 Colo. 1, 43 Pac. 122.

c. Who May Ask For. At common law the prosecution had the right of election, subject to the control and discretion of the court, whether to arraign and try prisoners jointly indicted separately or jointly.[52] Ordinarily the application for the severance comes from the defendant and he must show good cause therefor, unless the statute gives him the right to a severance absolutely.[53]

d. Causes For Which Permitted — (I) *Antagonistic Defenses.* Where the defenses of two or more jointly indicted are antagonistic, the court does not err in directing a separate trial for each.[54]

(II) *To Admit Evidence* — (A) *Of Husband or Wife.* If the evidence of the husband or wife is indispensable,[55] separate trials will usually be granted, and the evidence of the husband or wife of any defendant may be received against a co-defendant separately. (B) *Of Defendant.* Where one defendant desires the testimony of another jointly indicted, it is proper to grant separate trials, and on the acquittal of such person he may testify for the other.[57] If it appears to the court that

Mississippi.—Malone *v.* State, 77 Miss. 812, 26 So. 968; Greer *v.* State, 54 Miss. 378.

Tennessee.— State *v.* Knight, 3 Baxt. 418.

Texas.— Thompson *v.* State, 35 Tex. Cr. 511, 34 S. W. 629; Teiman *v.* State, 28 Tex. App. 144, 12 S. W. 742; Willey *v.* State, 22 Tex. App. 408, 3 S. W. 570.

See 14 Cent. Dig. tit. "Criminal Law," § 1380.

Contra.— Metz *v.* State, 46 Nebr. 547, 65 N. W. 190, holding that the severance was discretionary.

Not entitled to joint trial.— A statute which expressly or by implication entitles defendant to elect to be tried separately does not unless expressly so stated entitle him to demand to be tried jointly, and the action of the court in ordering his separate trial on the application of the prosecution is not reversible error. Barnes *v.* Com., 92 Va. 794, 23 S. E. 784; *In re* Curran, 7 Gratt. (Va.) 619; State *v.* Roberts, 50 W. Va. 422, 40 S. E. 484.

52. *In re* Curran, 7 Gratt. (Va.) 619; State *v.* Prater, 52 W. Va. 132, 43 S. E. 230; State *v.* Roberts, 50 W. Va. 422, 40 S. E. 484. See also Stewart *v.* State, 58 Ga. 577; Com. *v.* Hughes, 11 Phila. (Pa.) 430.

Origin of trying separately.—The practice of trying separately persons jointly indicted, on the application of the prosecution, grew out of the great inconvenience which resulted from the exercise by each joint defendant of the several right to challenge jurors peremptorily, each being entitled to the same number of challenges that he had on a separate trial. The venire and tales were frequently exhausted and trials were prevented from the deficiencies of juries at the same assizes. Accordingly, when the several defendants would not agree to join in their peremptory challenges, the court would, on the application of the crown, sever the trial. Ballard *v.* State, 31 Fla. 266, 12 So. 865.

The right of the prosecution to try prisoners separately is secured by statute in New York. Code Cr. Proc. 462; People *v.* Clark, 102 N. Y. 735, 8 N. E. 38.

53. See *supra*, XIV, A, 6, b.

In case one defendant's motion for a severance is denied, but a severance is granted his co-defendant, he cannot complain. State *v.* Scanlan, 52 La. Ann. 2058, 28 So. 211.

54. State *v.* Desroche, 47 La. Ann. 651, 17 So. 209; Roach *v.* State, 5 Coldw. (Tenn.) 39. But the fact that one defendant is attempting to escape by throwing the blame on the other is not a sufficient ground. Com. *v.* Place, 153 Pa. St. 314, 26 Atl. 620.

In an English case it was held, where it is likely that injustice may be caused to any one of several defendants charged by the same indictment, by trying them together, the court may order them to be tried separately. Reg. *v.* Cox, [1898] 1 Q. B. 179, 18 Cox C. C. 672, 67 L. J. Q. B. 293, 77 L. T. Rep. N. S. 534.

55. If the wife's evidence is shown to be immaterial to her husband's co-defendant the denial of a motion for a severance is proper. Emery *v.* State, 101 Wis. 627, 78 N. W. 145.

The mere fact that the husband is a party to the record does not of itself exclude the wife as a witness on behalf of other parties, but the rule of exclusion is only to be applied to cases in which the interests of the husband are to be affected by the testimony of the wife. Thompson *v.* Com., 1 Metc. (Ky.) 13.

56. *Kentucky.*—Thompson *v.* Com., 1 Metc. 13.

Maine.— State *v.* Worthing, 31 Me. 62.

Massachusetts.— Com. *v.* Easland, 1 Mass. 15.

Missouri.— State *v.* McCarron, 51 Mo. 27; State *v.* Burnside, 37 Mo. 343.

South Carolina.— State *v.* Drawdy, 14 Rich. 87; State *v.* Anthony, 1 McCord 285.

Tennessee.— Moffit *v.* State, 2 Humphr. 99, 36 Am. Dec. 301.

See 14 Cent. Dig. tit. "Criminal Law," § 1382.

The reason for this is that the husband or wife of one jointly indicted with others is not a competent witness either for or against a joint defendant. See cases cited *supra*, this note.

57. *Louisiana.*— State *v.* Leonard, 6 La. Ann. 420.

Massachusetts.— Com. *v.* Robinson, 1 Gray 555.

there is no evidence against the party whose testimony is desired, the severance ought to be granted; but if it appears to the court that there is evidence, although it may be insufficient for a conviction, the court does not err in refusing a severance.[58]

(c) *Confessions.* If one of several defendants jointly indicted confesses, and his confession involves another defendant, it is highly proper to order a separate trial, so that the confession, while evidence against the one confessing, may not prejudice the jury against the other.[59]

(III) *Adultery.* One of two defendants jointly indicted for adultery may be separately tried and convicted, although the other has been acquitted.[60]

(IV) *Escape of Defendant.* An escape of one of several persons jointly indicted before his trial creates a severance, and the court may proceed to try the others.[61]

(V) *Change of Venue or Continuance.* An application for a change of venue by one of several jointly indicted,[62] or for a continuance,[63] necessarily by implication includes a motion for a separate trial. The granting of such motion necessarily works a severance.[64]

(VI) *Plea of Guilty.* A plea of guilty by one of several jointly indicted, and of not guilty by the others, operates as a severance.[65]

e. Grade or Degree of Offense. The granting of a separate trial to defendants who are jointly indicted is equally within the discretion of the trial court, whether the defendants are indicted for a capital crime or other felony,[66] or

Michigan.—People *v.* McCullough, 81 Mich. 25, 45 N. W. 515.

Rhode Island.— Anthony *v.* State, 2 R. I. 305.

Tennessee.— Morrow *v.* State, 14 Lea 475.

Texas.— Williams *v.* State, (Cr. App. 1898) 44 S. W. 1103; Perry *v.* State, (Cr. App. 1896) 34 S. W. 618.

United States.— U. S. *v.* Davis, 25 Fed. Cas. No. 14,931.

England.— Reg. *v.* Bradlaugh, 15 Cox C. C. 217.

Discretion of court.— The granting of the application, in the absence of statute, is in the discretion of the court. See cases cited *supra*, this note.

58. Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Shay *v.* Com., 36 Pa. St. 305. See *supra*, XIV, A, 6, a.

The rule in Texas is that where several persons jointly indicted are put on their trial together, and there is little or no evidence against one of them, who is willing to be tried on the evidence of the prosecution, the jury should be instructed to pass on his case at once before the other defendants have opened their defense, so that if he be acquitted they may have his testimony, and it is error to refuse so to instruct. Bybee *v.* State, 36 Tex. 366; Jones *v.* State, 13 Tex. 168, 62 Am. Dec. 550. This is so, however, only where the defendant whose testimony is needed is producible. Where the effect of the severance would be to continue the case on account of his sickness it may be denied. Thompson *v.* State, 35 Tex. Cr. 511, 34 S. W. 629.

59. Davis *v.* People, 22 Colo. 1, 43 Pac. 122; State *v.* Cately, 52 La. Ann. 574, 26 So. 1004; Com. *v.* James, 99 Mass. 438; Reg. *v.* Jackson, 7 Cox C. C. 357.

As an implicating admission is not conclusive upon the question of a separate trial, it may be sufficient to instruct the jury that they are not to consider the confession as against the other defendants jointly indicted. Com. *v.* Bingham, 158 Mass. 169, 33 N. E. 341.

60. *Massachusetts.*— Com. *v.* Bakeman, 131 Mass. 577, 41 Am. Rep. 248.

North Carolina.— State *v.* Parham, 50 N. C. 416.

South Carolina.— State *v.* Carroll, 30 S. C. 85, 8 S. E. 433, 14 Am. St. Rep. 883.

Tennessee.— State *v.* Caldwell, 8 Baxt. 576.

Texas.— Alonzo *v.* State, 15 Tex. App. 378, 49 Am. Rep. 207.

See 14 Cent. Dig. tit. "Criminal Law," § 1380; and Adultery, 1 Cyc. 955.

61. Wright *v.* State, 108 Ala. 60, 18 So. 941; Yarbrough *v.* State, 105 Ala. 43, 16 So. 758; Lyman *v.* People, 98 Ill. App. 386.

62. Brown *v.* State, 18 Ohio St. 496.

63. White *v.* State, 31 Ind. 262.

64. Jones *v.* State, 152 Ind. 318, 53 N. E. 222.

Granting a continuance to one affords no ground for a continuance to others who may be tried separately after the cause is continued. White *v.* State, 31 Ind. 262. See also Krebs *v.* State, 3 Tex. App. 348.

65. Woodley *v.* State, 103 Ala. 23, 15 So. 820; State *v.* Gournet, 43 La. Ann. 197, 9 So. 436; Klein *v.* People, 31 N. Y. 229; Reg. *v.* Gallagher, 13 Cox C. C. 61, 32 L. T. Rep. N. S. 406.

Where one of two jointly indicted for larceny pleads guilty of an attempt the other may be tried for and convicted of the larceny. Klein *v.* People, 31 N. Y. 229.

66. *Georgia.*— Boyd *v.* State, 17 Ga. 194.

Louisiana.— State *v.* Lee, 46 La. Ann. 623, 15 So. 159.

whether such defendants are charged by the state with the commission of a mere misdemeanor.[67]

f. Principal and Accessary. At common law principals and accessaries before and after the fact may be and usually are jointly indicted. They may be tried together, but the accessary cannot be tried before the principal.[68]

g. Application and Affidavit For Severance. The application for a severance must be supported by affidavits showing good cause therefor.[69] The application if by defendant should precede his plea. If made after arraignment and plea and the setting of a day for the trial,[70] or after the organization of the jury has begun[71] and part of the evidence has been heard,[72] it comes too late.

h. Order of Trying Defendants. Where separate trials are granted on a joint indictment,[73] as well as where several are separately indicted,[74] the prosecution may determine [illegible] in which they shall be tried.

New Hampshire.— State *v.* Doolittle, 58 N. H. 92.

South Carolina.— State *v.* Yancy, 1 Tread. 241.

United States.— U. S. *v.* Marchant, 12 Wheat. 480, 6 L. ed. 700.

But see Johnson *v.* State, 14 Ind. 574.

See 14 Cent. Dig. tit. "Criminal Law," § 1383.

In Utah under a statute (Code Cr. Proc. § 262) providing that "when two or more defendants are jointly indicted for a felony any defendant requiring it must be tried separately," and a statute (Comp. L. § 1845) defining a felony as a crime punishable by death or imprisonment in the penitentiary, persons indicted for bribery under U. S. Rev. St. (1878) § 5451 [U. S. Comp. St. (1901) p. 3680] are entitled to separate trials. U. S. *v.* Jones, 5 Utah 552, 18 Pac. 233.

67. Johnson *v.* State, 14 Ind. 574; State *v.* Kirkpatrick, 74 Iowa 505, 38 N. W. 380; State *v.* Marvin, 12 Iowa 499; People *v.* White, 55 Barb. (N. Y.) 606; Com. *v.* Lewis, 25 Gratt. (Va.) 938.

68. Keech *v.* State, 15 Fla. 591; Loyd *v.* State, 45 Ga. 57; State *v.* Calvin, R. M. Charlt. (Ga.) 151; Allen *v.* State, 10 Ohio St. 287; State *v.* Yancy, 1 Tread. (S. C.) 241. See *supra*, V, F, 2.

If the defendants do not object they may be jointly tried in the discretion of the court. Sampson *v.* Com., 5 Watts & S. (Pa.) 385.

69. Mitchell *v.* State, 92 Tenn. 668, 23 S. W. 68; Hill *v.* State, 2 Yerg. (Tenn.) 246. An allegation that the defendant is innocent and believes he cannot have a fair and impartial trial if tried jointly is insufficient. Mask *v.* State, 32 Miss. 405; Shaw *v.* State, 39 Tex. Cr. 161, 45 S. W. 597.

The affidavit must definitely disclose the merits of the application. Simply stating that the theory and grounds of the applicant's defense are "incompatible and in conflict with those of his co-defendant" is too indefinite. State *v.* McLane, 15 Nev. 345. An allegation that the affiant "verily believes" there is no evidence against his co-defendant is sufficient. Reed *v.* State, 11 Tex. App. 509, 40 Am. Rep. 795. The court is not concluded by the allegations in the defendant's affidavit, but may inquire into their truth and permit the state to offer counter-affidavits. Grooms *v.* State, 40 Tex. Cr. 319, 50 S. W. 370.

70. Givens *v.* State, 109 Ala. 39, 19 So. 974.

71. Yarbrough *v.* State, 105 Ala. 43, 16 So. 758; Nichols *v.* Territory, 3 Okla. 622, 41 Pac. 108; State *v.* Mason, 19 Wash. 94, 52 Pac. 525. Where a severance is granted after the jury is impaneled and a witness sworn the jury and witness should be resworn. Babcock *v.* People, 15 Hun (N. Y.) 347.

72. McJunkins *v.* State, 10 Ind. 140; Metz *v.* State, 46 Nebr. 547, 65 N. W. 190; State *v.* McLane, 15 Nev. 345.

73. *Georgia.*— Jones *v.* State, 1 Ga. 610.

Iowa.— State *v.* Nash, 7 Iowa 347.

New York.— Patterson *v.* People, 46 Barb. 625; People *v.* McIntyre, 1 Park. Cr. 371.

Pennsylvania.— Shay *v.* Com., 36 Pa. St. 305.

South Carolina.— State *v.* Crank, 2 Bailey 66, 23 Am. Dec. 117.

Texas.— Price *v.* State, (Cr. App. 1897) 40 S. W. 596.

See 14 Cent. Dig. tit. "Criminal Law," § 1387.

In Texas by statute where several are separately indicted any one of them may, by showing that the testimony of another is desired by him, secure the trial of such person prior to his own. King *v.* State, 35 Tex. Cr. 472, 34 S. W. 282.

74. Allison *v.* State, 14 Tex. App. 402; Reg. *v.* Bennett, 10 Cox C. C. 331.

One of two jointly indicted, when his case was called for a separate trial, interposed a plea of *autrefois acquit*, which was decided against him. The prosecution then put another defendant on trial, who objected upon the grounds that the state should have continued the trial of the other defendant. It was held that no error was committed, as in the other case no step had been taken in the main trial. Studstill *v.* State, 7 Ga. 2.

The order in which the names of those indicted appear in the indictment does not determine the order of their trials. Reg. *v.* Holman, 3 Jur. N. S. 722.

Where one of several defendants jointly indicted turns state's evidence and agrees to testify against the others, they cannot, by

i. Simultaneous Trials After Severance. Where a severance is directed separate trials should not be simultaneous, although held in independent courts.[75]

j. Waiver of Right. A statutory right to a separate trial may be waived.[76]

7. Separate Trial of Issue of Insanity[77]**— a. General Rule.** If insanity existing at the time of arraignment is pleaded, or if from the conduct and appearance of the accused the judge has any doubts as to his sanity, he may order a venire returnable instanter and impanel a jury which will immediately proceed to hear evidence on this issue alone. If it be a simple case and the insanity plainly apparent he may determine the issue himself upon his inspection of the defendant and upon such evidence as he may take; or it seems he may direct the question of insanity to be tried under the general plea of not guilty. This is the procedure when the question to be determined is the present insanity of the accused.[78]

an application for a severance, force the trial of the defendant who has turned state's evidence, as the contract between the latter and the prosecution guaranteeing immunity continues so long as he complies, or is ready to comply, with its terms. Stevens *v.* State, 42 Tex. Cr. 154, 59 S. W. 545; *Ex p.* Greenhaw, 41 Tex. Cr. 278, 53 S. W. 1024.

Order on the docket.— A statute which entitles several jointly indicted to a severance, and to elect the order in which they shall stand upon the docket for trial, relates solely to the order of the cases on the docket, and does not authorize one defendant to insist that he shall not go to trial until his co-defendants have been finally disposed of, where the jury trying the other defendants have disagreed and been discharged. Sims *v.* State, 68 Ark. 188, 56 S. W. 1072.

75. The reason of this is that the production of the original indictment is necessary, and that cannot be in more than one court at one time. It is immaterial that the prosecuting attorney has several assistants who might conduct the trials simultaneously. People *v.* Matson, 129 Ill. 591, 22 N. E. 456.

76. People *v.* Alviso, 55 Cal. 230; People *v.* McCalla, 8 Cal. 301.

The joint motion of two of several persons indicted together that they be allowed a severance from the others is such a waiver as will prevent their being tried separately. Malachi *v.* State, 89 Ala. 134, 8 So. 104.

77. Criminal responsibility as affected by insanity see *supra*, III, B.

78. *Alabama.*—Jones *v.* State, 13 Ala. 153.

Iowa.— State *v.* Arnold, 12 Iowa 479.

Kansas.— State *v.* Gould, 40 Kan. 258, 19 Pac. 739.

Massachusetts.— Com. *v.* Braley, 1 Mass. 103.

Nebraska.— Walker *v.* State, 46 Nebr. 25, 64 N. W. 357.

New Jersey.— State *v.* Peacock, 50 N. J. L. 34, 11 Atl. 270.

New York.— Freeman *v.* People, 4 Den. 9, 47 Am. Dec. 216.

Tennessee.— Firby *v.* State, 3 Baxt. 358; Bonds *v.* State, Mart. & Y. 143, 17 Am. Dec. 795.

West Virginia.— State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224.

United States.— Youtsey *v.* U. S., 97 Fed. 937, 38 C. C. A. 562 [*reversing* 91 Fed. 864].

England.— Rex *v.* Dyson, [illegible] E. C. L. 627.

205, 32

See 14 Cent. Dig. tit. "Criminal Law," § 1391.

Conclusiveness of verdict.— A verdict finding defendant insane when arraigned is conclusive on his mental state at that time and relevant, although not conclusive at a subsequent trial on the indictment to show his insanity at the time of the crime. People *v.* Farrell, 31 Cal. 576; State *v.* Potts, 49 La. Ann. 1500, 22 So. 738; State *v.* Patton, 12 La. Ann. 288.

Statutory provisions.— Under Tenn. Acts (1871), c. 138, § 7, providing that if the jury believe defendant to be insane they shall so find, and the court shall commit him to an asylum until he recover from his insanity, when he shall be delivered to the jailer and the county clerk notified of the fact, the question of his insanity should be separately determined, and not by evidence under a plea of not guilty tending to show that he was insane at the time of the crime. Firby *v.* State, 3 Baxt. (Tenn.) 358. Statutes in some states create an absolute right to a jury trial. People *v.* Farrell, 31 Cal. 576. Thus in Ohio the accused has by statute a right to have his sanity determined by a jury. Rosselot *v.* State, 23 Ohio Cir. Ct. 370. A statute providing for an inquisition to determine the prisoner's sanity at the time of the trial is substantially in affirmance of the common law and in aid of the constitutional provision securing him a fair and impartial trial. French *v.* State, 93 Wis. 325, 67 N. W. 706.

Appointment of commissioner under New York statute see People *v.* McElvaine, 125 N. Y. 596, 26 N. E. 929.

Retrial of issue of sanity.— Under the Georgia statute the defendant has no right to more than one trial upon the special plea of insanity, but the court may in its discretion grant a second trial on this issue when, after this plea has been found against him, the trial upon the main issue has been postponed. Flannigan *v.* State, 103 Ga. 619, 30 S. E. 550. Under the Wisconsin statute providing that where the jury disagrees on the issue of insanity the court shall proceed to trial on the main issue, and such plea "shall be tried and determined by the jury with the plea of not guilty," a defendant cannot have a second

b. Time of Trial. If during the progress of the trial, either by observation or on the suggestion of counsel,[79] facts are brought to the attention of the court indicating the present insanity of defendant the question should be determined before another step is taken in the trial.[80]

c. No Plea Required. No formal plea of present insanity is required.[81]

d. Proceedings on Separate Trial. The issue at the preliminary jury trial is the sanity of the prisoner at that time,[82] to which the evidence should be confined, except so far as the defendant's mental condition at other times may aid in determining his present condition.[83] The burden is on the defendant to show insanity,[84] although if the prosecution alleges that the insanity is feigned it ought to produce some evidence to that effect.[85]

e. Proceedings After Special Verdict. The sole object of the inquiry being to determine whether the defendant shall be compelled to plead and his trial proceeded with,[86] if the jury find the defendant insane his trial must be suspended until he shall recover his sanity.[87] If his mental condition is still in doubt when recalled for trial, the court should proceed as before and try the question of sanity anew as often as he is arraigned.[88] He may be committed to an insane asylum, and his committal works a severance where he is jointly indicted with others.[89]

f. Insanity Subsequent to Conviction. A conviction establishes the defendant's sanity where the question was directly in issue.[90]

trial on the special issue, but the jury trying the main issue may find specially that he is insane. A general verdict of guilty includes the finding of present sanity. French *v.* State, 93 Wis. 325, 67 N. W. 706.

Trying main issue before same jury.— Where a jury which has tried the preliminary and special issue of the defendant's insanity has been discharged for a failure to agree it is error to submit to them the plea of not guilty and insanity for the reason that they are not impartial. French *v.* State, 85 Wis. 400, 55 N. W. 566, 39 Am. St. Rep. 855, 21 L. R. A. 402.

When insanity at time of offense is set up see State *v.* Gould, 40 Kan. 258, 19 Pac. 739.

79. **The mere suggestion of counsel,** however, without facts to support it will hardly justify such a proceeding. State *v.* Peacock, 50 N. J. L. 34, 11 Atl. 270. It has been held to be a matter of judicial discretion to proceed with the trial where there is a mere suggestion of insanity, after a jury is impaneled and no preliminary inquiry was requested. Lermo *v.* State, (Tex. Cr. App. 1902) 68 S. W. 684; State *v.* Kelley, 74 Vt. 278, 52 Atl. 434; Reg. *v.* Southey, 4 F. & F. 864.

80. State *v.* Reed, 41 La. Ann. 581, 7 So. 132; Youtsey *v.* U. S., 97 Fed. 937, 38 C. C. A. 562 [*reversing* 91 Fed. 864].

A physician appointed by the court to examine the mental condition of the accused with a view to testifying thereto at the trial need not make a written and detailed report of such examination prior to that trial. State *v.* Paine, 49 La. Ann. 1092, 22 So. 316.

81. The issue may be raised orally or by the court on its own observation (State *v.* Reed, 41 La. Ann. 581, 7 So. 132; Rex *v.* Dyson, 7 C. & P. 305, 32 E. C. L. 627; Reg. *v.* Turton, 6 Cox C. C. 385; Reg. *v.* Southey, 4 F. & F. 864; Frith's Case, 22 How. St. Tr. 307), or on an affidavit of some respectable person (Guagando *v.* State, 41 Tex. 626), unless by statute a plea of present insanity is required (Danforth *v.* State, 75 Ga. 614, 58 Am. Rep. 480).

82. State *v.* Arnold, 12 Iowa 479; State *v.* O'Grady, 5 Ohio S. & C. Pl. Dec. 654, 3 Ohio N. P. 279.

Challenges and exceptions.— Defendant may not, under a statute permitting him to except on the trial of an indictment, except to the instructions of the court on a preliminary inquiry as to his sanity (Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216); nor can he challenge a juror peremptorily, although he may do so for cause (Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216). A unanimous verdict of insanity is required on the preliminary jury trial to authorize the court to take action. U. S. *v.* German, 115 Fed. 987.

The jurors should be impartial, not only as to the issue but as between the parties. Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216.

83. State *v.* O'Grady, 5 Ohio S. & C. Pl. Dec. 654, 3 Ohio N. P. 279.

84. Reg. *v.* Turton, 6 Cox C. C. 385.

85. Reg. *v.* Davies, 3 C. & K. 328, 6 Cox C. C. 326.

86. Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216.

87. People *v.* Farrell, 31 Cal. 576; Com. *v.* Hathaway, 13 Mass. 299.

88. People *v.* Farrell, 31 Cal. 576.

89. Marler *v.* State, 67 Ala. 55, 42 Am. Rep. 95.

In England it is the custom for the attorney-general to move that he be kept in safe custody until the royal pleasure shall be known. Reg. *v.* Goode, 7 A. & E. 536, 34 E. C. L. 288.

90. Stover *v.* Com., 92 Va. 780, 22 S. E. 874. And see State *v.* Patton, 12 La. Ann.

8. SERVICE OF COPY OF INDICTMENT OR INFORMATION — a. Necessity of Service. At common law the defendant was not entitled to be served with a copy of the indictment;[91] but now by statutory or constitutional provision in England[92] and in the United States[93] the accused is entitled to have a copy of the indictment or information served upon him. A failure to serve a copy, or the service of an imperfect copy, if timely objection is made, entitles the accused to a postponement.[94] The denial of his statutory or constitutional right to a copy is reversible error.[95]

b. Demand For Service. A demand for a copy of the indictment by the prisoner or by his counsel is indispensable,[96] even though a constitutional provision secures to the defendant the right to have a copy.[97]

c. Time of Service. The statutes usually provide that the copy shall be served one[98] or two[99] entire days before the trial. Where the [illegible] silent service of the copy when the case is called is not ground for a continuance, unless request of the court ought to give the accused a reasonable time to examine it.[1]

288; French *v.* State, 93 Wis. 325, 67 N. W. 706.

A subsequent refusal to inquire into his sanity is proper in the absence of some showing that he has since become insane. Stoner *v.* Com., 92 Va. 780, 22 S. E. 874.

91. Reg. *v.* Hughes, 4 Cox C. C. 445; Reg. *v.* Lacey, 3 Cox C. C. 517; Reg. *v.* Mitchel, 3 Cox C. C. 1; Rex *v.* Holland, 4 T. R. 691, 1 Rev. Rep. 362; 2 Hale P. C. 236; 1 Hawkins P. C. c. 369.

92. 7 Anne, c. 21, § 11; 1 Geo. IV, c. 4, § 8, providing that those indicted for high treason or informed against in cases of misdemeanors shall enjoy the right to have delivered to them a copy of the indictment at least ten days before the trial.

93. The various bills of rights in the state constitutions enact in substance, but in varying language, that the accused shall be informed of the nature and cause of the accusation against him, and shall have a copy of the indictment. This constitutional right has often been affirmed and defined by statute.

Arkansas.— Howard *v.* State, 37 Ark. 265; Dawson *v.* State, 29 Ark. 116.

California.— People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161.

Louisiana.— State *v.* Briggs, 34 La. Ann. 69; State *v.* Cook, 20 La. Ann. 145.

Nebraska.— Bush *v.* State, 62 Nebr. 128, 86 N. W. 1062.

Tennessee.— Moses *v.* State, 9 Baxt. 229.

Texas.— Holden *v.* State, (Cr. App. 1903) 71 S. W. 600.

See 14 Cent. Dig. tit. "Criminal Law," § 1399.

Defendant on bail.— Under an Arkansas statute a defendant in a capital case is not entitled to be served with a copy of the indictment where he is out on bail. Howard *v.* State, 37 Ark. 265; Dawson *v.* State, 29 Ark. 116. See also Abrigo *v.* State, 29 Tex. App. 143, 15 S. W. 408, construing the Texas statute.

The fact that defendant was released on a bond for only a few hours, after which she was rearrested and confined in jail, does not deprive her of the right to be served with a copy of the indictment. Holden *v.* State, (Tex. Cr. App. 1903) 71 S. W. 600.

94. Tidwell *v.* State, 70 Ala. 33; State *v.* Finn, 43 La. Ann. 895, 9 So. 498; Johnson *v.* State, 36 Tex. 202. And see Reg. *v.* Burke, 10 Cox C. C. 519.

95. Nokes *v.* State, 6 Coldw. (Tenn.) 297. See also Johnson *v.* State, 36 Tex. 202.

96. *Alabama.*—Miller *v.* State, 45 Ala. 24; Driskill *v.* State, 45 Ala. 21.

Georgia.— Dean *v.* State, 43 Ga. 218.

Illinois.— Kelly *v.* People, 132 Ill. 363, 24 N. E. 56.

Texas.— Abrigo *v.* State, 29 Tex. App. 143, 15 S. W. 408.

United States.— U. S. *v.* Shive, 27 Fed. Cas. No. 16,278, Baldw. 510.

See 14 Cent. Dig. tit. "Criminal Law," § 1400.

97. Howard *v.* State, 37 Ark. 265.

Upon whom demand made.— The demand should be made of the prosecuting attorney in open court (State *v.* Winningham, 10 Rich. (S. C.) 257), or of the clerk of the court (People *v.* Warner, 1 Wheel. Cr. (N. Y.) 140).

Time of demand.— The copy ought to be demanded before arraignment. Consenting to an adjournment or to the impaneling of a jury is a waiver. State *v.* Briggs, 27 S. C. 80, 2 S. E. 854.

Payment of fees.— People *v.* Warner, 1 Wheel. Cr. (N. Y.) 140.

98. Bain *v.* State, 70 Ala. 4; Harvey *v.* State, 37 Tex. 365.

99. U. S. *v.* Neverson, 1 Mackey (D. C.) 152; State *v.* Wilson, 42 Kan. 587, 22 Pac. 622.

The federal statute (U. S. Rev. St. (1878) § 1033 [U. S. Comp. St. (1901) p. 722]) provides for the service of a copy of the indictment in a prosecution for treason at least three days before trial, and in case of other capital offenses at least two days before trial. This is mandatory, and a failure to comply with it is error. Thiede *v.* Utah, 159 U. S. 510, 16 S. Ct. 62, 40 L. ed. 237; Logan *v.* U. S., 144 U. S. 263, 12 S. Ct. 617, 36 L. ed. 429 [*reversing* 45 Fed. 872].

1. Woodall *v.* State, 25 Tex. App. 617, 8 S. W. 802; Craft *v.* Com., 24 Gratt. (Va.) 602.

The word "trial," in a statute requiring

d. On Whom Served. Where a statute provides that the copy may be served on the defendant or his counsel,[2] service on the defendant alone is sufficient.[3]

e. Sufficiency of Copy. A true copy must be served, but clerical errors will be disregarded if they do not prejudice the accused.[4] A clerk's certification includes the body and the indorsement,[5] and is sufficient, although not signed, where the copy appears to be accurate.[6]

f. Service of Amended Indictment. If an indictment is amended by the insertion of matter which substantially changes the crime charged,[7] or which includes another person in the charge,[8] the accused is entitled to a copy of the amended indictment, with time to prepare for trial. On the other hand, where matter is stricken out diminishing the aggravating circumstances alleged no copy need be served.[9]

g. Objections For Failure to Serve. The objection that the copy is not served before going to trial.[10] So the accused, although an incorrect copy, may waive his right to a copy of the indictment;[12] and this he does by pleading and going to trial without demanding service or objecting to an incorrect copy.[13]

a copy to be served before trial, means the impaneling of the jury, and not merely the arraignment (U. S. *v.* Neverson, 1 Mackey (D. C.) 152; U. S. *v.* Curtis, 25 Fed. Cas. No. 14,905, 4 Mason 232), and where the service must be two entire days before the trial the days of delivery and arraignment are excluded (U. S. *v.* Dow, 25 Fed. Cas. No. 14,990, Taney 34).

2. Henderson *v.* State, 98 Ala. 35, 13 So. 146; Johnson *v.* State, 94 Ala. 35, 10 So. 667.

3. Aaron *v.* State, 39 Ala. 75.

If the copy reaches counsel promptly it is immaterial in what manner it is delivered to him. Reese *v.* State, 90 Ala. 624, 8 So. 818.

Irregularity in the return of service may be cured by an admission of proper service made by defendant in open court. Griffin *v.* State, 90 Ala. 596, 8 So. 670.

The sheriff may usually serve the prisoner personally. Friar *v.* State, 3 How. (Miss.) 422.

4. State *v.* Daniel, 31 La. Ann. 91; Fortenberry *v.* State, 55 Miss. 403; State *v.* Elkins, 101 Mo. 344, 14 S. W. 116; White *v.* State, 32 Tex. Cr. 625, 25 S. W. 784; Johnson *v.* State, 4 Tex. App. 268. The finding (State *v.* Howell, 3 La. Ann. 50) and the caption (U. S. *v.* Insurgents, 26 Fed. Cas. No. 15,443, 2 Dall. 335), being parts of the entire instrument, must not be omitted from the copy. The omission of the names of the grand jurors (Ridenhour *v.* State, 75 Ga. 382) or of the names of additional witnesses indorsed on the indictment after the service of a copy (Dobson *v.* State, (Ark. 1891) 17 S. W. 3), or the omission on the certificate of the word "copy" (Freeman *v.* State, (Miss. 1901) 29 So. 75) does not vitiate service. Where an indictment is withdrawn because defective and a new indictment is found charging the same offense, a copy of the new indictment must be served. Harris *v.* State, 32 Tex. Cr. 279, 22 S. W. 1037.

On a change of venue a certified copy sent to the court to which the case is removed becomes an original, and service of a copy of it is sufficient. Brister *v.* State, 26 Ala. 107.

5. State *v.* Rector, 35 La. Ann. 1098.

6. Barrett *v.* State, 9 Tex. App. 33.

7. Zink *v.* State, 34 Nebr. 37, 51 N. W. 294.

8. Stokes *v.* State, 35 Tex. Cr. 279, 33 S. W. 350.

9. State *v.* Evans, 40 La. Ann. 216, 3 So. 838.

10. *Arkansas.*— Johnson *v.* State, 43 Ark. 391.

Louisiana.— State *v.* Murray, 47 La. Ann. 911, 17 So. 424.

Massachusetts.— Com. *v.* Betton, 5 Cush. 427.

Mississippi.— Loper *v.* State, 3 How. 429; State *v.* Johnson, Walk. 392.

Missouri.— Lisle *v.* State, 6 Mo. 426.

Ohio.— Smith *v.* State, 8 Ohio 294; Case *v.* State, 12 Ohio Cir. Ct. 158, 5 Ohio Cir. Dec. 194.

Tennessee.— Taylor *v.* State, 11 Lea 708.

Wisconsin.—Peterson *v.* State, 45 Wis. 535.

See 14 Cent. Dig. tit. "Criminal Law," § 1408.

11. Bartley *v.* People, 156 Ill. 234, 40 N. E. 831.

12. *Alabama.*—Miller *v.* State, 45 Ala. 24; Driskill *v.* State, 45 Ala. 21.

Louisiana.— State *v.* Price, 6 La. Ann. 691.

Missouri.— Taylor *v.* State, 11 Lea 708.

Nebraska.— Barker *v.* State, 54 Nebr. 53, 74 N. W. 427.

Wisconsin.— Peterson *v.* State, 45 Wis. 535.

See 14 Cent. Dig. tit. "Criminal Law," § 1408.

If a defendant wishes to avail himself of the omission to furnish him with a copy of the indictment, he must do it on motion before trial, or interpose it as an objection to being put on his trial, and show the omission on the record by a bill of exceptions. Fouts *v.* State, 8 Ohio St. 98.

In England it seems that failure to serve a true copy is not matter for a plea but for a postponement. Reg. *v.* Burke, 10 Cox C. C. 519.

13. *Arkansas.*— Howard *v.* State, 37 Ark. 265.

9. Indorsement of Witness on Indictment or Information[14]**— a. Statutory Requirements.** In many of the states the statutes require that the foreman of the grand jury or the prosecuting attorney shall indorse upon the back of each indictment the names of the witnesses upon whose testimony it was found.[15]

b. Time of Indorsement. The names of the witnesses should be indorsed on the indictment as early as possible. If the statutory requirement is construed to be directory, not mandatory, the court may permit the names of witnesses to be indorsed after the indictment is filed and before the day of trial,[16] and even after the trial has begun and the jury is in the box.[17]

Colorado.— Giano *v.* People, 30 Colo. 20, 69 Pac. 504.

Kansas.— State *v.* Wilson, 42 Kan. 587, 22 Pac. 622.

Louisiana.—State *v.* Hernandez, 4 La. Ann. 379.

Missouri.— State *v.* Dyer, 139 Mo. 199, 40 S. W. 768; State *v.* Schmidt, 137 Mo. 266, 38 S. W. 938; Lisle *v.* State, 6 Mo. 426.

Ohio.— Fouts *v.* State, 8 Ohio St. 98; Smith *v.* State, 8 Ohio 294.

Tennessee.— Moses *v.* State, 9 Baxt. 229.

Texas.— Diffin *v.* State, (Cr. App. 1901) 63 S. W. 128.

United States.— Logan *v.* U. S., 144 U. S. 263, 12 S. Ct. 617, 36 L. ed. 429 [*reversing* 45 Fed. 872].

See 14 Cent. Dig. tit. "Criminal Law," § 1408.

14. Indorsement of names of witnesses: As requisite to preliminary complaint see *supra*, X, A, 2. Giving right to compel prosecution to call witness see *infra*, XIV, C, 3, b. Touching the validity of indictment or information see Indictments and Informations.

Indorsement of name of prosecutor see *infra*, XIV, A, 10, d.

15. See, generally, Indictments and Informations.

The objects of the indorsement are: (1) To prevent malicious accusations being made by unknown and secret prosecutors; and (2) that the accused may be informed what witnesses he will have to confront. State *v.* Hawks, 56 Minn. 129, 57 N. W. 455.

A dying declaration is not within the statute. People *v.* Beverly, 108 Mich. 509, 66 N. W. 379.

The names of witnesses examined before a coroner's jury need not be indorsed on the indictment under Oreg. Sess. Laws (1899), p. 100, § 5, providing that the name of each witness examined by the district attorney in support of an information shall be inserted at the foot of it. State *v.* Warren, 41 Oreg. 348, 69 Pac. 679.

The names of witnesses examined before the grand jury on a charge against A may, when their evidence results in the indictment of B, be indorsed thereon. State *v.* Beehe, 17 Minn. 241.

The names of witnesses whose testimony is not material are not required. State *v.* Little, 42 Iowa 51.

The successor of the prosecuting attorney who drew the indictment may indorse the names thereon since the office is continuous in spite of changes in the personnel. State *v.* Berkley, 109 Mo. 665, 19 S. W. 192.

In Iowa it is provided by statute that in addition to indorsing the names of the witnesses on the indictment the minutes of their testimony must be returned therewith. State *v.* Cross, 95 Iowa 629, 64 N. W. 614; State *v.* Cook, 92 Iowa 483, 61 N. W. 185; State *v.* Postlewait, 14 Iowa 446.

16. *Kansas.*— State *v.* Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322; State *v.* Lowe, 6 Kan. App. 110, 50 Pac. 912.

Michigan.— People *v.* Gregory, 130 Mich. 522, 90 N. W. 414; People *v.* Luders, 126 Mich. 440, 85 N. W. 1081; People *v.* Williams, 118 Mich. 692, 77 N. W. 248; People *v.* Burwell, 106 Mich. 27, 63 N. W. 986; People *v.* Quick, 58 Mich. 321, 25 N. W. 302.

Missouri.— State *v.* Berkley, 109 Mo. 665, 19 S. W. 192; State *v.* Doyle, 107 Mo. 36, 17 S. W. 751.

Montana.— State *v.* Schnepel, 23 Mont. 523, 59 Pac. 927; State *v.* Black, 15 Mont. 143, 38 Pac. 674.

Nebraska.— Rauschkolb *v.* State, 46 Nebr. 658, 65 N. W. 776 [*distinguishing* Gandy *v.* State, 24 Nebr. 716, 40 N. W. 302].

Washington.— State *v.* Holmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887.

Wyoming.— Territory *v.* Anderson, 1 Wyo. 20.

See 14 Cent. Dig. tit. "Criminal Law," § 1410.

17. *Idaho.*—State *v.* Wilmbusse, (1902) 70 Pac. 849.

Iowa.— State *v.* Robinson, 47 Iowa 489.

Kansas.— State *v.* Price, 55 Kan. 606, 40 Pac. 1000; State *v.* Reno, 41 Kan. 674, 21 Pac. 803; State *v.* Dowd, 39 Kan. 412, 18 Pac. 483; State *v.* Taylor, 36 Kan. 329, 13 Pac. 550; State *v.* Cook, 30 Kan. 82, 1 Pac. 32.

Michigan.—People *v.* Baker, 112 Mich. 211, 70 N. W. 431; People *v.* Machen, 101 Mich. 400, 59 N. W. 664; People *v.* Howes, 81 Mich. 396, 45 N. W. 961; People *v.* Evans, 72 Mich. 367, 40 N. W. 473; People *v.* Perriman, 72 Mich. 184, 40 N. W. 425.

Washington.— State *v.* Holedger, 15 Wash. 443, 46 Pac. 652; State *v.* Regan, 8 Wash. 506, 36 Pac. 472; State *v.* Lee Doon, 7 Wash. 308, 34 Pac. 1103.

But see Sweenie *v.* State, 59 Nebr. 269, 80 N. W. 815; Barney *v.* State, 49 Nebr. 515, 68 N. W. 636; Gandy *v.* State, 24 Nebr. 716, 40 N. W. 302; Hyde *v.* Territory, 8 Okla. 69, 56 Pac. 851.

See 14 Cent. Dig. tit. "Criminal Law," § 1410.

c. Sufficiency of Indorsement. A statute requiring the names of witnesses to be indorsed on the indictment is properly complied with if they are written anywhere on the paper so plainly and conspicuously as to be readily seen.[18] The misspelling of a name,[19] the insertion of a wrong initial,[20] a mistake in the name,[21] or an error in stating the occupation of the witness[22] does not render a witness incompetent unless the accused can show he has been misled.

d. Adding Names of Newly Discovered Witnesses. The names of witnesses cannot, against objection, be added to the indictment or information by the state without a showing that they were not known earlier, and in time to give the accused notice in season to anticipate their presence before the trial.[23] But it is not error[24] to permit the prosecution prior to trial to indorse names on the indictment on motion and notice to the accused,[25] where he knows who they are and what they will testify to;[26] and under such circumstances another copy of the indictment with the added names indorsed need not be served.[27]

e. Competency of Witnesses Not Indorsed. The prosecution is not confined to the list of witnesses examined before the grand jury, and whose names, it is usually provided by statute, must be indorsed on the indictment.[28] The prosecution is not compelled to prove its case by the witnesses examined before the grand

18. Scott *v.* People, 63 Ill. 508; State *v.* McGonigle, 14 Wash. 594, 45 Pac. 20.

19. State *v.* Everitt, 14 Wash. 574, 45 Pac. 150.

20. State *v.* Blackman, 32 Kan. 615, 5 Pac. 173; Binkley *v.* State, 34 Nebr. 757, 52 N. W. 708.

Initials in place of the christian name are proper. State *v.* Schlagel, 19 Iowa 169; State *v.* McComb, 18 Iowa 43; State *v.* Pierce, 8 Iowa 231; Basye *v.* State, 45 Nebr. 261, 63 N. W. 811; Perry *v.* State, 44 Nebr. 414, 63 N. W. 26.

21. *California.*— People *v.* Breen, 130 Cal. 72, 62 Pac. 408.

Georgia.— Bird *v.* State, 50 Ga. 585.

Idaho.— State *v.* McGann, (1901) 66 Pac. 823.

Iowa.— State *v.* Arnold, 98 Iowa 253, 67 N. W. 252; State *v.* Story, 76 Iowa 262, 41 N. W. 12; State *v.* Stanley, 33 Iowa 526; State *v.* Ostrander, 18 Iowa 435.

Kansas.— State *v.* Labertew, 55 Kan. 674, 41 Pac. 945.

See 14 Cent. Dig. tit. "Criminal Law," § 1411.

22. State *v.* McPherson, 114 Iowa 492, 87 N. W. 421.

23. People *v.* Hall, 48 Mich. 482, 12 N. W. 665, 42 Am. Rep. 477; Gandy *v.* State, 27 Nebr. 707, 43 N. W. 747, 44 N. W. 108. See *supra*, XIV, A, 9, b.

24. Discretion of court.— It has been said in a number of cases that the indorsement of the names of additional witnesses upon an information or indictment is a matter within the discretion of the court. State *v.* Price, 55 Kan. 606, 40 Pac. 1000; State *v.* Dowd, 39 Kan. 412, 18 Pac. 483; State *v.* Taylor, 36 Kan. 329, 13 Pac. 550; Rauschkolb *v.* State, 46 Nebr. 658, 65 N. W. 776; State *v.* Regan, 8 Wash. 506, 36 Pac. 472.

25. Gore *v.* People, 162 Ill. 259, 44 N. E. 500.

26. Boykin *v.* People, 22 Colo. 496, 45 Pac. 419; State *v.* Teissedre, 30 Kan. 210, 476, 2 Pac. 108, 650.

Postponement on adding names.— The accused cannot complain because the court permits the prosecution to indorse additional witnesses at the trial, if he is granted sufficient time to inquire as to their character and credibility before they testify, and to prepare to meet their testimony. State *v.* Sorter, 52 Kan. 531, 34 Pac. 1036; Johnson *v.* State, 34 Nebr. 257, 51 N. W. 835. On general principles of justice and fair dealing it would seem reversible error to refuse time for such purpose if the accused can show he is surprised. State *v.* Jones, 2 Kan. App. 1, 42 Pac. 392; State *v.* Kelly, 14 Wash. 702, 45 Pac. 38; State *v.* Bokien, 14 Wash. 403, 44 Pac. 889. But in Rauschkolb *v.* State, 46 Nebr. 658, 65 N. W. 776, a postponement is said to be in the discretion of the court. And see Askew *v.* People, 23 Colo. 446, 48 Pac. 524; State *v.* McDonald, 57 Kan. 537, 46 Pac. 966.

27. State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382.

28. The object of these statutes is to give notice to the accused to enable him to meet the charges and to prevent surprise. As a matter of necessity, in order not to impede the course of justice, the court may in its discretion permit other witnesses to be examined, particularly where the defendant cannot affirmatively show surprise.

California.— People *v.* Bonney, 19 Cal. 426.

Colorado.— Kelly *v.* People, 17 Colo. 130, 29 Pac. 805; Minich *v.* People, 8 Colo. 440, 9 Pac. 4; Wilson *v.* People, 3 Colo. 325.

Dakota.— Territory *v.* Godfrey, 6 Dak. 46, 50 N. W. 481.

Georgia.— Cunningham *v.* Griffin, 107 Ga. 690, 33 S. E. 664.

Illinois.— Cross *v.* People, 192 Ill. 291, 61 N. E. 400; Bolen *v.* People, 184 Ill. 338, 56 N. E. 408; Schmaedeke *v.* People, 63 Ill. App. 662.

Iowa.— State *v.* Hurd, 101 Iowa 391, 70 N. W. 613; State *v.* Beal, 94 Iowa 39, 62 N. W. 657.

Kansas.— State *v.* Adams, 44 Kan. 135, 24

jury, but may examine any competent witness having knowledge of the facts.[29] The matter rests in judicial discretion, and this discretion will be reviewed only for the purpose of ascertaining if the defendant was in fact surprised.[30] Likewise it is within the discretion of the court to permit the prosecution to call and examine in rebuttal witnesses whose names are not on the indictment.[31]

f. Objections For Failure to Indorse. A motion to quash or set aside an indictment for failure to indorse the names of witnesses thereon is proper and will be sustained if the statute be mandatory.[32] A motion to require the names to be indorsed thereon is proper where there is a failure in this respect.[33] That the names of witnesses are not indorsed is not ground for a new trial when no objection is made at the time of the trial.[34]

g. Effect of Omitting to Indorse.[35] A failure to indorse the names on the indictment, where the statute is not mandatory, is not a ground for abatement,[36] nor will a conviction be reversed therefor.[37]

10. Notice of Prosecution's Witnesses and Evidence — a. Furnishing List of Witnesses — (1) *In General.* In the absence of statute defendant is not entitled to be served with a list of the witnesses who will appear against him.[38] This

Pac. 71; State *v.* Medlicott, 9 Kan. 257; State *v.* Scott, 1 Kan. App. 748, 42 Pac. 264.

Kentucky.— State *v.* Fowler, 2 Ky. L. Rep. 150.

Missouri.— State *v.* Tate, 156 Mo. 119, 56 S. W. 1099; State *v.* Smith, 137 Mo. 25, 38 S. W. 717; State *v.* Shreve, 137 Mo. 1, 38 S. W. 548; State *v.* Steifel, 106 Mo. 129, 17 S. W. 227.

Nebraska.— Fager *v.* State, 49 Nebr. 439, 68 N. W. 611; Parks *v.* State, 20 Nebr. 515, 31 N. W. 5; Stevens *v.* State, 19 Nebr. 647, 28 N. W. 304. See also Kelly *v.* State, 51 Nebr. 572, 71 N. W. 299.

North Dakota.— State *v.* Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

Oregon.— State *v.* Belding, (1903) 71 Pac. 330.

South Carolina.— State *v.* Robison, 61 S. C. 106, 39 S. E. 247; State *v.* Green, 61 S. C. 12, 39 S. E. 185.

South Dakota.— State *v.* King, 9 S. D. 628, 70 N. W. 1046; State *v.* Reddington, 7 S. D. 368, 64 N. W. 170; State *v.* Church, 6 S. D. 89, 60 N. W. 143; State *v.* Boughner, 5 S. D. 461, 59 N. W. 736.

Texas.— Williams *v.* State, 37 Tex. Cr. 147, 38 S. W. 999; Kramer *v.* State, 34 Tex. Cr. 84, 29 S. W. 157.

Utah.— People *v.* Thiede, 11 Utah 241, 39 Pac. 837.

Vermont.— State *v.* Smith, 55 Vt. 57.

Virginia.— Lawrence *v.* Com., 30 Gratt. 845.

Washington.— State *v.* Phelps, 22 Wash. 181, 60 Pac. 134; State *v.* Hunter, 18 Wash. 670, 52 Pac. 247.

United States.— Thiede *v.* Utah, 159 U. S. 510, 16 S. Ct. 62, 40 L. ed. 237.

See 14 Cent. Dig. tit. "Criminal Law," § 1416.

29. Mann *v.* State, 22 Fla. 600.

30. Gifford *v.* People, 148 Ill. 173, 35 N. E. 754. And see cases cited *supra*, note 28.

31. State *v.* McClintic, 73 Iowa 663, 35 N. W. 696; State *v.* Ruthven, 58 Iowa 121, 12 N. W. 235; State *v.* Parish, 22 Iowa 284; State *v.* Gillick, 10 Iowa 98; Kastner *v.* State, 58 Nebr. 767, 79 N. W. 713; McVey *v.* State, 57 Nebr. 471, 77 N. W. 1111; Fager *v.* State, 49 Nebr. 439, 68 N. W. 611; State *v.* Huckins, 23 Nebr. 309, 36 N. W. 527; State *v.* Hartigan, 19 N. H. 248. But see People *v.* Casey, 124 Mich. 279, 82 N. W. 883; People *v.* McArron, 121 Mich. 1, 79 N. W. 944; People *v.* Deitz, 86 Mich. 419, 49 N. W. 296.

32. People *v.* Symonds, 22 Cal. 348; State *v.* Griffin, 87 Mo. 608; State *v.* Heinze, 45 Mo. App. 403; State *v.* Andrews, 35 Oreg. 388, 58 Pac. 765; State *v.* Smith, 33 Oreg. 483, 55 Pac. 534.

33. Jacobs *v.* State, 35 Tex. Cr. 410, 34 S. W. 110. It has been held that if no motion is made the witnesses are competent on the trial. State *v.* Flynn, 42 Iowa 164.

34. Ray *v.* State, 1 Greene (Iowa) 316, 48 Am. Dec. 379; Miller *v.* State, 29 Nebr. 437, 45 N. W. 451.

The objection should be made before the witness is examined. Askew *v.* People, 23 Colo. 446, 48 Pac. 524; State *v.* Ward, 73 Iowa 532, 35 N. W. 617; State *v.* Houston, 50 Iowa 512; People *v.* Harris, 95 Mich. 87, 54 N. W. 648.

35. **Validity of indictment or information** as affected by failure to indorse see Indictments and Informations.

36. State *v.* Hanley, 47 Vt. 290.

37. State *v.* Townsend, 7 Wash. 462, 35 Pac. 367.

38. *Georgia.*—Echols *v.* State, 101 Ga. 531, 29 S. E. 14; Inman *v.* State, 72 Ga. 269; Keener *v.* State, 18 Ga. 194, 63 Am. Dec. 269.

Louisiana.— State *v.* Judge, 39 La. Ann. 847, 2 So. 588; State *v.* Kane, 36 La. Ann. 153.

Massachusetts.— Com. *v.* Edwards, 4 Gray 1; Com. *v.* Walton, 17 Pick. 403.

Missouri.— State *v.* Nugent, 71 Mo. 136.

Utah.— People *v.* Thiede, 11 Utah 241, 39 Pac. 837.

Wisconsin.— Cornell *v.* State, 104 Wis. 527, 80 N. W. 745.

England.— Reg. *v.* Greenslade, 11 Cox C. C. 412; Reg. *v.* Lacey, 3 Cox C. C. 517; Reg. *v.*

right, however, is often conferred by statutes,[39] the provisions of which may be either mandatory[40] or merely directory.[41] The statutory list of witnesses should be served personally on the accused.[42] The objection to a witness that his name was not furnished to defendant must be taken before he is examined.[43]

(II) *Errors in List.* Clerical errors, misspelling, and the omission of initials will be disregarded to the same extent that they are in the case of the list indorsed on the indictment.[44]

(III) *Competency of Witnesses Not on List.* Where the statute requiring a list of witnesses to be served on defendant is mandatory in its terms, a witness whose name is not on the list cannot testify.[45]

b. Disclosing Residence of Witness. The accused cannot require the state to inform him as to the residences of witnesses whose names appear on the indictment.[46]

c. Limitation of Testimony of Witness. Where it is required by statute that the state before calling a witness who was not examined before the grand jury or whose name is not indorsed on the indictment, should serve a notice upon defendant, stating the substance of what is intended to be proved by such witness, the state is not strictly limited in its examination of the witness to the matters stated in the notice.[47]

Gordon, 2 Dowl. P. C. N. S. 417, 6 Jur. 996, 12 L. J. M. C. 84.

See 14 Cent. Dig. tit. "Criminal Law," § 1420.

In the absence of a preliminary examination it is within the discretion of the court to order a list of the witnesses before the grand jury to be furnished to the accused. U. S. *v.* Southmayd, 27 Fed. Cas. No. 16,361, 6 Biss. 321.

39. People *v.* Quick, 58 Mich. 321, 25 N. W. 302; People *v.* Naughton, 38 How. Pr. (N. Y.) 430, 7 Abb. Pr. N. S. (N. Y.) 421.

By act of congress (U. S. Rev. St. (1878) § 1033 [U. S. Comp. St. (1901) p. 722]) in the federal conrts a list of witnesses must be served on defendant two days before trial (Thiede *v.* Utah, 159 U. S. 510, 16 S. Ct. 62, 40 L. ed. 237), but the right is conferred only upon prisoners in capital cases (U. S. *v.* Butler, 25 Fed. Cas. No. 14,700, 1 Hughes 457; U. S. *v.* Williams, 28 Fed. Cas. No. 16,709, 1 Cranch C. C. 178).

40. The federal statute is mandatory, and a failure to comply with it is error. Logan *v.* U. S., 144 U. S. 263, 12 S. Ct. 617, 36 L. ed. 429 [*reversing* 45 Fed. 872]. See also Lord *v.* State, 18 N. H. 173, where the trial was postponed because the list had not been furnished as required by statute.

41. State *v.* Wilkinson, 76 Me. 317; State *v.* Hanley, 47 Vt. 290.

On a second trial the accused is not entitled to a list before trial, where on his first trial he received a list of jurors and witnesses. Heller *v.* People, 2 Colo. App. 459, 31 Pac. 773.

42. State *v.* Russell, 98 Iowa 652, 68 N. W. 433; State *v.* Ostrander, 18 Iowa 435.

Service after the trial begins is insufficient, although the court gives the defendant a three days' adjonrnment. U. S. *v.* Neverson, 1 Mackey (D. C.) 152.

43. Hickory *v.* U. S., 151 U. S. 303, 14 S. Ct. 334, 38 L. ed. 170.

An objection after the trial cannot be urged to reverse the conviction, or in arrest of judgment. Minich *v.* People, 8 Colo. 440, 9 Pac. 4; Siberry *v.* State, 133 Ind. 677, 33 N. E. 681; State *v.* Kidd, 89 Iowa 54, 56 N. W. 263; Hayden *v.* Com., 10 B. Mon. (Ky.) 125.

44. State *v.* Dunn, 116 Iowa 219, 89 N. W. 984. And see *supra*, XIV, A, 9, c.

The name by which a witness is known, although not his true name, is sufficient, if defendant is thereby informed of his identity. State *v.* Burke, 54 N. H. 92.

The designation of a woman witness by her maiden name does not render her incompetent, where she has been married and divorced and has gone under her maiden name for ten or twelve years. Bird *v.* U. S., 187 U. S. 118, 23 S. Ct. 42, 47 L. ed. 100.

An error in stating the occupation of a witness in a list returned with and attached to the indictment is not fatal to his competency if the accused is not prejudiced thereby and it appears that the witness is the person meant in the list. State *v.* Dale, 109 Iowa 97, 80 N. W. 208.

45. U. S. *v.* Neverson, 1 Mackey (D. C.) 152.

If the language of the statute be directory merely the rule is otherwise, and the matter is then in the judicial discretion. Askew *v.* People, 23 Colo. 446, 48 Pac. 524; Inman *v.* State, 72 Ga. 269; Gates *v.* People, 14 Ill. 433. And see *supra*, XIV, A, 9, e.

46. Com. *v.* Applegate, 1 Pa. Dist. 127, even though he may desire such knowledge to ascertain their standing and credibility.

The omission from the list of the place of abode of each witness is not a valid objection, particularly if it appears that defendant's counsel knew the residences of the witnesses. State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38.

47. State *v.* Yetzer, 97 Iowa 423, 66 N. W. 737; State *v.* Craig, 78 Iowa 637, 43 N. W. 462.

d. Name of Private Prosecutor on Indictment. It is not necessary that the name of the prosecutor or informer be indorsed upon the indictment,[48] or information,[49] unless it is required by statute.[50]

e. Competency of Witnesses Not Examined Before Grand Jury. In the absence of statute it is not a valid objection to the competency of a witness for the prosecution that he was not examined before the grand jury.[51]

f. Furnishing Accused With Evidence — (i) *Attaching Minutes of Testimony to Indictment.* Under a statute requiring the minutes of the evidence taken before the grand jury to be filed with the indictment, it is not necessary, in order that the witness may testify, that the minutes shall be attached to the indictment if they are sufficiently identified.[52]

(ii) *Inspection of Grand Jury Minutes.* Leave to examine the minutes of the grand jury is not a matter of right, but whether defendant should be permitted to do so is in the discretion of the court.[53]

(iii) *Evidence Taken at Preliminary Examination.* In the absence of statute defendant is not entitled as of right to have a copy of the evidence taken at the preliminary examination,[54] although he may claim a continuance if the prosecuting attorney delays to file it when required to do so by statute.[55]

(iv) *Co-Defendant's Confession.* Where one defendant has made a confession implicating another, the district attorney is under no obligation to furnish the other defendant with a copy thereof.[56]

(v) *Sufficiency of Statement of Matter to Be Proved by Witness.* Under a statute providing that the prosecution shall give the accused notice of what it expects to prove by the witness whose name is not indorsed on the indictment, it seems that the mere brevity of the statement[57] or errors in it[58] will not exclude the witness.

48. State *v.* Stanford, 20 Ark. 145; Medaris *v.* State, 10 Yerg. (Tenn.) 239; Barkman *v.* State, 41 Tex. Cr. 105, 52 S. W. 73; U. S. *v.* Jamesson, 26 Fed. Cas. No. 15,466, 1 Cranch C. C. 62.

49. State *v.* Flowers, 56 Mo. App. 502; Bartlett *v.* State, 28 Ohio St. 669.

50. Rex *v.* Lukens, 1 Dall. (Pa.) 5, 1 L. ed. 13; Matter of Memorial of Citizens' Assoc., 8 Phila. (Pa.) 478. And see Indictments and Informations.

The object of the statute was to enable the accused to look to some person for damages in case the prosecution should prove malicious. Com. *v.* Jackson, 13 Lanc. Bar (Pa.) 59.

51. State *v.* Calvin, R. M. Charlt. (Ga.) 142; State *v.* Isaacson, 8 S. D. 69, 65 N. W. 430. And see *supra*, XIV, A, 9, e; XIV, A, 10, a, (iii).

A statute requiring a list of the witnesses to be produced on the trial to be served on the accused does not apply to witnesses in rebuttal (State *v.* Rivers, 68 Iowa 611, 27 N. W. 781; State *v.* Parish, 22 Iowa 284; Goldsby *v.* U. S., 160 U. S. 70, 16 S. Ct. 216, 40 L. ed. 343), nor prevent the prosecution from calling a material witness omitted from the list who is discovered after the trial has commenced (U. S. *v.* Schneider, 21 D. C. 381). Such a statute does not apply where the indictment is found by the grand jury on the minutes taken before the committing magistrate (State *v.* Rodman, 62 Iowa 456, 17 N. W. 663), nor where timely notice is served on the accused under the provisions of the statute (State *v.* Jordan, 87 Iowa 86, 54 N. W. 63). See also State *v.* Porter, 74 Iowa 623, 38 N. W. 514; State *v.* Kepper, 65 Iowa 745, 23 N. W. 304.

52. State *v.* Cross, 95 Iowa 629, 64 N. W. 614; State *v.* Cook, 92 Iowa 483, 61 N. W. 185; State *v.* Hamilton, 42 Iowa 655; State *v.* Postlewait, 14 Iowa 446.

The filing required by the statute is valid, although not evidenced by the clerk's indorsement on the indictment (State *v.* Craig, 78 Iowa 637, 43 N. W. 462), and although no memorandum of the filing is made on the docket (State *v.* Craig, 78 Iowa 637, 43 N. W. 462).

53. Hofler *v.* State, 16 Ark. 534; Eighmy *v.* People, 79 N. Y. 546; People *v.* Diamond, 72 N. Y. App. Div. 281, 76 N. Y. Suppl. 57; People *v.* Naughton, 38 How. Pr. (N. Y.) 430, 7 Abb. Pr. N. S. (N. Y.) 421; U. S. *v.* Southmayd, 27 Fed. Cas. No. 16,361, 6 Biss. 321.

The prosecuting attorney is not bound to furnish defendant with a copy of the evidence before the grand jury. Merrick *v.* State, 63 Ind. 327.

54. Territory *v.* McFarlane, 7 N. M. 421, 37 Pac. 1111; Com. *v.* Brown, 90 Va. 671, 19 S. E. 447.

55. People *v.* Thiede, 11 Utah 241, 39 Pac. 837.

56. Santry *v.* State, 67 Wis. 65, 30 N. W. 226.

57. State *v.* Kreder, 86 Iowa 25, 52 N. W. 658; State *v.* Van Vleet, 23 Iowa 27.

58. State *v.* Hall, 97 Iowa 400, 66 N. W. 725; State *v.* Rainsbarger, 74 Iowa 196, 37 N. W. 153.

11. Service of List of Jurors — a. In General. In England the accused is entitled to a copy of the jury panel in cases of treason ;[59] and statutes in some of the states confer upon an accused in certain cases the right to demand a list of the panel.[60] Where the statute is construed to be mandatory, a failure to serve a list of the jurors is good ground for setting aside the venire,[61] or if objection is promptly made and overruled, it constitutes reversible error.[62] An objection that the jury list is not served or that the list served is incomplete should be made before trial,[63] and where one declares that he is ready for trial and his trial is had the objection is waived.[64]

b. Demand For Service. Under some of the statutes it is not necessary to furnish the accused a list of the jurors unless it is demanded by him.[65]

c. Time of Service. The statutes usually[66] designate the period which must intervene between the service of the list and the trial.[67]

d. Sufficiency of List. The list should contain the names of the jurors drawn and summoned to serve at the time the accused is brought to trial.[68] A misnomer in the jury list, an immaterial variance between it and the names drawn from the box,[69]

59. Reg. *v.* Dowling, 3 Cox C. C. 509.

60. *Alabama.*— Linnehan *v.* State, 115 Ala. 471, 22 So. 662; Bill *v.* State, 29 Ala. 34.

Colorado.— Heller *v.* People, 2 Colo. App. 459, 31 Pac. 773.

Florida.— Collins *v.* State, 31 Fla. 574, 12 So. 906.

Louisiana.— State *v.* Toby, 31 La. Ann. 756; State *v.* Howell, 3 La. Ann. 50.

Mississippi.— Fletcher *v.* State, 60 Miss. 675.

Missouri.— State *v.* Ray, 53 Mo. 345; State *v.* Buckner, 25 Mo. 167.

Texas.— Murray *v.* State, 21 Tex. App. 466. 1 S. W. 522.

See 14 Cent. Dig. tit. "Criminal Law," § 1437 *et seq.*

The federal statute is mandatory (Logan *v.* U. S., 144 U. S. 263, 12 S. Ct. 617, 36 L. ed. 429 [*reversing* 45 Fed. 872]), and its operation is confined to capital cases (U. S. *v.* Williams, 28 Fed. Cas. No. 16,709, 1 Cranch C. C. 178).

61. Kellum *v.* State, 33 Tex. Cr. 82, 24 S. W. 897.

62. Brown *v.* State, 128 Ala. 12, 29 So. 200; Cochran *v.* State, 62 Ga. 731.

63. Minich *v.* People, 8 Colo. 440, 9 Pac. 4; State *v.* Blackman, 35 La. Ann. 483; State *v.* Russell, 33 La. Ann. 135; State *v.* Cook, 20 La. Ann. 145; State *v.* Fuller, 14 La. Ann. 667; State *v.* Jackson, 12 La. Ann. 679; State *v.* Price, 6 La. Ann. 691; State *v.* Dubord, 2 La. Ann. 732.

64. *Alabama.*— Bell *v.* State, 59 Ala. 55.

Mississippi.—Logan *v.* State, 50 Miss. 269; State *v.* Johnson, Walk. 392.

Missouri.— State *v.* McLain, 159 Mo. 340, 60 S. W. 736.

South Carolina.— State *v.* Colclough, 31 S. C. 156, 9 S. E. 811.

Wisconsin.—Peterson *v.* State, 45 Wis. 535.

See 14 Cent. Dig. tit. "Criminal Law," § 1446.

65. Bill *v.* State, 29 Ala. 34; Kelley *v.* People, 132 Ill. 363, 24 N. E. 56; McKinney *v.* People, 7 Ill. 540, 43 Am. Dec. 65; State *v.* May, 142 Mo. 135, 43 S. W. 637; U. S. *v.* Shive, 27 Fed. Cas. No. 16,278, Baldw. 510. And see *supra*, XIV, A, 8, b.

66. **If the statute prescribes no time** service of the list at any time before the commencement of the trial is sufficient, although the accused ought to be allowed a reasonable time to examine it. State *v.* Kane, 32 La. Ann. 999; State *v.* Holmes, 7 La. Ann. 567; Thurman *v.* State, 4 Ohio Cir. Ct. 141, 2 Ohio Cir. Dec. 466; Craft *v.* Com., 24 Gratt. (Va.) 602.

67. **In Alabama and Texas** the list must be served one day before trial is commenced (Bain *v.* State, 70 Ala. 4; Harvey *v.* State, 37 Tex. 365; Bates *v.* State, 19 Tex. 122; Harrison *v.* State, 3 Tex. App. 558); in the federal courts, two days (U. S. *v.* Neverson, 1 Mackey (D. C.) 152; U. S. *v.* Dow, 25 Fed. Cas. No. 14,990, Taney 34).

68. The fact that it contains other names does not invalidate it. Shelton *v.* State, 73 Ala. 5; State *v.* Casey, 44 La. Ann. 969, 11 So. 583; State *v.* Washington, 33 La. Ann. 896.

As to statement of residence of the jurors see State *v.* Underwood, 49 La. Ann. 1599, 22 So. 831; U. S. *v.* Insurgents, 26 Fed. Cas. No. 15,443, 2 Dall. 335.

Persons not drawn as jurors for the week of trial, but who have been summoned to supply the places of some who were unable to serve, need not be included in the list. Johnson *v.* State, 133 Ala. 38, 31 So. 951. See also Green *v.* State, 97 Ala. 59, 12 So. 416, 15 So. 242.

69. *Alabama.*— Cawley *v.* State, 133 Ala. 128, 32 So. 227; Kimbrell *v.* State, 130 Ala. 40, 30 So. 454; Brown *v.* State, 109 Ala. 70, 20 So. 103; Simon *v.* State, 108 Ala. 27, 18 So. 731.

Georgia.— Ratteree *v.* State, 53 Ga. 570.

Louisiana.—State *v.* Rodrigues, 45 La. Ann. 1040, 13 So. 802.

Mississippi.— Browning *v.* State, 33 Miss. 47.

Missouri.— State *v.* Hunt, 141 Mo. 626, 43 S. W. 389; State *v.* Miller, 111 Mo. 542, 20 S. W. 243.

or a clerical error in it[70] is not ground for challenge. Most of the statutes provide expressly for a list of jurors to include not merely those drawn, but those both drawn and summoned to attend;[71] and it has been held that including in the list the names of jurors not summoned is sufficient ground for quashing the venire.[72]

e. Mode of Service. Unless a statute requires personal service on the accused,[73] service either on him or his counsel will suffice.[74]

f. Special Jurors and Talesmen. Lists of special jurors provided for by statute are usually required to be served on the accused,[75] but the state is not, however, under any necessity of furnishing the accused with a list of the names of persons summoned as talesmen.[76]

12. Dockets and Calendars. The statutes in many of the states provide that criminal cases shall have the preference in their positions on the calendar over civil trials.[77] After a case is dismissed against one of two defendants, the trial of the other is not irregular because the title of the case continues to include the former defendant.[78]

B. Course and Conduct of Trial — 1. Regulations in General — a. Right to Fair and Impartial Trial. In the several states bills of rights and constitutional provisions usually confer upon the accused the absolute right to a fair and impartial trial.[79]

See 14 Cent. Dig. tit. "Criminal Law," § 1442.

70. Beard *v.* State, 41 Tex. Cr. 173, 53 S. W. 348.

Amendment.— The making of the list is clerical, and its service executive or ministerial. Errors occurring while the proceedings are under the control of the court may be corrected by amendment, if the accused is not prejudiced thereby. Kenan *v.* State, 73 Ala. 15. See Bailey *v.* State, 134 Ala. 59, 32 So. 673, for the duties of the clerk in preparing the list of jurors.

71. Smith *v.* State, 133 Ala. 73, 31 So. 942; Collins *v.* State, 31 Fla. 574, 12 So. 906; Murray *v.* State, (Tex. App. 1886) 3 S. W. 104.

72. Smith *v.* State, 133 Ala. 73, 31 So. 942. But see State *v.* Kane, 32 La. Ann. 999. And *compare* State *v.* Alverez, 7 La. Ann. 283; State *v.* Howell, 3 La. Ann. 50, holding that it is error to serve the prisoner with a long list of persons, the majority of whom have been either previously excused or exempt by law, or have never been summoned, for this necessarily tends to embarrass him in preparing his challenges.

73. Jones *v.* State, 33 Tex. Cr. 617, 28 S. W. 464.

74. Henderson *v.* State, 98 Ala. 35, 13 So. 146; Johnson *v.* State, 94 Ala. 35, 10 So. 667; Aaron *v.* State, 39 Ala. 75.

The return of the sheriff that he has served the prisoner is conclusive of the fact. Woodsides *v.* State, 2 How. (Miss.) 655.

The silence of the statutes as to the person by whom service of the list of witnesses and jurors must be made leaves it open to be made either by the sheriff, public prosecutor, or a private person. There can be no objection to its being served by the sheriff. State *v.* Washington, 37 La. Ann. 828.

75. Brown *v.* State, 128 Ala. 12, 29 So. 200; State *v.* Pollet, 45 La. Ann. 1168, 14 So. 179; Murray *v.* State, 21 Tex. App. 466, 1 S. W. 522.

76. *Alabama.*— Bailey *v.* State, 134 Ala. 59, 32 So. 673.

Louisiana.— State *v.* Henry, 15 La. Ann. 297; State *v.* Bunger, 14 La. Ann. 461.

Missouri.— State *v.* Price, 3 Mo. App. 586.

New Mexico.— Territory *v.* Kelly, 2 N. M. 292.

Texas.— Brotherton *v.* State, 30 Tex. App. 369, 17 S. W. 932.

See 14 Cent. Dig. tit. "Criminal Law," § 1443.

In New Jersey the rule is otherwise, and the accused must be furnished with a list of the talesmen two entire days before trial. Patterson *v.* State, 48 N. J. L. 381, 4 Atl. 449; State *v.* Aaron, 4 N. J. L. 231, 7 Am. Dec. 592.

The rule of the text relates to talesmen summoned from among the bystanders, and not to special jurors regularly drawn, although the statute under which the drawing is made refers to them as talesmen. State *v.* Stewart, 34 La. Ann. 1037.

77. In order to secure the preference it should be asked for on the first day of the term. Turnbull *v.* Com., 1 Binn. (Pa.) 45; Com. *v.* Pascalis, 1 Binn. (Pa.) 37.

In Texas the statute provides that all suits shall be called for trial in the order in which they stand on the docket, unless otherwise ordered. This applies to criminal cases. Johnson *v.* State, 12 Tex. App. 414.

78. State *v.* Dillingham, 43 Ark. 154.

79. See the constitutions of the several states.

The presiding judge must so control and conduct the proceedings that this right shall be secured, and his failure so to do is reversible error. Collier *v.* State, 115 Ga. 803, 42 S. E. 226; State *v.* Wilcox, 131 N. C. 707, 42 S. E. 536.

b. Readiness For Trial. The court may, before asking the state, ask defendant if he is ready for trial,[80] unless the state's application for a continuance is pending, in which case it should first be disposed of.[81]

c. Publicity of Proceedings. Again a public trial as well as an impartial one is also usually guaranteed under constitutional provisions.[82] However, the exclusion of a portion of the public from the court-room under certain circumstances[83] is not a violation of the constitutional rights of the accused.

d. Presence and Control of Witnesses. The court may exercise supervision and control over the witnesses while in attendance under a subpœna.[84]

e. Appointment and Services of Interpreter. Where the matter is not regulated by statute, the employment of an interpreter, where a witness is unable to speak or understand English,[85] and the manner in which the examination through the interpreter shall be conducted,[86] are discretionary with the court. Every non-official interpreter should be sworn to interpret truly.[87] The accuracy

80. Pines *v.* State, 21 Ga. 227; King *v.* State, 21 Ga. 220.

81. State *v.* Emerson, 90 Mo. 236, 2 S. W. 274.

82. This right has its basis in the ancient usages and principles of the common law. While it is of paramount importance that it shall be secured in its fullest enjoyment to the accused, the publicity of the proceedings should be subordinated to the orderly and proper way in which they are to be conducted. U. S. *v.* Buck, 24 Fed. Cas. No. 14,680.

83. Thus if the court finds that there are a number of persons present who endanger the secure administration of justice or create disorder (People *v.* Kerrigan, 73 Cal. 222, 14 Pac. 849; People *v.* Sprague, 53 Cal. 491; Stone *v.* People, 3 Ill. 326; Com. *v.* Van Horn, 4 Lack. Leg. N. (Pa.) 63; Grimmett *v.* State, 22 Tex. App. 36, 2 S. W. 631, 58 Am. St. Rep. 630; U. S. *v.* Buck, 24 Fed. Cas. No. 14,680) it may exclude them; and the same action may be taken when, because of the notoriety of the trial, the court-room is crowded to such an extent as to interfere with the orderly administration of justice (Benedict *v.* People, 23 Colo. 126, 46 Pac. 637; Myers *v.* State, 97 Ga. 76, 25 S. E. 252; Jackson *v.* Com., 100 Ky. 239, 38 S. W. 422, 1091, 18 Ky. L. Rep. 795, 66 Am. St. Rep. 336; State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330; Kugadt *v.* State, 38 Tex. Cr. 681, 44 S. W. 989). In People *v.* Murray, 89 Mich. 276, 50 N. W. 995, 28 Am. St. Rep. 294, 14 L. R. A. 809, where in a trial lasting for two weeks the court directed that an officer should stand at the door and see that the room was not overcrowded, but that all respectable citizens should be admitted, it was held to be error; but this case is distinguished from State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330, where the exclusion only continued one day, and the court announced that any who wished to come into the court-room might do so until the seats were filled, and from People *v.* Kerrigan, 73 Cal. 222, 14 Pac. 849, where the court ordered that the lobby outside the court-room should be cleared of spectators, as their presence irritated and excited defendant, who claimed to be insane.

Where the evidence is of a peculiarly indecent and vulgar character, the court may, in the interest of public morality and decency, exclude from the court-room all persons except the jurors, witnesses, and others connected with the case. People *v.* Hall, 51 N. Y. App. Div. 57, 64 N. Y. Suppl. 433, 15 N. Y. Cr. 29. *Contra*, People *v.* Yeager, 113 Mich. 228, 71 N. W. 491, holding that a statute giving the court the right to exclude from the court-room all persons except those necessarily in attendance, in cases where the evidence is of a licentious, immoral, or degrading character, is in conflict with the constitutional right to a public trial.

84. Thus it is not error to permit a dangerous and desperate man, indicted for murder, to be attended while testifying by an armed guard. State *v.* Duncan, 116 Mo. 288, 22 S. W. 699. So the court may decline to allow counsel for the defense to have a private interview with witnesses for the prosecution who are in custody. Republic *v.* Kapea, 11 Hawaii 293.

85. *Alabama.*— Horn *v.* State, 98 Ala. 23, 13 So. 329.

Iowa.— State *v.* Severson, 78 Iowa 653, 43 N. W. 533.

Missouri.—State *v.* McGinnis, 158 Mo. 105, 59 S. W. 83.

New York.— People *v.* Constantino, 153 N. Y. 24, 47 N. E. 37.

Texas.— Livar *v.* State, 26 Tex. App. 115, 9 S. W. 552.

See 14 Cent. Dig. tit. "Criminal Law," § 1455.

86. Skaggs *v.* State, 108 Ind. 53, 8 N. E. 695.

A juror may, with defendant's consent, act as an interpreter. People *v.* Thiede, 11 Utah 241, 39 Pac. 837 [*affirmed* in 159 U. S. 510, 16 S. Ct. 62, 40 L. ed. 237].

One of the witnesses may act as an interpreter. Com. *v.* Kepper, 114 Mass. 278; State *v.* Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686; Brown *v.* State, (Tex. Cr. App. 1900) 59 S. W. 1118.

The bias of the witness does not disqualify. State *v.* Burns, (Iowa 1899) 78 N. W. 681; Brown *v.* State, (Tex. Cr. App. 1900) 59 S. W. 1118.

87. People *v.* Dowdigan, 67 Mich. 95, 38 N. W. 920.

The fact that the interpreter is assisted by bystanders who are unsworn, and that he when in doubt uses their knowledge to aid

of the interpretation is for the jury;[88] and either party may show errors by cross-examining the interpreter or producing another.[89]

f. Appointment and Services of Stenographer. In the absence of statutory requirement[90] it is in the court's discretion to refuse to appoint a stenographer.[91] On the other hand it has been held to be error not to permit defendant to have a private stenographer in court to take down notes of the testimony and other matters in the progress of the trial,[92] although it seems that the court may refuse to permit the delay which would result from defendant taking down the evidence in longhand.[93]

g. Experiments and Tests.[94] It is within the discretion of the court to grant or refuse permission to either party to make an experiment in or out of court, pending the trial, with the purpose of introducing testimony as to its result.[95]

h. Presence of Others Under Indictment. The court may permit or require the presence in the court-room of persons jointly indicted with defendant but to be separately tried.[96]

i. Plea by Co-Defendants. Where several jointly indicted are in court, it is never erroneous to arraign one of them, who is to be separately tried,[97] and permit

his own, although finally stating his own version, is not error. U. S. *v.* Gilbert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19.

88. Schnier *v.* People, 23 Ill. 17.

89. Schnier *v.* People, 23 Ill. 17; Skaggs *v.* State, 108 Ind. 53, 8 N. E. 695.

Evidence not hearsay.— The fact that evidence in a criminal trial is received through an interpreter does not render it hearsay. State *v.* Hamilton, 42 La. Ann. 1204, 8 So. 304.

90. Official stenographers are found in most courts of record, appointed under statutes providing therefor. Whether such stenographer shall attend at the trial or shall remain in the court after the evidence is taken to decide disputes between counsel as to what the evidence was is discretionary. Kearney *v.* State, 101 Ga. 803, 29 S. E. 127, 65 Am. St. Rep. 344; State *v.* Pagels, 92 Mo. 300, 4 S. W. 931. In Iowa by statute his presence and employment may be dispensed with unless the interests of the state or defendant require the reporting of the testimony. State *v.* Frost, 95 Iowa 448, 64 N. W. 401.

91. Sarah *v.* State, 28 Ga. 576. So held, although the accused offered to pay the expense. Schoenfeldt *v.* State, 30 Tex. App. 695, 18 S. W. 640.

92. State *v.* Dreany, 65 Kan. 292, 69 Pac. 182.

93. State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89; Jenkins *v.* State, 31 Fla. 196, 12 So. 677; Lewis *v.* State, 15 Tex. App. 647; Nuckolls *v.* Com., 32 Gratt. (Va.) 884.

94. Testimony as to experiments before trial see EVIDENCE.

View and inspection see *infra*, XIV, B, 8.

95. *Alabama.*— Campbell *v.* State, 55 Ala. 80.

California.— People *v.* Levine, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631.

Connecticut.— State *v.* Smith, 49 Conn. 376.

Idaho.— State *v.* Hendel, 4 Ida. 88, 35 Pac. 836.

Missouri.— State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330.

Nebraska.— Polin *v.* State, 14 Nebr. 540, 16 N. W. 898.

Oregon.— State *v.* Fletcher, 24 Oreg. 295, 33 Pac. 575.

Washington.— State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382.

United States.— Ball *v.* U. S., 163 U. S. 662, 16 S. Ct. 1192, 41 L. ed. 300; U. S. *v.* Ried, 42 Fed. 134.

See 14 Cent. Dig. tit. "Criminal Law," § 1457.

It is not error to allow experiments to be made by the prosecuting attorney, although it would seem to be the better practice to permit them to be made by others. People *v.* Crandall, 125 Cal. 129, 57 Pac. 785.

An experiment illustrative of the methods of killing deceased, well calculated to inflame the minds of the jury against the prisoner, should not be permitted. Faulkner *v.* State, 43 Tex. Cr. 311, 65 S. W. 1093.

Age of a person may be determined by a personal inspection by the jurors, and the person may for this purpose be required to stand up facing the jury. Com. *v.* Emmons, 98 Mass. 6.

A person's identity may be tested by bringing other persons into the court-room and asking the witness to identify the particular person among them. State *v.* Murphy, 118 Mo. 7, 25 S. W. 95.

Time.— It is error for the judge to take out his watch and show by a comparison thereof with a period measured by a witness that the latter is mistaken. Burke *v.* People, 148 Ill. 70, 35 N. E. 376.

96. Thus it may allow such person to be in court in order that defendant's counsel may consult him (State *v.* Weems, 96 Iowa 426, 65 N. W. 387) or require his presence for purposes of identification (State *v.* Shive, 59 Kan. 780, 54 Pac. 1061; Cunningham *v.* State, 56 Nebr. 691, 77 N. W. 60; McIver *v.* State, (Tex. Cr. App. 1896) 37 S. W. 745; State *v.* Hyde, 22 Wash. 551, 61 Pac. 719).

97. State *v.* Johnson, 41 La. Ann. 574, 7 So. 670.

him to put in a plea of guilty[98] of the offense with which he is charged in the presence of the jury.

j. Remarks and Applause by Bystanders. The applauding by bystanders of the argument and remarks of the state's attorney, and any systematic exhibition of their dislike to defendant, made in the presence of the jury, should be promptly suppressed by the presiding judge.[99] And the court should pursue the same course where bystanders cause interruptions and make remarks prejudicial to the accused.[1]

k. Suspending Trial. The interruption of the trial by taking under consideration a matter of short duration while the jury are out of court is not erroneous where the accused is not prejudiced or affected except by the slight loss of time.[2]

2. Presence of Judge — a. At All Stages of Trial. It is the duty of the judge to be present during all stages of the trial,[3] and his absence during the examination of a witness,[4] during the argument of counsel,[5] or at the handing in of the verdict[6] is reversible error; but the absence of the judge is not reversible error, where he is still in hearing of the argument or evidence, and where he is in a position to pass upon any question which might arise therein.[7]

b. Absence of One of Several Judges. If a statute requires the presence of

98. State *v.* Duffy, 124 Mo. 1, 27 S. W. 358.

99. If he fails to perform his duty in this respect a conviction will be reversed; but where he promptly reprimands the disturbers, suspends proceedings, and causes them to be taken into custody, and at the same time directs the jury not to give the disturbance attention but to decide the case according to the evidence, the effect is neutralized and there is no error.

Georgia.— Woolfolk *v.* State, 81 Ga. 551, 8 S. E. 724.

Kentucky.— Arnold *v.* Com., 55 S. W. 894, 21 Ky. L. Rep. 1566.

Louisiana.— State *v.* Spillers, 105 La. 163, 29 So. 480.

Missouri.— State *v.* Dusenberry, 112 Mo. 277, 20 S. W. 461.

Oregon.— State *v.* Brown, 28 Oreg. 147, 41 Pac. 1042.

Texas.—Manning *v.* State, 37 Tex. Cr. 180, 39 S. W. 118; Parker *v.* State, 33 Tex. Cr. 111, 21 S. W. 604, 25 S. W. 967; Cartwright *v.* State, 16 Tex. App. 473, 49 Am. Rep. 826.

Virginia.— Doyle *v.* Com., 100 Va. 808, 40 S. E. 925.

1. State *v.* Robinson, 52 La. Ann. 541, 27 So. 129; Buchanan *v.* State, 41 Tex. Cr. 127, 52 S. W. 769.

The accused ought to make prompt objection (Burns *v.* State, 89 Ga. 527, 15 S. E. 748), and the court may then order the room cleared (Lide *v.* State, 133 Ala. 43, 31 So. 953).

2. Ouidas *v.* State, 78 Miss. 622, 625, 29 So. 525, where it was said: "The jury, during the whole trial of this case, were under the eye of the court or of some officer of it, and the court in no sense lost control of the proceeding. . . . if the trial of the case on hearing should be suspended by the intervention of other matters to such extent as to lessen its importance in the minds of the jury trying the case, or of impairing the due and orderly consideration of it by them, so as thereby to work an injustice to the accused, then such action would call for appropriate relief."

Presence of judge see *infra*, XIV, B, 2.

3. An absence of less than a quarter of an hour is error. People *v.* Blackman, 127 Cal. 248, 59 Pac. 573; Ellerbe *v.* State, 75 Miss. 522, 22 So. 950, 41 L. R. A. 569.

The judge need not be present at a view by the jury. State *v.* Adams, 20 Kan. 311; Newport *v.* Com., 108 Ky. 151, 55 S. W. 914, 21 Ky. L. Rep. 1591; State *v.* Hartley, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33.

4. Stokes *v.* State, (Ark. 1902) 71 S. W. 248; Hayes *v.* State, 58 Ga. 35.

5. People *v.* Blackman, 127 Cal. 248, 59 Pac. 573; O'Brien *v.* People, 17 Colo. 561, 31 Pac. 230; Thompson *v.* People, 144 Ill. 378, 32 N. E. 968; Meredeth *v.* People, 84 Ill. 479; Ellerbe *v.* State, 75 Miss. 522, 22 So. 950, 41 L. R. A. 569.

Waiver.—A temporary absence of the judge during the argument may be waived and defendant will be bound by such waiver in the absence of a showing of prejudice. State *v.* Hammer, 116 Iowa 284, 89 N. W. 1083.

6. Waller *v.* State, 40 Ala. 325; Nomaque *v.* People, 1 Ill. 145, 12 Am. Dec. 157.

7. *Colorado.*— Rowe *v.* People, 26 Colo. 542, 59 Pac. 57.

Connecticut.—State *v.* Smith, 49 Conn. 376.

Georgia.— Pritchett *v.* State, 92 Ga. 65, 18 S. E. 536.

Illinois.— Schintz *v.* People, 178 Ill. 320, 52 N. E. 903; Murphy *v.* People, 19 Ill. App. 125.

Iowa.— State *v.* Porter, 105 Iowa 677, 75 N. W. 519.

Mississippi.— Ermlick *v.* State, (1900) 28 So. 847; Turbeville *v.* State, 56 Miss. 793. And see Ouidas *v.* State, 78 Miss. 622, 29 So. 525.

Oklahoma.— Rutter *v.* Territory, 11 Okla. 454, 68 Pac. 507.

See 14 Cent. Dig. tit. "Criminal Law," § 1461.

two or more judges at the trial, a conviction is invalid where one or more of them is absent during the trial,[8] or when the verdict is received.[9]

c. Trial by Two Judges. The fact that two or more judges sat and coöperated in the trial,[10] or that the judge who had been assigned to try the case invited another judge to sit with him,[11] is not error.

d. Judge as Witness. Because of his duties it is erroneous for a judge presiding alone to testify as a witness.[12]

3. Presence and Custody of Defendant — a. Presence — (i) *In Felony Cases* **(a)** *In General.* By express statutory provision in many states, and at common law in the absence of a statute, it is essential to a valid trial and conviction on a charge of felony that defendant shall be personally present, not only when he is arraigned, but at every subsequent stage of the trial,[13] unless he may and does waive his right to be present;[14] and the fact that he was present must appear

8. Kampf *v.* State, (N. J. Ch. 1894) 30 Atl. 318.

Substitution of judge.— If by statute the presence of two or more judges is necessary to constitute a valid session of the court, those present when the trial begins should continue to constitute the court until it is terminated. If one therefore after the opening argument of the prosecution leaves the bench and his place is taken by another and the trial is then finished before the court as thus altered it is error. People *v.* Eckert, 16 Cal. 110; Durden *v.* People, 192 Ill. 493, 61 N. E. 317, 55 L. R. A. 240; Blend *v.* People, 41 N. Y. 604.

9. Hinman *v.* People, 13 Hun (N. Y.) 266.

The rule of the text does not apply to the casual and temporary absence of one judge, where a quorum remains. Tuttle *v.* People, 36 N. Y. 431.

10. State *v.* Lautenschlager, 22 Minn. 514.

11. Haas *v.* State, 13 Ohio Cir. Ct. 418.

12. His duty of administering the oath, where the court has no clerk, and his power to commit for contempt, render it highly improper that he should assume the dual rôle of witness and judge in the same case. If he be one of several judges he ought not to be a witness, unless he leave the bench for the remainder of the trial. Rapalje Witn. 345. And see Rogers *v.* State, 60 Ark. 76, 29 S. W. 894, 46 Am. St. Rep. 154, 31 L. R. A. 465; People *v.* Dohring, 59 N. Y. 374, 17 Am. Rep. 349; People *v.* Miller, 2 Park. Cr. (N. Y.) 197.

13. *Alabama.*— Slocovitch *v.* State, 46 Ala. 227.

Arkansas.— Bearden *v.* State, 44 Ark. 331; Osborn *v.* State, 24 Ark. 629; Brown *v.* State, 24 Ark. 620; Sweeden *v.* State, 19 Ark. 205; Sneed *v.* State, 5 Ark. 431, 41 Am. Dec. 102.

California.— People *v.* Kohler, 5 Cal. 72.

Colorado.— Smith *v.* People, 8 Colo. 457, 8 Pac. 920.

Florida.— Palmquist *v.* State, 30 Fla. 73, 11 So. 521; Brown *v.* State, 29 Fla. 543, 10 So. 736; Lovett *v.* State, 29 Fla. 356, 11 So. 172; Adams *v.* State, 28 Fla. 511, 10 So. 106.

Georgia.— Nolan *v.* State, 55 Ga. 521, 21 Am. Rep. 281.

Illinois.— Harris *v.* People, 130 Ill. 457, 22 N. E. 826; Brooks *v.* People, 88 Ill. 327.

Kansas.— State *v.* Smith, 44 Kan. 75, 24 Pac. 84, 21 Am. St. Rep. 266, 8 L. R. A. 774.

Kentucky.— Allen *v.* Com., 86 Ky. 642, 6 S. W. 645, 9 Ky. L. Rep. 784.

Louisiana.— State *v.* Christian, 30 La. Ann. 367.

Mississippi.— Rolls *v.* State, 52 Miss. 391; Long *v.* State, 52 Miss. 23.

Missouri.— State *v.* Braunschweig, 36 Mo. 397; State *v.* Schoenwald, 31 Mo. 147.

New York.— People *v.* Perkins, 1 Wend. 91.

North Carolina.— State *v.* Jenkins, 84 N. C. 812, 37 Am. Rep. 643.

Ohio.— Rose *v.* State, 20 Ohio 31.

Oregon.— State *v.* Spores, 4 Oreg. 198.

Pennsylvania.— Dougherty *v.* Com., 69 Pa. St. 286; Dunn *v.* Com., 6 Pa. St. 384. *Contra*, in the case of felonies not capital, Holmes *v.* Com., 25 Pa. St. 221.

Tennessee.— Andrews *v.* State, 2 Sneed 550; State *v.* France, 1 Overt. 434.

Texas.— Brown *v.* State, 38 Tex. 482.

Utah.— State *v.* Mannion, 19 Utah 505, 57 Pac. 542, 75 Am. St. Rep. 753, 45 L. R. A. 638, removal of defendant from presence of jury and witnesses but not out of court-room.

Virginia.— Coleman *v.* Com., 90 Va. 635, 19 S. E. 161; Lawrence *v.* Com., 30 Gratt. 845; Jackson *v.* Com., 19 Gratt. 656; Sperry *v.* Com., 9 Leigh 623, 33 Am. Dec. 261.

West Virginia.— State *v.* Greer, 22 W. Va. 800; Younger *v.* State, 2 W. Va. 579, 98 Am. Dec. 791.

Wisconsin.— French *v.* State, 85 Wis. 400, 55 N. W. 566, 39 Am. St. Rep. 855, 21 L. R. A. 402.

United States.— Lewis *v.* U. S., 146 U. S. 370, 13 S. Ct. 136, 36 L. ed. 1011; Hopt *v.* Utah, 110 U. S. 574, 4 S. Ct. 202, 28 L. ed. 262; Weirman *v.* U. S., 36 Ct. Cl. 236.

See 14 Cent. Dig. tit. "Criminal Law," § 1465 *et seq.*

Sickness of defendant rendering him unable to be present requires a temporary continuance or the withdrawal of a juror and a continuance. Brown *v.* State, 38 Tex. 482.

Absence for inappreciable space of time.— It has been held, however, even in a capital case, that the absence of defendant from the court-room for an inappreciable space of time during the trial is no ground for reversal. People *v.* Bush, 68 Cal. 623, 10 Pac. 169. And see *infra*, XIV, B, 3, a, (I), (C).

14. **Waiver of right to be present** see *infra*, XIV, B, 3, a, (I), (C).

affirmatively from the record.[15] Failure of the record to show such presence is fatal to a conviction.

(B) *Particular Stages of Prosecution.* According to this rule, common law or statutory, it has been held that defendant must be present at the arraignment and plea;[16] at the impaneling and swearing of the jury;[17] at the discharge of the jury because of the sickness of a juror,[18] or of inability to agree;[19] when witnesses are sworn and put under the rule;[20] during the examination of a witness as to competency;[21] during argument and determination as to the competency of a witness;[22] during the examination of witnesses or the reception of other evidence;[23]

15. *Alabama.*— Waller *v.* State, 40 Ala. 325.

Arkansas.— Cole *v.* State, 10 Ark. 318.

Florida.— Palmquist *v.* State, 30 Fla. 73, 11 So. 521; Brown *v.* State, 29 Fla. 543, 10 So. 736; Lovett *v.* State, 29 Fla. 356, 11 So. 172.

Illinois.— Harris *v.* People, 130 Ill. 457, 22 N. E. 826.

Louisiana.—State *v.* Christian, 30 La. Ann. 367.

Mississippi.— Long *v.* State, 52 Miss. 23; Stubbs *v.* State, 49 Miss. 716; Seaggs *v.* State, 8 Sm. & M. 722; Kelly *v.* State, 3 Sm. & M. 518.

Missouri.— State *v.* Cross, 27 Mo. 332.

Pennsylvania.— Dougherty *v.* Com., 69 Pa. St. 286; Hamilton *v.* Com., 16 Pa. St. 129, 55 Am. Dec. 485.

Virginia.— Shelton *v.* Com., 89 Va. 450, 16 S. E. 355; Lawrence *v.* Com., 30 Gratt. 845; Sperry *v.* Com., 9 Leigh 623, 33 Am. Dec. 261.

Wisconsin.— French *v.* State, 85 Wis. 400, 55 N. W. 566, 39 Am. St. Rep. 855, 21 L. R. A. 402.

See 14 Cent. Dig. tit. "Criminal Law," § 1465 *et seq.*

A formal statement of defendant's presence is not necessary, but it is sufficient if the fact appears by necessary or reasonable implication. Sweeden *v.* State, 19 Ark. 205; Palmquist *v.* State, 30 Fla. 73, 11 So. 521; Brown *v.* State, 29 Fla. 543, 10 So. 736; State *v.* Schoenwald, 31 Mo. 147; Gilligan *v.* Com., 99 Va. 816, 37 S. E. 962; Lawrence *v.* Com., 30 Gratt. (Va.) 845.

Presumption of continuance.— According to the better opinion, if the record shows defendant's presence, its continuance during subsequent stages may be presumed unless the contrary is shown. Brown *v.* State, 24 Ark. 620; Grimm *v.* People, 14 Mich. 300; Territory *v.* Herrera, (N. M. 1901) 66 Pac. 523; Stephens *v.* People, 19 N. Y. 549; Peters *v.* U. S., 94 Fed. 127, 36 C. C. A. 105. *Contra*, Harris *v.* People, 130 Ill. 457, 22 N. E. 826; Stubbs *v.* State, 49 Miss. 716; State *v.* Cross, 27 Mo. 332; Dougherty *v.* Com., 69 Pa. St. 286; Dunn *v.* Com., 6 Pa. St. 384.

16. Hall *v.* State, 40 Ala. 698; State *v.* Jones, 61 Mo. 232; Jacobs *v.* Com., 5 Serg. & R. (Pa.) 315; Younger *v.* State, 2 W. Va. 579, 98 Am. Dec. 791. See *supra*, XI, B, 1; XI, B, 4, a, (II); XI, B, 8, c.

17. *Mississippi.*— Rolls *v.* State, 52 Miss. 391.

Missouri.— State *v.* Smith, 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4.

Pennsylvania.— Dougherty *v.* Com., 69 Pa. St. 286.

West Virginia.—Younger *v.* State, 2 W. Va. 579, 98 Am. Dec. 791.

United States.— Lewis *v.* U. S., 146 U. S. 370, 13 S. Ct. 136, 36 L. ed. 1011; Hopt *v.* Utah, 110 U. S. 574, 4 S. Ct. 202, 28 L. ed. 262.

But see Maxwell *v.* State, 89 Ala. 150, 7 So. 824.

See 14 Cent. Dig. tit. "Criminal Law," § 1465 *et seq.*

Defendant's presence is not necessary, however, when the clerk puts the names in the jury box preparatory to drawing the jury. Bearden *v.* State, 44 Ark. 331.

18. State *v.* Smith, 44 Kan. 75, 24 Pac. 84, 21 Am. St. Rep. 266, 8 L. R. A. 774.

19. State *v.* Wilson, 50 Ind. 487, 19 Am. Rep. 719. See *supra*, IX, G, 2.

20. Bearden *v.* State, 44 Ark. 331.

21. Simpson *v.* State, 31 Ind. 90; People *v.* McNair, 21 Wend. (N. Y.) 608.

22. Adams *v.* State, 28 Fla. 511, 10 So. 106.

23. *California.*— People *v.* Kohler, 5 Cal. 72, reading depositions to jury after their retirement.

Kansas.— State *v.* Moran, 46 Kan. 318, 26 Pac. 754.

Mississippi.— Booker *v.* State, 81 Miss. 391, 33 So. 221, 95 Am. St. Rep. 474; Garman *v.* State, 66 Miss. 196, 5 So. 385; Rolls *v.* State, 52 Miss. 391.

Montana.— See State *v.* Spotted Hawk, 22 Mont. 33, 55 Pac. 1026.

Tennessee.— Richards *v.* State, 91 Tenn. 723, 20 S. W. 533, 30 Am. St. Rep. 907.

Virginia.— Jackson *v.* Com., 19 Gratt. 656, reading testimony to jury after retirement.

West Virginia.— State *v.* Greer, 22 W. Va. 800.

But see People *v.* Carey, 125 Mich. 535, 84 N. W. 1087, sustaining a conviction where the jury returned into court after retiring and the testimony of a witness was read to them in defendant's absence, his counsel being present.

See 14 Cent. Dig. tit. "Criminal Law," § 1473.

While co-defendant is testifying.— Garman *v.* State, 66 Miss. 196, 5 So. 385; Richards *v.* State, 91 Tenn. 723, 20 S. W. 533, 30 Am. St. Rep. 907.

Error in receiving evidence in defendant's absence is not cured by excluding the evidence which defendant did not hear, or by causing it to be repeated in his presence. Booker *v.* State, 81 Miss. 391, 33 So. 221, 95

during the argument of counsel;[24] when the court charges the jury and when they are recharged or given additional instructions after retirement;[25] when the case is finally submitted to the jury;[26] when the verdict is received[27] or

Am. St. Rep. 474; State *v.* Greer, 22 W. Va. 800.

24. Tiller *v.* State, 96 Ga. 430, 23 S. E. 825. *Compare*, however, State *v.* Paylor, 89 N. C. 539, which was to the contrary in a prosecution for a felony not capital. And see Doyle *v.* Com., 37 S. W. 153, 18 Ky. L. Rep. 518; State *v.* Bell, 70 Mo. 633; State *v.* Grate, 68 Mo. 22, in all of which cases a short temporary absence of defendant during the argument was held to be no ground for setting aside a conviction.

25. *Georgia.*— Bonner *v.* State, 67 Ga. 510.

Illinois.— Crowell *v.* People, 190 Ill. 508, 60 N. E. 872.

Indiana.— Roberts *v.* State, 111 Ind. 340, 12 N. E. 500.

Kansas.— State *v.* Myrick, 38 Kan. 238, 16 Pac. 330.

Kentucky.— Bailey *v.* Com., 71 S. W. 632, 24 Ky. L. Rep. 1419; Meece *v.* Com., 1 Ky. L. Rep. 337.

Missouri.— State *v.* Meagher, 49 Mo. App. 571.

New Mexico.— Territory *v.* Lopez, 3 N. M. 104, 2 Pac. 364.

North Carolina.— State *v.* Blackwelder, 61 N. C. 38.

Washington.— Linbeck *v.* State, 1 Wash. 336, 25 Pac. 452.

See 14 Cent. Dig. tit. "Criminal Law," § 1476.

The fact that the court asked the jury if they desired further instructions in the absence of defendant is not reversible error, where they replied in the negative and no instructions were given. State *v.* Coley, 114 N. C. 879, 19 S. E. 705; State *v.* Jones, 29 S. C. 201, 7 S. E. 296. See also State *v.* Olds, 106 Iowa 110, 76 N. W. 644, holding that there was no ground for reversal where the jury were brought into court in the absence of defendant and his counsel and stated that they could not agree, and the court told them he could not give them any light and sent them back.

26. Allen *v.* Com., 86 Ky. 642, 6 S. W. 645, 9 Ky. L. Rep. 784; Brewer *v.* Com., 8 S. W. 339, 10 Ky. L. Rep. 122.

Defendant's presence is not necessary when the jurors who have been sent out for the night or to their meals are brought back and sent to their room. Richie *v.* Com., 8 S. W. 913, 10 Ky. L. Rep. 181; Jones *v.* Com., 79 Va. 213; Lawrence *v.* Com., 30 Gratt. (Va.) 845.

While the jury are out considering their verdict defendant need not be present in court. State *v.* McGraw, 35 S. C. 283, 14 S. E. 630.

27. *Alabama.*— Waller *v.* State, 40 Ala. 325; State *v.* Hughes, 2 Ala. 102, 36 Am. Dec. 411.

Arkansas.— Sweeden *v.* State, 19 Ark. 205; Cole *v.* State, 10 Ark. 318; Sneed *v.* State, 5 Ark. 431, 41 Am. Dec. 102.

California.— People *v.* Beauchamp, 49 Cal. 41.

Colorado.— Smith *v.* People, 8 Colo. 457, 8 Pac. 920; Green *v.* People, 3 Colo. 68.

Florida.— Summeralls *v.* State, 37 Fla. 162, 20 So. 242, 53 Am. St. Rep. 247.

Georgia.— Nolan *v.* State, 55 Ga. 521, 21 Am. Rep. 281. *Compare* Smith *v.* State, 59 Ga. 513, 27 Am. Rep. 393, holding that the right to poll the jury is the sole reason of defendant's presence at the reception of the verdict, and that if he consents to their dispersing before the verdict is returned he waives his right to be present.

Kansas.— See State *v.* Muir, 32 Kan. 481, 4 Pac. 812, a prosecution for a misdemeanor.

Kentucky.— Temple *v.* Com., 14 Bush 769, 29 Am. Rep. 442.

Louisiana.— State *v.* Christian, 30 La. Ann. 367; State *v.* Ford, 30 La. Ann. 311.

Mississippi.— Finch *v.* State, 53 Miss. 363; Rolls *v.* State, 52 Miss. 391; Stubbs *v.* State, 49 Miss. 716.

Missouri.— State *v.* Braunschweig, 36 Mo. 397; State *v.* Cross, 27 Mo. 332; State *v.* Buckner, 25 Mo. 167.

New York.— People *v.* Perkins, 1 Wend. 91.

North Carolina.—State *v.* Jenkins, 84 N. C. 812, 37 Am. Rep. 643; State *v.* Bray, 67 N. C. 283.

Ohio.— Rose *v.* State, 20 Ohio 31.

Oregon.— State *v.* Spores, 4 Oreg. 198.

Pennsylvania.— Dougherty *v.* Com., 69 Pa. St. 286.

Tennessee.—Stewart *v.* State, 7 Coldw. 338; Andrews *v.* State, 2 Sneed 550; Clark *v.* State, 4 Humphr. 254; State *v.* France, 1 Overt. 434.

Texas.— Richardson *v.* State, 7 Tex. App. 486, holding, however, that defendant's counsel need not also be present.

Virginia.— Gilligan *v.* Com., 99 Va. 816, 37 S. E. 962.

Wisconsin.— French *v.* State, 85 Wis. 400, 55 N. W. 566, 39 Am. St. Rep. 855, 21 L. R. A. 402.

England.— Rex *v.* Ladsingham, T. Raym. 193; 1 Chitty Cr. L. 636; Coke Litt. 227*b*; 2 Hale P. C. 300.

See 14 Cent. Dig. tit. "Criminal Law," § 1478.

In New Jersey, by a long course of procedure, in all except capital cases a verdict may be taken in the absence of the accused. Jackson *v.* State, 49 N. J. L. 252, 9 Atl. 740 [*affirmed* in 50 N. J. L. 175, 17 Atl. 1104].

Jurors giving initials to clerk after discharge.— If the accused is present when the verdict is rendered and the jury are discharged, his presence is not necessary when they are recalled to give the initials of their names to the clerk to enable him to make up the minutes. Swor *v.* State, 81 Miss. 453, 33 So. 223.

The error in receiving a verdict in defendant's absence is not cured by reassembling

amended;[28] when sentence is pronounced;[29] and when the record is amended *nunc pro tunc* to show that the indictment was returned into court by the grand jury.[30] Defendant's presence is not necessary during proceedings which are no part of the trial, but merely preliminary or subsequent thereto.[31] According to the better opinion the hearing and determination of a motion for a new trial or in arrest of judgment is no part of the trial, and defendant need not be present.[32] And his presence is not necessary when an appeal is taken or on the hearing of an appeal where there is no trial *de novo*,[33] when a time for the execution of the sentence is fixed by the court, the time originally fixed having passed pending a writ of error,[34] when the record is corrected,[35] or when the judge signs the record

the jury after they have been discharged, and having them assent to and return the verdict in the prisoner's presence. Cook *v.* State, 60 Ala. 39, 31 Am. Rep. 31; Finch *v.* State, 53 Miss. 363.

Discharge of jury an acquittal.— If the jury are discharged after the receipt of their verdict in defendant's absence, it amounts to an acquittal, and defendant cannot be again tried. Cook *v.* State, 60 Ala. 39, 31 Am. Rep. 31; Finch *v.* State, 53 Miss. 363. But see Brister *v.* State, 26 Ala. 107 (where it was held that on the discovery of defendant's absence, before the jury had left the box, the order discharging them might be countermanded and the verdict again received after bringing the accused into court); State *v.* Hughes, 2 Ala. 102, 36 Am. Dec. 411. See also *supra*, IX, G, 2.

28. Waller *v.* State, 40 Ala. 325.

29. *Arkansas.*— Cole *v.* State, 10 Ark. 318.

Illinois.— Harris *v.* People, 130 Ill. 457, 22 N. E. 826.

Mississippi.— Rolls *v.* State, 52 Miss. 391; Kelly *v.* State, 3 Sm. & M. 518.

Pennsylvania.— Hamilton *v.* Com., 16 Pa. St. 129, 55 Am. Dec. 485.

Wisconsin.— French *v.* State, 85 Wis. 400, 55 N. W. 566, 39 Am. St. Rep. 855, 21 L. R. A. 402.

See also *infra*, XIV, D, 1.

Effect of absence at sentence.— If defendant is present when the verdict is received but absent when sentence is pronounced, a new trial will not necessarily be granted on reversal of the judgment, but the cause will be remanded with instructions to pronounce sentence according to law. Cole *v.* State, 10 Ark. 318; Harris *v.* People, 130 Ill. 457, 22 N. E. 826.

And see *infra*, XVI, D, 1.

30. Green *v.* State, 19 Ark. 178.

31. Jones *v.* State, 152 Ind. 318, 53 N. E. 222; State *v.* Kendall, 56 Kan. 238, 42 Pac. 711; Miller *v.* State, 29 Nebr. 437, 45 N. W. 451; Boswell *v.* Com., 20 Gratt. (Va.) 860, rescission of order removing cause to another court.

Illustrations.— Thus by the weight of authority defendant's presence is not necessary at the hearing and determination of a demurrer to the indictment or information (State *v.* Spotted Hawk, 22 Mont. 33, 55 Pac. 1026; Miller *v.* State, 29 Nebr. 437, 45 N. W. 451; State *v.* Woolsey, 19 Utah 486, 57 Pac. 426) or a motion to quash the same (Territory *v.* Gay, 2 Dak. 125, 2 N. W. 477; Epps *v.* State, 102 Ind. 539, 1 N. E. 491; State *v.* Pierre, 39 La. Ann. 915, 3 So. 60; State *v.* Little Whirlwind, 22 Mont. 425, 56 Pac. 820; State *v.* Spotted Hawk, 22 Mont. 33, 55 Pac. 1026; Miller *v.* State, 29 Nebr. 437, 45 N. W. 451; People *v.* Vail, 6 Abb. N. Cas. (N. Y.) 206, 57 How. Pr. (N. Y.) 81; State *v.* Atkinson, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877. *Contra*, State *v.* Clifton, 57 Kan. 448, 46 Pac. 715), plea in abatement (Miller *v.* State, 29 Nebr. 437, 45 N. W. 451); or a motion for a change of venue (Jones *v.* State, 152 Ind. 318, 53 N. E. 222. See *supra*, VII, B, 4, i), for a continuance (State *v.* Fahey, 35 La. Ann. 9; Miller *v.* State, 29 Nebr. 437, 45 N. W. 451; State *v.* Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888. *Contra*, Coleman *v.* Com., 90 Va. 635, 19 S. E. 161; Shelton *v.* Com., 89 Va. 450, 16 S. E. 355); for leave to file an information (State *v.* Little Whirlwind, 22 Mont. 425, 56 Pac. 820), to summon witnesses (Jones *v.* State, 152 Ind. 318, 53 N. E. 222), or to amend the information (State *v.* Beatty, 45 Kan. 492, 25 Pac. 899; State *v.* Pierre, 39 La. Ann. 915, 3 So. 60; State *v.* Dominique, 39 La. Ann. 323, 1 So. 665), or to compel the prosecution to elect between counts (State *v.* Kendall, 56 Kan. 238, 42 Pac. 711); on appointment of counsel to assist the prosecution (Hall *v.* State, 132 Ind. 317, 31 N. E. 356); on fixing the day for trial (State *v.* Clark, 32 La. Ann. 558; State *v.* Outs, 30 La. Ann. 1155; State *v.* Abrams, 11 Oreg. 169, 8 Pac. 327); on the hearing of an application for, or on the granting of, attachments for witnesses (State *v.* Simien, 36 La. Ann. 923; State *v.* Clark, 32 La. Ann. 558); and in a homicide case, where the body of deceased is disinterred, and the organs and tissues are subjected to a chemical analysis (State *v.* Bowman, 80 N. C. 432).

32. Com. *v.* Costello, 121 Mass. 371, 23 Am. Rep. 277; Jewell *v.* Com., 22 Pa. St. 94; State *v.* Jefcoat, 20 S. C. 383. *Contra*, Rolls *v.* State, 52 Miss. 391; Hooker *v.* Com., 13 Gratt. (Va.) 763; State *v.* Parsons, 39 W. Va. 464, 19 S. E. 876.

33. State *v.* Wyatt, 50 La. Ann. 1301, 24 So. 335 (appeal by state); State *v.* David, 14 S. C. 428; Schwab *v.* Berggren, 143 U. S. 442, 12 S. Ct. 525, 36 L. ed. 218.

34. State *v.* Haddox, 50 W. Va. 222, 40 S. E. 387.

35. McNamara *v.* State, 60 Ark. 400, 30 S. W. 762; Camp *v.* State, 91 Ga. 8, 16 S. E. 379; State *v.* Westfall, 49 Iowa 328.

of the day's proceedings.[36] In some cases it is held that defendant must be present when the jury are taken to view the place of the crime, on the ground that this is the taking of evidence and a part of the trial,[37] while others hold that his presence is unnecessary.[38]

(c) *Waiver of Right.* Some of the courts have held that the right to be present during the trial of an indictment for felony cannot be waived by defendant in a capital case,[39] and some have applied the same rule in the case of any felony whether capital or not, so that a trial or any material step therein, or reception of the verdict, in defendant's absence in such cases is error, although he has escaped or is otherwise voluntarily absent.[40] Most of the courts, however, have held that defendant may waive his right to be present when the felony is not capital, that he does so if, having been released on bail, he absconds or is voluntarily absent after his arraignment and plea, and that in such a case the trial may proceed and the verdict be received notwithstanding his absence.[41]

36. Weatherman *v.* Com., 91 Va. 796, 22 S. E. 349.

37. *Arkansas.*— Benton *v.* State, 30 Ark. 328.

California.— People *v.* Lowrey, 70 Cal. 193, 11 Pac. 605; People *v.* Jones, (1886) 11 Pac. 501; People *v.* Bush, 68 Cal. 623, 10 Pac. 169. *Compare* People *v.* Bonney, 19 Cal. 426.

Kentucky.— Rutherford *v.* Com., 78 Ky. 639, 1 Ky. L. Rep. 410.

Louisiana.— State *v.* Bertin, 24 La. Ann. 46.

Mississippi.— Foster *v.* State, 70 Miss. 755, 12 So. 822.

Missouri.— State *v.* Sanders, 68 Mo. 202, 30 Am. Rep. 782.

Nebraska.— Carroll *v.* State, 5 Nebr. 31.

North Carolina.—State *v.* Graham, 74 N. C. 646, 21 Am. Rep. 493.

Ohio.— Hotelling *v.* State, 3 Ohio Cir. Ct. 630, 2 Ohio Cir. Dec. 366.

Texas.— Riggins *v.* State, 42 Tex. Cr. 472, 60 S. W. 877.

Wisconsin.— Sasse *v.* State, 68 Wis. 530, 32 N. W. 849.

See 14 Cent. Dig. tit. "Criminal Law," § 1474.

38. *Idaho.*— State *v.* Reed, 3 Ida. 754, 35 Pac. 706.

Indiana.— Shular *v.* State, 105 Ind. 289, 4 N. E. 870, 55 Am. St. Rep. 211.

Kansas.— State *v.* Adams, 20 Kan. 311.

Massachusetts.— Com. *v.* Knapp, 9 Pick. 496, 20 Am. Dec. 491.

New York.— People *v.* Thorn, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368 [*overruling* in effect People *v.* Palmer, 43 Hun 397; Eastwood *v.* People, 3 Park. Cr. 25].

Oregon.— State *v.* Ah Lee, 8 Oreg. 214.

Washington.— State *v.* Lee Doon, 7 Wash. 308, 34 Pac. 1103.

See 14 Cent. Dig. tit. "Criminal Law," § 1474.

39. Gladden *v.* State, 12 Fla. 562; Holton *v.* State, 2 Fla. 476; State *v.* Kelly, 97 N. C. 404, 2 S. E. 185, 2 Am. St. Rep. 299; State *v.* Jenkins, 84 N. C. 812, 37 Am. Rep. 643.

Temporary absence from court-room held no ground for reversal.— People *v.* Bush, 68 Cal. 623, 10 Pac. 169; State *v.* Gonce, 87 Mo. 627. See *infra*, note 41.

40. *Arkansas.*— Sweeden *v.* State, 19 Ark. 205; Sneed *v.* State, 5 Ark. 431, 41 Am. Dec. 102.

California.— People *v.* Beauchamp, 49 Cal. 41.

Connecticut.— State *v.* Hurlbut, 1 Root 90.

Florida.— Summeralls *v.* State, 37 Fla. 162, 20 So. 242, 53 Am. St. Rep. 247.

Kansas.— State *v.* Moran, 46 Kan. 318, 26 Pac. 754.

Missouri.— State *v.* Smith, 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4; State *v.* Braunschweig, 36 Mo. 397; State *v.* Buckner, 25 Mo. 167. Since these decisions the rule has been changed by statute. See *infra*, note 41.

Pennsylvania.— Prine *v.* Com., 18 Pa. St. 103.

Tennessee.—Andrews *v.* State, 2 Sneed 550; Clark *v.* State, 4 Humphr. 254.

Virginia.— Jackson *v.* Com., 19 Gratt. 656.

West Virginia.— State *v.* Greer, 22 W. Va. 800.

United States.— Lewis *v.* U. S., 146 U. S. 370, 13 S. Ct. 136, 36 L. ed. 1011; Hopt *v.* Utah, 110 U. S. 574, 4 S. Ct. 202, 28 L. ed. 262; Weirman *v.* U. S., 36 Ct. Cl. 236.

See 14 Cent. Dig. tit. "Criminal Law," § 1468.

41. *District of Columbia.*— Falk *v.* U. S., 15 App. Cas. 446.

Georgia.— Robson *v.* State, 83 Ga. 166, 9 S. E. 610; Barton *v.* State, 67 Ga. 653, 44 Am. Rep. 743.

Illinois.— Sahlinger *v.* People, 102 Ill. 241.

Indiana.— State *v.* Wamire, 16 Ind. 357; McCorkle *v.* State, 14 Ind. 39.

Kentucky.— Smith *v.* Com., 6 Ky. L. Rep. 305; Stone *v.* Com., 2 Ky. L. Rep. 391.

Louisiana.— State *v.* Perkins, 40 La. Ann. 210, 3 So. 647; State *v.* Ricks, 32 La. Ann. 1098.

Massachusetts.— Com. *v.* McCarthy, 163 Mass. 458, 40 N. E. 766.

Michigan.— Frey *v.* Calhoun Cir. Judge, 107 Mich. 130, 64 N. W. 1047.

Mississippi.—Gales *v.* State. 64 Miss. 105, 8 So. 167; Stubbs *v.* State, 49 Miss. 716; Price *v.* State, 36 Miss. 531, 72 Am. Dec. 195.

New Jersey.— State *v.* Peacock, 50 N. J. L. 34, 11 Atl. 270.

(II) *In Misdemeanor Cases* — (A) *In General.* In misdemeanor cases as in felony cases defendant has a right to be present during the trial, and unless this right is expressly or impliedly waived, a trial and conviction in his absence is invalid.[42]

(B) *Waiver of Right.* In some jurisdictions a trial for misdemeanor in defendant's absence is expressly authorized by statute where defendant waives his right to be present, or where he is represented by counsel.[43] In the absence of a stat-

North Carolina.— State *v.* Kelly, 97 N. C. 404, 2 S. E. 185, 2 Am. St. Rep. 299.

Ohio.— Wilson *v.* State, 2 Ohio St. 319; Fight *v.* State, 7 Ohio 181, 28 Am. Dec. 626.

Pennsylvania.— Lynch *v.* State, 88 Pa. St. 189, 32 Am. Rep. 445.

Rhode Island.— See State *v.* Guinness, 16 R. I. 401, 16 Atl. 910, a misdemeanor case, however.

Wisconsin.— Hill *v.* State, 17 Wis. 675, 86 Am. Dec. 736.

United States.— U. S. *v.* Loughery, 26 Fed. Cas. No. 15,631, 13 Blatchf. 267.

See 14 Cent. Dig. tit. "Criminal Law," § 1468.

Temporary voluntary absence from court-room no ground for reversal.— *California.*— People *v.* Miller, 33 Cal. 99. See also People *v.* Bush, 68 Cal. 623, 10 Pac. 169.

Colorado.— Van Houten *v.* People, 22 Colo. 53, 43 Pac. 137.

Louisiana.— State *v.* Ricks, 32 La. Ann. 1098.

Missouri.— State *v.* Gonce, 87 Mo. 627; State *v.* Bell, 70 Mo. 633; State *v.* Grate, 68 Mo. 22.

New York.— People *v.* Bragle, 88 N. Y. 585, 63 How. Pr. 143, 42 Am. Rep. 269.

Texas.— O'Toole *v.* State, 40 Tex. Cr. 578, 51 S. W. 244.

See 14 Cent. Dig. tit. "Criminal Law," § 1468.

Statutory provisions.—In some states there are express statutory provisions allowing reception of a verdict in defendant's absence where he has escaped or is voluntarily absent, and such statutes are constitutional. Gore *v.* State, 52 Ark. 285, 12 S. W. 564, 5 L. R. A. 832; State *v.* Hope, 100 Mo. 347, 13 S. W. 490, 8 L. R. A. 608; State *v.* Smith, 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4.

Waiver through well-founded fear of mob violence will not render a conviction in defendant's absence valid. Massey *v.* State, 31 Tex. Cr. 371, 20 S. W. 758.

Counsel cannot waive defendant's right to be present. Smith *v.* People, 8 Colo. 457, 8 Pac. 920; Green *v.* People, 3 Colo. 68; State *v.* Myrick, 38 Kan. 238, 16 Pac. 330.

Grounds for removal from court-room.— Removal of defendant from the court to an adjoining room where he has access to his counsel is not error, where he persists in interrupting the prosecuting attorney in a loud voice after being admonished by the court to refrain. U. S. *v.* Davis, 25 Fed. Cas. No. 14,923, 6 Blatchf. 464.

Escape pending writ of error or appeal.— McGowan *v.* People, 104 Ill. 100, 44 Am. Rep. 87.

42. *Arkansas.*—Owen *v.* State, 38 Ark. 512.

Colorado.— Lawn *v.* People, 11 Colo. 343, 18 Pac. 281.

Kansas.— State *v.* Muir, 32 Kan. 481, 4 Pac. 812.

Kentucky.— Payne *v.* Com., 30 S. W. 416, 16 Ky. L. Rep. 839; Sharp *v.* Com., 30 S. W. 414, 16 Ky. L. Rep. 840.

Maine.— State *v.* Garland, 67 Me. 423.

Mississippi.— Garman *v.* State, 66 Miss. 196, 5 So. 385, holding that defendant cannot be excluded from the court-room while a co-defendant is testifying.

See 14 Cent. Dig. tit. "Criminal Law," § 1467.

A statute providing that defendant may be tried for a misdemeanor in his absence does not apply except where he expressly or impliedly waives his right to be present. Owen *v.* State, 38 Ark. 512.

43. *Arkansas.*— Sweeden *v.* State, 19 Ark. 205.

California.— People *v.* Ebner, 23 Cal. 158.

Iowa.— State *v.* Young, 86 Iowa 406, 53 N. W. 272.

Kentucky.— Payne *v.* Com., 30 S. W. 416, 16 Ky. L. Rep. 839; Sharp *v.* Com., 30 S. W. 414, 16 Ky. L. Rep. 840; Johnson *v.* Com., 1 Duv. 244; Com. *v.* Cheek, 1 Duv. 26.

Virginia.— Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838.

See 14 Cent. Dig. tit. "Criminal Law," § 1467.

Discretion of court.— Under some statutes defendant has a right to appear and plead by attorney and to be tried in his absence. People *v.* Ebner, 23 Cal. 158; Johnson *v.* Com., 1 Duv. (Ky.) 244. Under others the court has a discretion to refuse a trial in his absence, even when he consents. Owen *v.* State, 38 Ark. 512 (holding that the court had such discretion under a statute providing that, on indictment for a misdemeanor, trial may be had in the absence of defendant, and that such a trial should be refused where the punishment may be imprisonment); Bridges *v.* State, 38 Ark. 510; Warren *v.* State, 19 Ark. 214, 68 Am. Dec. 214.

Under the New York statute a defendant indicted for a misdemeanor cannot be tried in his absence, unless represented by an attorney "duly authorized for that purpose." Blythe *v.* Tompkins, 2 Abb. Pr. (N. Y.) 468. The general authority of an attorney as counsel in the case is insufficient. People *v.* Wilkes, 5 How. Pr. (N. Y.) 105.

Withdrawal of counsel.— On a trial for a misdemeanor where the defendant is absent, under a statute allowing trial for a misdemeanor if defendant appear by counsel, the

ute defendant may waive his right to be present, so as to render a trial or reception of a verdict in his absence valid, where the misdemeanor is punishable by fine only, and he does so where he appears by counsel or voluntarily absents himself.[44] In some jurisdictions it is so held whether the offense is punishable by fine only or by imprisonment,[45] but in others there are the decisions or *dictum* to the contrary.[46]

b. Custody and Restraint of Defendant. At common law defendant, although indicted for the highest crime, must be free from all manner of shackles or bonds, whether on his hands or feet, when he is arraigned, unless there is evident danger of escape.[47] In the United States the common-law rule is followed, and shackling defendant during arraignment, during the calling and examination of the jurors, or at any time during the trial, except in extreme cases to prevent escape or to protect the bystanders from the danger of defendant's attack, is reversible error.[48]

court may refuse to allow the counsel for defendant to withdraw from the case, and it is error to permit such withdrawal and proceed with the case in the absence of both counsel and defendant. State *v.* Young, 86 Iowa 406, 53 N. W. 272.

44. *Illinois.*— Bloomington *v.* Heiland, 67 Ill. 278.

Kentucky.— Canada *v.* Com., 9 Dana 304; Steele *v.* Com., 3 Dana 84.

Maine.— See State *v.* Garland, 67 Me. 423.

Vermont.— *Ex p.* Tracy, 25 Vt. 93.

Virginia.— Pifer *v.* Com., 14 Gratt. 710; Com. *v.* Lewis, 1 Va. Cas. 334; Com. *v.* Crump, 1 Va. Cas. 172.

United States.— U. S. *v.* Leckie, 26 Fed. Cas. No. 15,583, 1 Sprague 227; U. S. *v.* Mayo, 26 Fed. Cas. No. 15,754, 1 Curt. 433.

England.— See 1 Chitty Cr. L. 412; 2 Hale P. C. 216.

Contra, Slocovitch *v.* State, 46 Ala. 227.

See 14 Cent. Dig. tit. "Criminal Law," § 1467.

Leave of court necessary.— State *v.* Garland, 67 Me. 423; U. S. *v.* Mayo, 26 Fed. Cas. No. 15,754, 1 Curt. 433. And see Warren *v.* State, 19 Ark. 214, 68 Am. Dec. 214.

Absence from a trial by court-martial for a trivial offense, resulting in a sentence of a small fine, without objection to the sitting, will not justify the sentence being set aside. Weirman *v.* U. S., 36 Ct. Cl. 236.

45. *Iowa.*— See State *v.* Hale, 91 Iowa 367, 59 N. W. 281.

Kansas.— State *v.* Gomes, 9 Kan. App. 63, 57 Pac. 262.

Minnesota.—See State *v.* Reckards, 21 Minn. 47.

Nebraska.— Peterson *v.* State, 64 Nebr. 875, 90 N. W. 964.

Rhode Island.— State *v.* Guinness, 16 R. I. 401, 16 Atl. 910.

South Carolina.— State *v.* Lucker, 40 S. C. 549, 18 S. E. 797.

Texas.— Gage *v.* State, 9 Tex. App. 259, amendment of verdict.

West Virginia.— State *v.* Campbell, 42 W. Va. 246, 24 S. E. 875.

United States.— U. S. *v.* Shepherd, 27 Fed. Cas. No. 16,274, 1 Hughes 520.

See 14 Cent. Dig. tit. "Criminal Law," § 1467.

Judgment of imprisonment.— Although a defendant may appear by counsel in any misdemeanor case, and although it be punishable by imprisonment, in no case can there be judgment of imprisonment without having defendant present at its rendition. State *v.* Campbell, 42 W. Va. 246, 24 S. E. 875. See also People *v.* Winchell, 7 Cow. (N. Y.) 525.

46. Lawn *v.* People, 11 Colo. 343, 18 Pac. 281; *Ex p.* Tracy, 25 Vt. 93; Com. *v.* Crump, 1 Va. Cas. 172; U. S. *v.* Mayo, 26 Fed. Cas. No. 15,754, 1 Curt. 433.

A verdict for a misdemeanor may be received in defendant's absence.

Illinois.— Holliday *v.* People, 9 Ill. 111.

Iowa.— State *v.* Shepard, 10 Iowa 126.

Vermont.— Sawyer *v.* Joiner, 16 Vt. 497.

United States.— U. S. *v.* Shepherd, 27 Fed. Cas. No. 16,274, 1 Hughes 520.

England.— Rex *v.* Ladsingham, T. Raym. 193.

47. Waite's Case, 2 East P. C. 570, 1 Leach C. C. 33; Cranburne's Case, 13 How. St. Tr. 222. *Compare* Layer's Case, 16 How. St. Tr. 94; 4 Blackstone Comm. 322; Britton, c. 5; Fleta, lib. 1, c. 31, 1; 2 Hale P. C. 219; 2 Hawkins P. C. 308; 3 Inst. 316; Kel. 10.

48. *Alabama.*— Faire *v.* State, 58 Ala. 74.

California.— People *v.* Harrington, 42 Cal. 165, 10 Am. Rep. 296.

Mississippi.— Lee *v.* State, 51 Miss. 566.

Missouri.— State *v.* Kring, 64 Mo. 591 [*affirming* 1 Mo. App. 438].

New Mexico.— Territory *v.* Kelly, 2 N. M. 292.

Oregon.— State *v.* Smith, 11 Oreg. 205, 8 Pac. 343.

Tennessee.— Matthews *v.* State, 9 Lea 128, 42 Am. Rep. 667. See Poe *v.* State, 10 Lea 673.

Texas.— Vela *v.* State, 33 Tex. Cr. 322, 26 S. W. 396. See Rainey *v.* State, 20 Tex. App. 455.

See 14 Cent. Dig. tit. "Criminal Law," § 1484.

In removing the prisoner from court, on adjournment, he may be shackled. State *v.* Craft, 164 Mo. 631, 65 S. W. 280.

While awaiting jurors.— And accused may be shackled while he is in the dock, fifty feet from the jury-box, awaiting more jurors.

c. Place of Defendant in Court. By the English practice those charged with treason, whatever their rank, and whether or not on bail, would not be allowed to stand outside the dock.[49] Their attorney might freely communicate with them, but they had no right to sit next to him. Out of favor to one defending himself without counsel, he might be permitted to stand outside the bar.[50] In the United States these rules are modified to a certain extent. If the accused is in custody the proper place for him is at the bar or in the dock; if he is on bail he may sit near his counsel within the bar.[51]

4. Counsel For Prosecution[52] — a. Eligibility. If the prosecuting attorney has a personal interest in obtaining a conviction it may disqualify him.[53] On the other hand the mere prejudice of the prosecuting attorney against defendant, although open to severe criticism by the court, will not disqualify him.[54]

b. Assistance of Attorney-General. The attorney-general is sometimes required by statute, when requested so to do in writing by the governor, to assist in the prosecution of a crime.[55]

c. Employment of Private Assistants — (I) *In General.* No valid objection can be urged to the prosecuting attorney having the assistance of private counsel,[56] although it may be improper for the prosecuting attorney to surrender the direction and control of the case to a private person.[57]

(II) *Who Are Eligible.* An attorney who has been engaged by,[58] or who has appeared for, the accused on the preliminary examination,[59] or one who is not a resident of the state,[60] is not eligible. But a conditional employment of an

Matthews *v.* State, 9 Lea (Tenn.) 128, 42 Am. Rep. 667.

Where defendant is a lawless and desperate character he may be shackled during arraignment, but at no other time, where a statute provides that the accused shall not be restrained more than is necessary for his detention. Parker *v.* Territory, (Ariz. 1898) 52 Pac. 361.

Armed guard.— Permitting the prisoner, when dangerous and desperate, to be attended during the trial and while testifying by an armed guard is proper. State *v.* Duncan, 116 Mo. 288, 22 S. W. 699.

49. Reg. *v.* Zulueta, 1 C. & K. 215, 1 Cox C. C. 20, 47 E. C. L. 213; Reg. *v.* Douglas, C. & M. 193, 41 E. C. L. 109; Reg. *v.* Egan, 9 C. & P. 485 note *a*, 38 E. C. L. 287; Reg. *v.* St. George, 9 C. & P. 483, 38 E. C. L. 285; Kingston's Case, 20 How. St. Tr. 355; Byron's Case, 19 How. St. Tr. 1178; Ferrer's Case, 19 How. St. Tr. 886; Trial of Charles I, 4 How. St. Tr. 994.

50. Tooke's Case, 25 How. St. Tr. 1.

51. State *v.* Quinn, 2 Pennew. (Del.) 339, 45 Atl. 544; Matthews *v.* State, 9 Lea (Tenn.) 128, 42 Am. Rep. 667; State *v.* Underwood, 2 Overt. (Tenn.) 92; 1 Bishop New Cr. Proc. § 954.

52. Prosecuting attorneys generally see Prosecuting Attorneys.

53. People *v.* Cline, 44 Mich. 290, 6 N. W. 671, holding that a prosecuting attorney is disqualified where he is a brother of the complaining witness and is a member of a firm which is affected by the criminal transaction.

Private prosecutor.— In England criminal proceedings are often initiated by a private prosecutor. He is not entitled to address the jury and act as attorney for the prosecution. Rex *v.* Brice, 2 B. & Ald. 606, 1 Chit. 352, 18 E. C. L. 196; Rex *v.* Milne, 2 B. & Ald. 606 note *a*; Reg. *v.* Gurney, 11 Cox C. C. 414.

54. People *v.* Hamberg, 84 Cal. 468, 24 Pac. 298.

55. In such a case it is part of his duty to appear for the state and to prosecute any cause, civil or criminal, in which the state or the people may be interested. He has no option in the matter. Emery *v.* State, 101 Wis. 627, 78 N. W. 145.

56. *California.*— People *v.* Turcott, 65 Cal. 126, 3 Pac. 461.

Idaho.— People *v.* Biles, 2 Ida. (Hasb.) 114, 6 Pac. 120.

Kansas.— State *v.* Wells, 54 Kan. 161, 37 Pac. 1005.

Kentucky.— Price *v.* Caperton, 1 Duv. 207.

Louisiana.—State *v.* Mangrum, 35 La. Ann. 619.

Massachusetts.— Com. *v.* Knapp, 10 Pick. 477, 20 Am. Dec. 534.

Michigan.— People *v.* Wood, 99 Mich. 620, 58 N. W. 638; People *v.* Perriman, 72 Mich. 184, 40 N. W. 425; Ulrich *v.* People, 39 Mich. 245.

Missouri.— State *v.* Orrick, 106 Mo. 111, 17 S. W. 176, 329.

Montana.— State *v.* Tighe, 27 Mont. 327, 71 Pac. 3.

Tennessee.— Chambers *v.* State, 3 Humphr. 237; *Ex p.* Gillespie, 3 Yerg. 325.

See 14 Cent. Dig. tit. "Criminal Law," § 1487.

57. Burkhard *v.* State, 18 Tex. App. 599.

58. Wilson *v.* State, 16 Ind. 392.

59. State *v.* Halstead, 73 Iowa 376, 35 N. W. 457.

60. State *v.* Russell, 83 Wis. 330, 53 N. W. 441.

Statutory provisions.— The attorney for the person who has been injured by the com-

attorney by the accused, no confidential communications passing, does not render the attorney ineligible,[61] and an attorney who conducted the examination before the magistrate,[62] an attorney who is a non-resident of the county,[63] or a former district attorney[64] is eligible.[65]

(III) *Employment of Assistant Counsel by Persons Interested.* As a general rule it is proper for the court to permit counsel employed and paid by the prosecuting witness, or by other persons desirous of a conviction, to assist the prosecuting attorney.[66]

(IV) *Absence of Prosecuting Attorney.* If the prosecuting officer is absent or incapacitated from any cause to conduct the trial, it is the duty of the court and it has the inherent power to appoint a suitable person to discharge his duties, in order to avoid delay and to prevent a miscarriage of justice.[67]

mission of the crime (People *v.* Hendryx, 58 Mich. 319, 25 N. W. 299; People *v.* Hurst, 41 Mich. 328, 1 N. W. 1027; Meister *v.* People, 31 Mich. 99), and one who has been engaged in a civil suit, dependent on the same state of facts as the criminal proceedings (People *v.* Hillhouse, 80 Mich. 580, 45 N. W. 484), is by express statute ineligible in Michigan.

61. State *v.* Lewis, 96 Iowa 286, 65 N. W. 295; State *v.* Howard, 118 Mo. 127, 24 S. W. 41.

62. Com. *v.* King, 8 Gray (Mass.) 501.

63. People *v.* Thacker, 108 Mich. 652, 66 N. W. 562.

64. State *v.* Reed, 49 La. Ann. 704, 21 So. 732; Jackson *v.* State, 81 Wis. 127, 51 N. W. 89.

65. It is not error for the court to permit a witness who is related to the person injured by the crime to assist the prosecuting attorney after he has testified. Dale *v.* State, 88 Ga. 552, 15 S. E. 287; Marcum *v.* Com., 1 S. W. 727, 8 Ky. L. Rep. 418.

The fact that the lieutenant-governor assists the prosecuting attorney is not error, although he may subsequently have to pass upon the application of the accused for a pardon, where before his election he acted as assistant prosecuting attorney on a prior trial of the accused, and by such means became acquainted with the facts of the case. State *v.* Hawkins, 27 Wash. 375, 67 Pac. 814.

Unfriendliness to a relation of the accused (People *v.* Montague, 71 Mich. 447, 39 N. W. 585) or a strong prejudice against the business in which he is engaged does not disqualify (People *v.* O'Neill, 107 Mich. 556, 65 N. W. 540).

66. *Indiana.*—Keyes *v.* State, 122 Ind. 527, 23 N. E. 1097.

Iowa.— State *v.* Crafton, 89 Iowa 109, 56 N. W. 257; State *v.* Shreves, 81 Iowa 615, 47 N. W. 899; State *v.* Montgomery, 65 Iowa 483, 22 N. W. 639.

Kentucky.— Benningfield *v.* Com., 17 S. W. 271, 13 Ky. L. Rep. 446.

Minnesota.— State *v.* Rue, 72 Minn. 296, 75 N. W. 235.

Nebraska.— Gandy *v.* State, 27 Nebr. 707, 43 N. W. 747, 44 N. W. 108; Bradshaw *v.* State, 17 Nebr. 147, 22 N. W. 361; Polin *v.* State, 14 Nebr. 540, 16 N. W. 898.

New Jersey.— Gardner *v.* State, 55 N. J. L. 17, 26 Atl. 30.

Pennsylvania.— Com. *v.* Eisenhower, 181 Pa. St. 470, 37 Atl. 521, 59 Am. St. Rep. 670; Com. *v.* Dawson, 3 Pa. Dist. 603.

Virginia.— Hopper *v.* Com., 6 Gratt. 684.

Wisconsin.— Lawrence *v.* State, 50 Wis. 507, 7 N. W. 343, decided prior to the act of 1887.

In Michigan counsel in the employ of interested private persons cannot assist in the prosecution. Sneed *v.* People, 38 Mich. 248; Meister *v.* People, 31 Mich. 99. But see People *v.* Schick, 75 Mich. 592, 42 N. W. 1008. See also People *v.* Bemis, 51 Mich. 422, 16 N. W. 794, holding that counsel employed by a board of supervisors may assist in the prosecution.

In Wisconsin, under the act of 1887, the court may appoint assistant counsel, to be paid out of the public funds, but no counsel employed and receiving compensation from private parties can even by appointment assist in prosecuting a crime punishable by imprisonment in the state prison (Biemel *v.* State, 71 Wis. 444, 37 N. W. 244), unless he has renounced the employment and all claim to any compensation other than that allowed by the statute (Bird *v.* State, 77 Wis. 276, 45 N. W. 1126).

In a prosecution for homicide it is not error to permit an attorney who is employed and paid by the relatives or friends of the deceased to assist in the prosecution, even though the prosecuting attorney does not request such assistance. State *v.* Helm, 92 Iowa 540, 61 N. W. 246; State *v.* Wilson, 24 Kan. 189, 36 Am. Rep. 257; State *v.* Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686; People *v.* Tidwell, 4 Utah 506, 12 Pac. 61.

67. *Georgia.*— Mitchell *v.* State, 22 Ga. 211, 68 Am. Dec. 493.

Indiana.— Dukes *v.* State, 11 Ind. 557, 71 Am. Dec. 370.

Louisiana.— State *v.* Smith, 107 La. 129, 31 So. 693, 1014; State *v.* Jerry, 4 La. Ann. 190.

Mississippi.— Keithler *v.* State, 10 Sm. & M. 192.

Tennessee.—Douglass *v.* State, 6 Yerg. 525.

Texas.— Taylor *v.* State, (Cr. App. 1897) 42 S. W. 285.

Virginia.— Jackson *v.* Com., 96 Va. 107, 30 S. E. 452.

See 14 Cent. Dig. tit. "Criminal Law," § 1489.

A substitute may be appointed where the

(v) *Discretion of Court to Appoint.* It is wholly discretionary with the court, even in the absence of statute, to appoint private counsel to assist the prosecuting attorney;[68] and the fact that the person appointed expects to be paid by private persons will not deprive the court of power to appoint him.[69]

(vi) *Formalities of Appointment.* The attorney appointed to assist in the prosecution need not be sworn to act without partiality[70] or be required to give a bond;[71] nor is a formal order of appointment in writing necessary.[72]

(vii) *Supervision and Control of Trial.* The control and direct supervision of the case should remain with the prosecuting attorney, if he be not absolutely incapacitated; and for this reason the appointment, if not made at his request, should be subject to his approval.[73] The assisting counsel may open the case for the prosecution,[74] although the statute provides that in criminal cases the prosecuting attorney must state the case.[75] So too it has been held that the assisting counsel may close the argument for the prosecution,[76] and may pray

prosecuting attorney is by statute exempt from taking part in prosecutions for assault and battery (Bartell *v.* State, 106 Wis. 342, 82 N. W. 142), where the prosecuting attorney of the county to which the venue has been changed had formerly appeared in the case as counsel for the accused (Gandy *v.* State, 27 Nebr. 707, 43 N. W. 747, 44 N. W. 108), where he had been counsel for the accused in a transaction out of which the criminal proceeding arose (Roberts *v.* People, 11 Colo. 213, 17 Pac. 637; Hyde *v.* Territory, 8 Okla. 69, 56 Pac. 851), or where the action is against the prosecuting attorney, and the statute authorizes the court to appoint some other person in cases where the prosecuting attorney is interested (State *v.* Taylor, 93 Mo. App. 327, 67 S. W. 672).

An attorney appointed in place of an absent prosecuting attorney, and who conducts the greater part of the trial, need not be retired on the reappearance of the latter, although it is not error to allow him thereafter to assist the substitute. State *v.* Smith, 107 La. 129, 31 So. 693, 1014.

68. *Alabama.*— Shelton *v.* State, 1 Stew. & P. 208.

California.— People *v.* Blackwell, 27 Cal. 65.

Colorado.— Hinsdale County *v.* Crump, (App. 1902) 70 Pac. 159.

Indiana.— Shular *v.* State, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211; Tull *v.* State, 99 Ind. 238; Siebert *v.* State, 95 Ind. 471; Wood *v.* State, 92 Ind. 269.

Iowa.— State *v.* Fitzgerald, 49 Iowa 260, 31 Am. Rep. 148.

Massachusetts.— Com. *v.* Scott, 123 Mass. 222, 25 Am. Rep. 81; Com. *v.* Williams, 2 Cush. 582.

Michigan.— People *v.* Foote, 93 Mich. 38, 52 N. W. 1036.

Minnesota.— State *v.* Borgstrom, 69 Minn. 508, 72 N. W. 799, 975.

Mississippi.— Edwards *v.* State, 47 Miss. 581.

Ohio.— Price *v.* State, 35 Ohio St. 601.

Pennsylvania.— McElroy *v.* County, 1 Del. Co. 282.

Vermont.— State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

Washington.— State *v.* Hoshor, 26 Wash. 643, 67 Pac. 386.

Wisconsin.— Arnold *v.* State, 81 Wis. 278, 51 N. W. 426; Rounds *v.* State, 57 Wis. 45, 14 N. W. 865.

See 14 Cent. Dig. tit. "Criminal Law," § 1491.

Although a law partner of the prosecuting attorney is assisting him in the prosecution without fee or compensation, under a permissive statute the court may appoint another attorney, also to assist. Richards *v.* State, 82 Wis. 172, 51 N. W. 652.

Only such persons as are in a position to and are willing to act impartially and justly should be appointed in any case. Sneed *v.* People, 38 Mich. 248.

The number of counsel who may be appointed to prosecute is discretionary with the court, although it is an improper practice and hardly consistent with defendant's right to a fair and impartial trial for the court to appoint numerous assistants to the prosecuting attorney. Com. *v.* Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; State *v.* Sweeney, 93 Mo. 38, 5 S. W. 614; State *v.* Griffin, 87 Mo. 608.

69. State *v.* Bartlett, 55 Me. 200.

The county will in some states be liable for compensation for the services of the person appointed. Hinsdale County *v.* Crump, (Colo. App. 1902) 70 Pac. 159.

70. State *v.* Taylor, 98 Mo. 240, 11 S. W. 570.

71. Martin *v.* State, 16 Ohio 364.

72. People *v.* Walters, 98 Cal. 138, 32 Pac. 864; State *v.* Duncan, 116 Mo. 288, 22 S. W. 699.

73. Com. *v.* Williams, 2 Cush. (Mass.) 582.

74. Surber *v.* State, 99 Ind. 71; Roberts *v.* Com., 94 Ky. 499, 22 S. W. 845, 15 Ky. L. Rep. 341; State *v.* Taylor, 98 Mo. 240, 11 S. W. 570; State *v.* Robb, 90 Mo. 30, 2 S. W. 1.

75. State *v.* Stark, 72 Mo. 37.

The bringing of the indictment before the court must be by the prosecuting attorney, although the actual trial may be conducted by a private assistant. Carlisle *v.* State, 73 Miss. 387, 19 So. 207; Byrd *v.* State, 1 How. (Miss.) 247.

76. *California.*— People *v.* Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75; People *v.* Murphy, 47 Cal. 103; People *v.* Strong, 46 Cal. 302.

judgment of the court sentencing a prisoner to the death penalty on a verdict of conviction.[77]

5. Counsel For Accused — a. In General. At common law in England counsel were not allowed to persons indicted for treason, unless some point of law arose,[78] although the rule was otherwise in misdemeanors.[79] At the present day in England the assistance of counsel is always allowed, and counsel will be assigned if the poverty of the accused justifies it.[80] By the federal and the several state constitutions the accused is absolutely guaranteed the right to have the assistance of counsel at his trial.[81]

b. Waiver. The constitutional right of the accused to have the assistance of counsel may be waived, and a waiver will be implied where the accused, being without counsel, fails to demand that counsel be assigned him.[82]

c. Presence of Counsel.[83] While the accused is entitled to the presence and assistance of counsel at every step and stage of the prosecution,[84] the rendition of

Georgia.— Griffin *v.* State, 15 Ga. 476.

Idaho.— State *v.* Williams, 4 Ida. 502, 42 Pac. 511.

Tennessee.— Jarnagin *v.* State, 10 Yerg. 529.

Utah.— People *v.* Calton, 5 Utah 451, 16 Pac. 902.

See 14 Cent. Dig. tit. "Criminal Law," § 1494.

77. State *v.* Conly, 130 N. C. 683, 41 S. E. 534.

78. 4 Blackstone Comm. 355, 356; 1 Chitty Cr. L. 407, 413; 1 East P. C. 112; 2 Hawkins P. C. c. 29, § 1; 3 Inst. 29, 137. And see People *v.* Onondaga County, 4 N. Y. Cr. 102.

The protection of the legal rights of the prisoner was thus left to the presiding judge, whose bias in favor of the crown resulted in the majority of cases in great injustice to the accused. Rosewell's Case, 10 How. St. Tr. 147.

79. 4 Blackstone Comm. 355 note 8; 1 Chitty Cr. L. 409.

Counsel were allowed to defendant on an appeal, whether the offense was capital or not. Hawkins states that this distinction was probably made because appeals were generally carried on with greater vindictiveness than indictments, being grounded more on private revenge than on a desire for public justice. Counsel was also always allowed the prisoner to argue on a doubtful question of law, as for example the competency of witnesses or jurors, or where the prisoner pleaded pardon. 2 Hawkins P. C. c. 39, §§ 1–6. See also 1 Chitty Cr. L. 407; 2 Hale P. C. 236; 3 Inst. 29, 137.

80. In England the case may be conducted by the accused as to matters of fact, that is, examining the witnesses; and as to matter of law by counsel, but not partly by counsel and partly by the accused as to matters of fact. Rex *v.* White, 3 Campb. 98, 13 Rev. Rep. 765; Reg. *v.* Boucher, 8 C. & P. 141; Rex *v.* Parkins, 1 C. & P. 548, 12 E. C. L. 314, R. & M. 166, 21 E. C. L. 723. By the second decade of the nineteenth century it had become the practice to allow counsel to instruct the prisoner as to what questions he should ask, and sometimes to examine his witnesses and cross-examine those against him, although never to address the jury. By 7 Wm. III, c. 3, § 1, defendant charged with treason was entitled to two counsel to be assigned him by the court. 1 Chitty Cr. L. 409.

81. *California.*— People *v.* Napthaly, 105 Cal. 641, 39 Pac. 29.

Georgia.— Simmons *v.* State, 116 Ga. 583, 42 S. E. 779; Delk *v.* State, 99 Ga. 667, 26 S. E. 752; Hunt *v.* State, 49 Ga. 255, 15 Am. Rep. 677; Roberts *v.* State, 14 Ga. 18.

Kansas.— State *v.* Moore, 61 Kan. 732, 60 Pac. 748.

Louisiana.— State *v.* Bridges, 109 La. 530, 33 So. 589; State *v.* Ferris, 16 La. Ann. 424; State *v.* Cummings, 5 La. Ann. 330; State *v.* Summers, 4 La. Ann. 26.

Missouri.— State *v.* Ledford, 3 Mo. 102.

New Hampshire.— State *v.* Arlin, 39 N. H. 179.

North Carolina.— State *v.* Miller, 75 N. C. 73.

See 14 Cent. Dig. tit. "Criminal Law," § 1496.

In the absence of statute the constitutional guarantee does not confer the right to counsel at public expense (Houk *v.* Montgomery County, 14 Ind. App. 662, 41 N. E. 1068), nor does it confer a right on counsel for defendant to make a sworn statement of facts not otherwise proved (Wilson *v.* State, 3 Heisk. (Tenn.) 232).

Access to the accused by the counsel while the former is in jail must be allowed as a part of his constitutional right. It may be procured by mandamus to the sheriff. People *v.* Risley, 13 Abb. N. Cas. (N. Y.) 186, 66 How. Pr. (N. Y.) 67.

82. State *v.* Raney, 63 N. J. L. 363, 43 Atl. 677.

There must be a request for and a denial of counsel shown to constitute error. A denial will not be presumed. Barnes *v.* Com., 92 Va. 794, 23 S. E. 784. See also State *v.* De Serrant, 33 La. Ann. 979.

83. Presence of accused see *supra*, XIV, B, 3.

84. State *v.* Moore, 61 Kan. 732, 60 Pac. 748. Thus it is error to charge the jury in the absence of the counsel for the accused. People *v.* Trim, 37 Cal. 274; Martin *v.* State, 51 Ga. 567; State *v.* Williams, 45 La. Ann.

the verdict in the absence of the counsel for the accused, when the accused himself is present and does not object, is not error,[85] unless it affirmatively appears that the accused was prejudiced by something done or omitted.[86]

d. Former Prosecuting Attorney. It is contrary to public policy to permit a public prosecuting officer after his term of office has expired to act for and defend a person whose indictment he had procured.[87]

e. Assignment of Counsel — (i) *Power and Duty of Court.* In capital cases, and often in other cases where the accused is too poor to provide counsel for himself, the court has the power, which it ought and usually does exercise, to assign counsel to him.[88] In the absence of statute counsel assigned by the court are not entitled to compensation and are not at liberty to decline the appointment.[89]

936, 12 So. 932; State *v.* Davenport, 33 La. Ann. 231; State *v.* Meagher, 49 Mo. App. 571.

85. *California.*— People *v.* Bennett, 65 Cal. 267, 3 Pac. 868.

Georgia.— O'Bannon *v.* State, 76 Ga. 29; Lassiter *v.* State, 67 Ga. 739.

Iowa.— State *v.* Shepard, 10 Iowa 126.

Ohio.— Crusen *v.* State, 10 Ohio St. 258; Sutcliffe *v.* State, 18 Ohio 469, 51 Am. Dec. 459.

Texas.— Beaumont *v.* State, 1 Tex. App. 533, 28 Am. Rep. 424.

Wisconsin.— Barnard *v.* State, 88 Wis. 656, 60 N. W. 1058; Martin *v.* State, 79 Wis. 165, 48 N. W. 119.

See 14 Cent. Dig. tit. "Criminal Law," § 1498.

86. People *v.* Wilson, 109 N. Y. 345, 16 N. E. 540. See also People *v.* Rice, 73 Cal. 220, 14 Pac. 851.

87. He has acquired knowledge during his term of office which may and indeed must necessarily be employed to defend the accused, and to permit this would deter persons having knowledge of crimes from communicating such knowledge to the public prosecutor. Gaulden *v.* State, 11 Ga. 47.

88. *California.*— People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161.

Georgia.— Charlon *v.* State, 106 Ga. 400, 32 S. E. 347.

Indiana.— Burton *v.* State, 75 Ind. 477; Gordon *v.* Dearborn County, 52 Ind. 322; Kerr *v.* State, 35 Ind. 288; Fountain County *v.* Wood, 35 Ind. 70.

Louisiana.— State *v.* Rollins, 50 La. Ann. 925, 24 So. 664; State *v.* Simpson, 38 La. Ann. 23.

Texas.— Austin *v.* State, (Cr. App. 1899) 51 S. W. 249.

Wisconsin.—Dane County *v.* Smith, 13 Wis. 585, 80 Am. Dec. 754; Carpenter *v.* Dane County, 9 Wis. 274.

England.— Reg. *v.* Frost, 9 C. & P. 129, 38 E. C. L. 87; Reg. *v.* Fogarty, 5 Cox C. C. 161.

See 14 Cent. Dig. tit. "Criminal Law," § 1500.

The court is not required to assign counsel to an accused, except on his application, showing inability to employ counsel. State *v.* Whitesides, 49 La. Ann. 352, 21 So. 540; State *v.* De Serrant, 33 La. Ann. 979; Gutierez *v.* State, (Tex. Cr. App. 1898) 47 S. W. 372.

Under a statute providing that any poor person who has not sufficient means to defend the action may apply to the court to assign him an attorney, it is error for the court to deny the application because the applicant, who is an adult, has parents who possess the means with which they could hire counsel. Hendryx *v.* State, 130 Ind. 265, 29 N. E. 1131. The rule would be otherwise where the accused himself had means. Cross *v.* State, 132 Ind. 65, 31 N. E. 473.

In England, under the statute providing for the allowance of counsel in prosecutions for treason, prisoners are entitled to have counsel assigned ten days before arraignment, but on a collateral matter, on which the accused was always entitled to have counsel to advise him, the application to assign counsel was not usually granted until he was ready to plead. 1 Chitty Cr. L. 411. It was compulsory in England for counsel once assigned to serve. 2 Hawkins P. C. c. 39, § 8.

The number of counsel which may be assigned to defend the accused is within the discretion of the court (Keyes *v.* State, 122 Ind. 527, 23 N. E. 1097), and this remains true even where the statute provides that counsel appointed for defendant may be awarded proper compensation for "his" services (People *v.* Heiselbetz, 26 Misc. (N. Y.) 100, 55 N. Y. Suppl. 4, 5 N. Y. Annot. Cas. 165; People *v.* Fitch, 51 N. Y. Suppl 683).

Limiting authority of counsel appointed.— The fact that the judge in appointing counsel for the prisoner limits this appointment to the court and to the trial term then pending is not error. Ryan *v.* State, 83 Wis. 486, 53 N. W. 836.

89. Barnes *v.* Com., 92 Va. 794, 23 S. E. 784.

Compensation in the absence of statute is not allowed to counsel assigned. People *v.* Niagara County, 78 N. Y. 622; People *v.* Onondaga County, 4 N. Y. Cr. 102. In New York, Iowa, and perhaps elsewhere, compensation is provided for by statute. State *v.* Cater, 109 Iowa 69, 80 N. W. 222. A statute providing that counsel assigned shall receive a fixed sum not exceeding a fixed amount for personal and incidental expenses does not permit expenses incurred in procuring expert testimony to be paid. People *v.* Coler, 168 N. Y. 643, 61 N. E. 1132. The attorney who has been assigned as counsel for each of two defendants, jointly indicted and separately tried, may be allowed compensation for

(II) *Refusal of Prisoner to Accept Counsel.* Where the court asks defendant if he desires counsel, offering to furnish him therewith, and he declines,[90] or where it assigns counsel to him, whose services he refuses to avail himself of, the trial may proceed without his having counsel, for the court has no power to force counsel upon him.[91]

(III) *Selection of Counsel by Accused.* The constitutional guarantee to be represented by counsel does not confer the right upon the accused to compel the court to assign him such counsel as he may choose.[92]

f. Time to Prepare Defense. In fairness to the accused, and to insure him the full enjoyment of his constitutional privilege, counsel appointed by the court should have a reasonable time for preparation for the trial.[93]

6. Right to Open and Close — a. In General. The general rule is that the right to open and to close the argument belongs to the prosecution;[94] but in some jurisdictions the order of argument is discretionary with the court.[95]

b. Defendant Introducing no Evidence. In some jurisdictions it is the practice to allow the counsel for defendant to close the argument, in cases where defendant introduced no evidence;[96] but in others it is held that in the absence of statute

his services to each. People *v.* McElvaney, 36 Misc. (N. Y.) 316, 73 N. Y. Suppl. 639.

90. Stokes *v.* State, 73 Ga. 816.

91. State *v.* Moore, 121 Mo. 514, 26 S. W. 345, 42 Am. St. Rep. 542; State *v.* Zumbunson, 13 Mo. App. 592; Reg. *v.* Ysenado, 6 Cox C. C. 386.

92. The power to select counsel is in the discretion of the court. Fambles *v.* State, 97 Ga. 625, 25 S. E. 365; Burton *v.* State, 75 Ind. 477; Baker *v.* State, 86 Wis. 474, 56 N. W. 1088.

A destitute defendant, charged with murder in the first degree, can have no part in selecting the counsel authorized to be assigned him by the court and paid by the county, under N. Y. Code Cr. Proc. § 308. People *v.* Fuller, 35 Misc. (N. Y.) 189, 71 N. Y. Suppl. 487.

93. State *v.* Ferris, 16 La. Ann. 424; Pennington *v.* State, 13 Tex. App. 44.

94. *Iowa.*— State *v.* Novak, 109 Iowa 717, 79 N. W. 465; State *v.* Robbins, 109 Iowa 650, 80 N. W. 1061.

Nevada.— State *v.* Smith, 10 Nev. 106; State *v.* Pierce, 8 Nev. 291.

West Virginia.— State *v.* Schnelle, 24 W. Va. 767.

United States.—U. S. *v.* Bates, 24 Fed. Cas. No. 14,543, 2 Cranch C. C. 405.

England.— Reg. *v.* Holchester, 10 Cox C. C. 226; Rex *v.* Stannard, 7 C. & P. 673, 32 E. C. L. 816.

See 14 Cent. Dig. tit. "Criminal Law," § 1507.

The refusal of the prosecuting attorney to make any opening address does not deprive him of the right to close. King *v.* State, (Tex. Cr. App. 1902) 67 S. W. 411. *Contra,* State *v.* Honig, 78 Mo. 249.

95. People *v.* Haun, 44 Cal. 96; State *v.* Beebe, 17 Minn. 241.

In Minnesota, under Gen. St. (1894), § 7332, unless the cause is submitted on either or both sides without argument, plaintiff commences and defendant concludes the argument to the jury.

In Texas the order of argument is discretionary with the court, except that the state must be given the right to conclude. Vines *v.* State, 31 Tex. Cr. 31, 19 S. W. 545.

Counsel employed by private persons to assist the prosecution may in the discretion of the court be permitted to make the closing argument. Sawyers *v.* Com., 88 Va. 356, 13 S. E. 708.

96. State *v.* Brisbane, 2 Bay (S. C.) 451; Reg. *v.* Webb, 4 F. & F. 862.

In Florida the statute expressly provides that defendant may have the closing argument where he introduces no evidence. Heffron *v.* State, 8 Fla. 73.

In Georgia the mere introduction of the prisoner's statement does not deprive him of the right to close. Farrow *v.* State, 48 Ga. 30.

Where a witness introduced by one of two defendants jointly tried is examined by the other both will be regarded as having introduced evidence. Cruce *v.* State, 59 Ga. 83; State *v.* Huckie, 22 S. C. 298.

In England it is held that where several persons are indicted jointly, and some introduce witnesses while others do not, the crown has a right to close as to those prisoners who called witnesses, but that counsel for the other prisoners who called no witnesses have the right to close as to them. Reg. *v.* Burns, 16 Cox C. C. 195; Reg. *v.* Trevelli, 15 Cox C. C. 289. But it has also been held under similar circumstances that the prosecution has a right to reply and to close on the whole case. Reg. *v.* Jordan, 9 C. & P. 118, 38 E. C. L. 80; Reg. *v.* Burton, 2 F. & F. 788; Reg. *v.* Briggs, 1 F. & F. 106; Reg. *v.* Hayes, 2 M. & Rob. 155. Under the English statute it seems that "witnesses for the defense" do not mean those called merely to prove character, and that such witnesses do not give the prosecution a reply (Reg. *v.* Dowse, 4 F. & F. 492; Reg. *v.* Patteson, 2 Lew. C. C. 262); but the contrary view has also been taken (Reg. *v.* Corfell, 1 Cox C. C. 123; Rex *v.* Whiting, 7 C. & P. 771, 32 E. C. L. 864).

the state has the right to open and close the argument, whether defendant introduces any evidence or not.[97]

c. Affirmative Defense. The fact that defendant puts in an affirmative defense, under which he has the burden of proof, does not deprive the prosecution of its right to open and close.[98]

7. Time For Sessions and Adjournment[99] — **a. Night Sessions.** During a prosecution the court may in its discretion hold night sessions.[1]

b. Power of Judge to Adjourn During Trial — (i) *In General.* The court has full power and discretion even in a capital case[2] to adjourn its sessions from day to day while the trial is being had, over the objection of the accused, if the occasion be such that an adjournment is called for.[3]

(ii) *To Try Issue of Prejudice of Jurors.* After testimony has been introduced defendant cannot have a suspension of the trial to try the issue that some of the jury had, before they were sworn, expressed the opinion that he was guilty.[4]

(iii) *To Get Evidence or Witnesses.* The court may in its discretion grant a short adjournment to another day in the term to enable one of the parties to procure witnesses.[5]

97. State *v.* Daniel, 31 La. Ann. 91; State *v.* Milligan, 15 La. Ann. 557; Doss *v.* Com., 1 Gratt. (Va.) 557. See also Rex *v.* Marsden, M. & M. 439, 22 E. C. L. 562.

98. Bolling *v.* State, 54 Ark. 588, 16 S. W. 658; State *v.* Hudkins, 35 W. Va. 247, 13 S. E. 367; French *v.* State, 93 Wis. 325, 67 N. W. 706.

It is discretionary with the court in Texas to permit defendant to open and close, where he alleges insanity. Shirley *v.* State, 37 Tex. Cr. 475, 36 S. W. 267.

99. **Continuances** generally see Continuances in Criminal Cases, 9 Cyc. 163.

Necessity for presence of accused see *supra*, XIV, B, 3.

Sessions on Sunday see Sunday.

Time of trial see *supra*, XIII.

1. State *v.* McCann, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216; State *v.* Belknap, 39 W. Va. 427, 19 S. E. 507.

The inability of defendant's leading counsel to be present does not render such sessions erroneous if he is otherwise represented. Jones *v.* State, 61 Ark. 88, 32 S. W. 81.

Requiring defendant's counsel to make a night argument, over his request for a postponement until morning, based upon his inability, produced by fatigue from constant and arduous labor in the daytime and from loss of sleep, is not error, unless it be shown that defendant's rights were thereby affected. Wartena *v.* State, 105 Ind. 445, 5 N. E. 20.

2. State *v.* Kimbrough, 13 N. C. 431; Carroll *v.* Com., 84 Pa. St. 107.

3. Walker *v.* State, 116 Ga. 537, 42 S. E. 787; Com *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228; Com. *v.* Titus, 3 Brewst. (Pa.) 165.

An adjournment for a short time because of the illness of the accused (Curtis *v.* Com., 87 Va. 589, 13 S. E. 73), because a juror has suddenly been taken ill (State *v.* Garrity, 98 Iowa 101, 67 N. W. 92), to correct an error in the record (State *v.* Libby, 85 Me. 169, 26 Atl. 1015; Com. *v.* Kelly, 12 Gray (Mass.) 123), or because the prosecuting attorney cannot attend in a prosecution before a justice (People *v.* Weeks, 99 Mich. 86, 57 N. W. 1091) is not error.

An inadvertent adjournment to a public holiday is a nullity, and is not ground for an objection by the accused. Polin *v.* State, 14 Nebr. 540, 16 N. W. 898.

The suspension of the trial to receive presentments of the grand jury is not cause for a mistrial, where it does not appear that the rights of the accused were injured. Perry *v.* State, 116 Ga. 850, 43 S. E. 253.

The clerk of the court having no power to adjourn the term on the failure of the judge to appear, a conviction had at a term to which the clerk has adjourned the court is invalid. *In re* McClasky, 52 Kan. 34, 34 Pac. 459; *In re* Terrill, 52 Kan. 29, 34 Pac. 457, 39 Am. St. Rep. 327; *In re* McClaskey, 2 Okla. 568, 37 Pac. 854.

To another place. — It is within the discretion of the court in exceptional circumstances to adjourn the trial to another place if within the county. This has been done where it was absolutely necessary to take the testimony of a sick witness who could not leave his house. Hampton *v.* U. S., Morr. (Iowa) 489. *Contra*, Adams *v.* State, 19 Tex. App. 1.

In England it has been held that independently of statute the court has no power to adjourn the case after the prosecution has opened, and where the evidence fails the court may direct an acquittal. Reg. *v.* Harvey, 11 Cox C. C. 546; Reg. *v.* Robson, 4 F. & F. 360; Reg. *v.* Parr, 2 F. & F. 861; Reg. *v.* Tempest, 1 F. & F. 381. But see Reg. *v.* Wenborn, 6 Jur. 267.

4. State *v.* Howard, 17 N. H. 171.

5. Hill *v.* State, 37 Ark. 395; Pearce *v.* State, 79 Ga. 437, 4 S. E. 849.

The refusal of a short suspension of the trial for a few hours to enable defendant to procure the attendance of a witness who had just been discovered to be material (Monday *v.* State, 32 Ga. 672, 79 Am. Dec. 314; People

8. View and Inspection[6] — **a. Discretion of Court.** Allowing the jury to view the place where the alleged crime was committed, or where some fact or transaction material thereto occurred, being discretionary with the court, where the premises have been thoroughly described in the evidence, it is not error to refuse defendant to have the jury take the view.[7] This rule applies to capital cases;[8] but in any case if the view is likely to mislead the jury it should be denied.[9]

b. Purpose of. The cases are divided upon the question whether the purpose of the view is to furnish new evidence or to enable the jurors to comprehend more clearly, by the aid of visible objects, the evidence already received. The latter proposition is well sustained[10] and seems more consistent with the conservative theories on which the rules of procedure and jury trials are based; but the contrary theory, holding that the purpose of a view is to supply evidence, is supported by good authorities.[11]

c. No Evidence to Be Taken. It is improper to permit a witness to testify as to the location of the objects or as to any other material point in the presence of the jury while taking the view.[12] The same rule applies to a person present with the jury, not sworn as a witness, who explains the *locus in quo*.[13]

v. Severance, 67 Hun (N. Y.) 182, 22 N. Y. Suppl. 91) or one whose attendance defendant had not compelled because of age and feebleness (George *v.* State, 11 Tex. App. 95) is error. But the refusal of the court to grant a short adjournment pending the trial to procure the presence of a witness is proper where it appears that defendant has made no efforts in that direction (State *v.* Valere, 39 La. Ann. 1060, 3 So. 186), and he has not shown that the evidence of the witness would be material (Wells *v.* State, 131 Ala. 48, 31 So. 572; State *v.* Osborne, 96 Iowa 281, 65 N. W. 159; Thompson *v.* Com., 88 Va. 45, 13 S. E. 304; State *v.* Craemer, 12 Wash. 217, 40 Pac. 944).

Where defendant has delayed the trial for nearly three years by continuances and dilatory motions, and has had ample time to have his mental condition examined, it is not error to refuse to suspend the trial to enable physicians to examine him as to his sanity. State *v.* Crisp, 126 Mo. 605, 29 S. W. 699.

6. **Necessity for presence of accused** see *supra*, XIV, B, 3, a, (I), (B).

7. *California.*— People *v.* Milner, 122 Cal. 171, 54 Pac. 833; People *v.* White, 116 Cal. 17, 47 Pac. 771; People *v.* Hawley, 111 Cal. 78, 43 Pac. 404.

Indiana.— Fleming *v.* State, 11 Ind. 234.

Kentucky.— Roberts *v.* Com., 22 S. W. 845, 15 Ky. L. Rep. 341.

Massachusetts.— Com. *v.* Chance, 174 Mass. 245, 54 N. E. 551, 75 Am. St. Rep. 306.

Missouri.— State *v.* Hancock, 148 Mo. 488, 50 S. W. 112.

New York.— People *v.* Buddensieck, 103 N. Y. 487, 9 N. E. 44, 57 Am. Rep. 766.

Pennsylvania.— Com. *v.* Van Horn, 188 Pa. St. 143, 41 Atl. 469; Com. *v.* Miller, 139 Pa. St. 77, 21 Atl. 138, 23 Am. St. Rep. 170.

Washington.— State *v.* Hunter, 18 Wash. 670, 52 Pac. 247; State *v.* Coella, 8 Wash. 512, 36 Pac. 474.

England.— Reg. *v.* Martin, L. R. 1 C. C. 378, 12 Cox C. C. 204, 41 L. J. M. C. 113, 26 L. T. Rep. N. S. 778, 20 Wkly. Rep. 1016; Reg. *v.* Whalley, 2 C. & K. 376, 2 Cox C. C. 231, 61 E. C. L. 374.

See 14 Cent. Dig. tit. "Criminal Law," § 1516.

8. Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Com. *v.* Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491.

9. Anonymous, 2 Chit. 422, 18 E. C. L. 718.

For the prosecution to make a material change in the condition of the place viewed raises a presumption that the accused has been prejudiced thereby in the minds of the jurors, which it must overcome, or a view by the jurors will be error. State *v.* Knapp, 45 N. H. 148.

Outside of county.— Under the statutes, a view may be ordered elsewhere than in the county where the trial is had. People *v.* Bush, 71 Cal. 602, 12 Pac. 781; Jones *v.* State, 51 Ohio St. 331, 38 N. E. 79.

10. *California.*— People *v.* Fitzgerald, 137 Cal. 546, 70 Pac. 554.

Indiana.— Shuler *v.* State, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211.

Kansas.— State *v.* Adams, 20 Kan. 311.

Minnesota.— Chute *v.* State, 19 Minn. 271.

Wisconsin.— Sasse *v.* State, 68 Wis. 530, 32 N. W. 849.

See 14 Cent. Dig. tit. "Criminal Law," § 1517.

11. Benton *v.* State, 30 Ark. 328; State *v.* Bertin, 24 La. Ann. 46; State *v.* Henry, 51 W. Va. 283, 41 S. E. 439.

Permitting the jury outside of court to inspect certain cattle in order to ascertain their identity from their appearance and brand is error, where there is nothing in evidence either as to the cattle or the brand. People *v.* Fagan, 98 Cal. 230, 33 Pac. 60; Smith *v.* State, 42 Tex. 444.

12. Garcia *v.* State, 34 Fla. 311, 16 So. 223; Hays *v.* Territory, 7 Okla. 15, 54 Pac. 300, 52 Pac. 950.

13. People *v.* Green, 53 Cal. 60; State *v.* Lopez, 15 Nev. 407; Sasse *v.* State, 68 Wis. 530, 32 N. W. 849. And see Conrad *v.* State, 144 Ind. 290, 43 N. E. 221, where the view was taken without the consent of the court, and the jurors were permitted to converse with outside persons.

9. Remarks and Conduct of Judge[14] — **a. In General.** The judge presiding at a jury trial, in his remarks and conduct of the case, should endeavor to maintain a strict impartiality. It is error for him to express directly or indirectly an opinion which points to the guilt of the accused[15] or to make a statement which tends to discredit the accused with the jury;[16] and generally statements by the judge in the presence of the jury that would constitute error if contained in the instructions are improper.[17]

b. Censuring Disorder. The remarks of the court censuring demonstrations of approval or disapproval or manifestations of ridicule or frivolity by the audience in the court-room are not ground for reversal.[18]

c. Vindicating Rights of Judge. Remarks of the court asserting its rights, its impartiality, and its dignity, and warning the jury of the obligations of their oath are proper and unobjectionable, and, where the rights of the court have been assailed by counsel, commendable.[19]

d. On Selecting the Jury. Remarks made by the court as to the selection of a jury do not constitute error unless it can be shown that the accused was prejudiced thereby.[20]

e. Admonishing and Correcting Counsel — (i) *In General.* The court may properly caution, correct, admonish, and to a certain extent criticize counsel during the case, provided it is done in such a manner as not to subject counsel to contempt or ridicule, or to prejudice the accused in the minds of the jurors.[21] An admonition to the prosecuting attorney to examine witnesses carefully to avoid

14. Remarks on rulings on requests to charge see *infra*, XIV, B, 9, i, (II).

15. People *v.* Daily, 135 Cal. 104, 67 Pac. 16; Cunningham *v.* People, 195 Ill. 550, 63 N. E. 517; Fisher *v.* People, 23 Ill. 283; Scruggs *v.* State, 90 Tenn. 81, 15 S. W. 1074; Hawkins *v.* U. S., 116 Fed. 569, 53 C. C. A. 663.

16. People *v.* Moyer, 77 Mich. 571, 43 N. W. 928. And see People *v.* Leach, 146 N. Y. 392, 40 N. E. 865.

The remarks of the court on the absence of a witness, after a colloquy with him, on his return to court, which intimate that his absence had been procured by the defendant or his counsel (People *v.* Abbott, (Cal. 1893) 34 Pac. 500), or a statement by the court that witnesses are examined in the absence of the accused in order that he may stop and correct them if they testify falsely (State *v.* Norton, 28 S. C. 572, 6 S. E. 820), is error, as calculated to discredit the accused in the minds of the jury.

17. State *v.* Stowell, 60 Iowa 535, 15 N. W. 417.

An observation by the court, in determining a question of law arising on a motion, that it had doubts about the law and would give the state the benefit of the doubt (Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410), stating that it recognized as law the principles laid down in the authorities the counsel for defendant had read (Atkins *v.* State, 69 Ga. 595), stating that "if error be committed, there is a higher court" (State *v.* Young, 105 Mo. 634, 16 S. W. 408), stating, before the charge, that it would enforce the rules laid down by the appellate court with reference to exceptions (Tucker *v.* State, 23 Tex. App. 512, 5 S. W. 180), or stating on a second trial of defendant that he had been acquitted of murder in the first degree (Pharr *v.* State, 10 Tex. App. 485) is not error.

18. State *v.* Robertson, 121 N. C. 551, 28 S. E. 59. And particularly is this true where the court instructs the jury that its remarks are not to be regarded by them in making up their verdict. Smith *v.* State, 107 Ala. 139, 18 So. 306.

19. Harris *v.* State, 47 Miss. 318.

The action of the court in interrupting the trial and receiving a verdict of another case, with severe comments on the action of the jury in that case in bringing in an acquittal, is not ground for exception by defendant in the case on trial. Lehman *v.* District of Columbia, 19 App. Cas. (D. C.) 217.

20. Thus a comment by the court upon the great amount of time occupied by counsel for defendant in examining the veniremen (State *v.* Veillon, 105 La. 411, 29 So. 883), its observation threatening a prosecution for perjury, where one of them said he would find the accused guilty, although the court should instruct that he was not (State *v.* Hicks, 61 N. C. 441), or a remark by the court that it was singular that the prosecution had not challenged certain jurors who, the evidence showed, were biased in favor of defendant (Boldt *v.* State, (Wis. 1888) 35 N. W. 935), is not error.

A warning to the jury that the court had been informed that influences were at work to corrupt some of them, and that therefore it would keep them together until the case was submitted, is proper, and it is in no sense coercion. People *v.* Goslin, 171 N. Y. 627, 63 N. E. 1120.

21. *Arkansas.*— Ragland *v.* State, (1902) 70 S. W. 1039.

California.— People *v.* Mooney, 132 Cal. 13, 63 Pac. 1070.

exceptions[22] or to the counsel for defendant to treat a witness respectfully[23] is not error; but a remark by the judge conveying to the jury a severe criticism on the methods of defendant's attorney,[24] with a statement that he had been deceived by him,[25] is reversible error.

(II) *During Argument.* The court has full power to call the attention of counsel to what it believes to be the evidence,[26] to correct counsel for defendant when he incorrectly states the law in his argument[27] or assumes a condition of facts not shown by the evidence,[28] and to restrain and criticize him where he applies abusive and denunciatory language to the state's witnesses.[29]

f. Cautioning and Controlling Witnesses. It is proper for the court to rebuke a witness for levity,[30] to peremptorily check and silence one who is too voluble,[31] to direct one to tell only what he knows of his personal knowledge,[32] to ask a witness if he understands the question which has been put to him,[33] or to warn him not to become excited and to think over what he is going to say.[34]

g. Examining Witness. The trial judge violates no rule of procedure by putting questions to witnesses on their direct or cross-examination,[35] providing

Georgia.— Butler *v.* State, 91 Ga. 161, 16 S. E. 984; Lewis *v.* State, 90 Ga. 95, 15 S. E. 697; Smith *v.* State, 72 Ga. 114.

Kentucky.— Strange *v.* Com., 64 S. W. 980, 23 Ky. L. Rep. 1234.

Louisiana.— State *v.* Barnes, 48 La. Ann. 460, 19 So. 251.

Massachusetts.— Com. *v.* Coughlin, 182 Mass. 558, 66 N. E. 207.

North Carolina.—State *v.* Brown, 100 N. C. 519, 6 S. E. 568; State *v.* Robertson, 86 N. C. 628.

Texas.— Dailey *v.* State, (Cr. App. 1900) 55 S. W. 821; Magee *v.* State, (Cr. App. 1897) 43 S. W. 98; Green *v.* State, (Cr. App. 1895) 31 S. W. 386.

See 14 Cent. Dig. tit. "Criminal Law," § 1522.

Manifestations of impatience by the court at the character or length of the examination of a witness are not only in bad taste, but may constitute error. Patience to hear and determine matters involving the liberties of those charged with crime is a most important requirement of the trial judge. Impatience usually results in a violation of the right of the accused to a fair trial and lengthens rather than shortens the prosecution. A hasty remark, used by the court in overruling an objection to evidence which tends to ridicule both counsel and defendant, while it may not have produced any injurious effect, is so improper as to constitute error. State *v.* Clements, 15 Oreg. 237, 14 Pac. 410.

The remark of the court that defendant's exceptions have been very frequent (State *v.* Brown, 100 Iowa 50, 69 N. W. 277), its admonition directing defendant's counsel not to interrupt the argument for the state (People *v.* Ecarius, 124 Mich. 616, 83 N. W. 628), or a sarcastic reference to the fact that a cross-examination is exceedingly prolonged (State *v.* Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266) is not error.

A rule excluding oral instructions in a criminal case applies to a remark of the judge to counsel, which has the effect of a formal instruction. People *v.* Bonds, 1 Nev. 33.

22. State *v.* Johnson, 31 La. Ann. 368.

23. State *v.* Hatfield, 75 Iowa 592, 39 N. W. 910.

24. Peeples *v.* State, 103 Ga. 629, 29 S. E. 691; People *v.* O'Hare, 124 Mich. 515, 83 N. W. 279; People *v.* Hull, 86 Mich. 449, 49 N. W. 288; House *v.* State, 42 Tex. Cr. 125, 57 S. W. 825.

It is error for the judge in the presence of the jury to say to defendant's attorney while examining a witness: "Don't lead the witness. . . . These ignorant witnesses can be led to say anything in the world you want them to say." Jefferson *v.* State, 80 Ga. 16, 5 S. E. 293.

25. Massie *v.* Com., 24 S. W. 611, 15 Ky. L. Rep. 562.

A statement by the court that written evidence openly offered by defendant's counsel had been introduced in an underhanded manner is error. State *v.* English, 62 Minn. 402, 64 N. W. 1136.

26. Territory *v.* Cordova, (N. M. 1902) 68 Pac. 919.

27. Jones *v.* State, 110 Ga. 252, 34 S. E. 205.

28. U. S. *v.* Heath, 20 D. C. 272.

29. House *v.* State, (Tex. Cr. App. 1901) 69 S. W. 417.

30. Thomas *v.* State, 27 Ga. 287.

31. Robinson *v.* State, 82 Ga. 535, 9 S. E. 528.

32. Com. *v.* Certain Intoxicating Liquors, 122 Mass. 36.

33. State *v.* Mathews, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135.

34. Kearney *v.* State, 101 Ga. 803, 29 S. E. 127, 65 Am. St. Rep. 344.

35. *Georgia.*— McGinnis *v.* State, 31 Ga. 236.

Indiana.— Long *v.* State, 95 Ind. 481; Cline *v.* State, 25 Ind. App. 331, 58 N. E. 210.

Iowa.— State *v.* Spiers, 103 Iowa 711, 73 N. W. 343.

Louisiana.— State *v.* Green, 36 La. Ann. 185.

Massachusetts.— Com. *v.* Galavan, 9 Allen 271.

that no question put is based upon the assumption of defendant's guilt of the offense charged.[36]

h. On Ruling on Admissibility of Evidence. It is proper for the court to state its reason for admitting or excluding evidence,[37] or to state the purpose for which the evidence is offered or admitted.[38] But remarks of the court, on excluding evidence, which contain an intimation that it believes defendant guilty[39] constitute error, as invading the province of the jury. It is no less improper for the trial judge to intimate that the witnesses for the prosecution are credible than to hint that those for the defense are not credible;[40] but a remark discrediting the credibility of a witness for the state is not error.[41]

i. Comments on Evidence[42] — (1) *On Facts in Issue.* It is the duty of the court to abstain carefully from any expression of opinion or comment upon the evidence, not only in its charge to the jury, but during the examination of all witnesses.[43] The trial judge should not deny the existence of any fact bearing on

Tennessee.— State *v.* Hargroves, 104 Tenn. 112, 56 S. W. 857; Hill *v.* State, 5 Lea 725.

Texas.— Malcek *v.* State, 33 Tex. Cr. 14, 24 S. W. 417.

Wisconsin.— Yanke *v.* State, 91 Wis. 464, 8 N. W. 276.

36. Jaques *v.* State, 111 Ga. 832, 36 S. E. 104; Leo *v.* State, 63 Nebr. 723, 89 N. W. 303.

The court has a wide latitude in putting questions which will bring out the truth on points not made clear by the examination of counsel. Where anything material has been omitted, it is not only the right but the duty of the court to bring it out; but this should be done in such a way as not to show bias or prejudice for or against either side or to impress the jury that the court is taking sides. Looney *v.* People, 81 Ill. App. 370.

Leading questions, calling for answers prejudicial to the accused, must not be put by the court where a constitutional provision prohibits the court from commenting on facts. State *v.* Crotts, 22 Wash. 245, 60 Pac. 403.

It is proper for the court to recall a witness and question him as to a fact essential to a conviction which the prosecuting attorney failed to bring out on his examination. State *v.* Lee, 80 N. C. 483.

It is not proper for a judge to converse privately, either in or out of court, with a witness, to ascertain whether he has knowledge of particular facts or to suggest to him after his examination that there are facts other than those to which he has testified within his knowledge. Sparks *v.* State, 59 Ala. 82.

37. *Alabama.*— Mann *v.* State, 134 Ala. 1, 32 So. 704.

California.— People *v.* Yokum, 118 Cal. 437, 50 Pac. 686.

Georgia.— Croom *v.* State, 90 Ga. 430, 17 S. E. 1003.

Iowa.— State *v.* Heacock, 106 Iowa 191, 76 N. W. 654.

Louisiana.— State *v.* Logan, 104 La. 362, 29 So. 110; State *v.* Walker, 50 La. Ann. 420, 23 So. 967.

Michigan.— People *v.* Curtis, 52 Mich. 616, 18 N. W. 385.

Nebraska.— Shepherd *v.* State, 31 Nebr. 389, 47 N. W. 1118.

Texas.— Brantly *v.* State, 42 Tex. Cr. 293, 59 S. W. 892; Gregory *v.* State, (Cr. App. 1898) 43 S. W. 1017; McGee *v.* State, 37 Tex. Cr. 668, 40 S. W. 967; Rodriguez *v.* State, 23 Tex. App. 503, 5 S. W. 255.

Utah.— U. S. *v.* Peay, 5 Utah 263, 14 Pac. 342.

See 14 Cent. Dig. tit. "Criminal Law," § 1526.

The court may properly state, where it is alleged that a witness for the state is insane, that he did not see that the witness was more insane than counsel. State *v.* Hayward, 62 Minn. 474, 65 N. W. 63.

38. People *v.* Phelan, 123 Cal. 551, 56 Pac. 424; Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; Franklin *v.* State, 69 Ga. 36, 47 Am. Rep. 748; Armstrong *v.* State, 14 Ind. App. 566, 43 N. E. 142.

Such statements do not amount to oral instruction to the jury, nor are they expressions of opinion on the evidence. State *v.* Thomson, 155 Mo. 300, 55 S. W. 1013.

39. Senior *v.* State, 97 Ga. 185, 22 S. E. 404; Horne *v.* State, 37 Ga. 80, 92 Am. Dec. 49; State *v.* Taylor, 6 Ida. 134, 61 Pac. 288; Shirwin *v.* People, 69 Ill. 55; Crook *v.* State, 27 Tex. App. 198, 11 S. W. 444.

40. Pound *v.* State, 43 Ga. 88; State *v.* Staley, 45 W. Va. 792, 32 S. E. 198.

41. People *v.* Ametta, 73 N. Y. App. Div. 623, 77 N. Y. Suppl. 177.

42. Instructions invading the province of the jury see *infra*, XIV, F, 4.

43. *Arizona.*— Territory *v.* Davis, (1886) 10 Pac. 359.

Georgia.— Mallory *v.* State, 62 Ga. 164; Crawford *v.* State, 12 Ga. 142.

Illinois.— Lycan *v.* People, 107 Ill. 423.

Iowa.— State *v.* Donovan, 61 Iowa 369, 16 N. W. 206.

Louisiana.— State *v.* Alphonse, 34 La. Ann. 9.

Missouri.— State *v.* Gatlin, 170 Mo. 354, 70 S. W. 885.

North Carolina.— State *v.* Laxton, 78 N. C. 564.

Washington.— State *v.* Surry, 23 Wash. 655, 63 Pac. 557.

See 14 Cent. Dig. tit. "Criminal Law," § 1528 *et seq.*

It is not the province of the trial judge to express an opinion upon the facts either orally, during the trial, or in the form of

the innocence of the accused,[44] and it is error for him to make any remark or inquiry in the presence of the jury concerning matters of fact at issue which indicate his opinion as to such facts.[45] It has been held that the error is not corrected by the court telling the jury that it is their exclusive province to determine the facts, and instructing them not to be bound by his opinion.[46]

(11) *On the Weight and Sufficiency.* It follows that it is error for the judge during the examination of the witnesses or the argument of counsel, on being asked to instruct, or at any other time during the proceedings, to comment on the weight or the sufficiency of the evidence,[47] or to state expressly or by implication his belief as to the guilt of the accused.[48]

(111) *On Credibility of Witnesses.* The remarks of the judge during the trial, indicating his opinion as to the credibility or lack of credibility of a witness, or of the weight of any evidence he may give, however inadvertent they may be, constitute error.[49]

(IV) *On Credibility of Accused.* A remark of the judge indicating that he has a low opinion of the credibility and veracity of the accused or intimating

an instruction. Weyrich *v.* People, 89 Ill. 90.

44. State *v.* Washington, 30 La. Ann. 49.

45. *Alabama.*— Griffin *v.* State, 90 Ala. 596, 8 So. 670.

California.— People *v.* Woon Tuck Wo, 120 Cal. 294, 52 Pac. 833; People *v.* Kindleberger, 100 Cal. 367, 34 Pac. 852.

Illinois.— Cunningham *v.* People, 195 Ill. 550, 63 N. E. 517; Marzen *v.* People, 173 Ill. 43, 50 N. E. 249.

Nevada.— State *v.* Frazer, 14 Nev. 210.

New York.— People *v.* Moore, 26 Misc. 168, 56 N. Y. Suppl. 802.

South Carolina.— State *v.* Crawford, 39 S. C. 343, 17 S. E. 799; State *v.* Turner, 36 S. C. 534, 15 S. E. 602; State *v.* Milling, 35 S. C. 16, 14 S. E. 284.

West Virginia.— State *v.* Hurst, 11 W. Va. 54.

See 14 Cent. Dig. tit. "Criminal Law," § 1528 *et seq.*

46. State *v.* Dick, 60 N. C. 440, 86 Am. Dec. 439. But see People *v.* Mayes, 113 Cal. 618, 45 Pac. 860.

The well-settled practice of the federal courts is that expressions of opinion on the facts by the trial judge are not error, if the jury is instructed that it is not bound by such opinion, and all questions of fact are submitted to it. Simmons *v.* U. S., 142 U. S. 148, 12 S. Ct. 171, 35 L. ed. 968; Lovejoy *v.* U. S., 128 U. S. 171, 9 S. Ct. 57, 32 L. ed. 389; Breese *v.* U. S., 106 Fed. 680, 45 C. C. A. 535.

47. *Alabama.*— Stephens *v.* State, 47 Ala. 696.

Arkansas.— Felker *v.* State, 54 Ark. 489, 16 S. W. 663.

Florida.— Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

Georgia.— Hubbard *v.* State, 108 Ga. 786, 33 S. E. 814; Mason *v.* State, 97 Ga. 185, 22 S. E. 398; Parks *v.* State, 59 Ga. 879.

Illinois.— Duffy *v.* People, 197 Ill. 357, 64 N. E. 308.

Iowa.— State *v.* Philpot, 97 Iowa 365, 66 N. W. 730.

Kentucky.— Richards *v.* Com., 67 S. W. 818, 24 Ky. L. Rep. 14.

Missouri.— State *v.* Gatlin, 170 Mo. 354, 70 S. W. 885.

Texas.— Bradshaw *v.* State, (Cr. App. 1902) 70 S. W. 215; Secrest *v.* State, (Cr. App. 1897) 40 S. W. 988; King *v.* State, 35 Tex. Cr. 224, 32 S. W. 1045; Kelly *v.* State, 33 Tex. Cr. 31, 24 S. W. 295; Stayton *v.* State, 32 Tex. Cr. 33, 22 S. W. 38.

See 14 Cent. Dig. tit. "Criminal Law," § 1533.

48. *Alabama.*— Perkins *v.* State, 50 Ala. 154.

Arkansas.— Sharp *v.* State, 51 Ark. 147, 10 S. W. 228, 14 Am. St. Rep. 27.

Illinois.— Feinberg *v.* People, 174 Ill. 609, 51 N. E. 798.

North Carolina.— State *v.* Dixon, 75 N. C. 275.

Pennsylvania.— Com. *v.* Werntz, 161 Pa. St. 591, 29 Atl. 272.

Wisconsin.— Campbell *v.* State, 111 Wis. 152, 86 N. W. 855.

See 14 Cent. Dig. tit. "Criminal Law," § 1533.

49. Such remarks constitute an improper assumption of, and an infringement upon, the province of the jury.

Alabama.— Sims *v.* State, 43 Ala. 33.

Florida.— Roberson *v.* State, 40 Fla. 509, 24 So. 474; Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

Georgia.— Sarah *v.* State, 28 Ga. 576.

Maryland.— State *v.* Baker, 8 Md. 44.

Massachusetts.— Com. *v.* Foran, 110 Mass. 179.

Michigan.— People *v.* Hare, 57 Mich. 505, 24 N. W. 843.

Nevada.— State *v.* Tickel, 13 Nev. 502.

New York.— People *v.* Wood, 126 N. Y. 249, 27 N. E. 362; People *v.* Hill, 37 N. Y. App. Div. 327, 56 N. Y. Suppl. 282; People *v.* Brow, 90 Hun 509, 35 N. Y. Suppl. 1009.

North Carolina.— State *v.* Parker, 66 N. C. 624.

Oklahoma.— Kirk *v.* Territory, 10 Okla. 46, 60 Pac. 797; Wilson *v.* Territory, 9 Okla. 331, 60 Pac. 112.

Texas.— Manning *v.* State, 37 Tex. Cr. 180, 39 S. W. 118; Campbell *v.* State, 30 Tex. App. 645, 18 S. W. 409.

that the accused has perjured himself at any time is error.[50] And this rule applies to the court's instruction to defendant when he goes on the stand that all he shall say must be true.[51]

j. Remarks on Defective Verdict. If the jury bring in a defective or informal verdict, it is the court's duty so to inform them and point out the proper form. They should then be allowed to make up and return their own verdict. It is error for the court to ask them if they intend to find the accused guilty as charged, and to record the answer given as a verdict.[52]

k. Contempt Proceedings in Presence of Jury. Fining the counsel for defendant for contempt in the presence of the jury is not error, where the court was justified in so doing by his conduct.[53] So a proceeding for contempt against one who is charged with threatening a member of the jury may be heard in their presence.[54] Hearing excuses of witnesses accused of contempt in the presence of the jury is not improper if defendant's counsel consents.[55]

l. Proceedings Against Witnesses For Perjury, Etc. According to some authorities the court may, in the exercise of its discretion, commit to jail, in the presence of the jury, a witness who has in its opinion perjured himself before the jury[56] or at the preliminary examination without committing error;[57] but according to others such judicial action would be error.[58] In any case it is error for the court to order a witness for the prosecution to be committed for perjury before defendant has had the opportunity to cross-examine him.[59]

m. Examining Jurors as to Prejudice. Where a juror was suspected of bias in favor of the accused and an investigation was had, the other jurors not being

See 14 Cent. Dig. tit. "Criminal Law," § 1530.

50. People *v.* Willard, 92 Cal. 482, 28 Pac. 585; Featherstone *v.* People, 194 Ill. 325, 62 N. E. 684; Bowman *v.* State, 19 Nebr. 523, 28 N. W. 1, 56 Am. Rep. 750; Allen *v.* U. S., 115 Fed. 3, 52 C. C. A. 597.

Criticizing accused as a witness.— The remark of the trial judge to defendant, in the presence of the jury, intimating that he, while on the witness stand, was arguing and making speeches rather than answering, and that he was generally misbehaving himself as a witness, and clearly intimating that his story if true was inconsistent, being greatly prejudicial to defendant, is error (Synon *v.* People, 188 Ill. 609, 59 N. E. 508); and the same is true where the judge during defendant's examination reads a newspaper and converses pleasantly and familiarly with the state's witness, whose testimony defendant's counsel is trying to impeach (State *v.* Coella, 3 Wash. 99, 28 Pac. 28).

51. Newberry *v.* State, 26 Fla. 334, 8 So. 445.

Statement by the accused.— It is proper for the court to tell the jury that the statement defendant makes in his own behalf is neither under oath, nor must he submit to cross-examination. McTyier *v.* State, 91 Ga. 254, 18 S. E. 140; Murray *v.* State, 85 Ga. 378, 11 S. E. 655.

52. State *v.* Clifton, 30 La. Ann. 951.

Consent of defendant to discharge of jury. — Where a jury make an application to be discharged because unable to agree, defendant is not required to say anything. If therefore the judge asks him if he will consent and states in their presence that he would discharge them, but that he could not do so unless defendant would consent, and that defendant refuses to consent, it is reversible error, inasmuch as the jury will certainly attribute their further retention to the refusal of defendant to consent to their discharge. Thomas *v.* State, 124 Ala. 48, 27 So. 315.

53. Miller *v.* State, 32 Tex. Cr. 266, 22 S. W. 880.

An uncalled for prosecution of defendant's counsel for contempt, alleged to have been committed on a motion for a new trial, is so prejudicial to the accused as to be error. Robertson *v.* State, 38 Tex. 187.

54. This is not prejudicial to the rights of defendant. People *v.* Durrant, 116 Cal. 179, 48 Pac. 75.

55. Robson *v.* State, 83 Ga. 166, 9 S. E. 610.

56. State *v.* Strado, 38 La. Ann. 562; People *v.* Hayes, 140 N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572, 23 L. R. A. 830 [*affirming* 70 Hun 111, 24 N. Y. Suppl. 194]; Lindsay *v.* People, 67 Barb. (N. Y.) 548.

Such an act is not within a statute prohibiting the judge from giving an opinion as to what facts have been proved or disproved, State *v.* Strado, 38 La. Ann. 562.

57. Taylor *v.* State, 38 Tex. Cr. 241, 42 S. W. 384.

58. Burke *v.* State, 66 Ga. 157; Brandon *v.* State, 75 Miss. 904, 23 So. 517; Golden *v.* State, 75 Miss. 130, 21 So. 971.

Directing an information for bribery to be filed against the witnesses of defendant in the presence of the jury is error requiring a new trial. State *v.* Hughes, 33 Kan. 23, 5 Pac. 381.

59. State *v.* O'Connor, 105 Mo. 121, 16 S. W. 510.

present and being instructed not to pay attention to it, it was held that a conviction should be set aside.[60]

n. Exceptions.[61] A mere general exception[62] to the remarks claimed to be improper is not available unless it appears that no portion thereof was proper.[63]

C. Reception of Evidence[64] — **1. Right of Accused to Confront Witnesses**[65] — **a. In General.** In theory at least the accused had an absolute right at common law to confront the witnesses against him.[66] By the federal constitution[67] and the constitutions of most of the states the right to be confronted with the witnesses against him is secured to the accused.[68] In its strictest sense the word "confront" means to meet face to face;[69] and the right of the accused to be confronted with the witnesses includes the right not only to be present when they testify, but to hear all they say and to see them literally face to face.[70]

b. Documentary and Record Evidence. The constitutional guarantee to persons accused of crime that they shall be confronted with the witnesses against them is not applicable to the proof of facts in their nature essentially and purely documentary, and which can only be proved by the original, or by a copy officially authenticated in some way, especially when the facts to be proved come up col-

60. Lamar *v.* State, 64 Miss. 687, 2 So. 12. See also People *v.* Neilson, 22 Hun (N. Y.) 1. But *compare* People *v.* Kalkman, 72 Cal. 212, 13 Pac. 500, where it was held that an investigation of the reported attempt to bribe the jury, made with their knowledge but in their absence on the suggestion of the prosecuting attorney, was not error, where the court instructed the jury not to consider the circumstances and to dismiss it from their minds.

61. **Necessity of exceptions** generally see *infra*, XIV, I.

62. **The exception should show** wherein the remarks were prejudicial to defendant, if they do not show this on their face. State *v.* Findley, 101 Mo. 217, 14 S. W. 185.

63. Berry *v.* People, 1 N. Y. Cr. 43.

64. **Evidence in criminal cases** generally see *supra*, XII.

65. **Effect of dying declarations** see HOMICIDE.

Effect of omission of preliminary examination see *supra*, X, D, 1, b.

Right to confront witness on preliminary examination see *supra*, X, A, 2, b.

Right to cross-examine witness see WITNESSES.

66. As a matter of fact, down to comparatively recent times, on account of the use of depositions and the introduction of hearsay evidence, particularly in the English state trials, his right in this respect was of no value to him. 2 Hawkins P. C. c. 46, §§ 7–13.

67. U. S. Const. Amendm. art. 6.

68. See Effinger *v.* State, 11 Ohio Cir. Ct. 389; State *v.* Waldron, 16 R. I. 191, 14 Atl. 847. And see the constitutions of the several states. It was held in U. S. *v.* Angell, 11 Fed. 34, but denied in Petty *v.* State, 4 Lea (Tenn.) 326, that the prosecution equally with the prisoner has a right to claim the benefit of the constitutional guarantee.

Criminal proceedings.— The constitutional guarantee is applicable to criminal proceedings only. State *v.* Mitchell, 3 S. D. 223, 52 N. W. 1052.

The constitutional provisions are usually confined to the trial itself; and preliminary motions, such as applications for continuances and change of venue, are left to be decided upon written affidavits. Lipscomb State, 76 Miss. 223, 25 So. 158.

69. **For definition** of "confront" and "confrontation" see 8 Cyc. 569.

70. State *v.* Thomas, 64 N. C. 74.

This strict definition was adhered to where the court directed that the accused should be removed twenty-four feet from the witness testifying and made to sit with his back toward her so that he could neither see nor hear the witness nor see the jury, on account of the distance and intervening obstacles. The reason for this was that the witness, a very young child, stated that she was afraid to speak because she feared defendant, her father. State *v.* Mannion, 19 Utah 505, 57 Pac. 542, 75 Am. St. Rep. 753, 45 L. R. A. 638.

The admission of a statement as to what an absent witness would testify infringes the accused's constitutional right. Wills *v.* State, 73 Ala. 362; People *v.* Diaz, 6 Cal. 248; Dominges *v.* State, 7 Sm. & M. (Miss.) 475, 45 Am. Dec. 315.

There are several cases which, without expressly deciding the question, hold by implication that a confrontation face to face may be dispensed with, provided the accused has the opportunity to cross-examine the witnesses. The primary object of the constitutional provision is unquestionably to exclude depositions and to secure the personal presence of the witnesses, and if they are personally present and are examined in the presence of the accused and the jury, with an opportunity for cross-examination, it does not seem error for the court to direct the accused to occupy a place where his situation would not intimidate the witnesses and prevent the giving of testimony. See State *v.* Mannion, 19 Utah 505, 57 Pac. 542, 75 Am. St. Rep. 753, 45 L. R. A. 638 (dissenting opinion of Bartch, C. J.); Summons *v.* State, 5 Ohio St. 325; Howser *v.* Com., 51 Pa. St.

laterally.[71] Thus transcripts of a marriage record,[72] and of the account-books and other records of public officials,[73] and a notarial certificate of protest[74] have been received.

c. Use of Depositions.[75] Unless the accused stipulates to waive his constitutional right to confront the witness,[76] or unless he has had a prior opportunity to confront and cross-examine him,[77] it is not permissible for the prosecution to introduce depositions of an absent or deceased witness against him on his trial.[78]

d. Evidence Taken at Preliminary Examination.[79] The general rule seems to be that where the testimony of a witness against the accused has been taken down in writing by a magistrate or official reporter at a preliminary examination in the presence of the accused, who had an opportunity to cross-examine the witness, such testimony is admissible where it is shown that the witness cannot be found after diligent inquiry, or is beyond the jurisdiction of the court, but that otherwise such testimony is inadmissible.[80]

e. Death of Witness. So too where a witness has died after he has testified, either at the preliminary examination or on a prior trial of the accused, his evidence, if given in the presence of the accused, may be read against him on his trial or other proceedings.[81] The statement of a deceased witness may be proved by a person who heard it at the preliminary examination or former trial and who

332; Mattox *v.* U. S., 156 U. S. 237, 15 S. Ct. 337, 39 L. ed. 409.

Johns *v.* State, 55 Md. 350; People *v.* Jones, 24 Mich. 215; Patterson *v.* State, 17 Tex. App. 102; U. S. *v.* Ortega, 27 Fed. Cas. No. 15,971, 4 Wash. 531.

The act of March 3, 1875, is unconstitutional so far as it provides that a judgment of conviction against the principal in the crime of embezzling or stealing property of the United States shall be evidence against the receiver thereof, as it deprives the accused of the privilege of confronting the witnesses. Kirby *v.* U. S., 174 U. S. 47, 19 S. Ct. 574, 43 L. ed. 890.

The official weather record is not admissible without the presence of the person who made the observation and the record to testify as a witness that the accused may confront him. People *v.* Dow, 64 Mich. 717, 31 N. W. 597, 8 Am. St. Rep. 873.

72. Tucker *v.* People, 122 Ill. 583, 13 N. E. 809; State *v.* Matlock, 70 Iowa 229, 30 N. W. 495; State *v.* Behrman, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449.

73. U. S. *v.* Swan, 7 N. M. 306, 34 Pac. 533; Reeves *v.* State, 7 Coldw. (Tenn.) 96; Rogers *v.* State, 11 Tex. App. 608.

74. May *v.* State, 15 Tex. App. 430. *Contra*, State *v.* Reidel, 26 Iowa 430.

75. **Depositions** generally see DEPOSITIONS.

76. People *v.* Molins, 10 N. Y. Suppl. 130, 7 N. Y. Cr. 51.

77. State *v.* Kline, 109 La. 603, 33 So. 618; State *v.* Harvey, 28 La. Ann. 105.

78. Anderson *v.* State, 89 Ala. 12, 7 So. 429; State *v.* Chambers, 44 La. Ann. 603, 10 So. 886; People *v.* Restell, 3 Hill (N. Y.) 289; Motes *v.* U. S., 178 U. S. 458, 20 S. Ct. 993, 44 L. ed. 1150.

A statute conferring upon defendant the right to take depositions, upon condition that he shall concede a like privilege to the state, is not unconstitutional, nor does it violate his right to be confronted with the witnesses. Butler *v.* State, 97 Ind. 378.

A constitutional provision, and a statute permitting the taking of depositions in criminal trials, should be construed together. The statute, being in derogation of the general rule of evidence permitting the accused to confront the witnesses, and depriving him of one of his most important rights, must be strictly construed and followed, or the deposition taken under it may be rejected. Ryan *v.* People, 21 Colo. 119, 40 Pac. 775.

79. **Admissibility of evidence at preliminary examination** see *supra*, XII, E, 1, m, (v); XII, E, 2, c; XII, E, 4, b; XII, H, 2, j, (III).

80. *Arkansas.*— Sneed *v.* State, 47 Ark. 180, 1 S. W. 68; Hurley *v.* State, 29 Ark. 17.

California.— People *v.* Plyer, 126 Cal. 379, 58 Pac. 904; People *v.* Gordon, 99 Cal. 227, 33 Pac. 901; People *v.* Gardner, 98 Cal. 127, 32 Pac. 880; People *v.* Oiler, 66 Cal. 101, 4 Pac. 1066; People *v.* Chung Ah Chue, 57 Cal. 567.

Maine.— State *v.* Frederic, 69 Me. 400.

Michigan.— People *v.* Case, 105 Mich. 92, 62 N. W. 1017.

New York.— People *v.* Fish, 125 N. Y. 136, 26 N. E. 319; People *v.* Williams, 35 Hun 516.

Pennsylvania.— Com. *v.* Cleary, 148 Pa. St. 26, 23 Atl. 1110.

Utah.— State *v.* King, 24 Utah 482, 68 Pac. 418, declaring St. (1898) § 4513, subd. 4, constitutional.

But see State *v.* Collins, 32 Iowa 36.

See 14 Cent. Dig. tit. "Criminal Law," § 1542; and *infra*, XIV, C, 1, e.

The rule of the text is applicable to the testimony of a witness on a former trial. Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885.

81. *Idaho.*— Territory *v.* Evans, 2 Ida. (Hasb.) 651, 23 Pac. 232, 7 L. R. A. 646.

Michigan.— People *v.* Dowdigan, 67 Mich. 95, 38 N. W. 920.

Missouri.— State *v.* Harman, 27 Mo. 120; State *v.* Houser, 26 Mo. 431; State *v.* Baker,

is able to give the substance of it,[82] and it has been held that this is the only permissible method of proof.[83]

f. Absence of Witness Procured by Accused.[84] Admitting evidence of the testimony which a witness gave on a former trial of the accused is not a violation of his constitutional rights to confront the witnesses, where it is proved that they are absent by his procurement.[85]

g. Testimony Through Interpreter. The accused is not denied his right of confronting the witnesses against him, because the testimony of one of them unable to speak English is received through an interpreter,[86] or because, where a witness was unable to speak on account of violence done her by defendant, her answers were taken by a nod or shake of the head, or in writing.[87]

h. Reading Testimony in Absence of Accused. Where the accused has been confronted with a witness who has had his testimony taken down, his constitutional rights are not violated by permitting such testimony to be read to the jury while he is absent from the court-room.[88]

i. Flight of Accused. Defendant loses his right to confront the witnesses by fleeing from the jurisdiction during a trial for felony, or before trial in case of a misdemeanor.[89]

j. Waiver of Right. The defendant in a criminal prosecution may waive the benefit of the constitutional privilege of being confronted with the witnesses against him.[90]

24 Mo. 437; State *v.* McO'Blenis, 24 Mo. 402, 69 Am. Dec. 435.

New York.— People *v.* Elliott, 172 N. Y. 146, 64 N. E. 837, 60 L. R. A. 318; People *v.* Penhollow, 42 Hun 103.

Tennessee.— Bostick *v.* State, 3 Humphr. 344.

At common law the evidence of a deceased witness could not be proved against the accused at a subsequent trial. 2 Hawkins P. C. c. 46, § 12; 4 Howell St. Tr. 237, 265.

The reading of the stenographer's minutes of the testimony of a witness who is dead is not prohibited by the constitutional provision that the accused shall be confronted with the witnesses. Mattox *v.* U. S., 156 U. S. 237, 15 S. Ct. 337, 39 L. ed. 409. See also U. S. *v.* Angell, 11 Fed. 34; U. S. *v.* Macomb, 26 Fed. Cas. No. 15,702, 5 McLean 286; U. S. *v.* Wood, 28 Fed. Cas. No. 16,756, 3 Wash. 440.

82. State *v.* Fitzgerald, 63 Iowa 268, 19 N. W. 202; Hair *v.* State, 16 Nebr. 601, 21 N. W. 464; Summons *v.* State, 5 Ohio St. 325; State *v.* Summons, 1 Ohio Dec. (Reprint) 381, 8 West. L. J. 473 [*affirmed* in 1 Ohio Dec. (Reprint) 416, 9 West. L. J. 407]; Kendrick *v.* State, 10 Humphr. (Tenn.) 479 [*overruling* State *v.* Atkins, 1 Overt. (Tenn.) 229]. *Compare* Com. *v.* Richards, 18 Pick. (Mass.) 434, 29 Am. Dec. 608 (holding that the whole testimony of the deceased witness and the precise words used by him must be proved); State *v.* Lee, 13 Mont. 248, 33 Pac. 690 (holding that evidence from the mouth of a witness who purported to relate his general recollection of what the witness of the facts had testified on a preliminary examination before a magistrate was inadmissible).

See 14 Cent. Dig. tit. "Criminal Law," § 1543.

83. Kean *v.* Com., 10 Bush (Ky.) 190, 19 Am. Rep. 63.

84. Subornation of witness as evidence of guilt see *supra*, XII, B, 4, h, (III), (E).

85. If the facts raise a presumption that the witness is being kept out of the jurisdiction by the accused he must clearly rebut such presumption. Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244; Reg. *v.* Scaife, 7 A. & E. 239; Morley's Case, 6 How. St. Tr. 770. See also State *v.* Houser, 26 Mo. 431.

86. State *v.* Hamilton, 42 La. Ann. 1204, 8 So. 304.

In England, where the prisoner was ignorant of the language, it was held proper not to translate each question and answer as put, but when the evidence of a witness was concluded to read the whole to the witness and afford an opportunity for cross-examination. Reg. *v.* Yscuado, 6 Cox C. C. 386.

87. Roberson *v.* State, (Tex. Cr. App. 1899) 49 S. W. 398.

88. State *v.* Haines, 36 S. C. 504, 15 S. E. 555.

89. Hence a statute which provides that if a prisoner shall escape after arraignment or while on bail the trial may proceed to a verdict does not infringe his constitutional right to confront the witnesses against him. Gore *v.* State, 52 Ark. 285, 12 S. W. 564, 5 L. R. A. 832; Collier *v.* Com., 62 S. W. 4, 22 Ky. L. Rep. 1929. So a defendant charged with a misdemeanor, who is duly summoned, but who fails to be present, may be proceeded against and sentenced to imprisonment in his absence without violating his constitutional right to be confronted with the witnesses against him. Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838.

90. *Arkansas.*— Wells *v.* State, (1891) 16 S. W. 577.

Connecticut.— State *v.* Worden, 46 Conn. 349, 33 Am. Rep. 27.

Illinois.— Gillespie *v.* People, 176 Ill. 238, 52 N. E. 250.

2. EXCLUSION OF WITNESSES[91] — a. Discretion of Court. The exclusion of witnesses from the court-room is a matter for the discretion of the court, and not a matter of right.[92] The order for the exclusion of witnesses may be made by the court on its own motion;[93] but it is usual for the state or defendant to ask for it.[94]

b. What Witnesses May Be Put Under the Rule. Even after the rule or order has been granted sequestering the witnesses, it is within the discretion of the trial judge to permit some of them to remain and testify if the circumstances require

Indiana.— Butler *v.* State, 97 Ind. 378.
Iowa.— State *v.* Olds, 106 Iowa 110, 76 N. W. 644; State *v.* Fooks, 65 Iowa 196, 452, 21 N. W. 561, 773; State *v.* Polson, 29 Iowa 133.
Louisiana.— State *v.* Hornsby, 8 Rob. 554, 41 Am. Dec. 305.
Michigan.— People *v.* Murray, 52 Mich. 288, 17 N. W. 843.
Montana.— U. S. *v.* Sacramento, 2 Mont. 239, 25 Am. Rep. 742.
New York.— People *v.* Molins, 10 N. Y. Suppl. 130, 7 N. Y. Cr. 51.
North Carolina.— State *v.* Mitchell, 119 N. C. 784, 25 S. E. 783, 1020.
Texas.— Odell *v.* State, (Cr. App. 1902) 70 S. W. 964; Allen *v.* State, 16 Tex. App. 237; Hancock *v.* State, 14 Tex. App. 392.
Wisconsin.— Williams *v.* State, 61 Wis. 281, 21 N. W. 56.
See 14 Cent. Dig. tit. "Criminal Law," § 1548.

A waiver may be implied where defendant agrees that a deposition taken in a civil suit between him and the prosecutor (Rosenbaum *v.* State, 33 Ala. 354), the testimony of an absent witness taken down during the trial in the presence of defendant's counsel and the prosecuting attorney (State *v.* Minard, 96 Iowa 267, 65 N. W. 147), an affidavit of the witness (Taylor *v.* Com., 9 Ky. L. Rep. 316), an agreed statement of what an absent witness would testify to (State *v.* Wagner, 78 Mo. 644, 47 Am. Rep. 131; State *v.* O'Connor, 65 Mo. 374, 27 Am. Rep. 291), or a deposition of an absent witness taken in defendant's presence (State *v.* Bowker, 26 Oreg. 309, 38 Pac. 124) may be read to the jury.

91. Exclusion of joint defendant who is a witness see *supra*, XIV, B, 3, a, (I), (B).

92. *Alabama.*—McClellan *v.* State, 117 Ala. 140, 23 So. 653; Barnes *v.* State, 88 Ala. 204, 7 So. 38, 16 Am. St. Rep. 48.
California.— People *v.* Sam Lung, 70 Cal. 515, 11 Pac. 673.
Colorado.— Kelly *v.* People, 17 Colo. 130, 29 Pac. 805.
Georgia.— Turbaville *v.* State, 58 Ga. 545; Bird *v.* State, 50 Ga. 585; Thomas *v.* State, 27 Ga. 287.
Indiana.— Johnson *v.* State, 2 Ind. 652.
Kansas.— State *v.* Davis, 48 Kan. 1, 28 Pac. 1092.
Kentucky.— Baker *v.* Com., 106 Ky. 212, 50 S. W. 54, 20 Ky. L. Rep. 1778; Roberts *v.* Com., 94 Ky. 499, 22 S. W. 845, 15 Ky. L. Rep. 341; Salisbury *v.* Com., 79 Ky. 425.
Louisiana.— State *v.* Giroux, 26 La. Ann. 582.
Massachusetts.— Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1111; Com. *v.* Follansbee, 155 Mass. 274, 29 N. E. 471.
Michigan.— People *v.* Considine, 105 Mich. 149, 63 N. W. 196; People *v.* Burns, 67 Mich. 537, 35 N. W. 154.
Missouri.— State *v.* Duffy, 128 Mo. 549, 31 S. W. 98; State *v.* Fitzsimmons, 30 Mo. 236; King *v.* State, 1 Mo. 717.
Nebraska.— Murphey *v.* State, 43 Nebr. 34, 61 N. W. 491; Binfield *v.* State, 15 Nebr. 484, 19 N. W. 607.
New York.— People *v.* Green, 1 Park. Cr. 11; People *v.* Duffy, 1 Wheel. Cr. 123.
Tennessee.— Nelson *v.* State, 2 Swan 237.
Texas.— Rambo *v.* State, (Cr. App. 1902) 69 S. W. 163; De Lucenay *v.* State, (Cr. App. 1902) 68 S. W. 796.
Wisconsin.— Zoldoske *v.* State, 82 Wis. 580, 52 N. W. 778.
Wyoming.— Haines *v.* Territory, 3 Wyo. 167, 13 Pac. 8.
United States.— U. S. *v.* White, 28 Fed. Cas. No. 16,675, 5 Cranch C. C. 38.
See 14 Cent. Dig. tit. "Criminal Law," § 1549.

In New Jersey it is the rule that the prisoner's witnesses should not be in court when those of the state are examined. State *v.* Zellers, 7 N. J. L. 220.

Prohibiting witnesses from reading newspapers.— It is proper for the court to refuse an order prohibiting witnesses who have been excluded from the court-room from reading newspaper accounts of the evidence. Com. *v.* Hersey, 2 Allen (Mass.) 173.

Separation of witnesses.— Where the court has excluded witnesses during the trial, he will not carry his order so far as to require them to be kept separate from each other. U. S. *v.* White, 28 Fed. Cas. No. 16,675, 5 Cranch C. C. 38.

93. Wilson *v.* State, 52 Ala. 299.

94. Johnson *v.* State, 14 Ga. 55.

On recalling and reëxamining witnesses for the state because of an alleged informality in swearing them a separation will not be ordered unless the prisoner requests it, when the witnesses were already under the rule. State *v.* Morris, 84 N. C. 756.

The application seldom denied.— And, although the court may without error deny the application, it is rarely done if it appears that justice and truth will be advanced thereby. Wilson *v.* State, 52 Ala. 299.

Waiver.— An objection on appeal that the court exempted a witness from the rule is waived where defendant withdrew his request for a separation of the witnesses at the trial. State *v.* Whitworth, 126 Mo. 573, 29 S. W. 595.

it;[95] and so if asked to exclude all of the witnesses it is within his discretion to send out only a portion of them.[96] This rule has been applied to the following witnesses: Attorneys,[97] court officers,[98] experts,[99] and relatives of the accused.[1]

c. Consultation of Witnesses With Counsel. The fact that witnesses for the accused[2] or for the prosecution[3] have been placed under the rule does not deprive the counsel for the party calling them of his right to consult with them in a proper manner.

d. Permitting Witnesses to Remain After They Have Testified. It is not improper for the court to permit a witness for the prosecution to remain in the court-room after he has testified, and while defendant's witnesses are being examined.[4]

e. Effect of Disobedience of Rule. The fact that after witnesses are placed under the rule one or more of them remains in the court-room does not *ipso facto* render their testimony incompetent,[5] and it has been held that the court ought

95. Webb *v.* State, 100 Ala. 47, 14 So. 865; Riley *v.* State, 88 Ala. 193, 7 So. 149; Thomas *v.* State, 27 Ga. 287.

96. Shaw *v.* State, 102 Ga. 660, 29 S. E. 477; Carson *v.* State, 80 Ga. 170, 5 S. E. 295.

Permitting two comparatively immaterial witnesses to remain in the court-room, and refusing to allow the accused to retain one of his witnesses to help him manage his case, is not error. Turbaville *v.* State, 58 Ga. 545.

97. Allen *v.* Com., 9 S. W. 703, 10 Ky. L. Rep. 582.

Attorneys engaged in particular case not excluded.— Boatmeyer *v.* State, 31 Tex. Cr. 473, 20 S. W. 1102; Powell *v.* State, 13 Tex. App. 244.

It is not error to permit an attorney whose business requires his presence in the court to testify, although the witnesses are excluded. State *v.* Ward, 61 Vt. 153, 17 Atl. 483. *Contra*, State *v.* Brookshire, 2 Ala. 303.

98. It is not usual to exclude court officers who happen to be witnesses, and whose attendance in the court-room is necessary. Hoxie *v.* State, 114 Ga. 19, 39 S. E. 944; People *v.* Machen, 101 Mich. 400, 59 N. W. 664; Johnican *v.* State, (Tex. Cr. App. 1898) 48 S. W. 181; Brite *v.* State, (Tex. Cr. App. 1897) 43 S. W. 342; Bonners *v.* State, (Tex. Cr. App. 1896) 35 S. W. 669.

A statute making it the duty of the court to have the witnesses examined apart from each other does not authorize the exclusion from the court-room of an officer who may happen to be a witness. State *v.* Lockwood, 58 Vt. 378, 3 Atl. 539.

Where it became necessary for a juror to testify to one single fact unconnected with the other circumstances of the case, it was held that the fact of his remaining in the room after the order excluding the witnesses did not render him incompetent. State *v.* Vari, 35 S. C. 175, 14 S. E. 392.

99. Roberts *v.* State, 122 Ala. 47, 25 So. 238; Vance *v.* State, 56 Ark. 402, 19 S. W. 1066; Leache *v.* State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638. In State *v.* Baptiste, 26 La. Ann. 134, it was held that the court did not err in permitting the coroner and two other physicians who were to testify as experts to remain in the room after the rule.

1. Keller *v.* State, 102 Ga. 506, 31 S. E. 92; Hinkle *v.* State, 94 Ga. 595, 21 S. E. 595; May *v.* State, 94 Ga. 76, 20 S. E. 251; State *v.* Whitworth, 126 Mo. 573, 29 S. W. 595; State *v.* McGilvery, 20 Wash. 240, 55 Pac. 115.

Directing where witnesses shall sit.— The general powers of the court authorize it to direct in what portion of the room witnesses shall remain while not under examination. Hence if witnesses who are relatives of the accused are seated near him while his counsel is addressing the jury, and by their presence, appearance, or conduct manifest to the jury their desire for his acquittal, it is not error for the court to direct them to be seated elsewhere, even though this was done in an unusual manner by the judge himself and not by his orders through a bailiff. Hoover *v.* State, 48 Nebr. 184, 66 N. W. 1117.

2. Allen *v.* State, 61 Miss. 627.

3. Williams *v.* State, 35 Tex. 355; Jones *v.* State, 3 Tex. App. 150.

The action of the prosecuting witness in consulting with other witnesses, when all are under the rule and warned to talk to no one except the attorney, is not error where it does not appear what they talked about. Bryan *v.* Com., 33 S. W. 95, 17 Ky. L. Rep. 965.

4. Galloway *v.* Com., 7 Ky. L. Rep. 162; U. S. *v.* Woods, 28 Fed. Cas. No. 16,760, 4 Cranch C. C. 484.

Such witness may be reëxamined in rebuttal. Lyman *v.* State, 69 Ga. 404; Thomas *v.* State, 27 Ga. 287.

5. *Alabama.*— Montgomery *v.* State, 40 Ala. 684.

Arkansas.— Pleasant *v.* State, 15 Ark. 624.

Georgia.— Hoxie *v.* State, 114 Ga. 19, 39 S. E. 944; Cunningham *v.* State, 97 Ga. 214, 22 S. E. 954; May *v.* State, 90 Ga. 793, 17 S. E. 108; Rooks *v.* State, 65 Ga. 330.

Illinois.— Kota *v.* People, 136 Ill. 655, 27 N. E. 53; Bulliner *v.* People, 95 Ill. 394.

Iowa.— State *v.* Kissock, 111 Iowa 690, 83 N. W. 724.

Massachusetts.—Com. *v.* Hall, 4 Allen 305.

Mississippi.— Taylor *v.* State, (1901) 30 So. 657.

Nevada.— State *v.* Salge, 2 Nev. 321.

to receive such testimony;[6] but the majority of the cases hold that whether such a witness shall be examined or not is in the discretion of the court.[7]

f. Discovery of Witness After Rule. A person who, not being a witness at the time of the rule, remains in the court-room, may afterward be sworn and allowed to testify, where it was not known that he knew anything of the facts until immediately before he was called.[8]

3. Compelling Calling of Witnesses and Production of Evidence — a. In General. At a very early date it seems to have been the practice to compel the

North Carolina.— State *v.* Sparrow, 7 N. C. 487.

South Carolina.— State *v.* Vari, 35 S. C. 175, 14 S. E. 392.

See 14 Cent. Dig. tit. "Criminal Law," § 1559.

6. The reason assigned being that a party should not be deprived of the testimony of his witness without fault and merely because the witness disobeys the order or rules of court.

California.— People *v.* Boscovitch, 20 Cal. 436.

Georgia.— Lassiter *v.* State, 67 Ga. 739.

Kentucky.— Parker *v.* Com., 51 S. W. 573, 21 Ky. L. Rep. 406.

Maryland.— Parker *v.* State, 67 Md. 329, 10 Atl. 219, 1 Am. St. Rep. 387.

Missouri.— State *v.* Fannon, 158 Mo. 149, 59 S. W. 75.

Nevada.— State *v.* Salge, 2 Nev. 321.

West Virginia.— Gregg *v.* State, 3 W. Va. 705.

See 14 Cent. Dig. tit. "Criminal Law," § 1559.

7. *Alabama.*—Burks *v.* State, 120 Ala. 386, 24 So. 931; Sanders *v.* State, 105 Ala. 4, 16 So. 935; Wilson *v.* State, 52 Ala. 299; State *v.* Brookshire, 2 Ala. 303.

Colorado.— Kelly *v.* People, 17 Colo. 130, 29 Pac. 805.

Georgia.— Grant *v.* State, 89 Ga. 393, 15 S. E. 488; Lassiter *v.* State, 67 Ga. 739; Rooks *v.* State, 65 Ga. 330.

Illinois.— Bow *v.* People, 160 Ill. 438, 43 N. E. 593. See also Kota *v.* People, 136 Ill. 655, 27 N. E. 53.

Indiana.— Taylor *v.* State, 130 Ind. 66, 29 N. E. 415; Porter *v.* State, 2 Ind. 435.

Kentucky.— Carlton *v.* Com., 18 S. W. 535, 13 Ky. L. Rep. 946.

Louisiana.— State *v.* Cole, 38 La. Ann. 843.

Maryland.— Parker *v.* State, 67 Md. 329, 10 Atl. 219, 1 Am. St. Rep. 387.

Massachusetts.— Com. *v.* Crowley, 168 Mass. 121, 46 N. E. 415; Com. *v.* Hall, 4 Allen 305.

Michigan.— People *v.* Piper, 112 Mich. 644, 71 N. W. 174.

Mississippi.— Smith *v.* State, 61 Miss. 754; Sartorious *v.* State, 24 Miss. 602.

Missouri.— State *v.* Moore, 156 Mo. 204, 56 S. W. 883; State *v.* Fitzsimmons, 30 Mo. 236; Freleigh *v.* State, 8 Mo. 606.

North Carolina.— State *v.* Silver, 14 N. C. 332.

Ohio.— Laughlin *v.* State, 18 Ohio 99, 51 Am. Dec. 444.

Texas.— Goins *v.* State, 41 Tex. 334; Fay *v.* State, (Cr. App. 1902) 70 S. W. 744; Cauthern *v.* State, (Cr. App. 1901) 65 S. W. 96; Buchanan *v.* State, 41 Tex. Cr. 127, 52 S. W. 769; Hedrick *v.* State, 40 Tex. Cr. 532, 51 S. W. 252; Williams *v.* State, 37 Tex. Cr. 147, 38 S. W. 999; Miller *v.* State, 36 Tex. Cr. 47, 35 S. W. 391; Turner *v.* State, (Cr. App. 1895) 32 S. W. 700; King *v.* State, 34 Tex. Cr. 228, 29 S. W. 1086.

Washington.— State *v.* Lee Doon, 7 Wash. 308, 34 Pac. 1103.

England.— Rex *v.* Wylde, 6 C. & P. 380, 25 E. C. L. 484; Rex *v.* Brown, 4 C. & P. 588 note, 19 E. C. L. 662; Rex *v.* Colley, M. & M. 329, 22 E. C. L. 537.

See 14 Cent. Dig. tit. "Criminal Law," § 1559.

It is not error for the trial judge to reject the testimony of such a witness where (1) some reason or excuse is not shown for his not having complied with the rule, and where (2) the materiality of his testimony does not appear. Trujillo *v.* Territory, 6 N. M. 589, 30 Pac. 870.

Ignorance of the rule.— The admission of the testimony of a witness who not being in court when the rule was made ignorantly disobeys it is in the discretion of the court. State *v.* Watson, 36 La. Ann. 148. See also Cook *v.* State, 30 Tex. App. 607, 18 S. W. 412. And it has been held that his evidence ought not to be excluded. State *v.* Hare, 74 N. C. 591; Pile *v.* State, 107 Tenn. 532, 64 S. W. 477; State *v.* Burton, 27 Wash. 528, 67 Pac. 1097.

What constitutes a violation of the rule see Wilson *v.* State, 52 Ala. 299; Lymon *v.* State, 69 Ga. 404; Goldstein *v.* State, (Tex. Cr. App. 1893) 23 S. W. 686.

Violation of rule by connivance of party.— When after the rule is made the prisoner or his counsel detains one of the witnesses so that he hears what is said, the court may in its discretion exclude that one from testifying. Jackson *v.* State, 14 Ind. 327; State *v.* Sumpter, 153 Mo. 436, 55 S. W. 76; State *v.* Gesell, 124 Mo. 531, 27 S. W. 1101; State *v.* King, 9 S. D. 628, 70 N. W. 1046; Ashwood *v.* State, 37 Tex. Cr. 550, 40 S. W. 273.

8. Gilbert *v.* Com., 111 Ky. 793, 64 S. W. 846, 23 Ky. L. Rep. 1094; Grundy *v.* Com., 8 Ky. L. Rep. 876; State *v.* Jones, 47 La. Ann. 1524, 18 So. 515; Com. *v.* Brown, 90 Va. 671, 19 S. E. 447.

To reject his testimony has been held to be error. Smith *v.* State, 4 Lea (Tenn.) 428. *Contra,* Rummel *v.* State, 22 Tex. App. 558, 3 S. W. 763.

prosecution to produce as witnesses all who saw the crime committed.[9] Under the later and present practice the choice, introduction, and examination of the state's witnesses usually rests in the discretion of the prosecuting attorney.[10]

b. Names of Witnesses on Indictment — (i) *AMERICAN RULE.* His discretion, however, is not arbitrary, but is always subject to judicial discretion.[11] The prosecution is under no obligation to introduce as witnesses all persons whose names are indorsed on the indictment as having testified before the grand jury,[12] although they are present in court as witnesses summoned for the prosecution.[13] The accused has no right to demand that this shall be done,[14] and evidence that several persons who testified before the grand jury did not testify at the trial is not competent.[15]

(ii) *ENGLISH RULE.* While it is now the rule in England that the prosecutor is not bound to introduce as witnesses all persons whose names are on the bill,[16] yet these witnesses should be in court because the accused, seeing their names on the indictment, might have neglected to subpœna some of them.[17]

c. Eye-Witnesses. While the general rule is that the prosecution is not obliged to produce or call as witnesses at the trial all persons who saw the crime

9. The reason of this rule was that the prisoner was not permitted to call witnesses, although present, and the issue of his guilt or innocence was determined upon the evidence offered in support of the prosecution. Subsequently, when he was permitted to have witnesses, they did not obtain any particular degree of credit by reason of the fact that they were not sworn and the practice continued, but when later the prisoner's witnesses were permitted to testify on oath and he was at liberty to call in his own behalf all the eye-witnesses of the crime, the reason for the ancient rule ceased. 1 Chitty Cr. L. 624, 625. See also Keller *v.* State, 123 Ind. 110, 23 N. E. 1138, 18 Am. St. Rep. 318; Reyens *v.* State, 33 Tex. Cr. 143, 25 S. W. 786, 47 Am. St. Rep. 25.

10. State *v.* McAfee, 148 Mo. 370, 50 S. W. 82; State *v.* Eaton, 75 Mo. 586; State *v.* Baxter, 82 N. C. 602; State *v.* Martin, 24 N. C. 101; Hill *v.* Com., 88 Va. 633, 14 S. E. 330, 29 Am. St. Rep. 744; State *v.* Morgan, 35 W. Va. 260, 13 S. E. 385.

The exercise of this discretion will not be interfered with unless perhaps in a clear case of abuse. State *v.* Baxter, 82 N. C. 602.

11. The court may if the case demand it compel the prosecuting attorney to call a certain witness. Carlisle *v.* State, 73 Miss. 387, 19 So. 207; Phillips *v.* State, 22 Tex. App. 139, 2 S. W. 601; U. S. *v.* Bennett, 24 Fed. Cas. No. 14,572, 17 Blatchf. 357.

At the close of the evidence for the prosecution it is not error for the court to refuse to compel the prosecution to call and examine other witnesses then in the court. People *v.* Robertson, 67 Cal. 646, 8 Pac. 600; Ward *v.* State, 8 Blackf. (Ind.) 101; State *v.* Tighe, 27 Mont. 327, 71 Pac. 3; People *v.* Cunningham, 6 Park. Cr. (N. Y.) 398. And see Thomason *v.* Territory, 4 N. M. 150, 13 Pac. 223.

12. *Florida.*— Selph *v.* State, 22 Fla. 537.

Idaho.— State *v.* Rice, 7 Ida. 762, 66 Pac. 87.

Illinois.— Carle *v.* People, 200 Ill. 494, 66 N. E. 32, 93 Am. St. Rep. 208; Bressler *v.* People, 117 Ill. 422, 8 N. E. 62.

Iowa.— State *v.* Helm, 92 Iowa 540, 61 N. W. 246.

Louisiana.— State *v.* Ford, 42 La. Ann. 255, 7 So. 696.

Minnesota.— State *v.* Smith, 78 Minn. 362, 81 N. W. 17.

Mississippi.— Morrow *v.* State, 57 Miss. 836, a homicide case.

Pennsylvania.— Com. *v.* Keller, 191 Pa. St. 122, 43 Atl. 198.

Texas.— Steele *v.* State, 1 Tex. 142.

Utah.— People *v.* Robinson, 6 Utah 101, 21 Pac. 403; People *v.* Oliver, 4 Utah 460, 11 Pac. 612.

Virginia.— Clark *v.* Com., 90 Va. 360, 18 S. E. 440.

West Virginia.— State *v.* Cain, 20 W. Va. 679.

Wyoming.— Johnson *v.* State, 8 Wyo. 494, 58 Pac. 761.

United States.— U. S. *v.* Dowden, 25 Fed. Cas. No. 14,990*a*, 1 Hayw. & H. 145.

See 14 Cent. Dig. tit. "Criminal Law," § 1568.

13. *Florida.*— Selph *v.* State, 22 Fla. 537.

Missouri.— State *v.* David, 131 Mo. 380, 33 S. W. 28.

North Carolina.— State *v.* Lucas, 124 N. C. 825, 32 S. E. 962.

Texas.— Reyons *v.* State, 33 Tex. Cr. 143, 25 S. W. 786, 47 Am. St. Rep. 25.

Virginia.— Gaines *v.* Com., 88 Va. 682, 14 S. E. 375; Hill *v.* Com., 88 Va. 633, 14 S. E. 330, 29 Am. St. Rep. 744.

See 14 Cent. Dig. tit. "Criminal Law," § 1568.

14. State *v.* Billings, 140 Mo. 193, 41 S. W. 778; Jackson *v.* State, 90 Tenn. 396, 19 S. W. 118.

15. State *v.* Dillon, 74 Iowa 653, 38 N. W. 525.

16. Reg. *v.* Thompson, 13 Cox C. C. 181; Reg. *v.* Vincent, 9 C. & P. 91, 38 E. C. L. 65.

17. Reg. *v.* Woodhead, 2 C. & K. 520, 61 E. C. L. 520.

committed,[18] it has been decided that the refusal of defendant's request that the state should be compelled to call eye-witnesses of the crime, where he had been convicted wholly on circumstantial evidence and the eye-witnesses were in court, was error.[19]

d. Accomplices. Even where the practice is to require the prosecution to produce all the witnesses, the state cannot be required to call the accomplice of defendant as a witness.[20]

e. Unfavorable Witnesses. The general rule seems to be that the prosecution is not compelled to call and vouch for a witness, even though it be evident that he knows all about the facts, when the prosecuting officer, acting in good faith

If the prosecution does not call the witness it is in the discretion of the court to do so in order that the prisoner's counsel may cross-examine him. Rex *v.* Simmonds, 1 C. & P. 84, 12 E. C. L. 59. See also Selph *v.* State, 22 Fla. 537; Gaines *v.* Com., 88 Va. 682, 14 S. E. 375; Hill *v.* Com., 88 Va. 633, 14 S. E. 330, 29 Am. St. Rep. 744. The witness then stands in the position of the witness for defendant and cannot be contradicted by him. Rex *v.* Bodle, 6 C. & P. 186, 25 E. C. L. 386. It has also been held that the prisoner has an absolute right to insist on cross-examining the crown's witnesses, although they do not testify against him. Reg. *v.* Barley, 2 Cox C. C. 191.

18. *Florida.*— Selph *v.* State, 22 Fla. 537.

Indiana.— Keller *v.* State, 123 Ind. 110, 23 N. E. 1138, 18 Am. St. Rep. 318; Winsett *v.* State, 57 Ind. 26.

Iowa.— State *v.* Hudson. 110 Iowa 663, 80 N. W. 232; State *v.* Middleham, 62 Iowa 150, 17 N. W. 446.

Mississippi.— Hale *v.* State, 72 Miss. 140, 16 So. 387.

New York.— People *v.* Fitzpatrick, 5 Park. Cr. 26.

North Dakota.— State *v.* McGahey, 3 N. D. 293, 55 N. W. 753.

Pennsylvania.— Com. *v.* Keller, 191 Pa. St. 122, 43 Atl. 198.

South Carolina.— State *v.* Clark, 4 Strobh. 311.

Texas.— McCandless *v.* State, 42 Tex. Cr. App. 655, 62 S. W. 745; Robinson *v.* State, (Cr. App. 1900) 57 S. W. 811; McGrew *v.* State, (Cr. App. 1899) 49 S. W. 226; Williford *v.* State, (Cr. App. 1896) 37 S. W. 761; Mayes *v.* State, 33 Tex. Cr. 33, 24 S. W. 421; Gibson *v.* State, 23 Tex. App. 414, 5 S. W. 314; Wheelis *v.* State, 23 Tex. App. 238, 5 S. W. 224.

Virginia.— Clark *v.* Com., 90 Va. 360, 18 S. E. 440.

Washington.— State *v.* Payne, 10 Wash. 545, 39 Pac. 157.

West Virginia.— State *v.* Cain, 20 W. Va. 679.

See 14 Cent. Dig. tit. "Criminal Law," § 1568.

Homicide.— In America the rule of the text has been applied to cases of homicide (Trotter *v.* State, 37 Tex. Cr. 468, 36 S. W. 278; Kidwell *v.* State, 35 Tex. Cr. 264, 33 S. W. 342; Jackson *v.* State, (Tex Cr. App. 1894) 24 S. W. 896); but a different rule is recognized in England in such cases, where every witness present at the killing must be called (Reg. *v.* Holden, 8 C. & P. 606; 34 E. C. L. 917).

In Michigan the rule seems to be that the prosecution cannot properly claim a conviction upon evidence which expressly or by implication shows but a part of the *res gestæ* or whole transaction, if it appears that the rest of the evidence of the transaction is attainable and that all the witnesses present at the transaction should be called for the prosecution, unless it appears that the testimony of those not called would be merely cumulative. People *v.* Kindra, 102 Mich. 147, 60 N. W. 458; People *v.* Germaine, 101 Mich. 485, 60 N. W. 44; People *v.* Kenyon, 93 Mich. 19, 52 N. W. 1033; People *v.* Dietz, 86 Mich. 419, 49 N. W. 296; People *v.* McCullough, 81 Mich. 25, 45 N. W. 515; People *v.* Swetland, 77 Mich. 53, 43 N. W. 779; Thomas *v.* People, 39 Mich. 309; Bonker *v.* People, 37 Mich. 4; Wellar *v.* People, 30 Mich. 16; Hurd *v.* People, 25 Mich. 405. But *compare* People *v.* Higgins, 127 Mich. 291, 86 N. W. 812; People *v.* Marrs, 125 Mich. 376, 84 N. W. 284; People *v.* McArron, 121 Mich. 1, 79 N. W. 944. Witnesses whose names appear upon the indictment, but who were not present at the commission of the crime, need not be examined by the prosecution. People *v.* Henshaw, 52 Mich. 564, 18 N. W. 360. See also People *v.* Harris, 95 Mich. 87, 54 N. W. 648. On a criminal trial a refusal by the court to compel the prosecution to call a witness whose name is indorsed on the information will be held proper where proof of the fact he was to testify to became unnecessary. People *v.* Berry, 107 Mich. 256, 65 N. W. 98.

19. Donaldson *v.* Com., 95 Pa. St. 21; Thompson *v.* State, 30 Tex. App. 325, 17 S. W. 448.

Homicide.— A person who, although not an eye-witness of the crime, was near enough to overhear a preceding conversation between defendant and the deceased must be called, and a conviction on circumstantial evidence will be reversed. State *v.* Metcalf, 17 Mont. 417, 43 Pac. 182.

20. People *v.* Resh, 107 Mich. 251, 65 N. W. 99; People *v.* Considine, 105 Mich. 149, 63 N. W. 196.

Effect of failure to call.— It has been held that the failing to call an accomplice who was in court and who knew the facts entitled

and under his official oath, is of the opinion that he will by false swearing or by the concealment of material facts attempt to establish the innocence of defendant.[21]

f. Permitting Consultations Between Counsel and Witnesses. The general rule gives counsel full opportunity to consult with witnesses prior to producing them on the stand.[22]

g. Compelling Witness to Ascertain Facts. It is not error to refuse to direct a witness to ascertain a certain fact during a recess, in order to answer correctly subsequently.[23] On the other hand, it has been held proper to permit a witness for the state to retire from the court so that he could examine papers for the purpose of identifying them and explaining their contents.[24]

h. Calling Witnesses by Defense. If the prosecution fails to call a witness which the defense thinks material, defendant may do so, where he is in court on a subpœna, or may ask for an adjournment in order to procure his attendance.[25]

i. Extent of Examination. The extent to which the prosecuting attorney shall question any witness is in his discretion.[26]

4. Statement by Accused — a. Right to Make. In England in prosecutions for treason,[27] although the prisoner is defended by counsel, he will be permitted to make a statement to the jury in addition to what his counsel says.[28] In the United States, independently of statute, the accused, when represented by counsel, has no right save in capital crimes to make a statement of facts to the jury unless

the accused to every inference that might be drawn from this suppression of evidence. People *v.* Gordon, 40 Mich. 716.

21. State *v.* Barrett, 33 Oreg. 194, 54 Pac. 807; Ross *v.* State, 8 Wyo. 351, 57 Pac. 924.

Defendant as a witness.— The prosecution is not bound to use defendant as a witness to prove a fact peculiarly within his knowledge, although he may offer himself as a witness for the purpose. The statute making him a competent witness, at his own request, was intended to give him the privilege of testifying for himself and not to impose him upon the prosecution. Com. *v.* Pratt, 137 Mass. 98.

In Michigan, however, where the practice is to require the prosecution to produce all eye-witnesses, the fact that a witness is unfavorable to the prosecution (Wellar *v.* People, 30 Mich. 16) or that his evidence will contradict other witnesses (People *v.* Etter, 81 Mich. 570, 45 N. W. 1109) does not alter the rule.

22. Hence it is error to refuse counsel for the defendant permission to consult with a co-defendant, separately tried and convicted, whom he calls as a witness. White *v.* State, 52 Miss. 216.

In Texas it seems to be the practice to permit the defendant's counsel to consult with the witnesses for the prosecution prior to the trial. While allowing this, the court should not compel the state's witness to disclose to the defense what his testimony will be. Cahn *v.* State, 27 Tex. App. 709, 11 S. W. 723; Withers *v.* State, 23 Tex. App. 396, 5 S. W. 121.

23. People *v.* Ching Hing Chang, 74 Cal. 389, 16 Pac. 201.

24. Kunde *v.* State, 22 Tex. App. 65, 3 S. W. 325.

25. *California.*— People *v.* Jim Ti, 32 Cal. 60.

Illinois.— Bressler *v.* People, 117 Ill. 422, 8 N. E. 62.

Louisiana.— State *v.* Furco, 51 La. Ann. 1082, 25 So. 951.

Massachusetts.— Com. *v.* Haskell, 140 Mass. 128, 2 N. E. 773.

New York.— People *v.* Fitzpatrick, 5 Park. Cr. 26.

26. Defendant has no right to demand that he shall examine a witness as to the full details of the crime, where the examination ceases with a few general questions. People *v.* Hughes, 118 Mich. 80, 74 N. W. 309.

27. Some cases hold that in cases not capital one represented by counsel ought not to be allowed to make a statement except under very peculiar circumstances. Reg. *v.* Rider, 8 C. & P. 539, 34 E. C. L. 880; Reg. *v.* Malings, 8 C. & P. 242, 34 E. C. L. 712; Reg. *v.* Beard, 8 C. & P. 142, 34 E. C. L. 655; Reg. *v.* Manzano, 2 F. & F. 64. 6 Jur. N. S. 406; Reg. *v.* Burrows, 2 M. & Rob. 124. In Reg. *v.* Taylor, 1 F. & F. 535, the court, denying the right of the prisoner to make a statement where he has counsel, said that permitting these statements to be made would bring the prisoner's statement before the jury as evidence without the sanction of an oath, and that it would allow the prisoner to exercise the option of speaking himself or having counsel speak for him.

28. Reg. *v.* Millhouse, 15 Cox C. C. 622; Reg. *v.* Shimmin, 15 Cox C. C. 122; Reg. *v.* Dyer, 1 Cox C. C. 113; Thistlewood's Case, 33 How. St. Tr. 682, 894; Watson's Case, 32 How. St. Tr. 1, 538.

His counsel may comment upon the statement as part of the case when addressing the jury. Reg. *v.* Dyer, 1 Cox C. C. 113.

he goes on the witness stand.[29] Sometimes by statute the accused is permitted to make a statement to the jury not under oath.[30]

b. Character of. The statement made by the accused is in the nature of evidence and subject to the same tests as to its credibility.[31]

c. Time and Manner of Making. The cases are not uniform as to the proper time for making the statement.[32] The accused while making his statement is not under examination as a witness and cannot be questioned by his counsel without the permission of the court;[33] nor can the court question him over his objection.[34] The accused has a right to make a statement without being embarrassed by the strict rules of law regulating the admissibility of evidence, but may be restrained by the court from occupying its time with a long, rambling, and irrelevant story.[35] He may state facts, but cannot give to the jury his unsworn statement as to his beliefs and motives.[36]

d. Supplemental Statement. The statute generally gives the accused the right to make one statement only, so that the refusal to permit him to make a supplemental statement is not error.[37]

e. Evidence in Rebuttal of Statement. The prosecution is entitled to give evidence, within the proper limits of rebuttal, to disprove new matter in the statement, which is not in answer to the case of the prosecution.[38]

f. Statement Made at Former Trial. The state may introduce in evidence a statement of the accused made at a former trial.[39]

29. State *v.* McCall, 4 Ala. 643, 39 Am. Dec. 314; Com. *v.* Burrough, 162 Mass. 513, 39 N. E. 184; Com. *v.* McConnell, 162 Mass. 499, 39 N. E. 107.

The constitutional privilege "to be heard by himself and his counsel" does not confer upon defendant the right to make a statement after the argument has been closed. Williams *v.* State, (Ark. 1891) 16 S. W. 816.

30. Cochran *v.* State, 113 Ga. 736, 39 S. E. 337; Williams *v.* State, 105 Ga. 489, 30 S. E. 814; Vaughn *v.* State, 88 Ga. 731, 16 S. E. 64.

31. Williams *v.* State, 74 Ala. 18; Blackburn *v.* State, 71 Ala. 319, 46 Am. Rep. 323; Bond *v.* State, 21 Fla. 738; Defoe *v.* People, 22 Mich. 224; Durant *v.* People, 13 Mich. 351; Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781.

It is the province of the jury to consider it in connection with the evidence, and give it due weight, and if they think it true they may believe it in preference to the sworn testimony in the case. Barnes *v.* State, 113 Ga. 716, 39 S. E. 488; Smalls *v.* State, 105 Ga. 669, 31 S. E. 571; Keller *v.* State, 102 Ga. 506, 31 S. E. 92.

32. See Com. *v.* McConnell, 162 Mass. 499, 39 N. E. 107 (holding that it should be made after the arguments of both counsel and immediately before the charge to the jury); Palmer *v.* People, 43 Mich. 414, 5 N. W. 450 (holding that the accused should make his statement before the prosecution has summed up, and that its allowance thereafter is discretionary with the court). And see Higginbotham *v.* State, 19 Fla. 557, where it appears that it is error to refuse him the right to make a statement at any time before the case is submitted to the jury.

In England.— See Reg. *v.* Dyer, 1 Cox C. C. 113; Thistlewood's Case, 33 How. St. Tr. 682, 894; Watson's Case, 32 How. St. Tr. 1, 538; Bishop New Cr. Proc. § 962.

The right to make a statement is not lost by defendant's declining to do so after the introduction of his evidence, if the state thereafter introduces further evidence in rebuttal. King *v.* State, 99 Ga. 52, 25 S. E. 613.

33. Echols *v.* State, 109 Ga. 508, 34 S. E. 1038; Brown *v.* State, 58 Ga. 212.

In Michigan it has been held that it is error not to allow the counsel for the accused to call his attention to a point which he has omitted, in order that he may make a statement in reference to it. Annis *v.* People, 13 Mich. 511.

He is not subject to cross-examination, and the court should of its own motion prevent any interference with him either by questions or suggestions from any one. Walker *v.* State, 116 Ga. 537, 42 S. E. 787; Hawkins *v.* State, 29 Fla. 554, 10 So. 822.

34. Heckney *v.* State, 101 Ga. 512, 28 S. E. 1007.

35. Tiget *v.* State, 110 Ga. 244, 34 S. E. 1023; Wells *v.* State, 97 Ga. 209, 22 S. E. 958; Coxwell *v.* State, 66 Ga. 309.

36. Burke *v.* State, 71 Ala. 377.

37. Dixon *v.* State, 116 Ga. 186, 42 S. E. 357; Cochran *v.* State, 113 Ga. 736, 39 S. E. 337; Williams *v.* State, 105 Ga. 489, 30 S. E. 814; Vaughn *v.* State, 88 Ga. 731, 16 S. E. 64. And this seems to be true, although the prosecution introduces evidence which his first statement did not meet. Peavy *v.* State, 114 Ga. 260, 40 S. E. 234; Knox *v.* State, 112 Ga. 373, 37 S. E. 416; Sharp *v.* State, 111 Ga. 176, 36 S. E. 633; Boston *v.* State, 94 Ga. 590, 21 S. E. 603.

38. Burden *v.* People, 26 Mich. 162.

39. Lewis *v.* State, 91 Ga. 168, 16 S. E. 986.

5. Presence of Jury During Argument as to Admissibility. The court may in its discretion hear the argument for and against the admissibility of evidence in the presence of the jury or may send them out of the room.[40]

6. Presentation and Introduction of Evidence — a. Stating Purpose of Evidence. It is not error to reject evidence which on its face is irrelevant, where the purpose of its introduction is not stated, in order that the court may determine its relevancy.[41] An offer of evidence not showing its relevancy by something that has preceded it should on objection have its purpose stated by the party offering it.[42]

b. Evidence Not Admissible For Purpose Offered. It is not error to refuse

The entire statement need not be introduced, provided the accused is given an opportunity if he desires to do so. Smalls *v.* State, 105 Ga. 669, 31 S. E. 571.

40. *Alabama.*— Mose *v.* State, 36 Ala. 211.
Georgia.— Woolfolk *v.* State, 81 Ga. 551, 8 S. E. 724.
New Hampshire.— State *v.* Wood, 53 N. H. 484.
North Carolina.— State *v.* Moore, 104 N. C. 743, 10 S. E. 183.
Texas.— Williams *v.* State, (Cr. App. 1899) 53 S. W. 859.
See 14 Cent. Dig. tit. "Criminal Law," § 1591.

The provision that the trial must be public does not require that the jury shall remain in the court during discussions upon legal questions, nor is it proper that it should be present while the judge examines a witness to determine his competency. The practice of retiring the jury under such circumstances is highly proper, as it may tend to keep from their consideration evidence absolutely irrelevant. Kraner *v.* State, 61 Miss. 158.

Thus the preliminary question, whether a confession was voluntary, may in the discretion of the court be argued in the presence of the jury. Fletcher *v.* State, 90 Ga. 468, 17 S. E. 100; State *v.* Wright, 48 La. Ann. 1488, 21 So. 85; Lefevre *v.* State, 50 Ohio St. 584, 35 N. E. 52; State *v.* Kelly, 28 Oreg. 225, 42 Pac. 217, 52 Am. St. Rep. 777. Although the better practice is to determine this question out of the presence of the jury, as the accused may be done an injustice if they hear the confession and it is subsequently ruled out as involuntary. Hall *v.* State, 65 Ga. 36; Ellis *v.* State, 65 Miss. 44, 3 So. 188, 7 Am. St. Rep. 634; Carter *v.* State, 37 Tex. 362.

41. *Alabama.*— Stewart *v.* State, 63 Ala. 199.
California.— People *v.* Shaw, 111 Cal. 171, 43 Pac. 593.
District of Columbia.— De Forest *v.* U. S., 11 App. Cas. 458.
Florida.— Baker *v.* State, 30 Fla. 41, 11 So. 492.
Georgia.— Bush *v.* State, 109 Ga. 120, 34 S. E. 298.
Indiana.— Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 157; Noe *v.* State, 92 Ind. 92.
Iowa.— State *v.* Hurd, 101 Iowa 391, 70 N. W. 613; State *v.* Row, 81 Iowa 138, 46 N. W. 872; State *v.* Hockett, 70 Iowa 442, 30 N. W. 742; State *v.* Hallett, 63 Iowa 259, 19 N. W. 206.
Kentucky.— Nichols *v.* Com., 11 Bush 575.
Massachusetts.—Com. *v.* Chance, 174 Mass. 245, 54 N. E. 551, 75 Am. St. Rep. 306.
Michigan.— People *v.* Niles, 44 Mich. 606, 7 N. W. 192.
Minnesota.— State *v.* Scott, 41 Minn. 365, 43 N. W. 62; State *v.* Bilansky, 3 Minn. 246.
Missouri.— State *v.* Hodges, 144 Mo. 50, 45 S. W. 1093.
Nebraska.— Savary *v.* State, 62 Nebr. 166, 87 N. W. 34.
Pennsylvania.— Com. *v.* Wilson, 186 Pa. St. 1, 40 Atl. 283.
South Dakota.— State *v.* Yokum, 11 S. D. 544, 79 N. W. 835.
Tennessee.— Hagan *v.* State, 5 Baxt. 615.
Texas.— Mitchell *v.* State, 36 Tex. Cr. 278, 33 S. W. 367, 36 S. W. 456; Pearson *v.* State, (Cr. App. 1895) 33 S. W. 224.
Virginia.— Finn *v.* Com., 5 Rand. 701.
See 14 Cent. Dig. tit. "Criminal Law," § 1593.

Requiring the substance of the proposed evidence to be stated is matter of discretion. If the evidence is nicely balanced the court ought, in order to protect defendant from injustice, carefully to inquire into the substance of the evidence, in order that if irrelevant it may be kept from the jury. But where the evidence is sufficiently conclusive of the guilt of the accused, it will be sufficient for the court to determine the competency of the evidence as it comes from the witness. People *v.* White, 14 Wend. (N. Y.) 111.

42. He should state the fact he expects to elicit by the question, with explanations sufficient to show their relevancy. A general statement that he proposes by the evidence to establish his innocence is not sufficient. State *v.* West, 45 La. Ann. 14, 12 So. 7.

Contradiction.— Where evidence is offered to contradict a witness for the prosecution, it is not error to reject it in case defendant fails to show wherein it does so. People *v.* Totman, 135 Cal. 133, 67 Pac. 51.

Defendant's right to state facts.— It is error to refuse defendant permission to state the facts he expects to prove by witnesses who are excluded, in order that such statement may be incorporated in the bill of exceptions. Browder *v.* State, 30 Tex. App. 614, 18 S. W. 197.

evidence which, although admissible for certain purposes, is not admissible for the purpose which counsel states as the ground for offering it.[43]

c. Evidence Partially Inadmissible. Where evidence offered is partly admissible and partly inadmissible, it is not error for the court to sustain an objection to its introduction as a whole, it being the duty of the party offering the evidence to separate it and have the court rule separately as to each fact.[44]

d. Evidence Admissible Only Against One of Several Defendants. Where two defendants are tried together, evidence admissible only against one of them may be received; but the defendant against whom it is not admissible should ask the court to instruct that its effect shall be confined to the other defendant against whom it is admissible.[45]

e. Taking Down Evidence in Writing. In the absence of statute committing the testimony to writing at the trial is discretionary with the court.[46]

f. Repeating or Reading Testimony on Disagreement. The common practice is, where a court stenographer is employed in taking the testimony, to have it read from his notes, where there is a disagreement as to what the witness said.[47] In the absence of any notes of the evidence it is not error to direct the witness to repeat what he said.[48]

g. Handing Documentary Evidence to Jury. To make a record evidence it is not necessary that it should be handed or given to the jury.[49]

43. Roop *v.* State, 58 N. J. L. 479, 34 Atl. 749.

Where evidence is distinctly offered for one purpose, it is not error for the court in its charge to restrict it to that purpose, although it may have been relevant to others. Cochran *v.* State, 113 Ga. 736, 39 S. E. 337.

44. Murphy *v.* State, 108 Ala. 10, 18 So. 557; Davidson *v.* State, 135 Ind. 254, 34 N. E. 972. But see Com. *v.* Bezek, 168 Pa. St. 603, 32 Atl. 109, where it was held that this rule, although applicable in civil cases, could not be invoked to sustain a ruling prejudicial to a defendant in a trial for murder.

45. *Alabama.*—Alsabrooks *v.* State, 52 Ala. 24; Blackman *v.* State, 36 Ala. 295.

Georgia.— Johnson *v.* State, 70 Ga. 725.

Massachusetts.— Com. *v.* Bishop, 165 Mass. 148, 42 N. E. 560.

Pennsylvania.— Brandt *v.* Com., 94 Pa. St. 290.

Texas.— Woods *v.* State, (Cr. App. 1900) 60 S. W. 244; Wilkerson *v.* State (Cr. App. 1899) 57 S. W. 956.

See 14 Cent. Dig. tit. "Criminal Law," § 1597.

The fact that the evidence tends to prejudice defendant, against whom it is inadmissible, does not make its admission error, where the jury is properly instructed to disregard it as to him. State *v.* Fournier, 68 Vt. 262, 35 Atl. 178; State *v.* Cram, 67 Vt. 650, 32 Atl. 502.

46. State *v.* Downs, 50 La. Ann. 694, 23 So. 456.

It is not error for the court, where it has no stenographer, to request an attorney to take down the testimony, although not required by law to do so. This is purely in the judicial discretion. Green *v.* State, 43 Ga. 368. It is very good practice to read over carefully to the witness the testimony thus taken in order to correct errors. Conner *v.* State, 25 Ga. 515, 71 Am. Dec. 184. Usually the precise words of the witness are not necessary to be taken down. Hatcher *v.* State, 18 Ga. 460.

Taking down evidence on preliminary inquiry into admissibility.— On the question of the competency of dying declarations, the prosecution examined several witnesses whose evidence defendant's counsel asked to have taken down, as it was a mixed question of law and fact, reviewable by the appellate court. The trial court refused to do this, inasmuch as it was a useless consumption of time, and its action in so doing was held error, as it was necessary that the evidence should be reduced to writing for the purpose of having it annexed to the bill of exceptions. State *v.* Seiley, 41 La. Ann. 143, 6 So. 571.

47. Vann *v.* State, 83 Ga. 44, 9 S. E. 945. But see Conner *v.* State, 25 Ga. 515, 71 Am. Dec. 184, holding that the proper practice in such cases is to recall the witness to repeat what he has said if he be within reach, and if not then to read from the written testimony.

48. State *v.* Huff, 76 Iowa 200, 40 N. W. 720; State *v.* Shean, 32 Iowa 88; State *v.* Boon, 82 N. C. 637; Hayes *v.* State, 36 Tex. Cr. 146, 35 S. W. 983.

In Texas it has been held that a disagreement between counsel regarding the testimony given does not alone justify the recalling of the witness, but that the trial judge may ask the jury if they disagree as to the testimony, and if they do the witness may repeat his testimony. Lister *v.* State, 3 Tex. App. 17.

49. If it is submitted to the court and received without objection, or over objection, it is unnecessary either to read it to the jury or to hand it to them, unless they require it when they retire to consider their verdict. Binder *v.* State, 5 Iowa 457.

h. Exclusion of Evidence. Where the evidence is clearly inadmissible the court ought to exclude it in express language,[50] although it is not necessary to rebuke the witness or instruct the jury to give his statement no weight.[51]

i. Withdrawing Evidence. A party must take the consequences of having elicited unfavorable testimony from his witnesses. He has no right to withdraw it, and the refusal of the court to permit a defendant to do so is not error,[52] although some of the same evidence when offered by the prosecution, has on his objection been excluded.[53]

j. Effect of Evidence Admitted to Avoid Continuance. An agreement to permit defendant to read the testimony of an absent witness in order to avoid a continuance does not preclude the state from introducing the absent witness, if accessible before the conclusion of the evidence.[54]

k. Number of Witnesses. At the common law the testimony of one witness if believed was sufficient for conviction, except in case of high treason,[55] where two were required.[56] The number of witnesses that should be heard on behalf of either party is in the reasonable discretion of the court.[57]

l. Election Between Deposition and Oral Evidence. Under a statute providing for evidence by deposition, where by reason of temporary bodily infirmity a witness cannot attend, the trial court has discretion to decide whether in the interests of justice it is better to read the deposition or adjourn the case until the witness recovers.[58]

7. Order of Proof, Rebuttal, and Reopening Case — a. Order of Introducing Testimony — (i) *In General.* The order in which the evidence is introduced is within the court's discretion.[59]

Where a writing is produced by counsel, placed in the hands of the witnesses in the presence of the jury, and handled and inspected by some of the jurors, it is in evidence, although not formally offered or read to the jury during the trial. It is proper for the court to instruct the jury that they may consider such instrument in evidence. Bevington *v.* State, 2 Ohio St. 160.

50. Leggett *v.* State, 97 Ga. 426, 24 S. E. 165.

51. People *v.* Smith, 106 Mich. 431, 64 N. W. 200.

52. Cotton *v.* State, 87 Ala. 75, 6 So. 396; Com. *v.* Carbin, 143 Mass. 124, 8 N. E. 896; Kelly *v.* State, 1 Tex. App. 628.

53. Speights *v.* State, 1 Tex. App. 551.

The matter is wholly in the court's discretion. Boyd *v.* State, 17 Ga. 194.

54. Hackett *v.* State, 13 Tex. App. 406. And see, generally, Continuances in Criminal Cases, 9 Cyc. 182 *et seq.*

55. In treason either two witnesses to the same overt act or one witness to one and another witness to another overt act were required both for indictment and conviction. 2 Hawkins P. C. c. 46, § 2.

56. 2 Hawkins P. C. c. 25, § 131.

57. *Indiana.*— Mergentheim *v.* State, 107 Ind. 567, 8 N. E. 568; Butler *v.* State, 97 Ind. 378; Gardner *v.* State, 4 Ind. 632.

Iowa.— State *v.* Beabout, 100 Iowa 155, 69 N. W. 429.

New Mexico.—Borrego *v.* Territory, 8 N. M. 446, 46 Pac. 349.

Pennsylvania.— Com. *v.* Gibbons, 3 Pa. Super. Ct. 408.

Texas.— Brantly *v.* State, 42 Tex. Cr. 293, 59 S. W. 892; McMurray *v.* State, (Cr. App. 1899) 56 S. W. 76; Bryant *v.* State, (Cr. App. 1898) 47 S. W. 373.

See 14 Cent. Dig. tit. "Criminal Law," § 1608.

It is within the discretion of the court to limit the number of witnesses on matters collateral to the issue (Doner *v.* People, 92 Ill. App. 43), where defendant accumulates proof on a point sufficiently proven or admitted (Maxwell *v.* State, 129 Ala. 48, 29 So. 981), or where the witnesses are to prove an alibi (State *v.* Lamb, 141 Mo. 298, 42 S. W. 827) or to prove his reputation (State *v.* Rutherford, 152 Mo. 124, 53 S. W. 417).

58. Collins *v.* State, 24 Tex. App. 141, 5 S. W. 848.

59. *Alabama.*— Caddell *v.* State, 129 Ala. 57, 30 So. 76.

California.— People *v.* Rodley, 131 Cal. 240, 63 Pac. 351; People *v.* Mayes, 113 Cal. 618, 45 Pac. 860; People *v.* Shainwold, 51 Cal. 468.

Connecticut.— State *v.* Main, 31 Conn. 572.

Florida.— Hall *v.* State, 31 Fla. 176, 12 So. 449.

Georgia.— White *v.* State, 100 Ga. 659, 28 S. E. 423; Mitchell *v.* State, 71 Ga. 128.

Kentucky.— Hudson *v.* Com., 69 S. W. 1079, 24 Ky. L. Rep. 785; Jackson *v.* Com., 64 S. W. 729, 23 Ky. L. Rep. 1114.

Louisiana.— State *v.* Pruett, 49 La. Ann. 283, 21 So. 842; State *v.* Woods, 31 La. Ann. 267.

Maine.— State *v.* Day, 79 Me. 120, 8 Atl. 544.

Maryland.— Taylor *v.* State, 79 Md. 130, 28 Atl. 815.

Massachusetts.— Com. *v.* Kennedy, 170 Mass. 18, 48 N. E. 770; Com. *v.* Smith, 162

(m) *Corpus Delicti.* As a matter of good practice it is preferable to prove the *corpus delicti* before any evidence is offered to implicate the accused;[60] but the matter is largely in the discretion of the court; and while the state may[61] and should[62] prove the *corpus delicti* first, it is not error to receive evidence against the accused before the *corpus delicti* has been proved.[63]

(III) *Admission of Irrelevant Evidence on Promise to Connect.* Evidence which is not shown to be relevant when offered may in the discretion of the court be admitted or rejected. If admitted the court should exact a promise from counsel to connect it with the accused by evidence subsequently offered, or a consent to have it stricken out if not so connected.[64] Where irrevelant testimony is received against the accused under a promise, or on condition that it will subsequently be made relevant, it is error not to strike it out promptly on a failure to connect.[65]

Mass. 508, 39 N. E. 111; Com. *v.* Piper, 120 Mass. 185; Com. *v.* Dam, 107 Mass. 210.

Michigan.— People *v.* Durfee, 62 Mich. 487, 29 N. W. 109.

Missouri.— State *v.* Murphy, 118 Mo. 7, 25 S. W. 95; State *v.* Pratt, 98 Mo. 482, 11 S. W. 977; State *v.* Linney, 52 Mo. 40.

Nebraska.— Whitney *v.* State, 53 Nebr. 287, 73 N. W. 696; Davis *v.* State, 51 Nebr. 301, 70 N. W. 984; Yeoman *v.* State, 21 Nebr. 171, 31 N. W. 669.

New Jersey.—Donnelly *v.* State, 26 N. J. L. 601.

New York.— Blake *v.* People, 73 N. Y. 586; People *v.* Williams, 92 Hun 354, 36 N. Y. Suppl. 511.

Ohio.— Webb *v.* State, 29 Ohio St. 351.

Oregon.— State *v.* Marshall, 35 Oreg. 265, 57 Pac. 902.

Pennsylvania.— Com. *v.* Wilson, 186 Pa. St. 1, 40 Atl. 283.

South Carolina.— State *v.* Clyburn, 16 S. C. 375.

Texas.— Hennessy *v.* State, 23 Tex. App. 340, 5 S. W. 215.

Utah.— State *v.* Haworth, 24 Utah 398, 68 Pac. 155.

Vermont.— State *v.* Lawrence, 70 Vt. 524, 41 Atl. 1027; State *v.* Magoon, 50 Vt. 333.

United States.— Putnam *v.* U. S., 162 U. S. 687, 16 S. Ct. 923, 40 L. ed. 1118; Thiede *v.* Utah, 159 U. S. 510, 16 S. Ct. 62, 40 L. ed. 237; Taylor *v.* U. S., 89 Fed. 954, 32 C. C. A. 449; U. S. *v.* Flowery, 25 Fed. Cas. No. 15,122, 1 Sprague 109.

Order of proving conspiracy see *supra*, XII, F, 3, b.

Order of proving overt acts see TREASON.

Best and secondary evidence.— It is the duty of a party desiring to introduce secondary evidence to lay a proper foundation therefor before he offers it. Byrd *v.* State, 1 How. (Miss.) 247.

60. It has been held that evidence implicating the accused cannot be received in homicide until this has been done. People *v.* Aiken, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512; People *v.* Millard, 53 Mich. 63, 18 N. W. 562; People *v.* Hall, 48 Mich. 482, 12 N. W. 665, 42 Am. Rep. 477.

61. State *v.* Harrison, 66 Vt. 523, 29 Atl. 807, 44 Am. St. Rep. 864.

62. People *v.* Whiteman, 114 Cal. 338, 46 Pac. 99; Traylor *v.* State, 101 Ind. 65.

63. People *v.* Ward, 134 Cal. 301, 66 Pac. 372; People *v.* Jones, 123 Cal. 65, 55 Pac. 698; People *v.* Swetland, 77 Mich. 53, 43 N. W. 779; People *v.* Kemp, 76 Mich. 410, 43 N. W. 439; People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188; Pienovi's Case, 3 City Hall Rec. (N. Y.) 123.

64. *California.*—People *v.* Monroe, 138 Cal. 97, 70 Pac. 1072; People *v.* Van Horn, 119 Cal. 323, 51 Pac. 538; People *v.* Yokum, 118 Cal. 437, 50 Pac. 686; People *v.* Choy Ah Sing, 84 Cal. 276, 24 Pac. 379.

Iowa.— State *v.* Spiers, 103 Iowa 711, 73 N. W. 343; State *v.* Mushrush, 97 Iowa 444, 66 N. W. 746.

Maine.— State *v.* McAllister, 24 Me. 139.

Maryland.— Bloomer *v.* State, 48 Md. 521.

Michigan.— Dillin *v.* People, 8 Mich. 357.

New York.— McCarney *v.* People, 83 N. Y. 408, 38 Am. Dec. 456.

North Carolina.— State *v.* Cherry, 63 N. C. 493; State *v.* Black, 51 N. C. 510.

Oregon.— State *v.* Foot You, 24 Oreg. 61, 32 Pac. 1031, 33 Pac. 537.

Tennessee.— Owen *v.* State, 16 Lea 1.

Texas.— Dungan *v.* State, 39 Tex. Cr. 115, 45 S. W. 19; Phillips *v.* State, 22 Tex. App. 139, 2 S. W. 601; Johnson *v.* State, 20 Tex. App. 178; Pierson *v.* State, 18 Tex. App. 524.

See 14 Cent. Dig. tit. "Criminal Law," § 1611.

It is not error for the court to assume that the prosecution will connect apparently irrelevant evidence with the accused, and where it does not do so defendant should move to strike it out or to instruct the jury to disregard it. Having failed to make such a motion, defendant cannot complain of the ruling, which was not erroneous when it was made. U. S. *v.* Gardner, 42 Fed. 832. See also State *v.* Rothschild, 5 Mo. App. 411.

The court may properly exclude evidence, the relevancy of which depends on its having been communicated to the accused, unless the communication be first shown. State *v.* Scott, 41 Minn. 365, 43 N. W. 62.

65. Dillin *v.* People, 8 Mich. 357; State *v.* Clayton, 100 Mo. 516, 13 S. W. 819, 18

(iv) *Order in Which Defendant May Testify.* Independently of statute regulating the order in which the accused may testify,[66] it is error to compel him to testify before other witnesses.[67]

b. Scope of Direct Examination. Only evidence tending directly to make out the affirmative case of the prosecution should be admitted on the direct examination of its witnesses.[68]

c. Evidence in Rebuttal — (i) *Scope of.* The state may introduce rebutting evidence to meet any pertinent issue.[69] Evidence in rebuttal need not completely and entirely contradict any portion of the evidence for the defense, if it has a tendency to contradict or disprove it.[70]

(ii) *Evidence Which Should Have Been Offered in Chief.* According to the weight of authority it is within the discretion of the trial judge to admit in rebuttal facts and circumstances which should have been offered in chief.[71] Some cases have held, however, that nothing which tends directly to prove the

Am. St. Rep. 565; Zell *v.* Com., 94 Pa. St. 258.

It is the duty of the trial court to direct the jury to disregard the irrelevant evidence. Wright *v.* State, 43 Tex. 170; Phillips *v.* State, 22 Tex. App. 139, 2 S. W. 601.

The rule of the text was applied in arson to previous attempts to commit the crime, not connected with the accused (State *v.* Freeman, 49 N. C. 5), and to threats uttered by one accused of homicide, which the prosecution promised to show were addressed to the deceased (State *v.* Walsh, 5 Nev. 315).

66. Clemons *v.* State, 92 Tenn. 282, 21 S. W. 525.

67. Bell *v.* State, 66 Miss. 192, 5 So. 389.

After argument.—It is not an abuse of discretion to refuse to permit defendant to testify after the court has begun to charge the jury (People *v.* Christensen, 85 Cal. 568, 24 Pac. 888), or after the evidence is closed and the argument begun, if the character of his proposed testimony be not stated (Richards *v.* State, 34 Tex. Cr. 277, 30 S. W. 229).

68. Thus it is error to admit as part of the case for the prosecution evidence that one of its witnesses had told the same story that he told on the witness stand for the purpose of corroborating him. Webb *v.* State, 29 Ohio St. 351; Riojas *v.* State, 36 Tex. Cr. 182, 36 S. W. 268.

Questions which plainly show a purpose to anticipate and meet the evidence which will be introduced by defendant have generally been held incompetent. Hellyer *v.* People, 186 Ill. 550, 58 N. E. 245; Com. *v.* Chance, 174 Mass. 245, 54 N. E. 551, 75 Am. St. Rep. 306.

69. Kastner *v.* State, 58 Nebr. 767, 79 N. W. 713.

70. *Alabama.*— Mitchell *v.* State, 133 Ala. 65, 32 So. 132.

California.— People *v.* Figuerea, 134 Cal. 159, 66 Pac. 202; People *v.* Emerson, 130 Cal. 562, 62 Pac. 1069.

Idaho.— People *v.* Page, 1 Ida. 189.

Iowa.— State *v.* Yetzer, 97 Iowa 423, 66 N. W. 737.

Pennsylvania.— Com. *v.* McMurray, 198 Pa. St. 51, 47 Atl. 952.

Texas.— Lankster *v.* State, 42 Tex. Cr. 360, 59 S. W. 888; Stanton *v.* State, 42 Tex. Cr. 269, 59 S. W. 271; Magee *v.* State, (Cr. App. 1897) 43 S. W. 98.

Vermont.— State *v.* Wilkins, 66 Vt. 1, 28 Atl. 323.

Washington.— State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382.

United States.— U. S. *v.* Holmes, 26 Fed. Cas. No. 15,382, 1 Cliff. 98.

See 14 Cent. Dig. tit. "Criminal Law," § 1615.

Alibi.— Where, in a trial of an indictment for murder, defendant produces evidence to prove an alibi, the prosecution may introduce evidence in rebuttal. State *v.* Lewis, 69 Mo. 92.

Contradictory statements.— Evidence of statements made by defendant on his preliminary examination contradicting his evidence on the trial are admissible, as being directly in rebuttal. Rounds *v.* State, 57 Wis. 45, 14 N. W. 865.

Evidence brought out by the cross-examination of the accused cannot generally be rebutted. Redmond *v.* Com., 51 S. W. 565, 21 Ky. L. Rep. 331.

If evidence in chief is not relevant, it is in the discretion of the court to exclude evidence to rebut it. House *v.* State, (Tex. Cr. App. 1901) 69 S. W. 417.

Theory of defense.— Any evidence which tends to overthrow the theory sought to be established by the defense in a criminal case is admissible in rebuttal. State *v.* Cooper, 83 Mo. 698.

71. *Arkansas.*— Blair *v.* State, 69 Ark. 558, 64 S. W. 948; Campbell *v.* State, 38 Ark. 498.

California.— People *v.* Clark, 84 Cal. 573, 24 Pac. 313.

Connecticut.— State *v.* Alford, 31 Conn. 40.

District of Columbia.— U. S. *v.* Schneider, 21 D. C. 381.

Georgia.— Milam *v.* State, 108 Ga. 29, 33 S. E. 818.

Illinois.— Simons *v.* People, 150 Ill. 66, 36 N. E. 1019.

Iowa.— State *v.* Hunter, 118 Iowa 686, 92 N. W. 872; State *v.* Robbins, 109 Iowa 650, 80 N. W. 1061; State *v.* Watson, 102 Iowa

commission of the crime, or its immediate circumstances, and which does not bear directly upon the subject-matter of the defense, should be admitted in rebuttal.[72]

(III) *On Issue of Insanity.* Where defendant alleges and endeavors to prove his mental incapacity of any sort evidence of his sanity is competent in rebuttal.[73]

(IV) *Collateral Facts.* The rule that collateral testimony cannot be contradicted is by some authorities confined to testimony introduced in cross-examination by the party proposing to contradict,[74] and evidence to prove or contradict collateral facts is admissible where they are connected with and material to the inquiry as to the main facts.[75]

651, 72 N. W. 283; State *v.* Yetzer, 97 Iowa 423, 66 N. W. 737.

Kansas.— State *v.* Zimmerman, 3 Kan. App. 172, 42 Pac. 828.

Kentucky.— McQuinn *v.* Com., 31 S. W. 872, 17 Ky. L. Rep. 500.

Louisiana.— State *v.* Carter, 51 La. Ann. 442, 25 So. 385; State *v.* Fourchy, 51 La. Ann. 228, 25 So. 109.

Massachusetts.— Com. *v.* Moulton, 4 Gray 39.

Michigan.—People *v.* Mannausau, 60 Mich. 15, 26 N. W. 797.

Minnesota.— State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458.

Mississippi.— Dillard *v.* State, 58 Miss. 368; Sartorious *v.* State, 24 Miss. 602.

Missouri.— State *v.* Weber, 156 Mo. 249, 56 S. W. 729.

Nebraska.— Murphey *v.* State, 43 Nebr. 34, 61 N. W. 491.

New York.— Leighton *v.* People, 88 N. Y. 117, 10 Abb. N. Cas. 261; People *v.* Buddensieck, 4 N. Y. Cr. 230; People *v.* Taylor, 3 N. Y. Cr. 297.

Ohio.— Donald *v.* State, 21 Ohio Cir. Ct. 124, 11 Ohio Cir. Dec. 483.

Oregon.— State *v.* Warren, 41 Oreg. 348, 69 Pac. 679.

Pennsylvania.— Com. *v.* Weber, 167 Pa. St. 153, 31 Atl. 481; Com. *v.* Bell, 166 Pa. St. 405, 31 Atl. 123; Gaines *v.* Com., 50 Pa. St. 319; Com. *v.* Carey, 2 Brewst. 404; Com. *v.* Cullen, 13 Phila. 442.

South Carolina.— State *v.* Senn, 32 S. C. 392, 11 S. E. 292; State *v.* Watson, 7 S. C. 63.

Texas.— Patterson *v.* State, (Cr. App. 1901) 60 S. W. 557; Pilot *v.* State, 38 Tex. Cr. 515, 43 S. W. 112, 1024; Milrainey *v.* State, 33 Tex. Cr. 577, 28 S. W. 537; Morris *v.* State, 30 Tex. App. 95, 16 S. W. 757; Cooper *v.* State, 29 Tex. App. 8, 13 S. W. 1011, 25 Am. St. Rep. 717.

Utah.— State *v.* Webb, 18 Utah 441, 56 Pac. 159; People *v.* Tidwell, 4 Utah 506, 12 Pac. 61.

Vermont.— State *v.* Marsh, 70 Vt. 288, 40 Atl. 836; State *v.* Magoon, 50 Vt. 333.

Washington.— State *v.* Klein, 19 Wash. 368, 53 Pac. 364.

United States.— Goldsby *v.* U. S., 160 U. S. 70, 16 S. Ct. 216, 40 L. ed. 343.

See 14 Cent. Dig. tit. "Criminal Law," § 1615.

The admission of evidence against a defendant which is not properly evidence in rebuttal is not error unless he was refused an opportunity to give evidence in opposition thereto. Hire *v.* State, 144 Ind. 359, 43 N. E. 312.

The admission of evidence out of strict order is commonly in the discretion of the court and not ground for reversal. People *v.* Wilson, 55 Mich. 506, 21 N. W. 905.

72. *Kentucky.*— Mosley *v.* Com., 72 S. W. 344, 24 Ky. L. Rep. 1811.

Michigan.— People *v.* Hillhouse, 80 Mich. 580, 45 N. W. 484; People *v.* Quick, 58 Mich. 321, 25 N. W. 302.

Mississippi.— Reddick *v.* State, 72 Miss. 1008, 16 So. 490.

Missouri.— St. Charles *v.* Meyer, 58 Mo. 86.

Oregon.— State *v.* Hunsaker, 16 Oreg. 497, 19 Pac. 605.

United States.— U. S. *v.* Gardiner, 25 Fed. Cas. No. 15,186*a*, 2 Hayw. & H. 89.

See 14 Cent. Dig. tit. "Criminal Law," § 1615.

Where the state rests without having made a case against defendant, and without having offered to introduce its chief witness, the witness cannot afterward be introduced to make out the case for the state, under the pretense that his evidence is in rebuttal. Reddick *v.* State, 72 Miss. 1008, 16 So. 490.

73. Jordan *v.* People, 19 Colo. 417, 36 Pac. 218; Com. *v.* Eddy, 7 Gray (Mass.) 583.

The evidence in rebuttal is not confined to a denial of the particular act or declaration proved by the accused, but may include other acts and declarations within a reasonable period. U. S. *v.* Holmes, 26 Fed. Cas. No. 15,382, 1 Cliff. 98.

Where the prosecution proves in chief defendant's statement that he had killed a man, that he set up insanity as a defense and had been acquitted, defendant cannot prove in rebuttal that he had killed a man, had been acquitted and did not interpose insanity as a defense, if he does not connect the two cases. Smith *v.* State, 55 Ark. 259, 18 S. W. 237.

The opinion of an expert in rebuttal that the accused is not insane, based on defendant's evidence to prove his insanity, is not new matter entitling defendant to rebut. People *v.* Hill, 116 Cal. 562, 48 Pac. 711.

74. State *v.* Sargent, 32 Me. 429.

75. State *v.* Earnest, 70 Mo. 520.

d. Reopening Case to Hear Evidence[76] — (I) *Discretion of Court.* It is within the discretion of the trial court to reopen the case and admit evidence, either for the prosecution or for the defense at any stage of the trial before the jury has retired;[77] and the court it seems may properly exercise this discretion after the prosecution has closed its case;[78] after defendant has closed his case;[79] after the close of the evidence and both sides have rested;[80] during the argument

76. Recalling witnesses see, generally, WITNESSES.

77. *Florida.*— McCoggle *v.* State, 41 Fla. 525, 26 So. 734.

Georgia.— Hoxie *v.* State, 114 Ga. 19, 39 S. E. 944; Johnson *v.* State, 85 Ga. 561, 11 S. E. 844; Hollingsworth *v.* State, 79 Ga. 605, 4 S. E. 560. And see Franklin *v.* State, 69 Ga. 36, 47 Am. Rep. 748; Maddox *v.* State, 68 Ga. 294.

Kansas.— State *v.* Brechbill, 10 Kan. App. 575, 62 Pac. 251.

Kentucky.— See Vicaro *v.* Com., 5 Dana 504; Collins *v.* Com., 25 S. W. 743, 15 Ky. L. Rep. 691.

Missouri.— State *v.* Baker, 36 Mo. App. 58.

New York.— Tucker's Case, 5 City Hall Rec. 164; Sturdivant's Case, 1 City Hall Rec. 110.

North Carolina.— State *v.* Jimmerson, 118 N. C. 1173, 24 S. E. 494; State *v.* King, 84 N. C. 737.

Texas.— Ogden *v.* State, (Cr. App. 1900) 58 S. W. 1018; Malton *v.* State, 29 Tex. App. 527, 16 S. W. 423.

See 14 Cent. Dig. tit. "Criminal Law," § 1619 *et seq.*

78. *California.*— People *v.* Lewis, 124 Cal. 551, 57 Pac. 470, 45 L. R. A. 783; People *v.* Bowers, (1888) 18 Pac. 660.

Colorado.— Brooke *v.* People, 23 Colo. 375, 48 Pac. 502.

Georgia.— Cooper *v.* State, 103 Ga. 63, 29 S. E. 439; Fogarty *v.* State, 80 Ga. 450, 5 S. E. 782; Eberhart *v.* State, 47 Ga. 598; Reid *v.* State, 23 Ga. 190.

Indiana.— Kahlenbeck *v.* State, 119 Ind. 118, 21 N. E. 460.

Kansas.— State *v.* Bussey, 58 Kan. 679, 50 Pac. 891.

Kentucky.— Froman *v.* Com., 42 S. W. 728, 19 Ky. L. Rep. 948; Marcum *v.* Com., 1 S. W. 727, 8 Ky. L. Rep. 418.

Louisiana.— State *v.* Ganbert, 49 La. Ann. 1692, 22 So. 930; State *v.* Rose, 33 La. Ann. 932; State *v.* Coleman, 27 La. Ann. 291.

Massachusetts.—Com. *v.* Meaney, 151 Mass. 55, 23 N. E. 730; Com. *v.* Brown, 130 Mass. 279; Com. *v.* McGorty, 114 Mass. 299.

Missouri.— State *v.* Laycock, 141 Mo. 274, 42 S. W. 723; State *v.* Reed, 137 Mo. 125, 38 S. W. 574; State *v.* Baker, 36 Mo. App. 58.

Nebraska.— Hans *v.* State, 50 Nebr. 150, 69 N. W. 838.

New York.— People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730.

North Carolina.—State *v.* Groves, 119 N. C. 822, 25 S. E. 819; State *v.* Haynes, 71 N. C. 79.

Pennsylvania.— Com. *v.* Biddle, 200 Pa. St. 640, 50 Atl. 262.

South Carolina.— State *v.* Derrick, 44 S. C. 344, 22 S. E. 337; State *v.* Clyburn, 16 S. C. 375.

Tennessee.— Ray *v.* State, 108 Tenn. 282, 67 S. W. 553.

Texas.— Toler *v.* State, 41 Tex. Cr. 659, 56 S. W. 917; Garrett *v.* State, 37 Tex. Cr. 198, 38 S. W. 1017, 39 S. W. 108.

Virginia.— Flick *v.* Com., 97 Va. 766, 34 S. E. 39.

See 14 Cent. Dig. tit. "Criminal Law," § 1620.

79. Davis *v.* State, (Fla. 1902) 32 So. 822.

Further cross-examination.— It is not an abuse of discretion to allow the state to cross-examine one of defendant's witnesses after all defendant's evidence has been introduced. Brown *v.* State, 40 Fla. 459, 25 So. 63; Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Com. *v.* Eisenhower, 181 Pa. St. 470, 37 Atl. 521, 59 Am. St. Rep. 670.

80. *Alabama.*— Dyer *v.* State, 88 Ala. 225, 7 So. 267.

Florida.— Davis *v.* State, (1902) 32 So. 822; Anthony *v.* State, (1902) 32 So. 818; Burroughs *v.* State, 17 Fla. 643. And see Barber *v.* State, 5 Fla. 199.

Georgia.— Duggan *v.* State, 116 Ga. 846, 43 S. E. 253; Hunley *v.* State, 104 Ga. 755, 30 S. E. 958; Wilkerson *v.* State, 73 Ga. 799; Maddox *v.* State, 68 Ga. 294. But see Hoskins *v.* State, 11 Ga. 92.

Iowa.— State *v.* Johnson, 89 Iowa 1, 56 N. W. 404; State *v.* Flynn, 42 Iowa 164.

Kentucky.— Vicaro *v.* Com., 5 Dana 504; Walker *v.* Com., 7 Ky. L. Rep. 46.

Louisiana.— State *v.* Colbert, 29 La. Ann. 715. But see State *v.* Chandler, 36 La. Ann. 177.

Missouri.— State *v.* Eisenhour, 132 Mo. 140, 33 S. W. 785; State *v.* Smith, 80 Mo. 516. But see State *v.* Porter, 26 Mo. 201.

New York.—People *v.* Buddensieck, 4 N. Y. Cr. 230; Stephens *v.* People, 4 Park. Cr. 396.

Texas.— Kelly *v.* State, (Cr. App. 1903) 71 S. W. 756; Dodson *v.* State, (Cr. App. 1902) 70 S. W. 969. And see Grosse *v.* State, 11 Tex. App. 364.

Virginia.—See Schonberger *v.* Com., 86 Va. 489, 10 S. E. 713.

See 14 Cent. Dig. tit. "Criminal Law," § 1621.

For example it is not error for the court to permit the prosecution, after the evidence both for and against the accused is all in to examine other witnesses against the accused.

Georgia.— Frazier *v.* State, 112 Ga. 868, 38 S. E. 349; Huff *v.* State, 104 Ga. 521, 30 S. E. 808.

of counsel;[81] after the closing arguments on both sides have been made;[82] or even after the case has been submitted to the jury and they have retired to consider their verdict.[83] But it has been held that neither party should be allowed to

Indiana.— Harker *v.* State, 8 Blackf. 540.
Iowa.— State *v.* Falconer, 70 Iowa 416, 30 N. W. 655.
Massachusetts.— Com. *v.* Blair, 126 Mass. 40; Com. *v.* Arrance, 5 Allen 517.
Minnesota.— State *v.* Hayward, 62 Minn. 474, 65 N. W. 63.
Missouri.— State *v.* Worton, 139 Mo. 526, 41 S. W. 218; State *v.* Reed, 137 Mo. 125, 38 S. W. 574; State *v.* Buchler, 103 Mo. 203, 15 S. W. 331.
New Mexico.— Territory *v.* O'Donnell, 4 N. M. 66, 12 Pac. 743.
Pennsylvania.— Com. *v.* Fechtig, 1 Pa. Co. Ct. 164.
Texas.—Patterson *v.* State, (Cr. App. 1901) 60 S. W. 557; Garza *v.* State, (Cr. App. 1899) 49 S. W. 103; Laurence *v.* State, 31 Tex. Cr. 601, 21 S. W. 766; Farris *v.* State, 26 Tex. App. 105, 9 S. W. 487.
See 14 Cent. Dig. tit. "Criminal Law," § 1621.

The granting of a continuance, after the evidence is all in, to enable the prosecution to obtain and introduce evidence rebutting the defendant's alibi is not error. Taylor *v.* Com., 77 Va. 692. But where the prosecution rests and defendant states that he will offer no evidence, an adjournment then taken until the next day to examine new witnesses is error. Mary *v.* State, 5 Mo. 71.

81. *Alabama.*— Pond *v.* State, 55 Ala. 196.
California.— People *v.* Ross, 65 Cal. 104, 3 Pac. 491.
Florida.— Jordan *v.* State, 22 Fla. 528.
Georgia.— Blackman *v.* State, 80 Ga. 785, 7 S. E. 626.
Illinois.— North *v.* People, 139 Ill. 81, 28 N. E. 966. See Looney *v.* People, 81 Ill. App. 370.
Kansas.— State *v.* Teissedre, 30 Kan. 210, 476, 2 Pac. 108, 650.
New York.— Wilke *v.* People, 53 N. Y. 525; People *v.* Grunzig, 2 Edm. Sel. Cas. 236; Kalle *v.* People, 4 Park. Cr. 591; Phelan's Case, 6 City Hall Rec. 91. And see Tucker's Case, 5 City Hall Rec. 164.
North Carolina.— State *v.* Rash, 34 N. C. 382, 55 Am. Dec. 420.
Pennsylvania.— Com. *v.* Texter, 2 Browne 247.
Tennessee.— Cash *v.* State, 10 Humphr. 111.
Texas.— Dodson *v.* State, 35 Tex. Cr. 571, 34 S. W. 754; Malton *v.* State, 29 Tex. App. 527, 16 S. W. 423; Lister *v.* State, 3 Tex. App. 17.
See 14 Cent. Dig. tit. "Criminal Law," § 1622.

In Texas the statute authorizes the introduction of testimony at any time before the argument is concluded. Griffey *v.* State, (Cr. App. 1900) 56 S. W. 335; Rogers *v.* State, 40 Tex. Cr. 355, 50 S. W. 338; Leslie *v.* State, (Cr. App. 1899) 49 S. W. 73; Burt *v.* State, 38 Tex. Cr. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330. This statute is mandatory, and it is error for the court to exclude testimony offered before the conclusion of the arguments. Arrington *v.* State, (Cr. App. 1893) 20 S. W. 927; Donahoe *v.* State, 12 Tex. App. 297; Cook *v.* State, 11 Tex. App. 19; Hewitt *v.* State, 10 Tex. App. 501.

82. *Alabama.*— Dave *v.* State, 22 Ala. 23.
Florida.— Anthony *v.* State, (1902) 32 So. 818.
Georgia.— Wiggins *v.* State, 80 Ga. 468, 5 S. E. 503.
Illinois.— Tucker *v.* People, 122 Ill. 583, 13 N. E. 809.
Indiana.— Ross *v.* State, 9 Ind. App. 35, 36 N. E. 167.
Iowa.— State *v.* Burk, 88 Iowa 661, 56 N. W. 180.
Kentucky.— Com. *v.* Green, 10 S. W. 637, 10 Ky. L. Rep. 749.
Maine.— State *v.* Martin, 89 Me. 117, 35 Atl. 1023.
New York.— Kolle *v.* People, 9 Abb. Pr. 16; People *v.* Jackson, 2 Wheel. Cr. 253; Sturdivant's Case, 1 City Hall Rec. 110.
Ohio.— State *v.* Dugan, 4 Ohio Dec. (Reprint) 93, 1 Clev. L. Rep. 18.
Oklahoma.— Harvey *v.* Territory, 11 Okla. 156, 65 Pac. 837.
Texas.— Nutt *v.* State, 19 Tex. 340; Davis *v.* State, 39 Tex. Cr. 681, 44 S. W. 1099; Bostick *v.* State, 11 Tex. App. 126; Jones *v.* State, 3 Tex. App. 150; Thomas *v.* State, 1 Tex. App. 289.
Virginia.— *In re* Armstead, 7 Gratt. 599.
See 14 Cent. Dig. tit. "Criminal Law," § 1622.

83. *Alabama.*—Cooper *v.* State, 79 Ala. 54.
Kentucky.— Burk *v.* Com., 5 J. J. Marsh. 675.
Louisiana.— State *v.* Crittenden, 38 La. Ann. 448.
Massachusetts.—Com. *v.* Ricketson, 5 Metc. 412.
North Carolina.—State *v.* Noblett, 47 N. C. 418.
Virginia.— Livingston *v.* Com., 7 Gratt. 658.
United States.—Virginia *v.* Zimmerman, 28 Fed. Cas. No. 16,968, 1 Cranch C. C. 47.
See 14 Cent. Dig. tit. "Criminal Law," § 1624.

Contra.— Judge *v.* State, 8 Ga. 173; Ming *v.* State, (Tex. Cr. App. 1893) 24 S. W. 29.

In Texas a witness previously examined may be recalled after the case is submitted to the jury to restate testimony already given by him, but he cannot testify to any other facts. Lorance *v.* State, 37 Tex. Cr. 453, 36 S. W. 93.

The points which will determine the exercise of the judicial discretion are: (1) Whether the jury requests to hear the witness; (2) whether by hearing him it is likely an agreement will be reached; and

introduce new or additional testimony after the evidence has been closed, after the argument has been made, after the judge has given his general charge to the jury, and when he is about to give a special charge requested by accused on a point which the prosecution had omitted to support by evidence, and for the introduction of which it seeks to reopen the case.[84]

(II) *Effect of.* When the prosecution is permitted to offer new evidence on a material point on reopening the case after defendant has closed, it is error to refuse him permission to call witnesses to rebut it.[85] Again the court has a discretion to limit the examination of a witness, recalled to explain some point in his testimony, to that particular point.[86] In case the jury after retiring return to question a witness it is not error to refuse to permit counsel to question him.[87]

D. Objections to Evidence, Motions to Strike Out, and Exceptions — **1. Objections — a. Right to Object.** The defendant has the right to object to incriminating questions,[88] or to questions which, although unanswered, by calling for clearly improper evidence tend to his prejudice;[89] but he cannot complain of

(3) whether the point which he testifies to has been shown. Livingston *v.* Com., 7 Gratt. (Va.) 658.

The right to cross-examine.— Some of the cases deny both parties the right to question or cross-examine the witness (Virginia *v.* Zimmerman, 28 Fed. Cas. No. 16,968, 1 Cranch C. C. 47), where others permit his cross-examination by the accused (Cooper *v.* State, 79 Ala. 54).

84. State *v.* Paul, 39 La. Ann. 329, 1 So. 666. But see State *v.* Murphy, 9 Nev. 394, holding that the court properly allowed the state to call a witness and prove a venue after defendant had moved for his discharge on the ground that there had been no proof of venue.

A motion to strike out evidence because a witness had not been sworn, made by the counsel for the accused during his closing argument, may be denied and the witness recalled and resworn. Thomas *v.* State, 1 Tex. App. 289. But see Thompson *v.* State, 37 Tex. 121, holding that the court erred in refusing an instruction to acquit upon the ground that there was no evidence, the only witness in behalf of the state having testified without being sworn, the court having refused the instruction and allowed the witness to be recalled and sworn and to testify again.

In an English case it was expressly held that on the prisoner's counsel pointing out a defect in the proof the judge might put the question to supply it. Rex *v.* Remnant, R. & R. 101.

85. *Illinois.*— Bolen *v.* People, 184 Ill. 338, 56 N. E. 408.

Indiana.— Merrick *v.* State, 63 Ind. 327.

Michigan.— People *v.* Kindra, 102 Mich. 147, 60 N. W. 458.

New York.—Sturdivant's Case, 1 City Hall Rec. 110.

Oregon.— State *v.* Dilley, 15 Oreg. 70, 13 Pac. 648.

See 14 Cent. Dig. tit. "Criminal Law," § 1626.

In Louisiana permitting a defendant to rebut evidence offered after both sides have closed is in the judicial discretion. State *v.* Spencer, 45 La. Ann. 1, 12 So. 135; State *v.* Lyons, 44 La. Ann. 106, 10 So. 409.

A diagram used on recalling in rebuttal may be rebutted by another diagram used by a witness for defendant. Thomas *v.* State, 27 Ga. 287.

86. State *v.* Harris, 63 N. C. 1.

87. U. S. *v.* Greenwood, 26 Fed. Cas. No. 15,260, 1 Cranch C. C. 186.

In Texas the statute provides that a witness may be recalled at the request of the jury, where they disagree as to any statement previously made by him, but on such recall he cannot testify to any fact other than the particular point of disagreement, and must make his statement as nearly as possible in the language used upon his former examination. Tarver *v.* State, 43 Tex. 564.

88. Counsel, however, cannot insist that the witness shall not answer, as the right to refuse to answer is a personal privilege of the witness himself. State *v.* McCartey, 17 Minn. 76.

89. But the objection should be made before the answer is given.

Alabama.— Miller *v.* State, 130 Ala. 1, 30 So. 379; Lewis *v.* State, 121 Ala. 1, 25 So. 1017; Downey *v.* State, 115 Ala. 108, 22 So. 479.

Iowa.— State *v.* Cater, 100 Iowa 501, 69 N. W. 880; State *v.* McKinistry, 100 Iowa 82, 69 N. W. 267.

New Jersey.— Cunningham *v.* State, 61 N. J. L. 67, 38 Atl. 847; Ryan *v.* State, 60 N. J. L. 33, 36 Atl. 706.

Vermont.— State *v.* Fitzgerald, 72 Vt. 142, 47 Atl. 403; State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

Virginia.— Jackson *v.* Com., 96 Va. 107, 30 S. E. 452.

See 14 Cent. Dig. tit. "Criminal Law," § 1630; and *infra*, XIV, D, 1, b.

The judge cannot always determine the propriety of a question before it is fully stated, but if it is apparent from the general trend of the questions that when stated they will prejudice the accused the trial court should exclude the questions. Under such circumstances sustaining an objection to the answer or refusing to allow the question to be answered is not error, if the questions themselves, whether answered or not,

the erroneous admission of evidence in his favor.[90] On the other hand by bringing out on cross-examination evidence which was inadmissible on the examination in chief,[91] or by consenting to the introduction of[92] or by failing to make a motion to strike out incompetent or irrelevant evidence,[93] defendant may be estopped from objecting to the admission of such evidence on the theory that he has waived his right to do so. So a specific objection to evidence upon one ground estops the objecting party from objecting upon any other ground inconsistent with it.[94]

b. Time. An objection to evidence to be available must have been made at the time it was offered.[95]

c. Manner. Where an objection is sustained, the party asking the question must offer to prove what facts he desires to elicit by the question, in order to obtain a review of the court's ruling.[96]

d. Scope and Sufficiency — (i) *In General.* Generally an objection to evi-

tend to bias the minds of the jury against the accused. Gargill *v.* Com., 13 S. W. 916, 12 Ky. L. Rep. 149.

90. State *v.* Lett, 85 Mo. 52.

91. Carroll *v.* State, 99 Ga. 36, 25 S. E. 680.

92. Where counsel for the accused without examining documents consents that they may be admitted in evidence and read to the jury, he waives his right to object thereto on the ground that they are irrelevant. State *v.* Kring, 1 Mo. App. 438.

Reading letter.— After a letter has been examined by the counsel for defendant, put in evidence and partly read with his consent, it is within the discretion of the court to refuse to stop the reading by the prosecution, where he objects as soon as he discovers its alleged immateriality. Com. *v.* Marks, 101 Mass. 31.

93. Where evidence is admitted over objection, with a statement by the court that a motion to reject it will be entertained in case it thereafter proves to be irrelevant, if no such motion is subsequently made the admission of the evidence is not error. State *v.* Cannon, 49 S. C. 550, 27 S. E. 526. See also People *v.* Durrant, 116 Cal. 179, 48 Pac. 75.

94. Levison *v.* State, 54 Ala. 520; People *v.* Frank, 28 Cal. 507; Little *v.* People, 157 Ill. 153, 42 N. E. 389.

Defendant, having declined to introduce evidence after an objection to it had been withdrawn by the prosecution, waives his right to take advantage of an exception to the ruling which had excluded it, but he does not waive his right to except to the rejection of the same evidence again offered by him at a subsequent stage of the trial. Com. *v.* Robinson, 1 Gray (Mass.) 555.

95. *California.*— People *v.* Rodriguez, 10 Cal. 50.

Florida.— Purdy *v.* State, 43 Fla. 538, 31 So. 229.

Georgia.— Clarke *v.* State, 90 Ga. 448, 16 S. E. 96.

Illinois.— Graham *v.* People, 115 Ill. 566, 4 N. E. 790.

Iowa.— State *v.* Munzenmaier, 24 Iowa 87; State *v.* Pratt, 20 Iowa 267.

Kansas.— State *v.* Probasco, 46 Kan. 310, 26 Pac. 749.

Louisiana.— State *v.* Davis, 34 La. Ann. 351.

Massachusetts.— Com. *v.* Storti, 177 Mass. 339, 58 N. E. 1021.

Minnesota.— State *v.* Mims, 26 Minn. 183, 2 N. W. 494, 683.

Mississippi.— Gavigan *v.* State, 55 Miss. 533.

Missouri.— State *v.* Crab, 121 Mo. 554, 26 S. W. 548; State *v.* Beaucleigh, 92 Mo. 490, 4 S. W. 666; State *v.* Peak, 85 Mo. 190; Couley *v.* State, 12 Mo. 462.

Nebraska.— Dunn *v.* State, 58 Nebr. 807, 79 N. W. 719; Ford *v.* State, 46 Nebr. 390, 64 N. W. 1082.

New York.— Walsh *v.* People, 88 N. Y. 458; Perry *v.* People, 86 N. Y. 353, 62 How. Pr. 148.

Rhode Island.— State *v.* Gordon, 1 R. I. 179.

Tennessee.— Ewell *v.* State, 6 Yerg. 364, 27 Am. Dec. 480.

Texas.— Penn *v.* State, 36 Tex. Cr. 140, 35 S. W. 973; Schultz *v.* State, 20 Tex. App. 308; Mayo *v.* State, 7 Tex. App. 342.

Washington.— State *v.* Yourex, 30 Wash. 611, 71 Pac. 203.

See 14 Cent. Dig. tit. "Criminal Law," § 1630.

Contra.— Reg. *v.* Gibson, 18 Q. B. D. 537, 16 Cox C. C. 181, 51 J. P. 742, 56 L. J. M. C. 49, 56 L. T. Rep. N. S. 367, 35 Wkly. Rep. 411.

An exception on motion for a new trial is too late. Helton *v.* Com., 29 S. W. 331, 16 Ky. L. Rep. 464; Merritt *v.* Com., 11 S. W. 471, 11 Ky. L. Rep. 16.

Objections during a recess of court are not entitled to consideration. State *v.* Duncan, 116 Mo. 288, 22 S. W. 699.

96. Lewis *v.* State, 4 Ind. App. 504, 31 N. E. 375; Ford *v.* State, 46 Nebr. 390, 64 N. W. 1082.

An objection that a hypothetical question does not contain all the facts in defendant's favor will not be considered, the proper remedy being to propose the proper question. Shirley *v.* State, 37 Tex. Cr. 475, 36 S. W. 267.

Defendant, objecting that evidence is secondary, should produce better evidence or show that it once existed. Andrews *v.* State,

dence founded on one ground which is overruled will not be regarded on appeal as an objection to that evidence on another ground.[97] So an objection to evidence, general in its nature, will not by implication support an objection which is specific.[98]

(II) *General Objection.* A general objection to the admissibility of evidence is insufficient,[99] unless the evidence objected to is palpably inadmissible for any purpose or under any circumstances.[1]

(III) *Evidence Admissible in Part.* An objection to evidence as a whole is properly overruled where part of it is competent.[2]

123 Ala. 42, 26 So. 522; Allen *v.* State, 8 Tex. App. 67.

97. People *v.* O'Brien, 78 Cal. 41, 20 Pac. 359; Lane *v.* State, 16 Ind. 14; State *v.* Murphy, 9 Nev. 394; State *v.* Ellis, 30 Wash. 369, 70 Pac. 963. Thus an objection to a question upon the ground that no foundation was laid will not on appeal sustain an objection to the answer on the ground that it was incompetent. People *v.* Mahoney, 77 Cal. 529, 20 Pac. 73.

98. Thus a general objection to an exhibit will not raise the question, on appeal, of its identification (People *v.* Foo, 112 Cal. 17, 44 Pac. 453); nor will a general objection to a question sustain an objection as to its form (Williams *v.* State, 66 Ark. 264, 50 S. W. 517), or that the answer is not the best evidence (State *v.* Black, 15 Mont. 143, 38 Pac. 674), or as to the competency of expert testimony on the subject (Hartung *v.* People, 4 Park. Cr. (N. Y.) 319). An objection that papers were taken from defendant against his will is sufficient to raise the objection that the search was illegal. State *v.* Slamon, 73 Vt. 212, 50 Atl. 1097, 87 Am. St. Rep. 711. An objection to evidence on the ground that no foundation was laid covers an objection that it is not properly in rebuttal. Carver *v.* U. S., 160 U. S. 553, 16 S. Ct. 388, 40 L. ed. 532. An objection to evidence as to what deceased did on a certain occasion will include evidence of what he said on that occasion. People *v.* Shattuck, 109 Cal. 673, 42 Pac. 315.

99. *Alabama.*— Castleberry *v.* State, 135 Ala. 24, 33 So. 431.

California.— People *v.* Rodley, 131 Cal. 240, 63 Pac. 351; People *v.* Gordon, 99 Cal. 227, 33 Pac. 901; People *v.* Glenn, 10 Cal. 32.

Connecticut.— State *v.* Gannon, 75 Conn. 206, 52 Atl. 727.

District of Columbia.— De Forest *v.* U. S., 11 App. Cas. 458.

Georgia.— Smalls *v.* State, 99 Ga. 25, 25 S. E. 614.

Illinois.— Jamison *v.* People, 145 Ill. 357, 34 N. E. 486; Tracy *v.* People, 97 Ill. 101.

Indiana.— Musser *v.* State, 157 Ind. 423, 61 N. E. 1.

Iowa.— State *v.* Gunn, 106 Iowa 120, 76 N. W. 510; State *v.* Brady, 100 Iowa 191, 69 N. W. 290, 62 Am. St. Rep. 560, 36 L. R. A. 693.

Louisiana.— State *v.* Perry, 51 La. Ann. 1074, 25 So. 944.

Michigan.— People *v.* Foglesong, 116 Mich. 556, 74 N. W. 730.

Mississippi.— Lipscomb *v.* State, 75 Miss. 559, 23 So. 210, 230; Hamilton *v.* State, 35 Miss. 214.

Missouri.— State *v.* Dent, 170 Mo. 398, 70 S. W. 881; State *v.* Brown, 168 Mo. 449, 68 S. W. 568; State *v.* Hathhorn, 166 Mo. 229, 65 S. W. 756; State *v.* Westlake, 159 Mo. 669, 61 S. W. 243; State *v.* Harlan, 130 Mo. 381, 32 S. W. 997.

Nevada.— State *v.* Murphy, 9 Nev. 394.

New Hampshire.— State *v.* Flanders, 38 N. H. 324.

New York.— People *v.* Place, 157 N. Y. 584, 52 N. E. 576; Gaffney *v.* People, 50 N. Y. 416; Height *v.* People, 50 N. Y. 392; People *v.* Webster, 59 Hun 398, 13 N. Y. Suppl. 414.

North Carolina.— State *v.* Mitchell, 119 N. C. 784, 25 S. E. 783, 1020.

South Carolina.—State *v.* Wallace, 44 S. C. 357, 22 S. E. 411.

South Dakota.— State *v.* Sexton, 10 S. D. 127, 72 N. W. 84; State *v.* La Croix, 8 S. D. 369, 66 N. W. 944.

Texas.— Chambers *v.* State, (Cr. App. 1901) 65 S. W. 192; Neely *v.* State, (Cr. App. 1900) 56 S. W. 625; Barfield *v.* State, 41 Tex. Cr. 19, 51 S. W. 908; McGrath *v.* State, 35 Tex. Cr. 413, 34 S. W. 127, 941; Simons *v.* State, (Cr. App. 1896) 34 S. W. 619.

Washington.— State *v.* Douette, 31 Wash. 6, 71 Pac. 556.

Wisconsin.— Cornell *v.* State, 104 Wis. 527, 80 N. W. 745.

See 14 Cent. Dig. tit. "Criminal Law," § 1634.

A general objection made on the joint trial of two defendants, by counsel representing both, to a confession by one of them not made in the presence of the other entitles the latter to have the confession excluded as to him. Sparf *v.* U. S., 156 U. S. 51, 715, 15 S. Ct. 273, 39 L. ed. 343.

1. *Alabama.*— Downey *v.* State, 115 Ala. 108, 22 So. 479; Gabriel *v.* State, 40 Ala. 357.

Florida.— Kirby *v.* State, (1902) 32 So. 836.

Missouri.— State *v.* Bartlett, 170 Mo. 658, 71 S. W. 148, 59 L. R. A. 756; State *v.* Meyers, 99 Mo. 107, 12 S. W. 516.

Oregon.— State *v.* Magone, 32 Oreg. 206, 51 Pac. 452.

Texas.— Adams *v.* State, (Cr. App. 1902) 68 S. W. 270; Barkman *v.* State, 41 Tex. Cr. 105, 52 S. W. 73; Guajardo *v.* State, 24 Tex. App. 603, 7 S. W. 331.

See 14 Cent. Dig. tit. "Criminal Law," § 1634.

2. *Alabama.*— Davis *v.* State, 131 Ala. 10, 31 So. 569; Longmire *v.* State, 130 Ala. 66,

(iv) *Statement of Grounds.* Objections to evidence must specifically state the grounds on which they are based,[3] otherwise they will not be reviewed on appeal.[4]

e. Repetition. If when improper evidence is first proposed it is properly objected to, and the objection thoroughly argued and a motion made to strike out, objections to similar evidence need not be repeated.[5] So where an objection to a proper question is sustained, with the remark that the evidence is immaterial, counsel may assume that similar evidence will be excluded, and will not waive objections to the ruling by failing to ask further questions.[6]

2. Motions to Strike Out — a. In General. Where improper evidence is admitted over objection, or where a question does not apparently call for

30 So. 413; Henderson *v.* State, 105 Ala. 82, 16 So. 931; Harrall *v.* State, 26 Ala. 52.

Florida.— Anthony *v.* State, (1902) 32 So. 818.

Georgia.— Gully *v.* State, 116 Ga. 527, 42 S. E. 790; Cox *v.* State, 64 Ga. 374, 37 Am. Rep. 76.

Indiana.— Archibald *v.* State, 122 Ind. 122, 23 N. E. 758.

Iowa.— State *v.* Benge, 61 Iowa 658, 17 N. W. 100.

Missouri.— State *v.* Johnson, 76 Mo. 121.

New York.— Hochrieter *v.* People, 2 Abb. Dec. 363, 1 Keyes 66.

Texas.— Click *v.* State, (Cr. App. 1902) 66 S. W. 1104; Payton *v.* State, 35 Tex. Cr. 508, 34 S. W. 615.

Virginia.— Trogdon *v.* Com., 31 Gratt. 862.

See 14 Cent. Dig. tit. "Criminal Law," § 1637.

A general objection to a conversation offered against the accused in homicide is properly overruled where the conversation contains threats clearly admissible. Stitt *v.* State, 91 Ala. 10, 8 So. 669, 24 Am. St. Rep. 853.

An objection to a large volume of testimony must specifically point out the portions claimed to be incompetent. State *v.* Stanton, 118 N. C. 1182, 24 S. E. 536.

The duty of separating the incompetent from that which is competent devolves on counsel and not on the court. Harper *v.* State, 109 Ala. 28, 19 So. 857; Coleman *v.* State, 87 Ala. 14, 6 So. 290; South *v.* State, 86 Ala. 617, 6 So. 52; Shorter *v.* State, 63 Ala. 129; State *v.* Johnson, 76 Mo. 121.

3. *Alabama.*— Gunter *v.* State, 111 Ala. 23, 20 So. 632, 56 Am. St. Rep. 17.

California.— People *v.* Nelson, 85 Cal. 421, 24 Pac. 1006; People *v.* Eckman, 72 Cal. 582, 14 Pac. 359.

Connecticut.— State *v.* Gannon, 75 Conn. 206, 52 Atl. 727.

Florida.— Edwards *v.* State, 39 Fla. 753, 23 So. 537.

Georgia.— Thompson *v.* State, 97 Ga. 346, 23 S. E. 998; Pool *v.* State, 87 Ga. 526, 13 S. E. 556; Wormly *v.* State, 70 Ga. 721.

Indiana.— Lankford *v.* State, 144 Ind. 428, 43 N. E. 444.

Maine.— State *v.* Savage, 69 Me. 112.

Michigan.— People *v.* Moore, 86 Mich. 134, 48 N. W. 693; People *v.* Durfee, 62 Mich. 487, 29 N. W. 109.

Mississippi.— Hamilton *v.* State, 35 Miss. 214.

Missouri.— State *v.* Westlake, 159 Mo. 669, 61 S. W. 243; State *v.* Balch, 136 Mo. 103, 37 S. W. 808; State *v.* West, 95 Mo. 139, 8 S. W. 354; State *v.* Johnson, 76 Mo. 121.

Nebraska.—McCormick *v.* State, (1902) 92 N. W. 606.

New Jersey.— State *v.* Brooks, 30 N. J. L. 356.

New York.— People *v.* Place, 151 N. Y. 584, 52 N. E. 576; People *v.* Nino, 149 N. Y. 317, 43 N. E. 853; Patterson *v.* People, 12 Hun 137.

North Carolina.— State *v.* Mitchell, 119 N. C. 784, 25 S. E. 783, 1020.

Tennessee.— Garner *v.* State, 5 Lea 213.

Texas.— Miller *v.* State, (Cr. App. 1902) 71 S. W. 20; Yeary *v.* State, (Cr. App. 1902) 66 S. W. 1106; Newman *v.* State, (Cr. App. 1901) 64 S. W. 258; Andrews *v.* State, (Cr. App. 1894) 25 S. W. 425; Loakman *v.* State, 32 Tex. Cr. 561, 25 S. W. 20.

4. *Alabama.*— Campbell *v.* State, 133 Ala. 158, 32 So. 635; Waters *v.* State, 117 Ala. 108, 22 So. 490.

Georgia.— Hathcock *v.* State, 88 Ga. 91, 13 S. E. 959; Ratteree *v.* State, 78 Ga. 335; Fisher *v.* State, 73 Ga. 595.

Illinois.— Dunn *v.* People, 172 Ill. 582, 50 N. E. 137.

Iowa.—State *v.* Lee, 95 Iowa 427, 64 N. W. 284.

Missouri.— State *v.* Moore, 117 Mo. 395, 22 S. W. 1086.

Montana.— Territory *v.* Bryson, 9 Mont. 32, 22 Pac. 147.

See 14 Cent. Dig. tit. "Criminal Law," § 1636.

This is not a technical rule, but is founded on reason and good sense. If the ground of the objection is stated, or in other words if the objection is specific and not general, it is quite possible that the objection may be overcome by additional evidence or by remodeling the question. People *v.* Baird, 105 Cal. 126, 38 Pac. 633.

5. People *v.* Castro, 125 Cal. 521, 58 Pac. 133; Graves *v.* People, 18 Colo. 170, 32 Pac. 63; State *v.* McGee, 55 S. C. 247, 33 S. E. 353, 74 Am. St. Rep. 741.

6. State *v.* Shelton, 16 Wash. 590, 48 Pac. 258, 49 Pac. 1064.

improper evidence, but the answer contains evidence which is inadmissible or objectionable,[7] as where it is not responsive,[8] or is too much in detail,[9] the proper practice is to move to strike it out and to have the jury directed not to consider it.

b. Errors Cured. Errors arising from the admission of incompetent evidence over objection are cured by the court striking it out and directing the jury to totally disregard it.[10]

c. Necessity For Previous Objection. A majority of the authorities[11] hold that it is the duty of the court to refuse to strike out evidence, although irrelevant and immaterial, which has been admitted without an objection at the time it was offered.[12]

7. Wallace *v.* State, 41 Fla. 547, 26 So. 713; Ortiz *v.* State, 30 Fla. 256, 11 So. 611; People *v.* Pope, 108 Mich. 361, 66 N. W. 213; State *v.* Hope, 100 Mo. 347, 13 S. W. 490, 8 L. R. A. 608.

8. State *v.* Watson, 81 Iowa 380, 36 N. W. 868.

9. People *v.* Colvin, 118 Cal. 349, 50 Pac. 539.

The fact that a witness testifies from a memorandum on cross-examination, which he did not use when he testified in chief, is not ground for striking out his cross-examination. State *v.* Warren, 41 Oreg. 348, 69 Pac. 679.

The fact that evidence is insufficient to prove the fact that it was introduced to prove does not justify its being stricken out. State *v.* Cardoza, 11 S. C. 195.

The objecting party should make his objections as specifically as possible. The same rule applies to improper and incompetent testimony volunteered by a witness without questioning. Lankford *v.* State, 144 Ind. 428, 43 N. E. 444.

10. People *v.* Turner, 118 Cal. 324, 50 Pac. 537; People *v.* Barney, 114 Cal. 554, 47 Pac. 41; Madden *v.* State, 148 Ind. 183, 47 N. E. 220; State *v.* Laycock, 141 Mo. 274, 42 S. W. 723; State *v.* Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266.

Contra.— See Barth *v.* State, 39 Tex. Cr. 381, 46 S. W. 228, 73 Am. St. Rep. 935, holding that where the evidence is of a material character and calculated to influence the jury the error is not cured by subsequently withdrawing it from their consideration.

Objection to withdrawal by party objecting to admission of evidence.—When incompetent evidence is admitted over objection, but the party objecting to its admission also objects to its subsequent withdrawal, and the court allows it to remain before the jury, there is no error of which he can complain. Jackson *v.* State, 94 Ala. 85, 10 So. 509.

11. **A few cases** hold that it is in the discretion of the court to grant a request to strike out incompetent evidence offered against the accused, where he did not object at the time of the offer. State *v.* Johnson, 23 Minn. 569; Pontius *v.* People, 82 N. Y. 339; State *v.* Efler, 85 N. C. 585; Proper *v.* State, 85 Wis. 615, 55 N. W. 1035, in all of which cases, however, the motion to strike out the evidence was denied.

The practice of permitting evidence to be given without objection, and then moving to strike it out if unfavorable, upon grounds that might readily have been availed of on objection, should not be encouraged. People *v.* Long, 43 Cal. 444. But this rule does not apply where the answer is not responsive, for as this could not be anticipated the objection can fairly be dispensed with. Evans *v.* State, 109 Ala. 11, 19 So. 535; People *v.* Dixon, 94 Cal. 255, 29 Pac. 504.

12. *Alabama.*— Coppin *v.* State, 123 Ala. 58, 26 So. 333; Wright *v.* State, 108 Ala. 60, 18 So. 941; Ellis *v.* State, 105 Ala. 72, 17 So. 119; Traylor *v.* State, 100 Ala. 142, 14 So. 634; Billingsley *v.* State, 96 Ala. 126, 11 So. 409.

California.— People *v.* Ardell, (1901) 66 Pac. 970; People *v.* Johnson, 106 Cal. 289, 39 Pac. 622.

Indiana.— Lane *v.* State, 151 Ind. 511, 51 N. E. 1056.

Iowa.— State *v.* Moats, 108 Iowa 13, 78 N. W. 701; State *v.* Marshall, 105 Iowa 38, 74 N. W. 763; State *v.* McDonough, 104 Iowa 6, 73 N. W. 357; State *v.* Bernstein, 99 Iowa 5, 68 N. W. 442; State *v.* Wright, 98 Iowa 702, 68 N. W. 440.

Louisiana.— State *v.* Rohfrischt, 12 La. Ann. 382.

Maryland.— Goldman *v.* State, 75 Md. 621, 23 Atl. 1097.

Mississippi.— Brown *v.* State, 72 Miss. 95, 16 So. 202; Dick *v.* State, 30 Miss. 593.

Missouri.— State *v.* McAfee, 148 Mo. 370, 50 S. W. 82; State *v.* Rapp, 142 Mo. 443, 44 S. W. 270; State *v.* Marcks, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095; State *v.* Arnewine, 136 Mo. 130, 37 S. W. 799.

New York.— People *v.* Harris, 136 N. Y. 423, 33 N. E. 65; Stephens *v.* People, 4 Park. Cr. 396.

Pennsylvania.— Com. *v.* Valsalka, 181 Pa. St. 17, 37 Atl. 405.

Texas.— Gonzalez *v.* State, 30 Tex. App. 203, 16 S. W. 978.

An exception to the rule of the text occurs where the question is in form and substance proper, but the answer is incompetent (People *v.* Williams, 127 Cal. 212, 59 Pac. 581; Jones *v.* State, 118 Ind. 39, 20 N. E. 634), or where the testimony was such as could not have been anticipated (State *v.* Foley, 144 Mo. 600, 46 S. W. 733). Under such circumstances, although no objection was made, a denial of a motion to strike out is error. And in Nebraska the rule that in a capital case accused cannot waive his rights is held to entitle him to have prejudicial

d. Time For Motion. The motion to strike out incompetent evidence should be promptly made. Waiting until after verdict,[13] until after the other side has closed its case,[14] or until after other questions have been asked[15] has been held to constitute a waiver. There are cases permitting of longer delay.[16]

e. Statement of Grounds. The ground of the motion to strike out must be specifically stated.[17]

f. Evidence Admissible in Part. A motion to strike out evidence as a whole is properly denied where some of the evidence is competent, although the remainder is incompetent.[18] The motion should specifically point out the evidence to be stricken out.[19]

g. Evidence Elicited by Party. Where the prosecution, examining its own witnesses,[20] or defendant by his questions of his witness,[21] on the direct examination, or in cross-examining the witnesses for the state,[22] brings out irrelevant evidence he cannot move to strike out, provided always that the answer is responsive to the question.[23]

3. Exceptions — a. Manner of Taking. An exception to the exclusion of evidence must disclose the purpose of the evidence in order that the exception may be considered on appeal.[24]

b. Statement of Grounds. An exception to the admission of evidence must state the specific grounds of the objection urged against it.[25] In the absence of

evidence not legally admissible withdrawn from the jury, although no objection was made. Rakes *v.* People, 2 Nebr. 157. As to the Texas rule see Burke *v.* State, 15 Tex. App. 156.

13. Williams *v.* Com., 93 Va. 769, 25 S. E. 659.

14. U. S. *v.* Graff, 26 Fed. Cas. No. 15,244, 14 Blatchf. 381. But *compare* Freese *v.* State, 159 Ind. 597, 65 N. E. 915.

15. People *v.* Chacon, 102 N. Y. 669, 6 N. E. 303, 4 N. Y. Cr. 173 [*affirming* 3 N. Y. Cr. 418].

16. Thus where incompetent evidence has been received under a mistake of facts a motion to strike out, made when the facts are proved, is not too late. People *v.* McMahon, 2 Park. Cr. (N. Y.) 663.

A motion to strike out, made during the argument of the last counsel for defendant, has been held not to be too late. Morton *v.* State, 43 Tex. Cr. 533, 67 S. W. 115.

17. If this be omitted it is not error to deny the motion. People *v.* Eckman, 72 Cal. 582, 14 Pac. 359; State *v.* Wilson, 8 Iowa 407; Buel *v.* State, 104 Wis. 132, 80 N. W. 78.

A motion to strike out papers in evidence on one ground is properly denied where some were competent on another ground. People *v.* Schooley, 89 Hun (N. Y.) 391, 35 N. Y. Suppl. 429.

18. *Alabama.*— Pressley *v.* State, 111 Ala. 34, 20 So. 647; Marks *v.* State, 87 Ala. 99, 6 So. 377.

California.— People *v.* Munroe, (1893) 33 Pac. 776.

Indiana.— Jones *v.* State, 118 Ind. 39, 20 N. E. 634.

Michigan.— People *v.* Stanley, 101 Mich. 93, 59 N. W. 498.

Mississippi.— Magee *v.* State, (1897) 21 So. 130; Turney *v.* State, 8 Sm. & M. 104, 47 Am. Dec. 74.

Nevada.— State *v.* Hymer, 15 Nev. 49.

New Jersey.— Delaney *v.* State, 51 N. J. L. 37, 16 Atl. 267.

Oregon.— State *v.* Magers, 36 Oreg. 38, 58 Pac. 892.

See 14 Cent. Dig. tit. "Criminal Law," § 1643.

19. Kelly *v.* People, 17 Colo. 130, 29 Pac. 805; Higginbotham *v.* State, 42 Fla. 573, 29 So. 410, 89 Am. St. Rep. 237.

20. Toliver *v.* State, 94 Ala. 111, 10 So. 428.

21. Wright *v.* State, 108 Ala. 60, 18 So. 941; State *v.* Nash, 10 Iowa 81; May *v.* State, 23 Tex. App. 146, 4 S. W. 591.

22. *Kansas.*— State *v.* Bailey, 32 Kan. 83, 3 Pac. 769.

New York.— People *v.* Blase, 57 N. Y. App. Div. 585, 68 N. Y. Suppl. 472.

Tennessee.— State *v.* Becton, 7 Baxt. 138.

Texas.— Mealer *v.* State, 32 Tex. Cr. 102, 22 S. W. 142; Bell *v.* State, 31 Tex. Cr. 214, 20 S. W. 363.

Wisconsin.— Hanscom *v.* State, 93 Wis. 273, 67 N. W. 419.

See 14 Cent. Dig. tit. "Criminal Law," § 1644.

23. Davis *v.* State, 51 Nebr. 301, 70 N. W. 984.

24. Com. *v.* Kelley, 113 Mass. 453; Masterson *v.* State, (Tex. Cr. App. 1896) 34 S. W. 279; Graham *v.* State, 28 Tex. App. 582, 13 S. W. 1010.

It must be shown that the facts to be proved are admissible, and that their rejection will prejudice the party excepting. State *v.* Staley, 14 Minn. 105; Gandolfo *v.* State, 11 Ohio St. 114.

Before a refusal of the court to allow a party to prove a fact can be excepted to the witnesses must be produced. Robinson *v.* State, 1 Lea (Tenn.) 673.

25. Walker *v.* State, 97 Ga. 197, 22 S. E. 401; Gregory *v.* State, (Tex. Cr. App. 1898) 43 S. W. 1017, 48 S. W. 577; Angley *v.* State, 35 Tex. Cr. 427, 34 S. W. 116.

such specific ground of objection to its admissibility, the exception will not be reviewed on appeal.[26]

c. Time of Taking. An exception to a ruling of the court on an objection must be promptly made.[27]

d. Taking and Noting. Exceptions and objections to the admission of evidence should be written out in full on the record and sealed immediately.[28]

e. Scope and Sufficiency. Exceptions to a ruling on evidence must set forth the evidence[29] and the nature of the objections made.[30]

f. Evidence Admissible in Part. An exception to evidence as a whole is properly overruled where some of the evidence is admissible, although the balance is not.[31]

4. Failure to Object or Except — a. Waiver.[32] A failure to object or except to incompetent evidence when offered, or to move to strike it out after it has been admitted, constitutes a waiver of the party's right and cures the error, if any.[33] So the admission of parol evidence of the contents of a written instrument without objection constitutes a waiver of the primary evidence of the writing.[34]

b. Exclusion by Court on Its Own Motion. It is not ordinarily the duty of the court to exclude of its own motion incompetent evidence to which no objection is made.[35] Such action is, however, discretionary with the court, and if the evi-

26. State *v.* Nelson, 132 Mo. 184, 33 S. W. 809.

27. It ought to be made when the court rules. State *v.* Mims, 26 Minn. 183, 2 N. W. 494, 683; State *v.* Beaucleigh, 92 Mo. 490, 4 S. W. 666; Pontius *v.* People, 82 N. Y. 339.

It is too late to make an exception after verdict (Com. *v.* Lafayette, 148 Mass. 130, 19 N. E. 26; State *v.* Harris, 120 N. C. 577, 26 S. E. 774), after a motion to strike out (People *v.* Nelson, 85 Cal. 421, 24 Pac. 1006), or on a motion for a new trial (Garner *v.* State, 31 Fla. 170, 12 So. 638).

28. Donnelly *v.* State, 26 N. J. L. 463.

29. Com. *v.* Russell, 160 Mass. 8, 35 N. E. 84; State *v.* Williford, 91 N. C. 529; State *v.* Barber, 89 N. C. 523; Miller *v.* State, 28 Tex. App. 445, 13 S. W. 646.

30. Braswell *v.* State, 1 Ky. L. Rep. 285; State *v.* Stoyell, 70 Me. 360; State *v.* Jones, 7 Nev. 408; Davis *v.* State, 14 Tex. App. 645.

31. Fonville *v.* State, 91 Ala. 39, 8 So. 688; Lowe *v.* State, 88 Ala. 8, 7 So. 97; Boswell *v.* State, 63 Ala. 307, 35 Am. Rep. 20.

32. **Waiver of right to make objection** see *supra*, XIV, D, 1, b.

33. *Alabama.*— McLeroy *v.* State, 120 Ala. 274, 25 So. 247.

California.— People *v.* Machado, (1900) 63 Pac. 66; People *v.* Wong Chuey, 117 Cal. 624, 49 Pac. 833.

Connecticut.— State *v.* Basserman, 54 Conn. 88, 6 Atl. 185.

Indiana.—Madden *v.* State, 148 Ind. 183, 47 N. E. 220.

Iowa.— State *v.* Stickley, 41 Iowa 232.

Louisiana.— State *v.* Baptiste, 26 La. Ann. 134.

Massachusetts.—Com. *v.* Johnson, 137 Mass. 562.

Missouri.—State *v.* Eisenhour, 132 Mo. 140, 33 S. W. 785; State *v.* Rose, 92 Mo. 201, 4 S. W. 733; State *v.* Mills, 88 Mo. 417.

New York.— People *v.* Guidici, 100 N. Y. 503, 3 N. E. 493.

Pennsylvania.— Com. *v.* Bell, 166 Pa. St. 405, 31 Atl. 123.

South Carolina.— State *v.* Hicks, 20 S. C. 341; State *v.* Washington, 13 S. C. 453.

Tennessee.— Bolin *v.* State, 9 Lea 516.

See 14 Cent. Dig. tit. "Criminal Law," § 1651.

Failure to except is not a waiver if a motion to strike out is immediately made. State *v.* Brown, 86 Iowa 121, 53 N. W. 92. It is unsafe to fail to object or to fail to move to strike out, relying upon a request to the court to direct the jury to disregard the evidence. State *v.* McDaniel, 39 Oreg. 161, 65 Pac. 520.

Where a witness by a sudden illness is prevented from finishing his cross-examination, it is not error to admit what he has said, although the accused is prevented from further examination, where no motion is made to strike it out. People *v.* Pope, 108 Mich. 361, 66 N. W. 213.

34. Elrod *v.* State, 72 Ind. 292; Com. *v.* Goodwin, 122 Mass. 19; People *v.* Clark, 20 N. Y. Suppl. 729; Epperson *v.* State, 5 Lea (Tenn.) 291.

The falsity of defendant's representation as to the amount on deposit to his credit in a bank may be shown by the parol evidence of a clerk who had examined the books, if defendant fails to object. Smith *v.* People, 47 N. Y. 303.

35. State *v.* Higgins, 124 Mo. 640, 28 S. W. 178; State *v.* McCollum, 119 Mo. 469, 24 S. W. 1021 [*overruling* State *v.* O'Connor, 65 Mo. 374, 27 Am. Rep. 291]. But see State *v.* Crittenden, 38 La. Ann. 448.

If the accused is without counsel, the court should exclude incompetent evidence offered against him of its own motion. McClure *v.* Com., 81 Ky. 448.

Where evidence which is irrelevant when offered is admitted on a promise to connect, which is not fulfilled, it is not the duty of the court to exclude the evidence on its own motion, if no objection is subsequently made.

dence excluded was incompetent, the fact that the court acted on its own motion is not error.[36]

c. **Repetition of Incompetent Evidence.** The admission of incompetent evidence over objection is error, although the accused has failed to object to other prior evidence to the same effect.[37] It has also been held, however, that where an instrument is admitted in evidence without objection, it cannot subsequently be objected to when being read to the jury;[38] nor can an oral answer to a question be ruled out when it consists merely of a repetition of a prior answer to a similar question not objected to.[39]

E. Argument and Conduct of Counsel — 1. Argument in General — a. Refusal to Permit. The constitutional right of the accused to be heard by counsel precludes the trial court from refusing to allow his counsel to make an argument on the evidence in his favor,[40] however simple, clear, unimpeached, and conclusive the evidence may seem.[41]

b. Control by Court. The right of the parties to be heard by counsel is subject to the control of the court in the exercise of a sound discretion,[42] which, particularly in cases involving the right or liberty of the accused, must be carefully and cautiously exercised.[43] Thus where a number of counsel are engaged the order in which they may argue is in the discretion of the court.[44] Again the general rule is that the limitation of the time for argument by the counsel for either

McCarney *v.* People, 83 N. Y. 408, 38 Am. Rep. 456. But see People *v.* Stephenson, 91 Hun (N. Y.) 613, 36 N. Y. Suppl. 595.

36. Vaughn *v.* State, 130 Ala. 18, 30 So. 669; Durrett *v.* State, 62 Ala. 434; Johnson *v.* State, 17 Ala. 618; People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161; People *v.* Turcott, 65 Cal. 126, 3 Pac. 461; State *v.* Clarkson, 96 Mo. 364, 9 S. W. 925; Davis *v.* State, 51 Nebr. 301, 70 N. W. 984.

37. Sanchez *v.* People, 22 N. Y. 147; Cantor *v.* People, 23 How. Pr. (N. Y.) 243; Peyton *v.* State, (Tex. Cr. App. 1895) 32 S. W. 892.

38. State *v.* Thompson, 32 La. Ann. 796.

39. State *v.* Holmes, 40 La. Ann. 170, 3 So. 564.

40. Lynch *v.* State, 9 Ind. 541; Olds *v.* Com., 3 A. K. Marsh. (Ky.) 465; Stewart *v.* Com., 117 Pa. St. 378, 11 Atl. 370.

Foreign language.— It is not error to refuse to permit counsel for the accused to address the jury in a foreign language, on the ground that it is their mother tongue, where all the evidence is in English. State *v.* Cancienne, 50 La. Ann. 1324, 24 So. 321.

41. Word *v.* Com., 3 Leigh (Va.) 743.

An attorney for the accused who testifies as a witness for him cannot in Montana under a rule of court subsequently participate in the argument without the permission of the court. State *v.* Gleim, 17 Mont. 17, 41 Pac. 998, 52 Am. St. Rep. 655, 31 L. R. A. 294.

Upon a question of law the judge is not bound to hear an argument if his opinion is already formed. Howel *v.* Com., 5 Gratt. (Va.) 664.

42. *Indiana.*— Read *v.* State, 2 Ind. 438.

New Mexico.— Chacon *v.* Territory, 7 N. M. 241, 34 Pac. 448.

North Dakota.— State *v.* McGahey, 3 N. D. 293, 55 N. W. 753.

Texas.— Wilkerson *v.* State, (Cr. App. 1899) 57 S. W. 956.

Virginia.— Word *v.* Com., 3 Leigh 743.

See 14 Cent. Dig. tit. "Criminal Law," § 1665 *et seq.*

The court may refuse to permit defendant's counsel to address the jurors individually instead of collectively. State *v.* Pearson, 119 N. C. 871, 26 S. E. 117.

43. Kizer *v.* State, 12 Lea (Tenn.) 564.

A prolix and extended argument over a plain proposition of law which the prosecuting attorney and the court concede to be correct may be excluded by the court as an unnecessary waste of time. Sparks *v.* State, 111 Ga. 830, 35 S. E. 654.

A statute providing that two counsel on each side may argue the cause to the jury in case of a crime punishable with death gives both sides the right to at least two counsel, and takes the matter out of the discretion of the court in that respect, although it does not restrict the court from allowing more than two counsel to speak. People *v.* Ah Wee, 48 Cal. 236.

44. Green *v.* State, 38 Ark. 304.

In a case where the prosecution and defendant are respectively represented by several counsel, the court may refuse to submit the case to the jury without further argument, where defendant offers to waive argument after an opening by one counsel for the state. To do so would be to place the prosecution at a great disadvantage by permitting it to make only a partial opening. State *v.* Row, 81 Iowa 138, 46 N. W. 872.

In England the proper practice is for counsel to address the jury in the order in which the prisoners for whom they appear are respectively placed upon the record. Reg. *v.* Richards, 1 Cox C. C. 62. Not more than two counsel are entitled to address the court for the prisoner upon a point of law. Reg. *v.* Bernard, 1 F. & F. 240. Where prisoners jointly indicted are defended by separate counsel, each must address the jury before witnesses are called for either prisoner. Reg. *v.* Richards, 1 Cox C. C. 62.

side is in the discretion of the trial court.[45] If the court under the circumstances of the case abuse its discretion in unreasonably limiting the time of defendant's counsel to address the jury a conviction will be reversed.[46]

45. *Alabama.*— Huskey *v.* State, 129 Ala. 94, 29 So. 838; Crawford *v.* State, 112 Ala. 1, 21 So. 214.

Arkansas.— Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885; Green *v.* State, 38 Ark. 304.

Colorado.— Barr *v.* People, 30 Colo. 522, 71 Pac. 392.

Georgia.— Cohen *v.* State, 92 Ga. 476, 17 S. E. 859.

Indian Territory.—Wright *v.* U. S., (1902) 69 S. W. 819.

Kentucky.— Combs *v.* Com., 97 Ky. 24, 29 S. W. 734, 16 Ky. L. Rep. 699; Sewell *v.* Com., 3 Ky. L. Rep. 86.

Louisiana.— State *v.* Boasso, 38 La. Ann. 202; State *v.* Duck, 35 La. Ann. 764.

Mississippi.— Lee *v.* State, 51 Miss. 566.

Missouri.— State *v.* Baker, 136 Mo. 74, 37 S. W. 810; State *v.* Page, 21 Mo. 257, 64 Am. Dec. 229.

Nebraska.— Dixon *v.* State, 46 Nebr. 298, 64 N. W. 961; Hart *v.* State, 14 Nebr. 572, 16 N. W. 905.

New Jersey.— Sullivan *v.* State, 47 N. J. L. 151 [*affirming* 46 N. J. L. 446].

New York.— People *v.* Kelly, 94 N. Y. 526.

Pennsylvania.— Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228.

Texas.— Whitley *v.* State, (Cr. App. 1900) 56 S. W. 69; Bryant *v.* State, (Cr. App. 1898) 47 S. W. 373; Bailey *v.* State, 37 Tex. Cr. 579, 40 S. W. 281; Huntly *v.* State, (Cr. App. 1896) 34 S. W. 923.

Virginia.— Cunningham *v.* Com., 88 Va. 37, 13 S. E. 309.

See 14 Cent. Dig. tit. "Criminal Law," § 1657.

But see State *v.* Tighe, 27 Mont. 327, 71 Pac. 3, holding that it is error for the court to limit in advance the time for argument in a capital case.

The constitutional provision guaranteeing the accused the right to be heard by counsel does not prevent the court from limiting counsel's time in argument. Peagler *v.* State, 110 Ala. 11, 20 So. 363.

Under a statute giving counsel as long as he sees fit to address the jury, he cannot be limited by the trial court (State *v.* Miller, 75 N. C. 73), but such a statute is confined in its operation to the summing up and not to arguments on motions or on questions arising during the trial (State *v.* Jones, 117 N. C. 768, 23 S. E. 247).

Where as a matter of immemorial practice each party has the privilege of being heard by two counsel, a statute providing that counsel shall occupy one hour means that each party may have two hours for the argument. It is immaterial whether this space of time shall be occupied by one counsel or two, and if by two, how it is divided. As matter of practice, it is customary for counsel to divide this into unequal portions between themselves; and to confine one counsel to one hour and to refuse to let him occupy a portion of the hour which had not been used by his associate is error, particularly in a capital case. State *v.* Nyman, 55 Conn. 17, 10 Atl. 161.

In Georgia it is held that so long as counsel speaks to the point, proceeds in good faith, and wastes no time, the court should not interfere, but leave his time to his own discretion until it appears that the discussion is complete or until the subject is exhausted. Williams *v.* State, 60 Ga. 367, 27 Am. Rep. 412.

46. What shall be an unreasonable limitation depends upon the circumstances of the case, including its complexity or simplicity, the amount and character, whether direct or circumstantial, of the testimony taken, the number of witnesses which have been examined, contradictions in the evidence, and the time which has already been consumed in hearing it.

California.— People *v.* Keenan, 13 Cal. 581.

Georgia.— Chance *v.* State, 97 Ga. 346, 23 S. E. 832; Williams *v.* State, 60 Ga. 367, 27 Am. Rep. 412; Hunt *v.* State, 49 Ga. 255, 15 Am. Rep. 677.

Michigan.—People *v.* Labadie, 66 Mich. 702, 33 N. W. 806.

Ohio.— Dille *v.* State, 34 Ohio St. 617, 32 Am. Rep. 395.

Texas.— McLean *v.* State, 32 Tex. Cr. 521, 24 S. W. 898; Walker *v.* State, 32 Tex. Cr. 175, 22 S. W. 685.

Virginia.— Jones *v.* Com., 87 Va. 63, 12 S. E. 226.

See 14 Cent. Dig. tit. "Criminal Law," § 1657.

The periods of time allowed vary according to the circumstances. Where the facts were simple, fifteen minutes (State *v.* Page, 21 Mo. 257, 64 Am. Dec. 229), twenty minutes (Wright *v.* U. S., (Indian Terr. 1902) 69 S. W. 819), twenty-five minutes (Yeldell *v.* State, 100 Ala. 26, 14 So. 570, 46 Am. St. Rep. 20; Mansfield *v.* State, (Tex. Cr. App. 1894) 24 S. W. 901), thirty minutes (Wallace *v.* State, 95 Ga. 470, 20 S. E. 250), or thirty-five minutes (People *v.* Smith, 122 Mich. 284, 81 N. W. 107) have been held reasonable. Where the evidence has been lengthy and complicated, allowing an hour and a half (State *v.* Collins, 70 N. C. 241, 16 Am. Rep. 771; Taylor *v.* State, (Tex. Cr. App. 1897) 42 S. W. 285), an hour and three quarters (People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161; State *v.* Hall, 31 W. Va. 505, 7 S. E. 422), two hours (Waters *v.* State, 117 Ala. 108, 22 So. 490; Thompson *v.* Com., 88 Va. 45, 13 S. E. 304), four hours (State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89; State *v.* Riddle, 20 Kan. 711; Smith *v.* Com., 37 S. W. 586, 18 Ky. L. Rep. 652; State *v.* Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875), or five hours (Weaver *v.* State, 24 Ohio St. 584) was not error. But where seven witnesses were heard for the state and five for

c. Permitting Reply. Where the prosecutor defers the statement of his case and of the law on which he relies until his second address to the jury,[47] or where he is permitted to introduce additional testimony after defendant's counsel has closed,[48] the latter should be permitted to reply to the new arguments or evidence offered.

2. Opening Statement — a. For Prosecution. At common law, after the arraignment and the impaneling of the jury, the outline of the indictment and pleadings was usually stated to the jury by the junior counsel, who was then followed by the senior counsel, who stated to them the circumstances expected to be proved.[49] At the present time the prosecuting attorney may generally in opening his case to the jury state fully the facts which he expects to prove.[50] And it is not error for the prosecuting attorney in his opening address to state facts as he expects to prove them, although not followed by proof because the facts themselves are irrelevant, or because he fails to introduce any evidence or introduces incompetent evidence to support them.[51]

defendant, and defendant, who was represented by two counsel, was limited to one hour (Wingo *v.* State, 62 Miss. 311), where on a trial of an indictment for assault with intent to murder the time was limited to thirty minutes (Hunt *v.* State, 49 Ga. 255, 15 Am. Rep. 677), and where after a trial lasting five days, during which twenty-four witnesses were heard, and the evidence was circumstantial, the time of counsel was limited to one hour (People *v.* Green, 99 Cal. 564, 34 Pac. 231) it was held error.

It is an unreasonable restriction for the court to limit counsel to five minutes for summing up in a case where nine witnesses have been examined (White *v.* People, 90 Ill. 117, 32 Am. Rep. 12), or to seventeen minutes in a case where a large number of witnesses have testified and the evidence is conflicting (McLean *v.* State, 32 Tex. Cr. 521, 24 S. W. 898).

47. Morales *v.* State, 1 Tex. App. 494, 28 Am. Rep. 419.

48. Sturdivant's Case, 1 City Hall Rec. (N. Y.) 110.

49. 1 Chitty Cr. L. 535.

In England the prosecution must always open where there is counsel for the prisoner. Rex *v.* Gascoine, 7 C. & P. 772, 32 E. C. L. 864.

In the United States it has been held that where by statute he "may state to the jury the law and the evidence," it is in his discretion, and his omission to do so is not error. Hendrickson *v.* Com., 64 S. W. 954, 23 Ky. L. Rep. 1191. The same rule was supported where the statute read "shall" (Holsey *v.* State, 24 Tex. App. 35, 5 S. W. 523), or "must" (U. S. *v.* Sprague, 8 Utah 378, 31 Pac. 1049) open the case and state the evidence.

50. *California.*— People *v.* Ellsworth, 92 Cal. 594, 28 Pac. 604.

Georgia.— Sterling *v.* State, 89 Ga. 807, 15 S. E. 743; Dowda *v.* State, 74 Ga. 12.

Iowa.— State *v.* Meshek, 61 Iowa 316, 16 N. W. 143.

Missouri.— State *v.* Gartrell, 171 Mo. 489, 71 S. W. 1045.

Nebraska.— Russell *v.* State, 62 Nebr. 512, 87 N. W. 344.

New Hampshire.— State *v.* Greenleaf, 71 N. H. 606, 53 Atl. 38.

New York.— People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188.

England.— Rex *v.* Deering, 5 C. & P. 165, 24 E. C. L. 507.

See 14 Cent. Dig. tit. "Criminal Law," § 1659.

It is not error for the prosecuting attorney in opening to state that on a previous prosecution he had permitted the accused to plead guilty to a lower degree of crime than that for which he had been indicted (People *v.* Molina, 126 Cal. 505, 59 Pac. 34), to explain, when requested to do so by the court, what constitutes the crime (Ryan *v.* State, 83 Wis. 486, 53 N. W. 836), to state the law on which he relies (Morales *v.* State, 1 Tex. App. 494, 28 Am. Rep. 419), or to read a statute on which the prosecution is based (State *v.* Boogher, 8 Mo. App. 600).

It is error, however, for him to state that the accused has committed other crimes similar to the one in issue (State *v.* Stubblefield, 157 Mo. 360, 58 S. W. 337; People *v.* Smith, 162 N. Y. 520, 56 N. E. 1001; People *v.* Milks, 55 N. Y. App. Div. 372, 66 N. Y. Suppl. 889, 15 N. Y. Cr. 220. *Compare* People *v.* Van Zile, 73 Hun (N. Y.) 534, 26 N. Y. Suppl. 390), to outline an imaginary defense which is never attempted (People *v.* Montague, 71 Mich. 447, 39 N. W. 585), or to state in detail the confession of the accused (Rex *v.* Davis, 7 C. & P. 785, 32 E. C. L. 872; Rex *v.* Swatkins, 4 C. & P. 548, 19 E. C. L. 643).

The interruption of an opponent's opening to the jury is justifiable only in a very clear case of abuse, and the question thus raised should be disposed of summarily and without argument. People *v.* Wilson, 55 Mich. 506, 21 N. W. 905.

51. He must have acted, however, in good faith and with reasonable grounds to suppose that he could prove the facts as stated.

California.— People *v.* Gleason, 127 Cal. 323, 59 Pac. 592; People *v.* Lewis, 124 Cal. 551, 57 Pac. 470, 45 L. R. A. 783; People *v.* Searcey, 121 Cal. 1, 53 Pac. 359, 41 L. R. A. 157.

Indiana.— Reynolds *v.* State, 147 Ind. 3, 46 N. E. 31.

b. For Defense. The proper function of the opening for defendant is to enable him to inform the court and jury what he expects to prove. His counsel may therefore be forbidden to argue on the law,[52] to argue upon and review the testimony already offered by the state,[53] or to argue upon his own facts.[54] It is not error to refuse to allow him to state facts that he intends to prove which are manifestly inadmissible.[55] In the absence of statute,[56] it is discretionary with the court to allow the opening statement for the defense to be made after the close of the testimony for the prosecution.[57] It is also within the court's discretion to refuse to allow more than one attorney to open for the accused.[58]

3. Presentation of Evidence — a. For Prosecution — (i) *Duty of Prosecuting Attorney.* It is the sworn duty of the district attorney to see that defendant shall have a fair and impartial trial, and that he shall be convicted only by competent evidence, and to secure this he should himself be fair and impartial.[59]

Iowa.— State *v.* Todd, 110 Iowa 631, 82 N. W. 322; State *v.* Allen, 100 Iowa 7, 69 N. W. 274; State *v.* Tippet, 94 Iowa 646, 63 N. W. 445; State *v.* Williams, 63 Iowa 135, 18 N. W. 682; State *v.* Meshek, 61 Iowa 316, 16 N. W. 143.

Michigan.— People *v.* Ecarius, 124 Mich. 616, 83 N. W. 628; People *v.* Fowler, 104 Mich. 449, 62 N. W. 572.

New York.— People *v.* Milks, 55 N. Y. App. Div. 372, 66 N. Y. Suppl. 889.

Utah.— People *v.* Chalmers, 5 Utah 201, 14 Pac. 131.

But see Meyer *v.* State, (Tex. Cr. App. 1897) 41 S. W. 632, holding that counsel should not be permitted to state any facts which would not be admissible in evidence on the trial.

See 14 Cent. Dig. tit. "Criminal Law," § 1659.

Statutes permitting the district attorney to state the evidence on which he will rely do not authorize him to read writings which he intends to offer (O'Brien *v.* Com., 89 Ky. 354, 12 S. W. 471, 11 Ky. L. Rep. 534), or to make an elaborate argument upon facts which the evidence fails to establish (State *v.* Williams, 63 Iowa 135, 18 N. W. 682). It is highly proper and fair to the accused for the court to inform the jury that statements not supported by subsequent evidence should be rejected by them (Reynolds *v.* State, 147 Ind. 3, 46 N. E. 31), but the court is not required of its own motion to do so (McFalls *v.* State, 66 Ark. 16, 48 S. W. 492).

52. People *v.* Carty, 77 Cal. 213, 19 Pac. 490; People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161.

53. People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161; State *v.* Taylor, 61 N. C. 508; Emery *v.* State, 92 Wis. 146, 65 N. W. 848.

54. People *v.* Bezy, 67 Cal. 223, 7 Pac. 643.

55. Choice *v.* State, 31 Ga. 424; State *v.* Ramsey, 82 Mo. 133; State *v.* Boyce, 24 Wash. 514, 64 Pac. 719.

56. **Under the Indiana statute** it is error for the court to refuse to allow the counsel for the defense to reserve his opening statement until after the close of the evidence for the prosecution. Willey *v.* State, 52 Ind. 421.

57. Cannon *v.* People, 141 Ill. 270, 30 N. E. 1027.

Where an offer to reserve the opening statement for defendant until after the introduction of the state's evidence is passed without objection, the court cannot afterward refuse to allow the statement to be made. State *v.* Bateman, 52 Iowa 604, 3 N. W. 622.

58. People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161.

59. It is not his duty to convict by illegitimate and unfair means, and while the court will allow for the zeal which is the natural outcome of a legal contest, if by that zeal he is permitted to use unfair and unjust means to procure a conviction it will be reversed. People *v.* Lee Chuck, 78 Cal. 317, 20 Pac. 719; State *v.* Irwin, (Ida. 1903) 71 Pac. 608; People *v.* Carr, 64 Mich. 702, 31 N. W. 590; People *v.* Dane, 59 Mich. 550, 26 N. W. 781. See also People *v.* Derbert, 138 Cal. 467, 71 Pac. 564.

Arguing on the admission of incompetent evidence.— Where the prosecuting attorney arguing upon an offer of evidence which is incompetent argues as to its effect with the evident intent of prejudicing the jury against defendant it is error. People *v.* Lee Chuck, 78 Cal. 317, 20 Pac. 719. The prosecuting attorney should not be allowed to state what he expected to prove by a witness, where objection has already been made and the testimony rejected. Newby *v.* People, 28 Colo. 16, 62 Pac. 1035; Flint *v.* Com., 81 Ky. 186, 23 S. W. 346; Leahy *v.* State, 31 Nebr. 566, 48 N. W. 390. This is an indirect method of influencing improperly the minds of the jurors by suggesting the existence of prejudicial facts which the court has adjudged to be incompetent and improper. Randall *v.* State, 132 Ind. 539, 32 N. E. 305.

Communications by counsel with third persons during examination.—If during the examination of a witness it becomes necessary for counsel to communicate with third persons to procure information necessary in framing questions, it must be done in such a manner as not to give the jury any information which may affect their verdict. The proper practice where this rule is not observed is for the court to instruct the jury to disregard such information and consider only the evidence, or to discharge the jury if the court believes that what has happened is of such a character that they must be influenced thereby. Com. *v.* Tripp, 157 Mass. 514, 32 N. E. 905.

Interview with witness on the stand.— Permitting the prosecuting attorney against ob-

(II) *Persistence in Improper Questioning.* The district attorney should not be permitted to ask a series of improper, incompetent, and prejudicial questions,[60] which he knows or has reason to suppose from their character the court will not permit to be answered.[61]

(III) *Insulting Questions Put to Witness.* A series of insulting, impertinent, and insinuating questions, tending to belittle and hold up for contempt the witnesses for defendant, constitute reversible error, where the court fails to interfere.[62]

(IV) *Tampering With Witness.* The public prosecuting officer is not justified in attempting to prevent witnesses for defendant from testifying because he believes they are unreliable and may testify falsely.[63]

b. For the Defense. The defendant should be permitted to exercise his powers of examining and cross-examining within legal limits.[64]

4. Facts, Comments, and Arguments — a. In General. It is always the duty of the prosecuting attorney to treat the prisoner in a fair and impartial manner.[65]

b. Exhibits and Illustrations. The exhibition, by the prosecuting officer, of articles of personal property, models, weapons, implements, etc., by way of illustration, and their examination by the jury is not error, whether the articles are in evidence[66] or not.[67]

jection to hold an interview with a witness while under examination, in a tone not heard by counsel for defendant or by the court, while very bad practice and to be condemned as improper and unbecoming, is not error in the absence of a showing that something was said to the witness that affected his testimony, or that defendant was prejudiced by the interview. Rounds *v.* State, 57 Wis. 45, 14 N. W. 865.

60. The persistence in asking proper questions is not prejudicial. McDonel *v.* State, 90 Ind. 320.

61. Holder *v.* State, 58 Ark. 473, 25 S. W. 279; People *v.* Mullings, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223; State *v.* Forsythe, 99 Iowa 1, 68 N. W. 446; Cargill *v.* Com., (Ky. 1890) 13 S. W. 916.

Effect of persistent offer of incompetent writings see U. S. *v.* Cross, 19 D. C. 562; People *v.* Most, 8 N. Y. Suppl. 625, 7 N. Y. Cr. 376.

The assumption of the existence of damaging facts may be put in a list of questions with such persistency and show of proof as to impress the jury that there must be something wrong, although the prisoner answers no to every question. Gale *v.* People, 26 Mich. 157.

62. State *v.* Prendible, 165 Mo. 329, 65 S. W. 559.

The fact that a witness for the prosecution proves unsatisfactory to the prosecuting attorney confers no right upon the latter to ask him insulting and degrading questions which imply that he is falsifying, or which by implication impute to him a desire to shield the accused and make him appear guilty of perjury. This may be done properly, but not by a mere assertion of facts which are calculated to prejudice the jury. Such statements, if not ruled out when objected to, constitute reversible error. People *v.* Carr, 64 Mich. 702, 31 N. W. 590.

63. Gandy *v.* State, 24 Nebr. 716, 40 N. W. 302.

The prosecuting attorney is not justified in endeavoring to secure admissions from the accused while in prison by sending messengers to him who represent themselves as sent by his attorney to obtain the facts of his defense, or by telephoning him to assure him that he is his attorney. Such action will constitute reversible error. State *v.* Russell, 83 Wis. 330, 53 N. W. 441.

64. To allow a persistent interposition of technical objections by the prosecuting attorney while defendant is examining or cross-examining a witness is error. People *v.* Benson, 52 Cal. 380.

65. He should not be permitted to state any facts as of his own knowledge which have not been introduced in evidence, and any insulting language or unseemly demonstration directed toward the accused should be promptly corrected by the court. People *v.* Dane, 59 Mich. 550, 26 N. W. 781; Hamilton *v.* State, 97 Tenn. 452, 37 S. W. 194.

Where, after counsel have agreed to submit the case without argument, defendant's attorney presents certain requests to charge, it is error to permit the prosecuting attorney, under pretext of answering them, to enter into a lengthy argument on the testimony. People *v.* O'Brien, 96 Mich. 630, 56 N. W. 72.

66. Mitchell *v.* State, 114 Ala. 1, 22 So. 71; Little *v.* State, 39 Tex. Cr. 654, 47 S. W. 984.

67. *California.*— People *v.* Amaya, 134 Cal. 531, 66 Pac. 794; People *v.* Durrant, 116 Cal. 179, 48 Pac. 75; People *v.* Cox, 76 Cal. 281, 18 Pac. 332.

Kentucky.— Herron *v.* Com., 64 S. W. 432, 23 Ky. L. Rep. 782.

Missouri.— State *v.* Duncan, 116 Mo. 288, 22 S. W. 699.

Pennsylvania.— Newman *v.* Com., (1886) 7 Atl. 132.

South Carolina.— State *v.* Aughtry, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199.

See 14 Cent. Dig. tit. "Criminal Law," § 1663.

c. Reading Books and Writings to Jury [68] — (i) *Record in Pending or Prior Prosecution.* It is not error for the prosecuting attorney to read the evidence from a stenographer's minutes,[69] and it is proper to read the indictment to the jury, if this is done in good faith and for the purpose of stating what the prosecution intends to prove.[70] It is error, however, to allow the attorney for the prosecution to read to the jury the opinion of an appellate court commenting on the weight and effect of the evidence given on a former trial of the same case,[71] or to read an affidavit made on an application for a continuance which was not introduced in evidence.[72]

(ii) *Instructions of the Court.* Permitting counsel to read and comment on the written instructions is within the court's discretion.[73]

(iii) *Books of Science or Art.* It is within the discretion of the court to permit or to refuse to permit counsel to read to the jury in their argument medical or other books treating of art or science claimed to be pertinent to the question in issue.[74] If, however, extracts from medical books are introduced in evidence counsel have the right to read them.[75]

d. Comments in Argument — (i) *On Inferences Drawn From Evidence.* It is within the range of legitimate argument for counsel to discuss all inferences which may be drawn from the evidence,[76] and to impress them upon the jury.[77]

68. Reading newspaper articles to the jury is highly improper. Petty *v.* Com., 15 S. W. 1059, 12 Ky. L. Rep. 919.

69. People *v.* Greening, 102 Cal. 384, 36 Pac. 665; State *v.* McCool, 34 Kan. 613, 9 Pac. 618; State *v.* Henson, 106 Mo. 66, 16 S. W. 285; State *v.* Costello, 29 Wash. 366, 69 Pac. 1099.

70. Greenwood *v.* Com., 11 S. W. 811, 11 Ky. L. Rep. 220; State *v.* Desroches, 48 La. Ann. 428, 19 So. 250; State *v.* Pennington, 124 Mo. 388, 27 S. W. 1106; People *v.* Reilly, 164 N. Y. 600, 59 N. E. 1128 [*affirming* 49 N. Y. App. Div. 218, 63 N. Y. Suppl. 18, 14 N. Y. Cr. 458]. But see Mace *v.* Com., 5 Ky. L. Rep. 695, holding that reading the indictment with the indorsements thereon to the jury as evidence is error.

71. State *v.* Dickey, 48 W. Va. 325, 37 S. E. 695.

72. State *v.* Morse, 35 Oreg. 462, 57 Pac. 631.

73. People *v.* Denomme, (Cal. 1899) 56 Pac. 98; People *v.* Davis, (Cal. 1894) 36 Pac. 96; Murphy *v.* People, 9 Colo. 435, 13 Pac. 528; Burrell *v.* State, 25 Nebr. 581, 41 N. W. 399. *Contra,* Stephenson *v.* State, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 216.

A statute making it error to give instructions not reduced to writing or oral explanations of written instructions does not prevent counsel from commenting on the instructions. Burrell *v.* State, 25 Nebr. 581, 41 N. W. 399.

74. *Alabama.*— Bales *v.* State, 63 Ala. 30.

Connecticut.— State *v.* Hoyt, 46 Conn. 330.

Kansas.— State *v.* O'Neil, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555.

Michigan.— People *v.* Glover, 71 Mich. 303, 38 N. W. 874; People *v.* Vanderhoff, 71 Mich. 158, 39 N. W. 28.

Mississippi.— Cavanah *v.* State, 56 Miss. 299.

Missouri.— State *v.* Soper, 148 Mo. 217, 49 S. W. 1007.

North Carolina.— State *v.* Rogers, 112 N. C. 874, 17 S. E. 297.

Wisconsin.— Boyle *v.* State, 57 Wis. 472, 15 N. W. 827, 46 Am. Rep. 41; Luning *v.* State, 2 Pinn. 284, 1 Chandl. 264; Luning *v.* State, 2 Pinn. 215, 1 Chandl. 178, 52 Am. Dec. 153.

See 14 Cent. Dig. tit. "Criminal Law," § 1667.

The denial of the right to the counsel for the prosecution is not reversible error. Com. *v.* Brown, 121 Mass. 69; People *v.* Glover, 71 Mich. 303, 38 N. W. 874; Reg. *v.* Crouch, 1 Cox C. C. 94.

75. Scott *v.* People, 141 Ill. 195, 30 N. E. 329.

76. *Alabama.*— Lide *v.* State, 133 Ala. 43, 31 So. 953; Downey *v.* State, 115 Ala. 108, 22 So. 479; Cross *v.* State, 68 Ala. 476.

California.— People *v.* Phelan, 123 Cal. 551, 56 Pac. 424.

Georgia.— Milam *v.* State, 108 Ga. 29, 33 S. E. 818.

Massachusetts.— Com. *v.* Barrows, 176 Mass. 17, 56 N. E. 830.

Michigan.—People *v.* Barnes, 113 Mich. 213, 71 N. W. 504; People *v.* Harrison, 93 Mich. 594, 53 N. W. 725.

Missouri.— State *v.* Johns, 124 Mo. 379, 27 S. W. 1115; State *v.* Musick, 101 Mo. 260, 14 S. W. 212; State *v.* Mallon, 75 Mo. 355.

Nebraska.— Parker *v.* State, (1903) 93 N. W. 1037.

New York.— People *v.* Doody, 172 N. Y. 165, 64 N. E. 807.

Oregon.— State *v.* Moore, 32 Oreg. 65, 48 Pac. 468.

See 14 Cent. Dig. tit. "Criminal Law," § 1669.

77. Ogletree *v.* State, 115 Ga. 835, 42 S. E. 255; Smalls *v.* State, 105 Ga. 669, 31 S. E. 571.

That the inferences of the counsel are illogical and erroneous neither calls for the court's interference nor warrants a new trial.

Alabama.— Scott *v.* State, 110 Ala. 48, 20 So. 468; Green *v.* State, 97 Ala. 59, 12 So. 416, 15 So. 242; Hobbs *v.* State, 74 Ala. 39.

(II) *On Incompetent Evidence.* It is not error to permit counsel to comment on alleged incompetent evidence, whether the same has been improperly admitted over objection[78] or admitted without objection.[79]

(III) *On Matters Not Sustained by Evidence.* It is reversible error for the prosecuting attorney in his argument to the jury to assert facts and circumstances as being in the case which are not shown by the evidence, or to comment upon such facts, or to draw inferences from them unfavorable to the accused.[80] Some allowance, however, is made for the extravagance or imagination of the

California.— People *v.* Amaya, 134 Cal. 531, 66 Pac. 794.

Georgia.— Sterling *v.* State, 89 Ga. 807, 15 S. E. 743; Taylor *v.* Dobson, 89 Ga. 361, 15 S. E. 470.

Indiana.— Sage *v.* State, 127 Ind. 15, 26 N. E. 667; Warner *v.* State, 114 Ind. 137, 16 N. E. 189.

Texas.— Davis *v.* State, 15 Tex. App. 594.

United States.— U. S. *v.* Flowery, 25 Fed. Cas. No. 15,122, 1 Sprague 109.

See 14 Cent. Dig. tit. "Criminal Law," § 1669.

The jury is not bound by the inferences and may reject them. Hence there can be no harm in the court disregarding them. Mitchell *v.* State, 43 Fla. 584, 31 So. 242; State *v.* Toombs, 79 Iowa 741, 45 N. W. 300.

Interfering with counsel in his argument is discretionary with the court, and the appellate court will not review such discretion unless it appears that the rights of the prisoner were actually prejudiced. State *v.* Allen, 45 W. Va. 65, 30 S. E. 209.

78. Odom *v.* State, 102 Ga. 608, 29 S. E. 427.

79. Osborn *v.* State, 125 Ala. 106, 27 So. 758; State *v.* Free, 1 McMull. (S. C.) 494; State *v.* Bokien, 14 Wash. 403, 44 Pac. 889. *Contra,* People *v.* Duncan, 104 Mich. 460, 62 N. W. 556.

Stating that a writing is competent evidence, if not objected to, is not improper, although on a former appeal it had been held incompetent. State *v.* Punshon, 133 Mo. 44, 34 S. W. 25.

80. *Alabama.*— Roberson *v.* State, 123 Ala. 55, 26 So. 645; Dunmore *v.* State, 115 Ala. 69, 22 So. 541; Griffin *v.* State, 90 Ala. 596, 8 So. 670; McAdory *v.* State, 62 Ala. 154.

California.—People *v.* Valliere, 127 Cal. 65, 59 Pac. 295; People *v.* Smith, 121 Cal. 355, 53 Pac. 802; People *v.* Mitchell, 62 Cal. 411.

Georgia.— Brown *v.* State, 60 Ga. 210; Berry *v.* State, 10 Ga. 511.

Illinois.— Fox *v.* People, 95 Ill. 71.

Iowa.— State *v.* Hogan, 115 Iowa 455, 88 N. W. 1074.

Kentucky.— Gilbert *v.* Com., 106 Ky. 919, 51 S. W. 804, 21 Ky. L. Rep. 544; Parrott *v.* Com., 47 S. W. 452, 20 Ky. L. Rep. 761; Massie *v.* Com., 29 S. W. 871, 16 Ky. L. Rep. 790; Austin *v.* Com., 4 Ky. L. Rep. 29.

Louisiana.— State *v.* Thompson, 106 La. 362, 30 So. 895.

Massachusetts.— Com. *v.* Baldwin, 129 Mass. 481.

Michigan.— People *v.* Aikin, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512; People *v.* Dane, 59 Mich. 550, 26 N. W. 781.

Mississippi.— Long *v.* State, 81 Miss. 448, 33 So. 224.

Missouri.— State *v.* Furgerson, 152 Mo. 92, 53 S. W. 427; State *v.* Lingle, 128 Mo. 528, 31 S. W. 20; State *v.* Woolard, 111 Mo. 248, 20 S. W. 27.

New Hampshire.— State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38; State *v.* Foley, 45 N. H. 466.

New York.— People *v.* McGraw, 66 N. Y. App. Div. 372, 72 N. Y. Suppl. 679.

North Carolina.— State *v.* Tuten, 131 N. C. 701, 42 S. E. 443.

Tennessee.— Hamilton *v.* State, 97 Tenn. 452, 37 S. W. 194.

Texas.— Attaway *v.* State, 41 Tex. Cr. 395, 55 S. W. 45; Seals *v.* State, (Cr. App. 1897) 38 S. W. 1006; Bice *v.* State, 37 Tex. Cr. 38, 38 S. W. 803; Butler *v.* State, (Cr. App. 1894) 27 S. W. 128; Fuller *v.* State, 30 Tex. App. 559, 17 S. W. 1108; Tillery *v.* State, 24 Tex. App. 251, 5 S. W. 842, 5 Am. St. Rep. 882.

See 14 Cent. Dig. tit. "Criminal Law," § 1669.

Commenting upon the informal manner of proceeding at coroners' inquests, and their purpose, by the prosecuting attorney in explaining an apparent contradiction in the testimony is not objectionable, as not based on evidence, since judicial notice is taken of such proceedings. State *v.* Marsh, 70 Vt. 288, 40 Atl. 836. If the trial court instruct the jury in reference to improper statements made by the prosecuting attorney that they shall not consider them a new trial will not be granted. State *v.* Hernia, 68 N. J. L. 299, 53 Atl. 85.

It is improper for the prosecuting attorney to tell the jury what he thinks the witnesses know about the case which they do not tell, or that they know facts that would convict if they would tell. He has a right to comment on the manner, actions, and appearance of witnesses, but not to testify in his argument under the guise of telling what the witnesses would say if they were to answer truthfully. State *v.* McGahan, 48 W. Va. 438, 37 S. E. 573.

It is the duty of the court to punish counsel by fine and imprisonment if they persistently go outside of the facts in their argument and where the prosecution obtains a verdict by this means it should be set aside. State *v.* Gutekunst, 24 Kan. 252; State *v.* Comstock, 20 Kan. 650.

prosecuting attorney, and a slight deviation from the record may be overlooked if the accused is not prejudiced thereby.[81]

(iv) *On Facts Not Within the Issues.* It is error to permit the prosecuting attorney to argue upon matters outside of the issues in the case and which would not be relevant if offered in evidence, except as to matters of common and general knowledge which all intelligent persons may be presumed to know.[82]

(v) *On Matters of General Knowledge.* While in confining arguments to the facts in issue, it is proper always to prevent counsel from illustrating his argument by facts and circumstances drawn from beyond the record, it is not always easy to draw the line. Matters of common and general public information and of known and settled history may be properly referred to and commented upon by way of argument and illustration;[83] but matters outside the evidence of a local nature or matters not of common and public notoriety should not be commented upon.[84]

(vi) *Misstatement of Evidence.* The fact that the district attorney states some portion of the evidence erroneously[85] or makes exaggerated statements as to

81. *Arkansas.*— Redd *v.* State, 65 Ark. 475, 47 S. W. 119.

District of Columbia.— Funk *v.* U. S., 16 App. Cas. 478.

Indiana.— Livingston *v.* State, 141 Ind. 131, 40 N. E. 684.

Iowa.— State *v.* Newhouse, 115 Iowa 173, 88 N. W. 353.

Louisiana.— State *v.* Jones, 51 La. Ann. 103, 24 So. 594.

Wisconsin.— Williams *v.* State, 61 Wis. 281, 21 N. W. 56.

See 14 Cent. Dig. tit. "Criminal Law," § 1669.

For example an appeal to apply their common sense to the evidence, addressed to the jury, is proper (People *v.* Ringsted, 90 Mich. 371, 51 N. W. 519); nor will the judgment be reversed solely on the ground that the language of the prosecuting attorney was highly figurative and earnest, where there is no misstatement of either law or fact (State *v.* Baber, 74 Mo. 292, 41 Am. Rep. 314).

Extravagant statements.— The court cannot reverse convictions because counsel in their arguments sometimes make extravagant statements, or wander a little way outside of the record. If every immaterial assertion contained in an argument is to be held ground for reversal, no conviction would stand. Common fairness requires that jurors shall be presumed to possess ordinary intelligence, sufficient at least for them to disregard these general statements not supported by evidence, but if the immaterial matters are so weighty as to do the accused injury, the conviction should be reversed. Combs *v.* State, 75 Ind. 215.

82. Ragland *v.* State, 125 Ala. 12, 27 So. 983; Anderson *v.* State, 104 Ala. 83, 16 So. 108; Walker *v.* State, 91 Ala. 76, 9 So. 87; Cross *v.* State, 68 Ala. 476; State *v.* McCort, 23 La. Ann. 326; Miles *v.* State, (Tex. Cr. App. 1901) 65 S. W. 912.

A statutory provision for shortening the term of imprisonment for good behavior should not be referred to by the prosecuting attorney in his argument. Farrell *v.* People, 133 Ill. 244, 24 N. E. 423.

Counsel may not discuss the penalties prescribed for a crime, since the jury has no power to fix or recommend the penalty, except in cases of murder in the first degree. Eggart *v.* State, 40 Fla. 527, 25 So. 144.

83. *California.*— People *v.* Barthleman, 120 Cal. 7, 52 Pac. 112.

Georgia.— Evans *v.* State, 115 Ga. 229, 41 S. E. 691.

Indiana.— Combs *v.* State, 75 Ind. 215.

Kentucky.— Jackson *v.* Com., 100 Ky. 239, 38 S. W. 422, 1091, 18 Ky. L. Rep. 795, 66 Am. St. Rep. 336.

Missouri.— State *v.* Punshon, 133 Mo. 44, 34 S. W. 25.

Tennessee.— Turner *v.* State, 89 Tenn. 547, 15 S. W. 838; Northington *v.* State, 14 Lea 424.

But see People *v.* Bissert, 71 N. Y. App. Div. 118, 75 N. Y. Suppl. 630 [*affirmed* in 172 N. Y. 643, 65 N. E. 1120].

Commenting upon the frequency of crime as a reason for convicting the accused is not usually regarded as error.

Alabama.— Dollar *v.* State, 99 Ala. 236, 13 So. 575.

Georgia.— Washington *v.* State, 87 Ga. 12, 13 S. E. 131.

Illinois.— Siebert *v.* People, 143 Ill. 571, 32 N. E. 431.

Michigan.— People *v.* Gosch, 82 Mich. 22, 46 N. W. 101.

Missouri.— State *v.* Hyland, 144 Mo. 302, 46 S. W. 195; State *v.* Elvins, 101 Mo. 243, 13 S. W. 927.

Wisconsin.— Hoffman *v.* State, 65 Wis. 46, 26 N. W. 110.

The abuse of the doctrine of reasonable doubt by the jury is a proper subject of discussion. Anderson *v.* State, 147 Ind. 445, 46 N. E. 901; State *v.* Valwell, 66 Vt. 558, 29 Atl. 1018.

84. People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161; McDonald *v.* People, 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547; King *v.* State, 91 Tenn. 617, 20 S. W. 169.

85. People *v.* Lee Ah Yute, 60 Cal. 95; People *v.* Barnhart, 59 Cal. 402; People *v.* Pope, 108 Mich. 361, 66 N. W. 213; State *v.*

its strength[86] is not error unless it is clear to the court that the accused was prejudiced thereby.

(VII) *On Character of Witnesses.* Abusing the witnesses for defendant,[87] making remarks which reflect upon their character,[88] or intimating that they have been bribed to testify for defendant[89] is error, where there is no evidence to sustain such statement.

(VIII) *On Failure of Accused to Testify.* A statute which provides that the neglect or refusal of the accused to testify shall not be commented upon by the prosecuting attorney is usually mandatory. This being so, the prosecuting attorney should therefore maintain an absolute silence on the subject in his argument, and any reference by him, direct or indirect, to the absence of the accused from the witness stand is generally deemed reversible error.[90] Where, however,

Whitworth, 126 Mo. 573, 29 S. W. 595; State v. Kaiser, 124 Mo. 651, 28 S. W. 182; State v. Wieners, 66 Mo. 13; State v. Moore, 24 S. C. 150, 58 Am. Rep. 241.

An assertion that statements in the affidavit for a continuance, which he had agreed to have read as the testimony of certain absent witnesses, was not their evidence, that they had never seen them and had not been sworn is reversible error. State v. Barham, 82 Mo. 67.

86. Boldt v. State, (Wis. 1888) 35 N. W. 935.

The trial judge should interrupt and correct counsel misstating the evidence. Green v. State, 43 Ga. 368; Palin v. State, 38 Nebr. 862, 57 N. W. 743.

87. Schlotter v. State, 127 Ind. 493, 27 N. E. 149; State v. Hudson, 110 Iowa 663, 80 N. W. 232.

88. People v. Kahler, 93 Mich. 625, 53 N. W. 826; State v. Robinson, 106 Tenn. 204, 61 S. W. 65; Meyer v. State, (Tex. Cr. App. 1897) 41 S. W. 632; Sterling v. State, 15 Tex. App. 249.

89. State v. Helm, 92 Iowa 540, 61 N. W. 246.

Impeaching witness.—Remarks in the argument for the prosecution that the jury has a right to judge for whom an unfriendly witness called by the state is testifying are not improper as impeaching one's own witness, where the state was compelled to call him as an eye-witness to a homicide. State v. Mims, 36 Oreg. 315, 61 Pac. 888. And a statement by the prosecuting attorney that the state is not bound by the testimony of a witness it was obliged to introduce except so far as the evidence is believed to be true is not objectionable. People v. Harper, 83 Mich. 273, 47 N. W. 221.

It is not error for the prosecution to tell the jury a witness is untruthful (People v. Wirth, 108 Mich. 307, 66 N. W. 41; Driscoll v. People, 47 Mich. 413, 11 N. W. 221), to belittle his testimony (Taylor v. Com., 9 Ky. L. Rep. 316), to comment upon his inability to remember (People v. McKinney, 49 Mich. 334, 13 N. W. 619), to direct that he shall be held for perjury (State v. Pilkington, 92 Iowa 92, 60 N. W. 502), to allude to him as having guilty knowledge of the property he purchased of the accused being stolen (Tatum v. State, 61 Nebr. 229, 85 N. W. 40), or to state, where the proof justifies it, that defendant's witnesses have been furnished with copies of what they are expected to say (Ross v. State, 8 Wyo. 351, 57 Pac. 924).

90. *Alabama.*— Roberts v. State, 122 Ala. 47, 25 So. 238; Baker v. State, 122 Ala. 1, 26 So. 194.

California.— People v. Brown, 53 Cal. 66; People v. Tyler, 36 Cal. 522.

Florida.— Gray v. State, 42 Fla. 174, 28 So. 53.

Illinois.— McDonald v. People, 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547; Austin v. People, 102 Ill. 261; Gilmore v. People, 87 Ill. App. 128.

Indiana.— Davis v. State, 138 Ind. 11, 37 N. E. 397; Lewis v. State, 137 Ind. 344, 36 N. E. 1110; Showalter v. State, 84 Ind. 562.

Iowa.— State v. Trauger, (1898) 77 N. W. 336; State v. Baldoser, 88 Iowa 55, 55 N. W. 97; State v. Graham, 62 Iowa 108, 17 N. W. 192. See also State v. Snider, 119 Iowa 15, 91 N. W. 762.

Kansas.— State v. Tennison, 42 Kan. 330, 22 Pac. 429; Topeka v. Myers, 34 Kan. 500, 8 Pac. 726; State v. Mosley, 31 Kan. 355, 2 Pac. 782; State v. Deves, (App. 1900) 61 Pac. 511; State v. Shelton, 6 Kan. App. 662, 49 Pac. 702; State v. Boyd, 5 Kan. App. 802, 48 Pac. 998.

Kentucky.— Parrott v. Com., 47 S. W. 452, 20 Ky. L. Rep. 761; Tudor v. Com., 43 S. W. 187, 19 Ky. L. Rep. 1039.

Maine.— State v. Banks, 78 Me. 490, 7 Atl. 269.

Massachusetts.— Com. v. Scott, 123 Mass. 239, 25 Am. Rep. 87.

Minnesota.—State v. Holmes, 65 Minn. 230, 68 N. W. 11.

Mississippi.— Bunckley v. State, 77 Miss. 540, 27 So. 638; Eubanks v. State, (1890) 7 So. 462.

Missouri.— State v. Weaver, 165 Mo. 1, 65 S. W. 308, 88 Am. St. Rep. 406; State v. Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556; State v. Graves, 95 Mo. 510, 8 S. W. 739; State v. Martin, 74 Mo. 547; State v. Brownfield, 15 Mo. App. 593.

New York.— People v. Doyle, 58 Hun 535, 12 N. Y. Suppl. 836.

Ohio.— McGuire v. State, 2 Ohio Cir. Dec. 318.

defendant goes on the stand as a witness he occupies the position of any other witness and may be cross-examined to the same extent. The prosecuting attorney then has the same right to attack his credibility in argument or to comment upon his testimony or upon his failure or refusal to answer proper and material questions within his knowledge, as in the case of any other witness.[91] And a stat-

Pennsylvania.— Com. *v.* Draper, 2 Chest. Co. Rep. 424.

Tennessee.— Staples *v.* State, 89 Tenn. 231, 14 S. W. 603.

Texas.— Davis *v.* State, 39 Tex. Cr. 681, 44 S. W. 1099; Brazell *v.* State, 33 Tex. Cr. 333, 26 S. W. 723; Dawson *v.* State, (Cr. App. 1893) 24 S. W. 414; Alvilla *v.* State, 32 Tex. Cr. 136, 22 S. W. 406; Lienburger *v.* State, (Cr. App. 1893) 21 S. W. 603; Jordan *v.* State, 29 Tex. App. 595, 16 S. W. 543; Reed *v.* State, 29 Tex. App. 449, 16 S. W. 99.

Vermont.— State *v.* Cameron, 40 Vt. 555.

Virginia.— Price *v.* Com., 77 Va. 393.

United States.— Wilson *v.* U. S., 149 U. S. 60, 13 S. Ct. 765, 37 L. ed. 650.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1672, 2200.

For example a statement that the motive of defendant is locked in his breast (Howard *v.* State, (Tex. Cr. App. 1900) 57 S. W. 948); that he has not accounted for his whereabouts at the time of the crime (Price *v.* U. S., 14 App. Cas. (D. C.) 391; Nite *v.* State, 41 Tex. Cr. 340, 54 S. W. 763; State *v.* Ward, 61 Vt. 153, 17 Atl. 483; Sutton *v.* Com., 85 Va. 128, 7 S. E. 323); a remark by the prosecuting attorney that he did not say one word about defendant not testifying (Bruce *v.* State, (Tex. Cr. App. 1899) 53 S. W. 867); that he has no right to swear the accused, but may prove his incriminating statements (Sawyers *v.* Com., 88 Va. 356, 13 S. E. 708); a comment on the failure of the accused to prove or disprove facts which he might do by other witnesses (State *v.* Griswold, 73 Conn. 95, 46 Atl. 829; Frazier *v.* State, 135 Ind. 38, 34 N. E. 817; State *v.* Seely, 92 Iowa 488, 61 N. W. 184; State *v.* Johnston, 88 N. C. 623; Wilkerson *v.* State, (Tex. Cr. App. 1899) 57 S. W. 956; Bruce *v.* State, (Tex. Cr. App. 1899) 53 S. W. 867; People *v.* McGrath, 5 Utah 525, 17 Pac. 116; Halleck *v.* State, 65 Wis. 147, 26 N. W. 572); or on his failure, when arrested, to account for the possession of stolen property (Green *v.* State, (Tex. Cr. App. 1895) 31 S. W. 386); or on his omission while in jail to deny an implicating statement read to him (State *v.* Schmidt, 136 Mo. 644, 38 S. W. 719; State *v.* Weddington, 103 N. C. 364, 9 S. E. 577); or a remark that the prosecution could not compel the accused to state the whole of a certain conversation (Com. *v.* Taylor, 129 Pa. St. 534, 18 Atl. 558) is not a comment upon the failure of the accused to testify which violates the statute.

A statute which contains no express restrictions upon commenting on the failure of the accused to testify does not by implication prohibit the prosecuting attorney from commenting upon his silence and refusal to take the witness stand where the accusation against him may be disproved by his own oath as a witness. The jury will draw an inference of his guilt from his silence, even though it may not be commented upon, and, although his silence ought not to affect him where his testimony would only be a general denial of guilt, and should not then be commented upon, where the state proves his act, which he may disprove, if untrue, his silence may be commented upon with the strictest regard to his rights. Parker *v.* State, 62 N. J. L. 801, 45 Atl. 1092.

Comments addressed to the court.— A remark commenting on the failure of the accused to testify is error under the statute forbidding any such comment "during the trial," whether it is addressed to the court or to the jury, and whether defendant was prejudiced or not. State *v.* Ryan, 70 Iowa 154, 30 N. W. 397.

Comments by court.— A statute which forbids counsel to comment on the failure of the accused to testify does not prohibit the court from alluding to the fact, or from explaining defendant's right in that respect. Burks *v.* State, (Tex. Cr. App. 1900) 55 S. W. 824.

The word "comment" does not mean to criticize or condemn or anathematize the accused on his failure to testify. The statute forbids in unmistakable language any comment friendly or unfriendly. It forbids any remark, of any character, in any words, upon the failure of the accused to testify. The attention of the jury is not to be called to the fact at all by counsel. Yarbrough *v.* State, 70 Miss. 593, 12 So. 551.

91. *Colorado.*— Solander *v.* People, 2 Colo. 48.

Indian Territory.— Williams *v.* U. S., (1902) 69 S. W. 871.

Kansas.— State *v.* Glave, 51 Kan. 330, 33 Pac. 8.

Massachusetts.— Com. *v.* McConnell, 162 Mass. 499, 39 N. E. 107.

Missouri.— State *v.* Walker, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; State *v.* Anderson, 89 Mo. 312, 1 S. W. 135; State *v.* Testerman, 68 Mo. 408.

Nebraska.— Heldt *v.* State, 20 Nebr. 492, 30 N. W. 626, 57 Am. Rep. 835; Comstock *v.* State, 14 Nebr. 205, 15 N. W. 355.

Nevada.—State *v.* Harrington, 12 Nev. 125.

Texas.— Mirando *v.* State, (Cr. App. 1899) 50 S. W. 714.

Washington.— State *v.* Ulsemer, 24 Wash. 657, 64 Pac. 800; State *v.* Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888.

See 14 Cent. Dig. tit. "Criminal Law," § 1672.

ute prohibiting counsel from commenting on the failure of the accused to testify in his own behalf does not apply even in a case where he is a witness for himself but fails to testify to material matters.[92]

(IX) *On Failure to Produce Witnesses.* While many cases hold that it is not error for the prosecuting attorney to comment on the failure of the accused to produce certain witnesses, where such witnesses if produced would be competent to testify,[93] no comment should be allowed on the absence of a witness not shown to be competent.[94] So it is prejudicial error entitling defendant to be granted a new trial to allow counsel for the prosecution to comment in his argu-

In those states where accused is subject to cross-examination only as to matters testified to on his direct examination, the prosecution cannot comment upon his silence on cross-examination as to matters not touched upon in the direct examination. People *v.* Sanders, 114 Cal. 216, 46 Pac. 153; People *v.* McGungill, 41 Cal. 429; State *v.* Elmer, 115 Mo. 401, 22 S. W. 369.

92. *Alabama.*— Cotton *v.* State, 87 Ala. 103, 6 So. 372.

Arkansas.— Lee *v.* State, 56 Ark. 4, 19 S. W. 16.

Maryland.—Brashears *v.* State, 58 Md. 563.

Minnesota.— State *v.* Staley, 14 Minn. 105.

New York.— Stover *v.* People, 56 N. Y. 315.

Texas.— McFadden *v.* State, 28 Tex. App. 241, 14 S. W. 128.

See 14 Cent. Dig. tit. "Criminal Law," § 1672.

A statement in the opening of the prosecuting attorney, intimating that defendant may not testify, although not within the letter of the statute, is a violation of its spirit, and a remark in the opening would doubtless do the accused as much harm as though in the closing argument. Coleman *v.* State, 111 Ind. 563, 13 N. E. 105.

93. *Kansas.*— State *v.* Yordi, 30 Kan. 221, 2 Pac. 161.

Massachusetts.—Com. *v.* McCabe, 163 Mass. 98, 39 N. E. 777; Com. *v.* Clark, 14 Gray 367.

Missouri.— State *v.* Mathews, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135; State *v.* Emory, 12 Mo. App. 593.

North Carolina.— State *v.* Jones, 77 N. C. 520.

Ohio.— McGuire *v.* State, 2 Ohio Cir. Dec. 318.

Oregon.— State *v.* Mims, 36 Oreg. 315, 61 Pac. 888.

Texas.—Hawkins *v.* State, (Cr. App. 1903) 71 S. W. 756; Richardson *v.* State, (Cr. App. 1902) 70 S. W. 320; Mayes *v.* State, 33 Tex. Cr. 33, 24 S. W. 421; Jackson *v.* State, 31 Tex. Cr. 342, 20 S. W. 921; Crumes *v.* State, 28 Tex. App. 516, 13 S. W. 868.

United States.— U. S. *v.* Candler, 65 Fed. 308.

See 14 Cent. Dig. tit. "Criminal Law," § 1673.

A comment that defendant has failed to subpœna a witness who might reasonably have been expected to be favorable to him and who is called by the state is not error. State *v.* Kiger, 115 N. C. 746, 20 S. E. 456.

A comment that defendant has introduced no witnesses to account for his whereabouts during the period within which the crime must have been committed is proper. State *v.* Costner, 127 N. C. 566, 37 S. E. 326, 80 Am. St. Rep. 809.

Where a motion for a continuance has been made by the defendant on the ground of the absence of witnesses, the failure to call such witnesses after their subsequent appearance cannot be commented on by the prosecution as an evidence of guilt. Blackman *v.* State, 78 Ga. 592, 3 S. E. 418.

Where a witness is equally accessible to both parties, one side cannot comment upon the failure of the other to call him. Brock *v.* State, 123 Ala. 24, 26 So. 329; Crawford *v.* State, 112 Ala. 1, 21 So. 214; State *v.* Fitzgerald, 68 Vt. 125, 34 Atl. 429. See also Ethridge *v.* State, 124 Ala. 106, 27 So. 320.

Where defendant's counsel comments on the failure of the prosecuting attorney to fulfil a promise made to produce certain witnesses, the latter may in closing reply to the comments and explain the absence of the witnesses. Blake *v.* People, 73 N. Y. 586.

Presumption from failure to call witnesses. — But the failure to call witnesses cannot be adduced as a circumstance creating a presumption of law that they if called would have testified unfavorably to the accused. The absence of the witnesses is merely a fact from which the jury may with other facts infer guilt. See *supra*, XII, A, 2, b.

94. Knox *v.* State, 112 Ga. 373, 37 S. E. 416. Thus as one jointly indicted cannot be a witness for defendant, failure to produce him cannot be commented upon. Coppin *v.* State, 123 Ala. 58, 26 So. 333; Brock *v.* State, 123 Ala. 24, 26 So. 329; Landers *v.* State, (Tex. Cr. App. 1901) 63 S. W. 557. So where the wife of defendant is not a competent witness for him, commenting upon his failure to produce her is reversible error. Johnson *v.* State, 63 Miss. 313; State *v.* Hatcher, 29 Oreg. 309, 44 Pac. 584; Graves *v.* U. S., 150 U. S. 118, 14 S. Ct. 40, 37 L. ed. 1021; Reg. *v.* Corby, 30 Nova Scotia 330. The rule is otherwise where she is competent. State *v.* Millmeier, 102 Iowa 692, 72 N. W. 275; People *v.* Hovey, 92 N. Y. 554; Com. *v.* Weber, 167 Pa. St. 153, 31 Atl. 481; Smith *v.* State, (Tex. Cr. App. 1901) 65 S. W. 186; Armstrong *v.* State, 34 Tex. Cr 248, 30 S. W. 235; Hall *v.* State, (Tex. Cr. App. 1893) 22 S. W. 141; Mercer *v.* State, 17 Tex. App. 452.

ment to the jury upon the failure of defendant to offer evidence of his previous good character.[95]

(x) *On Other Crimes by Accused.* Statements by the prosecuting attorney that the accused has committed other crimes besides that for which he is on trial constitute error,[96] unless there is evidence on the record from which the jury may infer the commission of such crimes by him.[97]

(xi) *On Right to Appeal.* It is error for the prosecuting attorney to say that if the accused is wrongfully convicted he has a right to appeal and that he would receive a new trial,[98] where objection to such remark is promptly made.[99]

(xii) *On Conduct or Character of Accused.* The conduct of the accused and his counsel during the trial,[1] the appearance of the accused while he was testifying,[2] or the fact that he stood mute when arraigned[3] may be commented on without error. It is error, however, for the prosecuting attorney, where accused offers no evidence of character, to comment unfavorably on his character,[4] to

95. *Georgia.*— Thompson *v.* State, 92 Ga. 448, 17 S. E. 265; Bennett *v.* State, 86 Ga. 401, 12 S. E. 806, 22 Am. St. Rep. 465, 12 L. R. A. 449.

Indiana.— Davis *v.* State, 138 Ind. 11, 37 N. E. 397; Fletcher *v.* State, 49 Ind. 124, 19 Am. Rep. 673.

Maine.— State *v.* Tozier, 49 Me. 404; State *v.* Upham, 38 Me. 261. But see State *v.* McAllister, 24 Me. 139.

Michigan.— People *v.* Evans, 72 Mich. 367, 40 N. W. 473.

Texas.— Pollard *v.* State, 33 Tex. Cr. 197, 26 S. W. 70. But see Coyle *v.* State, 31 Tex. Cr. 604, 21 S. W. 765.

See 14 Cent. Dig. tit. "Criminal Law," § 1673.

Contra.— State *v.* Davis, 3 Pennew. (Del.) 220, 50 Atl. 99.

Such argument made over objection, with the consent of the court, in effect destroys the presumption in favor of the accused, and allows the jury to infer that his character is bad, because he has not produced proof to the contrary. McKnight *v.* U. S., 97 Fed. 208, 38 C. C. A. 115.

96. *Arkansas.*— Bennett *v.* State, 62 Ark. 516, 36 S. W. 947.

Indiana.— Heyl *v.* State, 109 Ind. 589, 10 N. E. 916.

Mississippi.— Long *v.* State, 81 Miss. 448, 33 So. 224.

Missouri.— State *v.* Good, 46 Mo. App. 515.

Texas.— Hamilton *v.* State, 40 Tex. Cr. 464, 51 S. W. 217; Rahm *v.* State, 30 Tex. App. 310, 17 S. W. 416, 28 Am. St. Rep. 911; Taylor *v.* State, 27 Tex. App. 463, 11 S. W. 462.

Wisconsin.— Sasse *v.* State, 68 Wis. 530, 32 N. W. 849.

United States.— Hall *v.* U. S., 150 U. S. 76, 14 S. Ct. 22, 37 L. ed. 1003.

See 14 Cent. Dig. tit. "Criminal Law," § 1675.

But see Com. *v.* Hanlon, 8 Phila. (Pa.) 423; State *v.* Robertson, 26 S. C. 117, 1 S. E. 443.

If the remark of the prosecuting attorney is censured by the court, and the jury are instructed to disregard it, it may not be sufficient ground for a new trial. State *v.* McCool, 34 Kan. 617, 9 Pac. 745.

97. People *v.* Sanders, 114 Cal. 216, 46 Pac. 153; Spahn *v.* People, 137 Ill. 538, 27 N. E. 688; Boyle *v.* State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218; People *v.* Kindra, 102 Mich. 147, 60 N. W. 458.

98. State *v.* Biggerstaff, 17 Mont. 510, 43 Pac. 709; Brazell *v.* State, 33 Tex. Cr. 333, 26 S. W. 723; Crow *v.* State, 33 Tex. Cr. 264, 26 S. W. 209. But see Moore *v.* State, (Tex. Cr. App. 1894) 28 S. W. 686, holding that such a statement made in answer to an argument of defendant's counsel and in a case where the evidence against the accused is positive is not error.

99. Boone *v.* People, 148 Ill. 440, 36 N. E. 99.

A remark that the state has no appeal if accused is acquitted is not error. State *v.* Emery, 76 Mo. 348.

1. Inman *v.* State, 72 Ga. 269; Norris *v.* State, (Tex. Cr. App. 1901) 64 S. W. 1044; Thomson *v.* State, (Tex. Cr. App. 1898) 44 S. W. 837.

2. Huber *v.* State, 57 Ind. 341, 26 Am. Rep. 57.

Remarks on the personal appearance of the accused, not as a witness nor on account of his manner and bearing as such, are not permissible (Bessette *v.* State, 101 Ind. 85), but merely calling the jury's attention to the prisoner without intimating that he has a bad or guilty look is not reversible error where it does not appear that he was prejudiced thereby (State *v.* Bokien, 14 Wash. 403, 44 Pac. 889).

3. Leonard *v.* State, 20 Tex. App. 442.

4. *California.*— People *v.* Smith, 134 Cal. 453, 66 Pac. 669.

Indiana.— Cluck *v.* State, 40 Ind. 263; Magnuson *v.* State, 13 Ind. App. 303, 41 N. E. 545.

Iowa.— State *v.* Winter, 72 Iowa 627, 34 N. W. 475.

New York.— People *v.* Barker, 17 N. Y. Suppl. 16.

Texas.— Turner *v.* State, 39 Tex. Cr. 322, 45 S. W. 1020.

See 14 Cent. Dig. tit. "Criminal Law," § 1674.

Where the character of the accused is disclosed in the evidence, it is proper to permit it to be commented upon. Shular *v.* State,

impute to him a character for violence,[5] or where the evidence does not justify it to speak of him as a desperado,[6] or to intimate that he has tried to corrupt the jury.[7]

(XIII) *On Former Conviction For Same Offense.* It is reversible error for the prosecuting attorney in his argument to refer to a former verdict of conviction for the same offense,[8] and it is immaterial whether the reference be direct or indirect.[9]

e. Expression of Opinion as to Guilt. It is reversible error for the prosecuting attorney in his argument to the jury to declare his individual opinion or belief not expressly stated to be on the evidence that the accused is guilty,[10] or to state that defendant's counsel advised him to plead guilty.[11] He may, however, argue to the jury that the evidence in his opinion shows guilt[12] or that it convinces him

105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211; Simmerman *v.* State, 16 Nebr. 615, 21 N. W. 387; State *v.* Surles, 117 N. C. 720, 23 S. E. 324; Snodgrass *v.* Com., 89 Va. 679, 17 S. E. 238.

5. People *v.* Ah Len, 92 Cal. 282, 28 Pac. 286, 27 Am. St. Rep. 103; Cline *v.* State, (Tex. Cr. App. 1902) 71 S. W. 23.

6. State *v.* Foley, 12 Mo. App. 431.

Referring to the accused as a murderer or assassin in a murder trial is not error. Bishop *v.* Com., 109 Ky. 558, 60 S. W. 190, 22 Ky. L. Rep. 1161; State *v.* Griffin, 87 Mo. 608.

7. State *v.* Reilly, 4 Mo. App. 392; Weatherford *v.* State, 31 Tex. Cr. 530, 21 S. W. 251, 37 Am. St. Rep. 828.

8. Wells *v.* State, (Ark. 1891) 16 S. W. 577; State *v.* Clouser, 72 Iowa 302, 33 N. W. 686; State *v.* Leabo, 89 Mo. 247, 1 S. W. 288; Brantly *v.* State, 42 Tex. Cr. 293, 59 S. W. 892; Pickett *v.* State, (Tex. Cr. App. 1899) 51 S. W. 374; Hatch *v.* State, 8 Tex. App. 416, 34 Am. Rep. 751.

Similarly it is error to permit the district attorney to refer to the failure of the accused to use a witness on a former trial (Gann *v.* State, (Tex. Cr. App. 1900) 59 S. W. 896), to state the grounds on which the accused had been given a new trial (Johnson *v.* State, 42 Tex. Cr. 298, 59 S. W. 898), or to ask the jury to duplicate the verdict rendered at the former trial (Fuller *v.* State, 30 Tex. App. 559, 17 S. W. 1108). And it is improper to permit the prosecuting attorney to comment upon the fact that a change of venue has been awarded (State *v.* Phillips, 24 Mo. 475; State *v.* Carland, 90 N. C. 668; Shamburger *v.* State, 24 Tex. App. 433, 6 S. W. 540) or refused (McDonald *v.* People, 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547) the accused, or that he has asked for a continuance (State *v.* Baker, 23 Oreg. 441, 32 Pac. 161).

On a trial de novo from a justice's court the county attorney's statement that defendant was convicted in a justice's court is not improper. State *v.* Valure, 95 Iowa 401, 64 N. W. 280.

9. House *v.* State, 9 Tex. App. 567.

For an allusion to a prior conviction brought out by a remark of defendant's counsel see Shepherd *v.* State, 64 Ind. 43.

10. *Georgia.*— Broznack *v.* State, 109 Ga. 514, 35 S. E. 123.

Illinois.— Raggio *v.* People, 135 Ill. 533, 26 N. E. 377.

Indiana.— Jackson *v.* State, 116 Ind. 464, 19 N. E. 330.

Kentucky.— Howard *v.* Com., 110 Ky. 356, 61 S. W. 756, 22 Ky. L. Rep. 1845.

Louisiana.— State *v.* Mack, 45 La. Ann. 1155, 14 So. 141.

Michigan.— People *v.* Dane, 59 Mich. 550, 26 N. W. 781; People *v.* Quick, 58 Mich. 321, 25 N. W. 302.

Nebraska.—Reed *v.* State, (1902) 92 N. W. 321.

Ohio.— Gawn *v.* State, 7 Ohio Cir. Dec. 19.

Pennsylvania.—Com. *v.* Bubnis, 197 Pa. St. 542, 47 Atl. 748.

Texas.— Henry *v.* State, (Tex. Cr. App. 1895) 30 S. W. 802; Thomas *v.* State, 33 Tex. Cr. 607, 28 S. W. 534; Hardy *v.* State, (App. 1900) 13 S. W. 1008; Moore *v.* State, 21 Tex. App. 666, 2 S. W. 887.

Wisconsin.— Hardtke *v.* State, 67 Wis. 552, 30 N. W. 723.

Wyoming.— Ross *v.* State, 8 Wyo. 351, 57 Pac. 924.

United States.— Williams *v.* U. S., 168 U. S. 382, 18 S. Ct. 92, 42 L. ed. 509.

See 14 Cent. Dig. tit. "Criminal Law," § 1677.

Contra.— State *v.* Stark, 72 Mo. 37.

11. People *v.* Shanley, 49 N. Y. App. Div. 56, 63 N. Y. Suppl. 449, 14 N. Y. Cr. 477.

12. *Florida.*— Gray *v.* State, 42 Fla. 174, 28 So. 53.

Indiana.— Keesier *v.* State, 154 Ind. 242, 56 N. E. 232.

Iowa.— State *v.* Cater, 100 Iowa 501, 69 N. W. 880.

Michigan.— People *v.* Welch, 80 Mich. 616, 45 N. W. 482.

Texas.— Johnson *v.* State. (Cr. App. 1899) 53 S. W. 105; Mathews *v.* State, 41 Tex. Cr. 98, 51 S. W. 915; Davis *v.* State, 39 Tex. Cr. 681, 44 S. W. 1099. See also Moore *v.* State, (Cr. App. 1902) 70 S. W. 89.

Wisconsin.— Fertig *v.* State, 100 Wis. 301, 75 N. W. 960.

See 14 Cent. Dig. tit. "Criminal Law," § 1677.

of the guilt of the accused.[13] Such argument will not necessitate the granting of a new trial.

f. Appeals to Prejudice and Passion. The remarks of the prosecuting attorney which are injurious to the accused, in that they prejudice the minds of the jurors against him generally or specifically,[14] by referring to his wealth and social influence as contrasted with the poverty of the person injured,[15] to an alleged improper influence over the administration of justice by one of his family,[16] to the fact that a conviction of a lower crime will entail great expense on the county,[17] or by stating that he cares nothing for the expense entailed on the county by hanging the jury [18] are error.

g. Abusive Language. While the remarks of the prosecuting attorney which consist merely in personal abuse or villification of defendant and which therefore tend to arouse or inflame the passion and prejudice of the jury against him are error, where they are not based on any facts in proof,[19] the better rule [20] seems to be that if the facts are in evidence which prove or tend to prove that defendant is a bad character, it is not error for the prosecuting attorney to employ epithets, although abusive, in referring to him.[21]

13. State *v.* Beasley, 84 Iowa 83, 50 N. W. 570; People *v.* Hanifan, 98 Mich. 32, 56 N. W. 1048; People *v.* Hess, 85 Mich. 128, 48 N. W. 181.

For the same reason a statement to the jury that "you must do your duty by hanging this man, and the government will not be satisfied with any verdict less than the death penalty" (Bias *v.* U. S., 3 Indian Terr. 27, 53 S. W. 471), or to the effect that the accused ought to be in jail (People *v.* McMahon, 124 Cal. 435, 57 Pac. 224), or that defendant was "either guilty of murder in the first degree or not guilty" (Williams *v.* State, (Ark. 1891) 16 S. W. 816) is not error.

14. **It is not error, however, to state that** a verdict of acquittal is equivalent to a finding that the prosecuting witness is a perjurer (Carter *v.* State, 107 Ala. 146, 18 So. 232; State *v.* Johnson, 48 La. Ann. 87, 19 So. 213), or to demand that the accused should be hung rather than imprisoned, as in the latter case he could be pardoned (McNeill *v.* State, 102 Ala. 121, 15 So. 352, 48 Am. St. Rep. 17).

15. Lane *v.* State, 85 Ala. 11, 4 So. 730; People *v.* Montague, 71 Mich. 447, 39 N. W. 585.

16. McDonald *v.* People, 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547; People *v.* Fielding, 158 N. Y. 542, 53 N. E. 497, 70 Am. St. Rep. 495, 46 L. R. A. 641 [*affirming* 36 N. Y. App. Div. 401, 55 N. Y. Suppl. 530].

17. State *v.* Warford, 106 Mo. 55, 16 S. W. 886, 27 Am. St. Rep. 322.

18. Davis *v.* State, (Tex. Cr. App. 1900) 55 S. W. 340.

19. *Indian Territory.*— Bradburn *v.* U. S., 3 Indian Terr. 604, 64 S. W. 550.

Iowa.— State *v.* Proctor, 86 Iowa 698, 53 N. W. 424.

Kansas.— State *v.* Comstock, 20 Kan. 650.

Kentucky.— Rhodes *v.* Com., 107 Ky. 354, 54 S. W. 170, 21 Ky. L. Rep. 1070, 92 Am. St. Rep. 360.

Michigan.— People *v.* Payne, (1902) 91 N. W. 739; People *v.* Conley, 106 Mich. 424, 64 N. W. 325; People *v.* Winslow, 39 Mich. 505.

Mississippi.—Martin *v.* State, 63 Miss. 505, 56 Am. Rep. 813.

Missouri.— State *v.* Prendible, 165 Mo. 329, 65 S. W. 559; State *v.* Fischer, 124 Mo. 460, 27 S. W. 1109; State *v.* Ulrich, 110 Mo. 350, 19 S. W. 656; State *v.* Young, 99 Mo. 666, 12 S. W. 879.

North Carolina.— State *v.* Rogers, 94 N. C. 860; State *v.* Underwood, 77 N. C. 502; State *v.* Smith, 75 N. C. 306.

Pennsylvania.— Com. *v.* Bruner, 11 Pa. Co. Ct. 428.

Tennessee.— Turner *v.* State, 4 Lea 206.

Texas.— Patterson *v.* State, (Cr. App. 1901) 60 S. W. 557; Parks *v.* State, 35 Tex. Cr. 378, 33 S. W. 872; Stone *v.* State, 22 Tex. App. 185, 2 S. W. 585; Crawford *v.* State, 15 Tex. App. 501.

See 14 Cent. Dig. tit. "Criminal Law," § 1679.

The application of abusive epithets to defendant in the opening, in advance of any evidence from which disparaging inferences may be drawn, is highly improper and ought to be checked, but may not be of sufficient importance to constitute error. Anderson *v.* State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711.

20. **Even where there is some evidence** tending to justify the abusive language it is held in some of the cases that such language is improper and erroneous. Earll *v.* People, 99 Ill. 123; State *v.* Baker, 57 Kan. 541, 46 Pac. 947; Cargill *v.* Com., (Ky. 1890) 13 S. W. 916; People *v.* Kahler, 93 Mich. 625, 53 N. W. 826. And see State *v.* Bobbst, 131 Mo. 328, 32 S. W. 1149.

21. *Arkansas.*— Henshaw *v.* State, 67 Ark. 365, 55 S. W. 157.

California.— People *v.* Wheeler, 65 Cal. 77, 2 Pac. 892.

Missouri.— State *v.* Gartrell, 171 Mo. 489, 71 S. W. 1045; State *v.* Hibler, 149 Mo. 478, 51 S. W. 85; State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330; State *v.* Goodman, 78 Mo. App. 224.

h. Instructing Jury in Their Duty. Remarks of the prosecuting attorney to the jury, which by appealing either to their fears or their vanity tend to coerce or cajole them into a verdict of conviction, are error.[22] He may legitimately appeal to them to do their full duty in enforcing the law,[23] and may tell them that the people look to them for protection against crime,[24] and, although it is improper for him to state that if juries do not punish the crime the people will do so by vigilance committees or other unlawful means, it is not error.[25]

i. Remarks Provoked by Opponent. Remarks of the prosecuting attorney which ordinarily would be improper are not ground for exception if they are provoked by defendant's counsel and are in reply to his statements.[26]

Pennsylvania.— Com. *v.* Sarves, 17 Pa. Super. Ct. 407.

Texas.— Moore *v.* State, (Cr. App. 1902) 70 S. W. 89.

See 14 Cent. Dig. tit. "Criminal Law," § 1679.

For example stating that defendant was a seller of liquors in a dive (State *v.* McLaughlin, 149 Mo. 19, 50 S. W. 315), that he was of no account, and ought to be in the penitentiary (Patterson *v.* State, (Tex. Cr. App. 1900) 56 S. W. 59), that he was a tramp (Anderson *v.* State, 147 Ind. 445, 46 N. E. 901; Murphy *v.* State, 108 Wis. 111, 83 N. W. 1112), a self-confessed thief (Haupt *v.* State, 108 Ga. 53, 34 S. E. 313, 75 Am. St. Rep. 19), or an infamous scoundrel (State *v.* Summar, 143 Mo. 220, 45 S. W. 254) was held proper where the evidence justified the characterization.

A violent assault by defendant upon the prosecuting attorney while addressing the jury, creating great confusion and excitement, justifies the use of abusive language by the attorney, and a charge of attempting to assassinate him. Eanes *v.* State, 10 Tex. App. 421.

22. Bessette *v.* State, 101 Ind. 85; People *v.* Ecarius, 124 Mich. 616, 83 N. W. 628; People *v.* Mull, 167 N. Y. 247, 60 N. E. 629; Hudson *v.* State, (Tex. Cr. App. 1902) 70 S. W. 764; Fredericson *v.* State, (Tex. Cr. App. 1902) 70 S. W. 754.

23. State *v.* John, (Iowa 1903) 93 N. W. 61; Howard *v.* Com., 70 S. W. 295, 24 Ky. L. Rep. 950; Arnold *v.* Com., 55 S. W. 894, 21 Ky. L. Rep. 1566; State *v.* Jefferson, 43 La. Ann. 995, 10 So. 199; State *v.* Zumbunson, 86 Mo. 111.

24. Brown *v.* State, 121 Ala. 9, 25 So. 744; State *v.* Mallon, 75 Mo. 355; Johnson *v.* State, (Tex. Cr. App. 1899) 50 S. W. 343.

Defendant's counsel may impress upon the jury their duty to acquit if guilt is not proved and that if asked by their neighbors or friends why they did so it would be enough to say that guilt was not proved. Com. *v.* Brownell, 145 Mass. 319, 14 N. E. 108.

25. Sanders *v.* People, 124 Ill. 218, 16 N. E. 81; Ferguson *v.* State, 49 Ind. 33; State *v.* Jackson, 95 Mo. 623, 8 S. W. 749; Northington *v.* State, 14 Lea (Tenn.) 424; Scott *v.* State, 7 Lea (Tenn.) 232.

26. *Alabama.*— Dollar *v.* State, 99 Ala. 236, 13 So. 575.

Arkansas.— Woodruff *v.* State, 61 Ark. 157, 32 S. W. 102.

California.— People *v.* Philbow, 138 Cal. 530, 71 Pac. 650; People *v.* Bush, 68 Cal. 623, 10 Pac. 169.

Indiana.— Reeves *v.* State, 84 Ind. 116.

Kentucky.— Parrott *v.* Com., 47 S. W. 452, 20 Ky. L. Rep. 761.

Michigan.—People *v.* Smith, 106 Mich. 431, 64 N. W. 200.

Missouri.— State *v.* Taylor, 134 Mo. 109, 35 S. W. 92; State *v.* Anderson, 126 Mo. 542, 29 S. W. 576.

Texas.—Jones *v.* State, (Cr. App. 1903) 71 S. W. 962; Cleland *v.* State, (Cr. App. 1901) 65 S. W. 189; Vincent *v.* State, (Cr. App. 1900) 55 S. W. 819; Martin *v.* State, 41 Tex. Cr. 242, 53 S. W. 849; Wilson *v.* State, 41 Tex. Cr. 179, 53 S. W. 122; Gaines *v.* State, (Cr. App. 1896) 37 S. W. 331; Ray *v.* State, 35 Tex. Cr. 354, 33 S. W. 869; Campbell *v.* State, 35 Tex. Cr. 160, 32 S. W. 774; Sinclair *v.* State, 35 Tex. Cr. 130, 32 S. W. 531; Williams *v.* State, 24 Tex. App. 32, 5 S. W. 658; Smith *v.* State, 21 Tex. App. 277, 17 S. W. 471.

West Virginia.—State *v.* Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

Wisconsin.— Barczynski *v.* State, 91 Wis. 415, 64 N. W. 1026.

See 14 Cent. Dig. tit. "Criminal Law," § 1681.

Contra.— State *v.* Goode, 132 N. C. 982, 43 S. E. 502, where the statement by the prosecuting attorney in reply was not sustained by any evidence.

Where counsel for accused goes outside of the evidence and charges the prosecuting attorney with suppressing evidence (Siberry *v.* State, 133 Ind. 677, 33 N. E. 681), with conducting the prosecution for personal reasons (Champion *v.* State, 9 Ohio Cir. Ct. 627), or, where, after a change of venue, he refers to the fact that defendant was on trial among and before strangers (Williams *v.* State, 30 Tex. App. 354, 17 S. W. 408), or states without any attempt at proof that defendant has a good record (People *v.* Oblaser, 104 Mich. 579, 62 N. W. 732) or a good character (Barkman *v.* State, 41 Tex. Cr. 105, 52 S. W. 73), or comments favorably upon defendant's personal appearance (State *v.* Underwood, 77 N. C. 502; Pierson *v.* State, 21 Tex. App. 14, 17 S. W. 468), or refers to certain evidence excluded on his objection, saying that the prosecution was afraid to use it (Chalk *v.* State, 35 Tex. Cr. 116, 32 S. W. 534), or alleges that a government witness and not defendant is guilty (Crumpton *v.*

5. Argument Upon Law of Case — a. In General. Counsel may, even where the jury must accept the law as laid down to them in the judge's charge, refer to and explain the law of the case in his argument,[27] and he may with better reason do this where the jury determine both the law and the facts.[28]

b. Reading Reports and Text-Books. Where by statute the jury determine both the law and the facts, it is proper to permit counsel to read to them judicial opinions.[29] It has also been held that while the practice is not to be commended, the court may permit counsel in cases where the jury is bound to take the law from the court to read extracts from the opinions in reported cases bearing upon the law of the case,[30] but not the facts in the opinion.[31] The statute under which the prosecution is had may be read, although it is not in evidence.[32] As a general

U. S., 138 U. S. 361, 11 S. Ct. 355, 34 L. ed. 978), or attempts to excite sympathy for the family of the accused (Furlow *v.* State, 41 Tex. Cr. 12, 51 S. W. 938), the prosecuting attorney may also go outside the record in replying to the improper remarks of opposing counsel. *Contra*, Hodgkins *v.* State, 89 Ga. 761, 15 S. E. 695. The frequency and character of the objections made by counsel for the accused may also be commented on by the prosecuting attorney. State *v.* Comstock, 20 Kan. 650; State *v.* Edie, 147 Mo. 535, 49 S. W. 563.

Permitting defendant to reply.— It is within the discretion of the court to refuse to permit counsel for defendant to reply to improper remarks by the prosecuting attorney, and the refusal will benefit the accused as much as a reply, which, being granted by the court, would convey to the minds of the jury that the judge conceded the correctness of the prosecuting attorney's comments. State *v.* Garig, 43 La. Ann. 365, 8 So. 934. But where the prosecuting attorney in his opening address comments on evidence which is never introduced, the error is not waived by the fact that defendant's counsel makes an elaborate reply to the improper argument. State *v.* Williams, 63 Iowa 135, 18 N. W. 682.

27. *Alabama.*— McQueen *v.* State, 103 Ala. 12, 15 So. 824.

Georgia.— Warmock *v.* State, 56 Ga. 503.

Massachusetts.— Com. *v.* Porter, 10 Metc. 263.

Nebraska.— McLain *v.* State, 18 Nebr. 154, 24 N. W. 720.

Tennessee.— Hannah *v.* State, 11 Lea 201.

See 14 Cent. Dig. tit. "Criminal Law," § 1682.

28. Stout *v.* State, 96 Ind. 407; Lynch *v.* State, 9 Ind. 541.

It is improper for counsel to argue immaterial questions of law not within the issue (State *v.* McCort, 23 La. Ann. 326), or, where the court determines the law, to argue against the rules laid down by the instructions (People *v.* Montague, 71 Mich. 447, 39 N. W. 585; U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441).

It is proper for the court to inform the jury that the reading of authorities by counsel is a part of the argument and not evidence. Harvey *v.* State, 40 Ind. 516.

29. Wohlford *v.* People, 148 Ill. 296, 36 N. E. 107 [*affirming* 45 Ill. App. 188]; Stout *v.* State, 96 Ind. 407.

A constitutional provision that the jury shall be judges of the law does not authorize them to pass on the constitutionality of a statute, or authorize counsel to argue such question before them. Franklin *v.* State, 12 Md. 236.

30. *Alabama.*— Askew *v.* State, 94 Ala. 4, 10 So. 657, 33 Am. St. Rep. 83; Stewart *v.* State, 78 Ala. 436.

Arkansas.— Cline *v.* State, 51 Ark. 140, 10 S. W. 225; Curtis *v.* State, 36 Ark. 284; Edmonds *v.* State, 34 Ark. 720; Winkler *v.* State, 32 Ark. 539.

California.— People *v.* Forsythe, 65 Cal. 101, 3 Pac. 402; People *v.* Anderson, 44 Cal. 65.

Missouri.— State *v.* Klinger, 46 Mo. 224.

Montana.— Territory *v.* Hart, 7 Mont. 42, 14 Pac. 768.

Texas.— Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 358; Phipps *v.* State, 36 Tex. Cr. 216, 36 S. W. 753; Forbes *v.* State, 35 Tex. Cr. 24, 29 S. W. 784; Hines *v.* State, 3 Tex. App. 483; Dempsey *v.* State, 3 Tex. App. 429, 30 Am. Rep. 148.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1682, 1687.

Counsel may state his conclusions as to what is proved by the evidence in the light of the opinions read. State *v.* Hoyt, 46 Conn. 330; Klepfer *v.* State, 121 Ind. 491, 23 N. E. 287.

On a second trial in a lower court it is not error to forbid counsel to read to the jury the opinion of the appellate court delivered on an appeal from a former trial (Croom *v.* State, 90 Ga. 430, 17 S. E. 1003; Bangs *v.* State, 61 Miss. 363; State *v.* Smallwood, 73 N. C. 560; Vernon *v.* State, (Tex. Cr. App. 1895) 33 S. W. 364; Dempsey *v.* State, 3 Tex. App. 429, 30 Am. Rep. 148), particularly where a statute provides that on a new trial a former conviction may not be alluded to in the argument (Guest *v.* State, 24 Tex. App. 530, 7 S. W. 242).

Refusing to allow counsel for defendant to read to the jury a decision of the supreme court is not error. State *v.* Neel, 23 Utah 541, 65 Pac. 494.

31. Williams *v.* State, 83 Ala. 68, 3 So. 743; State *v.* Wait, 44 Kan. 310, 24 Pac. 354.

32. Com. *v.* Hill, 145 Mass. 305, 14 N. E. 124; Com. *v.* Austin, 7 Gray (Mass.) 51;

rule it is not improper to permit legal text-books of approved authority to be read in argument,[33] although this matter is so much in the judicial discretion that refusing defendant's counsel the privilege is not error.[34]

c. Misstating Law. It is reversible error for the prosecuting attorney in argument to misstate the law, where objection is promptly made,[35] and the court may at any time[36] interrupt counsel to correct his statement of the law or may do so in the charge.[37]

d. Argument After Ruling by Court. It is proper for the court to refuse to permit counsel to argue upon the law to the jury, where it has already ruled upon it.[38]

6. Objections and Exceptions, and Withdrawal or Correction of Improper Matter — a. Time of Objections. Objections to improper remarks of the prosecuting attorney in his closing argument to the jury should be promptly made as soon as the improper remarks are uttered. Such objections come too late to be available to the accused if made after the counsel is through speaking,[39] after

People *v.* Ringsted, 90 Mich. 371, 51 N. W. 519; State *v.* Dent, 170 Mo. 398, 70 S. W. 881; State *v.* Morse, 66 Mo. App. 303; State *v.* Sartor, 2 Strobh. (S. C.) 60.

33. *Arkansas.*— Winkler *v.* State, 32 Ark. 539.

California.— People *v.* Treadwell, 69 Cal. 226, 10 Pac. 502.

Georgia.— Jones *v.* State, 65 Ga. 506.

Indiana.— Harvey *v.* State, 40 Ind. 516.

Kentucky.— Crane *v.* Com., 1 S. W. 880, 8 Ky. L. Rep. 515.

Texas.— Lott *v.* State, 18 Tex. App. 627.

See 14 Cent. Dig. tit. "Criminal Law," § 1682.

34. *Alabama.*— Yarbrough *v.* State, 105 Ala. 43, 16 So. 758.

Georgia.— Solomon *v.* State, 100 Ga. 81, 25 S. E. 847.

Massachusetts.—Com. *v.* Murphy, 10 Gray 1.

Missouri.— State *v.* Jones, 153 Mo. 457, 55 S. W. 80; State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113; State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330.

Texas.— Ogden *v.* State, (Cr. App. 1900) 58 S. W. 1018; Vincent *v.* State, (Cr. App. 1900) 55 S. W. 819; Collins *v.* State, 20 Tex. App. 399.

See 14 Cent. Dig. tit. "Criminal Law," § 1687.

Opposing counsel may in reply read what other jurists have written on the same question. Palmer *v.* People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146.

35. Springfield *v.* State, 96 Ala. 81, 11 So. 250, 38 Am. St. Rep. 85; State *v.* Proctor, 86 Iowa 698, 53 N. W. 424; People *v.* Lange, 90 Mich. 454, 51 N. W. 534; State *v.* Young, 99 Mo. 666, 12 S. W. 879; State *v.* Mahly, 68 Mo. 315; State *v.* Erb, 9 Mo. App. 589.

36. Harrison *v.* State, 78 Ala. 5; Coleman *v.* Com., 25 Gratt. (Va.) 865, 18 Am. Rep. 711.

37. Powell *v.* State, 65 Ga. 707; McMath *v.* State, 55 Ga. 303.

38. *Arkansas.*— Edwards *v.* State, 22 Ark. 253.

Kansas.— State *v.* O'Neil, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555.

Kentucky.— Bates *v.* Com., 16 S. W. 528, 13 Ky. L. Rep. 132; McDowell *v.* Com., 4 Ky. L. Rep. 353.

Mississippi.— Ayers *v.* State, 60 Miss. 709.

Missouri.— State *v.* Reed, 71 Mo. 200.

Texas.— Smith *v.* State, 21 Tex. App. 277, 17 S. W. 471.

Virginia.— Dejarnette *v.* Com., 75 Va. 867; Davenport *v.* Com., 1 Leigh 588.

United States.— U. S. *v.* Columbus, 25 Fed. Cas. No. 14,841, 5 Cranch C. C. 304; U. S. *v.* Cottom, 25 Fed. Cas. No. 14,873, 1 Cranch C. C. 55; U. S. *v.* Fenwick, 25 Fed. Cas. No. 15,086, 4 Cranch C. C. 675; U. S. *v.* Stockwell, 27 Fed. Cas. No. 16,405, 4 Cranch C. C. 671; Virginia *v.* Zimmerman, 28 Fed. Cas. No. 16,968, 1 Cranch C. C. 47.

See 14 Cent. Dig. tit. "Criminal Law," § 1685.

39. *Georgia.*—Von Pollnitz *v.* State, 92 Ga. 16, 18 S. E. 301, 44 Am. St. Rep. 72; Dale *v.* State, 88 Ga. 552, 15 S. E. 287; Turner *v.* State, 70 Ga. 765; Davis *v.* State, 33 Ga. 98.

Louisiana.—State *v.* Hall, 44 La. Ann. 976, 11 So. 574; State *v.* Jefferson, 43 La. Ann. 995, 10 So. 199.

Massachusetts.—Com. *v.* Poisson, 157 Mass. 510, 32 N. E. 906.

Michigan.— People *v.* Roat, 117 Mich. 578, 76 N. W. 91.

Missouri.— State *v.* Dyson, 39 Mo. App. 297.

Nebraska.— Parker *v.* State, (1903) 93 N. W. 1037; Reed *v.* State, (1902) 92 N. W. 321.

Ohio.— Davis *v.* State, 20 Ohio Cir. Ct. 430, 10 Ohio Cir. Dec. 738.

Oregon.— State *v.* Hawkins, 18 Oreg. 476, 23 Pac. 475.

Pennsylvania.— Com. *v.* Windish, 176 Pa. St. 167, 34 Atl. 1019; Com. *v.* Mudgett, 174 Pa. St. 211, 34 Atl. 588 [*affirming* 4 Pa. Dist. 739]; Com. *v.* Weber, 167 Pa. St. 153, 31 Atl. 481.

Texas.— Drye *v.* State, (Cr. App. 1900) 55 S. W. 65; Gilmore *v.* State, 37 Tex. Cr. 178, 39 S. W. 105; Jones *v.* State, 33 Tex. Cr. 7, 23 S. W. 793; Norris *v.* State, 32 Tex. Cr. 172, 22 S. W. 592.

Vermont.— State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

the jury have rendered their verdict,[40] or on motion for a new trial after a judgment of conviction.[41]

b. Sufficiency of Objections. The defendant should make his objection publicly in court,[42] pointing out specifically the matter complained of as improper[43] in the argument, and promptly take exception to the failure of the trial judge to condemn it.[44]

c. Necessity For Request For Correction. Improper remarks in argument by the prosecuting attorney, although prejudicial, do not justify reversal, unless the court has been requested to instruct the jury to disregard them and has refused to do so.[45]

d. Withdrawal and Disregarding Objectionable Matter. Prompt action by the court in reprimanding the prosecuting attorney for making improper comments or statements, and an immediate verbal direction to the jury to disregard them, is usually sufficient to cure the error and avoid a reversal;[46] and this is particularly

See 14 Cent. Dig. tit. "Criminal Law," § 1689.

40. State *v.* Shreves, 81 Iowa 615, 47 N. W. 899; State *v.* Latimer, 116 Mo. 524, 22 S. W. 804; State *v.* Speaks, 94 N. C. 865; State *v.* Suggs, 89 N. C. 527; State *v.* Johnston, 88 N. C. 623; Puryear *v.* Com., 83 Va. 51, 1 S. E. 512; Price *v.* Com., 77 Va. 393.

41. Choen *v.* State, 85 Ind. 209; Kennedy *v.* Com., 14 Bush (Ky.) 340; State *v.* Forsythe, 89 Mo. 667, 1 S. W. 834; Harvey *v.* State, 35 Tex. Cr. 545, 34 S. W. 623; Watson *v.* State, 28 Tex. App. 34, 12 S. W. 404.

42. Farris *v.* Com., 14 Bush (Ky.) 362.

43. *Georgia.*— Herndon *v.* State, 111 Ga. 178, 36 S. E. 634.

Indiana.— Morrison *v.* State, 76 Ind. 335.

Mississippi.— Oden *v.* State, (1900) 27 So. 992.

North Carolina.— State *v.* Caveness, 78 N. C. 484.

Texas.— Lewis *v.* State, (Cr. App. 1901) 64 S. W. 240.

A general objection to an argument without calling the attention of the court to any particular feature complained of is insufficient and cannot be made specific for the first time on appeal. People *v.* Frigerio, 107 Cal. 151, 40 Pac. 107.

An exception to an order limiting the time for an argument must be accompanied by a showing that more time is necessary to a fair presentation of the case. Williams *v.* Com., 6 Ky. L. Rep. 764.

44. Wilson *v.* U. S., 149 U. S. 60, 13 S. Ct. 765, 37 L. ed. 650.

45. *Alabama.*— Ethridge *v.* State, 124 Ala. 106, 27 So. 320.

California.— People *v.* Shears, 134 Cal. 154, 65 Pac. 295.

Illinois.— Earll *v.* People, 99 Ill. 123.

Indiana.— Rains *v.* State, 137 Ind. 83, 36 N. E. 532; Brow *v.* State, 103 Ind. 133, 2 N. E. 296.

Kentucky.— Cardwell *v.* Com., 46 S. W. 705, 20 Ky. L. Rep. 496.

Massachusetts.— Com. *v.* Tripp, 157 Mass. 514, 32 N. E. 905.

Texas.— Pearl *v.* State, 43 Tex. Cr. 189, 63 S. W. 1013; Duckworth *v.* State, (Cr. App. 1901) 63 S. W. 874; Brown *v.* State, 42 Tex. Cr. 178, 58 S. W. 131; Smith *v.* State, (Cr. App. 1900) 58 S. W. 101; Hamilton *v.* State, 41 Tex. Cr. 599, 58 S. W. 93; Howell *v.* State, (Cr. App. 1900) 57 S. W. 835; Trotter *v.* State, 37 Tex. Cr. 468, 36 S. W. 278; Boutwell *v.* State, (Cr. App. 1896) 35 S. W. 376. But see Patterson *v.* State, (Cr. App. 1901) 60 S. W. 557.

Washington.— State *v.* Regan, 8 Wash. 506, 36 Pac. 472.

See 14 Cent. Dig. tit. "Criminal Law," § 1691.

Contra.— Berry *v.* State, 10 Ga. 511; State *v.* Gutekunst, 24 Kan. 252.

In some states a motion to discharge the jury (State *v.* Briscoe, 30 La. Ann. 433) or to withdraw the case from them (Croom *v.* State, 90 Ga. 430, 17 S. E. 1003) is proper.

In some cases this request must be made in writing and an exception saved both to the remarks and to the refusal of the request (Masterson *v.* State, (Tex. Cr. App. 1896) 34 S. W. 279), although an objection has been taken and a motion to strike out has been made (State *v.* O'Keefe, 23 Nev. 127, 43 Pac. 918, 62 Am. St. Rep. 768).

46. *Alabama.*— Downey *v.* State, 115 Ala. 108, 22 So. 479; Jefferson *v.* State, 110 Ala. 89, 20 So. 434; Hodge *v.* State, 97 Ala. 37, 12 So. 164, 38 Am. St. Rep. 145; Griffin *v.* State, 90 Ala. 596, 8 So. 670; Childress *v.* State, 86 Ala. 77, 5 So. 775.

Arkansas.— Redd *v.* State, 65 Ark. 475, 47 S. W. 119; Rogers *v.* State, 60 Ark. 76, 29 S. W. 894, 46 Am. St. Rep. 154, 31 L. R. A. 465; Holder *v.* State, 58 Ark. 473, 25 S. W. 279; Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885.

California.— People *v.* Ward, 134 Cal. 301, 66 Pac. 372; People *v.* Bene, 130 Cal. 159, 62 Pac. 404; People *v.* Sears, 119 Cal. 267, 51 Pac. 325. But see People *v.* Derbert, 138 Cal. 467, 71 Pac. 564.

Colorado.—Gilstrap *v.* People, 30 Colo. 265, 70 Pac. 325; Newby *v.* People, 28 Colo. 16, 62 Pac. 1035.

Florida.— Thalheim *v.* State, 38 Fla. 169, 20 So. 938.

Georgia.— Patton *v.* State, 117 Ga. 230, 43 S. E. 533; Dill *v.* State, 106 Ga. 683, 32 S. E. 660; Hudson *v.* State, 101 Ga. 520, 28 S. E.

true where the prosecuting attorney promptly withdraws the remark or explains away its effect.[47] But whether comments upon the failure of the accused to testify are cured by the prosecuting attorney withdrawing his remarks, or by the court instructing the jury to disregard them, the authorities are not harmonious. Many cases hold the affirmative,[48] although others hold that the error remains,

1010; Ficken *v.* State, 97 Ga. 813, 25 S. E. 925.

Illinois.— Henry *v.* People, 198 Ill. 162, 65 N. E. 120; Bolombo *v.* People, 182 Ill. 411, 55 N. E. 519; Bradshaw *v.* People, 153 Ill. 156, 38 N. E. 652; Palmer *v.* People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146.

Indiana.— Shenkenberger *v.* State, 154 Ind. 630, 57 N. E. 519; Grubb *v.* State, 117 Ind. 277, 20 N. E. 257; Waterman *v.* State, 116 Ind. 51, 18 N. E. 63.

Iowa.— State *v.* Davis, 110 Iowa 746, 82 N. W. 328; State *v.* Lee, 95 Iowa 427, 64 N. W. 284.

Kentucky.— Riggs *v.* Com., 103 Ky. 610, 45 S. W. 866, 20 Ky. L. Rep. 276; Delaney *v.* State, 35 S. W. 1037, 18 Ky. L. Rep. 210; Handly *v.* State, 24 S. W. 609, 15 Ky. L. Rep. 736; Taylor *v.* Com., 5 Ky. L. Rep. 240.

Louisiana.— State *v.* Thompson, 109 La. 296, 33 So. 320; State *v.* Briscoe, 30 La. Ann. 433.

Michigan.— People *v.* Swartz, 118 Mich. 219, 76 N. W. 491; People *v.* Pope, 108 Mich. 361, 66 N. W. 213; People *v.* Perriman, 72 Mich. 184, 40 N. W. 425.

Minnesota.— State *v.* Brown, 12 Minn. 538.

Missouri.— State *v.* Gartrell, 171 Mo. 489, 71 S. W. 1045; State *v.* McMullin, 170 Mo. 608, 71 S. W. 221; State *v.* Wright, 141 Mo. 333, 42 S. W. 934; State *v.* Hack, 118 Mo. 92, 23 S. W. 1089.

Montana.— State *v.* Bloor, 20 Mont. 574, 52 Pac. 611.

Nebraska.— Argabright *v.* State, 62 Nebr. 402, 87 N. W. 146; Hoover *v.* State, 48 Nebr. 184, 66 N. W. 1117.

New Hampshire.— State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38.

New Jersey.— State *v.* Hernia, 68 N. J. L. 299, 53 Atl. 85.

North Carolina.—State *v.* Kilgore, 93 N. C. 533.

Ohio.— Thurman *v.* State, 2 Ohio Cir. Dec. 466.

Oregon.— State *v.* McDaniel, 39 Oreg. 169, 65 Pac. 520; State *v.* Birchard, 35 Oreg. 484, 59 Pac. 468; State *v.* Moore, 32 Oreg. 65, 48 Pac. 468.

Pennsylvania.— Com. *v.* Greason, 204 Pa. St. 64, 53 Atl. 539.

Texas.— McMillan *v.* State, (Cr. App. 1902) 71 S. W. 279; Webb *v.* State, (Cr. App. 1902) 70 S. W. 954; Gossett *v.* State, (Cr. App. 1902) 70 S. W. 319; Mitchell *v.* State, (Cr. App. 1901) 62 S. W. 572; Henry *v.* State, (Cr. App. 1899) 54 S. W. 592; Monticue *v.* State, 40 Tex. Cr. 528, 51 S. W. 236; Alexander *v.* State, 40 Tex. Cr. 395, 49 S. W. 229, 50 S. W. 716; Morris *v.* State, 39 Tex. Cr. 391, 46 S. W. 253; Patrick *v.* State, (Cr. App. 1896) 33 S. W. 1078; White *v.* State, (Cr. App. 1895) 29 S. W. 476; Horton *v.* State, (Cr. App. 1893) 24 S. W. 28; Pierson *v.* State, 18 Tex. App. 524.

Washington.— State *v.* Manville, 8 Wash. 523, 36 Pac. 470.

United States.— Dunlop *v.* U. S., 165 U. S. 486, 17 S. Ct. 375, 41 L. ed. 799.

See 14 Cent. Dig. tit. "Criminal Law," § 1693.

47. *Georgia.*—Smalls *v.* State, 105 Ga. 669, 31 S. E. 571.

Indiana.— Siberry *v.* State, 133 Ind. 677, 33 N. E. 681; Drew *v.* State, 124 Ind. 9, 23 N. E. 1098.

Iowa.— State *v.* Sigler, 114 Iowa 408, 87 N. W. 283.

Kentucky.— Anderson *v.* Com., 35 S. W. 542, 18 Ky. L. Rep. 99.

Michigan.— People *v.* Hess, 85 Mich. 128, 48 N. W. 181.

Mississippi.— Bryant *v.* State, (1903) 33 So. 225; Cheatham *v.* State, 67 Miss. 335, 7 So. 204, 19 Am. St. Rep. 310.

Missouri.— State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113.

Montana.— State *v.* Gibbs, 10 Mont. 213, 25 Pac. 289, 10 L. R. A. 749.

New York.— People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188.

Tennessee.— State *v.* Robinson, 106 Tenn. 204, 61 S. W. 65.

Texas.— Dudley *v.* State, 40 Tex. Cr. 31, 48 S. W. 179; Kugadt *v.* State, 38 Tex. Cr. 381, 44 S. W. 989; Taylor *v.* State, (Cr. App. 1897) 42 S. W. 285.

Utah.— People *v.* Hopt, 4 Utah 247, 9 Pac. 407.

United States.— Kellogg *v.* U. S., 103 Fed. 200, 43 C. C. A. 179.

See 14 Cent. Dig. tit. "Criminal Law," § 1692.

48. *Colorado.*— Petite *v.* People, 8 Colo. 518, 9 Pac. 622.

Georgia.— Robinson *v.* State, 82 Ga. 535, 9 S. E. 528.

Idaho.— U. S. *v.* Kuntze, 2 Ida. (Hasb.) 446, 21 Pac. 407.

Kentucky.—Barnes *v.* Com., 41 S. W. 772, 19 Ky. L. Rep. 803.

Massachusetts.— Com. *v.* Worcester, 141 Mass. 58, 6 N. E. 700; Com. *v.* Harlow, 110 Mass. 411.

Michigan.— People *v.* Hess, 85 Mich. 128, 48 N. W. 181.

New York.— People *v.* Priori, 164 N. Y. 459, 58 N. E. 668; People *v.* Hoch, 150 N. Y. 291, 44 N. E. 976; Ruloff *v.* People, 45 N. Y. 213; Crandall *v.* People, 2 Lans. 309.

Ohio.— Calkins *v.* State, 18 Ohio St. 366, 98 Am. Dec. 121.

South Carolina.—State *v.* Howard, 35 S. C. 197, 14 S. E. 481.

although the jury are positively instructed to dismiss the comments from their minds.[49]

F. Province of Judge and Jury — 1. Jury as Judges of the Law — a. In General. At English common law, from the earliest times, it was taken for granted that the jury should be the judges only of the issues of fact, and the court of the law.[50] The common-law rule that the determination of the law is for the court, not for the jury, and that the judicial instructions as to the law and the rulings of the court during the trial are in every sense binding upon the jury is followed in the majority of the states.[51]

b. Constitutional and Statutory Provisions. In some of the states it is expressly provided by statute or constitution that the jury in criminal cases may

Tennessee.— Staples *v.* State, 89 Tenn. 231, 14 S. W. 603.

Vermont.— State *v.* Cameron, 40 Vt. 555.

West Virginia.— State *v.* Chisnell, 36 W. Va. 659, 15 S. E. 412.

United States.— U. S. *v.* Snyder, 14 Fed. 554, 4 McCrary 618.

49. *Illinois.*— Quinn *v.* People, 123 Ill. 333, 15 N. E. 46; Angelo *v.* People, 96 Ill. 209, 36 Am. Rep. 132.

Indiana.— Showalter *v.* State, 84 Ind. 562; Long *v.* State, 56 Ind. 182, 26 Am. Rep. 19.

Kansas.— State *v.* Balch, 31 Kan. 465, 2 Pac. 609.

Minnesota.—State *v.* Holmes, 65 Minn. 230, 68 N. W. 11.

Mississippi.— Sanders *v.* State, 73 Miss. 444, 18 So. 541; Reddick *v.* State, 72 Miss. 1008 16 So. 490.

Missouri.— State *v.* Brownfield, 15 Mo. App. 593.

Oklahoma.— Wilson *v.* Territory, 9 Okla. 331, 60 Pac. 112.

Pennsylvania.— Com. *v.* Holtham, 1 Lack. Leg. N. 370.

South Dakota.—State *v.* Williams, 11 S. D. 64, 75 N. W. 815.

Texas.— Brazell *v.* State, 33 Tex. Cr. 333, 26 S. W. 723; Wilkins *v.* State, 33 Tex. Cr. 320, 26 S. W. 409 [*reaffirming* Hunt *v.* State, 28 Tex. App. 149, 12 S. W. 737, 19 Am. St. Rep. 815].

See 14 Cent. Dig. tit. "Criminal Law," § 1692 *et seq.*

50. Rex *v.* Oneby, 2 Str. 766; Rex *v.* Poole. Cas. t. Hardw. 23. See also Rex *v.* Woodfall, 5 Burr. 2661; Rex *v.* Withers, 3 T. R. 428; 4 Bl. Comm. 361; Coke Litt. 155*b*; 7 Dane Abr. c. 222, p. 382; Foster Crown L. (3d ed. 1792) 255, 256; 2 Hawkins P. C. c. 22, § 21.

51. It is followed by all except those where by express statutory enactment it is provided that the jury shall determine both the law and the facts.

Alabama.— Tidwell *v.* State, 70 Ala. 33; Washington *v.* State, 63 Ala. 135, 35 Am. Rep. 8; Pierson *v.* State, 12 Ala. 149.

Arkansas.— Sweeney *v.* State, 35 Ark. 585; Pleasant *v.* State, 13 Ark. 360.

California.— People *v.* Worden, 113 Cal. 569, 45 Pac. 844; People *v.* Evey, 49 Cal. 56; People *v.* Anderson, 44 Cal. 65.

Iowa.— State *v.* Reilly, 104 Iowa 13, 73 N. W. 356.

Kansas.— State *v.* Bowen, 16 Kan. 475.

Kentucky.— Sparks *v.* Com., 3 Bush 111, 96 Am. Dec. 196; Montee *v.* Com., 3 J. J. Marsh. 132.

Massachusetts.— Com. *v.* Anthes, 5 Gray 185.

Michigan.— Hamilton *v.* People, 29 Mich. 173.

Mississippi.— Williams *v.* State, 32 Miss. 389, 66 Am. Dec. 615.

Missouri.— State *v.* Schoenwald, 31 Mo. 147; Hardy *v.* State, 7 Mo. 607.

New Hampshire.— Pierce *v.* State, 13 N. H. 536.

New York.— Carpenter *v.* People, 8 Barb. 603; People *v.* Pine, 2 Barb. 566; Safford *v.* People, 1 Park. Cr. 474; People *v.* Finnegan, 1 Park. Cr. 147.

North Carolina.— State *v.* Walker, 4 N. C. 662.

Rhode Island.— State *v.* Smith, 6 R. I. 33.

South Carolina.—State *v.* Drawdy, 14 Rich. 87.

Texas.— Nels *v.* State, 2 Tex. 280; Wolfforth *v.* State, 31 Tex. Cr. 387, 20 S. W. 741.

Vermont.— State *v.* Burpee, 65 Vt. 1, 25 Atl. 964, 36 Am. St. Rep. 965, 19 L. R. A. 145 [*overruling* State *v.* Croteau, 23 Vt. 14, 54 Am. Dec. 90].

Virginia.— Brown *v.* Com., 86 Va. 466, 10 S. E. 745.

Washington.— Hartigan *v.* Territory, 1 Wash. Terr. 447.

West Virginia.—State *v.* Dickey, 48 W. Va. 325, 37 S. E. 695.

United States.— Sparf *v.* U. S., 156 U. S. 51, 715, 15 S. Ct. 273, 39 L. ed. 343; Stettinius *v.* U. S., 22 Fed. Cas. No. 13.387, 5 Cranch C. C. 573; U. S. *v.* Battiste, 24 Fed. Cas. No. 14,545, 2 Sumn. 240; U. S. *v.* Greathouse, 26 Fed. Cas. No. 15.254, 2 Abb. 364, 4 Sawy. 457.

See 14 Cent. Dig. tit. "Criminal Law," § 1694.

The jury never were judges of the law in any case, civil or criminal, except incidentally and as involved in the mixed determination of law and fact by a general verdict. Per Mitchell, J., in Com. *v.* McManus, 143 Pa. St. 64, 21 Atl. 1018, 22 Atl. 761, 14 L. R. A. 89.

determine both the law and the facts,[52] but the cases are conflicting as to the effect of these provisions.[53]

c. Extent of Power. In the absence of any constitutional or statutory provision it is the duty of the court to charge the jury fully upon the law of the case, and the duty of the jury to accept the law as laid down by the court.[54] This rule is also followed in some of those jurisdictions having constitutional or statutory provisions making the jury judges of both the law and the facts.[55] In other jurisdictions having similar provisions, it is held that the instructions of the court are merely advisory, and that the jury are not bound by them but may disregard them altogether,[56] and that it is proper so to instruct the

52. *Connecticut.*— State *v.* Gannon, 75 Conn. 206, 52 Atl. 727; State *v.* Buckley, 40 Conn. 246.

Georgia.— Dickens *v.* State, 30 Ga. 383.

Illinois.— Mullinix *v.* People, 76 Ill. 211; Falk *v.* People, 42 Ill. 331; Fisher *v.* People, 23 Ill. 283; Schnier *v.* People, 23 Ill. 17.

Indiana.— Nuzum *v.* State, 88 Ind. 599; McCarthy *v.* State, 56 Ind. 203; Williams *v.* State, 10 Ind. 503; McCullough *v.* State, 10 Ind. 276; Armstrong *v.* State, 4 Blackf. 247; Warren *v.* State, 4 Blackf. 150.

Louisiana.— State *v.* Vinson, 37 La. Ann. 792; State *v.* Ford, 37 La. Ann. 443; State *v.* Saliba, 18 La. Ann. 35; State *v.* Jurche, 17 La. Ann. 71; State *v.* Scott, 11 La. Ann. 429.

Maryland.— Forwood *v.* State, 49 Md. 531; Broll *v.* State, 45 Md. 356; Wheeler *v.* State, 42 Md. 563; Franklin *v.* State, 12 Md. 236.

In Pennsylvania and Tennessee there are constitutional provisions that "in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court as in other cases." The effect of these provisions upon the province of the court and jury in criminal cases generally has been the subject of much discussion and some conflict of authority, but it seems to be settled in each jurisdiction that they do not alter the general rule that the court must determine the law and the jury accept it as laid down by the court. Com. *v.* McManus, 143 Pa. St. 64, 21 Atl. 1018, 22 Atl. 761, 14 L. R. A. 89 [*distinguishing* Kane *v.* Com., 89 Pa. St. 522, 33 Am. Rep. 787]; Ford *v.* State, 101 Tenn. 454, 47 S. W. 703; Harris *v.* State, 7 Lea (Tenn.) 538; Dale *v.* State, 10 Yerg. (Tenn.) 551; McGowan *v.* State, 9 Yerg. (Tenn.) 184.

Criminal libel.— By statute or constitutional provision in many states, it is provided that the jury shall have the right to determine both law and fact in prosecutions for criminal libel. It is the duty of the court under such statutes to instruct as to the law of libel (State *v.* Whitmore, 53 Kan. 343, 36 Pac. 748, 42 Am. St. Rep. 288; State *v.* Syphrett, 27 S. C. 29, 2 S. E. 624, 13 Am. St. Rep. 616); but the jury are the judges of the law, and are not required to accept such instructions as conclusive (Lowe's Appeal, 46 Kan. 255, 26 Pac. 749; State *v.* Zimmerman, 31 Kan. 85, 1 Pac. 259; State *v.* Armstrong, 106 Mo. 395, 16 S. W. 604, 27 Am. St. Rep. 361, 13 L. R. A. 419 [*overruling* State *v.* Hosmer, 85 Mo. 553]). The court has a right to express its opinion, and the jury may decide for themselves, having in view such opinions, whether the publication was of a mischievous tendency, whether it came within the legal definition of a libel, whether it was privileged, and whether it was true. Drake *v.* State, 53 N. J. L. 23, 20 Atl. 747.

53. See *infra*, XIV, F, 1, c.

54. They have no more right to go outside of the judge's instructions for the law than to go outside of the evidence for the facts.

Alabama.— Batre *v.* State, 18 Ala. 119.

Iowa.— State *v.* Miller, 53 Iowa 84, 154, 209, 4 N. W. 838, 900, 1083.

Massachusetts.— Com. *v.* Maryzynski, 149 Mass. 68, 21 N. E. 228; Com. *v.* Huber, 12 Gray 29; Com. *v.* Anthes, 5 Gray 185.

Nebraska.— Parrish *v.* State, 14 Nebr. 60, 15 N. W. 357.

New Hampshire.— Lord *v.* State, 16 N. H. 325, 41 Am. Dec. 729.

New York.— Duffy *v.* People, 26 N. Y. 588.

Ohio.— Montgomery *v.* State, 11 Ohio 424.

Vermont.— State *v.* McDonnell, 32 Vt. 491.

United States.— U. S. *v.* Hodges, 26 Fed. Cas. No. 15,374, Brunn. Col. Cas. 465.

See 14 Cent. Dig. tit. "Criminal Law," § 1694; and *supra*, XIV, F, 1, a.

55. *Connecticut.*— State *v.* Gannon, 75 Conn. 206, 52 Atl. 727 [*overruling* State *v.* Buckley, 40 Conn. 246].

Georgia.— Berry *v.* State, 105 Ga. 683, 31 S. E. 592; Jackson *v.* State, 91 Ga. 271, 18 S. E. 298, 44 Am. St. Rep. 22; Hunt *v.* State, 81 Ga. 140, 7 S. E. 142; Danforth *v.* State, 75 Ga. 614, 58 Am. Rep. 480; Ridenhour *v.* State, 75 Ga. 382. But see Dickens *v.* State, 30 Ga. 383; McPherson *v.* State, 22 Ga. 478.

Louisiana.— State *v.* Tisdale, 41 La. Ann. 338, 6 So. 579; State *v.* Cole, 38 La. Ann. 843; State *v.* Matthews, 38 La. Ann. 795; State *v.* Vinson, 37 La. Ann. 792; State *v.* Ford, 37 La. Ann. 443; State *v.* Johnson, 30 La. Ann. 904; State *v.* Tally, 23 La. Ann. 677; State *v.* Schnapper, 22 La. Ann. 43. But see State *v.* Scott, 11 La. Ann. 429.

Pennsylvania.— Com. *v.* McManus, 143 Pa. St. 64, 21 Atl. 1018, 22 Atl. 761, 14 L. R. A. 89; Com. *v.* Goldberg, 4 Pa. Super. Ct. 142. But see Kane *v.* Com., 89 Pa. St. 522, 33 Am. Rep. 787.

Tennessee.— Ford *v.* State, 101 Tenn. 454, 47 S. W. 703; Harris *v.* State, 7 Lea 538.

See 14 Cent. Dig. tit. "Criminal Law," § 1694.

56. Fisher *v.* People, 23 Ill. 283; Schnier *v.* People, 23 Ill. 17; Walker *v.* State, 136 Ind. 663, 36 N. E. 356; Hudelson *v.* State, 94 Ind.

jury.[57] The jury should in all cases give the instructions of the court careful and respectful consideration,[58] and should not disregard them unless in their judgment there is a good and sufficient reason for so doing.[59] For it must not be understood that a constitutional provision making the jury judges of the law places them above the law or confers upon them either a moral or legal right to decide simply as they see fit, regardless of all law.[60]

d. General Verdict. The right of the jury to render a general verdict gives them to a certain extent in the majority of cases the power to determine the law as well as the facts, upon their own responsibility.[61]

2. Questions of Law or Fact — a. Questions of Law — (i) *Admissibility of Evidence.* Under the general rule that questions of law are for the court it is for the trial judge to pass upon all questions regarding the admissibility of evi-

426, 48 Am. Rep. 171; Nuzum *v.* State, 88 Ind. 599; Powers *v.* State, 87 Ind. 144; Fowler *v.* State, 85 Ind. 538; McDonald *v.* State, 63 Ind. 544; Lynch *v.* State, 9 Ind. 541; Lowe's Appeal, 46 Kan. 255, 26 Pac. 749; State *v.* Zimmerman, 31 Kan. 85, 1 Pac. 257; Beard *v.* State, 71 Md. 275, 17 Atl. 1044, 17 Am. St. Rep. 536, 4 L. R. A. 675; Broll *v.* State, 45 Md. 356; Wheeler *v.* State, 42 Md. 563.

In Illinois an instruction was held proper which told the jury that it is their duty to accept and act upon the law as laid down by the court, unless they can say upon their oath that they are better judges of the law than the court, when they are at liberty to so act. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Davison *v.* People, 90 Ill. 221; Mullinix *v.* People, 76 Ill. 211; Reddish *v.* People, 84 Ill. App. 509.

57. Fowler *v.* State, 85 Ind. 538.

It is error to refuse to instruct the jury that they are the judges of the law as well as of the facts. McCarthy *v.* State, 56 Ind. 203; State *v.* Saliba, 18 La. Ann. 35.

58. Bird *v.* State, 107 Ind. 154, 8 N. E. 14; Keiser *v.* State, 83 Ind. 234.

59. McDonald *v.* State, 63 Ind. 544.

An instruction that the jury are judges of the law, and that they can take it as given by the court, but if they see fit they can reject this and construe it for themselves, and as they have a legal right to disagree with the court, they should weigh the instructions to the same extent as they weigh the evidence, and disregard neither without proper reason, is proper. Blaker *v.* State, 130 Ind. 203, 29 N. E. 1077.

They must inquire what the law is, and when their judgment is satisfied, the law thus ascertained is binding on them, whether it is or is not as they think it ought to be. State *v.* Buckley, 40 Conn. 246.

60. Edwards *v.* State, 53 Ga. 428; Blaker *v.* State, 130 Ind. 203, 29 N. E. 1077; Bird *v.* State, 107 Ind. 154, 8 N. E. 14; Anderson *v.* State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; State *v.* Johnson, 30 La. Ann. 904; State *v.* Newton, 28 La. Ann. 65; State *v.* Ballerio, 11 La. Ann. 81; Robertson *v.* State, 4 Lea (Tenn.) 425.

Under these provisions the jury are not the sole judges of every question of law which arises, but only of those questions which they have to consider in making up their verdict, for the court still has a right to determine all questions as to the sufficiency of the indictment, and the admissibility of evidence. Anderson *v.* State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711.

Right to determine constitutionality of statute.— The right of the jury to determine the law does not authorize them to determine the constitutionality of a statute. State *v.* McKee, 73 Conn. 18, 46 Atl. 409, 49 L. R. A. 542; Franklin *v.* State, 12 Md. 236; Harrison *v.* Com., 123 Pa. St. 508, 16 Atl. 611. This question is solely for the court, and counsel will not be permitted to argue upon it to the jury. U. S. *v.* Callender, 25 Fed. Cas. No. 14,709; U. S. *v.* Riley, 27 Fed. Cas. No. 16,164, 5 Blatchf. 204. A charge to the jury to consider the constitutionality of a statute on which the indictment is based, and if they believe it unconstitutional to acquit defendant, is not proper. State *v.* Main, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623.

61. They have no more right, however, to exercise this power and determine the law contrary to the court's instructions than to disregard the evidence in their findings of fact. If by disregarding the law they render a general verdict of acquittal there is no remedy, since defendant cannot be twice put in jeopardy for the same offense, but if the verdict is of conviction it may be set aside and a new trial ordered as in the case of a verdict contrary to the evidence.

Georgia.— McDaniel *v.* State, 30 Ga. 853.

Kentucky.— Com. *v.* Van Tuyl, 1 Metc. 1, 71 Am. Dec. 455.

Maryland.— Franklin *v.* State, 12 Md. 236.

Massachusetts.— Com. *v.* Porter, 10 Metc. 263; Com. *v.* White, 10 Metc. 14.

Pennsylvania.— Com. *v.* Shurlock, 14 Leg. Int. 33.

Tennessee.— Harris *v.* State, 7 Lea 538; Brown *v.* State, 6 Baxt. 422.

United States.— U. S. *v.* Taylor, 11 Fed. 470, 3 McCrary 500; Stettinius *v.* U. S., 22 Fed. Cas. No. 13,387, 5 Cranch C. C. 573; U. S. *v.* Stockwell, 27 Fed. Cas. No. 16,405, 4 Cranch C. C. 671; U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78.

dence.[62] The decision of a fact on which the admissibility of evidence depends should not be left to the jury.[63]

(II) *Sufficiency of Indictment.* The sufficiency of the indictment,[64] or an issue upon an allegation that certain words have been erased from it or inserted in it,[65] or any issue which may be tried by an inspection of the record,[66] is to be determined by the court.

(III) *Construction and Interpretation of Writings.* The interpretation and construction of writings are exclusively for the court.[67]

b. Questions of Fact — (I) *In General.* Questions of fact in criminal proceedings are to be tried by the jury,[68] and it is not for the court to give instructions as to matters of fact[69] or to assume that a contested fact has been proved.[70]

(II) *Variance.* Whether there is a material variance between the proof and the allegations of the indictment as to the names of persons[71] or any other facts[72] is a question for the jury.

(III) *Corpus Delicti.* Whether the *corpus delicti* has been proved is a question of fact for the jury.[73]

(IV) *Venue and Jurisdiction.* Whether the venue has been properly laid

See 14 Cent. Dig. tit. "Criminal Law," § 1694.

62. People *v.* Ivey, 49 Cal. 56; People *v.* Glenn, 10 Cal. 32; Dugan *v.* Com., 102 Ky. 241, 43 S. W. 418, 19 Ky. L. Rep. 1273; State *v.* Perioux, 107 La. 601, 31 So. 1016; State *v.* Stephen, 45 La. Ann. 702, 12 So. 883; Berry *v.* State, 31 Ohio St. 219, 27 Am. Rep. 506.

Dying declarations.— The judicial decision upon the admissibility of dying declarations involves the question of fact as to the circumstances under which they were made, of law, whether they were admissible alone or in connection with the circumstances. State *v.* Williams, 67 N. C. 12.

63. Floyd *v.* State, 82 Ala. 16, 2 So. 683; State *v.* Dula, 61 N. C. 211; State *v.* Dick, 60 N. C. 440, 86 Am. Dec. 439. See also State *v.* Ward, 39 Vt. 225.

Preliminary determination of existence of a conspiracy.— Solander *v.* People, 2 Colo. 48; Crook *v.* State, 27 Tex. App. 198, 11 S. W. 444. And see *supra*, XII, F, 3.

Determination of voluntary character of confession.— Floyd *v.* State, 82 Ala. 16, 2 So. 683. And see *supra*, XII, H, 2, r.

64. State *v.* Beach, 147 Ind. 74, 43 N. E. 949, 46 N. E. 145, 36 L. R. A. 179; People *v.* Cook, 10 Mich. 164; Smith *v.* People, 47 N. Y. 303. And see Indictments and Informations.

65. Hunter *v.* State, 29 Ind. 80; Com. *v.* Davis, 11 Gray (Mass.) 4.

66. Woodward *v.* State, 33 Fla. 508, 15 So. 252; State *v.* Daugherty, 106 Mo. 182, 17 S. W. 303.

An issue of fact to be determined on a plea in abatement outside the record is for the jury. Taylor *v.* State, 32 Ind. 153; Day *v.* Com., 2 Gratt. (Va.) 562.

67. *Alabama.*— Dotson *v.* State, 88 Ala. 208, 7 So. 259.

Iowa.— State *v.* Delong, 12 Iowa 453.

Massachusetts.— Com. *v.* Riggs, 14 Gray 376, 77 Am. Dec. 333.

Oregon.— State *v.* Moy Looke, 7 Oreg. 54.

South Carolina.— State *v.* Williams, 32 S. C. 123, 10 S. E. 876.

Texas.— Carlisle *v.* State, (Cr. App. 1900) 56 S. W. 365; Irish *v.* State, (Cr. App. 1894) 25 S. W. 633.

See 14 Cent. Dig. tit. "Criminal Law," § 1699; and, generally, Evidence.

Thus the meaning of the words of a threatening letter (State *v.* Patterson, 68 Me. 473), of abbreviations in a writing (State *v.* White, 70 Vt. 225, 39 Atl. 1085), the validity of a warrant of arrest (State *v.* Worley, 33 N. C. 242), the construction of a statute of a foreign state (State *v.* Whittle, 59 S. C. 297, 37 S. E. 923), and whether a statute is so vague as to be void (State *v.* Main, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623), are questions of law for the trial judge.

68. Bennett *v.* State, 22 Ark. 215; Cason *v.* State, 22 Ark. 214; Goldsberry *v.* State, (Nebr. 1902) 92 N. W. 906.

Mixed question of law and fact.— The jury must receive the law from the court, but in cases where the issue involves a mixed question of law and testimony, they are necessarily the judges of the law and testimony in order to determine the criminal intent, etc. Robinson *v.* State, 33 Ark. 180.

69. Com. *v.* Brown, 121 Mass. 69; State *v.* Barry, 11 N. D. 428, 92 N. W. 809.

70. State *v.* Wheeler, 79 Mo. 366.

71. Com. *v.* Donovan, 13 Allen (Mass.) 571; State *v.* Perkins, 70 N. H. 330, 47 Atl. 268.

72. State *v.* Green, 100 N. C. 419, 5 S. E. 422. *Quære* in State *v.* Jay, 34 N. J. L. 368.

Idem sonans see Indictments and Informations.

73. Winslow *v.* State, 76 Ala. 42; Cunningham *v.* People, 195 Ill. 550, 63 N. E. 517; State *v.* Jackson, (Kan. 1889) 22 Pac. 427; Com. *v.* Wentworth, 118 Mass. 441.

Proof of corpus delicti see *supra*, XII, A, 1, f; XII, I, 1, i, (II).

is a question of law;[74] whether it has been proved is for the jury.[75] Questions of jurisdiction are usually questions of law,[76] but where the jurisdiction depends upon particular facts, the jury may by means of a general verdict confirm or reject a ruling that the court has jurisdiction.[77]

(v) *Knowledge and Intent.* Whether defendant had guilty knowledge or acted with a felonious or criminal intent is for the jury to determine,[78] even where the evidence is very clear and convincing.[79]

(vi) *Identification.* The identification of defendant as the person who committed the crime is a question for the jury.[80]

(vii) *Defenses* — (a) *In General.* The sufficiency of the evidence to prove an affirmative defense is a question for the jury, and their determination, if supported by any evidence, will not be disturbed.[81]

(b) *Limitations.* Whether an action was begun within the period of limitations is a question for the jury.[82]

(c) *Former Jeopardy.* If the plea of former jeopardy is based upon matter of fact which is shown by evidence outside the record, the determination of the question is for the jury.[83] The issue of *nul tiel* record on a plea of former con-

74. Stone *v.* State, 105 Ala. 60, 17 So. 114; Randolph *v.* State, 100 Ala. 139, 14 So. 792; Justice *v.* State, 99 Ala. 180, 13 So. 658; Childs *v.* State, 55 Ala. 28; Grady *v.* State, 11 Ga. 253.

75. State *v.* Miller, 9 Houst. (Del.) 564, 32 Atl. 137; State *v.* Spayde, 110 Iowa 726, 80 N. W. 1058; State *v.* Kline, 109 La. 603, 33 So. 618; State *v.* Thornton, 49 La. Ann. 1007, 22 So. 315; State *v.* Foster, 8 La. Ann. 290, 58 Am. Dec. 678; Chittenden *v.* State, 41 Wis. 285.

The question of the correctness of a county-line is for the jury. Mendiola *v.* State, 18 Tex. App. 462.

Venue and jurisdiction generally see *supra*, VI; VII.

76. U. S. *v.* Sanders, 27 Fed. Cas. No. 16,220, Hempst. 483.

Extradition. — Whether the accused has been properly extradited is a question of jurisdiction and therefore of law for the court. State *v.* Roller, 30 Wash. 692, 71 Pac. 718.

If the facts as to the jurisdiction are undisputed the question is for the court. State *v.* Sinclair, 120 N. C. 603, 27 S. E. 77.

77. U. S. *v.* Jackalow, 1 Black (U. S.) 484, 17 L. ed. 225; U. S. *v.* Sanders, 27 Fed. Cas. No. 16,220, Hempst. 483.

78. *Alabama.* — May *v.* State, 115 Ala. 14, 22 So. 611; McMullen *v.* State, 53 Ala. 531.

Kentucky. — Bush *v.* Com., 78 Ky. 268.

Missouri. — State *v.* Allen, 22 Mo. 318.

New York. — People *v.* Webster, 59 Hun 398, 13 N. Y. Suppl. 414; People *v.* Utter, 44 Barb. 170; People *v.* Hall, 6 Park. Cr. 642; People *v.* Teal, 1 Wheel. Cr. Cas. 199. And see People *v.* Jones, 3 N. Y. Cr. 252.

North Carolina. — State *v.* Journigan, 120 N. C. 568, 26 S. E. 696; State *v.* Barbee, 92 N. C. 820.

South Carolina. — State *v.* Herriott, 1 McMull. 126.

Texas. — Drake *v.* State, 29 Tex. App. 265, 15 S. W. 725; Hailes *v.* State, 15 Tex. App. 93.

United States. — U. S. *v.* Houghton, 14 Fed. 544. See also U. S. *v.* Smith, 27 Fed. Cas. No. 16,341, 1 Sawy. 277.

See 14 Cent. Dig. tit. "Criminal Law," § 1707.

79. People *v.* Wiman, 9 Misc. (N. Y.) 441, 29 N. Y. Suppl. 1034.

80. *California.* — People *v.* Rogers, 71 Cal. 565, 12 Pac. 679.

Florida. — Newton *v.* State, 15 Fla. 610.

Georgia. — Moore *v.* State, 73 Ga. 139.

Kentucky. — Tatum *v.* Com., 59 S. W. 32, 22 Ky. L. Rep. 927.

Maine. — State *v.* Lashus, 79 Me. 504, 11 Atl. 180.

Missouri. — State *v.* Cushenberry, 156 Mo. 168, 56 S. W. 737.

Identification generally see *supra*, XII, B, 4, e.

81. Stiles *v.* State, 113 Ga. 700, 39 S. E. 295. See also State *v.* Williams, 40 W. Va. 268, 21 S. E. 721.

Whether the accused was coerced into committing crime is for the jury, upon the whole evidence. State *v.* Learnard, 41 Vt. 585.

82. State *v.* West, 105 La. 639, 30 So. 119; State *v.* Strong, 39 La. Ann. 1081, 3 So. 266; People *v.* Clement, 72 Mich. 116, 40 N. W. 190.

Limitations generally see *supra*, VIII.

Whether the absence of defendant from the state after the crime was sufficient to prevent the running of the statute is for the jury. People *v.* Price, 74 Mich. 37, 41 N. W. 853.

83. *Alabama.* — Lyman *v.* State, 45 Ala. 72.

California. — People *v.* Hamberg, 84 Cal. 468, 24 Pac. 298; People *v.* Fuqua, 61 Cal. 377.

Colorado. — Kinkle *v.* People, 27 Colo. 459, 62 Pac. 197.

Louisiana. — State *v.* Williams, 45 La. Ann. 936, 12 So. 932.

Mississippi. — Helm *v.* State, 66 Miss. 537, 6 So. 322.

Nebraska. — State *v.* Priebnow, 16 Nebr. 131, 19 N. W. 628.

Nevada. — State *v.* Johnson, 11 Nev. 273.

viction,[84] and the construction of the record, if there be any,[85] and generally all matters of law on such plea,[86] as where the plea is bad on its face and demurrable,[87] are for the court to determine.

(D) *Intoxication.* It is a question for the jury to determine whether the mental condition of defendant was so far overcome by intoxication that he was unable to form a guilty intent.[88]

(E) *Insanity.* The insanity of the accused at the time of the crime is a question of fact to be determined by the jury.[89] Its existence, character, and extent are for them to determine.[90]

c. Weight and Sufficiency of Evidence — (I) *In General.* After it is determined by the court that evidence is admissible, its weight and sufficiency are questions for the jury.[91]

New York.— Grant *v.* People, 4 Park. Cr. 527.

Ohio.— Miller *v.* State, 3 Ohio St. 475.

Pennsylvania.— Solliday *v.* Com., 28 Pa. St. 13.

Texas.— McCullough *v.* State, (Cr. App. 1896) 34 S. W. 753; Grisham *v.* State, 19 Tex. App. 504.

Utah.— People *v.* Kerm, 8 Utah 268, 30 Pac. 988.

See 14 Cent. Dig. tit. "Criminal Law," § 1710.

Former jeopardy generally see *supra*, IX.

This is the case where the plea of former jeopardy and the plea of not guilty were tried together. Com. *v.* Merrill, 8 Allen (Mass.) 545.

If the plea is based on a discharge caused by the inability of the jury to agree, the length of time allowed for their deliberation is a question of fact, and its sufficiency a question of law. Helm *v.* State, 67 Miss. 562, 7 So. 487.

The identity of the present offense with that charged in the former trial is for the jury (Buhler *v.* State, 64 Ga. 504; State *v.* Andrews, 27 Mo. 267; Troy *v.* State, 10 Tex. App. 319); but where there is no question of identity the court may pass upon the question whether there has been a former conviction (State *v.* Haynes, 36 Vt. 667).

84. Brady *v.* Com., 1 Bibb (Ky.) 517; Hill *v.* State, 2 Yerg. (Tenn.) 248.

85. State *v.* Gorham, 67 Me. 247.

86. State *v.* Lee, 46 La. Ann. 623, 15 So. 159; Powell *v.* State, 17 Tex. App. 345.

87. State *v.* Paterno, 43 La. Ann. 514, 9 So. 442; State *v.* Meekins, 41 La. Ann. 543, 6 So. 822; State *v.* Shaw, 5 La. Ann. 342.

Where the facts are agreed upon, and the only question is whether defendant has been in jeopardy, it is matter of law for the court. State *v.* Pritchard, 16 Nev. 101.

88. Keeton *v.* Com., 92 Ky. 522, 18 S. W. 359, 15 Ky. L. Rep. 748; Com. *v.* Hagenlock, 140 Mass. 125, 3 N. E. 36; McGinnis *v.* Com., 102 Pa. St. 66.

Intoxication generally see *supra*, III, C.

Dipsomania.— Whether there is such a disease, whether defendant had it, and whether his actions were the product of it are questions for the jury. State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533.

89. *Alabama.*— Parsons *v.* State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193.

California.— People *v.* Hubert, 119 Cal. 216, 51 Pac. 329, 63 Am. St. Rep. 72.

Iowa.— State *v.* Geier, 111 Iowa 706, 83 N. W. 718.

New Hampshire.— State *v.* Jones, 50 N. H. 369, 9 Am. Rep. 242.

North Carolina.— State *v.* Jones, 126 N. C. 1099, 36 S. E. 38.

Pennsylvania.— Com. *v.* Preston, 188 Pa. St. 429, 41 Atl. 534.

South Carolina.— State *v.* Stark, 1 Strobh. 479.

Texas.— Harkness *v.* State, (Cr. App. 1894) 28 S. W. 476.

See 14 Cent. Dig. tit. "Criminal Law," § 1712.

Insanity generally see *supra*, III, B.

Province of court.— The character of an insane delusion or monomania is matter of fact, and it is not proper to instruct that a certain belief, if existing in defendant's mind, was, as matter of law, an insane delusion (People *v.* Hubert, 119 Cal. 216, 51 Pac. 329, 63 Am. St. Rep. 72); but it is not error to instruct the jury to examine the evidence of insanity with care, lest a counterfeit of mental disease furnish immunity for guilt (People *v.* Allender, 117 Cal. 81, 48 Pac. 1014; People *v.* Kloss, 115 Cal. 567, 47 Pac. 459; People *v.* McCarthy, 115 Cal. 255, 46 Pac. 1073; People *v.* Larrabee, 115 Cal. 158, 46 Pac. 922). If evidence of insanity is entirely inadequate, it is proper for the court to withdraw it from the jury (State *v.* Morledge, 164 Mo. 522, 65 S. W. 226), although this should not be done if the facts in the least degree tend to support the defense of insanity (Turner *v.* Territory, 11 Okla. 660, 69 Pac. 804).

90. Plake *v.* State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408.

91. *Alabama.*— White *v.* State, 133 Ala. 122, 32 So. 139.

Arkansas.— Reed *v.* State, 16 Ark. 499.

California.— People *v.* Plyler, 126 Cal. 379, 58 Pac. 904; People *v.* Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50; People *v.* Dick, 34 Cal. 663.

Colorado.—Barr *v.* People, 30 Colo. 522, 71 Pac. 392.

Connecticut.— State *v.* Green, Kirby 87.

(II) *Conflicting Evidence.* Where the evidence is conflicting, the determination of its effect is still for the jury.[92] They must endeavor to reconcile it, if possible;[93] and if they cannot, they may give credit to such testimony as in their opinion is most worthy of belief.[94]

(III) *Impeached Evidence.* The weight and credibility, if any, which should be given to the testimony of a witness who may have been impeached, whether by contradictory evidence or by a showing of bad character, is a question for the jury.[95]

d. Extent of Punishment — (I) *Power of the Court.* Where the fine or period of imprisonment is fixed by law it is for the court and not for the jury to assess it.[96]

(II) *Discretion of the Jury.* If a statute provides that the accused shall suffer one of two punishments in the alternative at the discretion of the jury,

District of Columbia.— U. S. *v.* Neverson, 1 Mackey 152.

Iowa.— Franks *v.* State, 1 Greene 541.

Kentucky.— Craft *v.* Com., 4 Ky. L. Rep. 182; Raney *v.* Com., 2 Ky. L. Rep. 62.

Louisiana.—State *v.* Thompson, 45 La. Ann. 969, 13 So. 392.

Massachusetts.— Com. *v.* Rogers, 181 Mass. 184, 63 N. E. 421.

Missouri.— State *v.* Gee, 85 Mo. 647; State *v.* Williams, 12 Mo. App. 591; State *v.* Kotovsky, 11 Mo. App. 584.

New Mexico.— Territory *v.* O'Donnell, 4 N. M. 66, 12 Pac. 743.

North Carolina.— State *v.* Keath, 83 N. C. 626; State *v.* Bowman, 80 N. C. 432.

Oklahoma.— Turner *v.* Territory, 11 Okla. 660, 69 Pac. 804.

Pennsylvania.— Com. *v.* Hanlon, 8 Phila. 401.

South Carolina.— State *v.* Cannon, 49 S. C. 550, 27 S. E. 526.

Texas.— Pridgen *v.* State, 31 Tex. 420; Brown *v.* State, 23 Tex. 195; McCulloh *v.* State, (Cr. App. 1902) 71 S. W. 278; Johnson *v.* State, 1 Tex. App. 609.

Utah.— State *v.* Webb, 18 Utah 441, 56 Pac. 159.

United States.— Endleman *v.* U. S., 86 Fed. 456, 30 C. C. A. 186.

England.— Reg. *v.* Silverlock, [1894] 2 Q. B. 766, 18 Cox C. C. 104, 58 J. P. 788, 63 L. J. M. C. 233, 10 Reports 431, 43 Wkly. Rep. 14.

See 14 Cent. Dig. tit. "Criminal Law," § 1713.

92. Crane *v.* State, 111 Ala. 45, 20 So. 590; Thompson *v.* State, 106 Ala. 67, 17 So. 512; Norris *v.* State, 87 Ala. 85, 6 So. 371; Bill *v.* People, 14 Ill. 432; People *v.* Brow, 90 Hun (N. Y.) 509, 35 N. Y. Suppl. 1009; State *v.* Parker, 66 N. C. 624.

93. Rickerson *v.* State, 78 Ga. 15, 1 S. E. 178; Territory *v.* Gonzales, (N. M. 1902) 68 Pac. 925; Means *v.* State, 10 Tex. App. 16, 38 Am. Rep. 640; Jackson *v.* State, 7 Tex. App. 363.

94. *Alabama.*— King *v.* State, 71 Ala. 1.

Georgia.— Ratteree *v.* State, 78 Ga. 335.

Illinois.— Gott *v.* People, 187 Ill. 249, 58 N. E. 293.

Indiana.— Epps *v.* State, 102 Ind. 539, 1 N. E. 491.

Iowa.— State *v.* James, 45 Iowa 412.

Nebraska.— Parker *v.* State, (1903) 93 N. W. 1037.

Texas.— Gatlin *v.* State, 5 Tex. App. 531; Johnson *v.* State, 5 Tex. App. 423; Templeton *v.* State, 5 Tex. App. 398; Brady *v.* State, 5 Tex. App. 343; Taylor *v.* State, 5 Tex. App. 1.

Wisconsin.— Rounds *v.* State, 57 Wis. 45, 14 N. W. 865.

See 14 Cent. Dig. tit. "Criminal Law," § 1714.

95. *Alabama.*— Addison *v.* State, 48 Ala. 478.

Georgia.— Huff *v.* State, 104 Ga. 521, 30 S. E. 808; Franklin *v.* State, 69 Ga. 36, 47 Am. Rep. 748; Pound *v.* State, 43 Ga. 88; McPherson *v.* State, 22 Ga. 478.

Illinois.— Carle *v.* People, 200 Ill. 494, 66 N. E. 32, 93 Am. St. Rep. 208.

Indiana.— Terry *v.* State, 13 Ind. 70.

Nebraska.— Dixon *v.* State, 46 Nebr. 298, 64 N. W. 961.

Texas.— Kelly *v.* State, 1 Tex. App. 628.

See 14 Cent. Dig. tit. "Criminal Law," § 1721.

No positive rule of law compels the jury to reject his testimony if they believe it is true, although impeachment has been attempted. Chester *v.* State, 1 Tex. App. 702.

96. *Alabama.*— Moss *v.* State, 42 Ala. 546; Hawkins *v.* State, 3 Stew. & P. 63.

Kentucky.— Buford *v.* Com., 14 B. Mon. 24.

Missouri.— State *v.* Gavner, 30 Mo. 44.

New Mexico.— U. S. *v.* Bowman, 3 N. M. 201, 5 Pac. 333.

New York.— People *v.* Ryan, 55 Hun 214, 8 N. Y. Suppl. 241, 7 N. Y. Cr. 448.

Pennsylvania.—Com. *v.* Beucher, 10 Pa. Co. Ct. 3.

United States.— U. S. *v.* Callender, 25 Fed. Cas. No. 14,709; U. S. *v.* Heinegan, 26 Fed. Cas. No. 15,340, 1 Cranch C. C. 50; U. S. *v.* McFarlane, 26 Fed. Cas. No. 15,675, 1 Cranch C. C. 163; U. S. *v.* Mundell, 27 Fed. Cas. No. 15,834, 1 Hughes 415.

See 14 Cent. Dig. tit. "Criminal Law," § 1723.

the court can neither review its action,[97] nor deprive it of its right to fix the punishment by an agreement with the prosecuting attorney,[98] nor dispense with the jury and fix the amount of the fine,[99] although it must instruct the jury as to the statutory limits of the punishment[1] and should see to it that the punishment does not transcend these limits.[2]

3. DEMURRER TO EVIDENCE AND DIRECTION OF VERDICT — a. Demurrer to Evidence. A demurrer to the evidence is a proceeding by which the court is called upon to determine what the law is upon the facts which appear in evidence.[3] It admits the truth of facts which are shown, whether by parol or by writing, and every fair inference from such facts,[4] and the court decides upon their legal effect only, and not upon the sufficiency of their proof.[5] In some states the practice of demurring to the evidence is not recognized.[6] Where it is recognized neither party can demur without the consent of the other,[7] and even when both parties consent, it is discretionary with the court whether it will entertain the demurrer.[8]

b. Direction of Verdict — (I) *OF ACQUITTAL.* Where there is no competent evidence tending to sustain the charge,[9] where the evidence is so weak that a conviction would be attributable to passion or prejudice,[10] or where it is so slight and indeterminate that a verdict of guilty would be set aside the court should direct an acquittal,[11] and in some jurisdictions its failure to do so constitutes reversible

97. Skains *v.* State, 21 Ala. 218; People *v.* Leary, 105 Cal. 486, 39 Pac. 24; Herron *v.* Com., 79 Ky. 38.

The discretion of the jury, exercised within the statutory limits, cannot be controlled by the court, on the ground that the punishment is cruel and excessive. Siberry *v.* State, (Ind. Sup. 1897) 47 N. E. 458.

Punishment in the alternative.— Where there is a discretion in the jury to either fine or imprison, it is the duty of the jury to choose between fine and imprisonment, and the duty of the court to fix the term of imprisonment (Turner *v.* State, 40 Ala. 21); and where both fine and imprisonment are imposed, the jury may fix the fine and the court the imprisonment (Cook *v.* U. S., 1 Greene (Iowa) 56). See also as to the power of the court to fine Melton *v.* State, 45 Ala. 56.

98. Bankhead *v.* State, 124 Ala. 14, 26 So. 979.

99. Ervine *v.* Com., 5 Dana (Ky.) 216.

1. Usher *v.* Com., 2 Duv. (Ky.) 394.

It is not necessary to instruct the jury as to an additional penalty of disqualification for office under the statute, and which it is the duty of the court to impose. Vowells *v.* Com., 84 Ky. 52.

2. Williams *v.* State, 11 Tex. App. 63.

3. 1 Chitty Cr. L. 623.

4. *Alabama.*—Martin *v.* State, 62 Ala. 240.

Florida.— Duncan *v.* State, 29 Fla. 439, 10 So. 815.

Iowa.— Franks *v.* State, 1 Greene 541.

Missouri.— State *v.* Cunningham, 154 Mo. 161, 55 S. W. 282.

Pennsylvania.— Com. *v.* Wilson, 14 Phila. 384.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1725, 1726.

5. Franks *v.* State, 1 Greene (Iowa) 541. If there be no evidence, the demurrer should be sustained, as a conviction in such case would be reversed. Martin *v.* State, 62 Ala. 240. But if there be sufficient *prima facie* evidence of defendant's guilt, the demurrer must be overruled. State *v.* Cunningham, 154 Mo. 161, 55 S. W. 282.

6. Miller *v.* State, 79 Ind. 198; State *v.* Keenan, 7 Kan. App. 813, 55 Pac. 102; Nelson *v.* State, 47 Miss. 621; State *v.* Alderton, 50 W. Va. 101, 40 S. E. 350.

7. *Alabama.*—Brister *v.* State, 26 Ala. 107.

Florida.— Duncan *v.* State, 29 Fla. 439, 10 So. 815.

Pennsylvania.— Com. *v.* Parr, 5 Watts & S. 345.

Virginia.— Doss *v.* Com., 1 Gratt. 557.

England.— 1 Chitty Cr. L. 623.

See 14 Cent. Dig. tit. "Criminal Law," § 1725.

8. Duncan *v.* State, 29 Fla. 439, 10 So. 815.

9. *Alabama.*— May *v.* State, 115 Ala. 14, 22 So. 611.

Michigan.— People *v.* Eaton, 59 Mich. 559, 26 N. W. 702.

Missouri.— State *v.* Warner, 74 Mo. 83; State *v.* Daubert, 42 Mo. 242.

Montana.— State *v.* Welch, 22 Mont. 92, 55 Pac. 927.

New York.— People *v.* Bennett, 49 N. Y. 137; Reynolds *v.* People, 41 How. Pr. 179.

Pennsylvania.— Com. *v.* Yost, 197 Pa. St. 171, 46 Atl. 845.

Wisconsin.— Black *v.* State, 59 Wis. 471, 18 N. W. 457.

See 14 Cent. Dig. tit. "Criminal Law," § 1727.

10. State *v.* Couper, 32 Oreg. 212, 49 Pac. 959.

11. *Alabama.*— Green *v.* State, 68 Ala. 539.

Idaho.— People *v.* Barnes, 2 Ida. (Hash.) 161, 9 Pac. 532.

Indiana.—State *v.* Overholser, 69 Ind. 144; State *v.* Banks, 48 Ind. 197.

Iowa.— State *v.* Myer, 69 Iowa 148, 28 N. W. 484; State *v.* Smith, 28 Iowa 565.

Kentucky.— Com. *v.* Hall, 38 S. W. 498, 18 Ky. L. Rep. 783.

New York.— U. S. *v.* Hayden, 52 How. Pr. 471.

error.[12] If there is any evidence to support or which tends to support the charge,[13] or if the evidence of a material nature is conflicting the court should not direct an acquittal, for the question is then for the jury.[14]

(II) *Of Conviction.* In criminal cases, where defendant pleads not guilty, the court has no power to direct a verdict of guilty, even where the incriminating evidence is conclusive or uncontradicted.[15]

North Carolina.— State *v.* Green, 117 N. C. 695, 23 S. E. 98.

Pennsylvania.— Pauli *v.* Com., 89 Pa. St. 432.

United States.— U. S. *v.* Fullerton, 25 Fed. Cas. No. 15,176, 7 Blatchf. 177.

See 14 Cent. Dig. tit. "Criminal Law," § 1727.

Where there is no proof of venue the court should direct an acquittal. Stone *v.* State, 105 Ala. 60, 17 So. 114; Randolph *v.* State, 100 Ala. 139, 14 So. 792; Justice *v.* State, 99 Ala. 180, 13 So. 658; Childs *v.* State, 55 Ala. 28; Clark *v.* State, 46 Ala. 307.

12. Green *v.* State, 68 Ala. 539; State *v.* Myer, 69 Iowa 148, 28 N. W. 484.

Discretion of court.— In some jurisdictions it is discretionary with the court whether it will direct an acquittal. State *v.* Collins, 24 R. I. 242, 52 Atl. 990; Tillinghast *v.* McLeod, 17 R. I. 208, 21 Atl. 345; Breese *v.* U. S., 106 Fed. 680, 45 C. C. A. 535.

In some states by statute the court is permitted only to advise an acquittal. People *v.* Lewis, 124 Cal. 551, 57 Pac. 470, 45 L. R. A. 783; People *v.* Roberts, 114 Cal. 67, 45 Pac. 1016; People *v.* Daniels, 105 Cal. 262, 38 Pac. 720; Territory *v.* Neilson, 2 Ida. (Hasb.) 614, 23 Pac. 537. And where the jury are judges of the law as well as of the facts it is in the discretion of the court to refuse to direct a verdict of acquittal, as the jury would not be bound by the direction. Goldman *v.* State, 75 Md. 621, 23 Atl. 1097; Ridgely *v.* State, 75 Md. 510, 23 Atl. 1099.

If the information or indictment does not state a crime, there is nothing on which the jury can pass, and it should be discharged and not directed to return a verdict of acquittal. State *v.* Dennison, 60 Nebr. 157, 82 N. W. 383.

A motion to discharge the accused because of insufficiency of evidence is not proper in the absence of statute. The accused has a right to go to the jury and be acquitted, if the evidence be insufficient. Boykin *v.* State, 40 Fla. 484, 24 So. 141. But in New York it is said that a motion to discharge the accused or to dismiss the indictment is in substance, although not in form, a motion to direct an acquittal. People *v.* Ledwon, 153 N. Y. 10, 46 N. E. 1046; People *v.* Bennett, 49 N. Y. 137.

Time of objection.—An objection that there is no evidence to sustain a conviction must be taken before verdict. State *v.* Williams, 129 N. C. 581, 40 S. E. 84; State *v.* Wilson, 121 N. C. 650, 28 S. E. 416; State *v.* Furr, 121 N. C. 606, 28 S. E. 552; State *v.* Curtis, 28 N. C. 247.

13. *Alabama.*— Welch *v.* State, 124 Ala. 41, 27 So. 307; Keller *v.* State, 123 Ala. 94, 26 So. 323; Gilyard *v.* State, 98 Ala. 59, 13 So. 391; Pellum *v.* State, 89 Ala. 28, 8 So. 83.

Florida.— Caldwell *v.* State, 43 Fla. 545, 30 So. 814.

Iowa.— State *v.* Harper, 88 Iowa 109, 55 N. W. 197; State *v.* Smith, 28 Iowa 565.

Kentucky.— Com. *v.* Foster, 61 S. W. 271, 22 Ky. L. Rep. 1711; Crawford *v.* Com., 35 S. W. 114, 18 Ky. L. Rep. 16.

Maine.— State *v.* Cady, 82 Me. 426, 19 Atl. 908.

Massachusetts.— Com. *v.* Williams, 171 Mass. 461, 50 N. E. 1035; Com. *v.* Brooks, 164 Mass. 397, 41 N. E. 660; Com. *v.* Irwin, 107 Mass. 401.

North Carolina.— State *v.* Costner, 127 N. C. 566, 37 S. E. 326, 80 Am. St. Rep. 809; State *v.* Utley, 126 N. C. 997, 35 S. E. 428; State *v.* Baker, 69 N. C. 147.

Oregon.— State *v.* Jones, 18 Oreg. 256, 22 Pac. 840.

Vermont.— State *v.* Hallock, 70 Vt. 159, 40 Atl. 51.

Washington.— State *v.* Wilson, 10 Wash. 402, 39 Pac. 106.

See 14 Cent. Dig. tit. "Criminal Law," § 1727.

14. Cook *v.* State, 134 Ala. 137, 32 So. 696; Maddox *v.* State, 122 Ala. 110, 26 So. 305; Thompson *v.* State, 122 Ala. 12, 26 So. 141; State *v.* Smith, 28 Iowa 565; Com. *v.* Broadbeck, 124 Mass. 319; Com. *v.* Irwin, 107 Mass. 401.

15. *Alabama.*— Sims *v.* State, 43 Ala. 33; Nonemaker *v.* State, 34 Ala. 211; Huffman *v.* State, 29 Ala. 40.

Georgia.— Tucker *v.* State, 57 Ga. 503.

Kansas.— State *v.* Wilson, 62 Kan. 621, 64 Pac. 23, 52 L. R. A. 679.

Missouri.— State *v.* Picker, 64 Mo. App. 126.

New York.— Howell *v.* People, 5 Hun 620; Pfomer *v.* People, 4 Park. Cr. 558; Breen *v.* People, 4 Park. Cr. 380.

North Carolina.— State *v.* Winchester, 113 N. C. 641, 18 S. E. 657; State *v.* Riley, 113 N. C. 648, 18 S. E. 168; State *v.* Dixon, 75 N. C. 275.

Pennsylvania.— Shaffner *v.* Com., 72 Pa. St. 60, 13 Am. Rep. 649.

United States.— U. S. *v.* Taylor, 11 Fed. 470, 3 McCrary 500; U. S. *v.* Fenwick, 25 Fed. Cas. No. 15,087, 5 Cranch C. C. 562.

Compare U. S. *v.* Anthony, 24 Fed. Cas. No. 14,459, 11 Blatchf. 200; *In re* Miltbank, 30 Fed. Cas. No. 17,855.

See 14 Cent. Dig. tit. "Criminal Law," § 1728.

In Michigan it is held that a conviction on a direction of a verdict of guilty will not be reversed on appeal, where the proof sustained the verdict. People *v.* Elmer, 109 Mich. 493,

(III) *Requisites of Motion to Direct Verdict.* A motion to direct an acquittal, which does not specify wherein the proof has failed, may be disregarded,[16] unless the failure of proof is total.[17]

(IV) *Presence of Jury During Argument.* Where defendant moves for a verdict in his favor, he is not entitled of right to have the jury sent from the room during the argument.[18]

(V) *As to One of Several Co-Defendants.* A joint motion to direct a verdict of acquittal of two co-defendants may be overruled where there is evidence tending to prove one of them guilty.[19] The same is true where one of several co-defendants moves for acquittal as to another, in order that he may introduce him as a witness,[20] although under such circumstances the prosecuting attorney may consent to the discharge of the witness. This action on his part is equivalent to entering a *nolle prosequi*.[21]

4. Instructions Invading Province of Jury — a. Comments on Evidence in General — (I) *Weight of Evidence* — (A) *In General.* The general rule is that the charge should be free from any intimation of an opinion as to the weight of evidence.[22] It has been held, however, that comments of the court in its charge upon the evidence in the case are within the proper province of the court

67 N. W. 550; People *v.* Neumann, 85 Mich. 98, 48 N. W. 290; People *v.* Ackerman, 80 Mich. 588, 45 N. W. 367; People *v.* Richmond, 59 Mich. 570, 26 N. W. 770. But where the violation of a statute is admitted, and the intent is denied, the court has no power to direct the clerk to enter a verdict without it being submitted to the jury. People *v.* Collison, 85 Mich. 105, 48 N. W. 292.

16. State *v.* Fiester, 32 Oreg. 254, 50 Pac. 561; State *v.* Tamler, 19 Oreg. 528, 25 Pac. 71, 9 L. R. A. 853; State *v.* Dyer, 67 Vt. 690, 32 Atl. 814; State *v.* Nulty, 57 Vt. 543; State *v.* Hyde, 22 Wash. 551, 61 Pac. 719.

17. State *v.* Tamler, 19 Oreg. 528, 25 Pac. 71, 9 L. R. A. 853.

18. People *v.* Tomlinson, 102 Cal. 19, 36 Pac. 506; State *v.* Huff, 76 Iowa 200, 40 N. W. 720; State *v.* Davis, 48 Kan. 1, 28 Pac. 1092.

19. Randolph *v.* State, 100 Ala. 139, 14 So. 792; State *v.* Gustave, 27 La. Ann. 395; U. S. *v.* Harding, 26 Fed. Cas. No. 15,301, 1 Wall. Jr. 127.

20. Brister *v.* State, 26 Ala. 107.

21. State *v.* Alexander, 2 Mill (S. C.) 171.

22. *Alabama.*— Foster *v.* State, 47 Ala. 643; Herges *v.* State, 30 Ala. 45.

California.— People *v.* Cowgill, 93 Cal. 596, 29 Pac. 228; People *v.* Travers, 88 Cal. 233, 26 Pac. 88.

Georgia.— Dozier *v.* State, 116 Ga. 583, 42 S. E. 762; Tiget *v.* State, 110 Ga. 244, 34 S. E. 1023; Rawls *v.* State, 97 Ga. 186, 22 S. E. 529; Hayes *v.* State, 58 Ga. 35.

Illinois.— Logg *v.* People, 92 Ill. 598; Andrews *v.* People, 60 Ill. 354; Bill *v.* People, 14 Ill. 432.

Indiana.— Garfield *v.* State, 74 Ind. 60.

Kansas.— Horne *v.* State, 1 Kan. 42, 81 Am. Dec. 409.

Kentucky.— Holloway *v.* Com., 11 Bush 344.

Louisiana.— State *v.* Hahn, 38 La. Ann. 169; State *v.* Asberry, 37 La. Ann. 124.

Missouri.— State *v.* Cushing, 29 Mo. 215; State *v.* Ross, 29 Mo. 32; State *v.* Dunn, 18 Mo. 419; State *v.* Homes, 17 Mo. 379, 57 Am. Dec. 269.

Montana.— State *v.* Mahoney, 24 Mont. 281, 61 Pac. 647.

North Dakota.— State *v.* Barry, 11 N. D. 428, 92 N. W. 809.

South Carolina.— State *v.* Green, 5 S. C. 65.

Texas.— Ross *v.* State, 29 Tex. 499; Knowles *v.* State, (Cr. App. 1902) 72 S. W. 398; Reese *v.* State, (Cr. App. 1902) 70 S. W. 424; Renner *v.* State, 43 Tex. Cr. 347, 65 S. W. 1102; Ezzell *v.* State, 29 Tex. App. 521, 16 S. W. 782; McWhorter *v.* State, 11 Tex. App. 584; Stephens *v.* State, 10 Tex. App. 120; Riojas *v.* State, 8 Tex. App. 49; Stuckey *v.* State, 7 Tex. App. 174; Stephenson *v.* State, 4 Tex. App. 591; Long *v.* State, 1 Tex. App. 466; Still *v.* State, (Cr. App. 1899) 50 S. W. 355.

West Virginia.— State *v.* Thompson, 21 W. Va. 741.

See 14 Cent. Dig. tit. "Criminal Law," § 1731.

Motive.— Whether any one else than the accused had a motive to commit the crime (Com. *v.* Dower, 4 Allen (Mass.) 297), and whether absence of motive on the part of the accused ought to operate in his favor (Clough *v.* State, 7 Nebr. 320), are questions for the jury.

Intent or malice.— Any instruction which interferes with the province of the jury to determine the intent is error. People *v.* Johnson, 106 Cal. 289, 39 Pac. 622; People *v.* Utter, 44 Barb. (N. Y.) 170. But an instruction that an intention is manifested by the circumstances connected with the offense and the sound mind of the accused is not objectionable on this ground. People *v.* Crowl, (Cal. 1893) 34 Pac. 860. An instruction that merely points out the legal elements of and defines malice (State *v.* McIntosh, 39 S. C. 97, 17 S. E. 446), or which indicates a circumstance from which, if the jury believe the evidence, they may infer the

so long as they do not amount to a direction or advice as to how the jury shall decide the matter to which the evidence relates. The jury ought to be instructed that it is for them ultimately and solely to determine all questions of fact, including the credibility of the witnesses.[23]

(B) *Federal Courts.* In the federal courts an expression of opinion on the facts by the court is not error, if at the same time the court informs the jury that they are the judges of all questions of fact.[24]

(C) *Of Particular Parts of Testimony.* It is error for the court to single out certain testimony in the case and to instruct the jury that this testimony is entitled to very great or little weight, or to otherwise instruct as to its weight.[25]

(D) *Of Circumstantial Evidence.* In those jurisdictions in which the determination of the weight and credibility of evidence is committed solely to the jury, a charge which comments upon the weight or credibility of circumstantial evidence in comparison with direct evidence is improper as encroaching upon the province of the jury.[26]

purpose and malice of the accused (State *v.* Littlejohn, 33 S. C. 599, 11 S. E. 638), does not invade the province of the jury.

23. *Connecticut.*— State *v.* Main, 75 Conn. 55, 52 Atl. 257; State *v.* Duffy, 57 Conn. 525, 18 Atl. 791.

District of Columbia.— U. S. *v.* Murphy, MacArthur & M. 375, 48 Am. Rep. 754.

Indiana.— Shank *v.* State, 25 Ind. 207.

Massachusetts.— Com. *v.* Burk, 15 Gray 404.

Minnesota.— State *v.* Rose, 47 Minn. 47, 49 N. W. 404.

Mississippi.— Sartorious *v.* State, 24 Miss. 602.

New York.— People *v.* Carpenter, 38 Hun 490, 4 N. Y. Cr. 39; People *v.* Rathbun, 21 Wend. 509; People *v.* McInnery, 5 N. Y. Cr. 47; People *v.* Quin, 1 Park. Cr. 340.

North Carolina.— State *v.* Cone, 46 N. C. 18.

Pennsylvania.— Kilpatrick *v.* Com., 31 Pa. St. 198; Com. *v.* Zuern, 16 Pa. Super. Ct. 588; Com. *v.* Warner, 13 Pa. Super. Ct. 461; Com. *v.* Winkelman, 12 Pa. Super. Ct. 497.

South Carolina.— State *v.* Smith, 12 Rich. 430; State *v.* Bennet, 3 Brev. 514.

Utah.— People *v.* Lee, 2 Utah 441.

See 14 Cent. Dig. tit. "Criminal Law," § 1731.

Technical or peculiar words.— The court may always define and comment upon technical and peculiar words, keeping in view the testimony given regarding them. State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318.

Testimony of absent witness.— Where facts stated in an affidavit for a continuance as being provable by an absent witness are admitted as true by the prosecutor, an instruction that, although taken as true, their weight and effect are for the jury, does not diminish the weight and effect, and hence does not invade the province of the jury. Mayfield *v.* State, 110 Ind. 591, 11 N. E. 618.

24. U. S. *v.* Schneider, 21 D. C. 381; Hart *v.* U. S., 84 Fed. 799, 28 C. C. A. 612; Allis *v.* U. S., 155 U. S. 117, 15 S. Ct. 36, 39 L. ed. 91. See also U. S. *v.* Connally, 1 Fed. 779, 9 Biss. 338.

25. *Alabama.*— Barker *v.* State, 126 Ala. 83, 28 So. 589; Bonner *v.* State, 107 Ala. 97, 18 So. 226; Davenport *v.* State, 85 Ala. 336, 5 So. 152; Steele *v.* State, 83 Ala. 20, 3 So. 547.

California.—People *v.* Amaya, 134 Cal. 531, 66 Pac. 794; People *v.* Grimes, 132 Cal. 30, 64 Pac. 101; People *v.* Ah Sing, 59 Cal. 400.

Georgia.— Moody *v.* State, 114 Ga. 449, 40 S. E. 242; Chapman *v.* State, 109 Ga. 157, 34 S. E. 369; Merritt *v.* State, 107 Ga. 675, 34 S. E. 361.

Illinois.— Devlin *v.* People, 104 Ill. 504.

Indiana.— Cunningham *v.* State, 65 Ind. 377.

Louisiana.— State *v.* Watkins, 106 La. 380, 31 So. 10.

Michigan.— People *v.* Gastro, 75 Mich. 127, 42 N. W. 937.

Missouri.— State *v.* Reed, 137 Mo. 125, 38 S. W. 574; State *v.* Hundley, 46 Mo. 414.

Montana.— State *v.* Pepo, 23 Mont. 473, 59 Pac. 721.

New York.— People *v.* Kemmler, 119 N. Y. 580, 24 N. E. 9 (that certain evidence is important); People *v.* O'Neil, 48 Hun 36 [*affirmed* in 109 N. Y. 251, 16 N. E. 68].

South Carolina.— State *v.* Davis, 53 S. C. 150, 31 S. E. 62, 69 Am. St. Rep. 845.

Texas.— Clark *v.* State, (Cr. App. 1900) 59 S. W. 887; Flanigan *v.* State, (Cr. App. 1899) 51 S. W. 1116, 53 S. W. 113; Ledbetter *v.* State, 21 Tex. App. 344, 17 S. W. 427; Rice *v.* State, 3 Tex. App. 451; Johnson *v.* State, 1 Tex. App. 609.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1732, 1733.

26. *California.*— People *v.* O'Brien, 130 Cal. 1, 62 Pac. 297; People *v.* Verenesenecckockkhoff, 129 Cal. 497, 58 Pac. 156, 62 Pac. 111.

Georgia.—Cicero *v.* State, 54 Ga. 156. And see Ware *v.* State, 96 Ga. 349, 23 S. E. 410.

Kentucky.— Brady *v.* Com., 11 Bush 282.

Michigan.— People *v.* Foley, 64 Mich. 148, 31 N. W. 94.

Texas.—Harrison *v.* State, 9 Tex. App. 407; Harrison *v.* State, 8 Tex. App. 183.

Compare Freiberg *v.* State, 94 Ala. 91, 10 So. 703.

See 14 Cent. Dig. tit. "Criminal Law," § 1740.

(II) *Directing Verdict*[27] *or Declaring Law* — (A) *If Jury Believe Evidence.* Where the evidence for the prosecution is uncontradicted, is not conflicting, and, if believed, shows defendant's guilt beyond a reasonable doubt, it is not error according to some of the cases to charge that if the jury believe the evidence of the prosecution it is their duty to convict.[28] This charge is not proper, however, where a substantial conflict exists in the evidence upon any material question of fact,[29] where the incriminating evidence is wholly circumstantial, and material inferences are to be drawn therefrom by the jury,[30] or where the evidence is so vague, unsatisfactory, and unconvincing that a verdict of conviction would probably be set aside on appeal.[31]

(B) *On Facts Stated Hypothetically.* An instruction which enumerates hypothetically certain acts which constitute the offense as a matter of law, and charges that if the jury find these acts to be established or proved to have been committed by the accused it is their duty to find him guilty does not invade the province of the jury.[32] It leaves the jury free to find the facts according to their own view and opinion of the evidence.[33]

(III) *Degree of Crime.* It has been held that where the accused is indicted

27. **Direction of verdict** see *supra*, XIV, F, 3, h.

28. *Alabama.*— Taylor *v.* State, 121 Ala. 24, 25 So. 689; Dill *v.* State, 25 Ala. 15; Thompson *v.* State, 21 Ala. 48. But see Foster *v.* State, 47 Ala. 643; Carter *v.* State, 44 Ala. 29; Edgar *v.* State, 43 Ala. 312.

California.— People *v.* Crowl, (1893) 34 Pac. 860; People *v.* King, 27 Cal. 507, 87 Am. Dec. 95.

Indiana.— Reynolds *v.* State, 147 Ind. 3, 46 N. E. 31.

Michigan.— People *v.* Neumann, 85 Mich. 98, 48 N. W. 290; People *v.* Ackerman, 80 Mich. 588, 45 N. W. 367; People *v.* Richmond, 59 Mich. 570, 26 N. W. 770; People *v.* Mortimer, 48 Mich. 37, 11 N. W. 776.

Minnesota.— State *v.* Taunt, 16 Minn. 109.

New Jersey.— Derby *v.* State, 60 N. J. L. 258, 37 Atl. 614.

New York.— People *v.* Cannon, 139 N. Y. 645, 34 N. E. 1098; People *v.* Crotty, 22 N. Y. App. Div. 77, 47 N. Y. Suppl. 845; Duffy *v.* People, 5 Park. Cr. 321.

North Carolina.— State *v.* Woolard, 119 N. C. 779, 25 S. E. 719; State *v.* Riley, 113 N. C. 648, 18 S. E. 168; State *v.* Winchester, 113 N. C. 641, 18 S. E. 657; State *v.* McLain, 104 N. C. 894, 10 S. E. 518; State *v.* Vines, 93 N. C. 493, 53 Am. Rep. 466.

Pennsylvania.— Johnston *v.* Com., 85 Pa. St. 54, 27 Am. Rep. 622; Com. *v.* Magee, 10 Phila. 201.

United States.— U. S. *v.* Anthony, 24 Fed. Cas. No. 14,459, 11 Blatchf. 200.

But *compare* Williams *v.* State, 50 Ark. 511, 9 S. W. 5.

See 14 Cent. Dig. tit. "Criminal Law," § 1734.

29. Grant *v.* State, 97 Ala. 35, 11 So. 915; Tinker *v.* State, 96 Ala. 115, 11 So. 383; Lucas *v.* State, 96 Ala. 51, 11 So. 216; Williams *v.* State, 47 Ala. 659; Arnold *v.* State, 29 Ala. 46.

30. Weil *v.* State, 52 Ala. 19; Perkins *v.* State, 50 Ala. 154; State *v.* Dixon, 104 N. C. 704, 10 S. E. 74; State *v.* Vance, 29 Wash. 435, 70 Pac. 34.

31. State *v.* Green, 48 S. C. 136, 26 S. E. 234.

32. *Arkansas.*— Fitzpatrick *v.* State, 37 Ark. 238.

California.— People *v.* Slater, 119 Cal. 620, 51 Pac. 957.

Connecticut.— State *v.* Fetterer, 65 Conn. 287, 32 Atl. 394.

Georgia.— Thomas *v.* State, 90 Ga. 437, 16 S. E. 94; Hill *v.* State, 63 Ga. 578, 36 Am. Rep. 120. See also Yarborough *v.* State, 86 Ga. 396, 12 S. E. 650.

Illinois.— Hopkinson *v.* People, 18 Ill. 264.

Iowa.— State *v.* Urie, 101 Iowa 411, 70 N. W. 603; State *v.* Thompson, 19 Iowa 299.

Kentucky.— Smallwood *v.* Com., 40 S. W. 248, 19 Ky. L. Rep. 344.

Louisiana.— State *v.* Mitchell, 41 La. Ann. 1073, 6 So. 785; State *v.* Durr, 39 La. Ann. 751, 2 So. 546; State *v.* Lenares, 12 La. Ann. 226.

Michigan.— People *v.* Carey, 125 Mich. 535, 84 N. W. 1087.

Mississippi.—Kliffield *v.* State, 4 How. 304.

Nevada.— State *v.* Anderson, 4 Nev. 265.

New York.— People *v.* Minnaugh, 131 N. Y. 563, 29 N. E. 750.

North Carolina.—State *v.* Rollins, 113 N. C. 722, 18 S. E. 394.

South Carolina.— State *v.* Whittle, 59 S. C. 297, 37 S. E. 923; State *v.* Aughtry, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199; State *v.* McIntosh, 40 S. C. 349, 18 S. E. 1033.

Tennessee.— Claxton *v.* State, 2 Humph. 181.

Washington.— State *v.* Fenton, 30 Wash. 325, 70 Pac. 741.

Compare, however, Corbett *v.* State, 31 Ala. 329; State *v.* Vance, 29 Wash. 435, 70 Pac. 34, holding that a requested instruction that certain facts if found by the jury are sufficient to raise a reasonable doubt of defendant's guilt is objectionable.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1735, 1749.

33. Hemingway *v.* State, 68 Miss. 371, 8 So. 317.

for an offense consisting of different grades, the court may, where the evidence warrants it, charge that the evidence shows that a crime of one of the specified grades has been committed, and direct the jury, if they believe the evidence, to find accordingly.[34]

(IV) *Reconciling Conflicting Evidence.* Where the evidence is contradictory, it is not error for the court in its charge to endeavor to reconcile the discrepancies by reviewing it in general terms, and by making suggestions warranted by it.[35] It is not proper, however, for the court to instruct that if the testimony shows two contradictory theories, one tending to guilt and the other tending to innocence, and both are reasonable, the jury must acquit, as this instruction invades the province of the jury.[36]

(V) *Confining Jury to Part of Evidence.* Inasmuch as it is the province of the jury to determine the guilt or innocence of the accused upon all the evidence, it is an invasion of their province for the court in its charge to ignore and exclude any material evidence from their consideration.[37]

(VI) *Declaring Judicial Knowledge.* It is no invasion of the province of the jury for the court to state in its charge that it will take judicial knowledge of facts that courts notice without proof.[38]

(VII) *Affirmative and Negative Testimony.* An instruction that makes any comparison between the weight and credibility of affirmative and of negative testimony, or that indicates that either is of less or greater weight than the other, is erroneous as encroaching on the province of the jury.[39]

(VIII) *Construing Evidence.* An instruction that directs the jury to put a construction favorable to defendant on evidence,[40] or which cautions them against putting a strained construction on incriminating evidence in order to convict,[41] is

34. State *v.* Joeckel, 44 Mo. 234; State *v.* Shoenwald, 31 Mo. 141. See also State *v.* Little, 6 Nev. 281. *Compare* Wood *v.* State, 31 Fla. 221, 12 So. 539; Burgess *v.* Com., 11 S. W. 88, 10 Ky. L. Rep. 927; Gwatkin *v.* Com., 9 Leigh (Va.) 678, 33 Am. Dec. 264. It is never error, where the crime charged may comprise offenses of different grades, for the court to charge the jury that it is possible for them upon the evidence to find the accused guilty of either grade, according as they believe the evidence. People *v.* Taylor, 3 N. Y. Cr. 297; State *v.* Montgomery, 9 N. D. 405, 83 N. W. 873.

35. Com. *v.* McManus, 143 Pa. St. 64, 21 Atl. 1018, 22 Atl. 761, 14 L. R. A. 89. The court's statement in an instruction that there is a conflict in the evidence is not the expression of an opinion upon the weight of evidence. People *v.* Flynn, 73 Cal. 511, 15 Pac. 102. And where in fact there is a downright contradiction in the evidence, it is not error for the court to intimate very strongly that in his opinion a great deal had been sworn to which was untrue. Horn *v.* State, 102 Ala. 144, 15 So. 278.

36. Thomas *v.* State, 103 Ala. 18, 16 So. 4; Toliver *v.* State, 94 Ala. 111, 10 So. 428; Mitchell *v.* State, 94 Ala. 68, 10 So. 518; Fonville *v.* State, 91 Ala. 39, 8 So. 688. See also Reeves *v.* State, 95 Ala. 31, 11 So. 158; Childs *v.* State, 76 Ala. 93. But the court may, in commenting upon conflicting theories, ask the jury whether one was not the probable and natural theory rather than the other. U. S. *v.* Connally, 1 Fed. 779, 9 Biss. 338. As to instructions when the evidence is conflicting see the following cases:

Alabama.— Crane *v.* State, 111 Ala. 45, 20 So. 590; Thompson *v.* State, 106 Ala. 67, 17 So. 512.

Indiana.— Epps *v.* State, 102 Ind. 539, 1 N. E. 491.

Louisiana.— State *v.* Johnson, 48 La. Ann. 87, 19 So. 213.

Massachusetts.— Com. *v.* Houle, 147 Mass. 380, 17 N. E. 896.

North Carolina.— State *v.* Parker, 66 N. C. 624.

Wisconsin.— Rounds *v.* State, 57 Wis. 45, 14 N. W. 865.

See 14 Cent. Dig. tit. "Criminal Law," § 1739.

37. *Alabama.*— Thomas *v.* State, 133 Ala. 139, 32 So. 250; Perry *v.* State, 78 Ala. 22; Carter *v.* State, 33 Ala. 429; Holmes *v.* State, 23 Ala. 17.

California.— People *v.* Ybarra, 17 Cal. 166.

Georgia.— Pound *v.* State, 43 Ga. 88.

Indiana.— Wade *v.* State, 71 Ind. 535; Barker *v.* State, 48 Ind. 163.

Kentucky.— Adwell *v.* Com., 17 B. Mon. 310.

See 14 Cent. Dig. tit. "Criminal Law," § 1741.

38. Koch *v.* State, 115 Ala. 99, 22 So. 471; People *v.* Mayes, 113 Cal. 618, 45 Pac. 860; Cash *v.* State, 10 Humphr. (Tenn.) 111.

39. Keith *v.* State, 49 Ark. 439, 5 S. W. 880; State *v.* Chevallier, 36 La. Ann. 81; State *v.* Gates, 20 Mo. 400; Haskew *v.* State, 7 Tex. App. 107.

40. Smith *v.* State, 88 Ala. 23, 7 So. 103.

41. State *v.* Curran, 51 Iowa 112, 49 N. W. 1006.

improper and should be refused, the construction to be placed upon the evidence being for the jury.[42]

(IX) *CORROBORATION OF WITNESS.* Where the evidence clearly shows that a witness is an accomplice, and a statute requires the testimony of an accomplice to be corroborated, an instruction that the witness is an accomplice and hence needs corroboration is proper.[43] But whether the testimony of a witness is corroborated is exclusively a question for the jury, and their province must not be invaded by the court.[44] Where corroboration is not indispensable, an instruction that the credibility of a witness is weakened by its absence,[45] or that if there be no corroboration the jury ought to acquit,[46] encroaches upon the province of the jury.

(X) *PURPOSE OF EVIDENCE.* An instruction properly limiting the application of evidence to the object for which it was introduced,[47] or forbidding the jury to apply it to an issue to which it is not relevant,[48] does not invade the province of the jury.

(XI) *CHARACTER.* A charge that evidence of good character should weigh with the jury as raising a strong presumption of defendant's innocence,[49] that it is entitled to great weight where the evidence against him is weak or doubtful,[50] or that it may create a reasonable doubt of the guilt of the accused[51] is improper, as invading the province of the jury.[52]

(XII) *CONFESSIONS.* The general rule is that the weight and credibility of confessions are to be determined by the jury under all the circumstances of the case, and that the court would not express any opinion as to their weight.[53]

(XIII) *INSTRUCTION IN RESPONSE TO REQUEST.* If defendant requests a charge that certain evidence is insufficient to prove a fact, he cannot complain that the court is charging as to the fact, if in response thereto it charges that the evidence is sufficient.[54] Nor, where an instruction on the facts is asked for, can he

42. Pancake *v.* State, 81 Ind. 93; People *v.* Van Dusen, 165 N. Y. 33, 58 N. E. 755 [*reversing* 53 N. Y. App. Div. 223, 65 N. Y. Suppl. 742, 15 N. Y. Cr. 238].

43. Winfield *v.* State, (Tex. Cr. App. 1903) 72 S. W. 182; Hatcher *v.* State, 43 Tex. Cr. 237, 65 S. W. 97; Sessions *v.* State, 37 Tex. Cr. 58, 38 S. W. 605. But see *infra*, XIV, F, 4, a, (XIV), (B). And *compare supra*, XII, G, l, j.

44. Burney *v.* State, 87 Ala. 80, 6 So. 391; Nabors *v.* State, 82 Ala. 8, 2 So. 357; Lanphere *v.* State, 114 Wis. 193, 89 N. W. 128. See also *supra*, XII, G, 3, f.

45. Gonzales *v.* State, 32 Tex. Cr. 611, 25 S. W. 781.

46. Com. *v.* Bosworth, 6 Gray (Mass.) 479; Gonzales *v.* State, 32 Tex. Cr. 611, 25 S. W. 781.

47. Freiberg *v.* State, 94 Ala. 91, 10 So. 703; Bruno *v.* State, (Tex. Cr. App. 1900) 58 S. W. 85; Wilkerson *v.* State, (Tex. Cr. App. 1899) 57 S. W. 956. See also Ball *v.* State, (Tex. Cr. App. 1896) 36 S. W. 448.

48. Trujillo *v.* Territory, 7 N. M. 43, 32 Pac. 154.

49. State *v.* Tarrant, 24 S. C. 593.

50. Vincent *v.* State, 37 Nebr. 672, 56 N. W. 320.

51. Maclin *v.* State, 44 Ark. 115; State *v.* Snow, 3 Pennew. (Del.) 259, 51 Atl. 607.

52. For other instructions as to character see the following cases:

Iowa.— State *v.* Horning, 49 Iowa 158.

Missouri.— State *v.* McNally, 87 Mo. 644.

New York.— People *v.* Wileman, 44 Hun 187.

Texas.— Messer *v.* State, 43 Tex. Cr. 97, 63 S. W. 643; Lockhart *v.* State, 3 Tex. App. 567.

Wisconsin.— State *v.* Leppere, 66 Wis. 355, 28 N. W. 376.

See 14 Cent. Dig. tit. "Criminal Law," § 1751.

A charge that good character was a circumstance to be considered, but that it was not a convincing matter, does not invade the province of the jury, where from all the evidence it is apparent that the reference to the evidence of good character was simply to tell the jury that good character alone was not sufficient to acquit, if they believe that the prisoner was guilty on all the evidence. State *v.* Newton, 29 Wash. 373, 70 Pac. 31.

53. *Alabama.*— Long *v.* State, 86 Ala. 36, 5 So. 443.

Indiana.— Keith *v.* State, 157 Ind. 376, 61 N. E. 716; Hauk *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465. See also Koerner *v.* State, 98 Ind. 7.

Kentucky.— Blackburn *v.* Com., 12 Bush 181.

Missouri.— State *v.* Bell, 70 Mo. 633.

Texas.— Morrison *v.* State, 41 Tex. 516; McVeigh *v.* State, 43 Tex. Cr. 17, 62 S. W. 757.

See 14 Cent. Dig. tit. "Criminal Law," § 1752. And see *supra*, XII, H, 4, 5.

54. Com. *v.* Brigham, 123 Mass. 248; Com. *v.* Lawless, 103 Mass. 425.

complain that the court modified it, where as modified it correctly stated the law.[55]

(XIV) *Assuming Facts*—(A) *In General.* An instruction is not erroneous as invading the province of the jury because it assumes the existence of facts which are expressly admitted by the accused,[56] or which are established by uncontradicted evidence,[57] or which are clearly and conclusively established by the evidence beyond a reasonable doubt;[58] but it is otherwise where an instruction assumes material facts to be proved of which there is no evidence, or upon which the evidence is contradictory or controverted.[59]

55. Needham *v.* State, 19 Tex. 332. See also State *v.* Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888.

56. *Alabama.*— Tidwell *v.* State, 70 Ala. 33.

California.— People *v.* Phillips, 70 Cal. 61, 11 Pac. 493.

Indiana.— Hawkins *v.* State, 136 Ind. 630, 36 N. E. 419; Anderson *v.* State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711.

Iowa.— State *v.* McKnight, 110 Iowa 79, 93 N. W. 63; State *v.* Archer, 73 Iowa 320, 35 N. W. 241.

Nebraska.— Pisar *v.* State, 56 Nebr. 455, 76 N. W. 869; Morgan *v.* State, 51 Nebr. 672, 71 N. W. 788.

North Carolina.— State *v.* Rash, 34 N. C. 382, 55 Am. Dec. 420; State *v.* Angel, 29 N. C. 27.

South Carolina.— State *v.* Nickels, 65 S. C. 169, 43 S. E. 521.

Texas.— Beard *v.* State, (Cr. App. 1903) 71 S. W. 960; Strang *v.* State, 32 Tex. Cr. 219, 22 S. W. 680; Fahey *v.* State, 27 Tex. App. 146, 11 S. W. 108, 11 Am. St. Rep. 182.

See 14 Cent. Dig. tit. "Criminal Law," § 1754.

57. *Alabama.*— Bynon *v.* State, 117 Ala. 80, 23 So. 640, 67 Am. St. Rep. 163.

California.— People *v.* Sternberg, 111 Cal. 3, 43 Pac. 198; People *v.* Lee Sare Bo, 72 Cal. 623, 14 Pac. 310.

Illinois.— Henry *v.* People, 198 Ill. 162, 65 N. E. 120; Smith *v.* People, 103 Ill. 82; Hanrahan *v.* People, 91 Ill. 142.

Iowa.— State *v.* Archer, 73 Iowa 320, 35 N. W. 241.

Kansas.— State *v.* Herold, 9 Kan. 194.

Kentucky.— Davis *v.* Com., 4 Ky. L. Rep. 717.

Maine.— State *v.* Day, 79 Me. 120, 8 Atl. 544.

Missouri.— State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743; State *v.* West, 157 Mo. 309, 57 S. W. 1071; State *v.* Moore, 101 Mo. 316, 14 S. W. 182; State *v.* Zinn, 61 Mo. App. 476.

Nebraska.— Welsh *v.* State, 60 Nebr. 101, 82 N. W. 368.

New York.— People *v.* Deacons, 109 N. Y. 374, 16 N. E. 676; People *v.* McInerney, 5 N. Y. Cr. 47.

North Carolina.— State *v.* Williams, 47 N. C. 194.

Texas.— O'Connell *v.* State, 18 Tex. 343; Morgan *v.* State, 43 Tex. Cr. 543, 67 S. W. 420; Holliday *v.* State, 35 Tex. Cr. 133, 32 S. W. 538.

Vermont.— State *v.* Gorham, 67 Vt. 365, 31 Atl. 845.

Washington.— Edwards *v.* Territory, 1 Wash. Terr. 195.

United States.— Wiborg *v.* U. S., 163 U. S. 632, 16 S. Ct. 1127, 41 L. ed. 289.

Contra, Green *v.* State, 43 Fla. 556, 30 So. 656.

See 14 Cent. Dig. tit. "Criminal Law," § 1754 *et seq.*

58. Smith *v.* People, 103 Ill. 82; State *v.* Zinn, 61 Mo. App. 476; O'Connell *v.* State, 18 Tex. 343.

59. *Alabama.*— Hall *v.* State, 134 Ala. 90, 32 So. 750; Fowler *v.* State, 100 Ala. 96, 14 So. 860; Horn *v.* State, 98 Ala. 23, 13 So. 329; Thompson *v.* State, 30 Ala. 28; Skains *v.* State, 21 Ala. 218.

Arizona.— Territory *v.* Kay, (1889) 21 Pac. 152.

California.— People *v.* Matthai, 135 Cal. 442, 67 Pac. 694; People *v.* Atherton, 51 Cal. 495.

Florida.— Doyle *v.* State, 39 Fla. 155, 22 So. 272, 63 Am. St. Rep. 159.

Georgia.— Suddeth *v.* State, 112 Ga. 407, 37 S. E. 747; Seales *v.* State, 97 Ga. 692, 25 S. E. 388; Davis *v.* State, 91 Ga. 167, 17 S. E. 292; Goldsmith *v.* State, 63 Ga. 85.

Illinois.— Hellyer *v.* People, 186 Ill. 550, 58 N. E. 245; Scott *v.* People, 141 Ill. 195, 30 N. E. 329; Coon *v.* People, 99 Ill. 368, 39 Am. Rep. 28; Conkwright *v.* People, 35 Ill. 204.

Indiana.— Densmore *v.* State, 67 Ind. 306, 33 Am. Rep. 96; Scott *v.* State, 64 Ind. 400; Barker *v.* State, 48 Ind. 163.

Iowa.— State *v.* Bige, 112 Iowa 433, 84 N. W. 518; State *v.* Driscoll, 44 Iowa 65; Houston *v.* State, 4 Greene 437.

Kansas.— State *v.* Lewis, 56 Kan. 374, 43 Pac. 265; State *v.* Johnson, 6 Kan. App. 119, 50 Pac. 907.

Louisiana.— State *v.* O'Kean, 35 La. Ann. 901.

Massachusetts.— Com. *v.* Smith, 153 Mass. 97, 26 N. E. 436.

Mississippi.— Ellerbe *v.* State, 79 Miss. 10, 30 So. 57; Robinson *v.* State, (1894) 16 So. 201.

Missouri.— State *v.* Grable, 46 Mo. 350; State *v.* Dillihunty, 18 Mo. 331; Whitney *v.* State, 8 Mo. 165.

Nebraska.— Williams *v.* State, 46 Nebr. 704, 65 N. W. 783.

(B) *Particular Instances.* Thus an instruction that assumes that the offense charged has been committed is erroneous where there is no evidence or a conflict of evidence as regards its commission.[60] And the same is true of an instruction which assumes the prisoner's guilt or that he committed the act charged in the indictment,[61] that he has committed other crimes,[62] that he has made a confession,[63] that declarations proved to have been made by him constitute a confes-

Nevada.— State *v.* Buralli, (1903) 71 Pac. 532.

New Jersey.— Smith *v.* State, 41 N. J. L. 370.

North Carolina.— State *v.* McDowell. 129 N. C. 523, 39 S. E. 840.

Ohio.— Cline *v.* State, 43 Ohio St. 332, 1 N. E. 22.

Oklahoma.— Kirk *v.* Territory, 10 Okla. 46, 60 Pac. 797.

South Carolina.— State *v.* Norton, 28 S. C. 572, 6 S. E. 820.

Texas.— White *v.* State, 13 Tex. 133; Nelson *v.* State, 43 Tex. Cr. 553, 67 S. W. 320; Harkey *v.* State, 33 Tex. Cr. 100, 25 S. W. 291, 47 Am. St. Rep. 19; Hardin *v.* State, 13 Tex. App. 192.

Washington.— State *v.* Walters, 7 Wash. 246, 34 Pac. 938, 1098.

West Virginia.— State *v.* Allen, 45 W. Va. 65, 30 S. E. 209; State *v.* Ahbott, 8 W. Va. 741.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1758, 1761.

"The evidence shows" followed by an enumeration of a number of facts involved in the trial, is an erroneous instruction. Cary *v.* State, 76 Ala. 78.

A constitutional provision which forbids an instruction charging on matters of fact is violated hy an instruction assuming a fact to have been proved where the evidence is contradictory. People *v.* Hertz, 105 Cal. 660, 39 Pac. 32.

60. *Alabama.*— Winter *v.* State, 133 Ala. 176, 32 So. 125.

Georgia.— Ross *v.* State, 59 Ga. 248.

Illinois.— Hellyer *v.* People, 186 Ill. 550, 58 N. E. 245; Davis *v.* People, 114 Ill. 86, 29 N. E. 192.

Mississippi.— Ashford *v.* State, 81 Miss. 414, 33 So. 174.

Ohio.— Morgan *v.* State, 48 Ohio St. 371, 27 N. E. 710.

Oregon.— State *v.* Mackey, 12 Oreg. 154, 6 Pac. 648.

Pennsylvania.— Com. *v.* Drass, 146 Pa. St. 55, 23 Atl. 233.

Washington.— State *v.* Burton, 27 Wash. 528, 67 Pac. 1097; State *v.* Walters, 7 Wash. 246, 34 Pac. 938, 1098.

See 14 Cent. Dig. tit. "Criminal Law," § 1756.

Illustrations.— A reference to defendants as having "acted in concert at the time the assault to murder was made" (Bond *v.* People, 39 Ill. 26), a statement that the alleged crime has been "committed" (People *v.* Roberts, 122 Cal. 377, 55 Pac. 137; Brown *v.* State, 72 Miss. 997, 17 So. 278; Com. *v.* Johnston, 5 Pa. Super Ct. 585, 41 Wkly. Notes Cas. (Pa.) 92), or an instruction which speaks of the sale of a stolen horse by the thief (White *v.* State, 21 Tex. App. 339, 17 S. W. 727) or instructs the jury "to have due regard to a broken and violated law" (Bradford *v.* State, 25 Tex. App. 723, 9 S. W. 46) is error. But speaking of the "time and place of the murder" (People *v.* Chun Heong, 86 Cal. 329, 24 Pac. 1021), of the "assault" (People *v.* Mallon, 103 Cal. 513, 37 Pac. 512), of "the offense" (Harris *v.* State, 97 Ga. 350, 23 S. E. 993), or referring to "the crime charged in the indictment" (State *v.* David, 131 Mo. 380, 33 S. W. 28; State *v.* Straub, 16 Wash. 111, 47 Pac. 227) does not invade the province of the jury by assuming the commission of the crime.

61. *Alabama.*—Ezell *v.* State, 102 Ala. 101, 15 So. 810; Sims *v.* State, 43 Ala. 33.

Arkansas.— Allen *v.* State, 70 Ark. 337, 68 S. W. 28; Fort *v.* State, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163.

Georgia.— Hodge *v.* State, 116 Ga. 929, 43 S. E. 370; Brewster *v.* State, 63 Ga. 639; Parker *v.* State, 34 Ga. 262.

Illinois.— Hammond *v.* People, 199 Ill. 173, 64 N. E. 980; Cannon *v.* People, 141 Ill. 270, 30 N. E. 1027; Wharton *v.* People, 8 Ill. App. 232.

Iowa.— State *v.* Porter, 74 Iowa 623, 38 N. W. 514.

Kentucky.— Duff *v.* Com., 68 S. W. 390, 24 Ky. L. Rep. 201; Leiber *v.* Com., 9 Bush 11.

Michigan.— People *v.* Bowkus, 109 Mich. 360, 67 N. W. 319.

Nevada.— State *v.* Duffy, 6 Nev. 138; State *v.* McGinnis, 5 Nev. 337.

New York.— People *v.* Langton, 32 Hun 461.

North Carolina.— State *v.* Dancy, 78 N. C. 437.

Pennsylvania.— Com. *v.* Light, 195 Pa. St. 220, 45 Atl. 933.

South Carolina.— State *v.* Williams, 31 S. C. 238, 9 S. E. 853.

Texas.— Renner *v.* State, 43 Tex. Cr. 347, 65 S. W. 1102.

Wisconsin.— Hempton *v.* State, 111 Wis. 127, 86 N. W. 596; Connors *v.* State, 95 Wis. 77, 69 N. W. 981.

See 14 Cent. Dig. tit. "Criminal Law," § 1757.

62. State *v.* Bowker, 26 Oreg. 309, 38 Pac. 124; Brewer *v.* State, (Tex. Cr. App. 1894) 27 S. W. 139. *Compare* State *v.* Jamison, 74 Iowa 613, 38 N. W. 509.

63. People *v.* Strong, 30 Cal. 151; Coley *v.* State, 110 Ga. 271, 34 S. E. 845; Covington *v.* State, 79 Ga. 687, 7 S. E. 153. The court

sion,[64] or which states that a witness who aided defendant is an accomplice,[65] or assumes the truth of the incriminating evidence as a whole, and implies that the accused is bound to overcome it.[66] An instruction which, in attempting to reconcile apparently contradictory testimony, assumes facts of which there is no evidence in order to reconcile the evidence is error, as invading the province of the jury.[67] An instruction assuming, although by implication, that defendant has failed to prove his defense is error, but a statement in an instruction that accused had attempted to prove a defense is not objectionable under this rule.[68]

b. Statement and Review of Evidence — (I) *In General.* As a general rule it is not error for the court, in charging, to recite the evidence, or to state what a witness has testified to, if he informs the jury that they are to be guided by their own recollection of the evidence, and that they are the exclusive judges of the truth of the testimony, and leave them to draw their own conclusions,[69] and in doing this does not give undue prominence to some evidence or overlook other evidence equally important.[70]

(II) *Existence of Evidence.* The court does not invade the province of the jury by stating that there is or is not evidence of particular facts, when by the record it appears that this is the case.[71] The right to state evidence conferred by

should distinctly instruct the jury to ascertain whether from the evidence a confession has been made. Dixon *v.* State, 113 Ga. 1039, 39 S. E. 846.

64. State *v.* Glynden, 51 Iowa 463, 1 N. W. 750; State *v.* Jones, 33 Iowa 9.

65. Heivner *v.* People, 7 Colo. App. 458, 43 Pac. 1047; Spears *v.* State, 24 Tex. App. 537, 7 S. W. 245 [*distinguished* in Hudson *v.* State, (Tex. Cr. App. 1896) 36 S. W. 452]. But if the evidence conclusively shows that a certain witness is an accomplice an instruction to that effect is not erroneous as invading the province of the jury. See *supra*, XIV, F, 4, a, (IX).

66. Snyder *v.* State, 59 Ind. 105; Webb *v.* State, 8 Tex. App. 115.

67. Moore *v.* State, 85 Ind. 90; State *v.* Lipsey, 14 N. C. 485; State *v.* Moses, 13 N. C. 452.

68. Allen *v.* State, 70 Ark. 337, 68 S. W. 28; People *v.* Swarbrick, 77 Cal. 125, 19 Pac. 374. An instruction which wholly ignores an affirmative defense and the evidence offered to support it (Walker *v.* State, 42 Tex. 360; Starr *v.* U. S., 153 U. S. 614, 14 S. Ct. 919, 38 L. ed. 841) or which by implication conveys the opinion of the court that defendant has failed to show his innocence (Johnson *v.* State, 27 Tex. App. 163, 11 S. W. 106) is error. It is proper to call the attention of the jury to the fact that defendant's story that he had killed deceased in self-defense was not corroborated, by "stating that his story is not gainsaid, as no one lives to gainsay it," where there were no witnesses to the homicide. People *v.* Rohl, 138 N. Y. 616, 33 N. E. 933. And it is not error to refuse to instruct in a way that would lead the jury to suppose that an affirmative defense, such as an alibi, has been partly proved by the evidence. Bohlman *v.* State, 135 Ala. 45, 33 So. 44. See also as to assuming that the accused had acted in good faith on a charge of embezzlement Willis *v.* State, 134 Ala. 429, 33 So. 226.

69. *Arkansas.*— Hughes *v.* State, 70 Ark. 420, 68 S. W. 676.

California.—People *v.* McLean, 84 Cal. 480, 24 Pac. 32.

Georgia.— Barnes *v.* State, 89 Ga. 316, 15 S. E. 313; Patterson *v.* State, 68 Ga. 292.

Indiana.— Jones *v.* State, 53 Ind. 235. *Compare* Cunningham *v.* State, 65 Ind. 377.

Minnesota.— State *v.* Rose, 47 Minn. 47, 49 N. W. 404.

Missouri.— State *v.* Sanders, 76 Mo. 35.

Nevada.— State *v.* Smith, 10 Nev. 106.

New York.— People *v.* Corey, 157 N. Y. 332, 51 N. E. 1024.

North Carolina.— State *v.* Freeman, 100 N. C. 429, 5 S. E. 921; State *v.* McNeill, 93 N. C. 552.

South Carolina.— State *v.* Ezzard, 40 S. C. 312, 18 S. E. 1025; State *v.* Glover, 27 S. C. 602, 4 S. E. 564; State *v.* Moorman, 27 S. C. 22, 2 S. E. 621; State *v.* Jones, 21 S. C. 596; State *v.* Summers, 19 S. C. 90.

Contra, State *v.* Foster, 1 Pennew. (Del.) 289, 40 Atl. 939; State *v.* Markham, 15 La. Ann. 498.

See 14 Cent. Dig. tit. "Criminal Law," § 1766.

Substance of the testimony.— A statement of the substance of a witness's testimony is not error where the statement is fairly made and includes substantially all his evidence. Hannon *v.* State, 70 Wis. 448, 36 N. W. 1.

70. Com. *v.* Walsh, 162 Mass. 242, 38 N. E. 436; Morgan *v.* State, 48 Ohio St. 371, 27 N. E. 710.

71. *Alabama.*— Griffin *v.* State, 76 Ala. 29.

California.— People *v.* Cummings, 113 Cal. 88, 45 Pac. 184; People *v.* Perry, 65 Cal. 568, 4 Pac. 572; People *v.* Vasquez, 49 Cal. 560; People *v.* Welch, 49 Cal. 174.

Indiana.— White *v.* State, 153 Ind. 689, 54 N. E. 763; Koerner *v.* State, 98 Ind. 7.

Massachusetts.— Com. *v.* Mulrey, 170 Mass. 103, 49 N. E. 91.

Minnesota.— State *v.* Taunt, 16 Minn. 109.

statute implies the right to state that there is no evidence when such is the fact.[72]

(III) *Tendency of Evidence.* It is not an invasion of the province of the jury for the court to state the tendency of evidence to prove certain facts, if it is stated fairly and the jury are instructed that they are the ultimate judges of the credibility of the evidence.[73] But it is objectionable as charging upon the weight of evidence to instruct that certain facts strongly tend to prove guilt.[74]

(IV) *Sufficiency of Evidence to Sustain Conviction.* It has been held that a statement by the judge that there is testimony enough before the jury to sustain a verdict of guilty, if they believe it and it satisfies them beyond a reasonable doubt, does not invade their province, if its credibility is left for them to determine,[75] but there are cases to the contrary.[76]

(V) *Corroboration.* It is not error to call the attention of the jury to evidence which the prosecution regards as corroboration, if it be left to them to determine whether such corroboration exists.[77]

c. Credibility of Witnesses — (I) *In General.* The question as to what degree of credit shall be given to the testimony of a witness, or whether his testimony is to be entirely rejected, is for the jury, and it is error for the court to invade their province in this respect in the giving of instructions to them.[78]

New Mexico.— Territory *v.* Young, 2 N. M. 93.

North Carolina.— State *v.* Edwards, 126 N. C. 1051, 35 S. E. 540; State *v.* Brown, 119 N. C. 789, 26 S. E. 121.

Texas.— Burrell *v.* State, 18 Tex. 713.

See 14 Cent. Dig. tit. "Criminal Law," § 1768.

A charge that there is no evidence as to a material fact should be refused where there is any evidence, although weak, as to such fact. Barnes *v.* State, 134 Ala. 36, 32 So. 670; People *v.* Plyler, 126 Cal. 379, 58 Pac. 904; People *v.* Schoedde, 126 Cal. 373, 58 Pac. 859.

Real evidence.— Where counsel has referred to evidence as real evidence, it is not error to instruct that all evidence in the case is real evidence, that there was no such classification as real or unreal evidence, and that all the evidence before the jury is real evidence. State *v.* Manning, (Vt. 1903) 54 Atl. 181.

72. People *v.* Dick, 34 Cal. 663; People *v.* King, 27 Cal. 507, 87 Am. Dec. 95.

73. *California.*— People *v.* Cummings, 113 Cal. 88, 45 Pac. 184.

Indiana.— Smith *v.* State, 142 Ind. 288, 41 N. E. 595.

Kansas.— State *v.* Thomas, 58 Kan. 805, 51 Pac. 228.

Minnesota.— State *v.* Rose, 47 Minn. 47, 49 N. W. 404.

Nevada.— State *v.* Watkins, 11 Nev. 30.

Oregon.— State *v.* Brown, 28 Oreg. 147, 41 Pac. 1042.

See 14 Cent. Dig. tit. "Criminal Law," § 1768.

74. Roberts *v.* State, (Wyo. 1902) 70 Pac. 803. See *supra*, XIV, F, 4, a, (I).

75. People *v.* Johnson, 104 Cal. 418, 38 Pac. 91; People *v.* Spiegel, 143 N. Y. 107, 38 N. E. 284 [*affirming* 75 Hun 161, 26 N. Y. Suppl. 1041].

76. Lunsford *v.* State, 9 Tex. App. 217; Benedict *v.* State, 14 Wis. 423.

77. Cathcart *v.* Com., 37 Pa. St. 108; Barker *v.* State, 36 Tex. 201.

78. *Alabama.*— Horn *v.* State, 98 Ala. 23, 13 So. 329; Lang *v.* State, 97 Ala. 41, 12 So. 183; Corley *v.* State, 28 Ala. 22. And see Green *v.* State, 97 Ala. 59, 12 So. 416, 15 So. 242.

Arkansas.— Wallace *v.* State, 28 Ark. 531. See also Ware *v.* State, 59 Ark. 379, 27 S. W. 485.

California.— People *v.* Compton, 123 Cal. 403, 56 Pac. 44; People *v.* Newcomer, 118 Cal. 263, 50 Pac. 405.

Colorado.— Davidson *v.* People, 4 Colo. 145.

Florida.—Atzroth *v.* State, 10 Fla. 207.

Georgia.—Alexander *v.* State, 114 Ga. 266, 40 S. E. 231; Thomas *v.* State, 95 Ga. 484, 22 S. E. 315; Whitten *v.* State, 47 Ga. 297; Clarke *v.* State, 35 Ga. 75.

Illinois.— Mullins *v.* People, 110 Ill. 42; Bowers *v.* People, 74 Ill. 418.

Iowa.— State *v.* Hossack, 116 Iowa 194, 89 N. W. 1077.

Kentucky.— Evans *v.* Com., 79 Ky. 414, 3 Ky. L. Rep. 30; Sapp *v.* Com., 48 S. W. 984, 20 Ky. L. Rep. 1126. And see Jackson *v.* Com., 34 S. W. 901, 17 Ky. L. Rep. 1350; Peoples *v.* Com., 87 Ky. 487, 9 S. W. 509, 810, 10 Ky. L. Rep. 517; Smith *v.* Com., 8 S. W. 192, 9 Ky. L. Rep. 1005.

Louisiana.— State *v.* Washington, 107 La. 298, 31 So. 638; State *v.* Bazile, 50 La. Ann. 21, 23 So. 8.

Massachusetts.— Com. *v.* Flynn, 165 Mass. 153, 42 N. E. 562; Com. *v.* Barry, 9 Allen 276.

Michigan.— People *v.* O'Brien, 68 Mich. 468, 36 N. W. 225.

Mississippi.— Owens *v.* State, 63 Miss. 450; Newcomb *v.* State, 37 Miss. 383; Ned *v.* State, 33 Miss. 364.

Missouri.— State *v.* Adair, 160 Mo. 391, 61

This rule applies to the testimony of prosecuting witnesses,[79] of detectives and informers,[80] of children,[81] of accomplices,[82] of relatives of the accused[83] and

S. W. 187; State *v.* Munson, 76 Mo. 109; State *v.* Kelly, 73 Mo. 608; State *v.* Williams, 12 Mo. App. 591.

Nebraska.— Everson *v.* State, (1903) 93 N. W. 394; Howell *v.* State, 61 Nebr. 391, 85 N. W. 289; Strong *v.* State, 61 Nebr. 35, 84 N. W. 410; St. Louis *v.* State, 8 Nebr. 405, 1 N. W. 371.

New York.— People *v.* Payne, 36 How. Pr. 94; Woodin *v.* People, 1 Park. Cr. 464.

Ohio.— State *v.* Tuttle, 67 Ohio St. 440, 66 N. E. 524, 93 Am. St. Rep. 689.

Pennsylvania.— Com. *v.* Hanlon, 8 Phila. 401.

South Carolina.— State *v.* Scott, 1 Bailey 270. See also State *v.* Brown, 33 S. C. 151, 11 S. E. 641; State *v.* Anderson, 24 S. C. 109; State *v.* Le Blanc, 3 Brev. 339.

Tennessee.—Kinchelow *v.* State, 5 Humphr. 9.

Texas.— Ross *v.* State, 29 Tex. 499; Chavarria *v.* State, (Cr. App. 1901) 63 S. W. 312; Bonner *v.* State, (Cr. App. 1895) 32 S. W. 1043; Franklin *v.* State, (Cr. App. 1894) 28 S. W. 472; Gibbs *v.* State, (Cr. App. 1892) 20 S. W. 919; Doss *v.* State, 21 Tex. App. 505, 2 S. W. 814, 57 Am. Rep. 618; Riojas *v.* State, 8 Tex. App. 49; Pharr *v.* State, 7 Tex. App. 472; Searcy *v.* State, 1 Tex. App. 440.

United States.— U. S. *v.* Pacific Express Co., 15 Fed. 867; U. S. *v.* Brown, 24 Fed. Cas. No. 14,667, 4 McLean 142.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1719, 1772, 1774.

Comparing credibility of witnesses.— An instruction which makes argumentative comparisons between the credibility of the testimony of the prosecution and defense respectively, to the disparagement of the credibility of the witnesses for the former, infringes the province of the jury (Territory *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003), as in all cases of this kind the reconciliation of the conflict is for them exclusively (Mitchell *v.* State, 43 Fla. 188, 30 So. 803).

Manner of witnesses on the stand.— An instruction that the jury may consider the manner of the witness on the stand (State *v.* Hilsabeck, 132 Mo. 348, 34 S. W. 38; State *v.* Hoshor, 26 Wash. 643, 67 Pac. 386), or which comments upon and points out an open exhibition of partiality and prejudice by the witness (State *v.* Nat, 51 N. C. 114), or states that the witness appeared to be candid (State *v.* Davis, 15 N. C. 612) does not invade the province of the jury.

Unimpeached witnesses.— Although there is a presumption that the reputation of a witness is good until it is impeached (State *v.* Taylor, 57 S. C. 483, 35 S. E. 729, 76 Am. St. Rep. 575), the jury should not be instructed that he is presumed to have testified truly (Glover *v.* State, 22 Fla. 493; State *v.* Jones, 77 N. C. 520; State *v.* Taylor, 57 S. C. 483, 35 S. E. 729, 76 Am. St. Rep. 575; State *v.* Norton, 28 S. C. 572, 6 S. E. 820; Sawyers *v.* State, 15 Lea (Tenn.) 694. But see Cornwell *v.* State, 91 Ga. 277, 18 S. E. 154). On the other hand the jury are not bound to believe the testimony of an unimpeached witness even where his testimony is probable (People *v.* Tuczkewitz, 149 N. Y. 240, 43 N. E. 548; State *v.* Rash, 34 N. C. 382, 55 Am. Dec. 420. See also State *v.* Breckenridge, 33 La. Ann. 310), although they are not arbitrarily to disregard it, unless they can conscientiously say that it fails to convince them as candid and impartial men (Jones *v.* State, 48 Ga. 163; Ferkel *v.* People, 16 Ill. App. 310).

79. People *v.* Murray, 86 Cal. 31, 24 Pac. 802; Richie *v.* State, 58 Ind. 355, although he or she has stated out of court that the prosecution was instigated to make money. The fact that he will receive a portion of a fine does not warrant a charge that his testimony should be received with caution. Com. *v.* Pease, 137 Mass. 576.

80. Myers *v.* State, 97 Ga. 76, 25 S. E. 252; Burns *v.* People, 45 Ill. App. 70; People *v.* Shoemaker, (Mich. 1902) 90 N. W. 1035; Copeland *v.* State, 36 Tex. Cr. 575, 38 S. W. 210. It has been held error to instruct that the testimony of private detectives and of the police should be received with "caution" (Hronek *v.* People, 134 Ill. 139, 24 N. E. 861, 23 Am. St. Rep. 652, 8 L. R. A. 837. *Contra*, State *v.* Fullerton, 90 Mo. App. 411), or "distrust" (State *v.* Hoxsie, 15 R. I. 1, 22 Atl. 1059, 2 Am. St. Rep. 838; State *v.* Bennett, 40 S. C. 308, 18 S. E. 886), or with "extreme care and suspicion" (State *v.* Snyder, 8 Kan. App. 686, 57 Pac. 135; State *v.* Keys, 4 Kan. App. 14, 45 Pac. 727). The credibility of a witness who by deceit, misrepresentation, and other disreputable means has obtained an illegal confession from a prisoner is for the jury, who should be specially instructed on that point. Heldt *v.* State, 20 Nebr. 492, 30 N. W. 626, 57 Am. Rep. 835. The motive of a detective, although it may be considered by the jury, does not justify an instruction that if for the purpose of betraying the accused he induced him to commit a crime, it should weigh against his testimony, but that if, acting honestly in the public interest, he visited the place of the offense for the purpose of procuring evidence, it should not detract from his testimony. Com. *v.* Foran, 110 Mass. 179.

81. State *v.* Todd, 110 Iowa 631, 82 N. W. 322; State *v.* Le Blanc, 3 Brev. (S. C.) 339. But it has been held that an instruction that the jury may take into consideration the immature age (Barnard *v.* State, 88 Wis. 656, 60 N. W. 1058), intelligence, interest, apparent prejudice, and the particular facts of the case in determining the credibility of such witness is not error. Brown *v.* State, 2 Tex. App. 115.

82. See *supra*, XII, G, 3.

83. State *v.* Rankin, 8 Iowa 355; State *v.* Guyer, 6 Iowa 263; State *v.* Collins, 118

of relatives of an accomplice.[84] The rule has also been held to apply to the testimony of expert witnesses.[85]

(11) *Improbability of Evidence.* An instruction that the jury must disregard testimony which appears to them improbable is error. Many improbable things occur, and the improbability of the statement of a witness is never, as matter of law, a sufficient reason for it to be disregarded, although it may diminish its weight and credibility.[86]

(111) *Reputation of Witnesses.* An instruction which in effect tells the jury that defendant's witnesses are disreputable[87] or lawless and criminal persons[88] is erroneous. An instruction is proper which tells the jury that they are not to disregard the evidence of convicts merely because they are convicts, but that they must weigh it and consider it according to the rules of evidence.[89]

N. C. 1203, 24 S. E. 118. According to the weight of authority the rule is that the testimony of relatives of the accused is to be received and its credibility tested by the same rules which apply to the testimony of other witnesses. Where near relatives of a party are called by him as witnesses, such relationship is always a proper matter for the consideration of the jury in estimating the value of their testimony, and the court may so instruct the jury; but it is not proper for the court to say that the testimony of witnesses related to the accused is entitled to less weight on account of such relationship or is to be received with caution.

Alabama.— See Mitchell *v.* State, 133 Ala. 65, 32 So. 132.

California.— People *v.* Wong Ah Foo, 69 Cal. 180, 10 Pac. 375. *Compare* People *v.* Shattuck, 109 Cal. 673, 42 Pac. 315; People *v.* Hertz, 105 Cal. 660, 37 Pac. 32.

Indiana.— Keesier *v.* State, 154 Ind. 242, 56 N. E. 232.

Iowa.— State *v.* Bernard, 45 Iowa 234; State *v.* Collins, 20 Iowa 85; State *v.* Rankin, 8 Iowa 355; State *v.* Guyer, 6 Iowa 263.

Kentucky.— Barnard *v.* Com., 8 S. W. 444, 10 Ky. L. Rep. 143.

Minnesota.—State *v.* Hogard, 12 Minn. 293.

Mississippi.— McEwen *v.* State, (1894) 16 So. 242.

Missouri.— State *v.* Fisher, 162 Mo. 169, 62 S. W. 690; State *v.* Hobbs, 117 Mo. 620, 23 S. W. 1074; State *v.* Young, 99 Mo. 666, 12 S. W. 879; State *v.* Parker, 39 Mo. App. 116.

North Carolina.— State *v.* Apple, 121 N. C. 584, 28 S. E. 469; State *v.* Lee, 121 N. C. 544, 28 S. E. 552; State *v.* Collins, 118 N. C. 1203, 24 S. E. 118; State *v.* Nash, 30 N. C. 35.

Oregon.— State *v.* Pomeroy, 30 Oreg. 16, 46 Pac. 797.

Texas.— Cockerell *v.* State, 32 Tex. Cr. 585, 25 S. W. 421. See also McGrath *v.* State, 35 Tex. Cr. 413, 34 S. W. 127, 941.

See 14 Cent. Dig. tit. "Criminal Law," § 1776.

84. Crittenden *v.* State, 134 Ala. 145, 32 So. 273.

85. *Alabama.*— Gunter *v.* State, 83 Ala. 96, 3 So. 600.

California.—People *v.* Storke, 128 Cal. 486, 60 Pac. 420, 1090.

Indiana.— Wagner *v.* State, 116 Ind. 181, 18 N. E. 833; Epps *v.* State, 102 Ind. 539, 1 N. E. 491.

Michigan.— People *v.* Seaman, 107 Mich. 348, 65 N. W. 203, 61 Am. St. Rep. 326.

New York.— See People *v.* Ferraro, 161 N. Y. 365, 55 N. E. 931, 14 N. Y. Cr. 266; Templeton *v.* People, 3 Hun 357, 6 Thomps. & C. 81.

Pennsylvania.—Com. *v.* Barner, 199 Pa. St. 335, 49 Atl. 60; Pannell *v.* Com., 86 Pa. St. 260.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1745, 1778.

Illustrations.— A statement that experts could be obtained to swear on both sides of any question (People *v.* Webster, 59 Hun (N. Y.) 398, 13 N. Y. Suppl. 414), or that their testimony, derived from an examination out of court, should be carefully considered in view of a possibility of their failure to seek for conditions favorable to the opposite party (State *v.* Rathbun, 74 Conn. 524, 51 Atl. 540), or that medical experts employed by defendant are by reason of such employment entitled to little or no credit, but that great weight should be given to the testimony of an expert appointed by the court and introduced by the state (Persons *v.* State, 90 Tenn. 291, 16 S. W. 726) is error. But it is not error to instruct that expert opinions are to be considered in connection with all the evidence and that the jury are not bound to act upon them (Wagner *v.* State, 116 Ind. 181, 18 N. E. 833), but may judge of the reasonableness of these opinions from the facts of the case, and that both expert and non-expert evidence should be subject to a careful examination (Wilcox *v.* State, 94 Tenn. 106, 28 S. W. 312) by the same tests. See Epps *v.* State, 102 Ind. 539, 1 N. E. 491.

How weight is determined.— The weight of expert testimony depends on the skill, knowledge, and experience of the witness, and his acquaintance with the subject under investigation. State *v.* Hockett, 70 Iowa 442, 30 N. W. 742 [*distinguishing* State *v.* Townsend, 66 Iowa 741, 24 N. W. 535].

86. State *v.* Adair, 160 Mo. 391, 61 S. W. 187; Bishop *v.* State, 43 Tex. 390. *Compare* Hunter *v.* State, 29 Fla. 486, 10 So. 730.

87. People *v.* Christensen, 85 Cal. 568, 24 Pac. 888; State *v.* Lucas, 24 Oreg. 168, 33 Pac. 538.

88. Smith *v.* U. S., 161 U. S. 85, 16 S. Ct. 483, 40 L. ed. 626.

89. People *v.* Puttman, 129 Cal. 258, 61 Pac. 961; People *v.* McLane, 60 Cal. 412.

(iv) *Interest or Bias of Witnesses.* The general rule is that the jury, in determining the credibility of witnesses, may among other circumstances consider their interest in the result or bias, and they may properly be so instructed by the court.[90] But an instruction that the jury may disregard the testimony of a witness interested in the result, irrespective of other considerations bearing on his credibility, is error.[91]

(v) *Effect of Impeachment.* It has been held that the court may with propriety state in its charge that there is no evidence impeaching the character of a witness, where such is the case;[92] but as a rule a charge that a witness has not been impeached invades the province of the jury and is properly refused.[93] The court must not instruct the jury that they cannot convict on impeached evidence unless it is corroborated,[94] but it may instruct them that they may disregard the evidence of a witness if they believe that he has been successfully impeached, unless it is corroborated to their satisfaction.[95] In every case where impeachment by any method is attempted the jury are not at liberty to arbitrarily discard the impeached testimony,[96] but ought to determine its credibility, and they may believe it if they think it credible.[97]

(vi) *Effect of Wilful Falsehood.* It is error and an invasion of the prov-

90. *California.*— People *v.* Amaya, 134 Cal. 531, 66 Pac. 794 [*distinguishing* People *v.* Shattuck, 109 Cal. 673, 42 Pac. 315; People *v.* Hertz, 105 Cal. 660, 39 Pac. 32].

Indiana.— State *v.* Carey, 23 Ind. App. 378, 55 N. E. 261.

Missouri.— State *v.* Adair, 160 Mo. 391, 61 S. W. 187.

Nebraska.— Van Buren *v.* State, 63 Nebr. 453, 88 N. W. 671; Clarey *v.* State, 61 Nebr. 688, 85 N. W. 897; Chezem *v.* State, 56 Nebr. 496, 76 N. W. 1056.

North Carolina.— State *v.* Nat, 51 N. C. 114.

Washington.— State *v.* Hosher, 26 Wash. 643, 67 Pac. 386.

West Virginia.—State *v.* Dickey, 48 W. Va. 325, 37 S. E. 695.

Wisconsin.— Lee *v.* State, 74 Wis. 45, 41 N. W. 960.

Compare for erroneous instructions as to interest or bias Bing *v.* State, 52 Ark. 263, 12 S. W. 559; Wright *v.* Com., 85 Ky. 123, 2 S. W. 904, 909, 8 Ky. L. Rep. 718; Shields *v.* State, 39 Tex. Cr. 13, 44 S. W. 844; Daggett *v.* State, 39 Tex. Cr. 1, 44 S. W. 148, 842; Williams *v.* State, (Tex. Cr. App. 1897) 40 S. W. 801.

See 14 Cent. Dig. tit. "Criminal Law," § 1780.

It is proper to instruct that in determining the facts the jury are to determine, from the appearance and demeanor of the witnesses, their manner of testifying and their apparent candor and fairness, their bias or prejudice, their apparent intelligence, their interest in the result, and all their surrounding circumstances, the witnesses most worthy of credit, and to give credit accordingly. State *v.* Hoshor, 26 Wash. 643, 67 Pac. 386.

91. Ricker *v.* State, (Miss. 1895) 18 So. 121; McEwen *v.* State, (Miss. 1894) 16 So. 242. *Compare*, however, Hunter *v.* State, 29 Fla. 486, 10 So. 730.

92. State *v.* Means, 95 Me. 364, 50 Atl. 30, 85 Am. St. Rep. 421.

93. Rambo *v.* State, 134 Ala. 171, 32 So. 650; Prior *v.* State, 99 Ala. 196, 13 So. 681; State *v.* Breckenridge, 33 La. Ann. 310.

94. Moore *v.* State, 68 Ala. 360; Addison *v.* State, 48 Ala. 478; McDermott *v.* State, 89 Ind. 187; State *v.* Larson, 85 Iowa 659, 52 N. W. 539; State *v.* Davis, 74 Iowa 578, 38 N. W. 424. See also Pentecost *v.* State, 107 Ala. 81, 18 So. 146.

95. *Alabama.*— Osborn *v.* State, 125 Ala. 106, 27 So. 758; Prater *v.* State, 107 Ala. 26, 18 So. 238.

Illinois.— Loerh *v.* People, 132 Ill. 504, 24 N. E. 68.

Missouri.— State *v.* Goforth, 136 Mo. 111, 37 S. W. 801; State *v.* Patrick, 107 Mo. 147, 17 S. W. 666.

West Virginia.— State *v.* Sutfin, 22 W. Va. 771.

United States.—Allen *v.* U. S., 164 U. S. 492, 17 S. Ct. 154, 41 L. ed. 528.

See 14 Cent. Dig. tit. "Criminal Law," § 1784.

96. Hall *v.* State, 130 Ala. 42, 30 So. 422; Osborn *v.* State, 125 Ala. 106, 27 So. 758; Pentecost *v.* State, 107 Ala. 81, 18 So. 146; Huff *v.* State, 104 Ga. 521, 30 S. E. 809; McDonald *v.* State, (Miss. 1900) 28 So. 750; Rylee *v.* State, (Miss. 1898) 22 So. 890; Territory *v.* Abeita, 1 N. M. 545.

97. *Georgia.*— Plummer *v.* State, 111 Ga. 839, 36 S. E. 233; Mitchell *v.* State, 110 Ga. 272, 34 S. E. 576; Huff *v.* State, 104 Ga. 521, 30 S. E. 809.

Illinois.— Roach *v.* People, 77 Ill. 25.

Iowa.— State *v.* Johnagen, 53 Iowa 250, 5 N. W. 176.

Michigan.— People *v.* Lyons, 51 Mich. 215, 16 N. W. 380.

Mississippi.— Owens *v.* State, 80 Miss. 499, 32 So. 152; Palmer *v.* State, (1895) 18 So. 269.

Nebraska.— Strong *v.* State, 61 Nebr. 35, 84 N. W. 410.

New York.— Dunn *v.* People, 29 N. Y. 523, 86 Am. Dec. 319.

ince of the jury for the court to charge that if they believe that a witness has wilfully or knowingly testified falsely in relation to any material fact, they should or must disregard his entire evidence altogether, unless his evidence is corroborated by other evidence;[98] but it is not error to instruct them that they may, or are at liberty, or have the right to do so,[99] unless his evidence in their opinion is corroborated.[1]

d. Credibility of Accused — (I) *In General.* The credibility of the accused, like that of every other witness, is for the jury to determine, and if they believe his testimony to be true they should act upon it and acquit,[2] and the court should not, where the statute makes the accused competent, defeat the statute by hostile instructions discrediting his testimony.[3] If an attempt is made to impeach him directly it is exclusively within their province to determine whether he has been impeached.[4] The fact that he establishes a good character does not warrant an instruction that his testimony should be given greater weight than that of a witness which contradicts it.[5]

(II) *Interest in the Result.* Where defendant testifies in his own behalf, most of the courts have held that it is not error for the court to call the attention of the jury to the fact that he is vitally interested in the outcome of the case, and to point out his situation and relation to it, and that it is proper at the same time

See 14 Cent. Dig. tit. "Criminal Law," §§ 1784, 1892.

98. *Alabama.*— Lowe *v.* State, 88 Ala. 8, 7 So. 97.

Louisiana.— State *v.* Banks, 40 La. Ann. 736, 5 So. 18.

Minnesota.— State *v.* McCartey, 17 Minn. 54.

Mississippi.— Spivey *v.* State, 58 Miss. 858.

Missouri.— State *v.* Stout, 31 Mo. 406; State *v.* Cushing, 29 Mo. 215.

Nebraska.—Argabright *v.* State, 49 Nebr. 760, 69 N. W. 102.

South Carolina.— State *v.* Jacob, 30 S. C. 131, 8 S. E. 698, 14 Am. St. Rep. 897.

West Virginia.— State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813; State *v.* Thompson, 21 W. Va. 741.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1785, 1893.

99. *Alabama.*— McClellan *v.* State, 117 Ala. 140, 23 So. 653.

California.— People *v.* Wilder, 134 Cal. 182, 66 Pac. 228; People *v.* Arlington, 131 Cal. 231, 63 Pac. 347; People *v.* Winters, 125 Cal. 325, 57 Pac. 1067.

Georgia.— Speight *v.* State, 80 Ga. 512, 5 S. E. 506.

Illinois.— Panton *v.* People, 114 Ill. 505, 2 N. E. 411; Gorgo *v.* People, 100 Ill. App. 130.

Kansas.— State *v.* Patterson, 52 Kan. 335, 34 Pac. 784; State *v.* Potter, 16 Kan. 80.

Missouri.— State *v.* Hale, 156 Mo. 102, 56 S. W. 881; State *v.* Goforth, 136 Mo. 111, 37 S. W. 801; State *v.* Martin, 124 Mo. 514, 28 S. W. 12; State *v.* Mounce, 106 Mo. 226, 17 S. W. 226 [*following* State *v.* Vansant, 80 Mo. 67].

New York.— Moett *v.* People, 85 N. Y. 373 [*affirming* 23 Hun 60].

Oregon.— State *v.* Birchard, 35 Oreg. 484, 59 Pac. 468.

South Carolina.— State *v.* Littlejohn, 33 S. C. 599, 11 S. E. 638.

South Dakota.— State *v.* Sexton, 10 S. D. 127, 72 N. W. 84.

Washington.— State *v.* Kyle, 14 Wash. 550, 45 Pac. 147.

West Virginia.— State *v.* Thompson, 21 W. Va. 741.

Contra, Barnett *v.* Com., 84 Ky. 449, 1 S. W. 722, 8 Ky. L. Rep. 448; Cook *v.* Com., 4 Ky. L. Rep. 31.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1785, 1893.

This instruction is properly qualified by adding that the jury are not bound to disbelieve the witness, if they still believe his entire testimony worthy of credit. State *v.* Baker, 89 Iowa 188, 56 N. W. 425.

The falsehood must be wilful, and as to a material fact.— People *v.* Strong, 30 Cal. 151.

1. Miller *v.* State, 106 Wis. 156, 81 N. W. 1020.

2. *California.*— People *v.* Morrow, 60 Cal. 142.

Florida.— Miller *v.* State, 15 Fla. 577.

Georgia.— Wilson *v.* State, 69 Ga. 224; Day *v.* State, 63 Ga. 667.

Illinois.— Rider *v.* People, 110 Ill. 11.

New York.— People *v.* Rankin, 1 Wheel. Cr. 120.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1722, 1786.

3. Ballard *v.* State, 31 Fla. 266, 12 So. 865; State *v.* Caddon, 30 S. C. 609, 8 S. E. 536; Ross *v.* State, 29 Tex. 499; Hicks *v.* U. S., 150 U. S. 442, 14 S. Ct. 144, 37 L. ed. 1137. Thus an instruction which tells the jury that while defendants are competent witnesses in their own behalf they are not bound to believe their evidence and to treat it the same as that of other witnesses is error. Lambert *v.* People, 34 Ill. App. 637.

4. State *v.* Chingren, 105 Iowa 169, 74 N. W. 946.

5. State *v.* Brown, 34 S. C. 41, 12 S. E 662.

to instruct them that they may consider these facts in determining his credibility.[6] It is error, however, to instruct the jury that they must or that they should consider his interest in the result,[7] that they should because of such interest regard his testimony with great caution,[8] that they should bear in mind the tendency on the part of the guilty accused of crime to fabricate a story which they think may effect their acquittal,[9] or to instruct that the jury may disregard the testimony of defendant because of his interest, if his testimony conflicts with other evidence.[10]

(III) *Comparison With Other Witnesses.* A charge that the jury must give the testimony of defendant the same weight and consideration as that of any other witness is properly refused, as invasive of their province.[11]

(IV) *Absence of Corroborative Evidence.* An instruction that the jury may believe the testimony of the accused or disbelieve it according as it is or is not corroborated or contradicted is error;[12] but an instruction commenting upon the absence of evidence which would corroborate the testimony of the accused, and which he could readily produce, is not error, where the court does not direct the jury that absence of corroboration is a circumstance against the accused.[13]

e. Presumptions of Fact — (I) *In General.* Presumptions of fact are infer-

6. *Alabama.*—Smith *v.* State, 107 Ala. 139, 18 So. 306, 118 Ala. 117, 24 So. 55; Dryman *v.* State, 102 Ala. 130, 15 So. 433.

Arizona.— Halderman *v.* Territory, (1900) 60 Pac. 876.

Arkansas.— Blair *v.* State, 69 Ark. 558, 64 S. W. 948; Hamilton *v.* State, 62 Ark. 543, 36 S. W. 1054; Felker *v.* State, 54 Ark. 489, 16 S. W. 663.

California.— People *v.* Hitchcock, 104 Cal. 482, 38 Pac. 198; People *v.* Curry, 103 Cal. 548, 37 Pac. 503; People *v.* Knapp, 71 Cal. 1, 11 Pac. 793; People *v.* O'Neal, 67 Cal. 378, 7 Pac. 790; People *v.* Wheeler, 65 Cal. 77, 2 Pac. 892.

Illinois.— Henry *v.* People, 198 Ill. 162, 65 N. E. 120; Gott *v.* People, 187 Ill. 249, 58 N. E. 293; Hellyer *v.* People, 186 Ill. 550, 58 N. E. 245.

Indiana.— McIntosh *v.* State, 151 Ind. 251, 51 N. E. 354.

Iowa.— State *v.* Young, 104 Iowa 730, 74 N. W. 693.

Louisiana.— State *v.* Wiggins, 50 La. Ann. 330, 23 So. 334.

Michigan.— People *v.* Resh, 107 Mich. 251, 65 N. W. 99; People *v.* Calvin, 60 Mich. 113, 26 N. W. 851; People *v.* Herrick, 59 Mich. 563, 26 N. W. 767.

Missouri.— State *v.* Miller, 162 Mo. 253, 62 S. W. 692, 85 Am. St. Rep. 498; State *v.* Adair, 160 Mo. 391, 61 S. W. 187; State *v.* Miller, 159 Mo. 113, 60 S. W. 67; State *v.* Napper, 141 Mo. 401, 42 S. W. 957; State *v.* Bryant, 134 Mo. 246, 35 S. W. 597; State *v.* Fairlamb, 121 Mo. 137, 25 S. W. 895; State *v.* Noeninger, 108 Mo. 166, 18 S. W. 990; State *v.* Mounce, 106 Mo. 226, 17 S. W. 226; State *v.* Brown, 104 Mo. 365, 16 S. W. 406; State *v.* Wisdom, 84 Mo. 177; State *v.* McGinnis, 76 Mo. 326.

Montana.— State *v.* Metcalf, 17 Mont. 417, 43 Pac. 182.

Nebraska.— Philamalee *v.* State, 58 Nebr. 320, 78 N. W. 625; Housh *v.* State, 43 Nebr. 163, 61 N. W. 571; Johnson *v.* State, 34 Nebr. 257, 51 N. W. 835; Clark *v.* State, 32 Nebr. 246, 49 N. W. 367.

New Mexico.— Territory *v.* Taylor, (1903) 71 Pac. 489; Territory *v.* Leyba, (1897) 47 Pac. 718; Territory *v.* Romine, 2 N. M. 114.

North Carolina.— State *v.* Collins, 118 N. C. 1203, 24 S. E. 118.

Oregon.— State *v.* Tarter, 26 Oreg. 38, 37 Pac. 53.

Pennsylvania.— Com. *v.* Pipes, 158 Pa. St. 25, 27 Atl. 839; Com. *v.* Orr, 138 Pa. St. 276, 20 Atl. 866.

South Carolina.— State *v.* Addy, 28 S. C. 4, 4 S. E. 814.

Washington.— State *v.* McCann, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216; State *v.* Carey, 15 Wash. 549, 46 Pac. 1050.

Wyoming.— Haines *v.* Territory, 3 Wyo. 167, 13 Pac. 8.

United States.— Johnson *v.* U. S., 157 U. S. 320, 15 S. Ct. 614, 39 L. ed. 717.

Contra, State *v.* Webb, 6 Ida. 428, 55 Pac. 892; Harrell *v.* State, 37 Tex. Cr. 612, 40 S. W. 799.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1787, 1896.

7. People *v.* Van Ewan, 111 Cal. 144, 43 Pac. 520; Hartford *v.* State, 96 Ind. 461, 49 Am. Rep. 185; Buckley *v.* State, 62 Miss. 705; Cockerell *v.* State, 32 Tex. Cr. 585, 25 S. W. 421; Muely *v.* State, 31 Tex. Cr. 155, 18 S. W. 411, 19 S. W. 915 [*overruling* Brown *v.* State, 2 Tex. App. 115].

8. State *v.* Vasquez, 16 Nev. 42; State *v.* Johnson, 16 Nev. 36; State *v.* Holloway, 117 N. C. 730, 23 S. E. 168; State *v.* White, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442.

9. State *v.* Hoy, 83 Minn. 286, 86 N. W. 98.

10. Allen *v.* State, 87 Ala. 107, 6 So. 370.

11. McKee *v.* State, 82 Ala. 32, 2 So. 451; People *v.* Pierson, 2 Ida. (Hasb.) 76, 3 Pac. 688; Chambers *v.* People, 105 Ill. 409; Clark *v.* State, (Tex. Cr. App. 1900) 59 S. W. 887.

12. State *v.* Sanders, 106 Mo. 188, 17 S. W. 223; State *v.* Patterson, 98 Mo. 283, 11 S. W. 728.

13. McGrory *v.* People, 48 Barb. (N. Y.) 466; Com. *v.* Pendergast, 138 Pa. St. 633, 21 Atl. 12.

ences of fact drawn from the existence of other facts.[14] It is the province of the jury, under the advice and suggestion of the court, to draw such presumptions or inferences from the facts proved,[15] and an instruction which tells them that they should or must draw a particular inference of fact from other facts proven or claimed to be proven in the case is error.[16] They should be told that it is for them to say whether or not they will draw a certain inference of fact.[17]

(II) *FALSE EXPLANATIONS.* It is proper for the court to suggest to the jury that if the accused has uttered false exculpatory statements, they may therefrom, but need not necessarily, infer his guilt;[18] but it is error to tell the jury that false statements should be construed as tending to establish guilt,[19] or to assume in the charge that the statements are false.[20]

(III) *FLIGHT.* An instruction that flight raises a strong presumption of guilt[21] or that the presumption from flight is so conclusive that it is the duty of the jury to act upon it[22] is error. The court, in charging on the flight of the accused, is limited to telling the jury that it is a circumstance which may be considered by them, and from which they may draw an inference of guilt in connection with other circumstances, in the absence of an explanation.[23]

f. Instructions to Jurors as to Their Duty — (I) *IN GENERAL.* The court should exercise great care in assuming to instruct the jurors as to their individual or collective responsibility, or as to the methods by which they should arrive at their verdict; but it is proper to instruct them that in considering and weighing the evidence they should use the same judgment, reason, common sense, and general knowledge of men and affairs as in every-day life,[24] and that if any of the

14. Allison *v.* State, 42 Ind. 354.

15. Berry *v.* State, 10 Ga. 511; State *v.* Cooper, 26 W. Va. 338. It is the duty of the jury in determining the guilt of the accused to keep within the limits of the evidence, and not to permit any knowledge of facts in controversy or any of the peculiar kinds, or requirements of any one of them, to influence them in determining the evidence; but they may determine the weight and the evidence before them in the light of their own experience. People *v.* Zeiger, 6 Park. Cr. (N. Y.) 355. The jury, however, have no right to infer a fact of which there is no evidence, and a charge to this effect is reversible error. Henderson *v.* State, 49 Ala. 20.

16. *Alabama.*— Wilkinson *v.* State, 106 Ala. 23, 17 So. 458; Easterling *v.* State, 30 Ala. 46.

California.— People *v.* Carrillo, 54 Cal. 63.

Indiana.— Allison *v.* State, 42 Ind. 354.

Massachusetts.— Com. *v.* Clifford, 145 Mass. 97, 13 N. E. 345.

Nebraska.— Williams *v.* State, 46 Nebr. 704, 65 N. W. 783.

New York.— People *v.* Bartholf, 20 N. Y. Suppl. 782.

Tennessee.— Persons *v.* State, 90 Tenn. 291, 16 S. W. 726.

Texas.— Clark *v.* State, (Cr. App. 1900) 59 S. W. 887; Brann *v.* State, (Cr. App. 1897) 39 S. W. 940; Williams *v.* State, 11 Tex. App. 275; Hull *v.* State, 7 Tex. App. 593.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1718, 1790.

17. Binns *v.* State, 66 Ind. 428; Com. *v.* Walsh, 162 Mass. 242, 38 N. E. 436. A charge that, if the jury believe certain enumerated facts, they may infer from such facts that the accused is guilty, is not error. Jeffries *v.* State, 61 Ark. 308, 32 S. W. 1080; People *v.* Jones, 123 Cal. 65, 55 Pac. 698; Hunt *v.* State, 81 Ga. 140, 7 S. E. 142.

18. People *v.* Stewart, 75 Mich. 21, 42 N. W. 662; Pilger *v.* Com., 112 Pa. St. 220, 5 Atl. 309 [*distinguishing* Turner *v.* Com., 86 Pa. St. 54, 27 Am. Rep. 683]; Cathcart *v.* Com., 37 Pa. St. 108; Massey *v.* State, 1 Tex. App. 563. A charge that if the jury should find that the accused added a lie to his denial of the accusation they are bound to inquire why he did so, and have a right to follow the conviction thereby produced on their minds is not on the facts. State *v.* Howard, 32 S. C. 91, 10 S. E. 831.

19. Territory *v.* Lucero, 8 N. M. 543, 46 Pac. 18.

20. Jones *v.* State, 59 Ark. 417, 27 S. W. 601.

21. People *v.* Wong Ah Ngow, 54 Cal. 151, 35 Am. Rep. 69.

22. Hickory *v.* U. S., 160 U. S. 408, 16 S. Ct. 327, 40 L. ed. 474.

23. *Alabama.*— See Miller *v.* State, 107 Ala. 40, 19 So. 37; Thomas *v.* State, 107 Ala. 13, 18 So. 229.

California.— People *v.* Flannelly, 128 Cal. 83, 60 Pac. 670.

Georgia.— Shannon *v.* Vincent, 76 Ga. 837.

Iowa.— State *v.* Heatherton, 60 Iowa 175, 14 N. W. 230.

Texas.— Cleavinger *v.* State, 43 Tex. Cr. 273, 65 S. W. 89.

United States.— Starr *v.* U. S., 164 U. S. 627, 17 S. Ct. 223, 41 L. ed. 577.

See 14 Cent. Dig. tit. "Criminal Law," § 1793.

24. Morrison *v.* State, 42 Fla. 149, 28 So. 97. It is proper to call the attention of the jury to the importance of having the laws properly executed, and of giving careful con-

jury differ in their views from the majority they should be induced to doubt the correctness of their own judgments, and be led to reëxamine the facts of the case.[25] A special direction, however, as to how the evidence of defendant's witnesses should be weighed,[26] or which instructs them as to the proper methods of reasoning on the facts,[27] is error, as invasive of their province to determine the credibility of the witnesses.[28] The court may and should on request instruct in regard to the individual duty and responsibility of each member of the jury.[29]

(II) *URGING AGREEMENT.* It is not error for the court to tell the jury that the case has cost a great deal, has consumed considerable time and postponed other important cases, and that it is important to the ends of justice that they should agree upon a verdict, in order that new trials and delays of justice may be avoided.[30] It is also proper for the court to hold up to the jury the effect of a disagreement at common law, to compare the rule in the United States, and to tell them that they will have to remain together until they agree upon a verdict,[31] or to urge them to begin their deliberations as soon as possible.[32] But the court ought, while telling the jury that no juror should from mere pride of opinion refuse to agree, to charge that he should not surrender any conscientious views founded on the evidence.[33]

(III) *FIXING PUNISHMENT.* Where the amount or character of the punishment is determinable by the jury, it is error for the court to interfere with the exercise of their discretion. They should be charged not to exceed the limit of the statute,[34] but it is error to direct them that if defendant is guilty they should assess a certain punishment.[35]

G. Instructions — 1. NECESSITY AND REQUISITES — a. In General. It is the duty of the trial court to instruct the jury distinctly and precisely upon the law of the case.[36] This is so even though the jury are expressly authorized to deter-

sideration to the evidence and the law, so that they may reach a result which will be just to both sides, regardless of what may be the consequences. People *v.* Hawes, 98 Cal. 648, 33 Pac. 791. And an instruction that the trial is not a contest of oratory between counsel, and that the jury are not sitting to determine who has made the most eloquent speech or who emitted the largest volume of sound, was correct. State *v.* Evans, 88 Minn. 262, 92 N. W. 976. The same is true of an instruction that the jury must not arrive at their verdict by lot or chance. Lankster *v.* State, (Tex. Cr. App. 1902) 72 S. W. 388. But an instruction that in weighing the evidence and arriving at a verdict "what is called common sense is perhaps the juror's best guide" has been held erroneous. Densmore *v.* State, 67 Ind. 306, 33 Am. Rep. 96.

25. Com. *v.* Tuey, 8 Cush. (Mass.) 1.

26. State *v.* Schnepel, 23 Mont. 523, 59 Pac. 927; State *v.* Mitchell, 56 S. C. 524, 35 S. E. 210.

27. Brown *v.* State, 23 Tex. 195.

28. See *supra*, XIV, F, 4, c.

29. State *v.* Witt, 34 Kan. 488, 8 Pac. 769.

30. Sigsbee *v.* State, 43 Fla. 524, 30 So. 816; State *v.* Hawkins, 18 Oreg. 476, 23 Pac. 475.

31. State *v.* Saunders, 14 Oreg. 300, 12 Pac. 441.

32. Wilson *v.* State, (Tex. Cr. App. 1894) 28 S. W. 200.

33. Myers *v.* State, 43 Fla. 500, 31 So. 275.

34. Leech *v.* Waugh, 24 Ill. 228.

35. State *v.* Gilbreath, 130 Mo. 500, 32 S. W. 1023. It is error to instruct that the jury cannot, in a capital case, consider reasonable doubt in mitigation of punishment, as this will influence them to inflict the death penalty. Johnson *v.* State, 27 Tex. App. 163, 11 S. W. 106. Where they have power to qualify their verdict in a capital case by adding "without capital punishment," which will have the effect of inflicting life imprisonment, they should be left to their own discretion upon the facts of the case. State *v.* Melvin, 11 La. Ann. 535.

36. *Georgia.*—Thomas *v.* State, 67 Ga. 767.

Iowa.— State *v.* Kunhi, 119 Iowa 461, 93 N. W. 342.

Kentucky.— Trimble *v.* Com., 78 Ky. 176.

Missouri.— State *v.* Matthews, 20 Mo. 55.

New Jersey.— Roesel *v.* State, 62 N. J. L. 216, 41 Atl. 408.

New Mexico.— Territory *v.* Baca, (1903) 71 Pac. 460.

New York.— People *v.* Kelsey, 14 Abb. Pr. 372.

Tennessee.— Ford *v.* State, 101 Tenn. 454, 47 S. W. 703; Lang *v.* State, 16 Lea 433, 1 S. W. 318; Brown *v.* State, 6 Baxt. 422.

Texas.— Gillmore *v.* State, 36 Tex. 334; Stewart *v.* State, 15 Tex. App. 598; Smith *v.* State, 8 Tex. App. 141.

Virginia.— Gwatkin *v.* Com., 9 Leigh 678, 33 Am. Dec. 264; Blunt *v.* Com., 4 Leigh 689, 26 Am. Dec. 341.

See 14 Cent. Dig. tit. "Criminal Law," § 1803 *et seq.*

mine the law as well as the facts.[37] If the instructions offered by counsel are objectionable, the court should give instructions which conform to the law.[38] The absolute right of defendant in a capital case to have the jury properly instructed on the law cannot be waived by him or by his counsel.[39]

b. Scope of Instructions — (i) *In General.* The instructions should be full, clear, and explicit, giving to the jury all the law so far as it relates to the facts proved or claimed to be proved, if such facts are sustained by any evidence.[40]

(ii) *Duty to Explain and Review Evidence.* The court, in addition to instructing as to the law, may, and usually should, recall and relate the testimony, and resolve complicated evidence into its simplest elements, to aid the jury in applying the law.[41] It need not, however, recapitulate all items of evidence, nor even all evidence bearing on a single question.[42] It is only necessary to repeat such evidence as will direct the attention of the jury to the principal questions at issue, in order to explain the law applicable to the case.[43]

(iii) *Application of Law to Disputed Facts.* The court in instructing upon the law based on disputed facts should accompany the instruction with such remarks as will enable the jury to apply the law to the facts claimed to be proved, and it should at the same time instruct them to apply it only upon finding the facts upon which it is based to be true.[44]

(iv) *Opposing Theories.* It is not error to state in the charge both the claims made by the state and those made by defendant, and the theories which the evidence for each respectively tends to establish.[45] Where the court groups together and states hypothetically the theory of the prosecution and cites evidence

The defendant has an absolute right to have the law stated to the jury so plainly that they may comprehend the principles involved. Staten *v.* State, 30 Miss. 619; Crawford *v.* State, 4 Coldw. (Tenn.) 190; Lancaster *v.* State, 3 Coldw. (Tenn.) 339, 91 Am. Dec. 288.

Statute of another state.— Although the law of another state is a fact to be proved, it is not charging on the facts for the court to construe it. State *v.* Whittle, 59 S. C. 297, 37 S. E. 923.

37. Parker *v.* State, 136 Ind. 284, 35 N. E. 1105; State *v.* Berdetta, 73 Ind. 185, 38 Am. Rep. 117. But see Baltimore, etc., Turnpike Road *v.* State, 63 Md. 573, 1 Atl. 285.

38. State *v.* Stonum, 62 Mo. 596.

39. Meyers *v.* Com., 83 Pa. St. 131.

40. *Kentucky.*— Louisville, etc., R. Co. *v.* Com., 13 Ky. L. Rep. 925.

Louisiana.— State *v.* Tucker, 38 La. Ann. 536.

Nebraska.— Milton *v.* State, 6 Nebr. 136.

North Carolina.— State *v.* Shaw, 49 N. C. 440.

Texas.— Ainsworth *v.* State, 11 Tex. App. 339; Elliston *v.* State, 10 Tex. App. 361.

See 14 Cent. Dig. tit. "Criminal Law," § 1806.

It is not a proper instruction to state to the jury the facts of a decided case and submit to them the question whether or not that case and the one on trial are parallel. This does not inform the jury what the law is, but leaves it to them to form their own notion of it by comparing the cases, and it is therefore error. Adams *v.* State, 28 Fla. 511, 10 So. 106.

41. State *v.* Brainard, 25 Iowa 572; State *v.* Means, 95 Me. 364, 50 Atl. 30, 85 Am. St. Rep. 421 (holding that the court may instruct the jury to apply the tests of consistency and probability to the evidence, and may state, both affirmatively and interrogatively, the various issues or theories to be considered and determined by them); People *v.* Fanning, 131 N. Y. 659, 30 N. E. 569; State *v.* Summers, 19 S. C. 90; State *v.* White, 15 S. C. 381.

42. State *v.* Rose, 129 N. C. 575, 40 S. E. 83; State *v.* Beard, 124 N. C. 811, 32 S. E. 804; State *v.* Caveness, 78 N. C. 484; State *v.* Haney, 19 N. C. 390; State *v.* Scott, 19 N. C. 35; Com. *v.* Kaiser, 184 Pa. St. 493, 39 Atl. 299; Pink *v.* State, (Tex. Cr. App. 1898) 48 S. W. 171; Allis *v.* U. S., 155 U. S. 117, 15 S. Ct. 36, 39 L. ed. 91.

43. State *v.* Pritchett, 106 N. C. 667, 11 S. E. 357; State *v.* Haney, 19 N. C. 390.

44. State *v.* Duffy, 66 Conn. 551, 34 Atl. 497; Jones *v.* State, 13 Tex. 168, 62 Am. Dec. 550.

45. *Alabama.*— Hawes *v.* State, 88 Ala. 37, 7 So. 302.

California.— People *v.* Worden, 113 Cal. 569, 45 Pac. 844.

Connecticut.—State *v.* Smith, 65 Conn. 283, 31 Atl. 206.

Georgia.— Pritchett *v.* State, 92 Ga. 65, 18 S. E. 536.

New York.— People *v.* Larned, 7 N. Y. 445.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1771, 1806.

Theories not advanced by parties.—Neither the judge nor the jury are tied down to the theories respectively advanced by the parties. The facts are before them, and the court is at liberty to assume any theory that they will reasonably support, and the jury may draw its own conclusion from such facts. People *v.* Wallin, 55 Mich. 497, 22 N. W. 15.

to authorize such theory, if believed, and instructs the jury that if these facts are true defendant is guilty, it is its duty, if the evidence is sufficient, also to group and state hypothetically the facts of defendant's theory, and to instruct the jury accordingly.[46] The jury should be instructed on the law applicable to any legitimate view they may take of the evidence.[47]

c. **Submitting Questions of Law.** An instruction submitting a question of law to the jury may and should be refused, as not within their province.[48] A charge that if the jury believe from the evidence that defendant's act was lawful he is not guilty is error.[49]

d. **Definition of Words.** As a general rule it is the duty of the court to define all technical terms of the law used by it in such a way as to give a correct idea of the meaning of such words to persons unlearned in the law.[50] An express definition, however, is usually not required where the court in an instruction has in so many words explained to the jury the meaning of the term.[51] The court's failure or refusal to define words which are not technical and are in common use is not error. The meaning of such words is for the jury.[52]

Inconsistent theory of the defense see People *v.* Sullivan, 173 N. Y. 122, 65 N. E. 989, 93 Am. St. Rep. 582.

Difference between theories.— The court may in its charge call the attention of the jury to the difference between two different theories of the prosecution, in relation to the manner in which defendant committed the crime. People *v.* Willett, 105 Mich. 110, 62 N. W. 1115.

46. *Alabama.*— Liner *v.* State, 124 Ala. 1, 27 So. 438.

Georgia.— Banks *v.* State, 89 Ga. 75, 14 S. E. 927.

Illinois.— Trask *v.* People, 104 Ill. 569.

North Carolina.— State *v.* Brewer, 98 N. C. 607, 3 S. E. 819; State *v.* Gilmer, 97 N. C. 429, 1 S. E. 491; State *v.* Dunlop, 65 N. C. 288.

Texas.— Snowden *v.* State, 12 Tex. App. 105, 41 Am. Rep. 667; Davis *v.* State, 10 Tex. App. 31.

Defendant has a right to have the jury instructed as to his theory of the case if there is any evidence tending to prove it. State *v.* Brady, (Iowa 1902) 91 N. W. 801; Territory *v.* Baca, (N. M. 1903) 71 Pac. 460.

47. Reynolds *v.* State, 8 Tex. App. 412; Smith *v.* State, 7 Tex. App. 414; Noland *v.* State, 3 Tex. App. 598.

48. Ayers *v.* State, 71 Ala. 11; U. S. *v.* Chaves, 6 N. M. 180, 27 Pac. 489; U. S. *v.* De Lujan, 6 N. M. 179, 27 Pac. 489; U. S. *v.* De Amador, 6 N. M. 173, 27 Pac. 488; State *v.* Yourex, 30 Wash. 611, 71 Pac. 203.

49. Carr *v.* State, 104 Ala. 4, 16 So. 150.

50. Williams *v.* State, 98 Ala. 22, 12 So. 808; Roberts *v.* State, 114 Ga. 450, 40 S. E. 297; State *v.* Reed, 154 Mo. 122, 55 S. W. 278; State *v.* Strong, 153 Mo. 548, 55 S. W. 78; Tollett *v.* State, (Tex. Cr. App. 1900) 55 S. W. 335; Jolly *v.* State, 19 Tex. App. 76.

"Wilful."— It has been decided that when a penal statute requires that the forbidden act should be "wilfully" done, the charge of the court should explain to the jury the legal meaning of the term "wilful." Dyrley *v.* State, (Tex. Cr. App. 1901) 63 S. W. 631; Wheeler *v.* State, 23 Tex. App. 598, 5 S. W. 160; Sparks *v.* State, 23 Tex. App. 447, 5 S. W. 135. An instruction that the term "wilful" signifies "without reasonable ground for believing the act to be lawful," or "a reckless disregard of the rights of others" is substantially correct. Finney *v.* State, 29 Tex. App. 184, 185, 15 S. W. 175. See also Rose *v.* State, 19 Tex. App. 470.

"Felonious" or "feloniously."— In Missouri it has been decided that it is not necessary to define the words "felonious" or "feloniously" in an instruction. State *v.* Weber, 156 Mo. 249, 56 S. W. 729; State *v.* Barton, 142 Mo. 450, 44 S. W. 239 [*overruling* State *v.* Johnson, 111 Mo. 578, 20 S. W. 302; State *v.* Hayes, 105 Mo. 76, 16 S. W. 514, 24 Am. St. Rep. 360; State *v.* Brown, 104 Mo. 365, 16 S. W. 406]; State *v.* Cantlin, 118 Mo. 100, 23 S. W. 1091.

51. People *v.* Sternberg, 111 Cal. 11, 43 Pac. 201; Battle *v.* State, 103 Ga. 53, 29 S. E. 491; Hatcher *v.* State, 43 Tex. Cr. 237, 65 S. W. 97; Garza *v.* State, (Tex. Cr. App. 1898) 47 S. W. 983.

52. *Illinois.*— Henderson *v.* People, 124 Ill. 607, 17 N. E. 68, 7 Am. St. Rep. 391.

Iowa.— State *v.* Bone, 114 Iowa 537, 87 N. W. 507 ("great bodily injury"); State *v.* Penney, 113 Iowa 691, 84 N. W. 509 ("felonious").

Massachusetts.— Com. *v.* Carroll, 145 Mass. 403, 14 N. E. 618, "stone."

Missouri.— State *v.* Gregory, 170 Mo. 598, 71 S. W. 170; State *v.* Jacobs, 152 Mo. 565, 54 S. W. 441 ("justifiable"); State *v.* Grant, 152 Mo. 57, 53 S. W. 432 ("just cause or provocation"); State *v.* Harkins, 100 Mo. 666, 13 S. W. 830 ("wilfully," "maliciously").

Montana.— State *v.* Felker, 27 Mont. 451, 71 Pac. 668, "preponderance of the evidence."

Texas.— Tores *v.* State, (Cr. App. 1901) 63 S. W. 880 ("prostitution"); Robinson *v.* State, (Cr. App. 1901) 63 S. W. 869 ("anger"); Beard *v.* State, 41 Tex. Cr. 173, 53 S. W. 348 ("cool, sedate, and deliberate"); Still *v.* State, (Cr. App. 1899) 50 S. W. 355 ("corroborate"); De Los Santos *v.* State, (Cr. App. 1895) 31 S. W. 395

e. Reading Reports, Text-Books, and Statutes. It is wholly within the discretion of the judge, in charging the jury, whether or not to read from legal text-books,[53] reported cases,[54] or from the statute.[55] While it is a sufficient charge to read from a decision the law covering the case,[56] it is not error to refuse to do so, or to refuse to read from an elementary writer on request.[57]

2. Nature and Elements of Crime — a. Defining Offense. A definition by the court of the crime charged, in precise and accurate language, setting forth the essential constituents thereof is indispensable.[58] When the offense is statutory the definition may be given in the exact words of the statute,[59] and the court need not charge as to its elements at common law.[60] The penalty of the statute need not be stated in the definition.[61] In reading the statute it is error for the court to read that portion thereof which does not define the crime charged, but defines another and distinct crime,[62] unless he expressly limits the application of the statute to the charge in the indictment.[63] It is error to instruct that the jury may convict without finding a particular and material fact which constitutes one of the ingredients of the crime for which the accused is being tried.[64]

b. Several Offenses or Counts. Where several offenses are charged the court should define and instruct as to each,[65] but it is not necessary to instruct separately where the same crime is charged in two or more counts of an indictment, the only

("serious bodily injury"); Humphreys *v.* State, 34 Tex. Cr. 434, 30 S. W. 1066; Goode *v.* State, 16 Tex. App. 411 ("family").

Wisconsin.— Shaffel *v.* State, 97 Wis. 377, 72 N. W. 888, "night-time."

53. U. S. *v.* Neverson, 1 Mackey (D. C.) 152; People *v.* Niles, 44 Mich. 606, 7 N. W. 192.

54. People *v.* Bowkus, 109 Mich. 360, 67 N. W. 319; State *v.* Dearing, 65 Mo. 530; People *v.* Minnaugh, 131 N. Y. 563, 29 N. E. 750; People *v.* Helmer, 13 N. Y. App. Div. 426, 43 N. Y. Suppl. 642, 12 N. Y. Cr. 134; State *v.* Chiles, 58 S. C. 47, 36 S. E. 496.

55. Com. *v.* Burns, 167 Mass. 374, 45 N. E. 755; Hobbs *v.* State, 7 Tex. App. 117.

56. Wright *v.* State, 18 Ga. 383.

57. People *v.* Wayman, 128 N. Y. 585, 27 N. E. 1070.

58. *Georgia.*— McDow *v.* State, 113 Ga. 699, 39 S. E. 295.

Louisiana.— State *v.* Glass, 7 La. Ann. 122.

Missouri.—State *v.* McCaskey, 104 Mo. 644, 16 S. W. 511; State *v.* Reakey, 62 Mo. 40.

New Mexico.—Territory *v.* Baca, (1903) 71 Pac. 460.

North Carolina.— State *v.* Fulford, 124 N. C. 798, 32 S. E. 377.

Texas.— Hilliard *v.* State, 37 Tex. 358; Adkins *v.* State, 41 Tex. Cr. 577, 56 S. W. 63; Bailey *v.* State, (Cr. App. 1895) 30 S. W. 669; Duran *v.* State, 14 Tex. App. 195; Lindley *v.* State, 8 Tex. App. 445; Cady *v.* State, 4 Tex. App. 238.

Virginia.— Ewing's Case, 5 Gratt. 701.

See 14 Cent. Dig. tit. "Criminal Law," § 1812.

It is not error to charge general principles in defining the crime, if the charge shows an application of these principles to the facts in the case. Davis *v.* State, 10 Tex. App. 31.

Offenses included in charge.— It is proper to define, not only the crime actually charged, but also any other crime included in the charges, of which defendant may be convicted, and of which there is evidence in the case. State *v.* Johnson, 76 Mo. 121. Where only murder is defined in an instruction in a prosecution therefor, it is not error, where the jury are elsewhere told that they are at liberty to convict of manslaughter. Henry *v.* People, 198 Ill. 162, 65 N. E. 120.

59. *Illinois.*— Hix *v.* People, 157 Ill. 382, 41 N. E. 862; Duncan *v.* People, 134 Ill. 110, 24 N. E. 765.

Missouri.— State *v.* Frank, 103 Mo. 120, 15 S. W. 330.

Nebraska.— Long *v.* State, 23 Nebr. 33, 36 N. W. 310.

New York.— People *v.* McGonegal, 17 N. Y. Suppl. 147.

Wisconsin.— Giskie *v.* State, 71 Wis. 612, 38 N. W. 334.

See 14 Cent. Dig. tit. "Criminal Law," § 1812.

60. Com. *v.* O'Brien, 172 Mass. 248, 52 N. E. 77.

61. Currier *v.* State, 157 Ind. 114, 60 N. E. 1023.

62. Jones *v.* State, 22 Tex. App. 680, 3 S. W. 478.

63. Simons *v.* State, (Tex. Cr. App. 1896) 34 S. W. 619; Hargrave *v.* State, (Tex. Cr. App. 1895) 30 S. W. 444.

64. Goldsberry *v.* State, (Nebr. 1902) 92 N. W. 906.

65. Thus where burglary and larceny are included in one count, each should be instructed upon separately, and the two together, where defendant may be convicted of either or both. State *v.* Hutchinson, 111 Mo. 257, 20 S. W. 34.

Nolle prosequi as to one count.— The court need not charge as to a crime in a count in the indictment as to which a *nolle prosequi* has been entered. Oakley *v.* State, 135 Ala. 29, 33 So. 693.

difference between them being in the allegation of the method by which it was accomplished.[66]

e. Time and Place of Offense. It is not error to instruct that it is sufficient to prove beyond a reasonable doubt that the crime was committed at or about the time alleged,[67] or within a given period, although the date cannot be definitely ascertained,[68] if such time as found is within the period of limitations.[69] An instruction is not fatally defective because it does not inform the jury that they must be satisfied that the alleged crime was committed in the county named in the indictment.[70]

d. Corpus Delicti. It is the duty of the court to charge the jury that they should acquit the accused if the *corpus delicti* is not proved,[71] and to instruct them against treating evidence offered and tending to prove intent or guilty knowledge only as proof of the *corpus delicti*.[72] The court should also instruct the jury against considering, as tending to prove the *corpus delicti*, evidence having no such tendency, but merely tending to connect defendant with the crime;[73] but it need not distinguish between circumstantial and other evidence tending to establish the *corpus delicti*.[74]

e. Motive. It is proper to instruct that the absence of a probable motive is a circumstance in favor of the accused,[75] or at least a circumstance to be considered in weighing the evidence of guilt;[76] but if the offense is clearly made out it is not necessary to prove motive, and the court may properly so charge or refuse a request to charge to the contrary.[77]

f. Intent. The court must properly instruct the jury as to the intent necessary to constitute the crime charged.[78] It is proper to charge that the intent is for the jury to determine,[79] and that it may be inferred from defendant's acts and the circumstances surrounding them.[80]

g. Defenses. An instruction which, while stating the charge or the evidence against the accused, omits to charge the jury as to the defense set up by him is error,[81] unless the defense is properly submitted to the jury in other parts of the charge.[82]

66. State *v.* Thomas, 99 Mo. 235, 12 S. W. 643.

67. Ferguson *v.* State, 52 Nebr. 432, 72 N. W. 590, 66 Am. St. Rep. 512; Phillips *v.* State, (Tex. Cr. App. 1898) 45 S. W. 709.

68. Com. *v.* Cobb, 14 Gray (Mass.) 57.

69. See *supra*, VIII.

If the state elects between several offenses shown by the evidence, which come within the allegation of the indictment, the court may limit the jury in its charge to the consideration of the act which the prosecution has elected to proceed upon. Price *v.* State, (Tex. Cr. App. 1902) 70 S. W. 966.

70. Dyer *v.* State, 74 Ind. 594.

71. Territory *v.* Monroe, (Ariz. 1885) 6 Pac. 478.

72. Francis *v.* State, 7 Tex. App. 501.

73. State *v.* Davidson, 30 Vt. 377, 73 Am. Dec. 312.

74. State *v.* Roberts, 63 Vt. 139, 21 Atl. 424.

75. State *v.* Foley, 144 Mo. 600, 46 S. W. 733.

76. State *v.* Coleman, 20 S. C. 441.

77. Hornsby *v.* State, 94 Ala. 55, 10 So. 522; State *v.* McIntosh, 39 S. C. 97, 17 S. E. 446. See *supra*, II, D, 2.

78. Shaeffer *v.* State, 61 Ark. 241, 32 S. W. 679; People *v.* Jenkins, 16 Cal. 431; State *v.* Green, 15 Mont. 424, 39 Pac. 322; State *v.* Caddle, 35 W. Va. 73, 12 S. E. 1098. See also BURGLARY, 6 Cyc. 252; HOMICIDE; and other special titles.

"Maliciously," "wantonly," and "wilfully." — Where a statute fixes the liability of one who maliciously and wantonly injures the property of another, an instruction in an action under the statute, directing the jury that the only question for their determination is whether defendant "willfully and maliciously" did the injury complained of is erroneous in using the word "wilfully." Garrett *v.* Greenwell, 92 Mo. 120, 4 S. W. 441.

79. Rumsey *v.* People, 19 N. Y. 41.

80. State *v.* Woodward, 84 Iowa 172, 50 N. W. 885; State *v.* Dineen, 10 Minn. 407; Cross *v.* State, 55 Wis. 261, 12 N. W. 425. See *supra*, II, D, 7. But an instruction that an intent may be inferred from "the mere doing of an act unlawful in itself, intending to do it" has been held erroneous. People *v.* Flack, 125 N. Y. 324, 26 N. E. 267, 11 L. R. A. 807 [*reversing* 57 Hun 83, 10 N. Y. Suppl. 475, 8 N. Y. Cr. 43].

81. Jones *v.* State, 35 Tex. Cr. 565, 34 S. W. 631; Moore *v.* State, (Tex. Cr. App. 1896) 33 S. W. 980; Stanton *v.* State, (Tex. Cr. App. 1895) 29 S. W. 476.

82. Lyon *v.* State, (Tex. Cr. App. 1897) 34 S. W. 947.

3. PRINCIPALS AND ACCESSARIES. When a defendant is charged as an aider and abetter or accessary before the fact, or where he is charged as a principal and the evidence tends to show that he did not himself commit the act, the court must correctly instruct the jury as to what is necessary to constitute him an aider and abetter or an accessary, as the case may be.[83] An instruction is erroneous if it authorizes the jury to convict defendant because of his presence, or because of his mere mental approval or consent, without requiring that he shall have aided in or encouraged the commission of the crime.[84]

4. INSANITY — a. Evidence Justifying or Requiring Instruction. If there is any evidence bearing directly upon the condition of defendant's mind and tending to show that he was insane when the crime was committed, it is error to refuse an instruction as to his mental condition and as to the responsibility of insane persons;[85] but in the absence of such evidence an instruction on insanity is neither necessary nor proper.[86] An instruction that assumes that defendant's

83. True *v.* Com., 90 Ky. 651, 14 S. W. 684, 12 Ky. L. Rep. 584; Leeper *v.* State, 29 Tex. App. 154, 15 S. W. 411; Wood *v.* State, 28 Tex. App. 14, 11 S. W. 678. It is unnecessary to charge as to accessaries where the court defines a principal and tells the jury they can only convict if they believe defendant was a principal as defined, and then charges that if they have a reasonable doubt as to whether he was guilty as a principal as defined to them, he is entitled to the benefit of the doubt, and they should acquit. Spradling *v.* State, (Tex. Cr. App. 1897) 42 S. W. 294. And where defendant is indicted and tried as principal, and the evidence shows that he committed the deed, the fact that he is indicted jointly with others does not require the court to submit which of them was the principal. Early *v.* Com., 70 S. W. 1061, 24 Ky. L. Rep. 1181.

Propriety and sufficiency of instructions as to aiders and abetters or accessaries.— *Alabama.*— Elmore *v.* State, 110 Ala. 63, 20 So. 323; Singleton *v.* State, 106 Ala. 49, 17 So. 327; Hughes *v.* State, 75 Ala. 30.

Indiana.— Clem *v.* State, 33 Ind. 418.

Kentucky.— True *v.* Com., 90 Ky. 651, 14 S. W. 684, 12 Ky. L. Rep. 584; Plummer *v.* Com., 1 Bush 76; Von Gundy *v.* Com., 12 S. W. 386, 11 Ky. L. Rep. 552; Ross *v.* Com., 9 S. W. 707, 10 Ky. L. Rep. 558.

Massachusetts.— Com. *v.* Macloon, 101 Mass. 1, 100 Am. Dec. 89.

Michigan.— People *v.* Gallagher, 75 Mich. 512, 42 N. W. 1063.

Minnesota.— State *v.* Beebe, 17 Minn. 241.

Missouri.— State *v.* Taylor, 134 Mo. 109, 35 S. W. 92; State *v.* Gooch, 105 Mo. 392, 16 S. W. 892; State *v.* Ludwig, 70 Mo. 412; State *v.* Hollenscheit, 61 Mo. 302.

New Mexico.— Territory *v.* De Gutman, 8 N. M. 92, 42 Pac. 68.

South Carolina.— State *v.* Prater, 26 S. C. 613, 2 S. E. 108.

Texas.— Tucker *v.* State, (Cr. App. 1893) 23 S. W. 682; Leeper *v.* State, 29 Tex. App. 154, 15 S. W. 411 (accomplice of one offering bribe); Slade *v.* State, 29 Tex. App. 381, 16 S. W. 253 (abandonment of purpose).

Utah.— People *v.* Olsen, 6 Utah 284, 22 Pac. 163.

Vermont.— State *v.* Learnard, 41 Vt. 585.

Washington.— State *v.* Jones, 3 Wash. 175, 28 Pac. 254.

United States.— Hicks *v.* U. S., 150 U. S. 442, 14 S. Ct. 144, 37 L. ed. 1137.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1818–1820. And see *supra*, V.

Definition of accomplice.— Smith *v.* State, 13 Tex. App. 507.

Statutory definition.— Where an accessary is defined by statute, the instruction should follow the language of the statutory definition. State *v.* Geddes, 22 Mont. 68, 55 Pac. 919.

84. Clem *v.* State, 33 Ind. 418; True *v.* Com., 90 Ky. 651, 14 S. W. 684, 12 Ky. L. Rep. 584; Plummer *v.* Com., 1 Bush (Ky.) 76; State *v.* Cox, 65 Mo. 29. And see Wood *v.* State, 28 Tex. App. 14, 11 S. W. 678. In charging upon ambiguous words and actions tending to connect defendant, as aider and abetter, with a murder committed by another, it is error not to charge that these words and actions must have been accompanied with an intention to encourage and abet. Hicks *v.* U. S., 150 U. S. 442, 14 S. Ct. 144, 37 L. ed. 1137. But it is proper to charge that if defendant was present for the purpose of actual assistance, as the circumstances might demand, and the principal was encouraged to commit the crime by his presence, then defendant aided and abetted in the crime. Singleton *v.* State, 106 Ala. 49, 17 So. 327. And an instruction that defendant is guilty if he was present aiding and abetting, or ready to aid and abet, is correct. State *v.* Gooch, 105 Mo. 392, 16 S. W. 892. And see State *v.* Owens, 79 Mo. 619; State *v.* Miller, 67 Mo. 604.

85. McClure *v.* Com., 81 Ky. 448; Warren *v.* State, 9 Tex. App. 619, 35 Am. Rep. 745.

86. Wilkerson *v.* Com., 88 Ky. 29, 9 S. W. 836, 10 Ky. L. Rep. 656. A charge on defendant's mental condition is not required or justified by proof of his intoxication at the time of the crime (Wilkerson *v.* Com., 88 Ky. 29, 9 S. W. 836, 10 Ky. L. Rep. 656; Vallereal *v.* State, (Tex. Cr. App. 1892) 20 S. W. 557; McConnell *v.* State, 22 Tex. App. 354, 3 S. W. 699, 58 Am. Rep. 647), or by

mental condition is in issue is not justified where there is no evidence of his insanity.[87]

b. Sufficiency and Propriety of Charge. Where the defense is the insanity of the accused, a general charge stating the law as applicable to the evidence, including the presumption of sanity and of its continuance, with a charge as to reasonable doubt, is sufficient.[88] Whether or not an instruction on the defense of insanity is correct generally depends upon the tests of insanity which are recognized in the particular jurisdiction, and this matter has been elsewhere treated.[89]

proof merely of his being subject to epilepsy (State *v.* Hayes, 16 Mo. App. 560).

87. *California.*— People *v.* Francis, 38 Cal. 183.

Illinois.— Doyle *v.* People, 147 Ill. 394, 35 N. E. 372.

Kentucky.— Buckhannon *v.* Com., 86 Ky. 110, 5 S. W. 358, 9 Ky. L. Rep. 411; Bishop *v.* Com., 58 S. W. 817, 22 Ky. L. Rep. 760.

Michigan.— People *v.* Slack, 90 Mich. 448, 51 N. W. 533.

Nevada.— State *v.* Hartley, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33.

North Carolina.—State *v.* Rippy, 104 N. C. 752, 10 S. E. 259.

See 14 Cent. Dig. tit. "Criminal Law," § 1821.

88. *California.*— People *v.* Methever, 132 Cal. 326, 64 Pac. 481.

Connecticut.— State *v.* Johnson, 40 Conn. 136.

District of Columbia.— Snell *v.* U. S., 16 App. Cas. 501.

Georgia.— Carr *v.* State, 96 Ga. 284, 22 S. E. 570.

Indiana.— Grubb *v.* State, 117 Ind. 277, 20 N. E. 725.

Montana.— State *v.* Peel, 23 Mont. 358, 59 Pac. 169, 75 Am. St. Rep. 529.

New York.— Walker *v.* People, 88 N. Y. 81.

Texas.— Hurst *v.* State, 40 Tex. Cr. 378, 46 S. W. 635, 50 S. W. 719.

Vermont.— State *v.* Kelley, 74 Vt. 278, 52 Atl. 434.

West Virginia.— State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224.

Wisconsin.— Butler *v.* State, 102 Wis. 364, 78 N. W. 590.

See 14 Cent. Dig. tit. "Criminal Law," § 1822.

Insanity as a defense see *supra*, III, B.

Instruction as to kleptomania.— Looney *v.* State, 10 Tex. App. 520, 38 Am. Rep. 646.

Definitions.— The court should define the words "temporary insanity," where these words are used in the charge. Evers *v.* State, 31 Tex. Cr. 318, 20 S. W. 744, 37 Am. St. Rep. 811, 18 L. R. A. 421. But where the charge is very full on the general question of "insane delusion," it is not error to refuse a technical definition of these words. Wilcox *v.* State, 94 Tenn. 106, 28 S. W. 312.

89. See *supra*, III, B.

Knowledge of right and wrong.— *Georgia.* — Anderson *v.* State, 42 Ga. 9. See also Loyd *v.* State, 45 Ga. 57.

Kansas.— State *v.* Mowry, 37 Kan. 369, 15 Pac. 282; State *v.* Nixon, 32 Kan. 205, 4 Pac. 159.

Kentucky.— Hardwick *v.* Com., 7 Ky. L. Rep. 370.

Maine.— State *v.* Knight, 95 Me. 467, 50 Atl. 276, 55 L. R. A. 323.

Mississippi.— Kearney *v.* State, 68 Miss. 233, 8 So. 292.

Missouri.— State *v.* Redemeier, 8 Mo. App. 1.

Nebraska.— Burgo *v.* State, 26 Nebr. 639, 42 N. W. 701; Hart *v.* State, 14 Nebr. 572, 16 N. W. 905.

New York.— People *v.* Mills, 98 N. Y. 176; Walker *v.* People, 26 Hun 67.

Oregon.— State *v.* Murray, 11 Oreg. 413, 5 Pac. 55. See also State *v.* Zorn, 22 Oreg. 591, 30 Pac. 317.

Utah.— Territory *v.* Calton, 5 Utah 451, 16 Pac. 902.

Wisconsin.— Eckert *v.* State, 114 Wis. 160, 89 N. W. 826. See also Alvoir *v.* State, 82 Wis. 295, 52 N. W. 84.

See 14 Cent. Dig. tit. "Criminal Law," § 1825. And see *supra*, III, B, 3, b.

Irresistible impulse.— *Arkansas.*— Bolling *v.* State, 54 Ark. 588, 16 S. W. 658; Williams *v.* State, 50 Ark. 511, 9 S. W. 5.

Georgia.— Fogarty *v.* State, 80 Ga. 450, 5 S. E. 782.

Indiana.— Grubb *v.* State, 117 Ind. 277, 20 N. E. 257, 725; Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99.

Michigan.— People *v.* Durfee, 62 Mich. 487, 29 N. W. 109.

New York.— People *v.* Foy, 138 N. Y. 664, 34 N. E. 396.

See 14 Cent. Dig. tit. "Criminal Law," § 1826. And see *supra*, III, B, 3, c.

Partial insanity and delusions.— State *v.* Hockett, 70 Iowa 442, 30 N. W. 742. See *supra*, III, B, 3, c. The use of the word "delusion" is not error where it is used in a charge to indicate insanity on a particular subject (People *v.* Schmitt, 106 Cal. 48, 39 Pac. 204); and an instruction applying the right and wrong test to partial insanity, and furthermore stating that if defendant knew what was right and possessed a will to choose his partial insanity was no excuse is correct. Dejarnette *v.* Com., 75 Va. 867. A special charge on partial insanity or mania is not called for where there is no evidence of a special mania. Carr *v.* State, 96 Ga. 284, 22 S. E. 570.

Emotional insanity.—An instruction which defines emotional insanity as that which begins on the eve of the crime and ends when it is finished (Genz *v.* State, 58 N. J. L. 482, 34 Atl. 816) and which denies that the law recognizes such insanity (People *v.* Ker-

Charges in disparagement of the defense of insanity should not be given to the jury.[90]

5. Intoxication — a. Evidence Justifying or Requiring Instruction. An instruction which in stating the law assumes that defendant's intoxication at the date of the crime is in issue is not proper where there is no evidence that he was then intoxicated;[91] but if there is any evidence tending to show his intoxication when he committed the crime, it is proper to give and error to refuse an instruction thereon.[92]

b. Effect of Drunkenness. Under the general rule that drunkenness is no excuse for crime[93] an instruction in a case not coming within an exception to the rule that if the jury have a reasonable doubt whether defendant's conduct was inspired by his intoxication they must acquit is properly refused.[94] And where it appears from the evidence that defendant was sober enough to form the necessary specific intent, it is error to charge that drunkenness as a separate element should be considered by the jury.[95] But where the actual existence of a specific intent is necessary to constitute the particular kind or degree of crime, and there is evidence of drunkenness which may negative such intent, the court should charge that the jury may take into consideration the fact that the accused was intoxicated in determining the intent with which he committed the act.[96] And a charge on mental incapacity produced by voluntary intoxication is proper, although it does not appear that the accused was intoxicated when he committed the crime, if there was evidence that his mind was affected by the previous habits of intoxication.[97] A charge on insanity produced by intoxicating liquors need not

naghan, 72 Cal. 609, 14 Pac. 566) is proper. See *supra*, III, B, 3, f.

90. People *v.* Methever, 132 Cal. 326, 64 Pac. 481 [*overruling* People *v.* Dennis, 39 Cal. 625, and other cases following the same]; Aszman *v.* State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33 [*overruling* Sanders *v.* State, 94 Ind. 147; Sawyer *v.* State, 35 Ind. 80].

91. *District of Columbia.*— Snell *v.* U. S., 16 App. Cas. 501.

Illinois.— Montag *v.* People, 141 Ill. 75, 30 N. E. 337.

Kentucky.— Carpenter *v.* Com., 92 Ky. 452, 18 S. W. 9, 13 Ky. L. Rep. 658.

Nebraska.— Clark *v.* State, 32 Nebr. 246, 49 N. W. 367.

Texas.— Howard *v.* State, 37 Tex. Cr. 494, 36 S. W. 475, 66 Am. St. Rep. 812; Leeper *v.* State, 29 Tex. App. 63, 14 S. W. 398.

See 14 Cent. Dig. tit. "Criminal Law," § 1829.

92. *Alabama.*— Winter *v.* State, 123 Ala. 1, 26 So. 949; Whitten *v.* State, 115 Ala. 72, 22 So. 483.

California.— People *v.* Hill, 123 Cal. 47, 55 Pac. 692.

Illinois.— Jamison *v.* People, 145 Ill. 357, 34 N. E. 486.

Texas.— Maynard *v.* State, (Cr. App. 1897) 39 S. W. 667; Upchurch *v.* State, (Cr. App. 1897) 39 S. W. 371.

Wisconsin.— Cross *v.* State, 55 Wis. 261, 12 N. W. 425.

See 14 Cent. Dig. tit. "Criminal Law," § 1829.

93. See *supra*, III, C.

94. Fonville *v.* State, 91 Ala. 39, 8 So. 688; Jenkins *v.* State, 93 Ga. 1, 18 S. E. 992; Hanvey *v.* State, 68 Ga. 612. See *supra*, III, C, 1.

95. Estes *v.* State, 55 Ga. 30; Shannahan *v.* Com., 8 Bush (Ky.) 463, 8 Am. Rep. 465. See *supra*, III, C, 3. An instruction that if defendant, who was drunk at the time of the crime, was conscious and understood what was done or said by him and others, and could give an intelligent and true account of it at the time of the trial, he was responsible for his act, is correct. Territory *v.* Franklin, 2 N. M. 307; Brown *v.* Com., 32 Leg. Int. (Pa.) 320; Delgado *v.* State, 34 Tex. Cr. 157, 29 S. W. 1070.

96. *Alabama.*— King *v.* State, 90 Ala. 612, 8 So. 856.

California.— People *v.* Phelan, 93 Cal. 111, 28 Pac. 855.

Connecticut.— State *v.* Fiske, 63 Conn. 388, 28 Atl. 572.

Florida.— Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

Kansas.— State *v.* White, 14 Kan. 538.

Kentucky.— Golliher *v.* Com., 2 Duv. 163, 87 Am. Dec. 493.

Nebraska.— Latimer *v.* State, 55 Nebr. 609, 76 N. W. 207, 70 Am. St. Rep. 403.

New York.— Rogers *v.* People, 3 Park. Cr. 632.

Ohio.— Nichols *v.* State, 8 Ohio St. 435.

Oregon.— State *v.* Hansen, 25 Oreg. 391, 35 Pac. 976, 36 Pac. 296.

Texas.— Gonzales *v.* State, 31 Tex. Cr. 508, 21 S. W. 253.

See 14 Cent. Dig. tit. "Criminal Law," § 1831. And see *supra*, III, C, 3.

97. Wagner *v.* State, 116 Ind. 181, 18 N. E. 833; Stokes *v.* State, (Tex. Cr. App. 1902) 70 S. W. 95; Erwin *v.* State, 10 Tex. App. 700. See *supra*, III, C, 6. If the alleged insanity from the operation of strong drink be complicated with some other cause, pro-

use the terms "*mania a potu*" or "delirium tremens," or define them, if it is sufficiently comprehensive to embrace such mania.[98]

6. ALIBI — a. Necessity of Special Instruction. The general rule[99] is that where defendant's evidence tends to prove an alibi, a refusal to instruct specially on the law of alibi is error.[1]

b. Sufficiency of Charge — (I) *IN GENERAL.* It seems to be the better rule[2] to charge that if the evidence of an alibi in connection with all the other evidence raises a reasonable doubt of the presence of the accused at the place of the crime he should be acquitted.[3]

(II) *TIME NECESSARILY COVERED.* According to some authorities an instruction that to establish an alibi successfully the evidence of the alibi must so cover the whole time of the transaction as to render it impossible that defendant could have committed the crime is erroneous;[4] but it has been held that such an instruction is unobjectionable when the jury is further instructed that upon the whole case, and every material part of it, they are to give the accused the benefit of any reasonable doubt arising out of the evidence;[5] and it has been expressly decided that an instruction "that to render an alibi satisfactory the evidence must cover the whole of the time of the transaction in question" is proper.[6]

ducing an impaired mental condition, a charge that mentions only one of such causes, apart and from the others, is error, although the facts should be considered together. People *v.* Cummins, 47 Mich. 334, 11 N. W. 184, 186; State *v.* Rippy, 104 N. C. 752, 10 S. E. 259.

98. Stuart *v.* State, 1 Baxt. (Tenn.) 178.

99. It seems that it may be sometimes proper to submit the question of alibi without charging specially upon it. State *v.* Shroyer, 104 Mo. 441, 16 S. W. 286, 24 Am. St. Rep. 344; State *v.* Powers, 72 Vt. 168, 47 Atl. 830.

Where the questions of personal identity and of an alibi are virtually involved in one defense, they may be charged on together. Dale *v.* State, 88 Ga. 552, 15 S. E. 287.

1. *Alabama.*— Burton *v.* State, 107 Ala. 108, 18 So. 284.

Florida.— Long *v.* State, 42 Fla. 509, 28 So. 775; Garcia *v.* State, 34 Fla. 311, 16 So. 223.

Indiana.— Binns *v.* State, 46 Ind. 311.

Kansas.— State *v.* Conway, 55 Kan. 323, 40 Pac. 661.

Missouri.— State *v.* Koplan, 167 Mo. 298, 66 S. W. 967; State *v.* Edwards, 109 Mo. 315, 19 S. W. 91.

North Carolina.— State *v.* Byers, 80 N. C. 426.

Tennessee.— Wiley *v.* State, 5 Baxt. 662.

Texas.— Arismendis *v.* State, (Cr. App. 1900) 60 S. W. 47; Padron *v.* State, 41 Tex. Cr. 548, 55 S. W. 827; Joy *v.* State, 41 Tex. Cr. 46, 51 S. W. 933; Wilson *v.* State, 41 Tex. Cr. 115, 51 S. W. 916; Smith *v.* State, (Cr. App. 1899) 49 S. W. 583, 50 S. W. 362.

Vermont.— State *v.* Powers, 72 Vt. 168, 47 Atl. 830.

See 14 Cent. Dig. tit. "Criminal Law," § 1833.

Conspiracy.— Where, because a conspiracy between accused and another to commit the crime is shown to have existed, it makes no difference whether accused was present or not when it was committed, an instruction on alibi may be refused. State *v.* Gatlin, 170 Mo. 354, 70 S. W. 885.

2. An instruction that unless the jury find from all the facts the presence of defendant at the place of the crime, and his guilt beyond a reasonable doubt, they should acquit, has been held sufficient. State *v.* Sanders, 106 Mo. 188, 17 S. W. 223. See also Winfield *v.* State, (Tex. Cr. App. 1903) 72 S. W. 182.

3. *California.*— People *v.* Winters, 125 Cal. 325, 57 Pac. 1067.

Iowa.— State *v.* Standley, 76 Iowa 215, 40 N. W. 815; State *v.* Butler, 67 Iowa 643, 25 N. W. 843; State *v.* Reed, 62 Iowa 40, 17 N. W. 150.

Kansas.— State *v.* Johnson, 40 Kan. 266, 19 Pac. 749.

Missouri.— State *v.* Miller, 156 Mo. 76, 56 S. W. 907; State *v.* Jones, 153 Mo. 457, 55 S. W. 80; State *v.* Bryant, 134 Mo. 246, 35 S. W. 597.

Montana.—State *v.* Spotted Hawk, 22 Mont. 33, 55 Pac. 1026.

Nebraska.— Nightingale *v.* State, 62 Nebr. 371, 87 N. W. 158.

Nevada.— State *v.* Waterman, 1 Nev. 543.

Texas.— Villereal *v.* State, (Cr. App. 1901) 61 S. W. 715; Benavides *v.* State, (Cr. App. 1901) 61 S. W. 125; Stevens *v.* State, 42 Tex. Cr. 154, 59 S. W. 545; Gutirrez *v.* State, (Cr. App. 1900) 59 S. W. 274.

Vermont.— State *v.* Powers, 72 Vt. 168, 47 Atl. 830.

See 14 Cent. Dig. tit. "Criminal Law," § 1834.

4. Beavers *v.* State, 103 Ala. 36, 15 So. 616; Albritton *v.* State, 94 Ala. 76, 10 So. 426; Pollard *v.* State, 53 Miss. 410, 24 Am. Rep. 703. See also Burger *v.* State, 83 Ala. 36, 3 So. 319; Snell *v.* State, 50 Ind. 516; West *v.* State, 48 Ind. 483.

5. Briceland *v.* Com., 74 Pa. St. 463. See also People *v.* Worden, 113 Cal. 569, 45 Pac. 844; State *v.* Maher, 74 Iowa 77, 37 N. W. 2.

6. Barr *v.* People, 30 Colo. 522, 71 Pac. 392; Wisdom *v.* People, 11 Colo. 170, 17 Pac. 519.

c. Effect of Failure to Prove. A charge that an unsuccessful attempt to prove an alibi is always a circumstance of great weight against the accused is reversible error;[7] but the jury should be instructed that an attempt to prove an alibi by the introduction of false or fabricated evidence constitutes a circumstance against the accused.[8]

d. Disparaging Alibi. As a general rule it is error to charge in language tending to disparage an alibi as a defense, or to cast suspicion on the evidence introduced to establish it.[9] It is not, however, error to warn the jury that evidence of an alibi should be considered with caution[10] or care,[11] if at the same time an instruction is given which tells the jury that if defendant shall raise a reasonable doubt by his evidence of alibi they ought to acquit.

7. Character — a. Necessity of Instruction. Where no evidence of defendant's character has been introduced,[12] or where it has not been attacked,[13] no instruction on character is required.

b. Generating Reasonable Doubt. The proper instruction to be given as to character is that evidence of good character is to be considered in connection with all the other evidence upon the question of guilt or innocence, and that when so considered it will sometimes create a reasonable doubt, when without it none would exist, but that evidence of good character is unavailing when after giving

Exact time not shown.— An instruction that where the exact time of the commission of the alleged offense is not shown, but it is shown to have been committed during a night or a part of a night, the evidence of the alibi ought to cover the whole of such time is proper. West *v.* State, 48 Ind. 483.

7. For generally no distinction exists between a failure to prove an alibi and a failure to prove any other fact in defense.

Alabama.— Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28; Albritton *v.* State, 94 Ala. 76, 10 So. 426; Kilgore *v.* State, 74 Ala. 1.

California.— People *v.* Malaspina, 57 Cal. 628.

Florida.— Adams *v.* State, 28 Fla. 511, 10 So. 106.

Georgia.— Landis *v.* State, 70 Ga. 651, 48 Am. Rep. 588.

Illinois.— Miller *v.* People, 39 Ill. 457.

Indiana.— Parker *v.* State, 136 Ind. 284, 35 N. E. 1105.

Iowa.— State *v.* Collins, 20 Iowa 85.

Ohio.— Toler *v.* State, 16 Ohio St. 583.

Pennsylvania.— Turner *v.* Com., 86 Pa. St. 54, 27 Am. Rep. 683; Com. *v.* Fisher, 15 Phila. 386.

Tennessee.— Sawyers *v.* State, 15 Lea 694.

See 14 Cent. Dig. tit. "Criminal Law," § 1836.

8. *Alabama.*— Porter *v.* State, 55 Ala. 95.

Iowa.— State *v.* Collins, 20 Iowa 85.

Pennsylvania.— Com. *v.* McMahon, 145 Pa. St. 413, 22 Atl. 971.

Tennessee.— Ford *v.* State, 101 Tenn. 454, 47 S. W. 703.

Vermont.— State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

Compare State *v.* Byers, 80 N. C. 426, holding that such a charge is erroneous, when no instruction on the subject of alibi is given.

See 14 Cent. Dig. tit. "Criminal Law," § 1836.

9. *California.*— People *v.* Lattimore, 86 Cal. 403, 24 Pac. 1091.

Indiana.— Sater *v.* State, 56 Ind. 378. See Albin *v.* State, 63 Ind. 598.

Michigan.— People *v.* Pearsall, 50 Mich. 233, 15 N. W. 98.

Mississippi.— Simmons *v.* State, 61 Miss. 243; Nelms *v.* State, 58 Miss. 362. See Dawson *v.* State, 62 Miss. 241.

Missouri.— State *v.* Crowell, 149 Mo. 391, 50 S. W. 893, 73 Am. St. Rep. 402.

New York.— People *v.* Kelly, 35 Hun 295.

Oregon.— State *v.* Chee Gong, 16 Oreg. 534, 19 Pac. 607.

Texas.— Walker *v.* State, 37 Tex. 366.

See 14 Cent. Dig. tit. "Criminal Law," § 1837.

10. Provo *v.* State, 55 Ala. 222; People *v.* Tice, 115 Mich. 219, 73 N. W. 108, 69 Am. St. Rep. 560; Com. *v.* Hanlon, 8 Phila. (Pa.) 401.

11. People *v.* Lee Gam, 69 Cal. 552, 11 Pac. 183. See also People *v.* Wong Ah Foo, 69 Cal. 180, 10 Pac. 375; State *v.* Rowland, 72 Iowa 327, 33 N. W. 137.

12. Bodine *v.* State, 129 Ala. 106, 29 So. 926; Drake *v.* State, 51 Ala. 30; Sanders *v.* People, 124 Ill. 218, 16 N. E. 81; Barker *v.* State, 48 Ind. 163; State *v.* Gartrell, 171 Mo. 489, 71 S. W. 1045; State *v.* Furgerson, 162 Mo. 668, 63 S. W. 101.

In Missouri, where the statute makes it the duty of the court, whether requested or not, to charge on all questions of law, the court must instruct on good character whenever there is any testimony of such good character, if this testimony shows the trait of character involved in the charge. State *v.* Anslinger, 171 Mo. 600, 71 S. W. 1041.

In Texas it is not incumbent on the judge to give a special instruction of good character, even when evidence thereof has been introduced. Pharr *v.* State, 9 Tex. App. 129; Heard *v.* State, 9 Tex. App. 1.

13. People *v.* Johnson, 61 Cal. 142. And see *supra*, XII, D, 1.

it due weight the evidence still shows the accused to be guilty beyond a reasonable doubt.[14]

c. Effect of Bad Character. An instruction which withdraws from the jury evidence of bad character admitted to impeach the accused may be properly refused.[15] It has been held that an instruction as to the effect which the jury might give to the bad character of the deceased in a prosecution for homicide was properly refused.[16]

d. Effect of Failure to Prove Character. The court should not, in its charge to the jury, call attention to a failure on the part of defendant to introduce evidence of good character.[17]

e. Inability of Prosecution to Attack Character. When the accused has offered evidence of his good character, it is error to instruct the jury that the law forbids the prosecution to attack his character.[18]

8. Presumptions and Burden of Proof[19] — a. Presumptions. The accused is entitled in every instance to an instruction on the presumption of his innocence;[20]

14. *Alabama.*— Bohlman *v.* State, 135 Ala. 45, 33 So. 44; Barnes *v.* State, 134 Ala. 36, 32 So. 670; Miller *v.* State, 107 Ala. 40, 19 So. 37; Grant *v.* State, 97 Ala. 35, 11 So. 915; Hussey *v.* State, 87 Ala. 121, 6 So. 420; Fields *v.* State, 47 Ala. 603, 11 Am. Rep. 771.

California.— People *v.* Doggett, 62 Cal. 27.

District of Columbia.— U. S. *v.* Bowen, 3 MacArthur 64.

Florida.— Olds *v.* State, (1902) 33 So. 296.

Kansas.—State *v.* Douglass, (1890) 24 Pac. 1118.

Louisiana.— State *v.* Riculfi, 35 La. Ann. 770.

Michigan.— People *v.* Mead, 50 Mich. 228, 15 N. W. 95.

Missouri.— State *v.* Kilgore, 70 Mo. 546.

New York.— People *v.* Hughson, 154 N. Y. 153, 47 N. E. 1092; People *v.* Brooks, 131 N. Y. 321, 30 N. E. 189 [*affirming* 15 N. Y. Suppl. 362]; People *v.* Sweeney, 13 N. Y. Suppl. 25; Carrington *v.* People, 6 Park. Cr. 336.

Ohio.— Moran *v.* State, 11 Ohio Cir. Ct. 464, 5 Ohio Cir. Dec. 234.

Virginia.— Briggs *v.* Com., 82 Va. 554.

Washington.— State *v.* Cushing, 17 Wash. 544, 50 Pac. 512.

United States.— Edgington *v.* U. S., 164 U. S. 361, 17 S. Ct. 164, 41 L. ed. 467.

Compare Hammond *v.* State, 74 Miss. 214, 21 So. 149.

See 14 Cent. Dig. tit. "Criminal Law," § 1841; and *supra*, XII, D, 1, d.

To charge that by being indicted the character of accused has a stain cast upon it, and that the purpose of his evidence of character is to remove such stain, is erroneous in wrongly stating its purpose, which in fact is to disprove guilt. Olive *v.* State, 11 Nebr. 1, 7 N. W. 444.

15. Jones *v.* State, 96 Ala. 102, 11 So. 399.

Instructions as to prior conviction see People *v.* Murray, 86 Cal. 31, 24 Pac. 802; People *v.* Davis, 19 N. Y. Suppl. 781.

16. Carpenter *v.* State, 62 Ark. 286, 36 S. W. 900.

17. People *v.* Bodine, 1 Den. (N. Y.) 281; State *v.* Sanders, 84 N. C. 728. *Compare* State *v.* Tozier, 49 Me. 404. And see *supra*, XII, A, 2, f; XII, D, 1.

18. People *v.* Marks, 90 Mich. 555, 51 N. W. 638.

Even where accused has offered no evidence of character a charge which in effect instructs the jury that the prosecution cannot as part of its case, to prove the guilt of the accused, give evidence that he is a man of bad character, and which also states that the law permits him to prove his good character, is erroneous, as it may induce the jury to believe that the people were under a disadvantage, and that if they had the chance they could show defendant's character was bad. People *v.* Gleason, 122 Cal. 370, 55 Pac. 123.

19. Presumptions and burden of proof generally see *supra*, XII, A.

20. Innocence.— *Alabama.*—Amos *v.* State, 123 Ala. 50, 26 So. 524; Harris *v.* State, 123 Ala. 69, 26 So. 515; Moorer *v.* State, 44 Ala. 15. See also Coleman *v.* State, 59 Ala. 52.

California.— People *v.* Arlington, 131 Cal. 231, 63 Pac. 347.

Georgia.— Hodge *v.* State, 116 Ga. 852, 43 S. E. 255.

Indiana.— Farley *v.* State, 127 Ind. 419, 26 N. E. 898; Castle *v.* State, 75 Ind. 146; Line *v.* State, 51 Ind. 172.

Michigan.— People *v.* Marks, 90 Mich. 555, 51 N. W. 638; People *v.* Potter, 89 Mich. 353, 50 N. W. 994; People *v.* De Foe, 64 Mich. 693, 31 N. W. 585, 5 Am. St. Rep. 863. See also People *v.* Resh, 107 Mich. 251, 65 N. W. 99.

Missouri.— State *v.* Hudspeth, 159 Mo. 178, 60 S. W. 136. See also State *v.* Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556.

Nebraska.— Long *v.* State, 23 Nebr. 33, 36 N. W. 310.

Washington.— State *v.* Krug, 12 Wash. 288, 41 Pac. 126.

Wisconsin.—Franklin *v.* State, 92 Wis. 269, 66 N. W. 107; Fossdahl *v.* State, 89 Wis. 482, 62 N. W. 185.

Wyoming.— Dalzell *v.* State, 7 Wyo. 450, 53 Pac. 297.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1846, 1847; and *supra*, XII, A, 2, a.

Evidence artificially important.— Where any portion of the evidence has a presumptive weight given it by law the court must

but it is proper for the court to charge that everyone is presumed to know the law.[21] An instruction that persons are presumed to intend the consequences of their voluntary acts is generally held unobjectionable;[22] and it is not error for the court to refuse to instruct the jury that "malice cannot be inferred."[23] The presumption of guilt arising from the flight of defendant is at most one of fact, and the jury should be instructed so to consider it in connection with other circumstances.[24] In order to justify a charge that the suppression of evidence may be considered by the jury, it should be shown that the evidence suppressed would shed light on the issue, and that it was in the possession or under the control of the party alleged to have suppressed it.[25] It is error to charge that a presumption of law does not continue after the production of any competent evidence to the contrary.[26]

b. Burden of Proof. An instruction which in substance tells the jury that the burden of proof has shifted during the trial and that it has become incumbent on defendant to prove a certain defense is error.[27]

9. Reasonable Doubt[28] — a. Right to Instruction. The accused is entitled to an instruction that the prosecution must prove the charge against him beyond a reasonable doubt.[29]

instruct the jury as to such presumption. Brown *v.* State, 23 Tex. 195.

An instruction that an indictment is but a formal charge and that it furnishes no evidence of guilt, although proper, is not necessary. Aszman *v.* State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33; State *v.* Donnelly, 130 Mo. 642, 32 S. W. 1124; State *v.* Pratt, 121 Mo. 566, 26 S. W. 556.

Omission cured by charge as to reasonable doubt.— People *v.* Ostrander, 110 Mich. 60, 67 N. W. 1079; People *v.* Smith, 92 Mich. 10, 52 N. W. 67; People *v.* Graney, 91 Mich. 646, 52 N. W. 66. *Compare* Franklin *v.* State, 92 Wis. 269, 66 N. W. 107.

Presumption of innocence declared by statute.— People *v.* Van Houter, 38 Hun (N. Y.) 168; Hughes *v.* State, 43 Tex. Cr. 511, 67 S. W. 104; Pierce *v.* State, (Tex. Cr. App. 1893) 22 S. W. 587; Mace *v.* State, 6 Tex. App. 470; Stapp *v.* State, 1 Tex. App. 734; Hampton *v.* State, 1 Tex. App. 652.

21. Knowledge of law.— Walker *v.* State, 91 Ala. 76, 9 So. 87; Whitton *v.* State, 37 Miss. 379.

22. Intent.— Krehnavy *v.* State, 43 Nebr. 337, 61 N. W. 628. See also *supra*, II, D, 7.

A charge that defendant's intent may be implied by the jury from the circumstances as proved is not error. People *v.* Keeley, 81 Cal. 210, 22 Pac. 593; People *v.* Morton, 72 Cal. 62, 13 Pac. 150.

This presumption is not one of law, however, to be applied by the court, but of fact to be weighed by the jury. Rogers *v.* Com., 96 Ky. 24, 27 S. W. 813, 16 Ky. L. Rep. 199. It was held that an instruction that when a crime is committed the law presumes the intent, and it devolves upon the person accused to show that the unlawful act was done by accident or otherwise, was absurd and meaningless. But *compare* State *v.* Painter, 67 Mo. 84.

23. Malice.—Walker *v.* Com., 7 Ky. L. Rep. 44, where it is said that while malice, like any other fact, must be proved, this may be done by circumstantial evidence from which the jury may infer it.

24. Flight.—Sheffield *v.* State, 43 Tex. 378. And see *supra*, XII, B, 4, h, (III).

Any instruction which intimates to the jury what inference they shall draw from proof of his flight is improper. People *v.* Giancoli, 74 Cal. 642, 16 Pac. 510; Smith *v.* State, 63 Ga. 168.

25. Suppression of evidence.— Fincher *v.* State, 58 Ala. 215.

It is only a circumstance to be considered at most, and never conclusive of the guilt of the accused. Sater *v.* State, 56 Ind. 378; State *v.* Collins, 20 Iowa 85. And see *supra*, XII, A, 2, c.

Failure to call witnesses see *supra*, XII, A, 2, b.

Withholding evidence.— It has been held that an instruction that if evidence within the power of the accused, and not accessible to the state, is withheld by him, the jury are authorized to infer that if produced it would be against him is unobjectionable. State *v.* Rodman, 62 Iowa 456, 17 N. W. 663.

No presumption unfavorable to the prosecution arises from an omission to examine all the witnesses to a transaction. Jackson *v.* State, 77 Ala. 18.

Refusal of witness to answer questions see Beach *v.* U. S., 46 Fed. 754.

26. Bradshaw *v.* People, 153 Ill. 156, 38 N. E. 652, for whether a presumption is overcome by evidence offered to rebut it is solely a question for the jury.

27. People *v.* Tapia, 131 Cal. 647, 63 Pac. 1001; Coffin *v.* U. S., 156 U. S. 432, 15 S. Ct. 394, 39 L. ed. 481. And see *supra*, XII, A, 1.

Proof evenly balanced.—And it is also error to charge that if the proof left the question of the guilt or innocence of the accused in equipoise, the jury could not on that account acquit. Winter *v.* State, 20 Ala. 39.

28. Reasonable doubt generally see *supra*, XII, 1, 2, c.

29. Compton *v.* State, 110 Ala. 24, 20 So. 119; Carter *v.* State, 103 Ala. 93, 15 So. 893; Forney *v.* State, 98 Ala. 19, 13 So. 540; McAdory *v.* State, 62 Ala. 154; People *v.*

b. Necessity For Definition. It is not necessary for the court in its instructions to define or explain the words "reasonable doubt";[30] and, at least in the absence of a request by the defense, a failure to define reasonable doubt is not error.[31]

c. Sufficiency in General. A charge to acquit, if the jury have a doubt of defendant's guilt, is properly refused, as the doubt must be a reasonable doubt.[32] A charge is erroneous which authorizes a conviction on the mere belief of the jury instead of requiring them to be satisfied beyond a reasonable doubt.[33]

d. Negative Definitions. A reasonable doubt is not mere conjecture or speculation,[34] or one suggested by the ingenuity of counsel, or arising from a merciful inclination to permit defendant to escape, and prompted by sympathy for him or

Cohn, 76 Cal. 386, 18 Pac. 410; Reeves *v.* State, 29 Fla. 527, 10 So. 901; State *v.* Gullette, 121 Mo. 447, 26 S. W. 354.

Doctrine of reasonable doubt declared by statute.— Pierce *v.* State, (Tex. Cr. App. 1893) 22 S. W. 587; Alonzo *v.* State, 15 Tex. App. 378, 49 Am. Rep. 207; Spears *v.* State, 2 Tex. App. 244; Treadway *v.* State, 1 Tex. App. 668; Hampten *v.* State, 1 Tex. App. 652; Lindsay *v.* State, 1 Tex. App. 327.

No state of proof short of a substantial admission by accused of all the facts essential to guilt will justify the withholding of a charge of reasonable doubt. State *v.* Ackerman, 62 N. J. L. 456, 41 Atl. 497.

Facts hypothesized.— It is not necessary, however, to instruct that the jury must believe facts hypothesized as absolutely true beyond a reasonable doubt. Clark *v.* State, 105 Ala. 91, 17 So. 37.

30. The idea intended to be expressed by these words can scarcely be expressed so truly or so clearly by any other words in the English language. There are, however, definitions or paraphrases of these words which have been held to be good by the courts. State *v.* Davis, 48 Kan. 1, 28 Pac. 1092; State *v.* Reed, 62 Me. 129; State *v.* Robinson, 117 Mo. 649, 23 S. W. 1066; Dunbar *v.* U. S., 156 U. S. 185, 15 S. Ct. 325, 39 L. ed. 390.

When the words "reasonable doubt" are defined by statute, the statutory definition should be followed in the judge's instructions. State *v.* Potts, 20 Nev. 389, 22 Pac. 754.

Where the doctrine is declared by statute, in instructing on reasonable doubt it is best simply to follow the language of the statute. Jolly *v.* Com., 110 Ky. 190, 61 S. W. 49, 22 Ky. L. Rep. 1622; Williams *v.* Com., 80 Ky. 313, 4 Ky. L. Rep. 3; Mickey *v.* Com., 9 Bush (Ky.) 593; McDade *v.* State, 27 Tex. App. 641, 11 S. W. 672, 11 Am. St. Rep. 216; Ham *v.* State, 4 Tex. App. 645; Bland *v.* State, 4 Tex. App. 15.

Where there is a plain conflict of testimony and one side or the other must be believed without qualification, there is no room for a reasonable doubt, and an error in defining it to the jury is immaterial. People *v.* Marble, 38 Mich. 117.

31. People *v.* Christensen, 85 Cal. 568, 24 Pac. 888.

32. *Alabama.*— Lodge *v.* State, 122 Ala. 107, 26 So. 200; Hale *v.* State, 122 Ala. 85, 26 So. 236; Dennis *v.* State, 118 Ala. 72, 23 So. 1002; Fleming *v.* State, 107 Ala. 11, 18 So. 263; Jones *v.* State, 79 Ala. 23.

Arizona.— Foster *v.* Territory, (1899) 56 Pac. 738.

California.— People *v.* Winters, 125 Cal. 325, 57 Pac. 1067.

Florida.— Ernest *v.* State, 20 Fla. 383. See also Heron *v.* State, 22 Fla. 86.

Kansas.— State *v.* Cassady, 12 Kan. 550.

New Jersey.—Raymond *v.* State, 53 N. J. L. 260, 21 Atl. 328.

New York.— People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188.

South Carolina.—State *v.* Summer, 55 S. C. 32, 32 S. E. 771, 74 Am. St. Rep. 707.

Texas.— Gibbs *v.* State, 1 Tex. App. 12.

Wisconsin.— Butler *v.* State, 102 Wis. 364, 78 N. W. 590.

United States.— U. S. *v.* Johnson, 26 Fed. Cas. No. 15,483.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1906, 1907.

Doubt upon all the evidence.— It is proper to instruct that a reasonable doubt sufficient to acquit exists, if after an impartial comparison and consideration of the evidence the jury candidly say that they are not satisfied of defendant's guilt. U. S. *v.* Meagher, 37 Fed. 875. Hence, inasmuch as the doubt must arise on all the evidence, it is error to charge that if the jury have a doubt growing out of any part of it they may acquit, as such doubt, if they have it, may be dissipated by other evidence. Lodge *v.* State, 122 Ala. 107, 26 So. 200.

33. *Alabama.*— Burton *v.* State, 107 Ala. 108, 18 So. 284; Shields *v.* State, 104 Ala. 35, 16 So. 84, 53 Am. St. Rep. 17; Green *v.* State, 97 Ala. 59, 12 So. 416, 15 So. 242.

Kentucky.— Claxon *v.* Com., 30 S. W. 998, 17 Ky. L. Rep. 284.

Mississippi.— Jeffries *v.* State, 77 Miss. 757, 28 So. 948; Webb *v.* State, 73 Miss. 456, 19 So. 238.

Missouri.— State *v.* Fugate, 27 Mo. 535.

Nebraska.— Elliott *v.* State, 34 Nebr. 48, 51 N. W. 315.

Virginia.— Waller *v.* Com., 84 Va. 492, 5 S. E. 364.

See 14 Cent. Dig. tit. "Criminal Law," § 1847.

34. Kennedy *v.* State, 107 Ind. 144, 6 N. E. 305, 57 Am. Rep. 99; State *v.* Neil, Tapp. (Ohio) 120; State *v.* Summons, 1 Ohio Dec.

those connected with him.[35] So also a mere misgiving of the guilt of the accused is not a reasonable doubt.[36]

e. Absolute Proof. It is not error to refuse to charge that unless the jury have an "absolute and abiding belief" in defendant's guilt,[37] or believe him guilty "beyond all doubt,"[38] or are "indubitably certain" of his guilt,[39] they must acquit. The court should not give any instruction which requires belief beyond that degree of moral certainty which excludes all reasonable doubt of the guilt of the accused.[40]

f. Possibility of Innocence. It is proper to instruct that a reasonable doubt to authorize an acquittal must be a substantial doubt arising on the evidence, and not a mere possibility of innocence.[41]

g. Substantial Doubt. A charge which defines a reasonable doubt as an actual, honest, and substantial misgiving or doubt of guilt arising from the evidence or want of evidence, and not a mere captious or ill-founded doubt, is correct.[42]

h. Moral Certainty. It is correct to charge the jury that they must be convinced to a moral certainty of defendant's guilt in connection with a charge that

(Reprint) 416, 9 West. L. J. 407; Brown *v.* State, 1 Tex. App. 154; U. S. *v.* Darton, 25 Fed. Cas. No. 14,919, 6 McLean 46; U. S. *v.* Foulke, 25 Fed. Cas. No. 15,143, 6 McLean 349; U. S. *v.* Knowles, 26 Fed. Cas. No. 15,540, 4 Sawy. 517.

Illustrations.— A charge that a reasonable doubt is not "a whimsical or vague doubt" (McGuire *v.* State, 43 Tex. 210), and that it is not a doubt merely fanciful or conjured up, but such a one as fairly arises out of the evidence (Com. *v.* Drum, 58 Pa. St. 9; Com. *v.* Shaub, 5 Lanc. Bar (Pa.) 121; Com. *v.* Lynch, 3 Pittsb. (Pa.) 412), or that it is not a mere imaginary, captious, or possible doubt, but a fair doubt based on reason and common sense and growing out of all the evidence (People *v.* Swartz, 118 Mich. 292, 76 N. W. 491), is proper.

35. U. S. *v.* Harper, 33 Fed. 471.

36. State *v.* Murphy, 6 Ala. 845; State *v.* Bodekee, 34 Iowa 520.

37. Whatley *v.* State, 91 Ala. 108, 9 So. 236; Martin *v.* State, 77 Ala. 1; State *v.* Marshall, 105 Iowa 38, 74 N. W. 763.

38. U. S. *v.* Brown, 24 Fed. Cas. No. 14,667, 4 McLean 142.

39. Ross *v.* State, 92 Ala. 28, 9 So. 357, 25 Am. St. Rep. 20.

40. *Alabama.*— Hicks *v.* State, 123 Ala. 15, 26 So. 337; Jackson *v.* State, (1894) 18 So. 728.

California.— People *v.* Smith, 105 Cal. 676, 39 Pac. 38; People *v.* Brown, 56 Cal. 405, 59 Cal. 345.

District of Columbia.— U. S. *v.* Heath, 20 D. C. 272.

Georgia.— Giles *v.* State, 6 Ga. 276.

Mississippi.— Browning *v.* State, 33 Miss. 47.

Nebraska.—St. Louis *v.* State, 8 Nebr. 405, 1 N. W. 371.

New York.— People *v.* Stephenson, 11 Misc. 141, 32 N. Y. Suppl. 1112.

Wyoming.— Cornish *v.* Territory, 3 Wyo. 95, 3 Pac. 793.

See 14 Cent. Dig. tit. "Criminal Law," § 1909.

41. *Alabama.*— Sims *v.* State, 100 Ala. 23, 14 So. 560; Martin *v.* State, 77 Ala. 1.

Illinois.— Pate *v.* People, 8 Ill. 644.

Missouri.— State *v.* Edie, 147 Mo. 535, 49 S. W. 563; State *v.* Duncan, 142 Mo. 456, 44 S. W. 263; State *v.* David, 131 Mo. 380, 33 S. W. 28; State *v.* Turner, 110 Mo. 196, 19 S. W. 645; State *v.* Evans, 55 Mo. 460.

Texas.— Jackson *v.* State, 9 Tex. App. 114.

Utah.— People *v.* Kerm, 8 Utah 268, 30 Pac. 988.

Wisconsin.— Emery *v.* State, 101 Wis. 627, 78 N. W. 145.

United States.— U. S. *v.* McKenzie, 35 Fed. 826, 13 Sawy. 337.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1910, 1911.

The jury is not required to find that it was impossible for the accused to have been innocent before they can convict. Poole *v.* People, 80 N. Y. 645.

42. *Alabama.*—Owens *v.* State, 52 Ala. 400. See also Little *v.* State, 89 Ala. 99, 8 So. 82.

Illinois.— Smith *v.* People, 74 Ill. 144.

Maine.— State *v.* Rounds, 76 Me. 123.

Michigan.— People *v.* Cox, 70 Mich. 247, 38 N. W. 235.

Missouri.— State *v.* Cushenberry, 157 Mo. 168, 56 S. W. 737; State *v.* Holloway, 156 Mo. 222, 56 S. W. 734; State *v.* Young, 105 Mo. 634, 16 S. W. 408; State *v.* Blunt, 91 Mo. 503, 4 S. W. 394; State *v.* Gann, 72 Mo. 374; State *v.* Heed, 57 Mo. 252.

Nebraska.— Ferguson *v.* State, 52 Nebr. 432, 72 N. W. 590, 66 Am. St. Rep. 512.

New York.— People *v.* Barker, 153 N. Y. 111, 47 N. E. 31.

Pennsylvania.— Com. *v.* Harman, 4 Pa. St. 269.

South Carolina.— State *v.* Senn, 32 S. C. 392, 11 S. E. 292; State *v.* Coleman, 20 S. C. 441.

United States.— U. S. *v.* Newton, 52 Fed. 275.

See 14 Cent. Dig. tit. "Criminal Law," § 1912.

they must be convinced beyond all reasonable doubt,[43] for these phrases are by some of the cases regarded as equivalent to each other.[44]

i. Abiding Conviction. It is proper to instruct the jury that a reasonable doubt exists when, after the entire evidence has been compared and considered by them, their minds are left in such a condition that they cannot say that they have an abiding conviction, to a moral certainty, of the truth of the charge against the accused.[45]

j. Conscientious Belief. An instruction which defines proof beyond a reasonable doubt to be such proof as satisfies the judgment and conscience of the jury, as reasonable men applying their reason to the evidence before them, that the crime was not committed by the accused and so satisfies them as to leave no other reasonable conclusion possible has been held to be correct.[46]

k. Belief or Doubt as Men. An instruction is not erroneous which tells the jury that they are not at liberty to disbelieve as jurors if from the evidence they believe as men,[47] and that the oath which they take as jurors imposes no obligation to doubt where no doubt would have existed if the oath had not been administered.[48]

43. *Alabama.*— Fuller *v.* State, 117 Ala. 200, 23 So. 73; Rogers *v.* State, 117 Ala. 192, 23 So. 82; Williams *v.* State, 52 Ala. 411; Mose *v.* State, 36 Ala. 211.

California.— People *v.* Davis, 64 Cal. 440, 1 Pac. 889; People *v.* Beck, 58 Cal. 212.

Delaware.— State *v.* Miller, 9 Houst. 564, 32 Atl. 137.

Iowa.— State *v.* Bodekee, 34 Iowa 520.

Minnesota.— State *v.* Hogard, 12 Minn. 293.

Montana.— Territory *v.* McAndrews, 3 Mont. 158; Territory *v.* Owings, 3 Mont. 137.

Nebraska.— St. Louis *v.* State, 8 Nebr. 405, 1 N. W. 371.

Texas.— Loggins *v.* State, 32 Tex. Cr. 364, 24 S. W. 512; Shelton *v.* State, 12 Tex. App. 513; Smith *v.* State, 10 Tex. App. 420.

United States.—U. S. *v.* Zes Cloya, 35 Fed. 493.

Compare Gafford *v.* State, 122 Ala. 54, 25 So. 10 (holding that an instruction that unless the evidence excludes, to a moral certainty, every hypothesis but that of guilt, the jury must acquit, is incorrect, as exacting too high a measure of proof); McAlpine *v.* State, 47 Ala. 78; Territory *v.* Clanton, (Ariz. 1889) 20 Pac. 94 (holding that in a criminal case proof to a moral certainty is not required); Territory *v.* Barth, (Ariz. 1887) 15 Pac. 673; Hall *v.* People, 39 Mich. 717.

See 14 Cent. Dig. tit. "Criminal Law," § 1913.

Moral certainty of guilt without evidence thereof is insufficient to justify a conviction. Heldt *v.* State, 20 Nebr. 492, 30 N. W. 626, 57 Am. Rep. 835.

44. Jones *v.* State, 100 Ala. 88, 14 So. 772; Com. *v.* Costley, 118 Mass. 1.

45. *Alabama.*— McKee *v.* State, 82 Ala. 32, 2 So. 451; Coleman *v.* State, 59 Ala. 52.

California.— People *v.* Brannon, 47 Cal. 96.

Iowa.— State *v.* Elsham, 70 Iowa 531, 31 N. W. 66.

Massachusetts.— Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

Nebraska.— Parrish *v.* State, 14 Nebr. 60, 15 N. W. 357.

Nevada.— State *v.* Van Winkle, 6 Nev. 340.

New Jersey.— Donnelly *v.* State, 26 N. J. L. 601.

Texas.— Billard *v.* State, 30 Tex. 367, 94 Am. Dec. 317.

See 14 Cent. Dig. tit. "Criminal Law," § 1914.

46. People *v.* Ezzo, 104 Mich. 341, 62 N. W. 407.

On the other hand it has been held that defining belief beyond a reasonable doubt as consisting in a conscientious belief that the accused is guilty is error. Johnson *v.* State, (Miss. 1895) 16 So. 494; Hemphill *v.* State, (Miss. 1894) 16 So. 491; Brown *v.* State, 72 Miss. 997, 17 So. 278, 72 Miss. 95, 16 So. 202; Burt *v.* State, 72 Miss. 408, 16 So. 342, 48 Am. St. Rep. 563.

47. People *v.* Worden, 113 Cal. 569, 45 Pac. 844; Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Clark *v.* Com., 123 Pa. St. 555, 16 Atl. 795 [*following* McMeen *v.* Com., 114 Pa. St. 300, 9 Atl. 878]; Fife *v.* Com., 29 Pa. St. 429. *Contra*, People *v.* Johnson, 140 N. Y. 350, 35 N. E. 604.

Reasonable man as the test.— An instruction that the degree of evidence required to convict defendant must be such as to remove all doubt from the mind of a reasonable man is incorrect. It should be such as to remove all reasonable doubt, for a man, although reasonable, may entertain an unreasonable doubt (Padfield *v.* People, 146 Ill. 660, 35 N. E. 469); but a charge that a reasonable doubt is such as a reasonable man would have after a careful investigation of any important subject that prevents his being able to come to a satisfactory conclusion about it is correct (Johnson *v.* State, 89 Ga. 107, 14 S. E. 889). Nor is it error for the court to define a reasonable doubt as such a doubt as would cause a reasonable man to hesitate and pause. Minich *v.* People, 8 Colo. 440, 9 Pac. 4.

48. Watt *v.* People, 126 Ill. 9, 18 N. E. 340, 1 L. R. A. 403.

l. Doubt Influencing Action in Private Affairs. Whether or not a reasonable doubt can be properly defined as such a doubt as a reasonable man would act upon, or decline to act upon, in the more weighty and important matters relating to his own affairs, is a question which has been frequently discussed,[49] and as to which the authorities are not uniform.

m. Doubt For Which Reason Can Be Given. The correctness of an instruction in which a reasonable doubt is defined as one for which a reason can be given has been the subject of discussion in a number of cases.[50]

n. Suspicion or Probability of Guilt. Even though the evidence establishes a strong suspicion or a probability of the guilt of the accused he should not be convicted, and the jury should be so charged.[51]

o. Probability of Innocence. An instruction that a probability of defendant's innocence is a just foundation for a reasonable doubt of his guilt, and therefore for his acquittal, asserts a correct legal proposition.[52]

The contrary has been held, however, on the ground that such an instruction tends to relieve the jury from the obligation of their oath. Siberry *v.* State, 133 Ind. 677, 33 N. E. 681 [*following* Cross *v.* State, 132 Ind. 65, 31 N. E. 473].

49. *Alabama.*— Allen *v.* State, 111 Ala. 80, 20 So. 490 [*distinguishing* Boulden *v.* State, 102 Ala. 78, 15 So. 341]; Welsh *v.* State, 96 Ala. 92, 11 So. 450.

Arkansas.— Carpenter *v.* State, 62 Ark. 286, 36 S. W. 900.

California.— People *v.* Wohlfrom, (1891) 26 Pac. 236; People *v.* Bemmerly, 87 Cal. 117, 25 Pac. 266; People *v.* Ah Sing, 51 Cal. 372.

Dakota.— Territory *v.* Bannigan, 1 Dak. 451, 46 N. W. 597.

Delaware.— State *v.* Miller, 9 Houst. 564, 32 Atl. 137.

District of Columbia.— U. S. *v.* Heath, 20 D. C. 272.

Florida.— Lovett *v.* State, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705.

Georgia.— Lewis *v.* State, 90 Ga. 95, 15 S. E. 697.

Idaho.— People *v.* Dewey, 2 Ida. (Hasb.) 83, 6 Pac. 103.

Illinois.— Wacaser *v.* People, 134 Ill. 438, 25 N. E. 564, 23 Am. St. Rep. 683.

Indiana.— Brown *v.* State, 105 Ind. 385, 5 N. E. 900; Toops *v.* State, 92 Ind. 13; Jarrell *v.* State, 58 Ind. 293; Arnold *v.* State, 23 Ind. 170.

Iowa.— State *v.* Schaffer, 74 Iowa 704, 39 N. W. 89; State *v.* Nash, 7 Iowa 347.

Kansas.— State *v.* Kearley, 26 Kan. 77.

Michigan.— Carver *v.* People, 39 Mich. 786.

Minnesota.— State *v.* Shettleworth, 18 Minn. 208.

Montana.— State *v.* Gleim, 17 Mont. 17, 41 Pac. 998, 52 Am. St. Rep. 655, 31 L. R. A. 294.

Nebraska.— Lawhead *v.* State, 46 Nebr. 607, 65 N. W. 779.

New Mexico.— Territory *v.* Lopez, 3 N. M. 104, 3 Pac. 364.

New York.— People *v.* Hughes, 137 N. Y. 29, 32 N. E. 1105; People *v.* Wayman, 128 N. Y. 585, 27 N. E. 1070.

North Carolina.— State *v.* Oscar, 52 N. C. 305.

Pennsylvania.— Com. *v.* Miller, 139 Pa. St. 77, 21 Atl. 138, 23 Am. St. Rep. 170.

Washington.—State *v.* Krug, 12 Wash. 288, 41 Pac. 126.

Wisconsin.— Emery *v.* State, 92 Wis. 146, 65 N. W. 848.

Wyoming.— Palmerston *v.* Territory, 3 Wyo. 333, 23 Pac. 73.

United States.— Hopt *v.* Utah, 120 U. S. 430, 7 S. Ct. 614, 30 L. ed. 708; U. S. *v.* Meagher, 37 Fed. 875; U. S. *v.* Jones, 31 Fed. 718; U. S. *v.* Wright, 16 Fed. 112.

See 14 Cent. Dig. tit. "Criminal Law," § 1917.

50. *Alabama.*— Thomas *v.* State, 126 Ala. 4, 28 So. 591; Harvey *v.* State, 125 Ala. 47, 27 So. 763; Roberts *v.* State, 122 Ala. 47, 25 So. 238; Talbert *v.* State, 121 Ala. 33, 25 So. 690; Hodge *v.* State, 97 Ala. 37, 12 So. 164, 38 Am. St. Rep. 145.

Georgia.— Powell *v.* State, 95 Ga. 502, 20 S. E. 483; Vann *v.* State, 83 Ga. 44, 9 S. E. 945.

Indiana.— Siberry *v.* State, 133 Ind. 677, 33 N. E. 681.

Iowa.— State *v.* Cohen, 108 Iowa 208, 78 N. W. 857, 75 Am. St. Rep. 213.

Louisiana.— State *v.* Jefferson, 43 La. Ann. 995, 10 So. 199.

Michigan.— People *v.* Stubenvoll, 62 Mich. 329, 28 N. W. 883.

Nebraska.— Childs *v.* State, 34 Nebr. 236, 51 N. W. 837.

New York.— People *v.* Guidici, 100 N. Y. 503, 3 N. E. 493.

Ohio.— Morgan *v.* State, 48 Ohio St. 371, 27 N. E. 710.

Oregon.— State *v.* Morey, 25 Oreg. 241, 35 Pac. 655, 36 Pac. 573.

See 14 Cent. Dig. tit. "Criminal Law," § 1918.

51. Binkley *v.* State, 34 Nebr. 757, 52 N. W. 708; People *v.* O'Bryan, 1 Wheel. Cr. (N. Y.) 21; Pilkinton *v.* State, 19 Tex. 214; Barnett *v.* State, 17 Tex. App. 191; Grant *v.* State, 3 Tex. App. I.

52. Howard *v.* State, 108 Ala. 571, 18 So. 813; Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28; Smith *v.* State, 92 Ala. 30, 9 So. 408; Bain *v.* State, 74 Ala. 38; Nelms *v.* State, 58 Miss. 362; Browning *v.* State, 30 Miss. 656.

p. Doubt Arising From Want of Evidence. An instruction that a reasonable doubt must be one suggested by or arising out of the evidence adduced is erroneous, as it excludes all reasonable doubts that may arise from the lack or want of evidence.[53]

q. Doubt Upon Any Fact. While all the essential facts constituting a crime must be established beyond a reasonable doubt, it is not required that each link in the chain of circumstances relied upon to establish defendant's guilt should be so proved. It is sufficient if, taking the testimony altogether, the jury are satisfied beyond a reasonable doubt that defendant is guilty.[54]

10. Accomplices[55] — a. In General. When the state introduces the evidence of an accomplice, it is a general rule of practice to caution the jury as to the danger of convicting upon the uncorroborated testimony of an accomplice, and the jury should be instructed as to the necessity of corroboration in cases where corroboration is required by statute;[56] but where there is no evidence tending to show that any witness for the state is an accomplice, it is proper to omit to charge

53. *Colorado.*— Mackey *v.* People, 2 Colo. 13.

Georgia.— McElven *v.* State, 30 Ga. 869.

Indiana.— Brown *v.* State, 105 Ind. 385, 5 N. E. 900; Wright *v.* State, 69 Ind. 163, 35 Am. Rep. 212; Densmore *v.* State, 67 Ind. 306, 33 Am. Rep. 96.

Iowa.— State *v.* Case, 96 Iowa 264, 65 N. W. 149.

Mississippi.— Hale *v.* State, 72 Miss. 140, 16 So. 387.

Texas.— Bray *v.* State, 41 Tex. 560; Bland *v.* State, 4 Tex. App. 15; Massey *v.* State, 1 Tex. App. 563.

See 14 Cent. Dig. tit. "Criminal Law," § 1921.

54. As a general rule therefore a charge is sufficient if it applies the doctrine of reasonable doubt to the whole of the case. It is not necessary that it should be applied to each question in issue.

Alabama.— Murphy *v.* State, 108 Ala. 10, 18 So. 557; Ming *v.* State, 73 Ala. 1; Williams *v.* State, 52 Ala. 26.

Florida.— Bryant *v.* State, 34 Fla. 291, 16 So. 177; Woodruff *v.* State, 31 Fla. 320, 12 So. 653.

Illinois.— Keating *v.* People, 160 Ill. 480, 43 N. E. 724; Weaver *v.* People, 132 Ill. 536, 24 N. E. 571.

Iowa.— State *v.* Hennessy, 55 Iowa 299, 7 N. W. 641.

Kansas.— Wise *v.* State, 2 Kan. 419, 85 Am. Dec. 595.

Kentucky.— Baker *v.* Com., 17 S. W. 625, 13 Ky. L. Rep. 571.

Missouri.— State *v.* Wells, 111 Mo. 533, 20 S. W. 232.

Nebraska.— Jameson *v.* State, 25 Nebr. 185, 41 N. W. 138.

North Carolina.— State *v.* Crane, 110 N. C. 530, 15 S. E. 231.

Oregon.— State *v.* Roberts, 15 Oreg. 187, 13 Pac. 896.

Texas.— Carson *v.* State, 34 Tex. Cr. 342, 30 S. W. 799.

See 14 Cent. Dig. tit. "Criminal Law," § 1922.

55. Acts and declarations of conspirators and co-defendants see *supra*, XII, F.

Testimony of accomplices generally see *supra*, XII, G.

56. *California.*— People *v.* Strybe, (1894) 36 Pac. 3; People *v.* Bonney, 98 Cal. 278, 33 Pac. 98 [*distinguishing* People *v.* O'Brien, 96 Cal. 171, 31 Pac. 45].

Connecticut.— State *v.* Stebbins, 29 Conn. 463, 79 Am. Dec. 223.

Illinois.— Hoyt *v.* People, 140 Ill. 588, 30 N. E. 315, 16 L. R. A. 239.

Iowa.— Ray *v.* State, 1 Greene 316, 48 Am. Dec. 379.

Kentucky.— Craft *v.* Com., 4 Ky. L. Rep. 182.

Louisiana.— State *v.* De Hart, 109 La. 570, 33 So. 605.

Mississippi.—Wilson *v.* State, 71 Miss. 880, 16 So. 304.

Missouri.—State *v.* Meysenburg, 171 Mo. 1, 71 S. W. 229; State *v.* Donnelly, 130 Mo. 642, 32 S. W. 1124; State *v.* Dawson, 124 Mo. 418, 27 S. W. 1104; State *v.* Woolard, 111 Mo. 248, 20 S. W. 27; State *v.* Walker, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133.

Nebraska.— Long *v.* State, 23 Nebr. 33, 36 N. W. 310.

New Mexico.— Territory *v.* Chavez, 8 N. M. 528, 45 Pac. 1107.

Ohio.— Allen *v.* State, 10 Ohio St. 287.

Texas.— Brooks *v.* State, (Cr. App. 1900) 56 S. W. 924; Wilson *v.* State, 41 Tex. Cr. 115, 51 S. W. 916.

Vermont.— State *v.* Dana, 59 Vt. 614, 10 Atl. 727.

Washington.— State *v.* Coates, 22 Wash. 601, 61 Pac. 726.

West Virginia.— State *v.* Perry, 41 W. Va. 641, 24 S. E. 634.

See 14 Cent. Dig. tit. "Criminal Law," § 1859; and *supra*, XII, G, 3.

Correctness and sufficiency of instruction as to accomplice evidence.— *Alabama.*— Moses *v.* State, 58 Ala. 117.

California.— People *v.* Sternberg, 111 Cal. 11, 43 Pac. 201; People *v.* Ribolsi, 89 Cal. 492, 26 Pac. 1082.

Colorado.— Wisdom *v.* People, 11 Colo. 170, 17 Pac. 519.

Connecticut.— State *v.* Maney, 54 Conn. 178, 6 Atl. 401.

the law applicable to accomplice testimony.[57] If, however, a witness is an accomplice, the accused is entitled to an instruction on accomplice evidence, although there be other evidence besides that of the accomplice tending to show his guilt.[58]

b. Extent of Corroboration. The instructions should properly state the extent of the corroboration required,[59] and should explain what is meant by the terms "material to the issues" and "corroborated."[60] The court need not, however, instruct that the corroboration should be beyond a reasonable doubt.[61]

11. Admissions and Confessions — a. In General. Where no confession has been admitted in evidence, a refusal to charge on the law of confessions is proper.[62] So also if there is no evidence, or only insufficient evidence to show that a confession is involuntary, a request to charge that it should not be considered if the jury believe it to be involuntary is properly denied.[63]

b. Corroboration. Where the *corpus delicti* has been abundantly proved,[64] it

Georgia.— Johnson *v.* State, 92 Ga. 577, 20 S. E. 8; Bernhard *v.* State, 76 Ga. 613.

Iowa.— State *v.* Hennessey, 55 Iowa 299, 7 N. W. 641.

Louisiana.— State *v.* Prudhomme, 25 La. Ann. 522; State *v.* Bayonne, 23 La. Ann. 78.

Massachusetts.— Com. *v.* Brooks, 9 Gray 299.

Mississippi.— Brown *v.* State, 72 Miss. 990, 18 So. 431; Wilson *v.* State, 71 Miss. 880, 16 So. 304.

Missouri.— State *v.* Donnelly, 130 Mo. 642, 32 S. W. 1124; State *v.* Dawson, 124 Mo. 418, 27 S. W. 1104; State *v.* Walker, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133.

Nebraska.— Olive *v.* State, 11 Nebr. 1, 7 N. W. 444.

New York.— People *v.* Williams, 1 N. Y. Cr. 336.

North Carolina.— State *v.* Barber, 113 N. C. 711, 18 S. E. 515.

Texas.— Josef *v.* State, 34 Tex. Cr. 446, 30 S. W. 1067; Conde *v.* State, 33 Tex. Cr. 10, 24 S. W. 415; Roe *v.* State, 25 Tex. App. 33, 8 S. W. 463; Phillips *v.* State, 17 Tex. App. 169.

Utah.— People *v.* Lee, 2 Utah 441.

See 14 Cent. Dig. tit. "Criminal Law," § 1861.

But where corroboration is not required by statute the refusal of the court to instruct the jury that they cannot convict on the evidence of an accomplice without corroboration is not error. Com. *v.* Clune, 162 Mass. 206, 38 N. E. 435.

57. *California.*— People *v.* Ward, 134 Cal. 301, 66 Pac. 372.

Florida.— Anthony *v.* State, (1902) 32 So. 818; Tuberson *v.* State, 26 Fla. 472, 7 So. 858.

Georgia.— Suddeth *v.* State, 112 Ga. 407, 37 S. E. 747; Sparks *v.* State, 111 Ga. 830, 35 S. E. 654.

Kentucky.— Early *v.* Com., 70 S. W. 1061, 24 Ky. L. Rep. 1181.

South Carolina.— State *v.* Lee, 29 S. C. 113, 7 S. E. 44.

Texas.— Waggoner *v.* State, 35 Tex. Cr. 199, 32 S. W. 896; Pace *v.* State, (Cr. App. 1895) 31 S. W. 173; Wilson *v.* State, (Cr. App. 1894) 24 S. W. 649.

Wyoming.— Arnold *v.* State, 5 Wyo. 439, 40 Pac. 967.

See 14 Cent. Dig. tit. "Criminal Law," § 1860.

Mere silence and concealment of the crime by the witness does not justify an instruction on accomplice evidence. Smith *v.* State, 28 Tex. App. 309, 12 S. W. 1104; O'Connor *v.* State, 28 Tex. App. 288, 13 S. W. 14.

58. State *v.* Goforth, 136 Mo. 111, 37 S. W. 801; People *v.* Thomsen, 3 N. Y. Cr. 562.

59. Clapp *v.* State, 94 Tenn. 186, 30 S. W. 214.

Corroboration by evidence of another accomplice.— It has been held that, where two or more accomplices testify against defendant, an omission to instruct the jury that the evidence of one cannot as matter of law be corroborated by the evidence of another is reversible error. Whitlow *v.* State, (Tex. App. 1892) 18 S. W. 865; McConnell *v.* State, (Tex. App. 1892) 18 S. W. 645. *Compare* Com. *v.* Wilson, 152 Mass. 12, 25 N. E. 16.

60. State *v.* McLain, 159 Mo. 340, 60 S. W. 736; State *v.* Miller, 100 Mo. 606, 13 S. W. 832, 1051, 14 S. W. 311.

61. Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885.

62. *Alabama.*—Burns *v.* State, 49 Ala. 370.

Georgia.— Simmons *v.* State, 116 Ga. 583, 42 S. E. 779; Suddeth *v.* State, 112 Ga. 407, 37 S. E. 747; Jones *v.* State, 65 Ga. 147.

Kentucky.— Cargill *v.* Com., 93 Ky. 578, 20 S. W. 782, 14 Ky. L. Rep. 517; Kelley *v.* Com., 54 S. W. 949, 21 Ky. L. Rep. 1306; McClure *v.* Com., 5 Ky. L. Rep. 861.

Michigan.— People *v.* Peterson, 93 Mich. 27, 52 N. W. 1039.

Mississippi.— Haynes *v.* State, (1900) 27 So. 601.

Nebraska.— Marion *v.* State, 16 Nebr. 349, 20 N. W. 289.

Wisconsin.— Bernhardt *v.* State, 82 Wis. 23, 51 N. W. 1009.

See 14 Cent. Dig. tit. "Criminal Law," § 1865.

63. Irby *v.* State, 95 Ga. 467, 20 S. E. 218; Earp *v.* State, 55 Ga. 136; Com. *v.* Kennedy, 135 Mass. 543; Frank *v.* State, 39 Miss. 705; Woodford *v.* People, 62 N. Y. 117, 20 Am. Rep. 464.

Admissions and confessions as evidence see *supra*, XII, E, H.

64. But where it is doubtful whether a crime has been committed at all, the jury

is not necessary to instruct that a confession will not justify a conviction unless accompanied by proof of the *corpus delicti*.[65]

c. Excluding Involuntary Confession. Where a confession has gone to the jury upon preliminary proof that it was voluntary, and it subsequently appears during the trial that it was involuntary, it is the duty of the court to withdraw such confession from the consideration of the jury, and to instruct them that they should wholly disregard it.[66] And when the court undertakes to analyze or define what makes a confession voluntary, both members of the definition should be presented to the jury, to wit: the slightest hope of benefit or the remotest fear of injury.[67]

d. Weight and Credit. It is well settled that it is proper to instruct the jury that the weight of confessions and the degree of credit to be given to them is for the jury to determine under the circumstances of the case; but the authorities are not so uniform as to whether the court should go further and caution the jury[68] as to receiving confessions, or tell them that deliberate confessions of guilt shown to have been voluntarily made are regarded as among the most satisfactory proofs obtainable, such a charge being regarded by some authorities as infringing the rule which forbids charging upon the weight of evidence.

should be instructed that a confession alone, not corroborated by proof of the *corpus delicti*, will not justify a conviction. Lucas *v.* State, 110 Ga. 756, 36 S. E. 87; Collins *v.* Com., 25 S. W. 743, 15 Ky. L. Rep. 691.

Conviction not made necessary by corroboration.— In instructing that proof of the *corpus delicti* is necessary as corroboration of the confession to sustain a conviction, the court should not so speak that the jury may infer that a confession thus corroborated will require a conviction, but it should leave them free to pass upon the question whether or not the corroborative evidence, with a confession, is enough to justify them in convicting the accused. Wimberly *v.* State, 105 Ga. 188, 31 S. E. 162.

Necessity and method of corroboration see *supra*, XII, H, 3.

65. State *v.* Turner, 19 Iowa 144; Dugan *v.* Com., 102 Ky. 214, 43 S. W. 418, 19 Ky. L. Rep. 1217; Patterson *v.* Com., 86 Ky. 313, 99 Ky. 610, 5 S. W. 765, 9 Ky. L. Rep. 481; Roberts *v.* Com., 7 S. W. 401, 9 Ky. L. Rep. 888; Com. *v.* Tarr, 4 Allen (Mass.) 315; Murphy *v.* State, 43 Tex. Cr. 515, 67 S. W. 108; Willard *v.* State, 27 Tex. App. 386, 11 S. W. 453, 11 Am. St. Rep. 197.

66. *Alabama.*— Bonner *v.* State, 55 Ala. 242.

Florida.— Holland *v.* State, 39 Fla. 178, 22 So. 298.

Mississippi.— Ellis *v.* State, 65 Miss. 44, 3 So. 188, 7 Am. St. Rep. 634.

South Carolina.—State *v.* Bailey, 1 Rich. 1.

Texas.— Cain *v.* State, 18 Tex. 387.

See 14 Cent. Dig. tit. "Criminal Law," § 1867.

Where there is evidence which, if believed by the jury, would show a confession to be involuntary, the jury should be instructed that if they do not believe that such confession was freely and voluntarily made by the accused they should wholly disregard the same.

Georgia.— Earp *v.* State, 55 Ga. 136. See also Thomas *v.* State, 84 Ga. 613, 10 S. E. 1016.

Massachusetts.— Com. *v.* Kennedy, 135 Mass. 543; Com. *v.* Cullen, 111 Mass. 435.

Michigan.— People *v.* Warner, 104 Mich. 337, 62 N. W. 405. See also People *v.* Clarke, 105 Mich. 169, 62 N. W. 1117; People *v.* Swetland, 77 Mich. 53, 43 N. W. 779.

Missouri.— Couley *v.* State, 12 Mo. 462.

Texas.— Anderson *v.* State, (Cr. App. 1899) 54 S. W. 581; Paris *v.* State, 35 Tex. Cr. 82, 31 S. W. 855; Sparks *v.* State, 34 Tex. Cr. 86, 29 S. W. 264.

See 14 Cent. Dig. tit. "Criminal Law," § 1867.

Compare Stone *v.* State, 105 Ala. 60, 17 So. 114; Hunter *v.* State, 74 Miss. 515, 21 So. 305; Ellis *v.* State, 65 Miss. 44, 3 So. 188, 7 Am. St. Rep. 634.

Rehearsing inadmissible confession.— The action of the court in rehearsing evidence of a confession illegally obtained, for the purpose of cautioning the jury against permitting it to have any influence upon their minds, except to weaken the force of subsequent voluntary confessions, is not error. State *v.* Gregory, 50 N. C. 315.

Involuntary confessions as evidence see *supra*, XII, H, 2, h.

67. Parker *v.* State, 34 Ga. 262.

Voluntary, although inducement held out.— An instruction that if any inducements were held out to the prisoner to confess his confession is incompetent is erroneous. Frank *v.* State, 39 Miss. 705.

68. *Alabama.*— Welsh *v.* State, 96 Ala. 92, 11 So. 450.

California.— People *v.* Wyman, 15 Cal. 70.

District of Columbia.— Davis *v.* U. S., 18 App. Cas. 468.

Florida.— Marshall *v.* State, 32 Fla. 462, 14 So. 92.

Georgia.— Mercer *v.* State, 17 Ga. 146. And see Nobles *v.* State, 98 Ga. 73, 26 S. E. 64, 38 L. R. A. 577.

Indiana.— Koerner *v.* State, 98 Ind. 7.

e. Silence Under Accusation. It is proper to instruct the jury that they may take into consideration the fact that defendant remained silent when accused of the crime.[69]

f. Statements Favorable to Defendant. The jury should be instructed that when the admissions or confessions of defendant are introduced in evidence by the state, then the whole of the admissions or confessions are to be taken together,[70] and that if such admissions or confessions contain exculpatory or mitigating statements, the state is bound by them, unless they are shown to be untrue by the evidence.[71]

g. Referring to Statements as "Confessions." Inasmuch as admissions and declarations are but circumstantial evidence of guilt and in no sense confessions, an instruction which characterizes them as "confessions" is erroneous.[72] So also a charge is erroneous which makes no distinction between deliberate confessions and statements or declarations uttered in casual conversation.[73]

12. Purpose and Effect of Evidence — a. Evidence Against Joint Defendants Limited to One. Where several defendants are jointly tried, evidence competent against one or more of them only and not against all cannot be excluded for that reason, but a defendant against whom it is not competent has a right to a charge by the court limiting its application and effect,[74] or declaring that it is not to have

Iowa.— State *v.* Jordan, 87 Iowa 86, 54 N. W. 63.

Massachusetts.— Com. *v.* Brown, 149 Mass. 35, 20 N. E. 458; Com. *v.* Sanborn, 116 Mass. 61. See also Com. *v.* Galligan, 113 Mass. 202.

Michigan.— People *v.* McArron, 121 Mich. 1, 79 N. W. 944; People *v.* Borgetto, 99 Mich. 336, 58 N. W. 328.

Mississippi.— Ellis *v.* State, 65 Miss. 44, 3 So. 188, 7 Am. St. Rep. 634.

Missouri.— State *v.* Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556. See also State *v.* Clump, 16 Mo. 385.

North Carolina.— State *v.* Hardee, 83 N. C. 619. See also State *v.* Davis, 63 N. C. 578; State *v.* Patrick, 48 N. C. 443.

South Carolina.— State *v.* Derrick, 44 S. C. 344, 22 S. E. 337.

Texas.— Attaway *v.* State, 35 Tex. Cr. 103, 34 S. W. 112.

Vermont— State *v.* Gorham, 67 Vt. 365, 31 Atl. 845.

See 14 Cent. Dig. tit. "Criminal Law," § 1868.

Weight and credit to be given to confessions see *supra*, XII, H, 5.

The reasons and arguments of a legal author in favor of receiving confessions with great caution need not be stated in the instructions, where the latter sufficiently state the rules of law. State *v.* Rorabacher, 19 Iowa 154; State *v.* Turner, 19 Iowa 144.

69. State *v.* Muston, 35 La. Ann. 888; Com. *v.* Brailey, 134 Mass. 527.

Silence and presumptions therefrom see *supra*, XII, E, 1, f.

70. State *v.* Young, 119 Mo. 495, 24 S. W. 1038; Jones *v.* State, 29 Tex. App. 20, 13 S. W. 990, 25 Am. St. Rep. 715.

Where several distinct voluntary confessions or declarations made by defendant are introduced in evidence, some more favorable to him than others, it is for the jury to determine which account is the true one, and a charge which leaves the jury to infer that they are not to take into consideration the accounts most favorable to him is erroneous. State *v.* Laliyer, 4 Minn. 368.

71. Jones *v.* State, 29 Tex. App. 20, 13 S. W. 990, 25 Am. St. Rep. 715. And *compare* Tipton *v.* State, Peck (Tenn.) 308, to the effect that in such cases the jury should be further instructed that if evidence is introduced to disprove any part of such a confession, they may weigh the confession, together with the facts proved, and draw such inferences from any part of the confession as they may think proper.

72. Fletcher *v.* State, 90 Ga. 468, 17 S. E. 100; Covington *v.* State, 79 Ga. 687, 7 S. E. 153; Ledbetter *v.* State, 61 Miss. 22; Hogan *v.* State, 46 Miss. 274; Hogsett *v.* State, 40 Miss. 522; State *v.* Heidenreich, 29 Oreg. 381, 45 Pac. 755.

The words "confession" and "admission" are not synonymous. The latter refers to the acknowledgment of facts, the former to the acknowledgment of guilt. Hence a charge using the word "confession," where the evidence merely shows an admission from which the jury may possibly infer guilt, is erroneous. State *v.* Heidenreich, 29 Oreg. 381, 45 Pac. 755.

Definition of admission see *supra*, XII, E, 1, a; and 1 Cyc. 912.

Definition of confession see *supra*, XII, H, 1, a; and 8 Cyc. 562.

73. Brown *v.* State, 32 Miss. 433.

74. *Alabama.*— Jordan *v.* State, 81 Ala. 20, 1 So. 577; Williams *v.* State, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133.

Missouri.— State *v.* Berry, 24 Mo. App. 466.

Nevada.— State *v.* McLane, 15 Nev. 345.

North Carolina.—State *v.* Collins, 121 N. C. 667, 28 S. E. 520.

Texas.— Crook *v.* State, 27 Tex. App. 198, 11 S. W. 444; Barron *v.* State, 23 Tex. App. 462, 5 S. W. 237.

any weight against him and is not to be considered by the jury in determining his guilt.[75]

b. Limiting Evidence Admitted For a Specific Purpose — (I) *In General.* Where evidence admissible for one purpose only has been admitted for that specific purpose, an instruction limiting it to that purpose must be given.[76]

(II) *Impeaching Evidence.* Where evidence, otherwise inadmissible, is introduced to impeach either a witness for the accused or the accused himself when he testifies, the court should on request charge that this evidence shall be considered by the jury only on the question of the credibility of the witness or the accused, and not to show the guilt of the accused.[77]

(III) *Other Crimes.* When evidence of other crimes is admitted, it should be carefully limited and guarded by instructions to the jury, so that its operation and effect may be confined to the legitimate purpose for which it is competent.[78]

See 14 Cent. Dig. tit. "Criminal Law," § 1873.

Where defendants jointly indicted are separately tried, the jury must be cautioned that the conviction of one of them must not be considered on the trial of the other for the same offense. James *v.* State, 104 Ala. 20, 16 So. 94; People *v.* Sligh, 48 Mich. 54, 11 N. W. 782.

75. Com. *v.* Ingraham, 7 Gray (Mass.) 46; State *v.* McKinzie, 102 Mo. 620, 15 S. W. 149.

Confessions of one defendant.—When, upon the trial of two or more joint defendants, a confession of one of them is admitted, the jury should be instructed to consider it only as against the one who made it, and that it does not inculpate or implicate any other one of them.

Alabama.— Lawson *v.* State, 20 Ala. 65, 56 Am. Dec. 182.

Delaware.— State *v.* Jones, Houst. Cr. 317.

Georgia.— Noble *v.* State, 98 Ga. 73, 26 S. E. 64, 38 L. R. A. 577.

Iowa.— State *v.* Miller, 81 Iowa 72, 46 N. W. 751.

Louisiana.— State *v.* Donelon, 45 La. Ann. 744, 12 So. 922.

Michigan.— People *v.* Maunausau, 60 Mich. 15, 26 N. W. 797; People *v.* Arnold, 46 Mich. 268, 9 N. W. 406.

South Carolina.— State *v.* Dodson, 16 S. C. 453; State *v.* Workman, 15 S. C. 540.

Texas.— Perigo *v.* State, 25 Tex. App. 533, 8 S. W. 660; Collins *v.* State, 24 Tex. App. 141, 5 S. W. 848.

See 14 Cent. Dig. tit. "Criminal Law," § 1873.

76. Roberson *v.* State, 40 Fla. 509, 24 So. 474; Gatlin *v.* State, 40 Tex. Cr. 116, 49 S. W. 87; Duke *v.* State, 35 Tex. Cr. 283, 33 S. W. 349; Puryear *v.* State, 28 Tex. App. 73, 11 S. W. 929; Kelley *v.* State, 18 Tex. App. 262; May *v.* State, 15 Tex. App. 430; Branch *v.* State, 15 Tex. App. 96.

77. *Florida.*— Olds *v.* State, (1902) 33 So. 296.

Georgia.— Bone *v.* State, 102 Ga. 387, 30 S. E. 845.

Illinois.— Purdy *v.* People, 140 Ill. 46, 29 N. E. 700; Ritter *v.* People, 130 Ill. 255, 22 N. E. 605.

Iowa.— State *v.* Rainsbarger, 79 Iowa 745, 45 N. W. 302. See also State *v.* Helm, 97 Iowa 378, 66 N. W. 751.

Kansas.—State *v.* Wellington, 43 Kan. 121, 23 Pac. 156.

Kentucky.— Fueston *v.* Com., 91 Ky. 230, 15 S. W. 177, 12 Ky. L. Rep. 854; Ashcraft *v.* Com., 68 S. W. 847, 24 Ky. L. Rep. 488; Ross *v.* Com., (1900) 59 S. W. 28; Gills *v.* Com., 37 S. W. 269, 18 Ky. L. Rep. 560. See also Holly *v.* Com., 36 S. W. 532, 18 Ky. L. Rep. 441.

Missouri.— State *v.* Weeden, 133 Mo. 70, 34 S. W. 473.

Pennsylvania.— Com. *v.* Wilson, 186 Pa. St. 1, 40 Atl. 283.

Texas.— Terry *v.* State, (Cr. App. 1903) 72 S. W. 382; Newman *v.* State, (Cr. App. 1902) 70 S. W. 951; Guinn *v.* State, (Cr. App. 1901) 65 S. W. 376; Ogle *v.* State, (Cr. App. 1900) 58 S. W. 1004; Winfrey *v.* State, 41 Tex. Cr. 538, 56 S. W. 919; Finley *v.* State, (Cr. App. 1898) 47 S. W. 1015; Magee *v.* State, (Cr. App. 1897) 43 S. W. 512; Golin *v.* State, 37 Tex. Cr. 90, 38 S. W. 794; Ferguson *v.* State, 31 Tex. Cr. 93, 19 S. W. 901.

Vermont.— State *v.* Broderick, 61 Vt. 421, 17 Atl. 716.

Wisconsin.—Fossdahl *v.* State, 89 Wis. 482, 62 N. W. 185.

See 14 Cent. Dig. tit. "Criminal Law," § 1875.

Applying this rule.— Proof of contradictory statements by a witness out of court (Jones *v.* Com., 46 S. W. 217, 20 Ky. L. Rep. 355; Thompson *v.* State, 29 Tex. App. 208, 15 S. W. 206; Foster *v.* State, 28 Tex. App. 45, 11 S. W. 832), or an admission by defendant that he has been in the penitentiary (Mahoney *v.* State, 33 Tex. Cr. 388, 26 S. W. 622), or that he had been indicted (Gann *v.* State, (Tex. Cr. App. 1900) 59 S. W. 896) should be limited to the purpose of impeachment.

78. *California.*— People *v.* Rogers, 71 Cal. 565, 12 Pac. 679.

Colorado.— Herren *v.* People, 28 Colo. 23, 62 Pac. 833.

Illinois.— See McDonald *v.* People, 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547.

Kentucky.— Martin *v.* Com., 93 Ky. 189,

13. Explaining Rules of Evidence — a. In General. Although the jury are the exclusive judges of the weight and credibility of the evidence, it is proper for the court to tell them in the instructions what rules they may apply in determining that weight and credibility.[79]

b. Positive and Negative Testimony. While as a general rule it is proper to instruct the jury that positive testimony outweighs negative testimony, the witnesses being equally credible,[80] yet it has been held that the rule relating to the distinction between positive and negative evidence does not apply, and should not be given in a charge to the jury where there are two witnesses having equal facilities for seeing and hearing the thing about which they testify, and directly contradicting each other, one of them testifying that it occurred and the other that it did not.[81]

c. Disregarding Improper Evidence. It is proper for the court in its charge, although not requested to do so, to withdraw from the consideration of the jury any incompetent evidence which has been admitted by mistake.[82]

d. Reference to Conviction of Innocent Men. It is proper to refuse an instruction which in substance states that it is better that ninety-nine guilty per-

19 S. W. 580, 14 Ky. L. Rep. 95 [*distinguished* in Shipp *v.* Com., 101 Ky. 518, 41 S. W. 856, 19 Ky. L. Rep. 634].

Massachusetts.— Com. *v.* Shepard, 1 Allen 575.

Michigan.— People *v.* Jacks, 76 Mich. 218, 42 N. W. 1134.

New York.— People *v.* McKane, 143 N. Y. 455, 38 N. E. 950.

North Carolina.— State *v.* Beard, 124 N. C. 811, 32 S. E. 804.

Oregon.— State *v.* Lewis, 19 Oreg. 478, 24 Pac. 914.

Texas.—Petersen *v.* State, (Cr. App. 1902) 70 S. W. 978; Grant *v.* State, (Cr. App. 1902) 70 S. W. 954; Roberts *v.* State, (Cr. App. 1902) 70 S. W. 423; Camarillo *v.* State, (Cr. App. 1902) 68 S. W. 795; Scott *v.* State, (Cr. App. 1902) 68 S. W. 680; McGee *v.* State, (Cr. App. 1902) 66 S. W. 562; Martin *v.* State, 41 Tex. Cr. 242, 53 S. W. 849; Holt *v.* State, 39 Tex. Cr. 282, 45 S. W. 1016, 46 S. W. 829. *Compare* Hamblin *v.* State, 41 Tex. Cr. 135, 50 S. W. 1019, 51 S. W. 1111.

Wisconsin.— Kollock *v.* State, 88 Wis. 663, 60 N. W. 817.

See 14 Cent. Dig. tit. "Criminal Law," § 1876.

When limiting instructions unnecessary.— When the purpose of admitting evidence of other crimes is clearly apparent and no instruction is asked limiting the purpose of such evidence, the omission of such an instruction is not error. State *v.* Gaston, 96 Iowa 505, 65 N. W. 415. When defendant is indicted for receiving stolen goods, and evidence is offered showing the theft at the same time of other goods than those charged in the bill of indictment, an instruction should usually be given limiting the purpose for which such evidence can be considered, but it is not absolutely necessary to give such instruction unless the character of the property stolen contemporaneously with that charged is such that the jury might convict for that offense. Moseley *v.* State, 36 Tex. Cr. 578, 37 S. W. 736, 38 S. W. 197.

79. Wilson *v.* State, 71 Miss. 880, 16 So. 304; Com. *v.* Bubnis, 197 Pa. St. 542, 47 Atl. 748. *Compare* Smith *v.* Com., 8 S. W. 192, 9 Ky. L. Rep. 1005, suggesting that an instruction of this kind should not be given because it might intimate that some of the witnesses were not entitled to credit and that some of the testimony was without weight.

For instance they may be properly instructed that they ought to acquit if, upon a consideration of the whole of the evidence, they entertain a well-founded doubt of defendant's guilt. Turner *v.* State, 124 Ala. 59, 27 So. 272.

For examples of improper instructions see Mann *v.* State, 134 Ala. 1, 32 So. 704; Allen *v.* State, 134 Ala. 159, 32 So. 318; Morris *v.* State, 124 Ala. 44, 27 So. 336; Thornton *v.* State, 113 Ala. 43, 21 So. 356, 59 Am. St. Rep. 97; Pool *v.* State, 87 Ga. 526, 13 S. E. 556; State *v.* Johnson, 104 La. 417, 29 So. 24, 81 Am. St. Rep. 139; State *v.* Darrah, 152 Mo. 522, 54 S. W. 226; O'Brien *v.* State, 63 N. J. L. 49, 42 Atl. 841.

80. Moon *v.* State, 68 Ga. 687; State *v.* Dorsey, 40 La. Ann. 739, 5 So. 26.

81. Skinner *v.* State, 108 Ga. 747, 32 S. E. 844.

The judge may explain by illustration the difference between positive and negative evidence. State *v.* Gardner, 94 N. C. 953.

82. Myers *v.* State, 97 Ga. 76, 25 S. E. 252.

Incompetent portions of a dying declaration are properly taken from the jury if they can be designated definitely to them. Johnson *v.* State, 17 Ala. 618.

Objection not taken at proper time.— It is proper for the court in a criminal prosecution to refuse to instruct the jury as to the competency of certain evidence which had been admitted without objection on defendant's part, and to which objection was made for the first time during the closing argument of the prosecuting attorney. Com. *v.* Clark, 145 Mass. 251, 13 N. E. 888.

sons should escape than that one innocent person should suffer,[83] or that the punishment of the innocent is a greater evil than the acquittal of the guilty, or that it is the policy of the law to acquit rather than to convict.[84]

e. Reasonableness of Evidence. A charge that the jury has a right to look to the reasonableness or unreasonableness of any testimony, and if they believe the statement of any witness is unreasonable and contrary to their observation and experience they may disregard it, is misleading.[85]

f. Jury Exclusive Judges of Facts. Independently of a statute requiring such a charge to be given,[86] it is not usually necessary to instruct the jury that they are the sole judges of the weight of evidence or of the credibility of the witnesses,[87] although it is not reversible error for the court to do so.

g. Lessening Sense of Jurors' Responsibility. It is error for the court, after impressing on the jury the care they should use in their deliberation, to give them any instructions which may tend to cause them to be indifferent in the proper discharge of their duty.[88]

14. CIRCUMSTANTIAL EVIDENCE — a. Necessity For Instruction. Where the prosecution relies solely upon circumstantial evidence, the court must always instruct upon the nature of circumstantial evidence.[89] Such evidence should be expressly

83. Lowe *v.* State, 88 Ala. 8, 7 So. 97; Ward *v.* State, 78 Ala. 441; Seacord *v.* People, 121 Ill. 623, 13 N. E. 194; Coleman *v.* State, 111 Ind. 563, 13 N. E. 100; Parrish *v.* State, 14 Nebr. 60, 15 N. W. 357.

84. Barnes *v.* State, 111 Ala. 56, 20 So. 565; Carden *v.* State, 84 Ala. 417, 4 So. 823; Territory *v.* Burgess, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808.

Instruction as to possibility of mistakes.— A charge which, while stating that innocent persons have been convicted, requires the jury to determine the issues from the evidence, and ends, "if all criminals must go free because there is a possibility of making mistakes, society might as well disband," was held erroneous. People *v.* Travers, 88 Cal. 233, 26 Pac. 88.

85. It makes the whole test of the reasonableness of testimony by the jury to depend upon the fact that they think it reasonable according to their own experience and observation. Hale *v.* State, 122 Ala. 85, 26 So. 236.

Testimony of one witness.— Where the testimony showing an act on the part of defendant is positive, but is stated by one witness only, an instruction that if there was a possibility that such witness was mistaken the jury should acquit was properly refused. Wilson *v.* State, 81 Miss. 404, 33 So. 171.

86. Barbee *v.* State, 23 Tex. App. 199, 4 S. W. 584; Jackson *v.* State, 22 Tex. App. 442, 3 S. W. 111; People *v.* Chadwick, 7 Utah 134, 25 Pac. 737.

87. People *v.* Boggs, 20 Cal. 432; Smith *v.* Com., 4 S. W. 798, 9 Ky. L. Rep. 215.

Rulings of court.— It is not necessary to instruct the jury that rulings by the court, made during the trial, should not be considered as intimating the court's opinion as to what the verdict of the jury ought to be. Lyons *v.* People, 137 Ill. 602, 27 N. E. 677.

88. People *v.* Harris, 77 Mich. 568, 43 N. W. 1060. Thus it is error for the court to tell the jury that they are not at liberty to disbelieve as jurors what they would believe as men, and that their oath imposes on them no obligation to doubt, where no doubt would exist in its absence, as this instruction tends to relieve them from the obligation of their oath. Adams *v.* State, 135 Ind. 571, 34 N. E. 956 [*following* Siberry *v.* State, 133 Ind. 677, 53 N. E. 681].

Right of appeal.— It has been held error for the judge to instruct that if he committed error, in consequence of which the prisoner was convicted, it might be corrected on appeal; but that such was not the case if the accused were acquitted. Hodges *v.* State, 15 Ga. 117; Monroe *v.* State, 5 Ga. 85. But some cases hold that a charge of this sort is not error. Territory *v.* Keyes, 5 Dak. 244, 38 N. W. 440; U. S. *v.* Adams, 2 Dak. 305, 9 N. W. 718; State *v.* Hannibal, 37 La. Ann. 619; State *v.* Petsch, 43 S. C. 132, 20 S. E. 993.

Possibility of pardon.— It is not error to tell the jury that their verdict is not final and irreversible, but that the executive will examine and review the evidence and may if he sees proper commute the sentence or pardon the offender. State *v.* Benner, 64 Me. 267.

89. *Alabama.*— Gilmore *v.* State, 99 Ala. 154, 13 So. 536; Shepperd *v.* State, 94 Ala. 102, 10 So. 663.

Georgia.— Jones *v.* State, 105 Ga. 649, 31 S. E. 574; Richards *v.* State, 102 Ga. 569, 27 S. E. 726; Hart *v.* State, 97 Ga. 365, 23 S. E. 831.

Iowa.— State *v.* Cohen, 108 Iowa 208, 78 N. W. 857, 75 Am. St. Rep. 213.

Kentucky.— McDowell *v.* Com., 4 Ky. L. Rep. 353.

New Mexico.— Territory *v.* Lermo, 8 N. M. 566, 46 Pac. 16.

Texas.— Beason *v.* State, 43 Tex. Cr. 442, 67 S. W. 96; Wallace *v.* State, (Cr. App. 1902) 66 S. W. 1102; Rountree *v.* State, (Cr. App. 1900) 58 S. W. 106; Hanks *v.* State, (Cr. App. 1900) 56 S. W. 922; Lindley *v.*

defined, and the rules governing its effect concisely stated.[90] Where there is direct evidence sufficient, if believed, to convict, an instruction on circumstantial evidence, although there be such evidence in the case, is properly refused.[91] Thus proof of a confession by defendant renders a charge on circumstantial evidence unnecessary.[92]

b. Form and Sufficiency of Instructions. The law does not require that a charge upon circumstantial evidence or any other subject should be couched in any particular set of words or phrases.[93] Where the evidence is circumstantial it is proper to charge that circumstantial evidence is legal and competent, and, if it is of such a character as to exclude every reasonable hypothesis other than that defendant is guilty, it will authorize a conviction.[94]

c. Links in the Chain. Some authorities hold that an instruction that the law requires the jury to be convinced beyond a reasonable doubt of each fact of the circumstances proved or, as it is often put, of each link in the chain of circumstances, is error, as it is enough if a reasonable doubt arises from the circum-

State, 8 Tex. App. 445; Smith *v.* State, 7 Tex. App. 382.

See 14 Cent. Dig. tit. "Criminal Law," § 1883.

All approved rules as to circumstantial evidence need not be given. State *v.* Roe, 12 Vt. 93.

90. State *v.* Brady, (Iowa 1902) 91 N. W. 801.

91. *Alabama.*— Welch *v.* State, 124 Ala. 41, 27 So. 307; Cotton *v.* State, 87 Ala. 75, 6 So. 396; Coleman *v.* State, 87 Ala. 14, 6 So. 290.

Arkansas.— Vaughan *v.* State, 57 Ark. 1, 20 S. W. 588; Cohen *v.* State, 32 Ark. 226.

California.— People *v.* Burns, 121 Cal. 529, 53 Pac. 1096.

Mississippi.— Purvis *v.* State, 71 Miss. 706, 14 So. 268.

Missouri.— State *v.* Gartrell, 171 Mo. 489, 71 S. W. 1045; State *v.* Donnelly, 130 Mo. 642, 32 S. W. 1124; State *v.* Fairlamb, 121 Mo. 137, 25 S. W. 895.

Montana.— State *v.* Calder, 23 Mont. 504, 59 Pac. 903.

New York.— People *v.* Kaatz, 3 Park. Cr. 129.

Tennessee.— Barnards *v.* State, 88 Tenn. 183, 12 S. W. 431.

Texas.— Jackson *v.* State, (Cr. App. 1901) 62 S. W. 914; White *v.* State, (Cr. App. 1899) 50 S. W. 705; Upchurch *v.* State, (Cr. App. 1897) 39 S. W. 371; Thompson *v.* State, 33 Tex. Cr. 217, 26 S. W. 198; Hardin *v.* State, 8 Tex. App. 653.

See 14 Cent. Dig. tit. "Criminal Law," § 1883.

92. *Alabama.*— Green *v.* State, 97 Ala. 59, 12 So. 416, 15 So. 242.

Georgia.— Perry *v.* State, 110 Ga. 234, 36 S. E. 781.

Illinois.— Langdon *v.* People, 133 Ill. 382, 24 N. E. 874.

Missouri.— State *v.* Robinson, 117 Mo. 649, 23 S. W. 1066.

Texas.— Roberts *v.* State, (Cr. App. 1902) 70 S. W. 423; Ricks *v.* State, 41 Tex. Cr. 676, 56 S. W. 928; Matthews *v.* State, 41 Tex. Cr. 98, 51 S. W. 915; Franks *v.* State, (Cr. App. 1898) 45 S. W. 1013; Albritton *v.* State, (Cr. App. 1894) 26 S. W. 398; White *v.* State, 32 Tex. Cr. 625, 25 S. W. 784.

See 14 Cent. Dig. tit. "Criminal Law," § 1883.

93. If the ideas are sufficient, and so expressed that the jury can readily comprehend the meaning of the language employed, the demands of the law are satisfied. Rye *v.* State, 8 Tex. App. 153. See also Otmer *v.* People, 76 Ill. 149; Morrison *v.* State, 76 Ind. 335; State *v.* Hart, 94 Iowa 749, 64 N. W. 278; Jenkins *v.* State, 62 Wis. 49, 21 N. W. 232.

Moral certainty.— An instruction that defendant must be acquitted unless the evidence excludes to a moral certainty every hypothesis but that of guilt, omitting the word "reasonable" (Crawford *v.* State, 112 Ala. 1, 21 So. 214), or that the test of the sufficiency of circumstantial evidence is whether it is as clear and convincing as the evidence of an eye-witness (Thornton *v.* State, 113 Ala. 43, 21 So. 356, 59 Am. St. Rep. 97), is properly refused.

Probabilities of the case.— An instruction that minds will form their judgments on circumstances and act on the probabilities of the case is error, since the jury are not at liberty to act on probabilities. People *v.* O'Brien, 130 Cal. 1, 62 Pac. 297.

Reasonable inferences from circumstances. — An instruction that circumstantial evidence is to be regarded by the jury and that, when strong and satisfactory, they should so consider it, neither enlarging nor belittling its force, and that they should make those reasonable inferences from the circumstances which the guarded judgment of a reasonable man should ordinarily make under like circumstances is correct. Smith *v.* State, 61 Nebr. 296, 85 N. W. 49.

Harmless remark of court.—A remark that "many, probably a majority of, convictions are had upon circumstantial evidence" is not error if defendant's guilt is submitted to the jury with full and fair instructions. Funk *v.* U. S., 16 App. Cas. (D. C.) 478.

94. Cunningham *v.* State, 56 Nebr. 691, 77 N. W. 60. See also Myers *v.* State, 43 Fla. 500, 31 So. 275.

stances taken as a whole.[95] Others, however, require that each separate fact or link tending to show guilt must at least be proved satisfactorily to the jury,[96] or beyond a reasonable doubt;[97] and that if the jury entertain doubt as to any of the facts they may acquit.

d. Consistency With Hypothesis of Guilt. Where all the evidence is circumstantial, a refusal to instruct that the circumstances, to warrant a conviction, must be consistent with each other, must tend to prove guilt, and must be consistent not only with the hypothesis of defendant's guilt, but must be inconsistent with every other reasonable hypothesis, including the hypothesis of his innocence, is error.[98]

As compared with direct evidence.— An instruction that circumstantial evidence is not only legal evidence, but also that a well-connected chain of circumstances is as conclusive of the fact as the greatest array of positive evidence, is proper when accompanied with a further instruction as to the certainty with which circumstantial evidence must establish guilt. Gantling *v.* State, 40 Fla. 237, 23 So. 857.

Concurrence of circumstances.— The following instruction was held proper: "A few facts, or a multitude of facts proved, all consistent with the supposition of guilt, are not enough to warrant a verdict of guilty. In order to convict on circumstantial evidence, not only the circumstances must all concur to show that the defendant committed the crime, but they must be inconsistent with any other rational conclusion." State *v.* Andrews, 62 Kan. 207, 208, 61 Pac. 808.

95. *Alabama.*— Harvey *v.* State, 125 Ala. 47, 27 So. 763; Grant *v.* State, 97 Ala. 35, 11 So. 915; Wharton *v.* State, 73 Ala. 366; Tompkins *v.* State, 32 Ala. 569.

Iowa.— State *v.* Cohen, 108 Iowa 208, 78 N. W. 857, 75 Am. St. Rep. 213.

Missouri.— State *v.* Avery, 113 Mo. 475, 21 S. W. 193.

Nebraska.— Smith *v.* State, 61 Nebr. 296, 85 N. W. 49; Marion *v.* State, 16 Nebr. 349, 20 N. W. 289.

North Carolina.— State *v.* Fleming, 130 N. C. 688, 41 S. E. 549.

North Dakota.— State *v.* Young, 9 N. D. 165, 82 N. W. 420.

See 14 Cent. Dig. tit. "Criminal Law," § 1884.

Strength of combined circumstances.— Where the instruction refers to a chain of evidence, and defendant's attorney speaks of its weakest link, it is proper to give an additional instruction that the facts of circumstantial evidence are not linked in a chain, but are like the strands of a rope, and the question is not one of separate circumstances, but of the strength of circumstances combined. Reyburn *v.* State, 69 Ark. 177, 63 S. W. 356.

96. Davis *v.* State 74 Ga. 869.

97. Graves *v.* People, 18 Colo. 170, 32 Pac. 63; Clare *v.* People, 9 Colo. 122, 10 Pac. 799; People *v.* McArron, 121 Mich. 1, 79 N. W. 944; People *v.* Aiken, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512; Johnson *v.* State, 18 Tex. App. 385; Kollock *v.* State, 88 Wis. 663, 60 N. W. 817.

98. *Alabama.*— Barnes *v.* State, 111 Ala. 56, 20 So. 565; Baldwin *v.* State, 111 Ala. 11, 20 So. 528; Howard *v.* State, 108 Ala. 571, 18 So. 813; Gilmore *v.* State, 99 Ala. 154, 13 So. 536.

California.— People *v.* Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50; People *v.* Gosset, 93 Cal. 641, 29 Pac. 246.

Delaware.— State *v.* Miller, 9 Houst. 564, 32 Atl. 137.

Georgia.— Roberts *v.* State, 110 Ga. 253, 34 S. E. 203; Hamilton *v.* State, 96 Ga. 301, 22 S. E. 528; Young *v.* State, 95 Ga. 456, 20 S. E. 270.

Indiana.— Wantland *v.* State, 145 Ind. 38, 43 N. E. 931; Sumner *v.* State, 5 Blackf. 579, 36 Am. Dec. 561.

Iowa.— State *v.* Novak, 109 Iowa 717, 79 N. W. 465.

Kansas.— State *v.* Asbell, 57 Kan. 398, 46 Pac. 770.

Louisiana.— State *v.* Willingham, 33 La. Ann. 537.

Massachusetts.— Com. *v.* Annis, 15 Gray 197.

Mississippi.— Kendrick *v.* State, 55 Miss. 436.

Missouri.— State *v.* David, 131 Mo. 380, 33 S. W. 28; State *v.* Woolard, 111 Mo. 248, 20 S. W. 27; State *v.* Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556.

Nebraska.— Davis *v.* State, 51 Nebr. 301, 70 N. W. 984.

Nevada.— State *v.* Rover, 13 Nev. 17.

New York.— People *v.* Nileman, 8 N. Y. St. 300.

South Carolina.—State *v.* Mitchell, 56 S. C. 524, 35 S. E. 210; State *v.* Milling, 35 S. C. 16, 14 S. E. 284.

Tennessee.— Lancaster *v.* State, 91 Tenn. 267, 18 S. W. 777; Turner *v.* State, 4 Lea 206; Lawless *v.* State, 4 Lea 173.

Texas.—Galloway *v.* State, (Cr. App. 1902) 70 S. W. 211; Bennett *v.* State, 39 Tex. Cr. 639, 48 S. W. 61; Black *v.* State, 1 Tex. App. 368. See also Lopez *v.* State, (Cr. App. 1892) 20 S. W. 395.

Virginia.— Longley *v.* Com., 99 Va. 807, 37 S. E. 339.

See 14 Cent. Dig. tit. "Criminal Law," § 1887.

Compare Jones *v.* State, 61 Ark. 88, 32 S. W. 81 (holding that such instruction is unnecessary when a court's instruction as to reasonable doubt has been given); Zimmerman *v.* Territory, 3 Wash. Terr. 445, 17 Pac. 624.

e. Weight and Effect. An instruction which tells the jury what weight they may or must give to circumstances in order to convict is erroneous;[99] but an instruction merely defining the nature of circumstantial evidence,[1] or pointing out the degree of certainty required as compared to or in connection with direct evidence,[2] is correct.

15. Credibility of Witnesses — a. Necessity For Instruction. It is not necessary to instruct the jury that they have a right to discredit the testimony of any witness when, from the facts before them, they are satisfied that the witness is unworthy of belief.[3] Where there is no impeaching evidence,[4] a failure to charge on the impeachment of witnesses is not error.[5] Where witnesses have not contradicted themselves, a charge that if witnesses contradict themselves the jury may consider that fact is properly refused.[6] An instruction which attempts to throw discredit upon certain evidence introduced by the state should be refused.[7]

b. Sufficiency of Instruction. An instruction which tells the jury that they are exclusive judges of the facts and of the weight of the evidence, and that where there is a conflict in the evidence it is their duty to reconcile it if possible, which they may do by determining which testimony is entitled to the greatest credibility, taking into consideration the appearance, intelligence, interest, bias, and prejudice of the witnesses, their manner of testifying, the probability of their stories, and all facts and circumstances which can aid in weighing their testimony, is sufficient and proper to be given.[8]

It is not necessary to exclude possibility of commission by another. People *v.* Foley, 64 Mich. 148, 31 N. W. 94.

99. *Alabama.*—Buchanan *v.* State, 109 Ala. 7, 19 So. 410.

California.— People *v.* Dilwood, 94 Cal. 89, 29 Pac. 420; People *v.* Shuler, 28 Cal. 490.

Florida.— Jenkins *v.* State, 35 Fla. 737, 18 So. 182, 48 Am. St. Rep. 267.

North Carolina.—State *v.* Carson, 115 N. C. 743, 20 S. E. 384; State *v.* Allen, 103 N. C. 433, 9 S. E. 626.

Tennessee.— Rea *v.* State, 8 Lea 356.

See 14 Cent. Dig. tit. "Criminal Law," § 1888.

1. West *v.* State, 76 Ala. 98; People *v.* Morrow, 60 Cal. 142.

2. People *v.* Eckman, 72 Cal. 582, 14 Pac. 359; People *v.* Cronin, 34 Cal. 191; Territory *v.* Egan, 3 Dak. 119, 13 N. W. 568; State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

Illustrations of proper instructions.— A charge that there is nothing in the nature of circumstantial evidence that renders it less reliable than other classes of evidence (People *v.* Urquidas, 96 Cal. 239, 31 Pac. 52 [*following* People *v.* Morrow, 60 Cal. 142]; State *v.* Rome, 64 Conn. 329, 30 Atl. 57), that the law requires the jury to convict upon it, where it is consistent with the guilt of defendant and inconsistent with any other rational conclusion, notwithstanding circumstantial evidence, may not be as satisfactory to the jurors as the evidence of credible eyewitnesses (People *v.* Daniels, (Cal. 1893) 34 Pac. 233 [*following* People *v.* Cronin, 34 Cal. 191]), or that strong circumstantial evidence is often the most satisfactory of any from which to draw a conclusion of guilt, and that witnesses may lie but circumstances cannot (State *v.* Moelchen, 53 Iowa 310, 5 N. W. 186; People *v.* Davis, 19 N. Y. Suppl. 781), is correct.

3. Franklin *v.* Com., 92 Ky. 612, 18 S. W. 532, 13 Ky. L. Rep. 814.

Witnesses implicated in the crime.— If the evidence tends to show the witnesses for the prosecution guilty of the crime charged, and that they have conspired to testify falsely against defendant to shield themselves, an instruction directing the attention of the jury to these facts is proper. People *v.* Marks, 90 Mich. 555, 51 N. W. 638.

4. **And even where witnesses are impeached,** it has been held that an instruction on this subject need not be given. Givens *v.* State, 35 Tex. Cr. 563, 34 S. W. 626; Thurmond *v.* State, 27 Tex. App. 347, 11 S. W. 451 [*overruling* Henderson *v.* State, 1 Tex. App. 432]. *Compare* Wolfe *v.* State, 25 Tex. App. 698, 9 S. W. 44. An instruction that the jury are judges of the evidence and might disregard any evidence they believe to be false sufficiently covers impeachment. State *v.* Horn, 115 Mo. 416, 22 S. W. 381.

5. Freeman *v.* State, 112 Ga. 48, 37 S. E. 172; Ingalls *v.* State, 48 Wis. 647, 4 N. W. 785.

6. Cauley *v.* State, 92 Ala. 71, 9 So. 456.

7. Davidson *v.* State, 135 Ind. 254, 34 N. E. 972.

8. *Alabama.*— Storey *v.* State, 71 Ala. 329.

Georgia.— Howard *v.* State, 73 Ga. 83.

Illinois.— Belt *v.* People, 97 Ill. 461.

Indiana.— Deal *v.* State, 140 Ind. 354, 39 N. E. 930.

Texas.— Lancaster *v.* State, 36 Tex. Cr. 16, 35 S. W. 165; Adam *v.* State. (Cr. App. 1892) 20 S. W. 548. See also Allison *v.* State, 14 Tex. App. 402.

Virginia.— Horton *v.* Com., 99 Va. 848, 38 S. E. 184.

See 14 Cent. Dig. tit. "Criminal Law," § 1891.

Arbitrary action of jury.— An instruction which in effect tells the jury that they

c. Effect of Impeaching Evidence. An instruction that evidence to prove that a witness had made contradictory statements out of court is introduced to discredit him and to show that he had sworn falsely,[9] but that such evidence is uncertain and somewhat unreliable, because persons are liable to misunderstand and repeat incorrectly what they hear,[10] is proper. An instruction that it does not follow that because a witness may be impeached his testimony shall be entirely excluded from consideration, and that in such case it is for the jury to decide for themselves what weight shall be given to the testimony of such a witness, taking into consideration all corroborating circumstances and testimony, if any exist, is not erroneous.[11]

d. False Testimony. The jury should not be instructed that if they find the testimony of a witness false as to certain material facts stated by him, or false in part as to a material fact, they may discard all the evidence.[12] An instruction that if the jury find that any witness has wilfully sworn falsely upon any material point, then the entire testimony of such witness is to be distrusted, is sufficient.[13]

e. Referring to Penalty For Perjury. An instruction that it has been provided by statute that a witness who wilfully and corruptly, and with intent to take away the life of a person, bears false testimony against him, and thereby causes such person's life to be taken, shall suffer death is proper.[14]

16. Credibility of Testimony or Statement of Accused — a. Necessity For Instructions. It is usually necessary, where the accused testifies, to instruct the jury that he is a competent witness for himself under the statute, unless perhaps where his testimony was immaterial.[15] On the other hand it is not usually neces-

have a right to arbitrarily believe one set of witnesses and reject another is properly refused. Shepard *v.* State, 135 Ala. 9, 33 So. 266.

On a prosecution for receiving stolen goods, the court may caution the jury as to the credibility of the testimony given by the thief. State *v.* Rachman, 68 N. J. L. 120, 53 Atl. 1046.

Prior conviction.— The court may also instruct the jury as to the purpose of evidence of a prior conviction proved to impeach the witness. Keating *v.* State, (Nebr. 1903) 93 N. W. 980.

9. Cline *v.* State, 33 Tex. Cr. 482, 27 S. W. 128; Howard *v.* State, 25 Tex. App. 686, 8 S. W. 929.

Effect of fear.— It is always proper to charge on the preliminaries which must be proved before contradictory statements can be proved (Evans *v.* State, 95 Ga. 468, 22 S. E. 298), and that if the statements were made under the influence of fear of one's life they shall not be considered as impeachment (Williams *v.* State, 69 Ga. 11).

Explanation of contradictory statements.— A charge which in effect makes it the duty of the jury to believe the witness if he satisfactorily accounts for his former false statement is error, as they have a right to believe him notwithstanding he made prior false statements under oath, and on the other hand they are not compelled to believe him if he explains why he did so, particularly if he be a person of bad character. Reinhart *v.* State, 102 Ga. 690, 29 S. E. 443.

Good character.— Where the witness is impeached directly, evidence of good character for veracity should be considered by the jury. Powell *v.* State, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277; Hart *v.* State, 93 Ga. 160. 20 S. E. 39.

Necessity for request.— Failure to instruct on the law as to the impeachment of witnesses is not cause for a new trial in the absence of a request. This is particularly true where there is no evidence impeaching any witness except the statements of the accused. Hodge *v.* State, 116 Ga. 852, 43 S. E. 255.

10. State *v.* Roberts, 63 Vt. 139, 21 Atl. 424. See also State *v.* Davis, 74 Iowa 578, 38 N. W. 424.

11. McDermott *v.* State, 89 Ind. 187.

12. To warrant the application of the maxim *falsus in uno, falsus in omnibus,* the alleged false statement must have been made knowingly, intentionally, or with a design to deceive or mislead. Prater *v.* State, 107 Ala. 26, 18 So. 238; Childs *v* State, 76 Ala. 93; Panton *v.* People, 114 Ill. 505, 2 N. E. 411. See also Moett *v.* People, 85 N. Y. 373 [*affirming* 23 Hun 60].

Omission of "wilfully" immaterial.— It has been held that the omission of the word "wilfully" in such an instruction is not erroneous, as a witness does not testify falsely unless he makes a wilful misstatement. State *v.* Kyle, 14 Wash. 550, 45 Pac. 147. See also People *v.* Righetti, 66 Cal. 184, 4 Pac. 1063, 1185.

13. The court need not instruct that testimony on any particular point is material. People *v.* Demousset, 71 Cal. 611, 12 Pac. 788.

14. State *v.* Fournier, 68 Vt. 262, 35 Atl. 178.

15. State *v.* Brandenburg, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. Rep. 362.

sary, even under a statute requiring the court to instruct on all questions of law, to give a special charge on the credibility of the accused as a witness.[16]

b. Sufficiency of Instructions. It is proper to instruct that in weighing his evidence the jury may consider defendant's manner of testifying, the reasonableness of his account of the transaction,[17] the surrounding facts and circumstances,[18] and that they may judge it by the same rules given for weighing other evidence.[19] They should be told that they have no right to disregard it or to refuse to give it any weight merely because it is the accused who testifies,[20] but that if they are not satisfied it is true they may disregard it.[21] Instructions calling the attention of the jury to defendant's interest in the result, as affecting his credibility, have been held proper.[22]

17. Failure of Accused to Testify — a. In General. In those jurisdictions where it is provided by statute that when defendant does not testify his silence shall not be considered against him by the jury, and that such failure raises no presumption of his guilt, an instruction to this effect is not erroneous,[23] unless

16. People *v.* Hitchcock, 104 Cal. 482, 38 Pac. 198; People *v.* Rodundo, 44 Cal. 538; State *v.* Westlake, (Mo. 1901) 61 S. W. 243.

17. Jones *v.* State, 61 Ark. 88, 32 S. W. 81; Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885; Dunn *v.* People, 109 Ill. 635; Com. *v.* Breyessee, 160 Pa. St. 451, 28 Atl. 824, 40 Am. St. Rep. 729.

18. McIntosh *v.* State, 151 Ind. 251, 51 N. E. 354; McClure *v.* State, 77 Ind. 287; Emery *v.* State, 101 Wis. 627, 78 N. W. 145.

Contrasting testimony and circumstances. — An instruction contrasting the testimony of the accused with the circumstances of the case in such a way as to convey to the jury the idea that the testimony of the accused was to be considered by them as having little or no weight is erroneous. Hickory *v.* U. S., 160 U. S. 408, 16 S. Ct. 327, 40 L. ed. 474.

19. Jones *v.* State, 61 Ark. 88, 33 S. W. 81; Howard *v.* State, 34 Ark. 433; Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465; State *v.* Case, 96 Iowa 264, 65 N. W. 149; People *v.* McArron, 121 Mich. 1, 79 N. W. 944.

To be tested like other evidence. — An instruction that the jury are not bound to believe the accused, but are bound to give his testimony such weight as they think it entitled to, that his credibility is for their consideration, and that his interest is proper to be considered is a proper instruction, when the jury are also instructed that his testimony should be fully and impartially considered and subjected to the same tests as that of other witnesses. Henry *v.* People, 198 Ill. 162, 65 N. E. 120.

20. Newport *v.* State, 140 Ind. 299, 39 N. E. 926; State *v.* McClellan, 23 Mont. 532, 59 Pac. 924, 75 Am. St. Rep. 558.

Testimony of no importance. — The court need not instruct the jury that defendant is a competent witness in his own behalf, and as to the weight to be given his testimony, when such testimony is of no importance. State *v.* Brandenbury, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. Rep. 362.

In Georgia it is made the duty of the court, by statute, to instruct the jury that they may believe the prisoner's statement in preference to the sworn testimony in the case. Doster *v.* State, 93 Ga. 43, 18 S. E. 997; Burns *v.* State, 89 Ga. 527, 15 S. E. 748; Harrison *v.* State, 83 Ga. 129, 9 S. E. 542; Brays *v.* State, 69 Ga. 765; Hayden *v.* State, 69 Ga. 731.

21. Lewis *v.* State, 88 Ala. 11, 6 So. 755.

Corroboration not necessary. — An instruction that the jury are not required to receive defendant's testimony as true, and are not bound to believe it any further than it may be corroborated by other credible evidence, is improper, as treating him as an impeached witness and leading the jury to believe that he must be corroborated. State *v.* Hunter, 118 Iowa 686, 92 N. W. 872.

22. *California.* — People *v.* Hitchcock, 104 Cal. 482, 38 Pac. 198; People *v.* O'Brien, 96 Cal. 171, 31 Pac. 45; People *v.* Cronin, 34 Cal. 191.

Illinois. — Dunn *v.* People, 109 Ill. 635.

Missouri. — State *v.* Patterson, 98 Mo. 283, 11 S. W. 728.

Nebraska. — Keating *v.* State, (1903) 93 N. W. 980.

New York. — People *v.* Petnesky, 99 N. Y. 415, 2 N. E. 145.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1895, 1896.

23. *Illinois.* — Farrell *v.* People, 133 Ill. 244, 24 N. E. 423.

Indiana. — Thrawley *v.* State, 153 Ind. 375, 55 N. E. 95.

Iowa. — State *v.* Hogan, 115 Iowa 455, 88 N. W. 1074.

Louisiana. — State *v.* Carr, 25 La. Ann. 407.

Maine. — State *v.* Landry, 85 Me. 95, 26 Atl. 998; State *v.* Banks, 78 Me. 490, 7 Atl. 269.

Massachusetts. — Com. *v.* Brown, 167 Mass. 144, 45 N. E. 1; Com. *v.* Harlow, 110 Mass. 411.

Mississippi. — Haynes *v.* State, (1900) 27 So. 601.

New York. — People *v.* Watson, 7 N. Y. Suppl. 532.

Vermont. — State *v.* O'Grady, 65 Vt. 66, 25 Atl. 905; State *v.* Cameron, 40 Vt. 555.

See 14 Cent. Dig. tit. "Criminal Law," § 1902.

there is some statutory provision prohibiting the giving of the same.[24] In quite a number of cases it has been held that the court need not give such an instruction unless requested to do so;[25] but the right of the court to so instruct, of its own motion, without request, has been frequently decided.[26]

b. Unfavorable Comment. An instruction commenting unfavorably upon the failure of the accused to testify, and intimating to the jury that they may draw an inference against him from his silence, is error.[27] The same rule applies to a failure to make an unsworn statement permitted under a statute.[28]

18. Grade or Degree of Crime — a. Necessity to Instruct Upon Crimes or Degrees of Crime Included. Where defendant may be found guilty of any offense necessarily included within the crime charged, it is error, on his request, to refuse to so instruct the jury.[29] According to some of the cases, where the crime charged is one that admits of degrees, and the evidence tends to establish an offense of a lower grade than that charged, the difference between the different

Sufficiency of charge.— Beavers *v.* State, 58 Ind. 530.

To give or to fail to give this instruction is not error. Prewett *v.* State, 41 Tex. Cr. 262, 53 S. W. 879; Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 358; Parker *v.* State, 40 Tex. Cr. 119, 49 S. W. 80.

24. In some jurisdictions the statutes upon the subject have been construed to prohibit the giving of such an instruction. State *v.* Goff, 10 Kan. App. 286, 61 Pac. 680 [in effect *overruling* State *v.* Evans, 9 Kan. App. 889, 58 Pac. 240]; State *v.* Pearce, 56 Minn. 226, 57 N. W. 652, 1065; State *v.* Robinson, 117 Mo. 649, 23 S. W. 1066; Leslie *v.* State, 10 Wyo. 10, 65 Pac. 849, 69 Pac. 2.

Where defendant testifies, he is not entitled to an instruction that he was not bound to do so, and that his failure to do so would not have created a presumption against him. Williams *v.* People, 166 Ill. 132, 46 N. E. 749.

25. *California.*— People *v.* Flynn, 73 Cal. 511, 15 Pac. 102.

Indiana.— Foxwell *v.* State, 63 Ind. 539.

Iowa.— State *v.* Carnagy, 106 Iowa 483, 76 N. W. 805.

Kansas.— Holton *v.* Bimrod, 8 Kan. App. 265, 55 Pac. 505.

Nebraska.— Metz *v.* State, 46 Nebr. 547, 65 N. W. 190.

Oregon.— State *v.* Magers, 36 Oreg. 38, 58 Pac. 892.

In Washington it is made the duty of the court, by statute, to give this instruction, even though not requested to do so. State *v.* Krug, 12 Wash. 288, 41 Pac. 126; State *v.* Myers, 8 Wash. 177, 35 Pac. 580; Linbeck *v.* State, 1 Wash. 336, 25 Pac. 452; Leonard *v.* Territory, 2 Wash. Terr. 381, 7 Pac. 872.

See 14 Cent. Dig. tit. "Criminal Law," § 1902.

26. *Illinois.*— Farrell *v.* People, 133 Ill. 244, 24 N. E. 423.

Iowa.— State *v.* Weems, 96 Iowa 426, 65 N. W. 387.

Louisiana.— State *v.* Johnson, 50 La. Ann. 138, 23 So. 199.

Nebraska.— Ferguson *v.* State, 52 Nebr. 432, 72 N. W. 590, 66 Am. St. Rep. 512.

New York.—People *v.* Fitzgerald, 156 N. Y. 253, 50 N. E. 846 [*reversing* 20 N. Y. App. Div. 139, 46 N. Y. Suppl. 1020] (holding that such instruction should be given in the plain and simple language of the statute and without qualifying words); People *v.* Hoch, 150 N. Y. 291, 44 N. E. 976; People *v.* Hayes, 140 N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572, 23 L. R. A. 830; Ruloff *v.* People, 45 N. Y. 213; Ruloff's Case, 11 Abb. Pr. N. S. 245.

Ohio.— Sullivan *v.* State, 9 Ohio Cir. Ct. 652.

Texas.— Grant *v.* State, (Cr. App. 1902) 70 S. W. 954; Pearl *v.* State, 43 Tex. Cr. 189, 63 S. W. 1013; Unsell *v.* State, (Cr. App. 1898) 45 S. W. 902; Guinn *v.* State, 39 Tex. Cr. 257, 45 S. W. 694; Fulcher *v.* State, 28 Tex. App. 465, 13 S. W. 750.

See 14 Cent. Dig. tit. "Criminal Law," § 1902.

27. *Illinois.*— Baker *v.* People, 105 Ill. 452.

Indiana.— Doan *v.* State, 26 Ind. 495.

Massachusetts.— Com. *v.* Maloney, 113 Mass. 211.

Missouri.— State *v.* Hudspeth, 150 Mo. 12, 51 S. W. 483.

New Jersey.— State *v.* Wines, 65 N. J. L. 31, 46 Atl. 702.

Washington.— Leonard *v.* Territory, 2 Wash. Terr. 381, 7 Pac. 872.

See 14 Cent. Dig. tit. "Criminal Law," § 1903.

Compare State *v.* Cleaves, 59 Me. 298, 8 Am. Rep. 422; State *v.* Bartlett, 55 Me. 200.

Use of "permitted" unobjectionable.—An instruction that accused is "permitted" to testify is not error because it uses the word "permitted." State *v.* Porter, 32 Oreg. 135, 49 Pac. 964.

28. Bird *v.* State, 50 Ga. 585.

29. State *v.* Dolan, 17 Wash. 499, 50 Pac. 472.

Larceny not included in burglary.— People *v.* Garnett, 29 Cal. 622. See Burglary; Larceny.

In Missouri by statute one may be tried for burglary and larceny on one indictment and the jury should be instructed that they may convict the accused of either or both offenses. State *v.* Brinkley, 146 Mo. 37, 47 S. W. 793; State *v.* Thompson, 137 Mo. 620, 39 S. W. 83. See Burglary; Larceny.

degrees should be made the subject of an explanatory charge.[30] Other cases hold that the failure of the court to charge on the right of the jury to convict of a lower grade or degree of the crime charged is not reversible error, where such an instruction is not specially requested.[31]

b. No Evidence of Crime of Lower Grade. Where there is no evidence tending to prove the commission of the lower offense, that is, where the evidence shows that the accused is either guilty of the higher offense or not guilty of any offense, an instruction on the lower degree of the offense is properly refused,[32]

30. *Alabama.*— Fleming *v.* State, 107 Ala. 11, 18 So. 263.

Georgia.— Kimball *v.* State, 112 Ga. 541, 37 S. E. 886; McGuffie *v.* State, 17 Ga. 497.

Iowa.— State *v.* Walters, 45 Iowa 389.

Kentucky.—Com. *v.* Blackwell, 93 Ky. 309, 20 S. W. 199, 14 Ky. L. Rep. 246.

Louisiana.— State *v.* Wright, 104 La. 44, 28 So. 909.

Missouri.— State *v.* Crabtee, 111 Mo. 136, 20 S. W. 7; State *v.* Barham, 82 Mo. 67; State *v.* Bryant, 55 Mo. 75.

Nebraska.— Dolan *v.* State, 44 Nebr. 643, 62 N. W. 1090.

New Mexico.— Territory *v.* Friday, 8 N. M. 204, 42 Pac. 62; Territory *v.* Nichols. 3 N. M. 76, 2 Pac. 78.

New York.— Foster *v.* People, 50 N. Y. 598.

Ohio.— Hagan *v.* State, 10 Ohio St. 459.

Oregon.— State *v.* Cody, 18 Oreg. 506, 23 Pac. 891, 24 Pac. 895.

Texas.— Cockerell *v.* State, 32 Tex. Cr. 585, 25 S. W. 421; Sowell *v.* State, 32 Tex. Cr. 482, 24 S. W. 504; McPhail *v.* State, 10 Tex. App. 128; Hemanus *v.* State, 7 Tex. App. 372.

See 14 Cent. Dig. tit. "Criminal Law," § 1923. See also HOMICIDE; and other special titles.

Conviction of lower degree or of included offense see INDICTMENTS AND INFORMATIONS.

The manner and extent of the instruction with reference to the several degrees of crime are largely in the judicial discretion. Conciseness is always desirable, and an omission to state legal principles in detail cannot be excepted to unless they are specially requested to be stated. State *v.* Conley, 39 Me. 78.

Conviction of some degree.—A charge which is calculated to make the jury believe that they must find the accused guilty in some degree and that they cannot acquit him of the crime charged is erroneous. Beaudieu *v.* State, 8 Ohio St. 634; Greta *v.* State, 9 Tex. App. 429.

31. *Arizona.*— Ward *v.* Territory, (1901) 64 Pac. 441.

California.— People *v.* Barney, 114 Cal. 554, 47 Pac. 41.

Colorado.— Miller *v.* People, 23 Colo. 95, 46 Pac. 111.

Idaho.— State *v.* White, 7 Ida. 150, 61 Pac. 517; People *v.* Biles, 2 Ida. (Hasb.) 114, 6 Pac. 120.

Indiana.— Reynolds *v.* State, 147 Ind. 3, 46 N. E. 31; McClary *v.* State, 75 Ind. 260.

Vermont.— State *v.* Hanlon, 62 Vt. 334, 19 Atl. 773.

See 14 Cent. Dig. tit. "Criminal Law," § 1923.

Necessity for request to charge see *infra*, XIV, H, 1.

32. *California.*—People *v.* Barney, 114 Cal. 554, 47 Pac. 41; People *v.* McNutt, 93 Cal. 658, 29 Pac. 243; People *v.* Wright, 93 Cal. 564, 29 Pac. 240; People *v.* Turley, 50 Cal. 469.

Georgia.— Robinson *v.* State, 84 Ga. 674, 11 S. E. 544; Boyd *v.* State, 17 Ga. 194. See also Wood *v.* State, 48 Ga. 192, 15 Am. Rep. 664.

Illinois.— Crowell *v.* People, 190 Ill. 508, 60 N. E. 872.

Iowa.—State *v.* Sherman, 106 Iowa 684, 77 N. W. 461; State *v.* Reasby, 100 Iowa 231, 69 N. W. 451; State *v.* Tippet, 94 Iowa 646, 63 N. W. 445; State *v.* Akin, 94 Iowa 50, 62 N. W. 667.

Kansas.— State *v.* Patterson, 52 Kan. 335, 34 Pac. 784; State *v.* Mowry, 37 Kan. 369, 15 Pac. 282.

Michigan.— People *v.* Ezzo, 104 Mich. 341, 62 N. W. 407; People *v.* Fuhrmann, 103 Mich. 593, 61 N. W. 865.

Mississippi.— Virgil *v.* State, 63 Miss. 317. See also Skates *v.* State, 64 Miss. 644, 1 So. 843, 60 Am. Rep. 70, holding that where the evidence shows that a wound inflicted by the accused on the deceased was a dangerous wound, an instruction applicable to wounds not dangerous is unnecessary.

Missouri.—State *v.* Alcorn, 137 Mo. 121, 38 S. W. 548; State *v.* Johnson, 129 Mo. 26, 31 S. W. 339; State *v.* Woods, 124 Mo. 412, 27 S. W. 1114; State *v.* Wilson, 88 Mo. 13; State *v.* Brady, 87 Mo. 142; State *v.* Wilson, 16 Mo. App. 550 [*affirmed* in 86 Mo. 520]; State *v.* Banks, 10 Mo. App. 111.

Nebraska.— Thurman *v.* State, 32 Nebr. 224, 49 N. W. 338.

New Mexico.— Sandoval *v.* Territory, 8 N. M. 573, 45 Pac. 1125; Territory *v.* Vialpando, 8 N. M. 211, 42 Pac. 64.

Oklahoma.— Gatliff *v.* Territory, 2 Okla. 523, 37 Pac. 809.

Tennessee.—Good *v.* State, 1 Lea 293; Ray *v.* State, 3 Heisk. 379 note.

Texas.— Parker *v.* State, 40 Tex. Cr. 119, 49 S. W. 80; Steiner *v.* State, 33 Tex. Cr. 291, 26 S. W. 214; Taylor *v.* State, 14 Tex. App. 340; Neyland *v.* State, 13 Tex. App. 536.

United States.— Sparf *v.* U. S., 156 U. S. 51, 715, 15 S. Ct. 273, 39 L. ed. 343.

See 14 Cent. Dig. tit. "Criminal Law," § 1924. See also HOMICIDE; and other special titles.

although giving an instruction in such a case on the lower degree of the offense may not be an error of which defendant can complain.[33]

e. Instruction to Acquit of Higher Grade. An instruction that if the accused shall be acquitted of the higher degree the jury may or should find defendant guilty of the lesser one ought to be accompanied by an instruction that in finding him guilty of the lower degree of the crime their verdict should expressly acquit him of the other and higher degree.[34] The same rule applies where the evidence fails to prove that the crime has been consummated and the jury are advised that they may convict of an attempt.[35]

d. Instruction on Higher Grade Than That Charged. It is error to instruct as to an offense which exceeds in grade or degree the offense for which the accused is indicted.[36]

e. Reasonable Doubt of Grade or Degree. It is proper to charge that if the jury believe the accused is guilty beyond a reasonable doubt, but have a reasonable doubt as to the degree of his offense, they should give him the benefit of that doubt and convict him of the lower degree.[37] But it has been held that it is sufficient for the court to charge that the accused is entitled to the benefit of any reasonable doubt without charging specially as to a reasonable doubt of the degree of the crime.[38]

19. PUNISHMENT — a. In General. Where the assessment of the punishment is in the discretion of the jury, they should be charged that if they find the accused guilty they should assess the punishment;[39] and it is reversible error to give an

33. State *v.* Bell, 136 Mo. 120, 37 S. W. 823; People *v.* Thiede, 11 Utah 241, 39 Pac. 837.

34. Kilkelly *v.* State, 43 Wis. 604.

On a joint trial for murder, if the judge is convinced that one prisoner is guilty of a crime of a less degree than is charged to both, he should so instruct the jury without regard to the effect it may have upon the other prisoner. State *v.* Pratt, 88 N. C. 639.

35. Marley *v.* State, 58 N. J. L. 207, 33 Atl. 208.

36. State *v.* Walton, 74 Mo. 270. Thus under an indictment for manslaughter a charge on murder in the first degree is error, although the evidence tends to show murder. Parker *v.* State, 22 Tex. App. 105, 3 S. W. 100. See also HOMICIDE.

37. *Georgia.*— Ramsey *v.* State, 92 Ga. 53, 17 S. E. 613; Jackson *v.* State, 91 Ga. 271, 18 S. E. 298, 44 Am. St. Rep. 22.

Iowa.— State *v.* Walters, 45 Iowa 389.

Kentucky.— Pace *v.* Com., 89 Ky. 204, 12 S. W. 271, 11 Ky. L. Rep. 407; Ireland *v.* Com., 57 S. W. 616, 22 Ky. L. Rep. 478; Williams *v.* Com., 4 Ky. L. Rep. 3.

Missouri.— State *v.* Anderson, 86 Mo. 309.

Texas.— Eanes *v.* State, 10 Tex. App. 421.

See 14 Cent. Dig. tit. "Criminal Law," § 1925.

38. Bennyfield *v.* Com., 22 S. W. 1020, 15 Ky. L. Rep. 321; Jackson *v.* Com., 14 S. W. 677, 12 Ky. L. Rep. 575; Abbott *v.* State, 86 N. Y. 460; Powell *v.* State, 28 Tex. App. 393, 13 S. W. 599; Hall *v.* State, 28 Tex. App. 146, 12 S. W. 739.

39. Barnard *v.* State, 150 Ind. 701, 50 N. E. 304; Blair *v.* Com., 7 Bush (Ky.) 227; Buford *v.* State, 44 Tex. 525; Cesure *v.* State, 1 Tex. App. 19. See also State *v.* Cobbs, 40 W. Va. 718, 22 S. E. 310, holding it to be the duty of the court to instruct the jury as to their right to fix the punishment, upon request made after announcement of their verdict.

Discretion of jury.—It has been held proper to refuse to instruct the jury how they should exercise their discretion in assessing punishment. People *v.* Kamaunu, 110 Cal. 609, 42 Pac. 1090. *Compare*, however, Powell *v.* State, 21 Ark. 509. The court, in defining the limits of the power and discretion of the jury, should strictly follow the statute. An instruction that the jury may, in their discretion, assess a fine is properly refused where a statute directs that they must assess a fine not less than a prescribed amount. Welsh *v.* State, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664. Where the jury have a discretion whether to assess a fine, or to leave the imposition of the punishment to the court, it is error to instruct that they must assess the punishment. Bibb *v.* State, 84 Ala. 13, 4 So. 275.

Sufficiency of instructions.— An instruction that the jury should fix the punishment between certain limits, as, in their discretion and judgment, the evidence seems to require, is sufficient. Boggs *v.* State, 38 Tex. Cr. 82, 41 S. W. 642.

Sympathy and considerations of mercy.— An instruction that the jury in fixing the penalty should be guided wholly by the evidence, under the instruction of the court, and not by considerations of mercy or sympathy, is proper. Dinsmore *v.* State, 61 Nebr. 418, 85 N. W. 445.

"Without capital punishment."—In Louisiana the jury has a discretion, where the punishment pronounced by law is death, to add to their verdict "without capital punishment" and should be so instructed. State *v.* Obregon, 10 La. Ann. 799.

Necessity for assessing punishment.— It is

instruction which states incorrectly the punishment which should be assessed by the jury,[40] even though the punishment actually assessed by the jury is within the limits of their discretion as prescribed by statute.[41] The jury should be told, where the statute empowers the court to assess the punishment in case the jury fails to do it, that if they find defendant guilty, but omit to declare his punishment, the court may pronounce the highest punishment.[42] An instruction as to the statutory punishment is properly refused where the jury has no power to fix or to recommend the punishment,[43] and where no statute confers on the jury the right to assess the punishment, it is not error to tell them that they have nothing to do with the punishment or with the consequences of the verdict, but that they are merely to determine whether or not defendant is guilty.[44] Merely reading to the jury the statute which fixes the punishment is not error.[45]

b. Several Counts. Where two or more offenses subject to different punishments are embraced in the same indictment, they should be treated separately in instructing as to the penalty attached to each;[46] and a conviction will be reversed where the court incorrectly stated that a penalty was applicable to one count, which in fact was applicable to another.[47]

20. Recommendation to Mercy. It is error to instruct the jury that they can recommend the prisoner to the mercy of the court, where the law gives the judge no discretion in passing sentence upon a convicted prisoner,[48] and where the jury is not authorized to recommend a convicted prisoner to mercy it is not error to so instruct.[49] On the other hand, when it is provided by statute that the jury may recommend the accused to the mercy of the court, it is error according to some of the cases for the court to refuse or to fail to so instruct them,[50] or for the

erroneous to instruct the jury that they "have the right and authority to return a general verdict of guilty, without assessing any punishment," when the power of the court to assess and declare punishment is merely contingent and only to be exercised in case of a failure of duty or disagreement of the jury. Fooxe *v.* State, 7 Mo. 502.

Confinement in reformatory.— The Texas statute, providing for the confinement in a reformatory of youthful offenders, is mandatory, and it is the duty of the court to give an instruction based on this statute. Washington *v.* State, 28 Tex. App. 411, 13 S. W. 606. As to the sufficiency of instructions on this subject see Rocha *v.* State, 38 Tex. Cr. 69, 41 S. W. 611; Duncan *v.* State, 29 Tex. App. 141, 15 S. W. 407.

Disposition of convicts.— An instruction, although requested by the jury, with reference to the disposition of convicts by the county commissioners, is properly refused where the court has fully instructed them with reference to the statutory punishment to be fixed by the jury. Leverett *v.* State, 40 Tex. Cr. 197, 49 S. W. 588.

40. Watson *v.* People, 134 Ill. 374, 25 N. E. 567; Ferrell *v.* State, 2 Lea (Tenn.) 25; Longenotti *v.* State, 22 Tex. App. 61, 2 S. W. 620. Where the jury's discretion is to inflict a fine and imprisonment, or either, an instruction omitting to charge as to the punishment in the alternative is error. Petteway *v.* State, 36 Tex. Cr. 97, 35 S. W. 646; Hargrove *v.* State, 33 Tex. Cr. 165, 25 S. W. 967; Irvin *v.* State, 25 Tex. App. 558, 8 S. W. 681. And where the statute provides that there may be imposed both fine and imprisonment, an instruction which only informs the jury that they may impose either is error. Moody *v.* State, 30 Tex. App. 422, 18 S. W. 94. And where the jury has a discretion to choose between death or imprisonment in the penitentiary at hard labor for the county, an instruction omitting to mention the authority to direct imprisonment at hard labor is error. James *v.* State, 53 Ala. 380.

41. State *v.* Milligan, 170 Mo. 215, 70 S. W. 473; State *v.* Sands, 77 Mo. 118.

42. Walton *v.* State, 57 Miss. 533. See also Brown *v.* State, 72 Miss. 997, 17 So. 278.

43. Eggart *v.* State, 40 Fla. 527, 25 So. 144; State *v.* Howard, 118 Mo. 127, 24 S. W. 41; State *v.* Ragsdale, 59 Mo. App. 590; Ford *v.* State, 46 Nebr. 390, 64 N. W. 1082.

44. Williams *v.* People, 196 Ill. 173, 63 N. E. 681; Clary *v.* State, 61 Nebr. 688, 85 N. W. 897.

45. People *v.* Henderson, 28 Cal. 465; Com. *v.* Harris, 168 Pa. St. 619, 32 Atl. 92; Miller *v.* Com., (Va. 1895) 21 S. E. 499.

46. Maul *v.* State, 25 Tex. 166; Stewart *v.* State, (Tex. Cr. App. 1895) 31 S. W. 407.

47. Watson *v.* People, 134 Ill. 374, 25 N. E. 567.

48. Hackett *v.* People, 8 Colo. 390, 8 Pac. 574; Territory *v.* Griego, 8 N. M. 133, 42 Pac. 81.

49. Hussey *v.* State, 69 Ga. 54.

50. Taylor *v.* State, 110 Ga. 150, 35 S. E. 161; Johnson *v.* State, 100 Ga. 78, 25 S. E. 940; Harris *v.* State, 59 Ga. 635; Calton *v.* Utah, 130 U. S. 83, 9 S. Ct. 435, 32 L. ed. 870. *Contra*, Milton *v.* State, 40 Fla. 251, 24 So. 60; Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; Newton *v.* State, 21 Fla. 53; State *v.* Dodson, 16 S. C. 453.

Failure of jury to understand instructions. — Where the court has properly instructed

court, in the instructions given, to limit or to interfere with the power and discretion of the jury in this respect.[51]

21. FORM AND BASIS OF VERDICT — a. Form. The judge should carefully instruct the jury as to what verdicts will be responsive to the indictment,[52] and may properly furnish them with a form of verdict for them to follow in case they convict.[53] If it is desired by defendant that an instruction as to the form of verdict, in case of his conviction of a lesser offense, should be given, it is his duty to prepare and ask such an instruction.[54] The court need not, in the absence of a special request, instruct on the form of a verdict of insanity[55] or of acquittal.[56]

b. Several Defendants. Where several defendants are tried together, the jury should be instructed that they may find some of such defendants guilty and some not guilty.[57]

c. Independent Judgment of Jurors. The oath taken by jurors binds each of them severally to render a true verdict, according to the evidence, upon his own judgment and conscience, and not that of his fellows, and no instruction which intimates anything to the contrary should be given.[58] It is the duty of jurors, however, in arriving at a verdict, to consult each other, to pay proper respect to each other's opinion, and to listen with candor to each other's arguments, and therefore an instruction should not be given which would have the effect of impressing upon an obstinate juror that he is never to yield to the arguments or reasoning of his fellow jurors.[59] An instruction that each juror should be satisfied beyond

the jury that a recommendation to mercy would reduce the penalty from death to imprisonment for life, a new trial will not be granted on the affidavits of jurors that they did not understand the instructions. State *v.* Aughtry, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199.

Tendency to induce compromise verdict.— A charge calling attention to the fact that the jury have the privilege of recommending the accused to mercy after a verdict of guilty is not open to the objection that it tends to produce a compromise verdict. Sterling *v.* State, 89 Ga. 807, 15 S. E. 743.

Judge's approval necessary.— The judge should state that the recommendation is effectual only when approved by him, if this is the law. Echols *v.* State, 109 Ga. 508, 34 S. E. 1038. See also Fogarty *v.* State, 80 Ga. 450, 5 S. E. 782; Green *v.* State, 71 Ga. 487.

Language of statute should be followed.— Lovett *v.* State, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705; Newton *v.* State, 21 Fla. 53.

51. Hill *v.* State, 72 Ga. 131.

Not responsible for consequences.— It is not error, however, where the jury are instructed fully upon their right to recommend to mercy to tell them also that they have nothing to do with the consequences of their verdict. Marshall *v.* State, 74 Ga. 26.

52. State *v.* Wright, 104 La. 404, 28 So. 909.

53. Com. *v.* Delehan, 148 Mass. 254, 19 N. E. 221; State *v.* Owens, 44 S. C. 324, 22 S. E. 244 [*following* State *v.* Faile, 43 S. C. 52, 20 S. E. 798].

Failure to furnish form not error.— Territory *v.* McFarlane, 7 N. M. 421, 37 Pac. 1111.

54. Dacey *v.* People, 116 Ill. 555, 6 N. E. 165; Dunn *v.* People, 109 Ill. 635.

55. Montag *v.* People, 141 Ill. 75, 30 N. E. 337.

56. Kelly *v.* State, (Fla. 1902) 33 So. 235; Long *v.* State, 95 Ind. 481; Hodge *v.* State, 85 Ind. 561.

57. Hayden *v.* Nott, 9 Conn. 367; People *v.* McGrath, 5 N. Y. Cr. 4; Hampton *v.* State, 45 Tex. 154; Holmes *v.* State, 9 Tex. App. 313; Bucklin *v.* U. S., 159 U. S. 680, 682, 16 S. Ct. 182, 40 L. ed. 304, 305. See also Morgan *v.* State, 117 Ind. 569, 19 N. E. 154, holding that such an instruction is not erroneous for failing to add that the jury might agree to one and disagree as to the other, as defendants should have requested a special instruction on that point.

58. Evans *v.* State, 62 Ala. 6; Swallow *v.* State, 20 Ala. 30. See also Simon *v.* State, 108 Ala. 27, 18 So. 731. An instruction which amounts to a direction to each individual juror to yield his convictions, unless the reasonable doubt entertained by him is shared by his fellows, is erroneous. State *v.* Hamilton, 57 Iowa 596, 11 N. W. 5; State *v.* Sloan, 55 Iowa 217, 7 N. W. 516; State *v.* Stewart, 52 Iowa 284, 3 N. W. 99.

59. *Connecticut.*— State *v.* Smith, 49 Conn. 376.

District of Columbia.— Horton *v.* U. S., 15 App. Cas. 310.

Georgia.— Fogarty *v.* State, 80 Ga. 450, 5 S. E. 782.

Illinois.— Addison *v.* People, 193 Ill. 405, 62 N. E. 235; Little *v.* People, 157 Ill. 153, 42 N. E. 389.

Massachusetts.— Com. *v.* Tuey, 8 Cush. 1.

Michigan.— People *v.* Wood, 99 Mich. 620, 58 N. W. 638.

Wisconsin.— Jackson *v.* State, 91 Wis. 253, 64 N. W. 838.

United States.—Allen *v.* U. S., 164 U. S. 492, 17 S. Ct. 154, 41 L. ed. 528.

See 14 Cent. Dig. tit. "Criminal Law," § 1940. See also, as to reasonable doubt, *supra*, XII, I, 2, c, (IV).

a reasonable doubt that the accused is guilty before a verdict against him is found is correct,[60] and according to some authorities must be given upon request.[61] Other authorities, while conceding its correctness, deny the necessity of giving it when proper instructions have been given on the general doctrine of reasonable doubt.[62] It is proper to charge the jury that it is a reasonable doubt entertained by the jury, and not by one member thereof, that justifies an acquittal.[63] The jury should not be given an instruction which means that if a majority are satisfied beyond a reasonable doubt, still if one is not satisfied the majority should yield and concur in a verdict of acquittal.[64]

d. Excluding Improper Considerations. An instruction telling the jury that they are not to be controlled in making up their verdict by fear of what the punishment may be,[65] by outside pressure for a conviction, or by an undue appeal to their sympathy,[66] is proper.

e. Personal Knowledge, Experience, and Common Sense. An instruction which authorizes the jury to base their verdict as well upon their personal knowledge and experience as upon the evidence legitimately in the case is erroneous.[67] But it has been held not to be error to charge the jury that "in arriving at a correct verdict, they should consult their general knowledge and their own experience of life,"[68] or to apply to the facts of the case the same rules of good common sense, subject always to a conscientious exercise of it, that they would apply to any other subject coming under their consideration and demanding their judgment.[69]

f. Arguments of Counsel. It is not error to instruct the jury to regard the statements of counsel made in argument with caution,[70] or to disregard assertions of their belief in the innocence of the accused,[71] or to warn them against attaching too much importance to cases of innocent men convicted on circumstantial evidence, which are read by defendant's counsel,[72] or to speak generally of the sophistries of counsel.[73] And when counsel in the heat of argument takes a position which is not well founded and is calculated to create an erroneous impression upon the mind of the jury, the court may in its charge call attention to and correct such impression.[74] But an instruction limiting the influence of legitimate statements and arguments of counsel should not be given.[75]

60. Spitz *v.* State, 104 Ind. 359, 4 N. E. 145; Fassinow *v.* State, 89 Ind. 235.

61. Grimes *v.* State, 105 Ala. 86, 17 So. 184; Carter *v.* State, 103 Ala. 93, 15 So. 893; Parker *v.* State, 136 Ind. 284, 35 N. E. 1105; Castle *v.* State, 75 Ind. 146.

62. U. S. *v.* Schneider, 21 D. C. 381; State *v.* Rogers, 56 Kan. 362, 43 Pac. 256; State *v.* Young, 105 Mo. 634, 16 S. W. 408; State *v.* Phelps, 5 S. D. 480, 59 N. W. 471. See also Smith *v.* State, 63 Ga. 168.

63. State *v.* Stewart, 52 Iowa 284, 3 N. W. 99; State *v.* Rorabacher, 19 Iowa 154; State *v.* Rogers, 56 Kan. 362, 43 Pac. 256 [*commenting* adversely upon Spitz *v.* State, 104 Ind. 359, 4 N. E. 145]; State *v.* Taylor, 134 Mo. 109, 35 S. W. 92.

64. Boyd *v.* State, 33 Fla. 316, 14 So. 836; State *v.* Bowman, 80 N. C. 432; State *v.* Neil, Tapp. (Ohio) 120.

65. Brantley *v.* State, 87 Ga. 149, 13 S. E. 257.

66. Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 157. See also State *v.* Rhodes, 44 S. C. 325, 21 S. E. 807, 22 S. E. 306.

67. State *v.* Bartlett, 47 Me. 388; Com. *v.* Lawrence, 9 Gray (Mass.) 133; State *v.* Gaymon, 44 S. C. 333, 22 S. E. 305, 51 Am. St. Rep. 861, 31 L. R. A. 489; State *v.* Jones, 29 S. C. 201, 7 S. E. 296.

Character of witnesses.—It has been held that an instruction that the jury in weighing the evidence may consider the character of the witnesses if known to them personally is erroneous. Collins *v.* State, 94 Ga. 394, 19 S. E. 243. But see State *v.* Jacob, 30 S. C. 131, 8 S. E. 698, 14 Am. St. Rep. 897; State *v.* Jones, 29 S. C. 201, 7 S. E. 296.

68. Rosenbaum *v.* State, 33 Ala. 354.

69. Dunlop *v.* U. S., 165 U. S. 486, 17 S. Ct. 375, 41 L. ed. 799. See also Rosenbaum *v.* State, 33 Ala. 354; Wright *v.* State, 69 Ind. 163, 35 Am. Rep. 212; State *v.* Elsham, 70 Iowa 531, 31 N. W. 66.

70. State *v.* Jones, 29 S. C. 201, 7 S. E. 296.

71. Smith *v.* State, 95 Ga. 472, 20 S. E. 291; McRae *v.* State, 52 Ga. 290; People *v.* McGuire, 89 Mich. 64, 50 N. W. 786.

72. People *v.* Shem Ah Fook, 64 Cal. 380, 1 Pac. 347.

73. State *v.* Way, 38 S. C. 333, 17 S. E. 39.

74. Rucker *v.* State, 114 Ga. 13, 39 S. E. 902. See also Roe *v.* State, 25 Tex. App. 33, 8 S. W. 463.

75. Reeves *v.* State, 34 Tex. Cr. 483, 31 S. W. 382; People *v.* Hite, 8 Utah 461, 33 Pac. 254. An instruction suggesting that defendant's counsel has in his argument dis-

22. Formal Requisites of Instructions — a. Time of Giving. It is not error for the court, before evidence is introduced, to state to the jury their duties and the rights of the accused,[76] or to instruct them as to the evidence which may be introduced;[77] and this charge is considered a part of the general charge. But the trial court cannot be required to instruct during the taking of evidence on abstract legal propositions which may or may not be applicable.[78] The order in which requested instructions may be given, whether before or after the general charge, is in the judicial discretion.[79]

b. Language. An instruction should be so explicit and so closely connected with the facts of the case as to enable the jury to apply the law to the facts. It must present the law substantially and correctly, and in such a way that it will be understood by the jury,[80] and if it does so it is sufficient.[81] Failure to follow the language of a statute is not error where the instruction fairly embraces its meaning.[82]

c. Written Instructions — (i) *In General.* By statute in many of the states, and as a rule of practice in others, instructions in criminal trials are required to be wholly in writing unless oral instructions are consented to.[83] These statutes

torted and misrepresented the facts and telling the jury that they are not to consider his argument is error, where there is no evidence of counsel's misconduct. Gibson *v.* State, 26 Fla. 109, 7 So. 376.

76. Ryan *v.* State, 83 Wis. 486, 53 N. W. 836.

77. State *v.* McGee, 55 S. C. 247, 33 S. E. 353, 74 Am. St. Rep. 741.

78. People *v.* McCallam, 103 N. Y. 587, 9 N. E. 502; Umbenhauer *v.* State, 4 Ohio Cir. Ct. 378.

79. Knight *v.* State, (Fla. 1902) 32 So. 110; Wood *v.* State, 64 Miss. 761, 2 So. 247; State *v.* Bickel, 7 Mo. App. 572.

80. Ritte *v.* Com., 18 B. Mon. (Ky.) 35; Farrar *v.* State, 29 Tex. App. 250, 15 S. W. 719; Ashlock *v.* State, 16 Tex. App. 13.

81. An objection that an instruction does not address each one of the jurors as an individual (State *v.* Williams, 13 Wash. 335, 43 Pac. 15), or contain the name of defendant or tell the jury who was meant by defendant (Jasper *v.* State, (Tex. Cr. App. 1901) 61 S. W. 392), or that it described him as a prisoner (Dinsmore *v.* State, 61 Nebr. 418, 85 N. W. 445), or that it is not numbered (State *v.* Booth, (Iowa 1901) 88 N. W. 344), has no merit.

82. Pitts *v.* State, 114 Ga. 35, 39 S. E. 873; Watson *v.* Com., 23 S. W. 666, 15 Ky. L. Rep. 360.

Reference to statute.— In an instruction sections of a statute may be identified otherwise than by the numbers. People *v.* Lewis, 64 Cal. 401, 1 Pac. 490.

83. *Arizona.*— Territory *v.* Kennedy, 1 Ariz. 505, 25 Pac. 517.

California.— People *v.* Max, 45 Cal. 254; People *v.* Prospero, 44 Cal. 186.

Florida.— Dixon *v.* State, 13 Fla. 636; Long *v.* State, 11 Fla. 295. *Compare* Luster *v.* State, 23 Fla. 339, 2 So. 690, holding that the jury may be charged orally when the offense is not capital unless a written charge is requested before the evidence is closed.

Illinois.— Helm *v.* People, 186 Ill. 153, 57 N. E. 886.

Indiana.— Feriter *v.* State, 33 Ind. 283; Widner *v.* State, 28 Ind. 394.

Iowa.— State *v.* Birmingham, 74 Iowa 407, 38 N. W. 121.

Mississippi.— Stewart *v.* State, 50 Miss. 587.

Missouri.— State *v.* Dewitt, 152 Mo. 76, 53 S. W. 429.

Nebraska.— Ehrlich *v.* State, 44 Nebr. 810, 63 N. W. 35.

New Mexico.— Territory *v.* Lopez, 3 N. M. 156, 2 Pac. 364; Leonardo *v.* Territory, 1 N. M. 291.

Tennessee.— Newman *v.* State, 6 Baxt. 164.

Texas.— Winfrey *v.* State, 41 Tex. Cr. 538, 56 S. W. 919; Harkey *v.* State, 33 Tex. Cr. 100, 25 S. W. 291, 47 Am. St. Rep. 19; Kelley *v.* State, (Cr. App. 1895) 31 S. W. 390.

Wisconsin.— Penberthy *v.* Lee, 51 Wis. 261, 8 N. W. 116.

See 14 Cent. Dig. tit. "Criminal Law," § 1948.

Curing error in giving oral instructions.— The error in charging orally may be cured by withdrawing the instructions as given, reducing them to writing and reading them, with a direction to disregard the oral charge given (People *v.* Garcia, 25 Cal. 531), but filing a written copy of the oral charge after verdict does not cure the error (Territory *v.* Duffield, 1 Ariz. 58, 25 Pac. 476; Territory *v.* Dorman, 1 Ariz. 56, 25 Pac. 516).

Stenographer's report.— In some jurisdictions the statutes on the subject are sufficiently complied with if oral instructions are taken down by the official stenographer and a copy given to the jury (People *v.* Curtis, 76 Cal. 57, 17 Pac. 941; State *v.* Preston, 4 Ida. 215, 38 Pac. 694); but in other jurisdictions such a procedure will not constitute a compliance with the statute (State *v.* Harding, 81 Iowa 599, 47 N. W. 877; State *v.* Bennington, 44 Kan. 583, 25 Pac. 91; State *v.* Fisher, 23 Mont. 540, 59 Pac. 919).

Judge may dictate and attorney write.— Barkman *v.* State, 13 Ark. 705.

are generally mandatory.[84] Under such statutes charging orally, in addition to or in explanation of the writtten charge, is usually error.[85] The defendant may under some statutes waive his right to have an instruction given in writing by express consent.[86] In some states an oral charge may be given unless one in writing is requested.[87]

(11) *Signature and Sealing.* In Texas the statute requiring the signature of the judge to be subscribed to the written instructions is mandatory, and his failure to sign is error.[88] Elsewhere it has been held that a failure to sign the instructions when they are handed to the jury is cured by subsequently filing

Printed instructions.— A statute directing that instructions shall be in writing is complied with by presenting them wholly or partly in print. State *v.* Fooks, 65 Iowa 196, 452, 21 N. W. 561, 773; State *v.* Kelly, 9 Mo. App. 512.

84. State *v.* Potter, 15 Kan. 302; State *v.* Fisher, 23 Mont. 540, 59 Pac. 919; Newman *v.* State, 6 Baxt. (Tenn.) 164.

85. *Arkansas.*— Mazzia *v.* State, 51 Ark. 177, 10 S. W. 257.

California.— People *v.* Payne, 8 Cal. 341.

Illinois.— Burns *v.* People, 45 Ill. App. 70.

Kentucky.— Payne *v.* Com., 1 Metc. 370.

North Carolina.—State *v.* Young, 111 N. C. 715, 16 S. E. 543.

Contra, Morris *v.* State, 25 Ala. 57.

See 14 Cent. Dig. tit. "Criminal Law," § 1951.

Illustrations.— A single oral charge as to the law (Stephenson *v.* State, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 216) or the punishment (Ellis *v.* People, 159 Ill. 337, 42 N. E. 873; Littell *v.* State, 133 Ind. 577, 33 N. E. 417. *Compare* Bush *v.* State, (Tex. Cr. App. 1902) 70 S. W. 550), or recapitulating the evidence (McClay *v.* State, 1 Ind. 385), or in a homicide case giving an oral illustration of what would constitute murder in the second degree (Territory *v.* Rivera, 1 N. M. 640; Territory *v.* Perea, 1 N. M. 627), or reading the law from printed statutes (Smurr *v.* State, 88 Ind. 504; Manier *v.* State, 6 Baxt. (Tenn.) 595; Wilson *v.* State, 15 Tex. App. 150. *Contra,* People *v.* Mortier, 58 Cal. 262; State *v.* Stewart, 9 Nev. 120), is error. On the other hand oral instructions on questions of the admissibility and purpose of evidence during the trial (Aiken *v.* Com., 68 S. W. 849, 24 Ky. L. Rep. 523; Green *v.* Com., 33 S. W. 100, 17 Ky. L. Rep. 943; State *v.* Good, 132 Mo. 114, 33 S. W. 790; State *v.* Moore, 117 Mo. 395, 22 S. W. 1086; Winfield *v.* State, (Tex. Cr. App. 1899) 54 S. W. 584), directing the jury to make their verdict specific in a homicide case (People *v.* Bonney, 19 Cal. 426), giving a direct affirmative or negative answer to the question of a juror (State *v.* Potter, 15 Kan. 302), pointing out which one of several verdicts they may find and how it should be signed (State *v.* Glass, 50 Wis. 218, 6 N. W. 500, 36 Am. Rep. 845), and a statement by the court that it can give them no instructions on a particular point (State *v.* Waterman, 1 Nev. 543) have been sustained. The same is true of remarks of the judge indicating which instructions are for the prosecution and which for the accused. State *v.* Gatlin, 170 Mo. 354, 70 S. W. 885.

The oral translation of a written charge from the English language in which it is written to a language more readily understood by the jurors does not make it an oral instruction. Territory *v.* Romine, 2 N. M. 114.

Direction as to different forms the verdict may take.— Burns *v.* State, 89 Ga. 527, 15 S. E. 748; Herron *v.* State, 17 Ind. App. 161, 46 N. E. 540.

86. People *v.* Kearney, 43 Cal. 383; Cutter *v.* People, 184 Ill. 395, 56 N. E. 412.

In Missouri under the statute which provides that the instructions shall be in writing, the prisoner cannot consent to oral instructions. State *v.* Cooper, 45 Mo. 64.

In Texas, by statute, the court may by consent give an oral charge in misdemeanor cases. Vick *v.* State, (Cr. App. 1902) 69 S. W. 156; Hill *v.* State, (Cr. App. 1902), 67 S. W. 506; Carr *v.* State, 5 Tex. App. 153; Killman *v.* State, 2 Tex. App. 222, 28 Am. Rep. 432. Without defendant's consent an oral charge is reversible error. Edwards *v.* State, (Cr. App. 1902) 69 S. W. 144.

Consent not presumed from conduct. State *v.* Fisher, 23 Mont. 540, 59 Pac. 919; Swaggart *v.* Territory, 6 Okla. 344, 50 Pac. 96 (holding failure to give written instructions harmless error); Rumage *v.* State, (Tex. Cr. App. 1900) 55 S. W. 64 (holding not reversible error in the absence of a showing of prejudice).

87. Bradford *v.* People, 22 Colo. 157, 43 Pac. 1013; Luster *v.* State, 23 Fla. 339, 2 So. 690 (offenses not punishable capitally); State *v.* Melton, 37 La. Ann. 77; State *v.* Porter, 35 La. Ann. 535; State *v.* Gilmore, 26 La. Ann. 599.

Submission to accused.— Where the judge at defendant's request reduces his charge to writing, he need not submit it to defendant or his counsel before delivery. State *v.* Saunders, 44 La. Ann. 973, 11 So. 583.

A request that the "entire charge" be in writing applies not only to the original instructions, but to supplemental instructions asked by the jury after their retirement, and need not be repeated at that time. State *v.* Young, 111 N. C. 715, 16 S. E. 543.

88. McLain *v.* State, 30 Tex. App. 482, 17 S. W. 1092, 28 Am. St. Rep. 934; Hubbard *v.* State, 2 Tex. App. 506; Smith *v.* State, 1 Tex. App. 408.

them,[89] or by incorporating them in the bill of exceptions.[90] In Florida the statute requiring charges of the court to juries to be sealed[91] has been repealed, and the law now only requires them to be signed by the judge.[92]

(III) *MARKING "GIVEN" OR "REFUSED."* In some states statutes require that the judge shall mark on each instruction asked "Given" or "Refused."[93] Such a statute applies only to instructions requested, and not to those given by the court of its own motion.[94]

d. Weight of Instructions. An admonition to the jury, before reading the charge, to pay careful attention to each word and sentence of it, so that they may be advised of the law of the case, is proper, and need not be in writing.[95] A charge that they should attach as much importance to written charges given on request as to any other charges is properly refused.[96]

e. Grouping Instructions. It is not reversible error for the court to divide its instructions into sections and read each separately, unless they are conflicting.[97] The better practice, however, is to bring together all instructions bearing on the same question.[98]

23. ARGUMENTATIVE INSTRUCTIONS. Argumentative instructions when requested are properly refused, and the giving of such instructions, when prejudicial to the accused, is error.[99]

24. CONFUSING, MISLEADING, OR CONTRADICTORY INSTRUCTIONS — a. In General. An instruction or requested instruction is bad and should not be given where it requires explanation or qualification,[1] or limits the freedom of the jury in consid-

89. State *v.* Davis, 48 Kan. 1, 28 Pac. 1092.

90. State *v.* McCombs, 13 Iowa 426; State *v.* Buffington, 20 Kan. 599, 27 Am. Rep. 193.

91. White *v.* State, 26 Fla. 602, 7 So. 857; Burroughs *v.* State, 17 Fla. 643; Baker *v.* State, 17 Fla. 406; Coleman *v.* State, 17 Fla. 206.

92. Denmark *v.* State, 43 Fla. 182, 31 So. 269.

93. Pearce *v.* State, 115 Ala. 115, 22 So. 502; Washington *v.* State, 106 Ala. 58, 17 So. 546; Reeves *v.* State, 95 Ala. 31, 11 So. 158; Redus *v.* State, 82 Ala. 53, 2 So. 713; Duffin *v.* People, 107 Ill. 113, 47 Am. Rep. 431; Territory *v.* Baker, 4 N. M. 117, 13 Pac. 30.

A failure to mark a requested instruction "Given" is not error if the record shows that the accused had the benefit of it. Tobin *v.* People, 101 Ill. 121; Daxanbeklar *v.* People, 93 Ill. App. 553.

Instructions should not be marked as given for either party, but should go to the jury as the instructions of the court. Aneals *v.* People, 134 Ill. 401, 25 N. E. 1022.

94. Territory *v.* Cordova, (N. M. 1902) 68 Pac. 919.

95. Sargent *v.* State, 35 Tex. Cr. 325, 33 S. W. 364.

96. Smith *v.* State, 103 Ala. 40, 16 So. 12. *Compare* Scott *v.* State, 37 Ala. 117, holding that a charge that the jury were to consider the written with the oral charges already given as the law is not erroneous.

97. State *v.* Shadwell, 22 Mont. 559, 57 Pac. 281.

98. Harrington *v.* People, 90 Ill. App. 456.

99. *Alabama.*— Willis *v.* State, 134 Ala. 429, 33 So. 226; Hogan *v.* State, 130 Ala. 104, 30 So. 358; Hall *v.* State, 130 Ala. 45, 30 So. 422; Mitchell *v.* State, 129 Ala. 23, 30 So. 348; Barker *v.* State, 126 Ala. 83, 28 So. 589; Gilmore *v.* State, 126 Ala. 20, 28 So. 595; Thompson *v.* State, 122 Ala. 12, 26 So. 141; Murphy *v.* State, 55 Ala. 252.

Arkansas.— Bolling *v.* State, 54 Ark. 588, 10 S. W. 658.

California.— People *v.* McNamara, 94 Cal. 509, 29 Pac. 953.

Georgia.— Thomas *v.* State, 95 Ga. 484, 22 S. E. 315; Miles *v.* State, 93 Ga. 117, 19 S. E. 805, 44 Am. St. Rep. 140.

Illinois.— Burns *v.* People, 126 Ill. 282, 18 N. E. 550.

Louisiana.— State *v.* Porter, 35 La. Ann. 1159.

Michigan.— People *v.* Crawford, 48 Mich. 498, 12 N. W. 673.

Nebraska.— Chapman *v.* State, 61 Nebr. 888, 86 N. W. 907.

Vermont.— State *v.* Roberts, 63 Vt. 139, 21 Atl. 424.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1959, 1960.

Harmless error.— In Alabama an argumentative instruction is not cause for reversal if it contains a correct statement of the law. Balfwin *v.* State, 111 Ala. 11, 20 So. 528; Karr *v.* State, 106 Ala. 1, 17 So. 328.

The fact that an instruction gives a reason for a rule of law which it states does not make it sufficiently argumentative to constitute error. Carleton *v.* State, 43 Nebr. 373, 61 N. W. 699.

1. *Alabama.*—Hooper *v.* State, 106 Ala. 41, 17 So. 679; Wills *v.* State, 74 Ala. 21; Clifton *v.* State, 73 Ala. 473.

California.—People *v.* Strange, 61 Cal. 496.

Illinois.— Baxter *v.* People, 8 Ill. 368.

Indiana.— Dean *v.* State, 130 Ind. 237, 29 N. E. 911.

Iowa.— State *v.* Fleming, 86 Iowa 294, 53 N. W. 234.

ering the evidence,[2] or withdraws competent evidence from them,[3] or is ambiguous, obscure, or uncertain,[4] or unintelligible,[5] or meaningless,[6] or contradictory,[7] or likely to confuse,[8] or difficult to understand and calculated to mislead.[9] If a portion of a charge which is misleading is intelligible and correct when read in connection with another portion, there is no error.[10]

b. As to Duty of Jury. An instruction that it is not for the jury to say whether defendant did wrong or not, and that they are only to consider the wrong charged in the indictment, is misleading and erroneous;[11] and the same is true of an instruction that while the law seeks to punish the guilty and to check crime it never attempts to do so by punishing the innocent, or even "the reasonably doubtful innocent,"[12] and of an instruction that "the jury has no right to pardon any one for any offense whatever; and, if they are satisfied, beyond a reasonable doubt, that the defendant is guilty in manner and form as charged in the indictment, then it would be a gross violation of their duty as jurors to acquit him through sympathy or a spirit of condonation of his offense."[13]

c. As to Weight and Credibility of Evidence. An instruction which tells the jury that some part of the testimony of a witness may be corroborated by other portions,[14] or draws a distinction between evidence which the jurors may believe as men and evidence which they have a right to believe as jurors,[15] or permits them to base their verdict on what the court vaguely calls circumstances as distinct from the actual facts of the crime,[16] or tells them, without further explanation, that the law makes no distinction between circumstantial and positive evidence,[17] or permits them to found a verdict of acquittal upon a reasonable doubt as to the credibility of a witness,[18] or upon a disbelief of the evidence generally,[19] is misleading and erroneous.

Ohio.— Adams *v.* State, 29 Ohio St. 412.
See 14 Cent. Dig. tit. "Criminal Law," § 1961.

To remove its unfairness.— Croft *v.* State, 95 Ala. 3, 10 So. 517 [*following* Bain *v.* State, 74 Ala. 38]; Wicks *v.* State, 44 Ala. 398.

2. Cotton *v.* State, 31 Miss. 504.

3. Myers *v.* State, 97 Ga. 76, 25 S. E. 252.

4. Adams *v.* State, (Ala. 1902) 31 So. 851; People *v.* Barthleman, 120 Cal. 7, 52 Pac. 112; People *v.* Hobson, 17 Cal. 424; Dorsey *v.* Com., 17 S. W. 183, 13 Ky. L. Rep. 359; Arbuckle *v.* State, 80 Miss. 15, 31 So. 437.

5. Adams *v.* State, (Ala. 1902) 31 So. 851.

6. State *v.* Pettit, 119 Mo. 410, 24 S. W. 1014; State *v.* Hellekson, 13 S. D. 242, 83 N. W. 254.

7. Murmutt *v.* State, (Tex. Cr. App. 1902) 67 S. W. 508.

8. Wilson *v.* State, 128 Ala. 17, 29 So. 569; People *v.* Messersmith, 57 Cal. 575; State *v.* Ott, 49 Mo. 326.

9. *Alabama.*— Wallace *v.* State, 124 Ala. 87, 26 So. 932; Sims *v.* State, 120 Ala. 380, 25 So. 33; Washington *v.* State, 58 Ala. 355.
California.—People *v.* Huntington, 138 Cal. 261, 70 Pac. 284.
Illinois.— Gindrat *v.* People, 138 Ill. 103, 27 N. E. 1085; Sanders *v.* People, 124 Ill. 218, 16 N. E. 81.
Nevada.— State *v.* Simas, 25 Nev. 432, 62 Pac. 242.
Pennsylvania.— Pistorius *v.* Com., 84 Pa. St. 158.
Texas.—Patterson *v.* State, (Cr. App. 1901) 60 S. W. 557; Lawson *v.* State, (Cr. App. 1895) 32 S. W. 895.
Wisconsin.— Buel *v.* State, 104 Wis. 132, 80 N. W. 78.

[XIV, G, 24, a]

See 14 Cent. Dig. tit. "Criminal Law," § 1961.

Misleading instruction as to venue.— Shackleford *v.* State, 79 Ala. 26; Jones *v.* State, 54 Ark. 371, 15 S. W. 1026.

As to principals and accessaries.— State *v.* Payne, 6 Wash. 563, 34 Pac. 317.

As to nature and elements of offense or defense.— Parker *v.* People, 97 Ill. 32; Gregg *v.* People, 98 Ill. App. 170; State *v.* Donovan, 61 Iowa 369, 16 N. W. 206; Lawson *v.* State, (Tex. Cr. App. 1895) 32 S. W. 895.

Phraseology immaterial.— A charge which asserts a correct legal proposition applicable to the evidence is not error, although it may tend to mislead or be subject to criticism on account of its phraseology. Floyd *v.* State, 82 Ala. 16, 2 So. 683.

10. State *v.* Rathbun, 74 Conn. 524, 51 Atl. 540; Knight *v.* State, (Fla. 1902) 32 So. 110; Henry *v.* People, 198 Ill. 162, 65 N. E. 120.

11. Dryman *v.* State, 102 Ala. 130, 15 So. 433.

12. Shelby *v.* State, 97 Ala. 87, 11 So. 727.

13. Smith *v.* State, 55 Ark. 259, 18 S. W. 237.

14. People *v.* Hong Tong, 85 Cal. 171, 24 Pac. 726; State *v.* Anderson, 6 Ida. 706, 59 Pac. 180.

15. People *v.* Ammerman, 118 Cal. 23, 50 Pac. 15; State *v.* Pratt, 20 Iowa 267. See *supra*, XIV, G, 9, k.

16. Nail *v.* State, 70 Miss. 32, 11 So. 793.

17. Burt *v.* State, 72 Miss. 408, 16 So. 342, 48 Am. St. Rep. 563.

18. Shipp *v.* Com., 86 Va. 746, 10 S. E. 1065.

19. Koch *v.* State, 115 Ala. 99, 22 So. 471.

d. As to Burden of Proof and Reasonable Doubt. The instructions requested as to reasonable doubt and burden of proof are frequently confusing and misleading, and when they are so should always be refused.[20]

e. Inconsistent and Contradictory Instructions. When a general charge may be divided into two propositions, if either proposition, when separated, is not applicable to the evidence,[21] or if the two propositions are conflicting and irreconcilable, the charge is erroneous.[22] The practice of giving conflicting instructions, although not intended to be conflicting and leaving the jury to conjecture which of them is applicable to the facts, is not favorable to the correct administration of justice. The court should tell the jury the state of facts to which if proved the proposition of law announced is applicable.[23]

25. Giving Undue Prominence to Particular Matters. The court should be careful in charging the jury and stating the evidence not to give undue prominence to any phase or facts which the evidence tends to establish, but to leave the jury to determine its weight and importance.[24] It is therefore proper to refuse and generally error to give an instruction which singles out or emphasizes particular parts of the evidence or gives undue prominence to isolated facts,[25] or

20. *Alabama.*— Adams *v.* State, 133 Ala. 166, 31 So. 851; Stewart *v.* State, 133 Ala. 105, 31 So. 944; Wilson *v.* State, 128 Ala. 17, 29 So. 569; Johnson *v.* State, 102 Ala. 1, 16 So. 99; Ray *v.* State, 50 Ala. 104.

Arizona.— U. S. *v.* Romero, (1894) 35 Pac. 1059.

California.— People *v.* Carroll, 92 Cal. 568, 28 Pac. 600.

Florida.— McCoggle *v.* State, 41 Fla. 525, 26 So. 734.

Indiana.— Shenkenberger *v.* State, 154 Ind. 630, 57 N. E. 519.

Mississippi.— Browning *v.* State, 33 Miss. 47.

Oklahoma.—New *v.* Territory, 12 Okla. 172, 70 Pac. 198.

Virginia.— Horton *v.* Com., 99 Va. 848, 38 S. E. 184.

Wisconsin.— Butler *v.* State, 102 Wis. 364, 78 N. W. 590.

See 14 Cent. Dig. tit. "Criminal Law," § 1967. See also *supra*, XII, I, 2, c; XIV, G, 9.

21. Martin *v.* State, 47 Ala. 564.

22. *Alabama.*— Spivey *v.* State, 26 Ala. 90.

Idaho.— State *v.* Webb, 6 Ida. 428, 55 Pac. 892.

Illinois.— Palmer *v.* People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146.

Michigan.—Durant *v.* People, 13 Mich. 351.

Missouri.— State *v.* Moore, 168 Mo. 432, 68 S. W. 358.

Montana.— State *v.* Peel, 23 Mont. 358, 59 Pac. 169, 75 Am. St. Rep. 529.

Texas.— Criner *v.* State, 41 Tex. Cr. 290, 53 S. W. 873; Green *v.* State, 32 Tex. Cr. 298, 22 S. W. 1094.

See 14 Cent. Dig. tit. "Criminal Law," § 1968.

Illustrations.— A charge that affirmative testimony is entitled to more weight than negative, but that if other witnesses who were present stated that the acts were not done their testimony was entitled to equal weight with the affirmative evidence is erroneous, as being contradictory. Keith *v.* State, 49 Ark. 439, 5 S. W. 880. The same is true of a charge that "all men, sane or insane, act from motive," and if the accused "had no motive" it might be considered in support of his plea of insanity (Blume *v.* State, 154 Ind. 343, 56 N. E. 771), and of an instruction which tells the jury that "a mere preponderance of evidence would suffice to convict," and also states that "defendant's guilt must be proved beyond a reasonable doubt" (People *v.* Levalie, 6 N. Y. App. Div. 230, 39 N. Y. Suppl. 874). See also as to insanity Bolling *v.* State, 54 Ark. 588, 16 S. W. 658.

Conflicting theories of defense.— Instructions on all the states of facts assumed to exist by defendant, and on all the theories of the defense, although the theories are inconsistent, are not error. Hamlet *v.* Com., 5 S. W. 366, 9 Ky. L. Rep. 418; Carver *v.* State, 36 Tex. Cr. 552, 38 S. W. 183.

23. Clem *v.* State, 31 Ind. 480.

24. Durrett *v.* State, 62 Ala. 434.

25. *Alabama.*—Jacobi *v.* State, 133 Ala. 1, 32 So. 158; Willingham *v.* State, 130 Ala. 35, 30 So. 429; Vaughn *v.* State, 130 Ala. 18, 30 So. 669; Mitchell *v.* State, 129 Ala. 23, 30 So. 348; McLeroy *v.* State, 120 Ala. 274, 25 So. 247.

Arkansas.— Newton *v.* State, 37 Ark. 333.

California.— People *v.* Sanders, 114 Cal. 216, 46 Pac. 153; People *v.* Hawes, 98 Cal. 648, 33 Pac. 791.

Florida.— Mims *v.* State, 42 Fla. 199, 27 So. 865.

Georgia.— Brantley *v.* State, 115 Ga. 229, 41 S. E. 695; Holt *v.* State, 62 Ga. 314.

Illinois.— Coon *v.* People, 99 Ill. 368, 39 Am. Rep. 28; Logg *v.* People, 92 Ill. 598.

Indiana.— Wachstetter *v.* State, 99 Ind. 290, 50 Am. Rep. 94.

Iowa.— State *v.* Jackson, 103 Iowa 702, 73 N. W. 467.

Kentucky.— Com. *v.* Hourigan, 89 Ky. 305, 12 S. W. 550, 11 Ky. L. Rep. 509; Com. *v.* Delaney, 29 S. W. 616, 16 Ky. L. Rep. 509.

Massachusetts.— Com. *v.* Cosseboom, 155 Mass. 298, 29 N. E. 463.

Michigan.— People *v.* Clarke, 105 Mich. 169, 62 N. W. 1117.

which directs the attention of the jury to a particular fact among a great number of facts.[26] An instruction which singles out certain witnesses and makes an acquittal depend upon whether or not the jury believe them is error where the evidence is conflicting.[27] So the court cannot select a particular witness or class of witnesses and instruct that if the jury believe he or they wilfully testified falsely as to any material fact they may reject or distrust all their evidence.[28] An instruction, requested by the accused, which singles out the absence of one of several possible motives on his part for the commission of the crime,[29] or calls attention to the fact that possession of stolen property by him in larceny was open,[30] or selects any other fact which is favorable to him and charges specially thereon may properly be refused.[31]

26. Appeals to Sympathy or Prejudice — a. In General. An instruction telling the jury that the crime charged against defendant is a dastardly one,[32] or a very

Mississippi.— Prine *v.* State, 73 Miss. 838, 19 So. 711.

Missouri.— State *v.* Cantlin, 118 Mo. 100, 23 S. W. 1091.

Nevada.— State *v.* Buralli, (1903) 71 Pac. 532; State *v.* Ward, 19 Nev. 297, 10 Pac. 133.

North Carolina.— State *v.* Weathers, 98 N. C. 685, 4 S. E. 512.

Texas.— Lee *v.* State, (Cr. App. 1903) 72 S. W. 195; Preston *v.* State, 41 Tex. Cr. 300, 53 S. W. 127, 881; Smith *v.* State, (Cr. App. 1899) 49 S. W. 583; Long *v.* State, 1 Tex. App. 709.

West Virginia.— State *v.* Morrison, 49 W. Va. 210, 38 S. E. 481.

United States.— Bird *v.* U. S., 187 U. S. 118, 23 S. Ct. 42, 47 L. ed. 100.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1970, 1971.

Warning the jury.— The fact that the court repeats threats and declarations of the accused for the purpose of warning the jury against placing too much confidence in them as evidence is not giving such evidence undue prominence. People *v.* Neary, 104 Cal. 373, 37 Pac. 943.

Reasonable doubt.— A charge designating any particular branch of the case for the state and telling the jury that unless it is proved beyond a reasonable doubt they must acquit is erroneous, as a reasonable doubt must be on all the evidence and not on any particular fact. Wallace *v.* U. S., 18 App. Cas. (D. C.) 152; Mullins *v.* People, 110 Ill. 42.

The repetition of a correct statement of the law in the charge in several different instructions is not erroneous (Wheeler *v.* State, 158 Ind. 687, 63 N. E. 975; State *v.* McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599; Benson *v.* State, (Tex. Cr. App. 1902) 69 S. W. 165) if no question of law involved is given undue prominence (Bonner *v.* State, 29 Tex. App. 223, 15 S. W. 821).

26. *Alabama.*—Crawford *v.* State, 112 Ala. 1, 21 So. 214.

California.— People *v.* Reed, (1898) 52 Pac. 835.

Georgia.— Hodgkins *v.* State, 89 Ga. 761, 15 S. E. 695.

Illinois.— Obermark *v.* People, 24 Ill. App. 259.

Indiana.— Longnecker *v.* State, 22 Ind. 247.

Missouri.— State *v.* Rutherford, 152 Mo. 124, 53 S. W. 417; State *v.* Brandau, 76 Mo. App. 305.

New York.— People *v.* McCallam, 3 N. Y. Cr. 189.

Virginia.— Montgomery *v.* Com., 98 Va. 852, 37 S. E. 1.

Wisconsin.— Seiler *v.* State, 112 Wis. 293, 87 N. W. 1072.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1970, 1971.

Part of instruction in print.— An objection that the part of the instruction which made most strongly against defendant was in print while the rest was in writing is frivolous. State *v.* Kelly, 73 Mo. 608.

Underscoring words in an instruction is improper. State *v.* Cater, 100 Iowa 501, 69 N. W. 880.

27. Frost *v.* State, 124 Ala. 71, 27 So. 550; King *v.* State, 120 Ala. 329, 25 So. 178; State *v.* Shields, 110 N. C. 497, 14 S. E. 779; State *v.* Rogers, 93 N. C. 523.

Colored witnesses.— Where all the state's witnesses are colored and defendant's witnesses are white, it is not error to tell the jury that if they believe the black witnesses told the truth beyond a reasonable doubt it was their duty to convict on their evidence. Dolan *v.* State, 81 Ala. 11, 1 So. 707.

Protecting witness.— An instruction does not give undue weight to the evidence of a witness by protecting him from the unjust attack of counsel which was caused by an erroneous ruling of the court. State *v.* Whit, 50 N. C. 224, 72 Am. Dec. 533.

28. People *v.* Arlington, 131 Cal. 231, 63 Pac. 347; Waters *v.* People, 172 Ill. 367, 50 N. E. 148.

Mentioning a witness by name is not error where from the evidence it appears that he was impeached by proof of former perjury. Shaw *v.* State, 102 Ga. 660, 29 S. E. 477.

29. Coffin *v.* U. S., 162 U. S. 664, 16 S. Ct. 943, 40 L. ed. 1109.

30. Jefferson *v.* State, 110 Ala. 89, 20 So. 434; Elswick *v.* Com., 13 Bush (Ky.) 155.

31. Gilmore *v.* State, 126 Ala. 20, 28 So. 595; Hicks *v.* State, 123 Ala. 15, 26 So. 337; Williams *v.* State, 98 Ala. 52, 13 So. 333.

32. State *v.* McCarter, 98 N. C. 637, 4 S. E. 553.

serious one which should not escape punishment,[33] or which characterizes as an outrage a transaction with which the crime charged is connected,[34] is not necessarily error. But in so far as instructions criticize unfavorably the character of the defense offered, or of the evidence which is introduced to sustain it, they are erroneous.[35] Speaking in an instruction of the deceased in a trial for murder as the "victim" has been held to be error.[36] On the other hand an instruction which calls attention to the fact that defendant is a man of family and assumes that he has a good character from his age may properly be refused.[37] It is not error for the court to instruct the jury that the case is in the court by reason of a change of venue from another county.[38]

b. Pointing Out Duty to Jury. An instruction which, while properly stating the degree of proof required to convict, tells the jury that they will, if satisfied beyond a reasonable doubt, be derelict in their duty if they fail to convict, is not error.[39]

c. Public Opinion. It is not error to caution the jury not to be influenced by public opinion, whether for or against the accused, and to state to them that they have nothing to do with the pleasure or displeasure of the public.[40]

d. Admonition to Bystanders. An appeal or admonition to the spectators by the judge, under the solemn sanction of his oath, as a part of his charge, although irregular, is not error if it does not prejudice defendant in the minds of the jurors.[41]

e. Irrelevant Matters Not Prejudicial. An instruction containing observations by the court, unfavorable to the accused, absolutely irrelevant to any issue in the case, while improper because of the irrelevancy does not constitute reversible error, unless the statements mislead or tend to mislead the jury to the prejudice of defendant.[42]

27. Application to Issue or Evidence — a. General Rule. The sufficiency and correctness of instructions must be determined with reference to the evidence, and therefore a charge which asserts correctly an abstract principle of law, but is not applicable to the evidence, or which is based upon the assumption of the existence of material facts of which there is no evidence, should not be given.[43]

33. Com. *v.* Harris, 168 Pa. St. 619, 32 Atl. 92.

34. People *v.* Pool, 27 Cal. 572; MacDonald *v.* U. S., 63 Fed. 426, 12 C. C. A. 339.

35. State *v.* Hawley, 63 Conn. 47, 27 Atl. 417; State *v.* McDowell, 129 N. C. 523, 39 S. E. 840.

36. People *v.* Williams, 17 Cal. 142.

37. Young *v.* People, 193 Ill. 236, 61 N. E. 1104.

38. Stout *v.* State, 90 Ind. 1; Kemp *v.* State, 11 Tex. App. 174.

39. People *v.* Bowers, (Cal. 1888) 18 Pac. 660; State *v.* Fulkerson, 61 N. C. 233.

40. McTyier *v.* State, 91 Ga. 254, 18 S. E. 140; People *v.* Harper, 83 Mich. 273, 47 N. W. 221.

41. Bailey *v.* State, 70 Ga. 617, where, the court-room being crowded with ignorant colored people, the trial judge seized the occasion to correct the general idea prevalent that a man had a right to kill a person who applied scurrilous and defamatory epithets to him by stating that he wished to say to the jury and to the people out there that no words that a man can say to another, no menaces, no contemptuous gestures, etc., will reduce murder to manslaughter. See also Malone *v.* State, 49 Ga. 210.

42. Horn *v.* State, 102 Ala. 144, 15 So. 278.

43. *Alabama.*— Willis *v.* State, 134 Ala. 429, 33 So. 226; Jacobi *v.* State, 133 Ala. 1, 32 So. 158; Hall *v.* State, 130 Ala. 45, 30 So. 422; Wilson *v.* State, 128 Ala. 17, 29 So. 569; Ragland *v.* State, 125 Ala. 12, 27 So. 983; Frost *v.* State, 124 Ala. 71, 27 So. 550; Thomas *v.* State, 124 Ala. 48, 27 So. 315; Scroggins *v.* State, 120 Ala. 369, 25 So. 180; Crane *v.* State, 111 Ala. 45, 20 So. 590; Murray *v.* State, 18 Ala. 727.

Arkansas.— Beavers *v.* State, 54 Ark. 336, 15 S. W. 1040; Harris *v.* State, 34 Ark. 469.

California.— People *v.* Ward, 134 Cal. 301, 66 Pac. 372; People *v.* Ross, 134 Cal. 256, 66 Pac. 229; People *v.* Brown, 130 Cal. 591, 62 Pac. 1072; People *v.* Matthews, (1899) 58 Pac. 371; People *v.* Bird, 60 Cal. 7; People *v.* Juarez, 28 Cal. 380; People *v.* Hurley, 8 Cal. 390.

District of Columbia.— U. S. *v.* Lee, 4 Mackey 489, 54 Am. Rep. 293.

Florida.— Kelly *v.* State, (1902) 33 So. 235; Green *v.* State, 43 Fla. 556, 30 So. 656; Richard *v.* State, 42 Fla. 528, 29 So. 413; Wallace *v.* State, 41 Fla. 547, 26 So. 713; Barker *v.* State, 40 Fla. 178, 24 So. 69; Doyle *v.* State, 39 Fla. 155, 22 So. 272, 63 Am. St. Rep. 159; Gladden *v.* State, 12 Fla. 562.

Georgia.— Moore *v.* State, 114 Ga. 256, 40 S. E. 295; Pugh *v.* State, 114 Ga. 16, 39 S. E. 875; Suddeth *v.* State, 112 Ga. 407, 37 S. E.

b. Application to Issue. A charge, although correctly stating the law, which has no relation to any issue which has arisen in the case, may properly be refused.[44]

747; Gaines *v.* State, 99 Ga. 703, 26 S. E. 760; McCoy *v.* State, 15 Ga. 205.

Hawaii.— Provisional Government *v.* Caecires, 9 Hawaii 523.

Idaho.— People *v.* Ah Too, 2 Ida. (Hasb.) 44, 3 Pac. 10.

Illinois.— Lyman *v.* People, 198 Ill. 544, 64 N. E. 974; Johnson *v.* People, 197 Ill. 48, 64 N. E. 286; Schintz *v.* People, 178 Ill. 320, 52 N. E. 903; Birr *v.* People, 113 Ill. 645; Devlin *v.* People, 104 Ill. 504.

Indiana.— Braxton *v.* State, 157 Ind. 213, 61 N. E. 195; Brown *v.* State, 105 Ind. 385, 5 N. E. 900.

Iowa.— State *v.* Swallum, 111 Iowa 37, 82 N. W. 439; State *v.* Phipps, 95 Iowa 487, 64 N. W. 410; State *v.* Fraunburg, 40 Iowa 555.

Kansas.— State *v.* Goff, 62 Kan. 104, 61 Pac. 683 [*reversing* 10 Kan. App. 286, 61 Pac. 680]; State *v.* Medlicott, 9 Kan. 257; State *v.* Shew, 8 Kan. App. 679, 57 Pac. 137.

Kentucky.— Greer *v.* Com., 111 Ky. 93, 63 S. W. 443, 23 Ky. L. Rep. 489; Ritte *v.* Com., 18 B. Mon. 35; Philpot *v.* Com., 69 S. W. 959, 24 Ky. L. Rep. 757; Hines *v.* Com., 62 S. W. 732, 23 Ky. L. Rep. 119; Stovall *v.* Com., 62 S. W. 536, 23 Ky. L. Rep. 103; Com. *v.* Rudert, 109 Ky. 653, 60 S. W. 489, 22 Ky. L. Rep. 1308; Ross *v.* Com., (1900) 59 S. W. 28.

Louisiana.— State *v.* Tibbs, 48 La. Ann. 1278, 20 So. 735; State *v.* Beck, 41 La. Ann. 584, 6 So. 431; State *v.* Labuzon, 37 La. Ann. 489; State *v.* Ford, 37 La. Ann. 443.

Maine.— State *v.* Wilkinson, 76 Me. 317; State *v.* Hall, 39 Me. 107.

Massachusetts.— Com. *v.* Reid, 175 Mass. 325, 56 N. E. 617; Com. *v.* Cosseboom, 155 Mass. 298, 29 N. E. 463.

Michigan.— People *v.* Hillard, 119 Mich. 24, 77 N. W. 306; People *v.* Considine, 105 Mich. 149, 63 N. W. 196.

Minnesota.— State *v.* Staley, 14 Minn. 105.

Mississippi.— Saffold *v.* State, (1900) 26 So. 945; Wheeler *v.* State, 76 Miss. 265, 24 So. 310; Shubert *v.* State, 66 Miss. 446, 6 So. 238; Oliver *v.* State, 39 Miss. 526; Preston *v.* State, 25 Miss. 383.

Missouri.— State *v.* Obuchon, 159 Mo. 256, 60 S. W. 85; State *v.* Callaway, 154 Mo. 91, 55 S. W. 444; State *v.* Hudspeth, 150 Mo. 12, 51 S. W. 483; State *v.* Johnson, 111 Mo. 578, 20 S. W. 302; State *v.* Primm, 98 Mo. 368, 11 S. W. 732; State *v.* Tice, 90 Mo. 112, 2 S. W. 269; State *v.* Brady, 87 Mo. 142; State *v.* Wilforth, 74 Mo. 528, 41 Am. Rep. 330; State *v.* Houser, 28 Mo. 233.

Nebraska.—Reed *v.* State, (1902) 92 N. W. 321; Rhea *v.* State, 63 Nebr. 461, 88 N. W. 789; Thompson *v.* State, 61 Nebr. 210, 85 N. W. 62, 87 Am. St. Rep. 453; Chezem *v.* State, 56 Nebr. 496, 76 N. W. 1056; Walrath *v.* State, 8 Nebr. 80; Caw *v.* People, 3 Nebr. 357.

Nevada.— State *v.* Douglas, 26 Nev. 196, 65 Pac. 802; State *v.* Ah Loi, 5 Nev. 99.

New Mexico.— Territory *v.* Claypool, (1903) 71 Pac. 463; Thomason *v.* Territory, 4 N. M. 150, 13 Pac. 223.

New York.— People *v.* Zachello, 168 N. Y. 35, 60 N. E. 1051; People *v.* De Graff, 6 N. Y. St. 412; People *v.* McCallam, 3 N. Y. Cr. 189; People *v.* Cunningham, 1 Den. 524, 43 Am. Dec. 709.

North Carolina.— State *v.* Lambert, 93 N. C. 618; State *v.* Murph, 60 N. C. 129; State *v.* Sizemore, 52 N. C. 206; State *v.* Rash, 34 N. C. 382, 54 Am. Dec. 420.

Ohio.— Breese *v.* State, 12 Ohio St. 146, 80 Am. Dec. 340; Lewis *v.* State, 4 Ohio 389.

Oklahoma.— New *v.* Territory, 12 Okla. 172, 70 Pac. 198; Kirk *v.* Territory, 10 Okla. 46, 60 Pac. 797.

Oregon.— State *v.* Bichard, 35 Oreg. 484, 59 Pac. 468; State *v.* Glass, 5 Oreg. 73.

South Carolina.— State *v.* Petsch, 43 S. C. 132, 20 S. E. 993.

Tennessee.— Johnson *v.* State, 100 Tenn. 254, 45 S. W. 436; Leach *v.* State, 99 Tenn. 584, 42 S. W. 195; Crabtree *v.* State, 1 Lea 267; Croft *v.* State, 6 Humphr. 317.

Texas.— Jones *v.* State, 13 Tex. 168, 62 Am. Dec. 550; Burns *v.* State, (Cr. App. 1903) 71 S. W. 965; Galloway *v.* State, (Cr. App. 1902) 70 S. W. 211; Stokes *v.* State, (Cr. App. 1902) 70 S. W. 95; Thomas *v.* State, (Cr. App. 1902) 70 S. W. 93; Randell *v.* State, (Cr. App. 1901) 64 S. W. 255; Garcia *v.* State, (Cr. App. 1901) 61 S. W. 122; Bailey *v.* State, 42 Tex. Cr. 289, 59 S. W. 900; Gann *v.* State, (Cr. App. 1900) 59 S. W. 896; Castlin *v.* State, (Cr. App. 1900) 57 S. W. 827; Jessel *v.* State, 42 Tex. Cr. 72, 57 S. W. 826; Meyer *v.* State, (Cr. App. 1899) 49 S. W. 600; Ransom *v.* State, (Cr. App. 1899) 49 S. W. 582; Wash *v.* State, (Cr. App. 1898) 47 S. W. 469; Ross *v.* State, 10 Tex. App. 455, 38 Am. Rep. 643; Pugh *v.* State, 2 Tex. App. 539.

Virginia.— Hill *v.* Com., 88 Va. 633, 14 S. E. 330, 29 Am. St. Rep. 744.

Washington.— Miller *v.* Territory, 3 Wash. Terr. 554, 19 Pac. 50; Yelm Jim *v.* Territory, 1 Wash. Terr. 63.

West Virginia.— State *v.* Prater, 52 W. Va. 132, 43 S. E. 230; State *v.* Dickey, 46 W. Va. 319, 33 S. E. 231; State *v.* Thompson, 21 W. Va. 741; State *v.* Abbott, 8 W. Va. 741.

Wisconsin.— Firmeis *v.* State, 61 Wis. 140, 20 N. W. 663; State *v.* Downer, 21 Wis. 274.

United States.— Bird *v.* U. S., 187 U. S. 118, 23 S. Ct. 42, 47 L. ed. 100.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1979, 1985.

44. *Alabama.*— Crittenden *v.* State, 134 Ala. 145, 32 So. 273; Mitchell *v.* State, 129 Ala. 23, 30 So. 348.

California.—People *v.* Huntington, 138 Cal. 261, 70 Pac. 284; People *v.* McFarlane, 134

c. Credibility of Supporting Evidence. It is proper to refuse an instruction not based on any evidence, but it should be given if there is any evidence, although slight, which will authorize the jury to find upon it, although in the opinion of the trial court it may be weak, inconclusive, and unworthy of belief.[45] The court is not justified in refusing to charge on defendant's theory of the case because it does not believe the evidence which supports it.[46] If there is a conflict between the evidence on which the instruction is desired and other evidence, it is for the jury to reconcile.[47]

d. Ignoring Evidence. The court should not give an instruction ignoring material evidence or attempting to withdraw it from the consideration of the jury, or to divert their attention from it.[48]

Cal. 618, 66 Pac. 865; People *v.* Tapia, 131 Cal. 647, 63 Pac. 1001.

Colorado.— Thompson *v.* People, 26 Colo. 496, 59 Pac. 51.

Georgia.—Studstill *v.* Murrell, 115 Ga. 851, 42 S. E. 250; Myers *v.* State, 97 Ga. 76, 25 S. E. 252.

Kentucky.— Philpot *v.* Com., 69 S. W. 959, 24 Ky. L. Rep. 757.

Nebraska.— Strong *v.* State, 63 Nebr. 440, 88 N. W. 772.

Texas.— Lee *v.* State, (Cr. App. 1903) 72 S. W. 195; Turner *v.* State, (Cr. App. 1903) 72 S. W. 187; Terry *v.* State, (Cr. App. 1901) 66 S. W. 451; Benavides *v.* State, (Cr. App. 1901) 61 S. W. 125; Wilson *v.* State, (Cr. App. 1900) 55 S. W. 489; Nite *v.* State, 41 Tex. Cr. 340, 54 S. W. 763; Prewett *v.* State, 41 Tex. Cr. 262, 53 S. W. 879; Griffin *v.* State, (Cr. App. 1899) 53 S. W. 848; Unsell *v.* State, (Cr. App. 1898) 45 S. W. 902; Edwards *v.* State, (Cr. App. 1897) 38 S. W. 779; Miller *v.* State, (App. 1892) 18 S. W. 197; Powell *v.* State, 12 Tex. App. 238.

See 14 Cent. Dig. tit. "Criminal Law," § 1980.

Insanity.— Where a statute provides that the defense of insanity shall be set up and shall be triable by special plea only, and the jury shall return a special verdict, a charge on insanity is improper if the defense is not set up as required. Perry *v.* State, 87 Ala. 30, 6 So. 425. *Compare* Conway *v.* State, 118 Ind. 482, 21 N. E. 285.

45. *Alabama.*— Miller *v.* State, 54 Ala. 155; Gilliam *v.* State, 50 Ala. 145.

Georgia.— Dixon *v.* State, 116 Ga. 186, 42 S. E. 357.

Indiana.— Wheeler *v.* State, 158 Ind. 687, 63 N. E. 975: Harris *v.* State, 155 Ind. 265, 58 N. E. 75.

Kansas.— State *v.* Newman, 57 Kan. 705, 47 Pac. 881.

Texas.— Ladwig *v.* State, 40 Tex. Cr. 585, 51 S. W. 390; Hayes *v.* State, (Cr. App. 1897) 39 S. W. 106; Jones *v.* State, 33 Tex. Cr. 492, 26 S. W. 1082, 47 Am. St. Rep. 46; Laurence *v.* State, 10 Tex. App. 495; Brown *v.* State, 9 Tex. App. 81.

See 14 Cent. Dig. tit. "Criminal Law," § 1983.

To justify an instruction, the theory to which it is applicable must arise fairly and naturally from the evidence. Reynolds *v.* State, 8 Tex. App. 493. If the evidence is so inconsistent with the theory and its connection so slight that the court may set aside the verdict, there should be no charge on it. Odle *v.* State, 13 Tex. App. 612.

46. State *v.* Thompson, 45 La. Ann. 969, 13 So. 392; State *v.* Wright, 40 La. Ann. 589, 4 So. 486 [*following* State *v.* Tucker, 38 La. Ann. 536]; Parker *v.* State, (Tex. Cr. App. 1896) 34 S. W. 265; Jones *v.* State, 33 Tex. Cr. 492, 26 S. W. 1082, 47 Am. St. Rep. 46; Rutherford *v.* State, 15 Tex. App. 236.

Instruction based on defendant's testimony.— The defendant is entitled to instructions predicated on his own testimony (State *v.* Anderson, 86 Mo. 309), although it be contradictory (State *v.* Partlow, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31), and although it may appear incredible to the court (People *v.* Keefer, 65 Cal. 232, 3 Pac. 818; State *v.* Fredericks, 136 Mo. 51, 37 S. W. 832). If, however, his evidence is at variance with the physical facts and the testimony of all the witnesses, the court does not err in refusing instructions thereon. State *v.* Pollard, 139 Mo. 220, 40 S. W. 949. It is not error for the court to refuse to charge on facts which appear only from defendant's declarations out of court (Smith *v.* State, (Tex. Cr. App. 1894) 25 S. W. 20), or which appear in his statements not under oath, but permitted by the statute (Darbey *v.* State, 79 Ga. 63, 3 S. E. 663).

47. Sisk *v.* State, 9 Tex. App. 246; Wasson *v.* State, 3 Tex. App. 474.

48. *Alabama.*— Crittenden *v.* State, 134 Ala. 145, 32 So. 273; Mitchell *v.* State, 133 Ala. 65, 32 So. 132; Cox *v.* State, 99 Ala. 162, 13 So. 556; Gilyard *v.* State, 98 Ala. 59, 13 So. 391.

Georgia.— Smith *v.* State, 109 Ga. 479, 35 S. E. 59; Epps *v.* State, 19 Ga. 102.

Illinois.— Scott *v.* People, 141 Ill. 195, 30 N. E. 329.

Indiana.— Burke *v.* State, 72 Ind. 392.

Massachusetts.— Com. *v.* Broadbeck, 124 Mass. 319.

Mississippi.— Oliver *v.* State, 39 Miss. 526.

New York.— People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188.

Pennsylvania.— Com. *v.* McMahon, 145 Pa. St. 413, 22 Atl. 971.

Texas.— Cage *v.* State, (Cr. App. 1900) 55 S. W. 63; Bennett *v.* State, 40 Tex. Cr. 445, 50 S. W. 946.

e. Application to Evidence. Where the court charges correctly on the rules of law in the abstract, it is error to refuse, on request, an instruction which will apply these rules to the facts;[49] and usually the instructions should be framed as far as possible to apply to the particular facts of the case.[50]

28. Construction and Correction — a. Construction of Instructions. An instruction must be construed with reference to the evidence on which it is based;[51] regard is to be had to the connection and interdependence of its several clauses;[52] and words are to be construed in connection with that portion of the charge from which they are taken.[53] Where instructions state the law with substantial accuracy, and are otherwise unobjectionable, a new trial will not be granted because of verbal omissions,[54] mistakes in punctuation,[55] or slight verbal inaccuracies which do not prejudice the accused.[56] The instructions must be considered by the jury in their entirety, and not by isolated paragraphs. Hence the fact that an instruction when taken from its context is incomplete, erroneous, or misleading will not justify granting a new trial, where the instructions taken as a whole are substantially correct.[57] A general proposition of law correctly stated

United States.— Bird *v.* U. S., 180 U. S. 356, 21 S. Ct. 403, 45 L. ed. 570.

See 14 Cent. Dig. tit. "Criminal Law," § 1986.

Alibi.— To ignore the defense of alibi in a charge is error. Ledford *v.* State, 75 Ga. 856; State *v.* Abbott, 65 Kan. 139, 69 Pac. 160.

Delusions.— A statement by the court, commenting on evidence, that there has been no testimony by a physician as to defendant's delusions is reversible error, as tending to lessen the weight of the testimony of a physician who had testified on that point. People *v.* Nino, 149 N. Y. 317, 43 N. E. 853.

Larceny.— To omit to charge that ownership must be proved is error. Corbett *v.* State, 31 Ala. 329.

Venue.—A charge pretermitting all inquiry as to venue is erroneous. Collier *v.* State, 69 Ala. 247; Gooden *v.* State, 55 Ala. 178; Salomon *v.* State, 27 Ala. 26; State *v.* Igo, 108 Mo. 568, 18 S. W. 923.

49. Roberts *v.* State, 114 Ga. 450, 40 S. E. 297; Davis *v.* State, 152 Ind. 34, 51 N. E. 928, 71 Am. St. Rep. 322; Puryear *v.* State, 28 Tex. App. 73, 11 S. W. 929; Knowles *v.* State, 27 Tex. App. 503, 11 S. W. 522; Miles *v.* State, 1 Tex. App. 510. And see Armstrong *v.* State, 33 Tex. Cr. 417, 26 S. W. 829.

50. Braswell *v.* State, 1 Ky. L. Rep. 285.

Statement of theories of parties.— Instructions should be applied to the respective theories contended for by the parties rather than stated in the form of general propositions. Gerdine *v.* State, 64 Miss. 798, 2 So. 313; Lamar *v.* State, 64 Miss. 428, 1 So. 354.

The applicability of a charge is tested by the pleadings and evidence. The object of a charge is to enable the jury to adduce the proper conclusion from the evidence, and to accomplish this it should be confined and adapted to the facts in proof. Berry *v.* State, 8 Tex. App. 515.

It is unnecessary to charge as to an exception where there is no evidence with respect to it. State *v.* Downer, 21 Wis. 274.

51. People *v.* Scott, 6 Mich. 287; Peck *v.* State, 9 Tex. App. 70.

52. Hardin *v.* State, 8 Tex. App. 653.

53. Com. *v.* Washington, 202 Pa. St. 148, 51 Atl. 759.

54. Rollins *v.* State, 62 Ind. 46; State *v.* Umfried, 76 Mo. 404; McCormick *v.* State, (Nebr. 1903) 92 N. W. 606; Spencer *v.* State, 34 Tex. Cr. 65, 29 S. W. 159; Arrington *v.* State, (Tex. Cr. App. 1893) 20 S. W. 927; Hill *v.* State, 11 Tex. App. 456.

55. Painter *v.* People, 147 Ill. 444, 35 N. E. 64.

56. *California.*— People *v.* Dole, (1898) 51 Pac. 945.

Georgia.— Tucker *v.* State, 114 Ga. 61, 39 S. E. 926; Huffman *v.* State, 95 Ga. 469, 20 S. E. 216.

Illinois.— Leigh *v.* People, 113 Ill. 372.

Mississippi.— Palmer *v.* State, (1895) 18 So. 269; Oliver *v.* State, 39 Miss. 526.

Nebraska.— Carrall *v.* State, 53 Nebr. 431, 73 N. W. 939.

Texas.— Hutcherson *v.* State, (Cr. App. 1896) 35 S. W. 376; Callicoatte *v.* State, (Cr. App. 1893) 22 S. W. 1041.

Washington.— State *v.* Carter, 15 Wash. 121, 45 Pac. 745.

See 14 Cent. Dig. tit. "Criminal Law," § 1989.

Illustrations.— The substitution of "and" for "or" (State *v.* Minneapolis, etc., R. Co., 88 Iowa 689, 56 N. W. 400), of "may" for "must" (State *v.* Tobie, 141 Mo. 547, 42 S. W. 1076; State *v.* Wilson, 9 Wash. 16, 36 Pac. 967), or of "ought" for "must" in an instruction is not error where the meaning is clear (Jackson *v.* State, 32 Tex. Cr. 192, 22 S. W. 831). But an instruction which transposes the words "acquit" and "convict" (Cummings *v.* State, 50 Nebr. 274, 69 N. W. 756), or which speaks of "express malice" where it is apparent the words meant to be used were "implied malice" is erroneous (Pickett *v.* State, 12 Tex. App. 86).

57. *Alabama.*— Williams *v.* State, 83 Ala. 68, 3 So. 743; Johnson *v.* State, 81 Ala. 54, 1 So. 573.

Arizona.— U. S. *v.* Christofferson, (1886) 11 Pac. 480; U. S. *v.* Tenney, (1886) 11 Pac. 472.

in one instruction and applicable to all the evidence in the case need not be repeated in each subsequent instruction.[58]

California.— People *v.* Emerson, 130 Cal. 562, 62 Pac. 1069; People *v.* Armstrong, 114 Cal. 570, 46 Pac. 611; People *v.* Morine, 61 Cal. 367; People *v.* Cleveland, 49 Cal. 577.

Colorado.— Kelly *v.* People, 17 Colo. 130, 29 Pac. 805; Kent *v.* People, 8 Colo. 563, 9 Pac. 852.

Connecticut.— State *v.* Rathbun, 74 Conn. 524, 51 Atl. 540; State *v.* Morris, 47 Conn. 179. See also State *v.* Coffee, 56 Conn. 399, 16 Atl. 151.

District of Columbia.— Lehman *v.* District of Columbia, 19 App. Cas. 217.

Florida.— Richard *v.* State, 42 Fla. 528, 29 So. 413; Pinson *v.* State, 28 Fla. 735, 9 So. 706.

Georgia.— Knight *v.* State, 114 Ga. 48, 39 S. E. 928, 88 Am. St. Rep. 17; Hays *v.* State, 114 Ga. 25, 40 S. E. 13; Wilson *v.* State, 69 Ga. 224.

Idaho.— Territory *v.* Evans, 2 Ida. (Hasb.) 425, 17 Pac. 139; People *v.* Bernard, 2 Ida. (Hasb.) 193, 10 Pac. 30.

Illinois.— Henry *v.* People, 198 Ill. 162, 65 N. E. 120; Howard *v.* People, 185 Ill. 552, 57 N. E. 441; Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Kennedy *v.* People, 40 Ill. 488.

Indiana.— Musser *v.* State, 157 Ind. 423, 61 N. E. 1; Hutchins *v.* State, 151 Ind. 667, 52 N. E. 403; McIntosh *v.* State, 151 Ind. 251, 51 N. E. 354; Boyle *v.* State, 105 Ind. 469, 5 N. E. 203, 55 Am. St. Rep. 218; Story *v.* State, 99 Ind. 413; Colee *v.* State, 75 Ind. 511; Cromer *v.* State, 21 Ind. App. 502, 52 N. E. 239.

Iowa.— State *v.* Phillips, 118 Iowa 660, 92 N. W. 876; State *v.* Steffens, 116 Iowa 227, 89 N. W. 974; State *v.* Urie, 101 Iowa 411, 70 N. W. 603; State *v.* Pierce, 65 Iowa 85, 21 N. W. 195; State *v.* Maloy, 44 Iowa 104.

Kansas.— State *v.* Fox, (App. 1900) 62 Pac. 727; State *v.* Nimrick, (App. 1899) 57 Pac. 555.

Kentucky.— Welch *v.* Com., 110 Ky. 105, 60 S. W. 185, 948, 1118, 63 S. W. 984, 64 S. W. 262, 23 Ky. L. Rep. 151; Sugg *v.* Com., 6 Ky. L. Rep. 50; Baldin *v.* Com., 2 Ky. L. Rep. 439; —— *v.* Com., 2 Ky. L. Rep. 321.

Louisiana.— State *v.* Ferguson, 37 La. Ann. 51.

Massachusetts.—Com. *v.* O'Brien, 172 Mass. 248, 52 N. E. 77.

Michigan.— People *v.* Ricketts, 108 Mich. 584, 66 N. W. 483; Mahoney *v.* People, 43 Mich. 39, 4 N. W. 546.

Mississippi.— Barr *v.* State, (1897) 21 So. 131; Skates *v.* State, 64 Miss. 644, 1 So. 843, 60 Am. Rep. 70; Evans *v.* State, 44 Miss. 762.

Missouri.— State *v.* Dent, 170 Mo. 398, 70 S. W. 881; State *v.* Miller, 159 Mo. 113, 60 S. W. 67; State *v.* Wilcox, 111 Mo. 569, 20 S. W. 314, 33 Am. St. Rep. 551; State *v.* McClure, 25 Mo. 338.

Montana.— State *v.* Whorton, 25 Mont. 11, 63 Pac. 627.

Nebraska.— Savary *v.* State, 62 Nebr. 166, 87 N. W. 34; Dunn *v.* State, 58 Nebr. 807, 79 N. W. 719; Philamalee *v.* State, 58 Nebr. 320, 78 N. W. 625; Carrall *v.* State, 53 Nebr. 431, 73 N. W. 939; Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744; St. Louis *v.* State, 8 Nebr. 405, 1 N. W. 371.

Nevada.— State *v.* Pritchard, 15 Nev. 74.

New Mexico.— Faulkner *v.* Territory, 6 N. M. 464, 30 Pac. 905.

New York.— People *v.* Dimick, 107 N. Y. 13, 14 N. E. 178; People *v.* Williams, 92 Hun 354, 36 N. Y. Suppl. 511; Remsen *v.* People, 57 Barb. 324.

North Carolina.— State *v.* Jones, 67 N. C. 285.

Oregon.— State *v.* Savage, 36 Oreg. 191, 60 Pac. 610, 61 Pac. 1128.

Pennsylvania.— Com. *v.* Zappe, 153 Pa. St. 498, 26 Atl. 16; Com. *v.* Pannel, 9 Lanc. Bar 82.

South Carolina.— State *v.* Lee, 58 S. C. 335, 36 S. E. 706; State *v.* Banister, 35 S. C. 290, 14 S. E. 678.

South Dakota.— State *v.* Brennan, 2 S. D. 384, 50 N. W. 625.

Texas.— Morgan *v.* State, 41 Tex. Cr. 102, 51 S. W. 902; Jackson *v.* State, (Cr. App. 1899) 51 S. W. 389; Harrell *v.* State, 39 Tex. Cr. 204, 45 S. W. 581; Thrasher *v.* State, 3 Tex. App. 281; Browning *v.* State, 1 Tex. App. 96.

Utah.— State *v.* Williamson, 22 Utah 248, 62 Pac. 1022, 83 Am. St. Rep. 780; State *v.* McCoy, 15 Utah 136, 49 Pac. 420.

Vermont.— State *v.* Smith, 72 Vt. 366, 48 Atl. 647.

Virginia.— Longley *v.* Com., 99 Va. 807, 37 S. E. 339.

West Virginia.— State *v.* Cottrill, 52 W. Va. 363, 43 S. E. 244.

Wisconsin.— Murphy *v.* State, 108 Wis. 111, 83 N. W. 1112.

Wyoming.— Downing *v.* State, (1902) 70 Pac. 833; Roberts *v.* State, (1902) 70 Pac. 803; Ross *v.* State, 8 Wyo. 351, 57 Pac. 924.

United States.— Peters *v.* U. S., 94 Fed. 127, 36 C. C. A. 105.

See 14 Cent. Dig. tit. "Criminal Law," § 1990.

58. *California.*— People *v.* Flynn, 73 Cal. 511, 15 Pac. 102.

Colorado.— Boykin *v.* People, 22 Colo. 496, 54 Pac. 419.

Georgia.— Hays *v.* State, 114 Ga. 25, 40 S. E. 13; Keys *v.* State, 112 Ga. 392, 37 S. E. 762, 81 Am. St. Rep. 63.

Illinois.— Padfield *v.* People, 146 Ill. 660, 35 N. E. 469.

Kansas.— State *v.* Kearley, 26 Kan. 77.

Missouri.— State *v.* Weeden, 133 Mo. 70, 34 S. W. 473.

Nebraska.— Carr *v.* State, 23 Nebr. 749, 37 N. W. 630; Olive *v.* State, 11 Nebr. 1, 7 N. W. 444.

b. Errors Cured by Subsequent Instructions — (i) *Requests Refused and Instructions Omitted.* An erroneous refusal to give an instruction requested is cured by the court subsequently giving in substance the instruction requested;[59] and where the instructions as given are incomplete the defects may be supplied by giving supplementary instructions.[60] If the jury have retired they may be recalled for the purpose of giving them an instruction previously refused or omitted.[61]

(ii) *Incorrect Statement of Law.* An instruction which states the law incompletely, or so as to confuse or mislead the jury, or even incorrectly in part, is cured by a subsequent statement of the judge, fully, correctly, and clearly giving the law, when it appears that no substantial right of defendant was prejudiced by the incomplete or partially incorrect instruction.[62] On the other hand

New Jersey.— Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811.

Texas.—Cauthern *v.* State, (Cr. App. 1901) 65 S. W. 96; Reid *v.* State, (Cr. App. 1900) 57 S. W. 662.

See 14 Cent. Dig. tit. "Criminal Law," § 1991.

For example it is not necessary to state in each instruction all the exceptions, limitations, and conditions applicable to the law contained therein, if they are properly stated somewhere in the instructions taken as a whole. People *v.* Welch, 49 Cal. 174.

Reasonable doubt.—A charge on reasonable doubt, as to the whole case and on all the evidence, is sufficient. It is not incumbent upon the court to carve the case or the evidence into different propositions, and in the charge apply the rule of reasonable doubt to each separately.

Georgia.— Carr *v.* State, 84 Ga. 250, 10 S. E. 626; Vann *v.* State, 83 Ga. 44, 9 S. E. 945.

Indiana.— Deilks *v.* State, 141 Ind. 23, 40 N. E. 120; McCulley *v.* State, 62 Ind. 428; Jones *v.* State, 49 Ind. 549.

Kentucky.— Powers *v.* Com., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 22 Ky. L. Rep. 1807, 53 L. R. A. 245; McClernand *v.* Com., 12 S. W. 148, 11 Ky. L. Rep. 301; Davis *v.* Com., 4 Ky. L. Rep. 717.

Mississippi.— Skeen *v.* State, (1894) 16 So. 495.

Missouri.— State *v.* Rockett, 87 Mo. 666; State *v.* Cunningham, 13 Mo. App. 576.

Nebraska.— Dunn *v.* State, 58 Nebr. 807, 79 N. W. 719; Carleton *v.* State, 43 Nebr. 373, 61 N. W. 699.

South Carolina.— State *v.* Bodie, 33 S. C. 117, 11 S. E. 624.

Compare Rhea *v.* State, 100 Ala. 119, 14 So. 853.

59. People *v.* Turley, 50 Cal. 469; Davis *v.* State, 20 Ohio Cir. Ct. 430, 10 Ohio Cir. Dec. 738.

60. *Alabama.*— Cunningham *v.* State, 73 Ala. 51.

Georgia.— Rockmore *v.* State, 93 Ga. 123, 19 S. E. 32.

Illinois.— Dacey *v.* People, 116 Ill. 555, 6 N. E. 165; Gregg *v.* People, 98 Ill. App. 170. *Compare* Hoge *v.* People, 117 Ill. 35, 6 N. E. 796.

Indiana.— Smurr *v.* State, 88 Ind. 504; Colee *v.* State, 75 Ind. 511.

Kentucky.— Sugg *v.* Com., 6 Ky. L. Rep. 50.

Mississippi.— Skates *v.* State, 64 Miss. 644, 1 So. 843, 60 Am. Rep. 70.

Missouri.— State *v.* Gregory, 30 Mo. App. 582.

See 14 Cent. Dig. tit. "Criminal Law," § 1993.

61. Shepperd *v.* State, 94 Ala. 102, 10 So. 663; Booker *v.* State, 76 Ala. 22; Davis *v.* Com., 4 Ky. L. Rep. 717; State *v.* Lee, 58 S. C. 335, 36 S. E. 706; Monticue *v.* State, 40 Tex. Cr. 528, 51 S. W. 236.

62. *California.*— People *v.* Warren, 130 Cal. 678, 63 Pac. 87; People *v.* Moore, 8 Cal. 90.

Colorado.— Edwards *v.* People, 26 Colo. 539, 59 Pac. 56.

Florida.— Kennard *v.* State, 42 Fla. 581, 28 So. 858; Gray *v.* State, 42 Fla. 174, 28 So. 53; Johnston *v.* State, 29 Fla. 558, 10 So. 686.

Idaho.— State *v.* Corcoran, 7 Ida. 220, 61 Pac. 1034.

Indiana.— Randall *v.* State, 132 Ind. 539, 32 N. E. 305.

Iowa.— State *v.* Harris, 97 Iowa 407, 66 N. W. 728.

Kentucky.— Chandler *v.* Com., 41 S. W. 437, 19 Ky. L. Rep. 631.

Louisiana.— State *v.* Ardoin, 49 La. Ann. 1145, 22 So. 620, 62 Am. St. Rep. 678.

Mississippi.— Joslin *v.* State, 75 Miss. 838, 23 So. 515; Rodgers *v.* State, (1897) 21 So. 130.

Missouri.— State *v.* Goforth, 136 Mo. 111, 37 S. W. 801.

Nebraska.— Parsons *v.* State, 61 Nebr. 244, 85 N. W. 65.

New York.— People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730.

North Carolina.— State *v.* Brabham, 108 N. C. 793, 13 S. E. 217.

Pennsylvania.— Com. *v.* Woodley, 166 Pa. St. 463, 31 Atl. 202; Murray *v.* Com., 79 Pa. St. 311.

South Carolina.—State *v.* Stewart, 26 S. C. 125, 1 S. E. 468.

Texas.— Poteet *v.* State, (Cr. App. 1897) 43 S. W. 339; White *v.* State, 19 Tex. App. 343.

a palpable misstatement of the law in an instruction is not cured by a subsequent instruction which contradicts it and correctly states the law on that point, unless the incorrect instruction is expressly withdrawn from the jury.[63] When, however, an erroneous instruction is expressly admitted to be such, and is formally withdrawn from the consideration of the jury, and a correct instruction given, there is no ground for a new trial.[64]

(III) *CURING INVASION OF PROVINCE OF JURY.* It is well settled that in the federal courts the judge may express his opinion on the questions of fact which he submits to the jury when he further tells them that they are the sole judges of the weight of the evidence and the credibility of the witnesses;[65] and in a few

West Virginia.— State *v.* Prater, 52 W. Va. 132, 43 S. E. 230; State *v.* Hughes, 22 W. Va. 743.

Wisconsin.— Ryan *v.* State, 115 Wis. 488, 92 N. W. 271.

See 14 Cent. Dig. tit. "Criminal Law," § 1994; and *supra*, XIV, G, 28, b, (I).

Illustrations.— Thus an instruction casting the burden of proof on the accused (Towns *v.* State, 111 Ala. 1, 20 So. 598; People *v.* Chun Heong, 86 Cal. 329, 24 Pac. 1021; State *v.* Goforth, 136 Mo. 111, 37 S. W. 801. *Contra*, State *v.* Grinstead, 10 Kan. App. 74, 61 Pac. 975; State *v.* Anderson, 59 S. C. 229, 37 S. E. 820), or omitting to state that certain facts must be proved by the state beyond a reasonable doubt (Cook *v.* State, (Miss. 1900) 28 So. 833), is cured by a correct charge on the rule of reasonable doubt.

63. Where instructions on a material point are contradictory there is error, for it is almost always impossible to say that the jury has not followed the erroneous instruction rather than the correct one.

California.— People *v.* Ford, 138 Cal. 140, 70 Pac. 1075; People *v.* Westlake, 124 Cal. 452, 57 Pac. 465; People *v.* Marshall, 112 Cal. 422, 44 Pac. 718.

Colorado.— McNamara *v.* People, 24 Colo. 61, 48 Pac. 541; Mackey *v.* People, 2 Colo. 13.

Illinois.— Johnson *v.* People, 197 Ill. 48, 64 N. E. 286; Steinmeyer *v.* People, 95 Ill. 383.

Indiana.— Plummer *v.* State, 135 Ind. 308, 34 N. E. 968; Snyder *v.* State, 59 Ind. 105.

Iowa.— State *v.* Brundidge, 118 Iowa 92, 91 N. W. 920; State *v.* Clark, 102 Iowa 685, 72 N. W. 296.

Kansas.— Horne *v.* State, 1 Kan. 42, 81 Am. Dec. 409.

Kentucky.— Roberts *v.* Com., 90 Ky. 654, 14 S. W. 832, 12 Ky. L. Rep. 681.

Missouri.— State *v.* Tatlow, 136 Mo. 678, 38 S. W. 552; State *v.* Mitchell, 64 Mo. 191; State *v.* Davies, 80 Mo. App. 239; State *v.* Brumley, 53 Mo. App. 126.

Montana.— State *v.* McClellan, 23 Mont. 532, 59 Pac. 924, 75 Am. St. Rep. 558.

Nebraska.— Dobson *v.* State, 61 Nebr. 584, 85 N. W. 843; Howell *v.* State, 61 Nebr. 391, 85 N. W. 289; Thompson *v.* State, 61 Nebr. 210, 85 N. W. 62, 87 Am. St. Rep. 453; Sweenie *v.* State, 59 Nebr. 269, 80 N. W. 815; Bergeron *v.* State, 53 Nebr. 752, 74 N. W. 253; Henry *v.* State, 51 Nebr. 149, 70 N. W. 924, 66 Am. St. Rep. 450; Beck *v.* State, 51 Nebr. 106, 70 N. W. 498; Raker *v.* State, 50 Nebr. 202, 69 N. W. 749; Barr *v.* State, 45 Nebr. 458, 63 N. W. 856.

New Jersey.— Burnett *v.* State, 60 N. J. L. 255, 37 Atl. 622.

New York.— People *v.* Shanley, 49 N. Y. App. Div. 56, 63 N. Y. Suppl. 449, 14 N. Y. Cr. 477; People *v.* Hill, 65 Hun 420, 20 N. Y. Suppl. 187; People *v.* Hill, 49 Hun 432, 3 N. Y. Suppl. 564; People *v.* Terrell, 11 N. Y. Suppl. 364.

North Dakota.— State *v.* Young, 9 N. D. 165, 82 N. W. 420.

Pennsylvania.— Rice *v.* Olin, 79 Pa. St. 391; Murray *v.* Com., 79 Pa. St. 311; Com. *v.* Goldberg, 4 Pa. Super. Ct. 142.

South Dakota.— State *v.* Evans, 12 S. D. 473, 81 N. W. 893.

Texas.— White *v.* State, (Cr. App. 1902) 68 S. W. 689; Bibby *v.* State, (Cr. App. 1901) 65 S. W. 193; Simmons *v.* State, 31 Tex. Cr. 227, 20 S. W. 573; Johnson *v.* State, 29 Tex. App. 150, 15 S. W. 647.

Vermont.— State *v.* Fitzgerald, 72 Vt. 142, 47 Atl. 403; State *v.* Bradley, 64 Vt. 466, 24 Atl. 1053.

Wyoming.— Palmer *v.* State, 9 Wyo. 40, 59 Pac. 793, 87 Am. St. Rep. 910.

United States.— Mills *v.* U. S., 164 U. S. 644, 17 S. Ct. 210, 41 L. ed. 584.

See 14 Cent. Dig. tit. "Criminal Law," § 1994.

64. *Indiana.*— Buntin *v.* State, 68 Ind. 38.

Kansas.— State *v.* Wells, 54 Kan. 161, 37 Pac. 1005.

Louisiana.— State *v.* Jones, 36 La. Ann. 204.

Nebraska.—Reed *v.* State, (1902) 92 N. W. 321.

New York.— People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188.

North Carolina.— State *v.* May, 15 N. C. 328.

South Carolina.— State *v.* Lightsey, 43 S. C. 114, 20 S. E. 975.

Tennessee.— Green *v.* State, 97 Tenn. 50, 36 S. W. 700.

Texas.— Shackelford *v.* State, (Cr. App. 1899) 53 S. W. 884.

Compare People *v.* Chew Sing Wing, 88 Cal. 268, 25 Pac. 1099, where there was no express withdrawal.

See 14 Cent. Dig. tit. "Criminal Law," § 1992.

65. Parris *v.* U. S., 1 Indian Terr. 43, 35 S. W. 243; Ching *v.* U. S., 118 Fed. 538, 55 C. C. A. 304; Woodruff *v.* U. S., 58 Fed. 766. And see *supra*, XIV, F, 4, a, (I), (B).

of the state courts the same rule seems to obtain.[66] Most of the cases, however, repudiate this proposition and hold that an instruction which invades the province of the jury is not cured by a subsequent instruction of this character.[67]

H. Requests For Instructions — 1. Necessity For Request — a. In General. The practice as to giving instructions when no request is made is not uniform in the different states. The general rule seems to be that if defendant is not satisfied with the charge as delivered by the court, he should submit such instructions as he desires, with a request that they be given,[68] and if no request is made, the omission to give particular instructions is not reversible error, particularly when

66. Engle *v.* State, 50 N. J. L. 272, 13 Atl. 604; Sindram *v.* People, 88 N. Y. 196, 1 N. Y. Cr. 448; People *v.* Fanshawe, 65 Hun 77, 19 N. Y. Suppl. 865, 8 N. Y. Cr. 326; People *v.* Rogers, 13 Abb. Pr. N. S. (N. Y.) 370; People *v.* Druse, 5 N. Y. Cr. 10; People *v.* Carpenter, 4 N. Y. Cr. 39; Jefferds *v.* People, 5 Park. Cr. (N. Y.) 522; Done *v.* People, 5 Park. Cr. (N. Y.) 364; Conraddy *v.* People, 5 Park. Cr. (N. Y.) 234; Stephens *v.* People, 4 Park. Cr. (N. Y.) 396; People *v.* Quin, 1 Park. Cr. (N. Y.) 340; Johnson *v.* Com., 115 Pa. St. 369, 9 Atl. 78; White *v.* Territory, 1 Wash. 279, 24 Pac. 447.

67. *California.*— People *v.* Kindleberger, 100 Cal. 367, 24 Pac. 852. See also People *v.* Choy Ah Sing, 84 Cal. 276, 24 Pac. 379.

Colorado.— Fincher *v.* People, 26 Colo. 169, 56 Pac. 902.

Georgia.— Fletcher *v.* State, 90 Ga. 389, 17 S. E. 101.

Michigan.— People *v.* Lyons, 49 Mich. 78, 13 N. W. 365.

Nevada.— State *v.* Harkin, 7 Nev. 377.

North Dakota.— State *v.* Barry, 11 N. D. 428, 92 N. W. 809; Territory *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003.

Oregon.— State *v.* Hatcher, 29 Oreg. 309, 44 Pac. 584.

South Carolina.— State *v.* White, 15 S. C. 381.

Texas.— Johnson *v.* State, 1 Tex. App. 609.

United States.— Hopt *v.* Utah, 110 U. S. 574, 4 S. Ct. 202, 28 L. ed. 262, decided under Utah statute.

See 14 Cent. Dig. tit. "Criminal Law," § 1995.

68. *Alabama.*— Smith *v.* State, 118 Ala. 117, 24 So. 55.

Arkansas.— Lackey *v.* State, 67 Ark. 416, 55 S. W. 213; Holt *v.* State, 47 Ark. 196, 1 S. W. 61.

California.— People *v.* Monroe, 138 Cal. 97, 70 Pac. 1072; People *v.* Matthai, 135 Cal. 442, 67 Pac. 694; People *v.* Oliveria, 127 Cal. 376, 59 Pac. 772; People *v.* Winthrop, 118 Cal. 85, 50 Pac. 390; People *v.* Gray, 66 Cal. 271, 5 Pac. 240.

Florida.— Clemmons *v.* State, 43 Fla. 200, 30 So. 699; Rawlins *v.* State, 40 Fla. 155, 24 So. 65; Blount *v.* State, 30 Fla. 287, 11 So. 547; Reed *v.* State, 16 Fla. 564.

Georgia.— Scott *v.* State, 117 Ga. 14, 43 S. E. 425; Hatcher *v.* State, 116 Ga. 617, 42 S. E. 1018; Robinson *v.* State, 114 Ga. 56, 39 S. E. 862; Gibson *v.* State, 114 Ga. 34, 39 S. E. 948; Lawrence *v.* State, 112 Ga. 121, 37 S. E. 89; Carroll *v.* State, 99 Ga. 36, 25 S. E. 680; Boston *v.* State, 94 Ga. 590, 21 S. E. 603.

Illinois.— McDonnall *v.* People, 168 Ill. 93, 48 N. E. 86; Williams *v.* People, 164 Ill. 481, 45 N. E. 987.

Iowa.— State *v.* Hathaway, 100 Iowa 225, 69 N. W. 449; State *v.* Illsley, 81 Iowa 49, 46 N. W. 977.

Kansas.— State *v.* Rook, 42 Kan. 419, 22 Pac. 626; State *v.* Pfefferle, 36 Kan. 90, 12 Pac. 406; State *v.* Cox, 1 Kan. App. 447, 40 Pac. 816.

Louisiana.— State *v.* Scossoni, 48 La. Ann. 1464, 21 So. 32; State *v.* Scott, 12 La. Ann. 386.

Maine.— State *v.* Straw, 33 Me. 554.

Michigan.— People *v.* Willett, 105 Mich. 110, 62 N. W. 1115.

Nebraska.— Chezem *v.* State, 56 Nebr. 496, 76 N. W. 1056; Johnson *v.* State, 53 Nebr. 103, 73 N. W. 463.

New Jersey.— Mead *v.* State, 53 N. J. L. 601, 23 Atl. 264.

New Mexico.—Territory *v.* Gonzales, (1902) 68 Pac. 925; U. S. *v.* De Amador, 6 N. M. 173, 27 Pac. 488; Territory *v.* O'Donnell, 4 N. M. 66, 12 Pac. 743.

New York.— People *v.* Truck, 170 N. Y. 203, 63 N. E. 281.

North Carolina.— State *v.* Ridge, 125 N. C. 655, 34 S. E. 439; State *v.* Groves, 119 N. C. 822, 25 S. E. 819; State *v.* Varner, 115 N. C. 744, 20 S. E. 518; State *v.* O'Neal, 29 N. C. 251.

Ohio.— Mitchell *v.* State, 21 Ohio Cir. Ct. 24, 11 Ohio Cir. Dec. 446.

Oregon.— State *v.* Meldrum, 41 Oreg. 380, 70 Pac. 526.

Pennsylvania.— Zell *v.* Com., 94 Pa. St. 258; Murray *v.* Com., 79 Pa. St. 311; McCabe *v.* Com., (1886) 8 Atl. 45.

South Carolina.— State *v.* Kendall, 54 S. C. 192, 32 S. E. 300; State *v.* Cannon, 49 S. C. 550, 27 S. E. 526; State *v.* Moore, 49 S. C. 438, 27 S. E. 454; State *v.* Anderson, 24 S. C. 109.

Washington.— State *v.* Donette, 31 Wash. 6, 71 Pac. 556.

Wisconsin.— Winn *v.* State, 82 Wis. 571, 52 N. W. 775.

See 14 Cent. Dig. tit. "Criminal Law," § 1996.

In Indiana it is provided by statute that if special instructions are desired in a criminal case they shall be reduced to writing

the charge given covers the facts of the case and states the law applicable thereto,[69] presents the case fairly,[70] and guards the substantial rights of defendant.[71] Where it is the practice for the judge to charge the jury in a criminal case, it seems that he should, with or without request, instruct them as to the general principles of the law which of necessity must be applied by them in reaching a correct conclusion upon the question submitted for their consideration.[72] In some jurisdictions the rule is that the law applicable to the case as it is developed in the evidence should be given, whether requested or not.[73]

b. Special Defenses. It has been held that when desired a special instruction must be requested as to such defenses as alibi,[74] drunkenness,[75] and self-defense.[76]

c. Rules of Evidence. A failure to instruct on the rules regulating the admission and the exclusion of evidence, its character, weight, effect, corroboration, or impeachment, is not error where such an instruction is not specially requested.[77]

and delivered to the court. Leeper *v.* State, 12 Ind. App. 637, 40 N. E. 1113. See also Jones *v.* State, 49 Ind. 549.

In Mississippi it is a violation of the statute for the court to give oral instructions of its own motion in criminal cases. Stewart *v.* State, 50 Miss. 587; Edwards *v.* State, 47 Miss. 581.

North Carolina rule as to recapitulating evidence in charge.— State *v.* Ussery, 118 N. C. 1117, 24 S. E. 414; State *v.* Gould, 90 N. C. 658; State *v.* Grady, 83 N. C. 643.

In Virginia it is not the practice for the court, unasked, to charge the jury upon the law of the case, yet the mere fact that it does so cannot of itself be assigned as error. Dejarnette *v.* Com., 75 Va. 867.

Withdrawal of request.— Generally the withdrawal of a request for special instructions waives the right to object to their refusal. State *v.* Floyd, 39 S. C. 23, 17 S. E. 505.

69. Wilson *v.* State, 69 Ga. 224.

70. State *v.* Pfefferle, 36 Kan. 90, 12 Pac. 406.

71. People *v.* Willett, 105 Mich. 110, 62 N. W. 1115; Zell *v.* Com., 94 Pa. St. 258.

72. Sledge *v.* State, 99 Ga. 684, 26 S. E. 756.

73. Kinglesmith *v.* Com., 7 Ky. L. Rep. 744; Mackey *v.* Com., 4 Ky. L. Rep. 179; Johnson *v.* Com., 2 Ky. L. Rep. 67. See also Blimm *v.* Com., 7 Bush (Ky.) 320.

In Missouri it is provided by statute that the court must instruct the jury in writing upon all questions of law arising in the case which are necessary for their information in giving a verdict, and a failure to so instruct in case of a felony is good ground for granting defendant a new trial. State *v.* Heinze, 66 Mo. App. 135; State *v.* Kolb, 48 Mo. App. 269. The statute is in the main merely declaratory of the rule of practice adopted by the courts before its enactment. State *v.* Banks, 73 Mo. 592; State *v.* Branstetter, 65 Mo. 149; Hardy *v.* State, 7 Mo. 607. In construing this statute it has been said: "Wherever it would be the duty of the trial court upon a proper request to instruct the jury upon any material question of law arising on the evidence, it is equally obligatory upon it to instruct the jury upon such matter of its own motion, whether requested or not." State *v.* Taylor, 118 Mo. 153, 180, 24 S. W. 449. But see State *v.* Fisher, 162 Mo. 169, 62 S. W. 690; State *v.* Pitts, 156 Mo. 247, 56 S. W. 887.

In Tennessee, in capital cases, it is error for the judge to fail to declare the whole law applicable to the case on trial. Phipps *v.* State, 3 Coldw. 344; Nelson *v.* State, 2 Swan 237.

In Texas, by statute, it is the duty of the trial judge, in felony cases, to charge the law applicable to the case, whether asked or not. Cole *v.* State, 40 Tex. 147; Thomas *v.* State, 40 Tex. 60; Miers *v.* State, 34 Tex. Cr. 161, 29 S. W. 1074, 53 Am. St. Rep. 705; Jackson *v.* State, 15 Tex. App. 84; Benevides *v.* State, 14 Tex. App. 378; Sims *v.* State, 9 Tex. App. 586. In misdemeanors a special instruction if desired must be requested. Mooring *v.* State, 42 Tex. 85; Efird *v.* State, (Cr. App. 1903) 71 S. W. 957; Garner *v.* State, (Cr. App. 1903) 70 S. W. 213; Lucio *v.* State, 35 Tex. Cr. 320, 33 S. W. 358; Dunbar *v.* State, 34 Tex. Cr. 596, 31 S. W. 401; Ramsay *v.* State, (Cr. App. 1901) 65 S. W. 187; Gruesendorf *v.* State, (Cr. App. 1900) 56 S. W. 624; Arnold *v.* State, (Cr. App. 1897) 40 S. W. 591; Davidson *v.* State, 27 Tex. App. 262, 11 S. W. 371; Sparks *v.* State, 23 Tex. App. 44, 5 S. W. 135; Howard *v.* State, 8 Tex. App. 612; Forrest *v.* State, 3 Tex. App. 232.

74. Ferguson *v.* State, 52 Nebr. 432, 72 N. W. 590, 66 Am. St. Rep. 512; Com. *v.* Boschino, 176 Pa. St. 103, 34 Atl. 964; Smith *v.* State, (Tex. Cr. App. 1899) 49 S. W. 583; Lyon *v.* State, (Tex. Cr. App. 1896) 34 S. W. 947; Rider *v.* State, 26 Tex. App. 334, 9 S. W. 688; Goldsby *v.* U. S., 160 U. S. 70, 16 S. Ct. 216, 40 L. ed. 343.

In Missouri, where there is evidence tending to prove an alibi, an instruction on that subject must be given, whether requested or not. State *v.* Taylor, 118 Mo. 153, 24 S. W. 449.

75. Thomas *v.* State, 91 Ga. 204, 18 S. E. 305.

76. State *v.* Salter, 48 La. Ann. 197, 19 So. 265; State *v.* Anderson, 26 S. C. 599, 2 S. E. 699.

77. *Alabama.*— Wills *v.* State, 74 Ala. 21.
Arkansas.— Carroll *v.* State, 45 Ark. 539.
California.— People *v.* Monroe, 138 Cal.

d. Reasonable Doubt. A failure to define "reasonable doubt" is not reversible error where an instruction embodying the definition is not specially requested.[78] A charge that defendant is presumed to be innocent until proved guilty should be given, although not requested;[79] and it is error to refuse to charge as to the presumption of innocence whenever asked, even though the jury has already been fully instructed on the subject of reasonable doubt.[80]

e. Failure of Accused to Testify. A failure to instruct that the jury are not to consider the failure of the accused to testify in his own behalf to his prejudice is not reversible error, where this instruction is not specially requested.[81]

97, 70 Pac. 1072; People *v.* Hiltel, 131 Cal. 577, 63 Pac. 919; People *v.* McNutt, 93 Cal. 658, 29 Pac. 243; People *v.* McLean, 84 Cal. 480, 24 Pac. 32.

Connecticut.— State *v.* Long, 72 Conn. 39, 43 Atl. 493.

Georgia.— Ponder *v.* State, 115 Ga. 831, 42 S. E. 224; Boynton *v.* State, 115 Ga. 587, 41 S. E. 995; Robison *v.* State, 114 Ga. 445, 40 S. E. 253; Robinson *v.* State, 114 Ga. 56, 39 S. E. 862; Levan *v.* State, 114 Ga. 258, 40 S. E. 252; Harris *v.* State, 114 Ga. 35, 39 S. E. 928; Downing *v.* State, 114 Ga. 30, 39 S. E. 927; Joiner *v.* State, 105 Ga. 646, 31 S. E. 556; Bass *v.* State, 103 Ga. 227, 29 S. E. 966; Lewis *v.* State, 91 Ga. 168, 16 S. E. 986; Robinson *v.* State, 84 Ga. 674, 11 S. E. 544; Johnson *v.* State, 70 Ga. 725; Franklin *v.* State, 69 Ga. 36, 47 Am. Rep. 748.

Iowa.— State *v.* Smith, 106 Iowa 701, 77 N. W. 499.

Louisiana.— State *v.* McFarlain, 42 La. Ann. 803, 8 So. 600.

Massachusetts.—Com. *v.* Wunsch, 129 Mass. 477.

Missouri.— State *v.* Gatlin, 170 Mo. 354, 70 S. W. 885; State *v.* Fisher, 162 Mo. 169, 62 S. W. 690; State *v.* Nickens, 122 Mo. 607, 27 S. W. 339; State *v.* Murphy, 118 Mo. 7, 25 S. W. 95; State *v.* Nugent, 71 Mo. 136; State *v.* Kilgore, 70 Mo. 546.

Nebraska.— Gettinger *v.* State, 13 Nebr. 308, 14 N. W. 403.

Nevada.— State *v.* Simas, 25 Nev. 432, 62 Pac. 242.

New York.— People *v.* McLaughlin, 2 N. Y. App. Div. 419, 37 N. Y. Suppl. 1005.

North Carolina.— State *v.* Kilgore, 93 N. C. 533.

Texas.— Tracey *v.* State, 42 Tex. Cr. 494, 61 S. W. 127; Sparks *v.* State, (Cr. App. 1899) 51 S. W. 1120; Bennett *v.* State, (Cr. App. 1899) 50 S. W. 945; Hurley *v.* State, 36 Tex. Cr. 73, 35 S. W. 731; Howard *v.* State, 8 Tex. App. 612.

Wisconsin.— Porath *v.* State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954; Sullivan *v.* State, 75 Wis. 650, 44 N. W. 647.

See 14 Cent. Dig. tit. "Criminal Law," § 1999.

Instruction as to defendant's testimony.— Where defendant desires an instruction on the law, based on a theory arising solely from his statement (Hardin *v.* State, 107 Ga. 718, 33 S. E. 700), or calling particular attention to his testimony (Com. *v.* Washington, 202 Pa. St. 148, 51 Atl. 759; State *v.* Anderson, 26 S. C. 599, 2 S. E. 699; Downing *v.* State, 66 Ga. 110), he should request it specially.

78. *California.*— People *v.* Ahern, 93 Cal. 518, 29 Pac. 49; People *v.* Winters, 93 Cal. 277, 28 Pac. 946.

Colorado.— Cremar *v.* People, 30 Colo. 363, 70 Pac. 415.

Connecticut.— State *v.* Smith, 65 Conn. 283, 31 Atl. 206.

Florida.— Shiver *v.* State, 41 Fla. 630, 27 So. 36.

Georgia.— Madden *v.* State, 67 Ga. 151.

Indiana.— Colee *v.* State, 75 Ind. 511.

Michigan.— People *v.* Waller, 70 Mich. 237, 38 N. W. 261.

Missouri.— State *v.* Leeper, 78 Mo. 470.

Texas.— Burgess *v.* State, (Cr. App. 1897) 42 S. W. 562.

Wisconsin.— Murphy *v.* State, 108 Wis. 111, 83 N. W. 1112; Miller *v.* State, 106 Wis. 156, 81 N. W. 1020.

See 14 Cent. Dig. tit. "Criminal Law," § 2000.

In Texas by statute in a felony case, it is error for the court not to charge even without request on the law of reasonable doubt. Frye *v.* State, 7 Tex. App. 94; Hutto *v.* State, 7 Tex. App. 44; Robinson *v.* State, 5 Tex. App. 519; Treadway *v.* State, 1 Tex. App. 668.

79. People *v.* Macard, 73 Mich. 15, 40 N. W. 784. See also Hutto *v.* State, 7 Tex. App. 44. Where, however, the jury have been instructed that they must be satisfied beyond all reasonable doubt that the accused is guilty, it is not error to omit to charge that he is presumed to be innocent when there is no request for the latter instruction. State *v.* Smith, 65 Conn. 283, 31 Atl. 206; State *v.* Heinze, 66 Mo. App. 135; Hutto *v.* State, 7 Tex. App. 44.

80. Hutto *v.* State, 7 Tex. App. 44; McMullen *v.* State, 5 Tex. App. 577; Coffee *v.* State, 5 Tex. App. 545; Cochrane *v.* U. S., 157 U. S. 286, 15 S. Ct. 628, 39 L. ed. 704; Coffin *v.* U. S., 156 U. S. 432, 15 S. Ct. 394, 39 L. ed. 481. But see People *v.* Parsons, 105 Mich. 177, 63 N. W. 69.

81. *Colorado.*—Matthews *v.* People, 6 Colo. App. 456, 41 Pac. 839.

Indiana.— Felton *v.* State, 139 Ind. 531, 39 N. E. 228; Foxwell *v.* State, 63 Ind. 539.

Iowa.— State *v.* Stevens, 67 Iowa 557, 25 N. W. 777.

Michigan.— People *v.* Warner, 104 Mich. 337, 62 N. W. 405.

Oregon.— State *v.* Magers, 36 Oreg. 38, 58 Pac. 892.

f. Additional or More Specific Instructions. The failure of the court to give instructions which defendant deems sufficiently ample and explicit on a particular point or points is not reversible error when correct general instructions have been given, and more ample and more explicit instructions have not been requested.[82]

2. Making and Presentation of Requests — a. Form of Requests — (i) *In General.* Instructions, when requested, should be clearly and explicitly stated[83] and should not need explanation to prevent them from misleading the jury.[84] They should be presented to the court couched in the very words in which they are

See 14 Cent. Dig. tit. "Criminal Law," § 2001.

82. *Alabama.*— McKleroy *v.* State, 77 Ala. 95; Williams *v.* State, 74 Ala. 18; Dave *v.* State, 22 Ala. 23.

California.— People *v.* Appleton, 120 Cal. 250, 52 Pac. 582; People *v.* Brittan, 118 Cal. 409, 50 Pac. 664; People *v.* Donguli, 92 Cal. 607, 28 Pac. 782.

Georgia.—Wheeless *v.* State, 92 Ga. 19, 18 S. E. 303; Farris *v.* State, 35 Ga. 241; Mercer *v.* State, 17 Ga. 146.

Idaho.— People *v.* Biles, 2 Ida. (Hasb.) 114, 6 Pac. 120.

Indiana.— Sutherlin *v.* State, 148 Ind. 695, 48 N. E. 246; Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 157; Conrad *v.* State, 132 Ind. 254, 31 N. E. 805; Hodge *v.* State, 85 Ind. 561; Rollins *v.* State, 62 Ind. 46; Cromer *v.* State, 21 Ind. App. 502, 52 N. E. 239.

Iowa.— State *v.* Todd, 110 Iowa 631, 82 N. W. 322; State *v.* Young, 104 Iowa 730, 74 N. W. 693; State *v.* Phipps, 95 Iowa 487, 64 N. W. 410; State *v.* Watson, 81 Iowa 380, 46 N. W. 868.

Kansas.—State *v.* Peterson, 38 Kan. 204, 16 Pac. 263.

Maine.— State *v.* Phinney, 42 Me. 384.

Massachusetts.— Com. *v.* Meserve, 154 Mass. 64, 27 N. E. 997.

Michigan.— Driscoll *v.* People, 47 Mich. 413, 11 N. W. 221; People *v.* McKinney, 10 Mich. 54.

Mississippi.— Herman *v.* State, 75 Miss. 340, 22 So. 873.

Missouri.— State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330; State *v.* Emory, 12 Mo. App. 593.

Nebraska.— Martin *v.* State, (1903) 93 N. W. 161; Dinsmore *v.* State, 61 Nebr. 418, 85 N. W. 445; Ferguson *v.* State, 52 Nebr. 432, 72 N. W. 590, 66 Am. St. Rep. 512.

New Mexico.— Territory *v.* O'Donnell, 4 N. M. 66, 12 Pac. 743.

New York.— People *v.* Martell, 138 N. Y. 595, 33 N. E. 838; People *v.* Moett, 58 How. Pr. 467.

North Carolina.— State *v.* Kinsauls, 126 N. C. 1095, 36 S. E. 31.

North Dakota.— State *v.* Rosencrans, 9 N. D. 163, 82 N. W. 422.

Oklahoma.— Douthitt *v.* Territory, 7 Okla. 55, 54 Pac. 312.

Pennsylvania.—Com. *v.* Hollinger, 2 Dauph. Co. Rep. 13.

South Carolina.— State *v.* Chiles, 58 S. C. 47, 36 S. E. 496; State *v.* Haddon, 49 S. C. 308, 27 S. E. 194. See also State *v.* Davenport, 38 S. C. 348, 17 S. E. 37.

Vermont.— State *v.* Harrison, 66 Vt. 523, 29 Atl. 807, 44 Am. St. Rep. 864.

West Virginia.— State *v.* Kohne, 48 W. Va. 335, 37 S. E. 553; State *v.* Donohoo, 22 W. Va. 761.

Wyoming.— Brantley *v.* State, 9 Wyo. 102, 61 Pac. 139.

See 14 Cent. Dig. tit. "Criminal Law," § 2005.

Defendant's theory of the case.— In the absence of any request for a further instruction, an objection that defendant's theory is omitted or is not set forth with sufficient prominence is not available. Murphy *v.* State, 54 Ala. 178; People *v.* Wong Chow, (Cal. 1884) 4 Pac. 763; Clark *v.* State, 68 Ga. 291; Trujillo *v.* Territory, 7 N. M. 43, 32 Pac. 154.

Indefiniteness.—Where no request has been made to have an instruction correctly stating the law made more definite or specific, an objection for indefiniteness is unavailable. People *v.* Olsen, 80 Cal. 122, 22 Pac. 125; Marshall *v.* State, 123 Ind. 128, 23 N. E. 1141; State *v.* Jelinek, 95 Iowa 420, 64 N. W. 259; State *v.* Tibbs, 48 La. Ann. 1278, 20 So. 735.

Texas rule.— While by statute it is the duty of the court, on the trial of all cases of felony, to instruct the jury as to the law applicable to the facts of the case before them, yet the law has as a general thing left it to the sound discretion of the court to determine the character, and particularly the extent, of the charge to be given. It cannot be expected that a court, in a simple charge to the jury, will attempt to instruct them in every branch or principle of law which might be applied to any particular case or state of facts. If the charge of the court is not satisfactory, it is the right of defendant or his counsel to ask such instructions as he thinks proper, and in the absence of such request he cannot assign as error the omission of the court to give them. Gillmore *v.* State, 36 Tex. 334; Greenwood *v.* State, 35 Tex. 587; O'Connell *v.* State, 18 Tex. 343; Allen *v.* State, (Cr. App. 1902) 70 S. W. 85; Oxford *v.* State, 32 Tex. Cr. 272, 22 S. W. 971; Surrell *v.* State, 29 Tex. App. 321, 15 S. W. 816; Crist *v.* State, 21 Tex. App. 361, 17 S. W. 260; Waite *v.* State, 13 Tex. App. 169.

83. Fuller *v.* State, 97 Ala. 27, 12 So. 392; People *v.* Vereneseneckockockhoff, (Cal. 1899) 58 Pac. 156.

84. Crawford *v.* State, 112 Ala. 1, 21 So. 214.

desired to be given,[85] they should contain such a statement of facts as a predicate for them as make the principles of law embodied in them applicable under the evidence.[86]

(11) *Writing.* Under the statutes or rules of practice of some jurisdictions, a requested instruction may be refused if not offered in writing,[87] and in Indiana it must be signed by the party or his counsel.[88]

b. Time For Request. In some jurisdictions requested instructions may be refused without error, unless presented before the closing argument;[89] but in others a requested charge presented at the conclusion of the general charge, if before the jury has retired, is not too late.[90] The court may properly refuse an instruction not requested until after the jury has retired,[91] and it has been held proper to refuse an instruction requested when the jury returns after being out for some time without being able to agree.[92]

c. Argument of Requests. The denial of permission to read and discuss requested instructions is within the discretion of the court.[93]

3. Disposition of Requests — a. On Points Covered. The court not being required to repeat instructions which have been given in substance, it is not error to refuse to give for defendant a requested special instruction on a point which has already been properly and sufficiently covered by the general charge, although it may not

85. People *v.* Gleason, 127 Cal. 323, 59 Pac. 592; Heilbron *v.* State, 2 Tex. App. 537.

If propositions of law are suggested to the court by counsel, with no request so to charge, it is sufficient for the court to follow them in substance, although not in detail. State *v.* Wine, 58 S. C. 94, 36 S. E. 439.

86. State *v.* Baum, 51 La. Ann. 1112, 26 So. 67; State *v.* Cancienne, 50 La. Ann. 847, 24 So. 134.

87. *Alabama.*— Fuller *v.* State, 97 Ala. 27, 12 So. 392; King *v.* State, 77 Ala. 94.

Florida.— Irvin *v.* State, 19 Fla. 872.

Georgia.— Freeman *v.* State, 112 Ga. 48, 37 S. E. 172; Woods *v.* State, 101 Ga. 526, 28 S. E. 970; Brown *v.* State, 28 Ga. 199.

Louisiana.— State *v.* Bogain, 12 La. Ann. 264.

North Carolina.—State *v.* Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613.

Texas.— Bush *v.* State, (Cr. App. 1902) 70 S. W. 550; Osborne *v.* State, (Cr. App. 1900) 56 S. W. 53; Warthan *v.* State, 41 Tex. Cr. 385, 55 S. W. 55; Bennett *v.* State, 40 Tex. Cr. 445, 50 S. W. 946; Murray *v.* State, 38 Tex. Cr. 677, 44 S. W. 830; Shaw *v.* State, (Cr. App. 1896) 33 S. W. 1083; Waechter *v.* State, 34 Tex. Cr. 297, 30 S. W. 444, 800; Sparks *v.* State, 23 Tex. App. 447, 5 S. W. 135; Hobbs *v.* State, 7 Tex. App. 117.

See 14 Cent. Dig. tit. "Criminal Law," § 2007.

Reading from statutes or law-books.— A statute requiring a requested charge to be in writing is not complied with by reading extracts from a statute, and orally requesting the court so to charge (State *v.* Davis, 50 S. C. 405, 27 S. E. 905, 62 Am. St. Rep. 837); and the court need not, as a part of its instruction to the jury, read passages from a law-book when requested orally to do so by defendant's counsel (Houser *v.* State, 58 Ga. 78).

88. Musser *v.* State, 157 Ind. 423, 61 N. E. 1; Glover *v.* State, 109 Ind. 391, 10 N. E. 282; Hamilton *v.* State, 22 Ind. App. 479, 52 N. E. 419.

89. Territory *v.* Harper, 1 Ariz. 399, 25 Pac. 528; Prindeville *v.* People, 42 Ill. 217; Benson *v.* State, 119 Ind. 488, 21 N. E. 1109; State *v.* Hairston, 121 N. C. 579, 28 S. E. 492.

Exceptions to this rule.— It has been held that instructions on the facts (People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162; State *v.* Magers, 35 Oreg. 520, 57 Pac. 197), on the right of the jury to find defendant guilty of a less offense necessarily included in that charged (People *v.* Demasters, 105 Cal. 369, 39 Pac. 35), or on the untrustworthiness of accomplice evidence (People *v.* Silva, 121 Cal. 668, 54 Pac. 146), or which have become necessary because of propositions or arguments contained in the summing up of the prosecuting attorney (People *v.* Sears, 18 Cal. 635) may be given after argument.

90. Brooks *v.* State, 96 Ga. 353, 23 S. E. 413; State *v.* Barry, 11 N. D. 428, 92 N. W. 809; Venable *v.* State, 1 Ohio Cir. Dec. 165. *Contra,* Clark *v.* State, 40 Tex. Cr. 127, 49 S. W. 85.

Opportunity to prepare request see Dixon *v.* State, 13 Fla. 636.

91. Engeman *v.* State, 54 N. J. L. 247, 23 Atl. 676. See also State *v.* Catlin, 3 Vt. 530, 23 Am. Dec. 230, request made after verdict.

92. Com. *v.* Ford, 146 Mass. 131, 15 N. E. 153; Williams *v.* Com., 85 Va. 607, 8 S. E. 470. *Compare* Harper *v.* State, 109 Ala. 66, 19 So. 901 (where it was held that defendant was entitled to instructions offered then, when the court had given additional instructions at the request of the jury); Preston *v.* State, 41 Fla. 627, 26 So. 736.

93. State *v.* Hill, 28 La. Ann. 311.

Whether the jury shall be required to retire during the argument of counsel on the instructions is within the judicial discretion. Casey *v.* State, 37 Ark. 67; State *v.* Coella, 3 Wash. 99, 28 Pac. 28.

have been covered of necessity in the identical words of the requested charge,[94]

94. *Alabama.*— Willis *v.* State, 134 Ala. 429, 33 So. 226; Mitchell *v.* State, 129 Ala. 23, 30 So. 348; Zimmerman *v.* State, (1901) 30 So. 18; Smith *v.* State, 92 Ala. 30, 9 So. 408.

Arizona.— Morgan *v.* Territory, (1901) 64 Pac. 421.

Arkansas.— State *v.* Reed, 68 Ark. 331, 58 S. W. 40; Kent *v.* State, 64 Ark. 247, 41 S. W. 849; Lewis *v.* State, 62 Ark. 494, 36 S. W. 689; Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885; Lee *v.* State, 56 Ark. 4, 19 S. W. 16; Reed *v.* State, 54 Ark. 621, 16 S. W. 819.

California.— People *v.* Fitzgerald, 138 Cal. 39, 70 Pac. 1014; People *v.* Feliz, (1902) 69 Pac. 220; People *v.* Ross, 134 Cal. 256, 66 Pac. 229; People *v.* Shears, 133 Cal. 154, 65 Pac. 295; People *v.* Schmitt, 106 Cal. 48, 39 Pac. 204; People *v.* Williams, 32 Cal. 280.

Colorado.— Barr *v.* People, 30 Colo. 522, 71 Pac. 392; Van Houton *v.* People, 22 Colo. 53, 43 Pac. 137; Chesnut *v.* People, 21 Colo. 512, 42 Pac. 656; May *v.* People, 8 Colo. 210, 6 Pac. 816; Dougherty *v.* People, 1 Colo. 514.

Connecticut.— State *v.* Laudano, 74 Conn. 638, 51 Atl. 860.

District of Columbia.— Lanckton *v.* U. S., 18 App. Cas. 348; Funk *v.* U. S., 16 App. Cas. 478; Harris *v.* U. S., 8 App. Cas. 20, 36 L. R. A. 465; Howgate *v.* U. S., 7 App. Cas. 217; U. S. *v.* Neverson, 1 Mackey 152.

Florida.— Bassett *v.* State, (1902) 33 So. 262; Myers *v.* State, 43 Fla. 500, 31 So. 275; Kennard *v.* State, 42 Fla. 581, 28 So. 858; Bryant *v.* State, 34 Fla. 291, 16 So. 177; Wooten *v.* State, 24 Fla. 335, 5 So. 39, 1 L. R. A. 819.

Georgia.— Lee *v.* State, 116 Ga. 563, 42 S. E. 759; Golding *v.* State, 116 Ga. 526, 42 S. E. 744; Reeves *v.* State, 117 Ga. 38, 43 S. E. 404; Gunter *v.* State, 116 Ga. 273, 42 S. E. 524; Moore *v.* State, 114 Ga. 256, 40 S. E. 295; Taylor *v.* State, 97 Ga. 432, 25 S. E. 320; Deen *v.* State, 92 Ga. 453, 17 S. E. 269; Smith *v.* State, 63 Ga. 168.

Hawaii.— Rex *v.* Ahop, 7 Hawaii 556.

Idaho.— State *v.* Lyons, 7 Ida. 530, 64 Pac. 236; U. S. *v.* Camp, 2 Ida. (Hasb.) 231, 10 Pac. 226.

Illinois.— Collins *v.* People, 194 Ill. 506, 62 N. E. 902; Davids *v.* People, 192 Ill. 176, 61 N. E. 537; Painter *v.* People, 147 Ill. 444, 35 N. E. 64; Lyons *v.* People, 137 Ill. 602, 27 N. E. 677; Kennedy *v.* People, 40 Ill. 488.

Indiana.— Musser *v.* State, 157 Ind. 423, 61 N. E. 1; Currier *v.* State, 157 Ind. 114, 60 N. E. 1023; Blume *v.* State, 154 Ind. 343, 56 N. E. 771; Conrad *v.* State, 132 Ind. 254, 31 N. E. 805; Greenley *v.* State, 60 Ind. 141.

Indian Territory.— Jennings *v.* U. S., 2 Indian Terr. 670, 53 S. W. 456.

Iowa.—State *v.* Soper, 118 Iowa 1, 91 N. W. 774; State *v.* Maxwell, 117 Iowa 482, 91 N. W. 772; State *v.* Easton, 113 Iowa 516, 85 N. W. 795, 86 Am. St. Rep. 389; State *v.* Seymore, 94 Iowa 699, 63 N. W. 661; State *v.* Reno, 67 Iowa 587, 25 N. W. 818.

Kansas.— State *v.* Reno, 41 Kan. 674, 21 Pac. 803; State *v.* Kellerman, 14 Kan. 135; State *v.* Start, (App. 1901) 63 Pac. 448; State *v.* Tulip, 9 Kan. App. 454, 60 Pac. 659.

Kentucky.— Patterson *v.* Com., 86 Ky. 313, 5 S. W. 765, 9 Ky. L. Rep. 310; Stevens *v.* Com., 45 S. W. 76, 20 Ky. L. Rep. 48; Alexander *v.* Com., 20 S. W. 254, 14 Ky. L. Rep. 290; Davis *v.* Com., 4 Ky. L. Rep. 717.

Louisiana.— State *v.* Callian, 109 La. 346, 33 So. 363; State *v.* Caymo, 108 La. 218, 32 So. 351; State *v.* Cain, 106 La. 708, 31 So. 300; State *v.* Martin, 47 La. Ann. 1540, 18 So. 508; State *v.* Porter, 35 La. Ann. 1159.

Maine.— State *v.* Williams, 76 Me. 480; State *v.* Knight, 43 Me. 11.

Massachusetts.—Com. *v.* Magoon, 172 Mass. 214, 51 N. E. 1082; Com. *v.* Farrell, 160 Mass. 525, 36 N. E. 475; Com. *v.* Moore, 157 Mass. 324, 31 N. E. 1070; Com. *v.* Cosseboom, 155 Mass. 298, 29 N. E. 463; Com. *v.* Brown, 121 Mass. 69; Com. *v.* Goodwin, 14 Gray 55.

Michigan.— People *v.* Hilliard, 119 Mich. 24, 77 N. W. 306; People *v.* Swartz, 118 Mich. 292, 76 N. W. 491; People *v.* Carter, 117 Mich. 576, 76 N. W. 90; People *v.* Cleveland, 107 Mich. 367, 65 N. W. 216; People *v.* High, 48 Mich. 54, 11 N. W. 782.

Minnesota.— State *v.* Scott, 41 Minn. 365, 43 N. W. 62; State *v.* Beebe, 17 Minn. 241.

Mississippi.— Shubert *v.* State, 66 Miss. 446, 6 So. 238; Wood *v.* State, 64 Miss. 761, 2 So. 247; Green *v.* State, 55 Miss. 454.

Missouri.— State *v.* Anslinger, 171 Mo. 600, 71 S. W. 1041; State *v.* Marsh, 171 Mo. 523, 71 S. W. 1003; State *v.* Ashcraft, 170 Mo. 409, 70 S. W. 898; State *v.* Dent, 170 Mo. 398, 70 S. W. 881; State *v.* Jones, 78 Mo. 278; State *v.* Walton, 74 Mo. 270; State *v.* Floyd, 15 Mo. 350.

Montana.—State *v.* Mahoney, 24 Mont. 281, 61 Pac. 647; State *v.* Hurst, 23 Mont. 484, 59 Pac. 911; State *v.* Bowser, 21 Mont. 133, 53 Pac. 179; U. S. *v.* Upham, 2 Mont. 170.

Nebraska.— McCormick *v.* State, (1902) 92 N. W. 606; Kerr *v.* State, 63 Nebr. 115, 88 N. W. 240; Argabright *v.* State, 62 Nebr. 402, 87 N. W. 146; Palin *v.* State, 38 Nebr. 862, 57 N. W. 743; Curry *v.* State, 4 Nebr. 545.

Nevada.— State *v.* Buralli, (1903) 71 Pac. 532; State *v.* Maher, 25 Nev. 465, 62 Pac. 236; State *v.* Rouer, 13 Nev. 17.

New Mexico.—Territory *v.* Taylor, (1903) 71 Pac. 489; Territory *v.* De Gutman, 8 N. M. 92, 42 Pac. 68; Territory *v.* Baker, 4 N. M. 117, 13 Pac. 30; Anderson *v.* Territory, 4 N. M. 108, 13 Pac. 21.

New York.— People *v.* Zachello, 168 N. Y. 35, 60 N. E. 1051; People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188; People *v.* Pallister, 138 N. Y. 601, 33 N. E. 741; People *v.* Harris, 136 N. Y. 423, 33 N. E. 65; People *v.* Glennon, 78 N. Y. App. Div. 271, 79 N. Y. Suppl. 997 [*reversed* in 175 N. Y. 45, 67 N. E. 125].

North Carolina.— State *v.* Booker, 123 N. C. 713, 31 S. E. 376; State *v.* Brewer, 98

or which has already been properly covered by another special instruction previously given by the court at defendant's request.[95]

b. Partly Erroneous. When an instruction embodying both a correct and an incorrect proposition of law is requested, it is not error to refuse to give it.[96] Where instructions containing several propositions of law are requested as a whole, it is not error to refuse to give all if they contain a single erroneous proposition of law.[97] It is not the duty of the court to pick out the unobjectionable part and charge thereon, while rejecting that which is erroneous.[98]

c. Modification by Court. The court has the right to modify the special instructions requested where they are incorrect, to supply improper omissions and to reject irrelevant and erroneous statements contained therein.[99] The court is

N. C. 607, 3 S. E. 819; State *v.* Neville, 51 N. C. 423.

North Dakota.— State *v.* Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

Ohio.— Donald *v.* State, 21 Ohio Cir. Ct. 124, 11 Ohio Cir. Dec. 483.

Oklahoma.— Queenan *v.* Territory, 11 Okla. 261, 71 Pac. 218, 61 L. R. A. 324 [*affirmed* in 190 U. S. 548, 23 S. Ct. 762, 47 L. ed. 1175]; Watkins *v.* U. S., 5 Okla. 729, 50 Pac. 88; Gatliff *v.* Territory, 2 Okla. 523, 37 Pac. 809.

Oregon.— State *v.* Sally, 41 Oreg. 366, 70 Pac. 396; State *v.* McDaniel, 39 Oreg. 161, 65 Pac. 520; State *v.* Tucker, 36 Oreg. 291, 61 Pac. 894, 51 L. R. A. 246; State *v.* Branton, 33 Oreg. 533, 56 Pac. 267; State *v.* Roberts, 15 Oreg. 187, 13 Pac. 896.

South Carolina.— State *v.* Powers, 59 S. C. 200, 37 S. E. 690; State *v.* Robinson, 35 S. C. 340, 14 S. E. 766; State *v.* Anderson, 20 S. C. 581.

Tennessee.— Griffin *v.* State, 109 Tenn. 17, 70 S. W. 61; Ray *v.* State, 108 Tenn. 282, 67 S. W. 553; Johnson *v.* State, 100 Tenn. 254, 45 S. W. 436.

Texas.— West *v.* State, (Cr. App. 1903) 71 S. W. 967; Burns *v.* State, (Cr. App. 1903) 71 S. W. 965; Hartley *v.* State, (Cr. App. 1903) 71 S. W. 603; Danforth *v.* State, (Cr. App. 1902) 69 S. W. 159; Johnson *v.* State, (Cr. App. 1902) 67 S. W. 412; Dent *v.* State, 43 Tex. Cr. 126, 65 S. W. 627; Burrage *v.* State, (Tex. Cr. App. 1898) 44 S. W. 169, 1104; Duncan *v.* State, 30 Tex. App. 1, 16 S. W. 753; Gibbs *v.* State, 1 Tex. App. 12.

Utah.— People *v.* Thiede, 11 Utah 241, 39 Pac. 837; People *v.* Chadwick, 7 Utah 134, 25 Pac. 737.

Vermont.— State *v.* Powers, 72 Vt. 168, 47 Atl. 830; State *v.* Totten, 72 Vt. 73, 47 Atl. 105; State *v.* Wade, 63 Vt. 80, 22 Atl. 12.

Virginia.— Gordon *v.* Com., 100 Va. 825, 41 S. E. 746; Longley *v.* Com., 99 Va. 807, 37 S. E. 339.

Washington.— State *v.* Vance, 29 Wash. 435, 70 Pac. 34; State *v.* Webb, 20 Wash. 500, 55 Pac. 935; State *v.* Cushing, 17 Wash. 544, 50 Pac. 512; State *v.* Murphy, 13 Wash. 229, 43 Pac. 44; State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382.

West Virginia.— State *v.* Cottrill, 52 W. Va. 363, 43 S. E. 244; State *v.* Clark, 51 W. Va. 457, 41 S. E. 204; State *v.* Staley, 45 W. Va. 792, 32 S. E. 198; State *v.* Bingham, 42 W. Va. 234, 24 S. E. 883.

Wisconsin.— Murphy *v.* State, 108 Wis. 111, 83 N. W. 1112; Miller *v.* State, 106 Wis. 156, 81 N. W. 1020; Buel *v.* State, 104 Wis. 132, 80 N. W. 78; Murphy *v.* State, 86 Wis. 626, 57 N. W. 361.

Wyoming.— Cook *v.* Territory, 3 Wyo. 110, 4 Pac. 887.

United States.— Humes *v.* U. S., 170 U. S. 210, 18 S. Ct. 602, 42 L. ed. 1011; Allen *v.* U. S., 164 U. S. 492, 17 S. Ct. 154, 41 L. ed. 528; White *v.* U. S., 164 U. S. 100, 17 S. Ct. 38, 41 L. ed. 365; Coffin *v.* U. S., 162 U. S. 664, 16 S. Ct. 943, 40 L. ed. 1109; Stockslager *v.* U. S., 116 Fed. 590.

See 14 Cent. Dig. tit. "Criminal Law," § 2011.

95. Burton *v.* State, 118 Ala. 109, 23 So. 729; Koch *v.* State, 115 Ala. 99, 22 So. 471.

96. People *v.* Davis, 64 Cal. 440, 1 Pac. 889; Richard *v.* State, 42 Fla. 528, 29 So. 413; Wooten *v.* State, 24 Fla. 335, 5 So. 39, 1 L. R. A. 819; Tomlinson *v.* People, 5 Park. Cr. (N. Y.) 313. See also State *v.* Anderson, 4 Nev. 265; Henderson *v.* Com., 98 Va. 794, 34 S. E. 881.

97. Price *v.* State, 107 Ala. 161, 18 So. 130; Oliver *v.* State, 38 Fla. 46, 20 So. 803; State *v.* Watkins, 106 La. 380, 31 So. 10; People *v.* Thiede, 11 Utah 241, 39 Pac. 837. See also Golson *v.* State, 124 Ala. 8, 26 So. 975, holding that where two instructions were written on the same piece of paper, across which the presiding judge wrote the word "refused," one of the instructions being bad, it was not error to refuse to give them.

98. Stanton *v.* State, 13 Ark. 317; State *v.* Neal, 120 N. C. 613, 27 S. E. 81, 58 Am. St. Rep. 810.

99. *California.*— People *v.* Methever, 132 Cal. 326, 64 Pac. 481; People *v.* Sternberg, 127 Cal. 510, 59 Pac. 942; People *v.* Ashmead, 118 Cal. 508, 50 Pac. 681; People *v.* Cotta, 49 Cal. 166; People *v.* Kelly, 46 Cal. 355.

District of Columbia.— Funk *v.* U. S., 16 App. Cas. 478.

Florida.— Leslie *v.* State, 35 Fla. 171, 17 So. 555.

Georgia.— Jones *v.* State, 63 Ga. 456; Hammack *v.* State, 52 Ga. 397. See also Lacewell *v.* State, 95 Ga. 346, 22 S. E. 546.

Illinois.— Meul *v.* People, 198 Ill. 258, 64 N. E. 1106; Cook *v.* People, 177 Ill. 146, 52 N. E. 273; Jamison *v.* People, 145 Ill. 357, 34 N. E. 486; Kinney *v.* People, 108 Ill. 519; Peri *v.* People, 65 Ill. 17.

not, however, obliged to do this, but may refuse to give a requested instruction which is defective or improper.[1]

d. Giving in Language of Request. Unless a contrary rule is established by statute,[2] the judge is not required to repeat the exact words of counsel in giving a requested instruction.[3] It has been held, however, that a party has the right to

Indiana.— Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 157.

Iowa.— State *v.* Collins, 20 Iowa 85; State *v.* Wilson, 8 Iowa 407.

Kansas.— State *v.* Kallerman, 14 Kan. 135.

Louisiana.— State *v.* Durr, 39 La. Ann. 751, 2 So. 546.

Mississippi.— Smith *v.* State, 75 Miss. 542, 23 So. 260; Warden *v.* State, 60 Miss. 638; George *v.* State, 39 Miss. 570; Mark *v.* State, 36 Miss. 77.

Missouri.— State *v.* Moore, 160 Mo. 443, 61 S. W. 199; State *v.* Fannon, 158 Mo. 149, 59 S. W. 75; State *v.* Reed, 154 Mo. 122, 55 S. W. 278; State *v.* McNamara, 100 Mo. 100, 13 S. W. 938.

Nevada.— State *v.* Watkins, 11 Nev. 30; People *v.* Bonds, 1 Nev. 33.

New York.— People *v.* Fanshawe, 65 Hun 77, 19 N. Y. Suppl. 865, 8 N. Y. Cr. 326.

North Carolina.— State *v.* Furr, 121 N. C. 606, 28 S. E. 552.

Pennsylvania.— Com. *v.* McMurray, 198 Pa. St. 51, 47 Atl. 952.

Texas.— Bradford *v.* State, 25 Tex. App. 723, 9 S. W. 46.

Utah.— People *v.* Scott, 10 Utah 217, 37 Pac. 335.

Washington.— State *v.* Robinson, 12 Wash. 491, 41 Pac. 884.

Wisconsin.— Baker *v.* State, 69 Wis. 32, 33 N. W. 52.

United States.— Johnson *v.* U. S., 157 U. S. 320, 15 S. Ct. 614, 39 L. ed. 717.

See 14 Cent. Dig. tit. "Criminal Law," § 2013.

Reconciling improper instructions.— It is error for the court to hand the jury submitted and requested instructions with an admonition to follow them so far as they conform to the general charge. Not only must the jury take the law from the lips of the court, but the accused is entitled to a full, fair, and plain statement to them of what the law is. If the instructions requested are in part erroneous, the court should have corrected them or refused them altogether. Lang *v.* State, 16 Lea (Tenn.) 433, 1 S. W. 318.

Erroneous modification.— The modification of a correct instruction so as to render it liable to misconstruction, and to mislead the jury is error. Young *v.* State, 24 Fla. 147, 3 So. 881; State *v.* Green, 20 Iowa 424.

1. Bolling *v.* State, 54 Ark. 588, 16 S. W. 658; Toops *v.* State, 92 Ind. 13; State *v.* Nicholls, 50 La. Ann. 699, 23 So. 980; Lawrence *v.* State, 20 Tex. App. 536.

Necessity for preparing correct instructions.— In a jurisdiction where the court is required, whether requested or not, to instruct the jury as to the law applicable to the case, if the instructions requested are incorrect or objectionable in their phraseology, the court should formulate and give proper instructions. State *v.* Stonum, 62 Mo. 596; State *v.* Jones, 61 Mo. 232; State *v.* Matthews, 20 Mo. 55.

2. In Alabama the statute requires that charges asked in writing shall be given or refused in the terms in which they are written. Blair *v.* State, 52 Ala. 343; Hogg *v.* State, 52 Ala. 2; Baker *v.* State, 49 Ala. 350. Under the statute the court has no right to qualify, limit, modify, or restrict the charge. If it needs qualification, restriction, or modification to make it a correct legal proposition as applicable to the evidence the court should refuse it. Eiland *v.* State, 52 Ala. 322; Edgar *v.* State, 43 Ala. 45. The court may, however, explain a charge which, although asserting a correct proposition, is inapt, or involved in expression, or has a tendency to mislead unless explained. Eiland *v.* State, 52 Ala. 322 [*distinguishing* Edgar *v.* State, 43 Ala. 45]. See also Ward *v.* State, 78 Ala. 441. And it is proper for the court to modify a charge requested orally, since this statute applies only to charges requested in writing. Richardson *v.* State, 54 Ala. 158; Warren *v.* State, 46 Ala. 549.

3. If therefore he thinks that by altering the phraseology he can without altering the sense render the instruction more intelligible to the jury, it is wholly in his discretion to do so, although the instruction be not objectionable as a statement of the law.

California.—People *v.* Lemperle, 94 Cal. 45, 29 Pac. 709; People *v.* Dodge, 30 Cal. 448.

Connecticut.— State *v.* Rathbun, 74 Conn. 524, 51 Atl. 540.

Georgia.— Cochran *v.* State, 113 Ga. 736, 39 S. E. 337; Whitley *v.* State, 66 Ga. 656.

Illinois.—Crowell *v.* People, 190 Ill. 508, 60 N. E. 872; Needham *v.* People, 98 Ill. 275.

Kansas.— State *v.* Volmer, 6 Kan. 371; Rice *v.* State, 3 Kan. 141.

Louisiana.— State *v.* Miller, 41 La. Ann. 677, 6 So. 546; State *v.* Durr, 39 La. Ann. 751, 2 So. 546.

Maine.— State *v.* Reed, 62 Me. 129; State *v.* Barnes, 29 Me. 561.

Massachusetts.— Com. *v.* Chance, 174 Mass. 245, 54 N. E. 551, 75 Am. St. Rep. 306; Com. *v.* Mullen, 150 Mass. 394, 23 N. E. 51; Com. *v.* Cobb, 120 Mass. 356; Com. *v.* Costley, 118 Mass. 1.

Michigan.— People *v.* Parsons, 105 Mich. 177, 63 N. W. 69; Ulrich *v.* People, 39 Mich. 245. *Compare* People *v.* Stewart, 75 Mich. 21, 42 N. W. 662.

Nebraska.— Bradshaw *v.* State, 17 Nebr. 147, 22 N. W. 361.

New Jersey.— Gardner *v.* State, 55 N. J. L. 17, 26 Atl. 30.

New York.— People *v.* Williams, 92 Hun 354, 36 N. Y. Suppl. 511.

North Carolina.— State *v.* Hicks, 130 N. C.

have his instruction given in his own language, provided there are facts in evidence to support it, and provided that it contains a true statement of the law, and is not obscure, ambiguous, or calculated to mislead.[4]

e. Proper Request Refused. It is reversible error to refuse to give a proper instruction which is requested and justified by the evidence, and which has not already been given.[5]

f. Method of Giving Instructions. Where the judge reads aloud to the jury requested instructions,[6] or turns the requests over to defendant's attorneys and they read them to the jury,[7] and the court approves them as read, the instructions are properly given.

g. Reasons For Refusal. Where the court refuses to give a special charge requested, because the point is covered by another instruction, he should so state.[8]

I. Objections to Instructions and Refusals to Instruct — 1. Necessity and Waiver. Where it is the duty of the court in criminal trials to instruct the

705, 41 S. E. 803; State *v.* Crews, 128 N. C. 581, 38 S. E. 293; State *v.* Mills, 116 N. C. 992, 21 S. E. 106; State *v.* Scott, 64 N. C. 586; State *v.* Brantley, 63 N. C. 518.

Pennsylvania.— Com. *v.* McManus, 143 Pa. St. 64, 21 Atl. 1018, 22 Atl. 761, 14 L. R. A. 89.

South Carolina.— State *v.* Petsch, 43 S. C. 132, 20 S. E. 993; State *v.* Prater, 26 S. C. 198, 613, 2 S. E. 108.

Texas.— Shultz *v.* State, 13 Tex. 401.

Vermont.— State *v.* Eaton, 53 Vt. 574.

Washington.— State *v.* Anderson, 30 Wash. 14, 70 Pac. 104; State *v.* Baldwin, 15 Wash. 15, 45 Pac. 650.

See 14 Cent. Dig. tit. "Criminal Law," § 2014.

4. State *v.* Evans, 33 W. Va. 417, 10 S. E. 792.

Duty to give instruction as requested when correct.— Instructions should be given as asked when entirely free from objection. The court may modify an instruction to make it correct, but if already correct it ought to be given as requested. Cotton *v.* State, 31 Miss. 504. The trial judge should, however, carefully scrutinize the requests for charges to the jury, and to insure an accurate and complete statement of the law should give them in language of his own selection. Scott *v.* State, 56 Miss. 287; Evans *v.* State, 44 Miss. 762; Lambeth *v.* State, 23 Miss. 322.

5. *Indiana.*— Carpenter *v.* State, 43 Ind. 371.

New York.— People *v.* Corey, 157 N. Y. 332, 51 N. E. 1024.

North Carolina.— State *v.* Christmas, 51 N. C. 471.

South Carolina.— State *v.* McIntosh, 39 S. C. 97, 17 S. E. 446.

Tennessee.— Wiley *v.* State, 5 Baxt. 662.

Texas.— Lawrence *v.* State, 11 Tex. App. 306.

No evidence to justify.— It is not error to refuse to instruct upon a matter of law where no evidence tending to raise that question is introduced. U. S. *v.* Guiteau, 1 Mackey (D. C.) 498, 47 Am. Rep. 247.

Where two instructions are asked for, both of which contain the same principle of law, the court may give the one and refuse the other. U. S. *v.* Heath, 20 D. C. 272; Kennedy *v.* People, 40 Ill. 488.

6. Long *v.* State, 12 Ga. 293; State *v.* Stewart, 26 S. C. 125, 1 S. E. 468.

Affirming together.— It is proper to read defendant's instructions through and affirm all together. Com. *v.* Cleary, 135 Pa. St. 64, 19 Atl. 1017, 8 L. R. A. 301.

Law read by counsel.— Defendant has a right to an express charge by the court on proper requests submitted. It is not enough to charge that the jury must take the law as read by counsel in argument perhaps many hours before. Such a course is calculated rather to confuse than to enlighten the jury. Roe *v.* State, 45 N. J. L. 49.

Reading without oral comment.—A statute which requires requested charges to be written precisely as they are desired to be given, and requires them to be read to the jury, if at all, without one word of oral comment, is imperative and not directory. Failure to obey it is error. Newman *v.* State, 6 Baxt. (Tenn.) 164. It is also error under this statute to read a portion of a law-book as a part of the charge, for it is the plain duty of the judge to commit or cause someone to commit every word of his charge to writing and deliver it to the jury when they retire. Manier *v.* State, 6 Baxt. (Tenn.) 595. It is also improper practice under this statute for counsel to read requested instructions in the hearing of the jury. They should be handed to the judge who after he has examined and committed them to writing should charge as much thereof as to him may seem just and proper. State *v.* Missio, 105 Tenn. 218, 58 S. W. 216.

7. People *v.* Harper, 83 Mich. 273, 47 N. W. 221.

8. People *v.* Williams, 17 Cal. 142; People *v.* Ramirez, 13 Cal. 172; People *v.* Hurley, 8 Cal. 390; State *v.* McCartey, 17 Minn. 76; State *v.* Ferguson, 9 Nev. 106. *Compare* People *v.* Douglass, 100 Cal. 1, 34 Pac. 490, holding that omitting to state the reason of the refusal to charge was not prejudicial error. See also People *v.* Barthleman, 120 Cal. 7, 52 Pac. 112; O'Bryan *v.* State, 12 Tex. App. 118.

The Florida statute which requires the judge to state his rulings on instructions

jury upon all questions of law arising in the case which are necessary for their information, if defendant does not at the proper time call the court's attention to an omission so to charge, he must be regarded as having waived the same and will not be heard to complain.[9]

2. Time of Objections. As a general rule objections and exceptions to charges given or to failure to instruct as requested must be taken at once when the charge is given and before the jury retire.[10] They will not be considered on appeal[11] or on a motion for a new trial,[12] unless this rule is complied with.

3. Form and Mode of Objections. The form and manner of taking objections depend upon the local practice in the various jurisdictions.[13]

presented is mandatory. A failure to comply therewith is error. Baker *v.* State, 17 Fla. 406.

9. State *v.* Westlake, 159 Mo. 669, 61 S. W. 243; State *v.* Paxton, 126 Mo. 500, 29 S. W. 705; State *v.* Reynolds, 87 N. C. 544; State *v.* Owens, 44 S. C. 324, 22 S. E. 244; State *v.* Davis, 27 S. C. 609, 4 S. E. 567.

Failure to appear.— Where on the trial for a misdemeanor defendant fails to appear either in person or by counsel, he cannot complain of the court's failure to give a charge for his benefit. State *v.* Meyers, 40 S. C. 555, 18 S. E. 892.

10. State *v.* Reynolds, 87 N. C. 544; State *v.* Owens, 44 S. C. 324, 22 S. E. 244; State *v.* Davis, 27 S. C. 609, 4 S. E. 567.

11. *Florida.*— Morrison *v.* State, 42 Fla. 149, 28 So. 97; Lester *v.* State, 37 Fla. 382, 20 So. 232; Shepherd *v.* State, 36 Fla. 374, 18 So. 773; Gibson *v.* State, 26 Fla. 109, 7 So. 376.

Idaho.— State *v.* Hurst, 4 Ida. 345, 39 Pac. 554.

Indiana.— Grubb *v.* State, 117 Ind. 277, 20 N. E. 257, 725; Ledley *v.* State, 4 Ind. 580.

Iowa.— State *v.* Hathaway, 100 Iowa 225, 69 N. W. 449.

Kentucky.— Burns *v.* Com., 3 Metc. 13.

Louisiana.— State *v.* Harris, 107 La. 325, 31 So. 782; State *v.* Wright, 104 La. 44, 28 So. 909.

Maine.— State *v.* Richards, 85 Me. 252, 27 Atl. 122; State *v.* Fenlason, 78 Me. 495, 7 Atl. 385; State *v.* Wilkinson, 76 Me. 317.

Massachusetts.— Com. *v.* Kelley, 165 Mass. 175, 42 N. E. 573; Com. *v.* Costley, 118 Mass. 1.

Michigan.— People *v.* Wallin, 55 Mich. 497, 22 N. W. 15; People *v.* Saunders, 25 Mich. 119. See also People *v.* Raher, 92 Mich. 165, 52 N. W. 625, 31 Am. St. Rep. 575.

Mississippi.— Haynie *v.* State, 32 Miss. 400; Keithler *v.* State, 10 Sm. & M. 192.

Missouri.— State *v.* Norman, 159 Mo. 531, 60 S. W. 1036; State *v.* Sacre, 141 Mo. 64, 41 S. W. 905; State *v.* Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; State *v.* Paxton, 126 Mo. 500, 29 S. W. 705; State *v.* Cantlin, 118 Mo. 100, 23 S. W. 1091.

North Carolina.— State *v.* Hart, 116 N. C. 976, 20 S. E. 1014; State *v.* Halford, 104 N. C. 874, 10 S. E. 524; State *v.* Debnam, 98 N. C. 712, 3 S. E. 742; State *v.* Reynolds, 87 N. C. 544; State *v.* Nicholson, 85 N. C. 548; State *v.* Caveness, 78 N. C. 484. *Compare* State *v.* Varner, 115 N. C. 744, 20 S. E. 518, holding that defendant may except specifically after verdict.

North Dakota.— State *v.* Campbell, 7 N. D. 58, 72 N. W. 935.

Rhode Island.—State *v.* Pirlot, 20 R. I. 273, 38 Atl. 656.

South Carolina.— State *v.* Davis, 27 S. C. 609, 4 S. E. 567; State *v.* Jones, 21 S. C. 596.

Texas.— Corn *v.* State, 41 Tex. 301; Robinson *v.* State, 24 Tex. 152; Martin *v.* State, 25 Tex. App. 557, 8 S. W. 682; Williams *v.* State, 4 Tex. App. 5; Franklin *v.* State, 2 Tex. App. 8; Browning *v.* State, 1 Tex. App. 96. *Compare* McCall *v.* State, 14 Tex. App. 353.

Vermont.— State *v.* Clark, 37 Vt. 471.

Wisconsin.— Jenks *v.* State, 17 Wis. 665.

United States.— Thiede *v.* Utah, 159 U. S. 510, 16 S. Ct. 62, 40 L. ed. 237.

Canada.— Reg. *v.* Fick, 16 U. C. C. P. 379.

See 14 Cent. Dig. tit. "Criminal Law," § 2022.

Filing exceptions with the clerk before the jury has retired is sometimes necessary. Territory *v.* O'Brien, 7 Mont. 38, 14 Pac. 631.

Objectionable instructions tendered by the prosecution must be objected to when offered and passed on. An exception made when they are given is unavailable. Reed *v.* Com., 7 Bush (Ky.) 641.

In Washington by statute counsel are compelled to take their exceptions after the jury has retired. State *v.* Vance, 29 Wash. 435, 70 Pac. 34. See also State *v.* Coella, 8 Wash. 512, 36 Pac. 474.

12. *Florida.*— Shepherd *v.* State, 36 Fla. 374, 18 So. 773.

Indiana.— Murray *v.* State, 26 Ind. 141.

Louisiana.— State *v.* West, 105 La. 639, 30 So. 119; State *v.* Wright, 104 La. 44, 28 So. 909; State *v.* Ryan, 30 La. Ann. 1176.

Missouri.— State *v.* Dewitt, 152 Mo. 76, 53 S. W. 429; State *v.* Elkins, 101 Mo. 344, 14 S. W. 116; State *v.* Meyers, 99 Mo. 107, 12 S. W. 516; State *v.* Rambo, 95 Mo. 462, 8 S. W. 365.

Texas.— Cunningham *v.* State, 20 Tex. App. 162.

See 14 Cent. Dig. tit. "Criminal Law," § 2022.

Exception in capital cases.— State *v.* Wright, 104 La. 44, 28 So. 909; State *v.* Brown, 40 La. Ann. 725, 4 So. 897.

13. Thus it has been held that the proper manner of excepting to the giving or refusal of a series of instructions is to number

4. Specific Exceptions Necessary. Exceptions to the charge of the court should be specific. A general exception to the entire charge has as a rule been deemed to be insufficient.[14]

5. Exception to Refusal to Give Instructions. A general exception to the court's refusal to give the instructions requested is insufficient if any one of such instructions was properly refused.[15]

J. Custody, Conduct, and Deliberations of Jury — 1. In General — a. Place of Lodging Jury. The mere fact that the jurors are lodged or remain in a place where they might be approached and influenced to the prejudice of the accused is not ground for a new trial, unless it appears that they were actually

each and except to them by reference to their numbers. State *v.* Bartlett, 9 Ind. 569. It is sometimes required that an exception to an instruction must be reduced to writing. Territory *v.* O'Brien, 7 Mont. 38, 14 Pac. 631. See also Keithler *v.* State, 10 Sm. & M. (Miss.) 192.

14. *Alabama.*— Ragsdale *v.* State, 134 Ala. 24, 32 So. 674; Bonner *v.* State, 107 Ala. 97, 18 So. 226; Cohen *v.* State, 50 Ala. 108.

Arkansas.— Williams *v.* State, 66 Ark. 264, 50 S. W. 517.

Colorado.— Edwards *v.* People, 26 Colo. 539, 59 Pac. 56; Wilson *v.* People, 3 Colo. 325.

Florida.— Wood *v.* State, 31 Fla. 221, 12 So. 539; Smith *v.* State, 29 Fla. 408, 10 So. 894; Pinson *v.* State, 28 Fla. 735, 9 So. 706; Carter *v.* State, 20 Fla. 754.

Georgia.— Boynton *v.* State, 115 Ga. 587, 41 S. E. 995; Barber *v.* State, 112 Ga. 584, 37 S. E. 885; Fordham *v.* State, 112 Ga. 228, 37 S. E. 391; Wilson *v.* State, 69 Ga. 224; Wood *v.* State, 68 Ga. 296; Brassell *v.* State, 64 Ga. 318.

Indian Territory.—Harless *v.* U. S., (1898) 45 S. W. 133.

Louisiana.— State *v.* Weston, 107 La. 45, 31 So. 383; State *v.* Tibbs, 48 La. Ann. 1278, 20 So. 735.

Maine.— State *v.* Savage, 69 Me. 112.

Massachusetts.— Com. *v.* Meserve, 154 Mass. 64, 27 N. E. 997; Com. *v.* Tolman, 149 Mass. 229, 21 N. E. 377, 14 Am. St. Rep. 414, 3 L. R. A. 747.

Michigan.—Turner *v.* People, 33 Mich. 363.

Nebraska.— Smith *v.* State, 4 Nebr. 277.

New Jersey.— Engle *v.* State, 50 N. J. L. 272, 13 Atl. 604.

New Mexico.— Beall *v.* Territory, 1 N. M. 507.

New York.— Ellis *v.* People, 21 How. Pr. 356.

North Carolina.—State *v.* Downs, 118 N. C. 1242, 24 S. E. 531; State *v.* Varner, 115 N. C. 744, 20 S. E. 518.

Ohio.— Adams *v.* State, 29 Ohio St. 412.

South Carolina.— State *v.* Davenport, 38 S. C. 348, 17 S. E. 37.

Texas.— Barrett *v.* State, (Cr. App. 1902) 69 S. W. 144; Simons *v.* State, (Cr. App. 1896) 34 S. W. 619; Mayes *v.* State, 33 Tex. Cr. 33, 24 S. W. 421; Quintana *v.* State, 29 Tex. App. 401, 16 S. W. 258, 25 Am. St. Rep. 730; Peace *v.* State, 27 Tex. App. 83, 10 S. W. 761.

Utah.— People *v.* Hart, 10 Utah 204, 37 Pac. 330.

Wisconsin.— Jenks *v.* State, 17 Wis. 665.

United States.— Edgington *v.* U. S., 164 U. S. 361, 17 S. Ct. 72, 41 L. ed. 467; Brown *v.* U. S., 164 U. S. 221, 17 S. Ct. 33, 41 L. ed. 410; Shelp *v.* U. S., 81 Fed. 694, 26 C. C. A. 570.

See 14 Cent. Dig. tit. "Criminal Law," § 2025.

Contra.— Williams *v.* Com., 80 Ky. 313, 4 Ky. L. Rep. 3.

Illustrations.— An exception "to the latter portion of said charge" (Stroud *v.* State, 55 Ala. 77), "to so much of the charge as commences with the words . . . on the fourth line from the bottom of [a] . . . page" (Stroud *v.* State, 55 Ala. 77), "to each and all of said instructions and to every paragraph thereof" (Miller *v.* People, 23 Colo. 95, 46 Pac. 111; Hayes *v.* State, 112 Wis. 304, 87 N. W. 1076. *Compare* Rhea *v.* U. S., 6 Okla. 249, 50 Pac. 992), "to each and every part of the charge given" (People *v.* Bristol, 23 Mich. 118), that a charge is contrary to law (Smith *v.* State, 67 Ga. 769), fails to state the law and is calculated to mislead the jury (Wood *v.* State, 68 Ga. 296), or is "calculated to do defendant an injury" (State *v.* Tibbs, 48 La. Ann. 1278, 20 So. 735), to a charge "as given" (State *v.* Moore, 120 N. C. 570, 26 S. E. 697; State *v.* Frizell, 111 N. C. 722, 16 S. E. 409; State *v.* Parker, 106 N. C. 711, 11 S. E. 517), or that the court "erred in its charge to the jury" (Hearne *v.* State, 43 Tex. Cr. 435, 66 S. W. 773) is too general to sustain error where some portion of the charge is unobjectionable.

An exception to the court's definition of reasonable doubt (State *v.* Davenport, 38 S. C. 348, 17 S. E. 37) or malice (People *v.* Thiede, 11 Utah 241, 39 Pac. 387) without pointing out where the error lies, is too general to be considered.

15. *Alabama.*— Alston *v.* State, 109 Ala. 51, 20 So. 81; Goley *v.* State, 87 Ala. 57, 6 So. 287; Williams *v.* State, 68 Ala. 551; McGehee *v.* State, 52 Ala. 224.

Florida.— King *v.* State, 43 Fla. 211, 31 So. 254.

New Jersey.—Gardner *v.* State, 55 N. J. L. 17, 26 Atl. 30.

Washington.— State *v.* Robinson, 12 Wash. 491, 41 Pac. 884.

United States.— Thiede *v.* Utah, 159 U. S. 510, 16 S. Ct. 62, 40 L. ed. 237.

so approached and influenced;[16] but it has been held that an unimpeached affidavit that the jury have been kept where they were exposed to improper influences makes a *prima facie* case, and casts upon the prosecution the burden of showing that the jury have not been so exposed or that the exposure was of such a nature that it could not or did not influence them.[17]

b. Places Where Jury May Go. A new trial will not be granted merely because the jury in a body, while in the charge of the officer, attended a theater[18] or a church,[19] walked through the jail,[20] or had their pictures taken in a photograph gallery,[21] or in a capital case, while taking a ride by permission of the court, were carried by the scene of the homicide,[22] or being out for exercise were taken beyond the confines of the state[23] or county.[24]

c. Furnishing Eatables and Other Articles to Jury. By the rules of the common law jurors are not permitted to eat or drink during their retirement without permission of the court, and they are liable to fine if they take anything to eat or drink into the room with them, although they do not actually partake thereof;[25] but their eating during retirement, unless done at the cost of the prosecutor, will not avoid a conviction.[26] It is proper, however, to permit jurors to be supplied with medicine,[27] changes of clothing,[28] and other necessaries, where it can be done without exposing them to unfair influence.

d. Illness of Juror. Where after the jury have retired a juror becomes ill, but is able after medical assistance to resume his place, and it is not shown that the illness was of such a character as to unfit him to pass upon the case or that there was any illegal separation of the jurors, there is no ground for awarding a new trial.[29] If a juror becomes so ill during the trial as to be incapable of joining in the deliberations or verdict or if a juror dies the jury must be discharged.[30]

e. Absence of Jury From Room During Argument. It has been held that where the court is the exclusive judge of the law and the jury must accept it as laid down by his instructions, it is not error to permit them to retire temporarily during the argument of a question of law addressed to the court.[31]

2. Jury in Charge of Officer — a. In General. In trials for felony the jury were required at common law to be kept together in charge of a sworn officer during adjournments, and this rule is still enforced to some extent, particularly in the case of capital felonies.[32] The sheriff or his deputy is the proper officer to take custody of the jury during an adjournment, or after they have retired, where

See 14 Cent. Dig. tit. "Criminal Law," § 2026.

16. Spier *v.* State, 89 Ga. 737, 15 S. E. 633; Dumas *v.* State, 63 Ga. 600; State *v.* Perry, 44 N. C. 330.

17. Vaughan *v.* State, 57 Ark. 1, 20 S. W. 588, where a new trial was granted on the ground that the jury had been kept where they could overhear an angry and excited discussion of the case, in which were demands for the conviction of the accused.

18. Moore *v.* People, 26 Colo. 213, 57 Pac. 857; Jones *v.* People, 6 Colo. 452, 45 Am. Rep. 526.

19. State *v.* Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

Remarks by preacher.— Although the preacher in his sermon cautions them to be careful and to do their duty to God and their country, and prays for a fair and impartial trial for the prisoner, it is not ground for a new trial. State *v.* Kinsauls, 126 N. C. 1095, 36 S. E. 31.

20. State *v.* Baber, 74 Mo. 292, 41 Am. Rep. 314.

21. State *v.* Taylor, 134 Mo. 109, 35 S. W. 92.

22. Palmer *v.* State, 65 N. H. 221, 19 Atl. 1003.

23. King *v.* State, 91 Tenn. 617, 20 S. W. 169.

24. Thompson *v.* Com., 8 Gratt. (Va.) 637.

25. 1 Chitty Cr. L. 632; Plowden 519.

26. 1 Chitty Cr. L. 633; Coke Litt. 227*b*.

Where the court permits the sheriff to furnish the jury with food, it is not misconduct for him to ask them if they wish anything to eat, or for them to tell him what they want. Reighard *v.* State, 22 Ohio Cir. Ct. 340, 12 Ohio Cir. Dec. 382.

27. O'Shields *v.* State, 55 Ga. 696.

28. State *v.* Caulfield, 23 La. Ann. 148.

29. People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846.

30. See *infra*, XIV, K, 1, c.

31. Driggers *v.* State, 38 Fla. 7, 20 So. 758. But see Patterson *v.* State, (Tex. Cr. App. 1901) 60 S. W. 557, holding that unless the parties or their counsel consent it is never proper to allow the jury to retire whether the argument is on the law or the facts.

32. See *infra*, XIV, J, 3, a, (II).

custody is necessary.[33] Where they are disqualified or otherwise unable to act, the trial judge may appoint an officer,[34] or he may take charge of the jurors himself.[35] The fact that an officer is sworn and testifies as a witness does not disqualify him from acting as bailiff in charge of the jury during their deliberations.[36]

b. Oath of Officer — (i) *In General.* At common law, and in some states under mandatory statutes, it is necessary to swear the officer who has charge of the jury during their retirement, and a failure to do so may be ground for a new trial.[37] The contrary has also been held, and some of the authorities approve the court's action in dispensing with a special oath on the ground that the sheriff or other officer is merely performing his official duty, and is consequently bound by his oath of office.[38]

(ii) *Requisites.* The form of oath as given in the statute prescribing the oath which shall be administered to the officer must be substantially followed. The officer is usually sworn to keep the jury together during the adjournment, and to suffer no person to converse or communicate with them on any subject connected with the trial, and not to do so himself.[39] An error in this particular is not

33. State *v.* Devall, 51 La. Ann. 497, 25 So. 384 (constable designated by sheriff); Woodson *v.* State, 40 Tex. Cr. 685, 51 S. W. 918; Bennett *v.* Com., 8 Leigh (Va.) 745. The sheriff's action in changing, in the absence of defendant and his counsel, the bailiff in whose custody the jury have been placed by the court is not error. Nicholson *v.* State, 38 Fla. 99, 20 So. 818.

34. People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269. It is not error for the judge to go to the hotel where the jurors are and swear in an assistant to the officer in charge, although the accused and his counsel are absent. State *v.* Robinson, 106 Tenn. 204, 61 S. W. 65.

35. Philips *v.* Com., 19 Gratt. (Va.) 485.

36. *Michigan.*— People *v.* Beverly, 108 Mich. 509, 66 N. W. 379; People *v.* Coughlin, 65 Mich. 704, 32 N. W. 905.

North Dakota.— State *v.* Rosencrans, 9 N. D. 163, 82 N. W. 422.

Texas.— Washington *v.* State, 19 Tex. App. 521, 53 Am. Rep. 387.

Vermont.— State *v.* Lockwood, 58 Vt. 378, 3 Atl. 539.

Virginia.— Reed *v.* Com., 98 Va. 817, 36 S. E. 399.

Washington.— Edwards *v.* Territory, 1 Wash. Terr. 195.

West Virginia.— State *v.* Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

See 14 Cent. Dig. tit. "Criminal Law," § 2034.

37. *Illinois.*— Dreyer *v.* People, 188 Ill. 40, 58 N. E. 620, 59 N. E. 424, 58 L. R. A. 869; Sanders *v.* People, 124 Ill. 218, 16 N. E. 81; Lewis *v.* People, 44 Ill. 452; McIntyre *v.* People, 38 Ill. 514; Jackson *v.* People, 36 Ill. App. 88 [*affirmed* in 126 Ill. 139, 18 N. E. 286].

Kansas.— State *v.* McCormick, 57 Kan. 440, 46 Pac. 777, 57 Am. St. Rep. 341.

Kentucky.— Com. *v.* Shields, 2 Bush 81.

Mississippi.— McCann *v.* State, 9 Sm. & M. 465.

Tennessee.—Maynard *v.* State, 9 Baxt. 225; Clark *v.* State, 8 Baxt. 591.

Wisconsin.— Brucker *v.* State, 16 Wis. 333.

See 14 Cent. Dig. tit. "Criminal Law," § 2035.

Waiver by accused.— The statutory requirement that an officer shall be sworn to attend the jury while they consider their verdict may be waived by the accused. Dreyer *v.* People, 188 Ill. 40, 58 N. E. 620, 59 N. E. 424, 58 L. R. A. 869.

Time of administering oath.— An oath, although in the statutory form, administered at the time the jury was impaneled, is not a compliance with a statute requiring that the officer having the jury in charge shall be sworn when they retire to consider their verdict. Dreyer *v.* People, 188 Ill. 40, 58 N. E. 620, 59 N. E. 424, 58 L. R. A. 869.

At each adjournment.— The officer need not be specially sworn at each recess or adjournment of the court. State *v.* Ice, 34 W. Va. 244, 12 S. E. 695; State *v.* Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

38. *Arkansas.*— Atterberry *v.* State, 56 Ark. 515, 20 S. W. 411.

Florida.— O'Connor *v.* State, 9 Fla. 215; Cato *v.* State, 9 Fla. 163.

Indiana.— Hittner *v.* State, 19 Ind. 48.

Louisiana.— State *v.* Kennedy, 8 Rob. 590.

Ohio.— Davis *v.* State, 15 Ohio 72, 45 Am. Dec. 559.

Virginia.— Longley *v.* Com., 99 Va. 807, 37 S. E. 339; Reed *v.* Com., 98 Va. 817, 36 S. E. 399; Bennett *v.* Com., 8 Leigh 745.

West Virginia.— State *v.* Poindexter, 23 W. Va. 805.

See 14 Cent. Dig. tit. "Criminal Law," § 2035.

39. State *v.* Eldred, 8 Kan. App. 625, 56 Pac. 153; Buxton *v.* State, 89 Tenn. 216, 14 S. W. 480; Scott *v.* Tenn, 7 Lea (Tenn.) 232; Spain *v.* State, 8 Baxt. (Tenn.) 514. As to the form of oath see also State *v.* Lashell, (Kan. App. 1900) 61 Pac. 678.

In England the oath administered to the bailiff was: "You shall swear that you shall keep this jury without meat, drink, fire or candle; you shall suffer none to speak to them, neither shall you speak to them yourself, but only to ask them, whether they are

cured by proof that the bailiff did all that a proper statutory oath required him to do.[40]

c. Manner of Guarding Jury. The fact that one of two officers having the jury in charge was temporarily absent, the jury being left in charge of the other,[41] or that one bailiff was substituted for another during their retirement,[42] is not ground for a new trial.

3. Separation of Jury — a. Before Submission of Case — (i) *In Misdemeanor Cases.* In trials for misdemeanors the court may always, even at common law, allow the jury to separate before they retire to consider their verdict, but they should be cautioned not to converse with any one about the case.[43]

(ii) *In Felony Cases*—(a) *In General.* In all trials for felony it was necessary at common law to keep the jury together in charge of an officer, and not to permit them to separate, from the time of their being impaneled and sworn.[44] In most jurisdictions this rule still applies, in the absence of a statute, in the case of capital felonies,[45] and in some it applies in the case of felonies not capital.[46] In other jurisdictions it has been regarded as within the discretion of the court to allow a separation before the case is finally submitted to them in the case of felonies not capital,[47] and even in the case of capital felonies.[48] In many states

agreed: So help you God." 1 Chitty Cr. L. 632.

40. State *v.* Lashell, (Kan. App. 1900) 61 Pac. 678.

The oath may be administered by the clerk during recess in the absence of the judge. Nicholson *v.* State, 38 Fla. 99, 20 So. 818.

41. State *v.* Harrigan, 9 Houst. (Del.) 369, 31 Atl. 1052.

42. Com. *v.* Jenkins, Thach. Cr. Cas. (Mass.) 118.

43. Rex *v.* Kinnear, 2 B. & Ald. 462; Rex *v.* Woolf, 1 Chit. 401, 18 E. C. L. 223. See also Frances *v.* State, 6 Fla. 306; Bowdoin *v.* State, 113 Ga. 1150, 39 S. E. 478.

44. 1 Chitty Cr. L. 628.

45. *Colorado.*—Elkin *v.* People, 5 Colo. 508.

Florida.— Gamble *v.* State, (1902) 33 So. 471.

Illinois.— Jumpertz *v.* People, 21 Ill. 375.

Indiana.— Quinn *v.* State, 14 Ind. 589.

Louisiana.— State *v.* Hornsby, 8 Rob. 554, 41 Am. Dec. 305. See State *v.* Johnson, 30 La. Ann. 921.

Michigan.— See People *v.* Hull, 86 Mich. 449, 49 N. W. 288.

Mississippi.— Woods *v.* State, 43 Miss. 364.

Missouri.— State *v.* Murray, 91 Mo. 95, 3 S. W. 397; McLean *v.* State, 8 Mo. 153.

Pennsylvania.— Peiffer *v.* Com., 15 Pa. St. 468, 53 Am. Dec. 605.

Tennessee.— Wiley *v.* State, 1 Swan 256; Wesley *v.* State, 11 Humphr. 502; Cochran *v.* State, 7 Humphr. 544.

Utah.— People *v.* Shafer, 1 Utah 260.

Vermont.— State *v.* Godfrey, Brayt. 170.

Virginia.— Com. *v.* McCaul, 1 Va. Cas. 271.

West Virginia.— State *v.* Clark, 51 W. Va. 457, 41 S. E. 204.

Wisconsin.— Hempton *v.* State, 111 Wis. 127, 86 N. W. 596; Keenan *v.* State, 8 Wis. 132.

See 14 Cent. Dig. tit. "Criminal Law," § 2039 *et seq.*

46. *Colorado.*—Elkin *v.* People, 5 Colo. 508.

Delaware.— State *v.* Brown, 2 Marv. 380, 36 Atl. 458.

Georgia.— Berry *v.* State, 10 Ga. 511.

Indiana.— Quinn *v.* State, 14 Ind. 589.

Maine.— State *v.* McCormick, 84 Me. 566, 24 Atl. 938.

Mississippi.— Organ *v.* State, 26 Miss. 78.

Missouri.— McLean *v.* State, 8 Mo. 153.

Tennessee.— Wiley *v.* State, 1 Swan 256.

See 14 Cent. Dig. tit. "Criminal Law," § 2039 *et seq.*

47. *Alabama.*— Robbins *v.* State, 49 Ala. 394.

Florida.— Tervin *v.* State, 37 Fla. 396, 20 So. 551; Frances *v.* State, 6 Fla. 306. And see Smith *v.* State, 40 Fla. 203, 23 So. 854.

Hawaii.— Provisional Government *v.* Caecires, 9 Hawaii 523.

Illinois.— Sutton *v.* People, 145 Ill. 279, 34 N. E. 420; Daxanbeklar *v.* People, 93 Ill. App. 553.

Louisiana.— State *v.* Antoine, 52 La. Ann. 488, 26 So. 1011; State *v.* Hornsby, 8 Rob. 554, 41 Am. Dec. 305.

Minnesota.— State *v.* Salverson, 87 Minn. 40, 91 N. W. 1; Bilansky *v.* State, 3 Minn. 427.

Ohio.— Davis *v.* State, 15 Ohio 72, 45 Am. Dec. 559; State *v.* Engle, 13 Ohio 490; Sargent *v.* State, 11 Ohio 472.

Pennsylvania.— McCreary *v.* Com., 29 Pa. St. 323.

South Carolina.— State *v.* McKee, 1 Bailey 651, 21 Am. Dec. 499.

Wisconsin.— Baker *v.* State, 88 Wis. 140, 59 N. W. 570.

See 14 Cent. Dig. tit. "Criminal Law," § 2039 *et seq.*

48. *Alabama.*— See Robbins *v.* State, 49 Ala. 394.

Kansas.— State *v.* Henricks, 32 Kan. 559, 4 Pac. 1050; State *v.* McKinney, 31 Kan. 570, 3 Pac. 356. *Compare* State *v.* Burton, 65 Kan. 704, 70 Pac. 640.

Minnesota.— State *v.* Ryan, 13 Minn. 370; Bilansky *v.* State, 3 Minn. 427.

Nebraska.— Walrath *v.* State, 8 Nebr. 80.

New Mexico.— Territory *v.* Chenowith, 3 N. M. 225, 5 Pac. 532.

the matter is now regulated by express statutory provisions prohibiting or allowing a separation of the jury under certain circumstances.[49]

(B) *Separation by Consent.* In many jurisdictions it has been held that when a rule of practice or statutory provision requires that the jury shall be kept together, defendant cannot waive his rights in this respect, particularly in the case of capital felonies by requesting or consenting to a separation, since defendant ought not to be placed in the position of having to consent or perhaps prejudice the jury by withholding consent.[50] Other decisions, however, are to the contrary.[51] Defendant's counsel cannot give consent.[52]

(C) *Effect of Improper Separation.* Improper separation of the jury in a criminal case is not equivalent to an acquittal, but at most merely entitles defendant to a new trial;[53] and as will be shown in another place, it does not necessarily entitle him to a new trial.[54]

(D) *Necessary Separation.* The rule that the jury must be kept together does not apply, even in capital cases, to temporary separation of one or more jurors from the others in cases of necessity, where the separating jurors are in

New York.— Stephens *v.* People, 19 N. Y. 549; People *v.* Montgomery, 13 Abb. Pr. N. S. 207.

South Carolina.— State *v.* Stewart, 26 S. C. 125, 1 S. E. 468; State *v.* Belcher, 13 S. C. 459; State *v.* McElmurray, 3 Strobh. 33; State *v.* Anderson, 2 Bailey 565; State *v.* McKee, 1 Bailey 651, 21 Am. Dec. 499.

See 14 Cent. Dig. tit. "Criminal Law," § 2039 *et seq.*

49. *Arkansas.*— Hamilton *v.* State, 62 Ark. 543, 36 S. W. 1054; Johnson *v.* State, 32 Ark. 309.

California.— People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269; People *v.* Hawley, 111 Cal. 78, 43 Pac. 404. See People *v.* Tan Poi, 86 Cal. 225, 24 Pac. 998.

Indiana.— Evans *v.* State, 7 Ind. 271.

Iowa.— State *v.* Smith, 102 Iowa 656, 72 N. W. 279; State *v.* Garrity, 98 Iowa 101, 67 N. W. 92; State *v.* Walton, 92 Iowa 455, 61 N. W. 179; State *v.* Gillick, 10 Iowa 98; Grable *v.* State, 2 Greene 559.

Kentucky.— French *v.* Com., 100 Ky. 63, 37 S. W. 269, 18 Ky. L. Rep. 574.

Missouri.— State *v.* Schaeffer, 172 Mo. 335, 72 S. W. 518; State *v.* Avery, 113 Mo. 475, 21 S. W. 193; State *v.* Collins, 81 Mo. 652.

Nevada.— State *v.* McMahon, 17 Nev. 365, 30 Pac. 1000.

Ohio.— Bergin *v.* State, 31 Ohio St. 111; Cantwell *v.* State, 18 Ohio St. 477.

Oregon.— State *v.* Shaffer, 23 Oreg. 555, 32 Pac. 545.

Texas.— Grissom *v.* State, 4 Tex. App. 374; Porter *v.* State, 1 Tex. App. 394.

Virginia.— Jones *v.* Com., 31 Gratt. 830.

Washington.— State *v.* Parker, 25 Wash. 405, 65 Pac. 776 (involuntary consent); State *v.* Tommy, 19 Wash. 270, 53 Pac. 157; State *v.* Place, 5 Wash. 773, 32 Pac. 736; Anderson *v.* State, 2 Wash. 183, 26 Pac. 267.

See 14 Cent. Dig. tit. "Criminal Law," § 2039 *et seq.*

Constitutionality of statute.— A statute permitting a separation pending trial does not violate the constitutional right to trial by jury. People *v.* Chaves, 122 Cal. 134, 54 Pac. 596.

50. *Colorado.*—Elkin *v.* People, 5 Colo. 508.

Georgia.— Berry *v.* State, 10 Ga. 511.

Louisiana.— State *v.* Hornsby, 8 Rob. 554, 41 Am. Dec. 305.

Mississippi.— Woods *v.* State, 43 Miss. 364.

Ohio.— Cantwell *v.* State, 18 Ohio St. 477.

Pennsylvania.— Peiffer *v.* Com., 15 Pa. St. 468, 53 Am. Dec. 605.

Tennessee.— Wiley *v.* State, 1 Swan 256; Wesley *v.* State, 11 Humphr. 502.

Utah.— People *v.* Shafer, 1 Utah 260.

Washington.— Anderson *v.* State, 2 Wash. 183, 26 Pac. 267.

51. *Indiana.*— Henning *v.* State, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756; Quinn *v.* State, 14 Ind. 589.

Missouri.— State *v.* Frier, 118 Mo. 648, 24 S. W. 220; State *v.* Mix, 15 Mo. 153.

Nevada.— State *v.* McMahon, 17 Nev. 365, 30 Pac. 1000.

New York.— Stephens *v.* People, 19 N. Y. 549 [*affirming* 4 Park. Cr. 396].

Texas.— Brown *v.* State, 38 Tex. 482. But see Grissom *v.* State, 4 Tex. App. 374.

Washington.— Hartigan *v.* Territory, 1 Wash. Terr. 447.

See 14 Cent. Dig. tit. "Criminal Law," § 2041.

Failure to object until after verdict.— Henning *v.* State, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756.

Involuntary consent.— State *v.* Parker, 25 Wash. 405, 65 Pac. 776.

A breach of the condition in defendant's consent that a juror might act in a dramatic performance providing he should be attended by a sheriff is ground for a new trial, although no prejudice is shown. Wilson *v.* State, 18 Tex. App. 576.

52. People *v.* Backus, 5 Cal. 275; Pfeiffer *v.* Com., 15 Pa. St. 468, 53 Am. Dec. 605; Brown *v.* State, 38 Tex. 482.

53. Williams *v.* State, 45 Ala. 57; Tervin *v.* State, 37 Fla. 396, 20 So. 551; Wyatt *v.* State, 1 Blackf. (Ind.) 257; State *v.* Harras, 22 Wash. 57, 60 Pac. 58.

54. **Separation of jury as ground for new trial** see *infra*, XV, A, 2, l, (IV), (E).

charge of an officer and are not allowed to communicate with other persons.[55] Where a juror is permitted to separate from his fellows, an order to that effect should be entered, and an officer should be sworn to have custody of him, not to converse with him about the trial, or permit others to do so, and to cause him to return as soon as possible.[56]

b. Before Completion and Swearing of Jury. By the weight of authority the fact that the court allowed the jurors to separate, or that one or more of them separated from the others without leave of the court, before the jury was impaneled and sworn, is not ground for a new trial or reversal.[57] Those who have separated need not, on the reassembling of the jury, be reëxamined on their *voir dire*.[58]

c. After Retirement For Deliberation. After the case has been finally submitted to the jury and they have retired to consider their verdict, they must in all cases be kept together in charge of a sworn officer and not be permitted to separate before they render or at least find and seal their verdict.[59] Whether or not an improper separation is ground for a new trial is elsewhere considered.[60]

d. After Sealing Verdict. The separation of the jury after they have agreed upon and sealed their verdict during a recess of the court, when so directed by the court, is not error,[61] unless this is expressly or impliedly prohibited by

55. State *v.* Callian, 109 La. 346, 33 So. 363; State *v.* Scanlan, 52 La. Ann. 2058, 28 So. 211; State *v.* Schmidt, 137 Mo. 266, 38 S. W. 938; State *v.* Washburn, 91 Mo. 571, 4 S. W. 274; State *v.* Payton, 90 Mo. 220, 2 S. W. 394; State *v.* Collins, 86 Mo. 245. See *infra*, XV, A, 2, l, (IV), (E).

56. Jumpertz *v.* People, 21 Ill. 375; State *v.* Shippy, Brayt. (Vt.) 169.

Waiver.— In Texas a defendant, although he may consent to a separation of the jury, cannot waive his right to have the separated jurors accompanied by an officer. McCampbell *v.* State, 37 Tex. Cr. 607, 40 S. W. 496.

57. *Louisiana.*— State *v.* Forney, 24 La. Ann. 191.

Missouri.— State *v.* Williams, 149 Mo. 496, 51 S. W. 88; State *v.* Burns, 33 Mo. 483.

Texas.— Woodson *v.* State, 40 Tex. Cr. 685, 51 S. W. 918; Bailey *v.* State, 26 Tex. App. 706, 9 S. W. 270.

Virginia.— Epes' Case, 5 Gratt. 676; Tooel *v.* Com., 11 Leigh 714.

Wisconsin.— Clifford *v.* State, 58 Wis. 477, 17 N. W. 304.

Contra, McQuillen *v.* State, 8 Sm. & M. (Miss.) 587. And see Hines *v.* State, 8 Humphr. (Tenn.) 597, holding that the fact that a juror is unsworn at the time of the separation makes no difference, the objection being the same at that time as at any other stage of the trial.

See 14 Cent. Dig. tit. "Criminal Law," § 2044.

A statute prohibiting the separation of a jury except by consent of both sides does not prevent the court, although defendant object, from allowing eleven jurors passed, although not sworn, to separate during a recess taken to procure an additional venire. State *v.* Voorhies, 12 Wash. 53, 40 Pac. 620.

Where defendant does not object at the time to a part of the jury leaving the room and mingling with outsiders before the whole jury is impaneled, he cannot, after the jury is completed, make this a ground of objection to the entire panel. James *v.* State, 53 Ala. 380.

58. Curtis *v.* Com., 87 Va. 589, 13 S. E. 73.

59. *Arkansas.*— Cornelius *v.* State, 12 Ark. 782.

Georgia.— Daniel *v.* State, 56 Ga. 653.

Indiana.— State *v.* Leunig, 42 Ind. 541.

Louisiana.— State *v.* Populus, 12 La. Ann. 710.

Minnesota.— Maher *v.* State, 3 Minn. 444.

New Mexico.— U. S. *v.* Swan, 7 N. M. 306, 34 Pac. 533.

Ohio.— Parker *v.* State, 18 Ohio St. 88.

South Dakota.— State *v.* Church, 7 S. D. 289, 64 N. W. 152.

See 14 Cent. Dig. tit. "Criminal Law," § 2039 *et seq.* See also *infra*, XV, A, 2, l, (IV), (E).

Statutes.— In some states it is expressly provided by statute that the jury shall be kept together after retiring to deliberate, and in such a case defendant cannot consent to their separation. People *v.* Hawley, 111 Cal. 78, 43 Pac. 404.

60. Separation as ground for new trial see *infra*, XV, A, 2, l, (IV), (E).

61. *California.*— People *v.* Kelly, 46 Cal. 355.

Illinois.— Reins *v.* People, 30 Ill. 256.

Indiana.— Beyerline *v.* State, 147 Ind. 125, 45 N. E. 772.

Iowa.— Sanders *v.* State, 2 Iowa 230.

Maine.— State *v.* Fenlason, 78 Me. 495, 7 Atl. 385.

Massachusetts.— Com. *v.* Desmond, 141 Mass. 200, 5 N. E. 856.

Ohio.— State *v.* Engle, 13 Ohio 490.

Pennsylvania.— Com. *v.* Heller, 5 Phila. 123.

See 14 Cent. Dig. tit. "Criminal Law," § 2046.

Presence of defendant.— In a trial for a felony defendant must be present when an order is made permitting the jury to seal their verdict and separate. Smith *v.* State, 40 Fla. 203, 23 So. 854.

statute, as by a statute requiring the jury to be kept together until the verdict is declared or rendered.[62]

e. After Defective Verdict. The separation of the jury on their discharge after a defective verdict,[63] or after a verdict delivered in the unobserved absence of defendant,[64] is not ground for a new trial where, being still in court, they are at once recalled and the irregularity corrected.[65]

f. Warning the Jury. When the jurors are permitted to separate, they should be admonished by the court not to hold conversations among themselves or with any persons about the case.[66] In some states it is expressly provided by statute that the court must at each adjournment caution the jurors against discussing the case, and to omit this admonition, although by oversight, and although the omission is not objected to at the time, has been held to be error.[67]

4. Misconduct of Jurors and of Others Affecting Them — a. In General. In all criminal trials the jury must conduct themselves properly, and care must be taken to keep them free from improper influences. Misconduct on their part, or misconduct affecting them on the part of the judge, the officer having them in charge, or outsiders, which was or may have been prejudicial to defendant, will be ground for setting aside a conviction and granting a new trial.[68]

b. Taking Refreshments and Intoxicating Liquors. The jury may properly be furnished with necessary food and refreshments from a proper source,[69] but according to the weight of authority they should not be furnished with or indulge in the use of intoxicating liquors.[70]

c. Communication of Jurors With Outsiders. After the jury have retired, or even before then in trials for felony, they should not be allowed to hold any communication with outsiders.[71] It is improper to allow them to be or remain where

62. In **Iowa** where the statute requires the jury to be kept together until the verdict is declared in open court, a separation after agreeing upon and sealing the verdict is error. State *v.* Fertig, 84 Iowa 79, 50 N. W. 545.

In **Washington** a separation after a sealed verdict justifies a reversal (State *v.* Mason, 19 Wash. 94, 52 Pac. 525; State *v.* Barkuloo, 18 Wash. 141, 51 Pac. 350), although defendant's counsel consented (State *v.* Rogan, 18 Wash. 43, 50 Pac. 582; Anderson *v.* State, 2 Wash. 183, 26 Pac. 267).

63. Boyett *v.* State, 26 Tex. App. 689, 9 S. W. 275.

64. Russell *v.* State, 11 Tex. App. 288.

65. State *v.* Whittier, 21 Me. 341, 38 Am. Dec. 272.

66. State *v.* McKinney, 31 Kan. 570, 3 Pac. 356; Lewis *v.* State, 4 Kan. 296; Walrath *v.* State, 8 Nebr. 80; Kruger *v.* State, 1 Nebr. 365; McCreary *v.* Com., 29 Pa. St. 323.

67. Johnson *v.* State, 68 Ark. 401, 59 S. W. 34; State *v.* Mulkins, 18 Kan. 16. But *compare* State *v.* McKinney, 31 Kan. 570, 3 Pac. 356; People *v.* Draper, 28 Hun (N. Y.) 1.

The admonition need not be in the exact words of the statute provided it is equally full and specific. State *v.* McKinney, 31 Kan. 570, 3 Pac. 356.

Allowing a separation before the introduction of evidence, without an admonition, is a technical error, but is not of sufficient importance to demand a new trial. People *v.* Coyne, 116 Cal. 295, 48 Pac. 218.

At a brief recess no admonition is necessary. People *v.* Colmere, 23 Cal. 631; State *v.* Stackhouse, 24 Kan. 445; People *v.* Draper, 28 Hun (N. Y.) 1.

Where the jury are kept together in charge of an officer, and not allowed to separate, an admonition at each adjournment is not necessary. State *v.* Bussey, 58 Kan. 679, 50 Pac. 891.

It will be presumed, in the absence of a showing to the contrary, that the jury were admonished on an adjournment as required by statute. Evans *v.* State, 7 Ind. 271.

68. **Misconduct as ground for new trial** see *infra*, XV, A, 2, l.

69. People *v.* Douglass, 4 Cow. (N. Y.) 26, 15 Am. Dec. 332.

70. *California.*— People *v.* Myers, 70 Cal. 582, 12 Pac. 719.

Indiana.— Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760.

Iowa.— State *v.* Baldy, 17 Iowa 39.

New Hampshire.— State *v.* Bullard, 16 N. H. 139.

New York.— People *v.* Douglass, 4 Cow. 26, 15 Am. Dec. 332.

Texas.— Jones *v.* State, 13 Tex. 168, 62 Am. Dec. 550.

Whether ground for new trial see *infra*, XV, A, 2, l, (IV), (G).

71. *California.*—People *v.* Symonds, 22 Cal. 348.

Illinois.— Dempsey *v.* People, 47 Ill. 323.

Minnesota.— Hoberg *v.* State, 3 Minn. 262.

New York.— People *v.* Gallo, 149 N. Y. 106, 43 N. E. 529.

Texas.— Darter *v.* State, 39 Tex. Cr. 40, 44 S. W. 850.

they can hear outsiders discussing the case,[72] or to read newspapers in which the case is discussed,[73] or letters by which defendant may be prejudiced.[74] Such misconduct, unless it appears that defendant was not prejudiced, will generally be ground for a new trial.[75]

d. Communications Between Jurors and Officer. The officer having charge of the jury, before or after they have retired to consider their verdict, should not hold any communication with them further than to ask them whether they have agreed on a verdict, or to attend to their necessities, and any such communication, if it may have been prejudicial to defendant, will be ground for a new trial.[76] A new trial will not be granted, however, because of communications between the jurors and the officer which, although improper, could not prejudice defendant.[77]

e. Presence of Officer or Judge in Jury Room. It is improper and may be ground for a new trial for the officer in charge of the jury to remain in the jury room while they are deliberating.[78] The same is true of the judge. He may recall the jury and communicate with them in open court,[79] but he cannot properly go to the jury room to communicate with them or remain in the room while they are deliberating.[80]

f. Conversation Among and Taking of Notes by Jurors. Conversation among the jurors or the taking of notes by them is not of itself misconduct, and unless it is of an improper character and prejudicial to defendant, it is not ground for a new trial.[81]

5. Deliberation and Mode of Reaching Verdict — a. Deliberation. The law does not require the jury to deliberate on their verdict for any particular period.[1] It is a matter of discretion with the court.[2] The jury should, when possible, after their retirement, deliberate and discuss the case as a body.[3]

b. Papers and Articles Which May Be Sent to Jury — (I) *Documents in Evidence.* Usually, either by statute or as a rule of practice, the pleadings and all papers in evidence are delivered to the jury on their retirement.[4] But permit-

72. Vaughan *v.* State, 57 Ark. 1, 20 S. W. 588.

73. *California.*— People *v.* Stokes, 103 Cal. 193, 37 Pac. 207, 42 Am. St. Rep. 102.

Kansas.— State *v.* Dugan, 52 Kan. 23, 34 Pac. 409.

Mississippi.— Cartwright *v.* State, 71 Miss. 82, 14 So. 526.

Missouri.— State *v.* Wilson, 121 Mo. 434, 26 S. W. 357.

Texas.— Williams *v.* State, 33 Tex. Cr. 128, 25 S. W. 629, 28 S. W. 958, 47 Am. St. Rep. 21.

74. State *v.* McCormick, 20 Wash. 94, 54 Pac. 764; State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799. See also *infra*, XV, A, 2, l, (IV), (B).

75. **Communication with outsiders, reading newspapers, etc., as ground for new trial** see *infra*, XV, A, 2, l, (IV), (A), (B).

76. Cooper *v.* State, 103 Ga. 63, 29 S. E. 439; State *v.* Langford, 45 La. Ann. 1177, 14 So. 181, 40 Am. St. Rep. 277; Brown *v.* State, 69 Miss. 398, 10 So. 579.

77. **Communications between officer and jurors as ground for new trial** see *infra*, XV, A, 2, l, (IV), (C).

78. Quinn *v.* State, 130 Ind. 340, 30 N. E. 300; Rickard *v.* State, 74 Ind. 275; State *v.* Snyder, 20 Kan. 306; People *v.* Knapp, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438; Gandy *v.* State, 24 Nebr. 716, 40 N. W. 302.

When ground for new trial see *infra*, XV, A, 2, l, (IV), (D).

79. Hall *v.* State, 8 Ind. 439; Com. *v.* Ricketson, 5 Metc. (Mass.) 412. See also *infra*, XIV, J, 6, a, (I).

80. Hoberg *v.* State, 3 Minn. 262; People *v.* Linzey, 79 Hun (N. Y.) 23, 29 N. Y. Suppl. 560; State *v.* Wroth, 15 Wash. 621, 47 Pac. 106.

When ground for new trial see *infra*, XV, A, 2, l, (IV), (D).

81. People *v.* Kramer, 117 Cal. 647, 49 Pac. 842; State *v.* Joseph, 45 La. Ann. 903, 12 So. 934; U. S. *v.* Davis, 103 Fed. 457.

A juror may take notes of the evidence while in the box. Thomas *v.* State, 90 Ga. 437, 16 S. E. 94.

1. Smith *v.* State, 40 Tex. Cr. 391, 50 S. W. 938. They may, after consulting in the box, agree upon a verdict and hand it in at once. If they cannot agree in a short time, it is proper for them to retire to a place appointed for their deliberations. 1 Chitty Cr. L. 633.

2. Russell *v.* State, (Nebr. 1902) 92 N. W. 751.

3. Monroe *v.* State, 5 Ga. 85.

This is not always practicable, however, and where a further discussion is desired there can be no objection to a separation of the jury into groups and a discussion as thus separated, where all remain in the same room. State *v.* Turner, 6 Baxt. (Tenn.) 201.

4. *Alabama.*— Burton *v.* State, 115 Ala. 1, 22 So. 585. *Compare* Campbell *v.* State, 23 Ala. 44.

ting papers and documents unfavorable to the accused, which have not been produced as evidence in the case, to be taken by the jury into their room and read and considered by them during their deliberation is error.[5] If counsel for the accused believe that papers not in evidence are being sent into the jury room he should promptly object before the jury retire, and request that they be instructed not to consider them.[6] Where one side requests that some of the documentary evidence shall be sent to the jury, it is error to refuse a request of the other to allow them to take the remainder.[7]

(II) *Law-Books and Statutes.* While some authorities hold that it is error to permit the jury during their deliberations to have access to law-books or printed statutes,[8] other cases sustain the contrary proposition, particularly if it

Colorado.— Howard *v.* People, 27 Colo. 396, 61 Pac. 595.

Connecticut.— State *v.* Tucker, 75 Conn. 201, 52 Atl. 741.

Georgia.— Davis *v.* State, 91 Ga. 167, 17 S. E. 292; Jackson *v.* State, 76 Ga. 551.

Indiana.— Bersch *v.* State, 13 Ind. 434, 74 Am. Dec. 263.

Iowa.— State *v.* Gibson, 29 Iowa 295.

Kansas.— State *v.* Taylor, 36 Kan. 329, 13 Pac. 550.

Louisiana.—State *v.* Williams, 34 La. Ann. 959; State *v.* Colbert, 29 La. Ann. 715.

Missouri.— State *v.* Tompkins, 71 Mo. 613.

Nebraska.— Russell *v.* State, (1902) 92 N. W. 751.

New Jersey.— State *v.* Raymond, 53 N. J. L. 260, 21 Atl. 328.

New York.— People *v.* Formosa, 61 Hun 272, 16 N. Y. Suppl. 753.

Pennsylvania.— Com. *v.* Stanley, 19 Pa. Super. Ct. 58.

Texas.— Grayson *v.* State, 40 Tex. Cr. 573, 51 S. W. 246.

Vermont.— State *v.* Shaw, 73 Vt. 149, 50 Atl. 863.

Indictment.— It is proper for the jury to take the indictment when they retire to make up their verdict. Sanders *v.* State, 131 Ala. 1, 31 So. 564; Cargill *v.* Com., 93 Ky. 578, 20 S. W. 782, 14 Ky. L. Rep. 517; Masterson *v.* State, 144 Ind. 240, 43 N. E. 138; Stout *v.* State, 90 Ind. 1.

5. *California.*— People *v.* Thornton, 74 Cal. 482, 16 Pac. 244.

Dakota.— Territory *v.* Jones, 6 Dak. 85, 50 N. W. 528.

Kansas.— State *v.* Clark, 34 Kan. 289, 8 Pac. 528; State *v.* Lantz, 23 Kan. 728, 33 Am. Rep. 215.

Oregon.— State *v.* Baker, 23 Oreg. 441, 32 Pac. 161.

Texas.— Parker *v.* State, 43 Tex. Cr. 526, 67 S. W. 121.

Wisconsin.— State *v.* Hartmann, 46 Wis. 248, 50 N. W. 193.

See 14 Cent. Dig. tit. "Criminal Law," § 2056.

Depositions.— Independently of statute, and often by express statute, depositions are excluded from the jury during their deliberations. Dunn *v.* People, 172 Ill. 582, 50 N. E. 137; Com. *v.* Stanley, 19 Pa. Super. Ct. 58; State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561; State *v.* Cain, 20 W. Va. 679. It has been held that this is in the discretion of the court. Baker *v.* Com., 17 S. W. 625, 13 Ky. L. Rep. 571. In one case a dying declaration was regarded as in substance a deposition, and excluded under the statute (State *v.* Moody, 18 Wash. 165, 51 Pac. 356), but in the same state subsequently a stenographer's transcript of a dying declaration, proved to be correct, was permitted to go to the jury (State *v.* Webster, 21 Wash. 63, 57 Pac. 361).

6. State *v.* Tucker, 75 Conn. 201, 52 Atl. 741; Smalls *v.* State, 105 Ga. 669, 31 S. E. 571; Cargill *v.* Com., 93 Ky. 578, 20 S. W. 782, 14 Ky. L. Rep. 517.

Indictment showing indorsement of verdict at former trial.— It has been held that allowing the jury to take an indictment on which is indorsed the verdict rendered at a former trial of defendant, or of one jointly indicted with him, is not error where no objection is made at the time. Sanders *v.* State, 131 Ala. 1, 31 So. 564; Cargill *v.* Com., 93 Ky. 578, 20 S. W. 782, 14 Ky. L. Rep. 517. But see Ogden *v.* U. S., 112 Fed. 523, 50 C. C. A. 380. And see Lancaster *v.* State, 36 Tex. Cr. 16, 35 S. W. 165; Harvey *v.* State, 35 Tex. Cr. 545, 34 S. W. 623, holding that where the trial judge certifies that the indorsement has been made illegible, and it appears that it was not commented on by the jury in making up their verdict, the judgment should not be reversed.

It is the better practice, although no objection be made, not to allow the jury to take an indictment on which the verdict at a former trial is indorsed. Green *v.* State, 38 Ark. 304.

7. All should be sent in or none. English *v.* State, 31 Fla. 340, 356, 12 So. 689; Rainforth *v.* People, 61 Ill. 365.

8. *Florida.*— Johnson *v.* State, 27 Fla. 245, 9 So. 208.

Indiana.— Newkirk *v.* State, 27 Ind. 1.

Iowa.— State *v.* Gillick, 10 Iowa 98.

Maine.— State *v.* Kimball, 50 Me. 409.

Missouri.— State *v.* Hopper, 71 Mo. 425.

New York.— People *v.* Hartung, 17 How. Pr. 85, 4 Park. Cr. 256; Wilson *v.* People, 4 Park. Cr. 619.

See 14 Cent. Dig. tit. "Criminal Law," § 2057.

When the paragraph applying to the case is separately marked out for the jury they may be permitted to take a law-book with them. Hardy *v.* State, 7 Mo. 607.

be not shown that the jurors actually read the books which they had in the jury room.[9]

(III) *COPIES OF INSTRUCTIONS.* Independently of statute,[10] it is in the discretion of the court to permit the jury to take with them the written instructions.[11]

(IV) *DEMONSTRATIVE AND REAL EVIDENCE.* Permitting the jury to have with them in the jury room and to inspect during their deliberations articles of personal property connected with the case and introduced in evidence is not generally erroneous, where it does not appear that they were used or handled by the jurors in a manner not consistent with the evidence.[12] A statute permitting

In New York reading law-books by the jurors is not ground for a new trial, in the absence of proof to the satisfaction of the court that it affected the verdict or was in some way prejudicial to the accused. People *v.* Priori, 164 N. Y. 459, 58 N. E. 668; People *v.* Draper, 28 Hun 1; People *v.* Gaffney, 1 Sheld. 304, 14 Abb. Pr. N. S. 36.

9. *Georgia.*— Graves *v.* State, 63 Ga. 740; Lovett *v.* State, 60 Ga. 257.

Louisiana.— State *v.* Tanner, 38 La. Ann. 307; State *v.* Harris, 34 La. Ann. 118.

Massachusetts.— Com. *v.* Jenkins, Thach. Cr. Cas. 118.

Michigan.— Findley *v.* People, 1 Mich. 234.

Washington.— Edwards *v.* Territory, 1 Wash. Terr. 195.

Wisconsin.— Bernhardt *v.* State, 82 Wis. 23, 51 N. W. 1009; Loew *v.* State, 60 Wis. 559, 19 N. W. 437.

Wyoming.— Gustavenson *v.* State, 10 Wyo. 300, 68 Pac. 1006.

See 14 Cent. Dig. tit. "Criminal Law," § 2057.

Reading law-books after agreement on a verdict, although before its rendition, is not error. State *v.* Wilson, 40 La. Ann. 751, 5 So. 52, 1 L. R. A. 795.

The opinion of the appellate court may on a retrial be considered and referred to by the jury in determining their verdict. State *v.* Anderson, 1 Hill (S. C.) 327.

10. A statute which requires requested charges to be in writing, and also requires that these charges when given must be taken by the jury on retirement, confers the absolute right on the accused to have his requested charges which have been given taken into the jury room. Orr *v.* State, 117 Ala. 69, 23 So. 696. See also Ragland *v.* State, 125 Ala. 12, 27 So. 983, holding that it is not error to allow the jury to take the general charge also, where it has been reduced to writing at the request of one of the parties.

11. *Arkansas.*— Benton *v.* State, 30 Ark. 328.

Florida.— Dixon *v.* State, 13 Fla. 636 [*overruling* Holton *v.* State, 2 Fla. 476].

Missouri.— State *v.* Thompson, 83 Mo. 257 [*overruling* State *v.* Butterfield, 75 Mo. 297; State *v.* Phelps, 74 Mo. 128]; State *v.* Tompkins, 71 Mo. 613.

Ohio.— Griffin *v.* State, 34 Ohio St. 299.

Washington.— Edwards *v.* Territory, 1 Wash. Terr. 195.

See 14 Cent. Dig. tit. "Criminal Law," § 2059.

Requested instructions which have not been given (Irvine *v.* State, 18 Tex. App. 51) or which have been given no further than they are embraced in the general charge (State *v.* Kimball, 50 Me. 409) cannot be taken into the jury room.

12. *California.*— People *v.* Mahoney, 77 Cal. 529, 20 Pac. 73; People *v.* Cochran, 61 Cal. 548.

Connecticut.— State *v.* Stebbins, 29 Conn. 463, 79 Am. Dec. 223.

Georgia.— Adams *v.* State, 93 Ga. 166, 18 S. E. 553. But see McCoy *v.* State, 78 Ga. 490, 3 S. E. 768.

Maine.— State *v.* McCafferty, 63 Me. 223.

Mississippi.— Powell *v.* State, 61 Miss. 319.

Texas.— Gresser *v.* State, (Cr. App. 1897) 40 S. W. 595; Spencer *v.* State, 34 Tex. Cr. 238, 30 S. W. 46, 32 S. W. 690.

Virginia.— Taylor *v.* Com., 90 Va. 109, 17 S. E. 812.

Washington.— State *v.* Webster, 21 Wash. 63, 57 Pac. 361.

Exhibits and papers.— Blood-stained garments introduced in evidence in a murder trial are exhibits. An objection to their going to the jury room must be specific. People *v.* Hughson, 154 N. Y. 153, 47 N. E. 1092.

Exhibits are distinguished from written and oral testimony in that they have none of the qualities of personalty, telling always the same story and the whole of that, subject to no variations either in memory or in the recital of what they have to say, and being destitute of any feeling in the matter. On such grounds they are properly admitted. Their admission is not only permissible but even desirable as tending to fix an unvarying standard in the case, by which the contradictory and variable elements of human testimony can be tested. Jack *v.* Territory, 2 Wash. Terr. 101, 3 Pac. 832.

For the jury to perform experiments during their deliberations with the weapons alleged to have been used in the commission of the crime is error. Hansing *v.* Territory, 4 Okla. 443, 46 Pac. 509.

Standards for comparison.— Where handwriting is in controversy, it has been held proper to permit the writings whose authenticity is in question and the standards of comparison to go to the jury room (State *v.* Wetherell, 70 Vt. 274, 40 Atl. 728) where no objection is made at the time (Bailey *v.* State, (Tex. Cr. App. 1897) 38 S. W. 992; Chester *v.* State, 23 Tex. App. 577, 5 S. W. 125).

the jury to have all papers, permits them to inspect relevant articles of personal property.[13]

c. Examinations With Magnifying Glass. It is not error for the jury, while considering their verdict, to use a maguifying glass in examining papers submitted in evidence.[14]

d. Experiments. Experiments by the jurors by which they ascertain facts material to the case but not included in the evidence, constitute misconduct on their part and will justify a reversal.[15]

e. Appearance and Conduct of Accused. The jury may properly consider the appearance and behavior of the accused, not only while he testifies but throughout the trial.[16]

f. Statements by Jurors. A conviction ought not to be set aside because one of the jury during their deliberations makes statements based on his own knowledge about the case or about the prior career or character of defendant, or because the jurors discuss material facts or features of the case within the personal knowledge of some of them, but outside the evidence,[17] unless it appears that the statements made were manifestly and necessarily prejudicial to the accused.[18]

The presence of clothing of the deceased in a homicide case, in the jury room, is not ground for a new trial, where it had been admitted in evidence and thoroughly examined in the court, and witnesses had been closely questioned in relation to the facts relative to the crime, which the clothing indicated, and all the jurors testify that its inspection in the jury room did not influence their verdict. Bell *v.* State, 32 Tex. Cr. 436, 24 S. W. 418; Hendricks *v.* State, 28 Tex. App. 416, 13 S. W. 672.

13. State *v.* Webster, 21 Wash. 63, 57 Pac. 361.

14. Hatch *v.* State, 6 Tex. App. 384. *Compare* State *v.* Bailey, 100 N. C. 528, 6 S. E. 372.

15. Forehand *v.* State, 51 Ark. 553, 11 S. W. 766; People *v.* Conkling, 111 Cal. 616, 44 Pac. 314; Yates *v.* People, 38 Ill. 527; State *v.* Sanders, 68 Mo. 202, 30 Am. Rep. 782. *Compare* Galloway *v.* State, 42 Tex. Cr. 380, 57 S. W. 658.

Where the question was, "Could the prisoner's voice have been heard on a certain occasion?" the experiment of stationing a man outside the jury room who was to listen and report if he could hear the voices of the jurors through a closed door is ground for a new trial. Jim *v.* State, 4 Humphr. (Tenn.) 289.

16. Boykin *v.* People, 22 Colo. 496, 45 Pac. 419; Rider *v.* People, 110 Ill. 11; State *v.* Hutchison, 95 Iowa 566, 64 N. W. 610; Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228.

Age of defendant.—The jury may take into consideration the appearance of the accused in determining his age. Com. *v.* Phillips, 162 Mass. 504, 39 N. E. 109; State *v.* McNair, 93 N. C. 628. *Contra*, Bird *v.* State, 104 Ind. 384, 3 N. E. 827; Robinius *v.* State, 63 Ind. 235; Thinger *v.* State, 53 Ind. 251; Stephenson *v.* State, 28 Ind. 272.

17. Moore *v.* People, 26 Colo. 213, 57 Pac. 857; Taylor *v.* State, 52 Miss. 84; State *v.* Sprague, 149 Mo. 425, 50 S. W. 901; Austin *v.* State, 42 Tex. 355; Parker *v.* State, (Tex. Cr. App. 1895) 30 S. W. 553; Borer *v.* State, (Tex. Cr. App. 1894) 28 S. W. 951; Testard *v.* State, 26 Tex. App. 260, 9 S. W. 888; Jack *v.* State, 20 Tex. App. 656.

18. State *v.* Olds, 106 Iowa 110, 76 N. W. 644; State *v.* Woodson, 41 Iowa 425; State *v.* Burton, 65 Kan. 704, 70 Pac. 640; State *v.* Beam, 1 Kan. App. 688, 42 Pac. 394; Irvine *v.* State, 104 Tenn. 132, 56 S. W. 845; Sims *v.* State, (Tex. Cr. App. 1902) 70 S. W. 90; Ray *v.* State, 35 Tex. Cr. 354, 33 S. W. 869; Hargrove *v.* State, 33 Tex. Cr. 431, 26 S. W. 993.

If the statements have no relation to the merits of the case, and if they are such statements as would not influence the mind of a conscientious juror, there is no presumption that they have influenced any juror. State *v.* Cowan, 74 Iowa 53, 36 N. W. 886. And it is permissible on this question for the prosecution to submit affidavits of the jurors to the effect that they did not consider what the juror said in arriving at their verdict. State *v.* Wright, 98 Iowa 702, 68 N. W. 440.

Statements will be presumed to be prejudicial to the accused where the juror states to his fellows, solely on his own knowledge, that the accused has been convicted on a former trial (State *v.* McCormick, 57 Kan. 440, 46 Pac. 777, 57 Am. St. Rep. 341), that he has been guilty of other similar crimes (Morton *v.* State, 1 Lea (Tenn.) 498; Hefner *v.* State, (Tex. Cr. App. 1903) 71 S. W. 964; Hughes *v.* State, (Tex. Cr. App. 1902) 70 S. W. 746; Hopkins *v.* State, (Tex. Cr. App. 1902) 68 S. W. 986; Lankster *v.* State, (Tex. Cr. App. 1901) 65 S. W. 373; Hardiman *v.* State, (Tex. Cr. App. 1899) 53 S. W. 121; Holmes *v.* State, 38 Tex. Cr. 370, 42 S. W. 996; Terry *v.* State, (Tex. Cr. App. 1897) 38 S. W. 986; Mason *v.* State, (Tex. App. 1891) 16 S. W. 766 [*overruling* Mitchell *v.* State, 36 Tex. Cr. 278, 33 S. W. 367, 36 S. W. 456]), or that he is a man of wicked life and actions (Sims *v.* State, (Tex. Cr. App. 1902) 70 S. W. 90); or where a juror gives his private opinion of, or states facts bearing upon, the credibility of a witness, which are not based upon any evidence in the case

g. Manner of Reaching Verdict — (I) *Quotient Verdict.* It is generally misconduct on the part of the jurors, justifying a reversal, for them to agree, after they have found the accused guilty, that each shall set down on paper the term of imprisonment or the amount of the fine which in his opinion should be assessed, that these sums shall be added, the total divided by twelve, and the quotient accepted as the verdict of the jury.[19] If, however, there was no positive prior agreement to abide by the result of this process,[20] or even though there may have been an agreement, if the jury subsequently refused to abide by it and imposed a greater or less punishment than the quotient,[21] it is not error.

(II) *Agreement That Majority Determine.* Evidence that it was agreed by the jurors that the verdict should be determined by the votes of a majority is not sufficient to set aside a verdict arrived at in disregard of the agreement.[22]

(III) *Suggestion of Pardon.* A verdict of guilty must be set aside where one juror, not being satisfied of the guilt of the accused, assented thereto on the suggestion of his fellows that the governor would pardon the accused if they recommended it.[23]

6. Aiding or Inducing Determination — a. Additional Instructions — (I) *Recalling For.* As a general rule it is not error for the court of its own motion[24] or

(Barnes *v.* State, (Tex. Cr. App. 1901) 65 S. W. 922; Buessing *v.* State, (Tex. Cr. App. 1901) 63 S. W. 318; Blalock *v.* State, (Tex. Cr. App. 1901) 62 S. W. 571; Tate *v.* State, 38 Tex. Cr. 261, 42 S. W. 595).

In Texas, by the statute, any discussion of defendant's prior conviction of crime by the jury will invalidate their verdict of guilty, although they all swear positively that as a matter of fact it has not influenced their verdict. Hughes *v.* State, (Cr. App. 1902) 70 S. W. 746.

Where the statements are strongly prejudicial to the accused, a new trial will be granted whether the verdict is shown to have been in fact influenced by these statements or not. McWilliams *v.* State, 32 Tex. Cr. 269, 22 S. W. 970.

19. *Arkansas.*— Williams *v.* State, 66 Ark. 264, 50 S. W. 517.

Kentucky.— Paducah, etc., R. Co. *v.* Com., 3 Ky. L. Rep. 650.

Missouri.— State *v.* Branstetter, 65 Mo. 149.

Tennessee.— Williams *v.* State, 15 Lea 129, 54 Am. Rep. 404; Joyce *v.* State, 7 Baxt. 273; Crabtree *v.* State, 3 Sneed 302.

Texas.— Magill *v.* State, (Cr. App. 1902) 67 S. W. 1018; Good *v.* State, (Cr. App. 1902) 66 S. W. 1099, 67 S. W. 102; White *v.* State, 37 Tex. Cr. 651, 40 S. W. 789; Wood *v.* State, 13 Tex. App. 135, 44 Am. Rep. 701; Hunter *v.* State, 8 Tex. App. 75.

See 14 Cent. Dig. tit. "Criminal Law," § 2063.

In Kentucky, where the jury agree on the guilt of the accused, and the process of arriving at a quotient verdict does not impose an excessive fine, the appellate court has no power over the verdict. Smith *v.* Com., 98 Ky. 437, 33 S. W. 419, 17 Ky. L. Rep. 1010; Redmon *v.* Com., 82 Ky. 333. This is also the rule as to verdicts determined by lot (Milstead *v.* Com., 51 S. W. 451, 21 Ky. L. Rep. 358) or by a majority vote (McKee *v.* Com., 1 S. W. 810, 8 Ky. L. Rep. 417).

In South Dakota the statute authorizes a new trial where a verdict has been decided by lot, or by any means other than a fair expression of opinion by the jurors. State *v.* Vincent, (1902) 91 N. W. 347.

20. Batterson *v.* State, 63 Ind. 531; Glidewell *v.* State, 15 Lea (Tenn.) 133; Crabtree *v.* State, 3 Sneed (Tenn.) 302; Hill *v.* State, (Tex. Cr. App. 1902) 67 S. W. 506; McAnally *v.* State, (Tex. Cr. App. 1900) 57 S. W. 832; Keith *v.* State, (Tex. Cr. App. 1900) 56 S. W. 628; Gaines *v.* State, (Tex. Cr. App. 1896) 37 S. W. 331; Warren *v.* State, 9 Tex. App. 619, 35 Am. Rep. 745; Leverett *v.* State, 3 Tex. App. 213; Thompson *v.* Com., 8 Gratt. (Va.) 637.

21. Cochlin *v.* People, 93 Ill. 410; Barton *v.* State, 34 Tex. Cr. 613, 31 S. W. 671; Reineke *v.* State, (Tex. Cr. App. 1893) 23 S. W. 684; Pruitt *v.* State, 30 Tex. App. 156, 16 S. W. 773.

22. State *v.* Harper, 101 N. C. 761, 7 S. E. 730, 9 Am. St. Rep. 46.

Balloting.— The fact that jurors, to determine the amount of punishment, balloted, but without any agreement to abide by the result, and without a showing that it influenced the verdict, is not reversible error. Dooley *v.* State, 28 Ind. 239.

23. Crawford *v.* State, 2 Yerg. (Tenn.) 60, 24 Am. Dec. 467.

24. *Alabama.*— Wilson *v.* State, 128 Ala. 17, 29 So. 569.

California.— People *v.* Righetti, 66 Cal. 184, 4 Pac. 1063, 1185; People *v.* Perry, 65 Cal. 568, 4 Pac. 572.

Florida.— Coleman *v.* State, 17 Fla. 206.

Georgia.— Barber *v.* State, 112 Ga. 584, 37 S. E. 885; Pritchett *v.* State, 92 Ga. 65, 18 S. E. 536.

Iowa.— State *v.* Tripp, 113 Iowa 698, 84 N. W. 546.

Massachusetts.— McDonald *v.* Com., 173 Mass. 322, 53 N. E. 874, 73 Am. St. Rep. 293.

Missouri.— State *v.* Furgerson, 152 Mo. 92, 53 S. W. 427.

at the request of the jury[25] to recall them to court and to give them further instructions on questions upon which the prior instructions are unintelligible, or which they omitted to touch upon, or upon the rules which shall regulate the framing of their verdict. The accused has a right to have explanatory instructions given when in response to a request by the state the court gives additional instructions.[26]

(II) *Refusing Request For.* Where the request of the jury calls for an instruction which would invade their province, it is proper for the court to refuse to give it.[27] And on the other hand where the language of a refusal to give an instruction intimates an opinion that the accused is guilty it is reversible error.[28]

(III) *When Must Be in Writing.* Where the statutes require the court to instruct in writing, it is error to give additional instructions orally.[29]

(IV) *Confined to Doubtful Point.* In some cases, by statute,[30] and usually in the absence of statute,[31] where the jury requests instructions on particular questions, it is proper for the court to confine itself to such questions.[32]

(V) *Given in Absence of Accused.* It is error to repeat the charge to

Texas.— Flores *v.* State, 41 Tex. Cr. 166, 53 S. W. 346; Benavides *v.* State, 31 Tex. Cr. 173, 20 S. W. 369, 37 Am. St. Rep. 799.

25. *Arkansas.*— Hamilton *v.* State, 62 Ark. 543, 36 S. W. 1054.

Dakota.— People *v.* Odell, 1 Dak. 197, 46 N. W. 601.

Georgia.— Phelps *v.* State, 75 Ga. 571.

Indiana.— Farley *v.* State, 57 Ind. 331.

Iowa.— State *v.* Tripp, 113 Iowa 698, 84 N. W. 546.

Kentucky.— Pearce *v.* Com., 42 S. W. 107, 19 Ky. L. Rep. 782.

Minnesota.— State *v.* Brown, 12 Minn. 538.

New Jersey.— Jackson *v.* State, 49 N. J. L. 252, 9 Atl. 740.

Texas.— Wilson *v.* State, 37 Tex. Cr. 156, 38 S. W. 1013; Caston *v.* State, 31 Tex. Cr. 304, 20 S. W. 585.

Utah.— State *v.* Kessler, 15 Utah 142, 49 Pac. 293, 62 Am. St. Rep. 911.

Virginia.— Perkins *v.* Com., 7 Gratt. 651, 56 Am. Dec. 123.

See 14 Cent. Dig. tit. "Criminal Law," § 2065.

Disagreement.—This is usually done where the jury return into court and say they cannot agree. The court may then give them such special instructions as may meet and remove the difficulties in their minds.

Indiana.— Hogg *v.* State, 7 Ind. 551.

Iowa.— State *v.* Pitts, 11 Iowa 343.

Kansas.— State *v.* Chandler, 31 Kan. 201, 1 Pac. 787.

Missouri.— State *v.* Miller, 100 Mo. 606, 13 S. W. 832, 1051.

Wisconsin.— Hannon *v.* State, 70 Wis. 448, 36 N. W. 1; Douglass *v.* State, 4 Wis. 387.

See 14 Cent. Dig. tit. "Criminal Law," § 2065.

Proper charge on disagreement.— The court may properly inquire as to the nature of a disagreement, and on learning that it is on a question of law, may charge that the jury must take the law from the court, and that, while they may disbelieve a witness, they cannot captiously reject any testimony without cause. Marcus *v.* State, 89 Ala. 23, 8 So. 155.

When the jury return to court, the court is bound to charge them only upon such special points as they may request, and need not give requested charges of defendant which they do not desire. Rieger *v.* U. S., 107 Fed. 916, 47 C. C. A. 61.

26. Fisher *v.* People, 23 Ill. 283; State *v.* Cottrell, 19 R. I. 724, 37 Atl. 947; McHenry *v.* State, 42 Tex. Cr. 542, 61 S. W. 311.

27. State *v.* Maxwell, 42 Iowa 208.

28. King *v.* State, 86 Ga. 355, 12 S. E. 943.

29. *California.*— People *v.* Hersey, 53 Cal. 574.

Colorado.— Gile *v.* People, 1 Colo. 60.

Kansas.— State *v.* Stoffel, 48 Kan. 364, 29 Pac. 685.

Mississippi.—Gilbert *v.* State, 78 Miss. 300, 29 So. 477.

Missouri.— Mallison *v.* State, 6 Mo. 399.

See 14 Cent. Dig. tit. "Criminal Law," § 2067.

In California an immaterial instruction (People *v.* Jackson, 57 Cal. 316), or an additional instruction which is in substance and in greater detail given in the charge, need not be in writing or taken down by the stenographer (People *v.* Leary, 105 Cal. 486, 39 Pac. 24), under Pen. Code, § 1093.

An oral statement in relation to the agreement of the jury without laying down any rule of law or commenting on the testimony is not an instruction which is required to be in writing under Kan. Cr. Code, § 23*b*. State *v.* McLafferty, 47 Kan. 140, 27 Pac. 843.

30. Wharton *v.* State, 45 Tex. 2; Garza *v.* State, 3 Tex. App. 286.

31. People *v.* McKay, 122 Cal. 628, 55 Pac. 594.

32. Fordham *v.* State, 112 Ga. 228, 37 S. E. 391; Gravett *v.* State, 74 Ga. 191; O'Shields *v.* State, 55 Ga. 696; Hannahan *v.* State, 7 Tex. App. 610; U. S. *v.* White, 28 Fed. Cas. No. 16,677, 5 Cranch C. C. 116.

the jury[33] or to give them additional instructions[34] in the absence of the accused. The presence of defendant's counsel does not cure the error.[35] If he is present the absence of his counsel is not material,[36] unless as in some states the statute expressly provides that notice shall be given to the counsel for defendant.[37]

b. Receiving Evidence During Deliberations. The objection that the jury received evidence during their deliberations should be made before verdict and sustained by affidavits.[38]

c. Reading Minutes and Restating Evidence. It is discretionary with the court, after the jury have returned to court, to permit witnesses to restate their testimony at their request,[39] or for the court to state the evidence,[40] or to read it from a memorandum made by another person, or from the stenographer's minutes,[41] or to permit documentary evidence,[42] or a deposition to be again read to them,[43] if this is done in open court and defendant is present.[44] But the record cannot be sent into the jury room.[45]

d. Communications Between Judge and Jury— (i) *In General.* All communications between the judge and the jury after they have retired to consider their verdict must be made in open court, the accused and his counsel being present.[46]

(ii) *Caution Against Attempt to Tamper With Jury.* If rumors have come to the trial judge, creating a reasonable suspicion in his mind that an attempt is being made to tamper with the jury in their retirement, it is not error

33. Kinnemer *v.* State, 66 Ark. 206, 49 S. W. 815; Hopson *v.* State, 116 Ga. 90, 42 S. E. 412; Witt *v.* State, 5 Coldw. (Tenn.) 11; Linbeck *v.* State, 1 Wash. 336, 25 Pac. 452. But see People *v.* La Munion, 64 Mich. 709, 31 N. W. 593, holding that it is not error for the court in the absence of defendant and his counsel to repeat to the jury a portion of the charge already given.

34. Johnson *v.* State, 100 Ala. 55, 14 So. 627; Wilson *v.* State, 87 Ga. 583, 13 S. E. 566; State *v.* Frisby, 19 La. Ann. 143; Jones *v.* State, 26 Ohio St. 208; Kirk *v.* State, 14 Ohio 511. See also *supra*, XIV, B, 3, a.

35. Jones *v.* State, 26 Ohio St. 208; Linbeck *v.* State, 1 Wash. 336, 25 Pac. 452.

36. Collins *v.* State, 33 Ala. 434, 73 Am. Dec. 426; People *v.* Mayes, 113 Cal. 618, 45 Pac. 860; State *v.* Dudoussat, 47 La. Ann. 977, 17 So. 685.

37. People *v.* Kennedy, 57 Hun (N. Y.) 532, 11 N. Y. Suppl. 244; People *v.* Cassiano, 30 Hun (N. Y.) 388. But see People *v.* Parker, 137 N. Y. 535, 32 N. E. 1013.

38. Jackson *v.* U. S., 102 Fed. 473, 42 C. C. A. 452, for the court is not required merely upon counsel's unverified statement to recall the jury and question them.

39. Bennefield *v.* State, 62 Ark. 365, 35 S. W. 790; Dozier *v.* State, 26 Ga. 156.

The court may refuse to permit the witness to be reëxamined by counsel. Herring *v.* State, 1 Iowa 205; Edmondson *v.* State, 7 Tex. App. 116.

40. People *v.* Ybarra, 17 Cal. 166; Hulse *v.* State, 35 Ohio St. 421; Atchison *v.* State, 13 Lea (Tenn.) 275; Bannen *v.* State, 115 Wis. 317, 91 N. W. 107, 965.

41. *California.*—People *v.* Boggs, 20 Cal. 432.

Georgia.— Morman *v.* State, 110 Ga. 311, 35 S. E. 152.

Iowa.— State *v.* Hunt, 112 Iowa 509, 84 N. W. 525.

Nebraska.—Jameson *v.* State, 25 Nebr. 185, 41 N. W. 138; Hair *v.* State, 16 Nebr. 601, 21 N. W. 464.

New York.— People *v.* Foy, 138 N. Y. 664, 34 N. E. 396.

Vermont.— State *v.* Manning, (1903) 54 Atl. 181.

See 14 Cent. Dig. tit. "Criminal Law," § 2064.

42. State *v.* Collens, 37 La. Ann. 607.

43. Clark *v.* State, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817.

44. Presence of accused.— By virtue of his right to be present at all the proceedings during his trial for a felony, it is reversible error to fail to procure the presence of the accused while the court is restating the testimony. He has the same right to be present then as he has to confront the witnesses. Wade *v.* State, 12 Ga. 25; Maurer *v.* People, 43 N. Y. 1; Jackson *v.* Com., 19 Gratt. (Va.) 656. It is not material whether the testimony was unfavorable to him or how much of it was read in his absence. Jackson *v.* Com., 19 Gratt. (Va.) 656. If, although he be present, his counsel is absent it is error. Bartell *v.* State, 40 Nebr. 232, 58 N. W. 716.

45. Com. *v.* Ware, 137 Pa. St. 465, 20 Atl. 806.

46. Hall *v.* State, 8 Ind. 439.

For example it is error for the court to send them a copy of the statutes (Merrill *v.* Nary, 10 Allen (Mass.) 416; Hoberg *v.* State, 3 Minn. 262; State *v.* Patterson, 45 Vt. 308, 12 Am. Rep. 200. *Contra*, Gandolfo *v.* State, 11 Ohio St. 114), or for the jury in a capital case to communicate with the court orally or in writing without being brought into court (Fisher *v.* People, 23 Ill. 283).

to recall them and question them as to the rumors and admonish them against attempts to tamper with them.[47]

(III) *Promise of Clemency.* It is error for the court, in reply to a question by the jury, to promise to exercise clemency in case a verdict of guilty is rendered.[48]

(IV) *Urging Agreement.* It is proper for the judge after the jury have deliberated for some time to recall them to ascertain why they cannot agree. He may then give them advice calculated to assist them in coming to an agreement;[49] may call the attention of the jury to the fact that the case has entailed great expense on the county;[50] may impress upon them the importance of the case, and urge them strongly to come to some agreement;[51] may ask them if any one has intruded upon their deliberations or attempted to tamper with them;[52] and may direct them to retire for further consideration.[53]

(V) *Coercing Verdict.* A verdict may be set aside and a new trial ordered if it appear that the jury were coerced into it by a threat of the court that they would be held together until they agreed.[54] It is impossible to state any rule by

47. State *v.* Kyne, 10 Kan. App. 277, 62 Pac. 728. And see *infra*, XIV, J, 6, d, (IV).

48. State *v.* Kiefer, (S. D. 1902) 91 N. W. 1117; McBean *v.* State, 83 Wis. 206, 53 N. W. 497.

Where a part of the jury consent to a verdict of guilty under a mistaken impression that a recommendation to the mercy of the governor will procure a discharge of the prisoner the verdict is thereby rendered invalid. Crawford *v.* State, 2 Yerg. (Tenn.) 60, 34 Am. Dec. 467.

While the question of the jury may be harmless in itself, the promise of the court is error, as calculated to overcome reason and coerce a verdict of guilty. It draws the attention of the jury from the evidence and induces them to base their verdict upon other considerations. McBean *v.* State, 83 Wis. 206, 53 N. W. 497.

49. Muckleroy *v.* State, (Tex. Cr. App. 1897) 42 S. W. 383; Dow *v.* State, 31 Tex. Cr. 278, 20 S. W. 583; Allis *v.* U. S., 155 U. S. 117, 15 S. Ct. 36, 39 L. ed. 91.

The time of recalling the jury is in the discretion of the court. Allis *v.* U. S., 155 U. S. 117, 15 S. Ct. 36, 39 L. ed. 91.

50. *Arkansas.*— Johnson *v.* State, 60 Ark. 45, 28 S. W. 792.

Dakota.— Territory *v.* King, 6 Dak. 131, 50 N. W. 623.

Texas.— Jordan *v.* State, (Cr. App. 1895) 30 S. W. 445.

Vermont.— State *v.* Gorham, 67 Vt. 365, 31 Atl. 845.

Wisconsin.— Hannon *v.* State, 70 Wis. 448, 36 N. W. 1.

See 14 Cent. Dig. tit. "Criminal Law," § 2069.

Contra.— State *v.* Fisher, 23 Mont. 540, 59 Pac. 919.

51. *Iowa.*— State *v.* Olds, 106 Iowa 110, 76 N. W. 644.

Kansas.— State *v.* Palmer, 40 Kan. 474, 20 Pac. 270.

Louisiana.— State *v.* Dudoussat, 47 La. Ann. 977, 17 So. 685.

Maine.— State *v.* Pike, 65 Me. 111.

Massachusetts.— Com. *v.* Kelley, 165 Mass. 175, 42 N. E. 573; Com. *v.* Whalen, 16 Gray 25.

Missouri.— State *v.* Daugherty, 106 Mo. 182, 17 S. W. 303.

Tennessee.— Frady *v.* State, 8 Baxt. 349.

See 14 Cent. Dig. tit. "Criminal Law," § 2069.

52. Holland *v.* People, 30 Colo. 94, 69 Pac. 519. And see *supra*, XIV, J, 6, d, (II).

53. Chapman *v.* State, (Tex. Cr. App. 1897) 42 S. W. 559. And see *infra*, XIV, J, 6, d, (VI).

A suggestion by the court on a disagreement that if the jury find defendant guilty they may incorporate a recommendation for mercy in the verdict is not prejudicial to his rights. Watkins *v.* U. S., 1 Indian Terr. 364, 41 S. W. 1044.

54. State *v.* Hill, 91 Mo. 423, 4 S. W. 121; Parrish *v.* State, 12 Lea (Tenn.) 655.

Illustrations of coercion.— Where the jury were sent back with an instruction to be as expeditious as they could, and they returned with a verdict of guilty in twenty minutes (Bennett *v.* State, 10 Ohio Cir. Ct. 84), where the judge told the jury that the court would adjourn in thirty minutes (Maury *v.* State, 68 Miss. 605, 9 So. 445, 24 Am. St. Rep. 291), that the judge must have a verdict as it was one of a peculiar character and he believed the jury had been tampered with (State *v.* Ladd, 10 La. Ann. 271), where he tells the jury after they have been out some time that they should make concessions and bring their minds together and that they need not hope to be discharged for a long time (State *v.* Bybee, 17 Kan. 462), that each of the jurors should try as hard as he can to be persuaded and to try and persuade themselves by listening to the arguments of those not agreeing with them (People *v.* Engle, 118 Mich. 287, 76 N. W. 502), that if they did not agree the next jury that tried the case could not arrive at a verdict any better than they could, and persisted furthermore in endeavoring to persuade them to surrender their deliberate convictions (State *v.* Ivanhoe, 35 Oreg. 150, 57 Pac. 317), a new trial will be granted and a verdict of con-

which to determine what language by the court is sufficiently coercive to invalidate a verdict. This depends upon the circumstances of each case.[55]

(VI) *Directing Further Deliberation.* Independently of statute the number of times the court may direct a jury unable to agree to return for further deliberation is in the judicial discretion.[56] If the foreman states that an agreement is probable, it is not error for the court to direct them to return, although they have been out a long time.[57]

7. Discharge of Jury — a. Failure to Agree. In felonies not capital it is within the discretionary power of the court to discharge the jury where there is no reasonable probability that they will agree.[58] The power of the court to discharge the jury in a capital case, under circumstances which would justify it doing so in cases not capital, is now conceded.[59] The length of time which will

viction will be set aside, as being coerced and not voluntary.

55. *Missouri.*— State *v.* Pierce, 136 Mo. 34, 37 S. W. 815.

Montana.— State *v.* Fisher, 23 Mont. 540, 59 Pac. 919.

New Mexico.— Territory *v.* McGinnis, 10 N. M. 269, 61 Pac. 208.

Tennessee.—Wilson *v.* State, 109 Tenn. 169, 70 S. W. 57.

Texas.— Carlisle *v.* State, (Cr. App. 1900) 56 S. W. 365.

United States.— U. S. *v.* Ingham, 97 Fed. 935.

See 14 Cent. Dig. tit. "Criminal Law," § 2064 *et seq.*

An announcement by the court after the jury have deliberated over night that he is determined not to discharge them until they agree is not error. State *v.* Green, 7 La. Ann. 518.

It is not coercion on the part of the trial judge to urge that the jury ought to agree, that the jurors ought to listen patiently and conscientiously to one another's arguments, and that a dissenting juror ought carefully to consider if his doubt be a reasonable one. Allen *v.* U. S., 164 U. S. 492, 17 S. Ct. 154, 41 L. ed. 528.

Packing the jury.— Remarks by the court on the jury coming into court after a disagreement that he had heard that some of the jurors went into the box to secure a disagreement, with the expression of a hope that this was not true, and of his desire not to interfere with the conscientious action of each juror, are not improper invasions of the sphere of the jury. State *v.* Lawrence, 38 Iowa 51.

56. Driver *v.* State, 112 Ga. 229, 37 S. E. 400; Russell *v.* State, (Nebr. 1902) 92 N. W. 751. And see *supra*, XIV, J, 6, d, (IV).

57. State *v.* Garrett, 57 Kan. 132, 45 Pac. 93.

Holding a jury for four days in a murder case to obtain a verdict is not an abuse of discretion. State *v.* Rose, 142 Mo. 418, 44 S. W. 329. See also Russell *v.* State, (Nebr. 1902) 92 N. W. 751.

Holding a jury more than two and one-half days in a murder case to secure an agreement is not error. People *v.* Stock, 1 Ida. 218.

58. *Alabama.*— Walker *v.* State, 117 Ala. 42, 23 So. 149.

California.— People *v.* Cage, 48 Cal. 323, 17 Am. Rep. 436.

Delaware.— State *v.* Gamble, 2 Pennew. 368, 45 Atl. 716.

Idaho.— State *v.* Jorgenson, 3 Ida. 620, 32 Pac. 1129.

Indiana.— Shaffer *v.* State, 27 Ind. 131.

Louisiana.— State *v.* Fuselier, 51 La. Ann. 1317, 26 So. 264.

Massachusetts.— Com. *v.* Purchase, 2 Pick. 521, 13 Am. Dec. 452; Com. *v.* Bowden, 9 Mass. 494.

Missouri.— State *v.* Matrassey, 47 Mo. 295.

Nevada.— *Ex p.* Maxwell, 11 Nev. 428.

New York.— People *v.* Green, 13 Wend. 55; People *v.* Goodwin, 1 Wheel. Cr. Cas. 470; People *v.* Ward, 1 Wheel. Cr. Cas. 469.

North Carolina.— State *v.* Chase, 82 N. C. 575; State *v.* Bass, 82 N. C. 570; State *v.* Bullock, 63 N. C. 570.

Ohio.— Hurley *v.* State, 6 Ohio 399.

South Carolina.— State *v.* Stephenson, 54 S. C. 234, 32 S. E. 305.

Tennessee.— State *v.* Waterhouse, Mart. & Y. 278.

Texas.— Penn *v.* State, 36 Tex. Cr. 140, 35 S. W. 973; Rudder *v.* State, 29 Tex. App. 262, 15 S. W. 717; Varnes *v.* State, 20 Tex. App. 107.

Virginia.— Jones *v.* Com., 86 Va. 740, 10 S. E. 1004.

United States.— Logan *v.* U. S., 144 U. S. 263, 12 S. Ct. 617, 36 L. ed. 429 [*reversing* 45 Fed. 872]; U. S. *v.* Workman, 28 Fed. Cas. No. 16,764.

England.— Matter of Newton, 13 Q. B. 716, 3 C. & K. 85, 3 Cox C. C. 489, 13 Jur. 606, 18 L. J. M. C. 201, 66 E. C. L. 716.

See 14 Cent. Dig. tit. "Criminal Law," § 2071 *et seq.*

A statute conferring the power to discharge the jury for failure to agree is constitutional. Moseley *v.* State, 33 Tex. 671.

59. *Louisiana.*— State *v.* Costello, 11 La. Ann. 283; State *v.* Ferguson, 8 Rob. 613.

Mississippi.— Whitten *v.* State, 61 Miss. 717.

North Carolina.— State *v.* Jefferson, 66 N. C. 309.

Ohio.— Dobbins *v.* State, 14 Ohio St. 493.

Tennessee.— Mahala *v.* State, 10 Yerg. 532, 31 Am. Dec. 591.

Virginia.— Com. *v.* Fells, 9 Leigh 613.

United States.— U. S. *v.* Shoemaker, 27 Fed. Cas. No. 16,279, 2 McLean 114.

be permitted to the jury to deliberate, and the circumstances which may warrant a conclusion that they cannot agree, are regulated wholly by the circumstances of each case, and are largely in the discretion of the trial court.[60]

b. Manifest Neeessity For Diseharge — (i) *Judicial Discretion to Determine.* Statutes permitting the court to discharge the jury without the consent of the accused,[61] where there is a manifest necessity for it, exist in some states;[62] and even in the absence of statute prescribing when the jury may be discharged this principle is usually recognized.[63]

(ii) *What Constitutes Manifest Necessity.* What shall constitute manifest necessity which will justify the discharge of the jury depends always on the circumstances of each case.[64] Thus bias or prejudice on the part of the

See 14 Cent. Dig. tit. "Criminal Law," § 2071 *et seq.*

At common law it is well settled that a jury sworn and charged in a capital case cannot be discharged without the prisoner's consent until they have given a verdict. Com. *v.* Cook, 6 Serg. & R. (Pa.) 577, 9 Am. Dec. 465; Com. *v.* Lutz, 10 Kulp (Pa.) 231; Bacon Abr. tit. "Juries"; 1 Chitty Cr. L. 634.

In England at common law, if they did not agree before the judges sitting at the assizes departed, they were in early times placed in a cart and taken with the judges from place to place until they agreed. 1 Chitty Cr. L. 634.

60. *Colorado.*— *In re* Allison, 13 Colo. 525, 22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790.

Georgia.— Driver *v.* State, 112 Ga. 229, 37 S. E. 400; Williford *v.* State, 23 Ga. 1.

Kansas.— State *v.* Rudy, 9 Kan. App. 69, 57 Pac. 263.

Kentucky.— Gilbert *v.* Com., 51 S. W. 590, 21 Ky. L. Rep. 415.

Nevada.— *Ex p.* Maxwell, 11 Nev. 428.

North Carolina.— State *v.* Honeycutt, 74 N. C. 391.

Texas.— Penn *v.* State, 36 Tex. Cr. 140, 35 S. W. 973; Smith *v.* State, 22 Tex. App. 196, 2 S. W. 542; Brady *v.* State, 21 Tex. App. 659, 1 S. W. 462.

See 14 Cent. Dig. tit. "Criminal Law," § 2073.

The fact alone that the jury have been out only a very short time does not show that a discharge is unnecessary, where from other facts it appears that there is no reasonable probability of an agreement. Lovett *v.* State, 80 Ga. 255, 4 S. E. 912; State *v.* Leach, 120 Ind. 124, 22 N. E. 111.

61. The consent of the accused to the discharge of the jury may be dispensed with where from the facts as shown by the record an urgent and manifest necessity exists for such discharge.

Connecticut.— State *v.* Woodruff, 2 Day 504, 2 Am. Dec. 122.

Indiana.— Wyatt *v.* State, 1 Blackf. 257.

Nebraska.— State *v.* Shuchardt, 18 Nebr. 454, 25 N. W. 722.

New York.— People *v.* Olcott, 2 Johns. Cas. 301, 1 Am. Dec. 168.

Ohio.— Dobbins *v.* State, 14 Ohio St. 493.

Misdemeanors.— The rule is applied in misdemeanor cases.

New York.— People *v.* Denton, 2 Johns. Cas. 275.

Tennessee.— State *v.* Pool, 4 Lea 363.

Virginia.— Dye *v.* Com., 7 Gratt. 662.

West Virginia.— Crookham *v.* State, 5 W. Va. 510.

United States.— U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441.

62. Smith *v.* State, 40 Fla. 203, 23 So. 854; Wright *v.* Com., 75 Va. 914; Gruber *v.* State, 3 W. Va. 699.

63. Although considerable latitude is allowed at the present day, the earlier cases lay down the rule that this discretion must be exercised with the greatest care and caution and only under urgent circumstances or in cases of manifest or extreme and absolute necessity.

Arkansas.— Atkins *v.* State, 16 Ark. 568.

Florida.— Tervin *v.* State, 37 Fla. 396, 20 So. 551.

Georgia.— Stocks *v.* State, 91 Ga. 831, 18 S. E. 847; Nolan *v.* State, 55 Ga. 521, 21 Am. Rep. 281.

Indiana.— Miller *v.* State, 8 Ind. 325.

Massachusetts.— Com. *v.* Townsend, 5 Allen 216.

Mississippi.— Price *v.* State, 36 Miss. 531, 72 Am. Dec. 195.

New York.— People *v.* Goodwin, 18 Johns. 187, 9 Am. Dec. 203.

North Carolina.— State *v.* Morrison, 20 N. C. 113.

Tennessee.— State *v.* Brooks, 3 Humphr. 70.

Virginia.— Williams *v.* Com., 2 Gratt. 567, 44 Am. Dec. 403.

United States.— U. S. *v.* Perez, 9 Wheat. 579, 6 L. ed. 165.

See 14 Cent. Dig. tit. "Criminal Law," § 2071 *et seq.*

The discretion to discharge a jury is a most important trust, in view of the fact that a discharge without sufficient reason is in law substantially equivalent to an acquittal. State *v.* Shuchardt, 18 Nebr. 454, 25 N. W. 722.

64. Thus if it be discovered that the accused is insane at the trial the jury may be discharged. Gruber *v.* State, 3 W. Va. 699.

Urgency and necessity.— The following considerations are to be held in view in determining whether the discretion is properly exercised: (1) Whether the jury have deliberated so long as to preclude all reasonable expectation that they will ever agree unless

jurors,[65] the act of a juror leaving the jury-box during the taking of the testimony,[66] the end of the term or session,[67] the failure of the prosecution's case,[68] the illness of a juror,[69] or the illness of the prisoner[70] may under certain circumstances warrant the court in discharging the jury.

c. Proceedings and Determination. The jury should not be discharged in defendant's absence, unless he voluntarily remains away.[71] The exercise of the court's discretion in discharging a jury must be based on some proper evidence showing facts which will justify their discharge, and the judgment of the court discharging the jury should be formally entered on the record;[72] and although the discharge of a jury on their failure to agree is no bar to a new trial, the judge's decision that it is necessary to discharge them is conclusive on the accused.[73]

forced to do so by physical exhaustion; (2) the exercise of the discretion not arbitrarily but according to all the facts in the case; and (3) the facts constituting the necessity should affirmatively appear on the record, or the discharge will operate as an acquittal. State *v.* Shuchardt, 18 Nebr. 454, 25 N. W. 722; State *v.* Ephraim, 19 N. C. 162; Dobbins *v.* State, 14 Ohio St. 493.

65. Whenever it is made to appear to the court that either by reason of facts existing when the jurors were sworn, but not then known to the court, or by reason of influences brought to bear on them during the trial, the jurors, or any of them, are subject to such bias or prejudice as not to stand impartial between the state and the accused, the jury should be discharged. Simmons *v.* U. S., 142 U. S. 148, 12 S. Ct. 171, 35 L. ed. 968.

66. The act of a juror in leaving the box and the court-house during the taking of the testimony, without leave and without being noticed by any one, warrants the discharge of the jury and a new trial. Reg. *v.* Ward, 10 Cox C. C. 573, 17 L. T. Rep. N. S. 220, 16 Wkly. Rep. 281.

67. Where, pending the deliberation of the jury, it being beyond apparent probability that they will agree, the end of the term arrives or the court has disposed of all its business, the jury may properly be discharged (Barrett *v.* State, 35 Ala. 406; Powell *v.* State, 19 Ala. 577; *In re* State, 7 Ala. 259; Josephine *v.* State, 39 Miss. 613; State *v.* Moor, Walk. (Miss.) 134, 12 Am. Dec. 541; People *v.* Goodwin, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203; State *v.* Whitson, 111 N. C. 695, 16 S. E. 332; State *v.* Brooks, 3 Humphr. (Tenn.) 70; Williams *v.* Com., 2 Gratt. (Va.) 567, 44 Am. Dec. 403) if it appears that the term cannot be continued (Com. *v.* Fitzpatrick, 121 Pa. St. 109, 15 Atl. 466, 6 Am. St. Rep. 757, 1 L. R. A. 451).

A discharge of the jury before the expiration of the term and against the objection of the accused, merely because the other business of the court is finished and the jury have not agreed, is unauthorized and amounts to an acquittal. *Ex p.* Vincent, 43 Ala. 402.

68. Where the indictment proves defective (State *v.* England, 78 N. C. 552), or a very material witness for the prosecution refuses to answer (Reg. *v.* Charlesworth, 2 F. & F. 326), or is so grossly intoxicated that he is unable to testify intelligently (Hughes *v.* State, 35 Ala. 351), by reason of which the prosecution cannot prove its case, the discharge of the jury is proper.

69. The court may properly, even in a capital case (State *v.* Scruggs, 115 N. C. 805, 20 S. E. 720; Com. *v.* Clue, 3 Rawle (Pa.) 498) and after the jury have retired (Hector *v.* State, 2 Mo. 166, 22 Am. Dec. 454) discharge the jury without the prisoner's consent, where, because of the illness of a juror, it is impossible to proceed with the trial (Lee *v.* State, 26 Ark. 260, 7 Am. Rep. 611; Atkins *v.* State, 16 Ark. 568; West *v.* State, 42 Fla. 244, 28 So. 430; Stout *v.* State, 76 Md. 317, 25 Atl. 299).

In England the court might with the prisoner's consent swear another juror in place of the one who had been taken ill, but the better practice was to discharge the jury. 1 Chitty Cr. L. 630; 2 Leach Cr. L. 621 note *b*.

70. Where the prisoner is by sudden illness rendered incapable of remaining at the bar, the jury may be discharged, and the prisoner, on his recovery, may be tried before another jury. Rex *v.* Stevenson, 2 Leach C. C. 618.

71. People *v.* Soto, 65 Cal. 621, 4 Pac. 664; People *v.* Cage, 48 Cal. 323, 17 Am. Rep. 436; State *v.* Sommers, 60 Minn. 90, 61 N. W. 907; Rudder *v.* State, 29 Tex. App. 262, 15 S. W. 717.

72. People *v.* Cage, 48 Cal. 323, 17 Am. Rep. 436. The sickness of a juror as reason for a discharge must be determined by the court as any other fact. State *v.* Smith, 44 Kan. 75, 24 Pac. 84, 21 Am. St. Rep. 266, 8 L. R. A. 774. A report of his illness made to a court officer by telephone is not sufficient. State *v.* Nelson, 19 R. I. 467, 34 Atl. 990, 61 Am. St. Rep. 780, 33 L. R. A. 559. The fact that the jury cannot agree must be determined by the court on evidence (*Ex p.* Maxwell, 11 Nev. 428), and it is not sufficient that the jury state that they cannot agree without the court making some effort to ascertain whether it is probable that they will agree (Ladd *v.* State, 5 Ohio Cir. Ct. 276). If fraud in the impaneling of the jury or tampering with the jury be a sufficient cause for their discharge, under a statute which permits a discharge for the sickness of a juror or other accident or calamity, the fraud must be proved by clear and convincing evidence. State *v.* Hoffman, 8 Ohio Dec. (Reprint) 128, 5 Cinc. L. Bul. 875.

73. State *v.* Allen, 59 Kan. 758, 54 Pac. 1060; People *v.* Harding, 53 Mich. 48, 481,

K. Verdict — 1. Rendition and Reception — a. Delivery — (I) *In Open Court.* The verdict in all cases of felony must be delivered in open court[74] in the presence of defendant.

(II) *By Whom and to Whom Delivered.* As a matter of practice, and often by statute, the verdict must be delivered to the clerk by the foreman.[75] The presence of the judge at the delivery of the verdict is indispensable, but if he is there to receive it, it is not material that the clerk is absent if he afterward records it.[76]

(III) *Time of Delivery* — (A) *Holidays and Sundays.* A verdict may be received on Sunday[77] or on any *dies non juridicus.*[78]

(B) *After Term or During Adjournment.* A verdict which is received after the expiration of the term is void, unless the court has power to receive it under a statute.[79] So a verdict delivered to the clerk during recess,[80] without the permission of the court or the consent of the parties, and in the absence of defendant and the judge, should be set aside and a new trial ordered.[81]

b. Sealing. It is the practice, sanctioned by long usage in criminal cases not capital, on the court taking a recess while the jury is out, for the judge to instruct them to seal up their verdict and separate, if they agree during the recess. They must then come in and affirm it at the next session of the court.[82]

18 N. W. 555, 19 N. W. 155, 51 Am. Rep. 95; State *v.* Jefferson, 66 N. C. 309; State *v.* Pool, 4 Lea (Tenn.) 363.

74. Jackson *v.* State, 102 Ala. 76, 15 So. 351; Com. *v.* Tobin, 125 Mass. 203, 28 Am. Rep. 220; Longfellow *v.* State, 10 Nebr. 105, 4 N. W. 420. And see Rex *v.* Ladsingham, T. Raym. 193; 1 Chitty Cr. L. 636; 2 Hawkins P. C. c. 47, § 2.

A verdict privily pronounced or pronounced while defendant is absent is void. 4 Blackstone Comm. 360; 2 Hale P. C. 300.

At common law a privy verdict may be given in misdemeanors and in the absence of defendant (Bacon Abr. tit. "Verdict"; 1 Chitty Cr. L. 636), and by consent of the parties, a verdict may be delivered at the judge's house, although beyond the limits of the county in which the trial was had (1 Chitty Cr. L. 636).

If defendant himself is present it does not seem material if his counsel is absent when the verdict is rendered. Hommer *v.* State, 85 Md. 562, 37 Atl. 26.

75. Hasson *v.* Com., 11 S. W. 286, 10 Ky. L. Rep. 1054; Com. *v.* Tobin, 125 Mass. 203, 28 Am. Rep. 220. But see State *v.* Faulk, 30 La. Ann. 831.

76. McClerkin *v.* State, 20 Fla. 879.

An attorney cannot by the direction of the court receive a verdict. Quinn *v.* State, 130 Ind. 340, 30 N. E. 300.

Change of judge for prejudice.— Although irregular, it is not error for a judge from whom a change was made on account of prejudice to receive a verdict where the judge who tried the case has left. State *v.* Finder, 10 S. D. 103, 72 N. W. 97.

77. *Alabama.*— Reid *v.* State, 53 Ala. 402, 25 Am. Rep. 627.

Indiana.— Joy *v.* State, 14 Ind. 139; McCorkle *v.* State, 14 Ind. 39.

Kansas.— State *v.* Muir, 32 Kan. 481, 4 Pac. 812.

Kentucky.— Meece *v.* Com., 78 Ky. 586.

Nevada.— State *v.* Rover, 13 Nev. 17.

New York.— Pulling *v.* People, 8 Barb. 384.

North Carolina.— State *v.* Ricketts, 74 N. C. 187.

Texas.— Huffman *v.* State, 28 Tex. App. 174, 12 S. W. 588.

See 14 Cent. Dig. tit. "Criminal Law," § 2083.

78. State *v.* Atkinson, 104 La. 570, 29 So. 279; State *v.* Canty, 41 La. Ann. 587, 6 So. 338.

Motions and judgment.—Any motion or order touching the verdict may be made and the discharge of the jury ordered (McCorkle *v.* State, 14 Ind. 39), but judgment cannot be entered on Sunday (Shearman *v.* State, 1 Tex. App. 215, 28 Am. Rep. 402).

79. Morgan *v.* State, 12 Ind. 448; Grable *v.* State, 2 Greene (Iowa) 559; Harper *v.* State, 43 Tex. 431; *Ex p.* Juneman, 28 Tex. App. 486, 13 S. W. 783.

80. But a verdict delivered to the judge in open court after an adjournment should not be set aside where the usual requirements as to the presence of defendant and the polling of the jury, etc., are properly observed. McIntyre *v.* People, 38 Ill. 514; *In re* Green, 16 Ill. 234; State *v.* McKinney, 31 Kan. 570, 3 Pac. 356; State *v.* Barfield, 36 La. Ann. 89; Barrett *v.* State, 1 Wis. 175.

81. Hayes *v.* State, 107 Ala. 1, 18 So. 172; Jones *v.* State, 97 Ala. 77, 12 So. 274, 38 Am. St. Rep. 150; State *v.* Mills, 19 Ark. 476; State *v.* Epps, 76 N. C. 55.

82. *California.*— People *v.* Kelly, 46 Cal. 355.

Georgia.— Nolan *v.* State, 53 Ga. 137.

Illinois.— Reins *v.* People, 30 Ill. 256.

Maine.— State *v.* Fenlason, 78 Me. 495, 7 Atl. 385; Anonymous, 63 Me. 590.

Massachusetts.— Com. *v.* Heden, 162 Mass. 521, 39 N. E. 181; Com. *v.* Costello, 128 Mass. 88; Com. *v.* Durfee, 100 Mass. 146.

Montana.— Territory *v.* Hexter, 3 Mont. 206.

c. Presence of All Jurors. A conviction will be set aside where it appears that all the jurors were not present when the verdict was rendered.[83]

d. Assent of Jury — (I) *In General.* When the jury agree upon their verdict they return to the box to deliver it. It is the duty of the clerk to call off their names and ask them whether they agree on this verdict.[84] If any juror does not agree in the verdict as rendered, he must express his dissent before it is recorded, for it is not perfected until the jurors have expressed their assent either in this method or by polling.[85]

(II) *Polling Jurors* — (A) *Discretion of Court.* According to the majority of the authorities, whether the jury shall be polled is in the discretion of the court;[86] but the rule is by no means universally accepted, and in many of the states it has been held that either party may claim as of right to have the jury polled, and that the action of the court in denying this right is reversible error.[87]

New Hampshire.—State *v.* Prescott, 7 N. H. 287.

Ohio.— State *v.* Engle, 13 Ohio 490; State *v.* Wallahan, Tapp. 80.

Pennsylvania.—Com. *v.* Boyle, 9 Phila. 592.

United States.— U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 16 Blatchf. 338.

See 14 Cent. Dig. tit. "Criminal Law," § 2084; 1 Bennett & H. Lead. Cr. Cas. (2d ed.) 496; 1 Bishop Cr. Proc. § 828 note.

Under the Iowa and Minnesota statutes requiring the jury to be kept together in charge of an officer until they are brought into court, it is error to allow them to seal the verdict agreed upon and separate. State *v.* Fertig, 84 Iowa 79, 50 N. W. 545; State *v.* Callahan, 55 Iowa 364, 7 N. W. 603; State *v.* Anderson, 41 Minn. 104, 43 N. W. 786. But see State *v.* Thompson, 74 Iowa 119, 37 N. W. 104.

An omission to seal the envelope containing the verdict does not invalidate it where, by being written upon the indictment, it is identified as the verdict agreed upon. Com. *v.* Slattery, 147 Mass. 423, 18 N. E. 399.

Sealed statement that jury disagree.— Where the jury, being permitted to return a sealed verdict, write a statement as follows: "We, the jury, agree to disagree, so say we all," and separate, reassembling the next morning to affirm this as their verdict, the court will declare a mistrial and discharge the jury. Tervin *v.* State, 37 Fla. 396, 20 So. 551.

The consent of counsel in open court to a sealed verdict waives objections to the separation of the jury. Pounds *v.* U. S., 171 U. S. 35, 18 S. Ct. 729, 43 L. ed. 62.

83. State *v.* Meyers, 68 Mo. 266; State *v.* Mansfield, 41 Mo. 470; Rex *v.* Wooller, 2 Stark. 111, 18 Rev. Rep. 402, 3 E. C. L. 338. And *compare* Com. *v.* Gibson, 2 Va. Cas. 70, holding that if all were present when the verdict was read in open court, and one left before a subsequently amended verdict was read, and eleven agreed to the latter, it is a nullity.

84. Com. *v.* Tobin, 125 Mass. 203, 28 Am. Rep. 220; State *v.* Shule, 32 N. C. 153; Rogers *v.* Com., (Va. 1894) 19 S. E. 162; Com. *v.* Gibson, 2 Va. Cas. 70.

If as customary they reply in the affirmative, the clerk must demand who shall answer for them, to which they reply their foreman. He must then direct the prisoner to stand up or hold up his right hand, and thus address the jury: "Look upon the prisoner at the bar; how say you? Is he guilty of the matter whereof he stands indicted or not guilty?" and the foreman will answer guilty, or not, as the case may be. The clerk then records the verdict, and again addresses the jury as follows: "Hearken to your verdict as the court has recorded it. You say that (name of accused) is guilty (or not guilty, as the case may be) of the matter whereof he stands indicted, and so say you all." Rex *v.* Arnold, 16 How. St. Tr. 695, 766; *In re* Dawson, 13 How. St. Tr. 451; 1 Bishop Cr. Proc. § 1001; 1 Chitty Cr. L. 635.

85. Givens *v.* State, 76 Md. 485, 25 Atl. 689.

An omission to call the jurors' names is a mere irregularity where all are present and had agreed (People *v.* Rodundo, 44 Cal. 538; Mitchell *v.* State, 22 Ga. 211, 68 Am. Dec. 493), although the calling of the names is required by the statute (Norton *v.* State, 106 Ind. 163, 6 N. E. 126).

86. Neither side has a right to have the jury polled.

Arkansas.— Harris *v.* State, 31 Ark. 196.

Connecticut.— State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89.

Louisiana.— State *v.* Colomb, 108 La. 253, 32 So. 351.

Maine.— Fellow's Case, 5 Me. 333.

Massachusetts.—Com. *v.* Cosgley, 118 Mass. 1; Com. *v.* Roby, 12 Pick. 496.

South Carolina.— State *v.* Wyse, 32 S. C. 45, 10 S. E. 612; State *v.* Whitman, 14 Rich. 113; State *v.* Wise, 7 Rich. 412; State *v.* Allen, 1 McCord 525, 10 Am. Dec. 687.

See 14 Cent. Dig. tit. "Criminal Law," § 2085.

87. *Georgia.*— Blankensbip *v.* State, 112 Ga. 402, 37 S. E. 732; Tilton *v.* State, 52 Ga. 478.

Illinois.— Nomaque *v.* People, 1 Ill. 145, 12 Am. Dec. 157.

Iowa.— State *v.* Callahan, 55 Iowa 364, 7 N. W. 603.

Maryland.— Givens *v.* State, 76 Md. 485, 25 Atl. 689; Williams *v.* State, 60 Md. 402.

Michigan.— Stewart *v.* People, 23 Mich. 63, 9 Am. Rep. 78.

(B) *Time of.* A motion to poll the jurors comes too late if made after the verdict is announced and recorded[88] or after the jury has dispersed.[89]

(C) *Manner of.* In polling the jurors each should be questioned individually and separately.[90] A juror cannot, however, be questioned concerning his verdict further than to ask, "Is this your verdict?"[91] The juror may be required to answer "yes" or "no," and his detailed explanations may be refused,[92] but the exact words used by the juror in answering are immaterial if they indicate clearly his individual assent.[93]

(D) *Effect of Dissent of Juror.* When on polling a juror dissents, it is sometimes provided by statute that the jury may be sent back for further deliberation;[94] but although a juror at first answers evasively or in the negative, if he finally acquiesces in the verdict it must be sustained.[95]

2. Form and Sufficiency — a. General, Partial, or Special. A verdict is either general, where the verdict is on the whole charge; partial, where the jury find as to part of the charge, that is, where the prisoner is found guilty on one count and acquitted on the others; or special, where the facts in the case are found and the legal inference of guilt or innocence is referred to the court.[96]

b. In Writing. The verdict need not be in writing,[97] unless this is required

Missouri.— State *v.* Reppetto, 66 Mo. App. 251.

New York.— Jackson *v.* Gale, 3 Cow. 24.

North Carolina.— State *v.* Young, 77 N. C. 498, where the court intimates that this is a constitutional right under a clause requiring a conviction by the unanimous verdict of the jury.

Ohio.— Sargent *v.* State, 11 Ohio 472.

Pennsylvania.— Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228.

See 14 Cent. Dig. tit. "Criminal Law," § 2085.

Polling the jury is not essential to the validity of the verdict, and where a failure to make a request that the jury be polled is due to the absence of defendant's counsel, it is discretionary with the court to grant or refuse a motion for a new trial on this account. State *v.* Jones, 91 N. C. 654.

The court need not poll the jury of its own motion without any demand therefor. State *v.* Burns, 148 Mo. 167, 49 S. W. 1005, 71 Am. St. Rep. 588.

Defendant's consent to a sealed verdict has been held not to deprive him of a right to poll the jury. Wright *v.* State, 11 Ind. 569; Stewart *v.* People, 23 Mich. 63, 9 Am. Rep. 78. *Contra,* U. S. *v.* Bridges, 24 Fed. Cas. No. 14,644. It has been held, however, that the consent of defendant that the jury may return a verdict in his absence waives his right to poll them. Brown *v.* State, 63 Ala. 97.

88. Williams *v.* State, 63 Ga. 306; Short *v.* State, 63 Ind. 376; Hommer *v.* State, 85 Md. 562, 37 Atl. 26; Com. *v.* Schmous, 162 Pa. St. 326, 29 Atl. 644.

89. Robinson *v.* State, 109 Ga. 506, 34 S. E. 1017; Harrison *v.* State, 100 Ga. 264, 28 S. E. 38; Joy *v.* State, 14 Ind. 139.

90. It is not sufficient to question the jurors collectively, although each and all express assent to the verdict. Brownlow *v.* State, 112 Ga. 405, 37 S. E. 733; Blankenship *v.* State, 112 Ga. 402, 37 S. E. 732; Swor *v.* State, 81 Miss. 453, 33 So. 223.

91. State *v.* Bogain, 12 La. Ann. 264; Leighton *v.* People, 10 Abb. N. Cas. (N. Y.) 261; State *v.* John, 30 N. C. 330, 49 Am. Dec. 396; Bassham *v.* State, 38 Tex. 622; Bean *v.* State, 17 Tex. App. 60.

92. State *v.* Tomlinson, 7 N. D. 294, 74 N. W. 995.

93. Biscoe *v.* State, 68 Md. 294, 12 Atl. 25; Com. *v.* Schmous, 162 Pa. St. 326, 29 Atl. 644; Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228.

94. Winslow *v.* State, 76 Ala. 42.

95. McAlpine *v.* State, 117 Ala. 93, 23 So. 130; Parker *v.* State, 81 Ga. 332, 6 S. E. 600; Hill *v.* State, 64 Ga. 453; State *v.* Godwin, 27 N. C. 401, 44 Am. Dec. 42; Henderson *v.* State, 12 Tex. 525.

Assent of juror to secure agreement.— Where on polling one of the jurors says he thinks that the prisoner is guilty of a less crime than that found, and that he assented to the verdict for the sake of an agreement, judgment on a verdict of guilty should be reversed (Rothbauer *v.* State, 22 Wis. 468), and the same action may be taken on a verdict of guilty where a juror answers that he had doubts about defendant's guilt, but on being told that he must answer yes or no, he replied: "Then I will answer yes, because I subscribed to it," and then on being reprimanded he answers "yes" (State *v.* Austin, 6 Wis. 205).

Where a juror answered that the verdict of guilty was his "but not without doubts," and subsequently answered, "It is," a new trial should be denied. Gose *v.* State, 6 Tex. App. 121.

96. See McGuffie *v.* State, 17 Ga. 497; People *v.* Wells, 8 Mich. 104; Archbold Pr. Pl. & Ev. (13th Lond. ed.) 146, 147; 4 Blackstone Comm. 361; 1 Chitty Cr. L. 636; Coke Litt. 228.

97. State *v.* Reed, 49 La. Ann. 704, 21 So. 732; State *v.* Anderson, 45 La. Ann. 651, 12 So. 737; State *v.* Jenkins, 43 La. Ann. 917, 9 So. 905; State *v.* Simon, 37 La. Ann. 569; State *v.* Daniel, 31 La. Ann. 91; State *v.*

by statute, and even when writing is expressly required by statute an oral verdict is not necessarily void.[98]

e. Signature. A written verdict need not be signed by the foreman of the jury[99] or by the jurors.[1]

d. Misspelling. Neither bad spelling nor bad grammar will vitiate a verdict when its meaning is clear.[2]

e. Surplusage. A general verdict, which is responsive to the issues, will not be reversed solely because it finds facts not embraced in the issues. Such findings may be rejected as irresponsive and therefore surplusage.[3]

f. Uncertainty. A strict adherence to the statutory form of verdict is not usually required. An informal verdict, if intelligible, is sufficient where it is clearly understood to be a general verdict of guilty or not guilty;[4] but where it

Faulk, 30 La. Ann. 831; State *v.* Walters, 15 La. Ann. 648; State *v.* Moore, 8 Rob. (La.) 518; Lord *v.* State, 16 N. H. 325, 41 Am. Dec. 729.

98. Ellis *v.* State, 30 Tex. App. 601, 18 S. W. 139, holding, however, that the statute does not require that it should be written with pen and ink.

Even where it is so provided by statute it has been held that where the verdict is delivered orally in open court, and each juror says that the verdict is his, and it is entered upon the record, the irregularity does not prejudice the accused and is not ground for a new trial. Hardy *v.* State, 19 Ohio St. 579.

99. Thomas *v.* Com., 15 S. W. 861, 12 Ky. L. Rep. 903; State *v.* Jenkins, 43 La. Ann. 917, 9 So. 905; State *v.* Peterson, 2 La. Ann. 921; State *v.* Moore, 8 Rob. (La.) 518; Yarber *v.* State, (Tex. Cr. App. 1894) 24 S. W. 645; Morton *v.* State, 3 Tex. App. 510; Crump *v.* Com., (Va. 1895) 23 S. E. 760.

But by statute signing by the foreman is sometimes required in felony cases. Barton *v.* State, (Tex. Cr. App. 1898) 44 S. W. 1093.

Immaterial variances in the signatures will be disregarded. State *v.* Duffield, 49 W. Va. 274, 38 S. E. 577; State *v.* Allen, 45 W. Va. 65, 30 S. E. 209; State *v.* Morgan, 35 W. Va. 260, 13 S. E. 385.

In cases where a sealed verdict is allowable, it must be signed by the foreman of the jury. State *v.* McCormick, 84 Me. 566, 24 Atl. 938.

1. *Arkansas.*— Anderson *v.* State, 5 Ark. 444.

Florida.— Yates *v.* State, 43 Fla. 177, 29 So. 965.

Illinois.— Mertz *v.* People, 81 Ill. App. 576.

Louisiana.— State *v.* Nolan, 8 Rob. 513.

Virginia.— Woods *v.* Com., 86 Va. 933, 11 S. E. 799.

See 14 Cent. Dig. tit. "Criminal Law," § 2081.

2. *Florida.*— Long *v.* State, 42 Fla. 612, 28 So. 855; Higginbotham *v.* State, 42 Fla. 573, 29 So. 410, 89 Am. St. Rep. 237.

Kentucky.— Mitchell *v.* Com., 106 Ky. 602, 51 S. W. 17, 21 Ky. L. Rep. 222.

Louisiana.— State *v.* Smith, 104 La. 464, 29 So. 20; State *v.* Reed, 49 La. Ann. 704, 21 So. 732; State *v.* Ross, 32 La. Ann. 854.

Mississippi.— Kellum *v.* State, 64 Miss. 226, 1 So. 174.

Missouri.— State *v.* McNamara, 100 Mo. 100, 13 S. W. 938.

Texas.— McMillan *v.* State, (Cr. App. 1902) 71 S. W. 279; Howard *v.* State, (Cr. App. 1901) 65 S. W. 519; Passmore *v.* State, (Cr. App. 1901) 64 S. W. 1040; Cosby *v.* State, (Cr. App. 1901) 63 S. W. 129; Brown *v.* State, (Cr. App. 1900) 59 S. W. 1118; Whitley *v.* State, (Cr. App. 1900) 56 S. W. 69; Augustine *v.* State, 41 Tex. Cr. 59, 52 S. W. 77; Garza *v.* State, (Cr. App. 1898) 47 S. W. 983; Kelly *v.* State, 36 Tex. Cr. 480, 38 S. W. 39; Price *v.* State, 36 Tex. Cr. 403, 37 S. W. 743.

See 14 Cent. Dig. tit. "Criminal Law," § 2090.

3. *Alabama.*— Mountain *v.* State, 40 Ala. 344.

California.— People *v.* Ah Kim, 34 Cal. 189.

Illinois.— Armstrong *v.* People, 37 Ill. 459.

Iowa.— State *v.* Williams, 8 Iowa 533.

Louisiana.— State *v.* O'Brien, 22 La. Ann. 27.

Maryland.— Gover *v.* Turner, 28 Md. 600.

Massachusetts.— Com. *v.* Crowley, 168 Mass. 222, 46 N. E. 626.

Mississippi.— Traube *v.* State, 56 Miss. 153.

Nevada.— State *v.* Hutchinson, 7 Nev. 53.

Tennessee.— Wallace *v.* State, 2 Lea 29.

Virginia.— Wells *v.* Garland, 2 Va. Cas. 471.

Wisconsin.— State *v.* Jenkins, 60 Wis. 599, 19 N. W. 406.

See 14 Cent. Dig. tit. "Criminal Law," § 2091.

Designating the offense.— Under a statute providing that a general verdict is either "guilty" or "not guilty," the designation by the jurors of the offense of which the accused is guilty is merely surplusage. People *v.* Brady, (Cal. 1901) 65 Pac. 823.

Referring to disagreement.— Where a verdict of guilty is rendered on two counts of the indictment, with a disagreement as to the others, the words referring to the disagreement are surplusage. State *v.* McGee, 55 S. C. 247, 33 S. E. 353, 74 Am. St. Rep. 741.

4. People *v.* McCarty, 48 Cal. 557.

Where a verdict is not properly framed, but it is thoroughly understood what verdict

is so indefinite and uncertain as to be unintelligible, the court will entertain and sustain a motion in arrest of judgment.[5]

g. Special Verdict. At common law the jury may give a special verdict in all felonies. By this verdict the facts of the case are found by the jury and become a part of the record, and questions of law thereon are submitted to the court to be decided.[6] No particular form of words is necessarily to be followed in framing a special verdict,[7] but it must find all the facts and circumstances which constitute the offense charged to enable the court to render a judgment of guilty; and no defect in the findings can be supplied by the court by any intendment or implication.[8]

h. Responsiveness to Crime Charged. The sufficiency of a general verdict of guilty is determined by ascertaining whether it is responsive to and covers the offense charged in the indictment.[9] So a verdict which finds defendant "guilty as charged in the indictment" is sufficient.[10] The omission from the verdict of the words in manner and form "as charged in the indictment" has been held not to invalidate a conviction.[11]

the jury desire to find, it is not error to permit the prosecuting attorney in open court, at the request of the jury, to put the verdict in a form that will legally express the intention of the jury. They should then publicly affirm it as their verdict. Pool *v.* State, 87 Ga. 526, 13 S. E. 556; Brantley *v.* State, 87 Ga. 149, 13 S. E. 257.

5. Wells *v.* State, 116 Ga. 87, 42 S. E. 390.

Reference to indictment.— It will not be void for uncertainty if its meaning can be determined by reference to the indictment. Arnold *v.* State, 51 Ga. 144; Doolittle *v.* State, 93 Ind. 272; Burgess *v.* State, 33 Tex. Cr. 9, 24 S. W. 286; Howell *v.* State, 10 Tex. App. 298; Hoback *v.* Com., 28 Gratt. (Va.) 922.

6. Underwood *v.* People, 32 Mich. 1, 20 Am. Rep. 633; Com. *v.* Eichelberger, 119 Pa. St. 254, 13 Atl. 422, 4 Am. St. Rep. 642; Com. *v.* Chathams, 50 Pa. St. 181, 88 Am. Dec. 539; 4 Blackstone Comm. 361; 1 Chitty Cr. L. 642; 2 Hawkins P. C. c. 47, § 3.

A special verdict is one in which the jury find certain facts to exist, and leave the court to say whether or not by the law controlling such facts the prisoner is guilty. McGuffie *v.* State, 17 Ga. 497; State *v.* Morris, 104 N. C. 837, 10 S. E. 454; State *v.* Savage, 36 Oreg. 191, 60 Pac. 610, 61 Pac. 1128. And see State *v.* Moore, 29 N. C. 228.

In some states special verdicts in criminal cases are not permitted. State *v.* Fooks, 65 Iowa 196, 452, 21 N. W. 561, 773; State *v.* Ridley, 48 Iowa 370; Maiden *v.* Com., 82 Ky. 133; State *v.* Jurche, 17 La. Ann. 71; Smith *v.* State, 59 Ohio St. 350, 52 N. E. 826.

7. 1 Chitty Cr. L. 643.

8. *Alabama.*— Huffman *v.* State, 89 Ala. 33, 8 So. 28; Clay *v.* State, 43 Ala. 350.

Louisiana.— State *v.* Burdon, 38 La. Ann. 357; State *v.* Ritchie, 3 La. Ann. 511.

Michigan.— People *v.* Piper, 50 Mich. 390, 15 N. W. 523; People *v.* Wells, 8 Mich. 104.

North Carolina.— State *v.* Finlayson, 113 N. C. 628, 18 S. E. 200; State *v.* Stewart, 91 N. C. 566; State *v.* Belk, 76 N. C. 10; State *v.* Watts, 32 N. C. 369; State *v.* Moore, 29 N. C. 228.

South Carolina.—State *v.* Nichols, 12 Rich. 672.

Tennessee.— Jones *v.* State, 2 Swan 399.

Texas.— Jackson *v.* State, 21 Tex. 668.

United States.— Peters *v.* U. S., 94 Fed. 127, 36 C. C. A. 105; U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441.

England.— 1 Chitty Cr. L. 644; 2 East P. C. 708, 784; 2 Hawkins P. C. c. 47, § 9.

See 14 Cent. Dig. tit. "Criminal Law," § 2092.

For example the venue (Com. *v.* Call, 21 Pick. (Mass.) 509, 32 Am. Dec. 284; Rex *v.* Hazel, 1 Leach C. C. 406) and the intent (State *v.* Bray, 89 N. C. 480; State *v.* Blue, 84 N. C. 807; Short *v.* State, 7 Yerg. (Tenn.) 509) must be found in the special verdict substantially as laid in the indictment.

9. State *v.* French, 50 La. Ann. 461, 23 So. 606; State *v.* Green, 37 La. Ann. 382; State *v.* Womack, 31 La. Ann. 635; Weighorst *v.* State, 7 Md. 442; Nelson *v.* People, 23 N. Y. 293.

A verdict that accused is not guilty as charged, but that he is guilty of another crime, is absolutely void. *In re* McVey, 50 Nebr. 481, 70 N. W. 51.

10. People *v.* De Cleer, 60 Cal. 382; Ellis *v.* State, 141 Ind. 357, 40 N. E. 801; Harrington *v.* State, 4 Ohio Dec. (Reprint) 402, 2 Clev. L. Rep. 113.

11. *Alabama.*— Blount *v.* State, 49 Ala. 381.

Arkansas.— Evans *v.* State, 58 Ark. 47, 22 S. W. 1026.

Illinois.— Eyman *v.* People, 6 Ill. 4.

Indiana.— Polson *v.* State, 137 Ind. 519, 35 N. E. 907; Lovell *v.* State, 45 Ind. 550; Moon *v.* State, 3 Ind. 438.

Iowa.— State *v.* McCombs, 13 Iowa 426.

Louisiana.— State *v.* Anderson, 45 La. Ann. 651, 12 So. 737.

Maine.— State *v.* Webber, 90 Me. 108, 37 Atl. 877.

Nebraska.— Preuit *v.* People, 5 Nebr. 377.

Virginia.— Rogers *v.* Com., (1894) 19 S. E. 162.

Wyoming.—Ackerman *v.* State, 7 Wyo. 504, 54 Pac. 228.

i. Designation of Persons. The fact that the verdict does not contain the name of defendant,[12] or states it incorrectly in some immaterial particular,[13] does not invalidate it; but a verdict designating him by an entirely different name from that in the indictment is fatally defective.[14] Again immaterial variances[15] as to names between the verdict and the allegations of the indictment, or omitting names of persons other than defendant from the verdict, are not sufficient to invalidate a verdict where it is otherwise intelligible, certain, and sufficient.[16]

j. Where There Are Joint Defendants — (I) *VERDICT ON SEPARATE TRIAL.* Where of several defendants jointly indicted the record shows that one only was tried, a verdict finding defendant guilty, although not naming him, is sufficiently certain.[17]

(II) *SEPARATE VERDICT ON JOINT TRIAL.* Where on a joint indictment several are tried together, a verdict of guilty assessing the penalty jointly, whether the penalty is fine or imprisonment, is invalid.[18] The jury in such a case

See 14 Cent. Dig. tit. "Criminal Law," § 2093.

12. *Alabama.*— Robinson *v.* State, 54 Ala. 86.

Georgia.— Martin *v.* State, 25 Ga. 494.

Louisiana.— State *v.* Tolliver, 47 La. Ann. 1099, 17 So. 502; State *v.* Faulk, 30 La. Ann. 831.

Texas.— Gear *v.* State, (Cr. App. 1897) 42 S. W. 285.

Virginia.— Thornton *v.* Com., 24 Gratt. 657.

See 14 Cent. Dig. tit. "Criminal Law," § 2095.

But see State *v.* McCormick, 84 Me. 566, 24 Atl. 938; Williams *v.* State, 6 Nebr. 334.

13. *California.*—People *v.* Ah Kim, 34 Cal. 189; People *v.* Boggs, 20 Cal. 432.

Louisiana.— State *v.* Florez, 5 La. Ann. 429.

Minnesota.— State *v.* Framness, 43 Minn. 490, 45 N. W. 1098.

South Carolina.— State *v.* Dodson, 16 S. C. 453.

Virginia.—Poindexter *v.* Com., 6 Rand. 667.

See 14 Cent. Dig. tit. "Criminal Law," § 2095.

Age of defendant.—A statute requiring the verdict to state whether or not defendant is between the ages of ten and twenty-one, and if so to state his age, does not apply in the case of an adult defendant. Schmaedeke *v.* People, 63 Ill. App. 662. A verdict need not state defendant's exact age where the statute requires the jury finding a person guilty of felony to state whether or not he is over sixteen or less than thirty years of age. Colip *v.* State, 153 Ind. 584, 55 N. E. 739, 74 Am. St. Rep. 322.

14. Territory *v.* Do, 1 Ariz. 507, 25 Pac. 472; State *v.* McBride, 19 Mo. 239.

15. **Where the variance is such that the verdict is absolutely irresponsive** in some very material respect, it will be set aside on motion or reversed on appeal. Million *v.* People, 6 Ill. App. 537; State *v.* Lohman, Riley (S. C.) 67; State *v.* Mayson, 3 Brev. (S. C.) 284; Randall *v.* Com., 24 Gratt. (Va.) 644; State *v.* Newsom, 13 W. Va. 859.

16. Henderson *v.* Com., 98 Va. 794, 34 S. E. 881.

The omission of the name of a person injured by the crime may be cured by a reference to the indictment. Price *v.* Com., 77 Va. 393.

Verdict formulated by jury on blanks furnished see People *v.* Brady, (Cal. 1901) 65 Pac. 823.

17. *Georgia.*—Wilson *v.* State, 66 Ga. 591; Thurmond *v.* State, 55 Ga. 598.

Illinois.— Hronek *v.* People, 134 Ill. 139, 24 N. E. 861, 23 Am. St. Rep. 652, 8 L. R. A. 837.

Indiana.— Bloomhuff *v.* State, 8 Blackf. 205.

Kentucky.— Hughes *v.* Com., 14 S. W. 682, 12 Ky. L. Rep. 580.

Texas.— Garza *v.* State, (Cr. App. 1892) 20 S. W. 752; George *v.* State, 17 Tex. App. 513.

See 14 Cent. Dig. tit. "Criminal Law," § 2096.

Where the record shows that two or more jointly indicted were tried together, a verdict finding defendant (in the singular) guilty is void for uncertainty. People *v.* Sepulveda, 59 Cal. 342; Favor *v.* State, 54 Ga. 249; State *v.* Weeks, 23 Oreg. 3, 34 Pac. 1095; Brannigan *v.* People, 3 Utah 488, 24 Pac. 767.

18. *Georgia.*— Cruce *v.* State, 59 Ga. 83.

Illinois.— Miller *v.* People, 47 Ill. App. 472.

Indiana.— Hughes *v.* State, 65 Ind. 39.

Kentucky.— Curd *v.* Com., 14 B. Mon. 386; Arnold *v.* Com., 55 S. W. 894, 21 Ky. L. Rep. 1566.

Missouri.— State *v.* Gay, 10 Mo. 440.

Texas.— Allen *v.* State, 34 Tex. 230; Hays *v.* State, 30 Tex. App. 472, 17 S. W. 1063; Caesar *v.* State, 30 Tex. App. 274, 17 S. W. 258; Cunningham *v.* State, 26 Tex. App. 83, 9 S. W. 62.

Virginia.— Com. *v.* Harris, 7 Gratt. 600.

Illustrations.— A joint verdict finding each defendant guilty by name (Fife *v.* Com., 29 Pa. St. 429), fixing the punishment of each by name at a specific fine and term of imprisonment (Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 303, 54 Am. St. Rep. 447, 35 L. R. A. 176; Bennett *v.* State, 30 Tex. 521), or that defendants are guilty and "their" punishment assessed at death (Mootry *v.* State, 35 Tex. Cr. 450, 33 S. W. 877, 34 S. W. 126) or life imprisonment (Polk *v.* State, 35 Tex. Cr. 495, 34 S. W. 633) or

should be sent back to their room with instructions to assess a separate penalty against each defendant.[19]

(III) *Acquittal of One or More and Conviction of Others.* Where two are jointly indicted and jointly tried for an offense which could be committed by one alone, there may be a verdict of guilty as to one and an acquittal[20] or a disagreement as to the other.[21] It is error to tell the jury, where two are tried together for the same crime, that if one is convicted both should be.[22]

k. Where Indictment Contains Several Counts — (I) *Separate Crimes in Different Counts.* A general verdict of guilty is invalid where an indictment is in several counts, each of which charges a separate and distinct offense, of a nature and character radically different from that in the other counts, and having no necessary connection.[23] The same result follows where the offenses, although

confinement for a certain number of years in the penitentiary (Garza *v.* State, 43 Tex. Cr. 499, 66 S. W. 1098; Davidson *v.* State, 40 Tex. Cr. 285, 49 S. W. 372, 50 S. W. 365. But see Caesar *v.* State, 30 Tex. App. 274, 17 S. W. 258) is not defective as assessing a joint penalty.

Absent defendant.— Where three are indicted, but two only have been arrested and tried, a general verdict of guilty will be presumed to refer only to those actually tried. The jury need not refer in their verdict to defendants on trial. State *v.* Chambers, 45 La. Ann. 36, 11 So. 944; State *v.* Bradley, 30 La. Ann. 326.

19. Straughan *v.* State, 16 Ark. 37.

20. *Georgia.*— Nobles *v.* State, 98 Ga. 73, 26 S. E. 64, 38 L. R. A. 577; Roane *v.* State, 97 Ga. 195, 22 S. E. 374.

Kentucky.— Weatherford *v.* Com., 10 Bush 196.

Louisiana.— State *v.* Thompson, 13 La. Ann. 515.

Massachusetts.— Com. *v.* Gavin, 148 Mass. 449, 18 N. E. 675, 19 N. E. 554; Com. *v.* Slate, 11 Gray 60; Com. *v.* Griffin, 3 Cush. 523.

Mississippi.—Funderburk *v.* State, 75 Miss. 20, 21 So. 658.

Missouri.— State *v.* Kaiser, 124 Mo. 651, 28 S. W. 182.

New York.— People *v.* White, 55 Barb. 606; Chatterton *v.* People, 15 Abb. Pr. 147.

North Carolina.—State *v.* Mooney, 64 N. C. 54.

West Virginia.— State *v.* Lilly, 47 W. Va. 496, 35 S. E. 837.

United States.— U. S. *v.* Bebout, 28 Fed. 522.

England.— Reg. *v.* Matthews, 4 Cox C. C. 214, 1 Den. C. C. 596, 14 Jur. 513, T. & M. 337; 2 Hawkins P. C. c. 47, § 8.

See 14 Cent. Dig. tit. "Criminal Law," § 2097.

It is the duty of the court so to instruct. Hayden *v.* Nott, 9 Conn. 367; Hampton *v.* State, 45 Tex. 154; Holmes *v.* State, 9 Tex. App. 313.

21. Com. *v.* Wood, 12 Mass. 313; Bucklin *v.* U. S., 159 U. S. 680, 682, 16 S. Ct. 182, 40 L. ed. 304, 305; Reg. *v.* Hamilton, 23 N. Brunsw. 540.

22. People *v.* McGrath, 5 N. Y. Cr. 4.

Same evidence against both defendants.— Where the only proof of guilt is the evidence of one witness in every detail identical against two defendants, a verdict of guilty as to one will be set aside where the jury disagree as to the other. Davis *v.* State, 75 Miss. 637, 23 So. 770, 941.

This rule does not apply to a crime, for example, conspiracy, which can only be committed by two jointly. If therefore one of two defendants be convicted, and subsequently the other is acquitted, the conviction must be set aside. Delany *v.* People, 10 Mich. 241.

23. *Illinois.*— Hudson *v.* People, 29 Ill. App. 454.

Maryland.— Burk *v.* State, 2 Harr. & J. 426.

Massachusetts.— Com. *v.* Carey, 103 Mass. 214.

Missouri.— State *v.* Burke, 151 Mo. 136, 52 S. W. 226; State *v.* Karlowski, 142 Mo. 463, 44 S. W. 244; State *v.* Harmon, 106 Mo. 635, 18 S. W. 128; State *v.* Nitch, 79 Mo. App. 99; State *v.* Jackson, 72 Mo. App. 59.

Ohio.— Eldredge *v.* State, 37 Ohio St. 191.

Tennessee.— Kelly *v.* State, 7 Baxt. 84. But see Davis *v.* State, 85 Tenn. 522, 3 S. W. 348.

Texas.— Lee *v.* State, 41 Tex. Cr. 557, 55 S. W. 814.

United States.— U. S. *v.* Keller, 19 Fed. 633; U. S. *v.* Dickinson, 25 Fed. Cas. No. 14,958, 2 McLean 325; U. S. *v.* Peterson, 27 Fed. Cas. No. 16,037, 1 Woodb. & M. 305.

See 14 Cent. Dig. tit. "Criminal Law," § 2098 *et seq.*

Forgery and uttering in separate counts.— A general verdict of guilty is invalid. State *v.* Pierce, 136 Mo. 34, 37 S. W. 815.

Where burglary and larceny are charged in separate counts, a general verdict of guilty as charged in the indictment is insufficient. State *v.* Rowe, 142 Mo. 439, 44 S. W. 266 [*overruling* State *v.* Butterfield, 75 Mo. 297]; State *v.* Hudson, 137 Mo. 618, 38 S. W. 1107; Miller *v.* State, 16 Tex. App. 417.

A verdict in response to the charges of each of two counts and assessing appropriate punishment on each count separately is not a general verdict, nor will it be set aside because it contains no recital that defendant is guilty as charged in the indictment, or as charged in either count. Lawrence *v.* State, (Ark. 1902) 71 S. W. 263.

When general verdict sufficient.— Where the evidence as given applies only to one of several counts (State *v.* Long, 52 N. C. 24),

of the same class, or growing out of one transaction, are punishable by penalties differing not only in degree but in their character and form as well.[24]

(II) *Same Crime or Transaction in Different Counts.* When but one offense is charged in various forms in separate counts of one indictment, a general verdict of guilty, or of guilty as charged, without mentioning the count on which it is based, is sufficient.[25] The same rule is applicable, although several distinct crimes are charged in different counts, if they all arose out of the same transaction.[26]

where the court instructs the jury to disregard two out of three counts (Waver *v.* State, 108 Ga. 775, 33 S. E. 423), or where in its instructions the court intentionally ignores and fails to instruct upon one of the counts (Parks *v.* State, 29 Tex. App. 597, 16 S. W. 532), a general verdict will be applied to that count which was recognized by the court or to which the evidence was directed.

24. State *v.* Jones, 168 Mo. 398, 68 S. W. 566; State *v.* Bedell, 35 Mo. App. 551; State *v.* Hight, 124 N. C. 845, 32 S. E. 966; State *v.* Goings, 98 N. C. 766, 4 S. E. 121; State *v.* Johnson, 75 N. C. 123, 22 Am. Rep. 666; State *v.* Anderson, 1 Strobh. (S. C.) 455; State *v.* Montague, 2 McCord (S. C.) 257.

Larceny and embezzlement.—Where a conviction of the former crime works disfranchisement, while a conviction of the latter does not, defendant is entitled to a verdict designating the count on which he is convicted, where counts for these crimes are contained in the same indictment. State *v.* Cornwall, 88 Mo. App. 190.

Uncertainty as to counts.— Where a jury finds a defendant guilty as to certain acts alleged in three different counts, not alluding to any count, the court has no power to order a verdict entered on any particular count, and the verdict thus entered must be set aside, although affirmed by the jury. Com. *v.* Munn, 14 Gray (Mass.) 364.

Where two offenses of a similar character are charged in the alternative, a general verdict is proper, and the court is not obliged to instruct the jury to specify in their verdict on which count they find. White *v.* State, 74 Ala. 31.

25. *Alabama.*— Jackson *v.* State, 74 Ala. 26; Kilgore *v.* State, 74 Ala. 1.

Arkansas.— Youngblood *v.* State, 35 Ark. 35.

Colorado.— Bergdahl *v.* People, 27 Colo. 302, 61 Pac. 228.

Connecticut.— State *v.* Rathbun, 74 Conn. 524, 51 Atl. 540; State *v.* Tuller, 34 Conn. 280.

Georgia.— Stewart *v.* State, 58 Ga. 577.

Illinois.— Longford *v.* People, 134 Ill. 444, 25 N. E. 1009; Herman *v.* People, 131 Ill. 594, 22 N. E. 471, 9 L. R. A. 182; Armstrong *v.* People, 37 Ill. 459; Mertz *v.* People, 81 Ill. App. 576; Powers *v.* People, 42 Ill. App. 30.

Indiana.— Merrick *v.* State, 63 Ind. 327; Lovell *v.* State, 45 Ind. 550.

Kansas.— State *v.* Webb, 7 Kan. App. 423, 53 Pac. 276.

Maine.— State *v.* Tibbetts, 86 Me. 189, 29 Atl. 979; State *v.* Rounds, 76 Me. 123.

Massachusetts.— Com. *v.* Storti, 177 Mass. 339, 58 N. E. 1021; Com. *v.* Flagg, 135 Mass. 545; Com. *v.* Fitchburg R. Co., 120 Mass. 372; Com. *v.* Nickerson, 5 Allen 518.

Mississippi.— Scott *v.* State, 31 Miss. 473.

Missouri.— State *v.* Schmidt, 137 Mo. 266, 38 S. W. 938; State *v.* Noland, 111 Mo. 473, 19 S. W. 715 [*distinguishing* State *v.* Harmon, 106 Mo. 635, 18 S. W. 128]; State *v.* Jackson, 90 Mo. 156, 2 S. W. 128; State *v.* McDonald, 85 Mo. 539; State *v.* Miller, 67 Mo. 604; State *v.* McCue, 39 Mo. 112; State *v.* Bean, 21 Mo. 269; Frasier *v.* State, 5 Mo. 536; State *v.* Nicholson, 56 Mo. App. 412; State *v.* Haycroft, 49 Mo. App. 488.

Nebraska.— Hurlburt *v.* State, 52 Nebr. 428, 72 N. W. 471.

New Hampshire.— State *v.* Scripture, 42 N. H. 485.

New Jersey.—Donnelly *v.* State, 26 N. J. L. 463.

New York.— People *v.* Davis, 36 N. Y. 77; People *v.* Trainor, 57 N. Y. App. Div. 422, 68 N. Y. Suppl. 263, 15 N. Y. Cr. 333; People *v.* Emerson, 5 N. Y. Suppl. 374, 6 N. Y. Cr. 157.

North Carolina.— State *v.* Robbins, 123 N. C. 730, 31 S. E. 669, 68 Am. St. Rep. 841; State *v.* Cross, 106 N. C. 650, 10 S. E. 857; State *v.* Bailey, 73 N. C. 70; State *v.* Baker, 63 N. C. 276.

Pennsylvania.—Com. *v.* Birdsall, 69 Pa. St. 482, 8 Am. Rep. 283.

South Carolina.— State *v.* Priester, Cheves 103.

Tennessee.— Cook *v.* State, 16 Lea 461, 1 S. W. 254; Bennett *v.* State, 8 Humphr. 118.

Texas.— Floyd *v.* State, (Cr. App. 1902) 68 S. W. 690; Wilborne *v.* State, (Cr. App. 1902) 66 S. W. 559; Isaacs *v.* State, 36 Tex. Cr. 505, 38 S. W. 40; Yarber *v.* State, (Cr. App. 1893) 24 S. W. 645; Nance *v.* State, (Cr. App. 1893) 22 S. W. 44.

West Virginia.— Moody *v.* State, 1 W. Va. 337.

United States.— Ballew *v.* U. S., 160 U. S. 187, 16 S. Ct. 263, 40 L. ed. 388; U. S. *v.* Pirates, 5 Wheat. 184, 5 L. ed. 64.

See 14 Cent. Dig. tit. "Criminal Law," § 2098 *et seq.*

26. *Arkansas.*— Watkins *v.* State, 37 Ark. 370.

Indiana.— Siple *v.* State, 154 Ind. 647, 57 N. E. 544.

Missouri.— State *v.* Schmidt, 137 Mo. 266, 38 S. W. 938; State *v.* Van Wye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627.

South Carolina.— State *v.* Smith, 18 S. C. 149; State *v.* Nelson, 14 Rich. 169, 94 Am. Dec. 130.

(III) *General Verdict Referred to Good Count.* One good count in an indictment, if sustained by the proof, will support a general verdict of guilty, although there be other counts which are defective.[27] So where there are two or more counts in the indictment, and but one offense in fact is charged, a general verdict of guilty is good if one of the counts be good and the allegations in it are sustained by the evidence.[28]

(IV) *Acquittal or Conviction Under One of Several Counts.* While in a few of the older cases it has been held that where an indictment contains several counts, although charging distinct offenses, the verdict to be valid must specifically pass upon each and every count,[29] it is now well settled, however, that where several counts are included in the same indictment, a conviction upon one of them may be sustained, although the jury ignores the others.[30] A conviction

Virginia.— Murphy *v.* Com., 23 Gratt. 960.
Wisconsin.— Grottkau *v.* State, 70 Wis. 462, 36 N. W. 31.
United States.— Gallot *v.* U. S., 87 Fed. 446, 31 C. C. A. 44; Gardes *v.* U. S., 87 Fed. 172, 30 C. C. A. 596.
See 14 Cent. Dig. tit. "Criminal Law," § 2098 *et seq.*

Illustrations.— A general verdict was sustained where an indictment charged a rescue and an assault and battery (State *v.* Morrison, 24 N. C. 9), robbery and larceny (Vancleve *v.* State, 150 Ind. 273, 49 N. E. 1060), or larceny and receiving stolen goods (Rosson *v.* State, 37 Tex. Cr. 87, 38 S. W. 788; Reg. *v.* Campbell, 8 Quebec Q. B. 322).

27. State *v.* Jennings, 18 Mo. 435.

28. *Alabama.*— Handy *v.* State, 121 Ala. 13, 25 So. 1023; Montgomery *v.* State, 40 Ala. 684; Hudson *v.* State, 34 Ala. 253.
California.— People *v.* Lapique, (1901) 67 Pac. 14.
Georgia.— Bulloch *v.* State, 10 Ga. 46.
Illinois.— Looney *v.* People, 81 Ill. App. 370.
Indiana.— Dean *v.* State, 147 Ind. 215, 46 N. E. 528.
Iowa.— State *v.* Shelledy, 8 Iowa 477.
Kentucky.— Parker *v.* Com., 8 B. Mon. 30.
Maine.— State *v.* Mayberry, 48 Me. 218; State *v.* Burke, 38 Me. 574.
Massachusetts.— Com. *v.* Storti, 177 Mass. 339, 58 N. E. 1021; Com. *v.* Howe, 13 Gray 26.
Mississippi.— West *v.* State, 70 Miss. 598, 12 So. 903.
Missouri.—State *v.* Testerman, 68 Mo. 408; State *v.* Scott, 39 Mo. 424; State *v.* Bean, 21 Mo. 269.
North Carolina.— State *v.* Perry, 122 N. C. 1018, 29 S. E. 384.
Tennessee.— McTigue *v.* State, 4 Baxt. 313.
Texas.— Looman *v.* State, 37 Tex. Cr. 276, 39 S. W. 571; Fry *v.* State, 36 Tex. Cr. 582, 37 S. W. 741, 38 S. W. 168.
Vermont.— State *v.* Wheeler, 35 Vt. 261.
United States.— Gardes *v.* U. S., 87 Fed. 172, 10 C. C. A. 596.
England.— Latham *v.* Reg., 5 B. & S. 635, 9 Cox C. C. 516, 10 Jur. N. S. 1145, 33 L. J. M. C. 197, 10 L. T. Rep. N. S. 571, 12 Wkly. Rep. 908, 117 E. C. L. 635.
See 14 Cent. Dig. tit. "Criminal Law," § 2099.

The general verdict will be applied to the good count if there is evidence to sustain that count. Lafferty *v.* State, 41 Tex. Cr. 606, 56 S. W. 623; McMurtry *v.* State, 38 Tex. Cr. 521, 43 S. W. 1010; Pitner *v.* State, 37 Tex. Cr. 268, 39 S. W. 662.

Where there are good and bad counts in an indictment, upon a general verdict of guilty, the court will presume that the finding is responsive to the good and not to the bad counts. If the proof is set out, and relates to the bad count only, the judgment should be arrested. If it relates equally and properly to both, the verdict and judgment will be good. Rice *v.* State, 3 Heisk. (Tenn.) 215.

Where the indictment charges distinct offenses in two counts, but the state's evidence was directed to one count, a general verdict of guilty, which was undoubtedly based on that count, will not be set aside. Cannon *v.* State, 75 Miss. 364, 22 So. 827.

29. State *v.* Sutton, 4 Gill (Md.) 494 [*overruled* in Hechter *v.* State, 94 Md. 429, 50 Atl. 1041, 56 L. R. A. 457]; People *v.* Parshall, 6 Park. Cr. (N. Y.) 129; Baron *v.* People, 1 Park. Cr. (N. Y.) 246; Hurley *v.* State, 6 Ohio 399 [*criticized* in Wilson *v.* State, 20 Ohio 26, and virtually *overruled* by Jackson *v.* State, 39 Ohio St. 37; Breese *v.* State, 12 Ohio St. 146, 80 Am. Dec. 340].

This theory took its origin from the case of Rex *v.* Hayes, 2 Ld. Raym. 1518; but the law is now well settled to the contrary both in England and in this country. Selvester *v.* U. S., 170 U. S. 262, 18 S. Ct. 580, 42 L. ed. 1029.

30. *Alabama.*— Bell *v.* State, 48 Ala. 684, 17 Am. Rep. 40; Nabors *v.* State, 6 Ala. 200.
Illinois.— Chambers *v.* People, 5 Ill. 351; Stoltz *v.* People, 5 Ill. 168.
Maryland.— Hechter *v.* State, 94 Md. 429, 50 Atl. 1041, 56 L. R. A. 457.
Massachusetts.— Com. *v.* Hackett, 170 Mass. 194, 48 N. E. 1087; Edgerton *v.* Com., 5 Allen 514.
Missouri.— State *v.* Maurer, 96 Mo. App. 347, 70 S. W. 264.
New York.— Guenther *v.* People, 24 N. Y. 100; People *v.* McDonald, 49 Hun 67, 1 N. Y. Suppl. 703.
Ohio.— Jackson *v.* State, 39 Ohio St. 37; Breese *v.* State, 12 Ohio St. 146, 80 Am. Dec. 340.

and judgment upon one of several counts, with no verdict upon the others, is an acquittal as to the other counts,[31] and although the conviction be subsequently reversed, the implied acquittal as to the counts not mentioned in the verdict is a bar to any further prosecution on those counts.[32]

(v) *Inconsistent Verdict.* If defendant is charged with separate and distinct crimes, although of a similar character, in two or more counts, a verdict of acquittal on one or more counts and conviction on the others is not inconsistent.[33]

l. Where Several Indictments Are Tried Together. Where by consent several indictments against one defendant are tried together a separate verdict must be rendered on each,[34] and the jury should distinguish between the indictments in their verdict[35]

m. Where Special Pleas Are Interposed. Where in addition to a plea of not guilty defendant pleads a former conviction or acquittal, the verdict must include an express finding upon this special plea to the effect that it is true or untrue.[36] On the other hand, although insanity is specially pleaded, it seems

United States.— Selvester *v.* U. S., 170 U. S. 262, 18 S. Ct. 580, 42 L. ed. 1029; Dealy *v.* U. S., 152 U. S. 539, 14 S. Ct. 680, 38 L. ed. 545.

See 14 Cent. Dig. tit. "Criminal Law," § 2100.

A verdict finding a defendant guilty on a certain number of counts, the number being less than the whole number charged in the indictment, and which does not specify which particular counts, is invalid. Day *v.* People, 76 Ill. 380.

31. *Alabama.*— Parish *v.* State, 130 Ala. 92, 30 So. 474; Walker *v.* State, 61 Ala. 30; May *v.* State, 55 Ala. 164; Bell *v.* State, 48 Ala. 684, 17 Am. Rep. 40; Nabors *v.* State, 6 Ala. 200; State *v.* Coleman, 3 Ala. 14.

Colorado.— Bigcraft *v.* People, 30 Colo. 298, 70 Pac. 417.

Florida.— Smith *v.* State, 40 Fla. 203, 23 So. 854; Green *v.* State, 17 Fla. 669.

Illinois.— Thomas *v.* People, 113 Ill. 531; Keedy *v.* People, 84 Ill. 569; Chambers *v.* People, 5 Ill. 351; Stoltz *v.* People, 5 Ill. 168.

Indiana.— Bryant *v.* State, 72 Ind. 400; Bonnell *v.* State, 64 Ind. 498; Yount *v.* State, 64 Ind. 443; Bittings *v.* State, 56 Ind. 101; Hayworth *v.* State, 14 Ind. 590; Weinzorpflin *v.* State, 7 Blackf. 186.

Kansas.— State *v.* McNaught, 36 Kan. 624, 14 Pac. 277.

Maine.— State *v.* Leavitt, 87 Me. 72, 32 Atl. 787; State *v.* Phinney, 42 Me. 384; State *v.* Payson, 37 Me. 361.

Mississippi.— Morris *v.* State, 8 Sm. & M. 762.

Missouri.—State *v.* Patterson, 116 Mo. 505, 22 S. W. 696; State *v.* Cofer, 68 Mo. 120; State *v.* Chumley, 67 Mo. 41; State *v.* McCue, 39 Mo. 112; State *v.* Gannon, 11 Mo. App. 502.

New York.— People *v.* Dowling, 84 N. Y. 478; Guenther *v.* People, 24 N. Y. 100; People *v.* McDonald, 49 Hun 67, 1 N. Y. Suppl. 703.

North Carolina.— State *v.* Thompson, 95 N. C. 596; State *v.* Taylor, 84 N. C. 773.

Pennsylvania.— Girts *v.* Com., 22 Pa. St. 351.

Virginia.— Hawley *v.* Com., 75 Va. 847; Page *v.* Com., 9 Leigh 683; Com. *v.* Bennet, 2 Va. Cas. 235.

Wisconsin.— Tandy *v.* State, 94 Wis. 498, 69 N. W. 160; State *v.* Hill, 30 Wis. 416.

United States.— Jolly *v.* U. S., 170 U. S. 402, 18 S. Ct. 624, 42 L. ed. 1085; Dealy *v.* U. S., 152 U. S. 539, 14 S. Ct. 680, 38 L. ed. 545.

See 14 Cent. Dig. tit. "Criminal Law," § 2100.

Illustrations.— Where an indictment in separate counts charges embezzlement and larceny, a verdict of "guilty of larceny and embezzlement" as charged in the indictment, although irregular, is not void. Rex *v.* McGiffin, 7 Hawaii 104; Rex *v.* Naone, 2 Hawaii 747; Stephens *v.* State, 53 N. J. L. 245, 21 Atl. 1038.

32. People *v.* Dowling, 84 N. Y. 478.

33. Com. *v.* Donovan, 170 Mass. 228, 49 N. E. 104; Com. *v.* Lowrey, 159 Mass. 62, 34 N. E. 81; Com. *v.* Ruisseau, 140 Mass. 363, 5 N. E. 166; Pettes *v.* Com., 126 Mass. 242; Weinecke *v.* State, 34 Nebr. 14, 51 N. W. 307; Griffin *v.* State, 18 Ohio St. 438; Mills *v.* Com., 13 Pa. St. 634.

Robbery or larceny and receiving stolen goods.— One cannot be convicted of robbery, and also of receiving the goods which were the subject of the robbery; and where the evidence leaves it in doubt of which of these offenses defendant is guilty a general verdict of guilty must be set aside. Tobin *v.* People, 104 Ill. 565; Com. *v.* Haskins, 128 Mass. 60.

34. Com. *v.* McCrossin, 3 Pa. L. J. 219.

35. Fontaine *v.* State, 6 Baxt. (Tenn.) 514.

36. *Alabama.*—Moody *v.* State, 60 Ala. 78; Dominick *v.* State, 40 Ala. 680, 91 Am. Dec. 496.

California.—People *v.* Tucker, 115 Cal. 337, 47 Pac. 111; People *v.* O'Leary, (1888) 16 Pac. 884; People *v.* Fuqua, 61 Cal. 377; People *v.* Helbing, 59 Cal. 567; People *v.* Kinsey, 51 Cal. 278.

New York.— People *v.* Burch, 5 N. Y. Cr. 29.

Pennsylvania.—Solliday *v.* Com., 28 Pa. St. 13; Com. *v.* Demuth, 12 Serg. & R. 389.

Texas.— Wright *v.* State, 27 Tex. App. 447, 11 S. W. 458; Smith *v.* State, 18 Tex. App. 329; McCampbell *v.* State, 9 Tex. App. 124, 35 Am. Rep. 726; Brown *v.* State, 7 Tex. App. 619.

that a general verdict is proper where the issue of insanity is not separately tried.[37]

n. Specification of Offense — (I) *In General.* The verdict must in itself or by a reference to the indictment contain a finding of every essential element of the crime charged.[38]

(II) *Degree of Crime.* Independently of the statutes requiring a verdict to specify the degree of the crime, it is the rule that where an indictment contains two separate counts or offenses properly joined, one of which charges a higher and the other a lower degree of an offense, a general verdict of guilty, not mentioning the degree, will be presumed to apply to the crime of the higher degree, particularly where the offenses grow out of the same transaction;[39] and if a party is found guilty of the higher grade the jury need not pass upon the lower.[40] It is, however, required by statute in many of the states that where a crime is distinguished or divided into degrees, a verdict of guilty of such a crime must spe-

Virginia.— Vaughan *v.* Com., 2 Va. Cas. 273.

See 14 Cent. Dig. tit. "Criminal Law," § 2103.

A failure to instruct to find on the special plea, or a failure to find on it where a proper instruction was given and the evidence failed to sustain the plea, is error. Wright *v.* State, 27 Tex. App. 447, 11 S. W. 458; Burks *v.* State, 24 Tex. App. 326, 6 S. W. 300; Taylor *v.* State, 4 Tex. App. 40.

Conclusiveness of finding on special plea.— A finding against defendant on the plea of former jeopardy, with a disagreement on the general plea, is conclusive on him on the question of jeopardy on a subsequent trial. Having been once tried on this issue he cannot expect it to be retried, or urge the court to pass upon it on appeal. People *v.* Smith, 121 Cal. 355, 53 Pac. 802; People *v.* Majors, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295.

37. Anderson *v.* State, 42 Ga. 9. But see Com. *v.* Smith, 6 Am. L. Reg. (Pa.) 257.

A statute authorizing the judge to commit to an asylum any person who shall on a trial before him be shown to be insane, not being mandatory, it is not necessary to direct the jury to determine defendant's mental condition. State *v.* Coleman, 20 S. C. 441.

Separate trial on plea of insanity.— Where a statute provides that a plea of insanity at the time of the crime or at the trial shall first be tried by the jury, they have nothing to do in trying this issue with determining the question of defendant's guilt. If therefore they pass or attempt to pass upon his guilt and render a verdict of guilty, but insane, a new trial will be granted. Hoiss *v.* State, 79 Wis. 513, 48 N. W. 517.

38. People *v.* Cummings, 117 Cal. 497, 49 Pac. 576; State *v.* French, 50 La. Ann. 461, 23 So. 606; Holmes *v.* State, 58 Nebr. 297, 78 N. W. 641. But see State *v.* Faulk, 30 La. Ann. 831.

A verdict of "guilty as charged in the indictment" is a sufficient compliance with a statute requiring the verdict to designate the crime. Bond *v.* People, 39 Ill. 26; Colip *v.* State, 153 Ind. 584, 55 N. E. 739, 74 Am. St. Rep. 322; State *v.* Nicholls, 37 La. Ann. 779; Steinberger *v.* State, 35 Tex. Cr. 492, 34 S. W. 617.

Guilty of an attempt.— A verdict that the prisoner is guilty of an attempt need not contain a formal acquittal of the actual commission of the crime charged. Miller *v.* State, 58 Ga. 200.

Inasmuch as a general verdict of guilty implies proof of all facts necessary to the conviction, this verdict need not contain an express finding of the venue (People *v.* Jochinsky, 106 Cal. 638, 39 Pac. 1077), or of the value of the property stolen in an indictment for grand larceny (Schoonover *v.* State, 17 Ohio St. 294).

Where defendant is found guilty of an assault with intent to commit a felony, the verdict should designate the felony he intended to commit. State *v.* Austin, 109 Iowa 118, 80 N. W. 303.

39. This rule applies, although the punishment for each grade of the offense may be different.

Georgia.— Estes *v.* State, 55 Ga. 131; Adams *v.* State, 52 Ga. 565; Welch *v.* State, 50 Ga. 128, 15 Am. Rep. 690; Dean *v.* State, 43 Ga. 218.

Illinois.— Love *v.* People, 160 Ill. 501, 43 N. E. 710, 32 L. R. A. 139; Lyons *v.* People, 68 Ill. 271.

Indiana.— Rose *v.* State, 82 Ind. 344; Frolich *v.* State, 11 Ind. 213.

Maryland.— Manly *v.* State, 7 Md. 135.

Michigan.— Hanna *v.* People, 19 Mich. 316.

Minnesota.—Bilansky *v.* State, 3 Minn. 427.

Missouri.—State *v.* Mattrassey, 47 Mo. 295.

New York.— Conkey *v.* People, 1 Abb. Dec. 418, 5 Park. Cr. 31.

South Carolina.— State *v.* Nelson, 14 Rich. 169, 94 Am. Dec. 130.

Wyoming.—Cook *v.* Territory, 3 Wyo. 110, 4 Pac. 887.

See 14 Cent. Dig. tit. "Criminal Law," § 2105 *et seq.*

40. *Missouri.*— State *v.* Elvins, 101 Mo. 243, 13 S. W. 937.

New Mexico.— Territory *v.* Yarberry, 2 N. M. 391; Territory *v.* Romine, 2 N. M. 114.

North Carolina.— State *v.* Barnes, 122 N. C. 1031, 29 S. E. 381.

Tennessee.— Kelly *v.* State, 7 Baxt. 84.

Texas.— Nettles *v.* State, 5 Tex. App. 386.

United States.— Craemer *v.* Washington, 168 U. S. 124, 18 S. Ct. 1, 42 L. ed. 407.

cifically state the degree of which the accused is convicted, or it may be set aside and a new trial ordered,[41] although the court instructs the jury that if they convict it must be for the lower degree.[42] Where an indictment charges only the lowest degree of crime, it is unnecessary to specify in the verdict the degree of the crime of which the accused is guilty.[43] Where issue is joined on a single count alleging a crime charged in different grades, a verdict of guilty of the lower degree of the crime necessarily implies an acquittal of the higher offense.[44]

o. Recommendation to Mercy. The addition by the jury of a recommendation to mercy to a verdict of guilty does not render it uncertain. The recommendation may be disregarded by the court in its discretion[45] as surplusage,[46] and the verdict recorded without it.[47]

See 14 Cent. Dig. tit. "Criminal Law," § 2105 *et seq.*

41. *Alabama.*— Benbow *v.* State, 128 Ala. 1, 29 So. 553; Kendall *v.* State, 65 Ala. 492; Murphy *v.* State, 45 Ala. 32.

Arkansas.— Neville *v.* State, 26 Ark. 614.

California.— People *v.* Coch, 53 Cal. 627; People *v.* Marquis, 15 Cal. 38.

Connecticut.— State *v.* Dowd, 19 Conn. 388.

Georgia.— Thomas *v.* State, 38 Ga. 117.

Kansas.— State *v.* Scarlett, 57 Kan. 252, 45 Pac. 602; State *v.* Treadwell, 54 Kan. 513, 38 Pac. 813.

Michigan.— Tully *v.* People, 6 Mich. 273.

Mississippi.— Thomas *v.* State, 5 How. 20.

Missouri.— State *v.* Montgomery, 98 Mo. 399, 11 S. W. 1012; State *v.* McCue, 39 Mo. 112; State *v.* Upton, 20 Mo. 397.

Nevada.— State *v.* Rover, 10 Nev. 388, 21 Am. Rep. 745.

Pennsylvania.— Rhodes *v.* Com., 48 Pa. St. 396.

Tennessee.— McPherson *v.* State, 9 Yerg. 279; Kirby *v.* State, 7 Yerg. 259.

Texas.— Hays *v.* State, 33 Tex. Cr. 546, 28 S. W. 203; Zwicker *v.* State, 27 Tex. App. 539, 11 S. W. 633; Guest *v.* State, 24 Tex. App. 530, 7 S. W. 242.

Virginia.— Com. *v.* Williamson, 2 Va. Cas. 211.

See 14 Cent. Dig. tit. "Criminal Law," § 2105.

Where the offense charged includes others of a lower degree, a verdict of "guilty as charged in the indictment" is not in compliance with the statutory requirement that the verdict shall specify the degree of the crime. State *v.* Moran, 7 Iowa 236; State *v.* Pettys, (Kan. 1900) 60 Pac. 735; State *v.* Pickering, 57 Kan. 326, 46 Pac. 314; State *v.* Scarlett, 57 Kan. 252, 45 Pac. 602; Allen *v.* State, 85 Wis. 22, 54 N. W. 999. But see Patterson *v.* Com., 86 Ky. 313, 5 S. W. 765, 9 Ky. L. Rep. 481.

42. People *v.* Cornwell, (Cal. 1894) 35 Pac. 566; People *v.* Bannister, (Cal. 1893) 34 Pac. 710.

43. Wright *v.* State, 79 Ala. 262; Anderson *v.* State, 65 Ala. 553; People *v.* Fisher, 51 Cal. 319; State *v.* Shoemaker, 7 Mo. 177.

44. *Connecticut.*— Rookey *v.* State, 70 Conn. 104, 38 Atl. 911.

Kansas.— State *v.* Behee, 17 Kan. 402.

Louisiana.— State *v.* Stanley, 42 La. Ann. 978, 8 So. 469.

Maryland.— Weighorst *v.* State, 7 Md. 442.

Minnesota.— State *v.* Lessing, 16 Minn. 75.

Mississippi.— Swinney *v.* State, 8 Sm. & M. 576.

Missouri.— State *v.* Brannon, 55 Mo. 63, 17 Am. Rep. 643; State *v.* Ball, 27 Mo. 324; State *v.* Grimes, 29 Mo. App. 470.

See 14 Cent. Dig. tit. "Criminal Law," § 2105 *et seq.*

The rule applies only to cases where different degrees of the same offense are charged, and not to distinct offenses. Weighorst *v.* State, 7 Md. 442 [*distinguishing* State *v.* Flannigan, 6 Md. 167].

In Texas it is required by statute that where defendant is found guilty of a minor grade of the offense the verdict must negative the higher grades. Slaughter *v.* State, 24 Tex. 410.

45. **Discretion of court.**—The recommendation to mercy, while entitled to great consideration, is not binding upon the court. Forrest *v.* State, 13 Lea (Tenn.) 103; Poe *v.* State, 10 Lea (Tenn.) 673; Lewis *v.* State, 3 Head (Tenn.) 127.

The court may decline to receive the verdict and give the jury a form omitting the recommendation. State *v.* Potter, 15 Kan. 302.

46. *Florida.*— Hicks *v.* State, 25 Fla. 535, 6 So. 441.

Georgia.— Wair *v.* State, 51 Ga. 303; Stephens *v.* State, 51 Ga. 236; West *v.* State, 49 Ga. 451; Peterson *v.* State, 47 Ga. 524.

Louisiana.— State *v.* Rosa, 26 La. Ann. 75; State *v.* O'Brien, 22 La. Ann. 27; State *v.* Bradley, 6 La. Ann. 554.

Mississippi.— Penn *v.* State, 62 Miss. 450.

Nevada.— State *v.* Stewart, 9 Nev. 120.

South Carolina.— State *v.* Bennett, 40 S. C. 308, 18 S. E. 886.

Tennessee.— Ray *v.* State, 108 Tenn. 282, 67 S. W. 553; Hannum *v.* State, 90 Tenn. 647, 18 S. W. 269; Clark *v.* State, 8 Baxt. 591; Greer *v.* State, 3 Baxt. 321.

West Virginia.— State *v.* Newman, 49 W. Va. 724, 39 S. E. 655.

See 14 Cent. Dig. tit. "Criminal Law," § 2108.

Requesting jury to explain meaning of recommendation.— Where a recommendation of mercy taken in connection with the judge's charge renders the verdict ambiguous, it is error for the court to refuse to have the jury explain their meaning. Smith *v.* State, 75 Miss. 542, 23 So. 260.

47. People *v.* Lee, 17 Cal. 76.

An instruction that the jury have a right to recommend to mercy, but omitting to

p. Assessment of Punishment — (i) *Discretion of Jury.* A statute which provides that the jury shall assess the punishment does not refer to an offense, the punishment for which is absolutely fixed by statute.[48]

(ii) *Assessment of Fine.* A verdict which assesses both a fine and an imprisonment will be sustained as to the former, although the imprisonment may be rejected as surplusage where the statute provides that imprisonment shall be assessed by the court.[49]

(iii) *Illegal Assessment.* A verdict of guilty which in assessing the punishment prescribes imprisonment for a period which is illegal because in excess of the statutory period,[50] or which is less than the minimum punishment the law allows,[51] or a verdict which fails to fix the period of disfranchisement and incompetency to hold office under a statute,[52] is invalid, and a valid judgment cannot be entered thereon. But a verdict which is otherwise sufficient is not always invalidated because the jury exceed their power by assessing a punishment which is greater than that prescribed by the statute.[53]

state that the recommendation could not affect the sentence, is proper. State *v.* Gill, 14 S. C. 410.

48. It applies only to crimes, the limits only of whose punishment is fixed by law, and within which a discretion as to the amount of punishment is to be exercised by the jury. State *v.* Butterfield, 75 Mo. 297; Territory *v.* Webb, 2 N. M. 147; Territory *v.* Romine, 2 N. M. 114; O'Connor *v.* State, 37 Tex. Cr. 267, 39 S. W. 368.

In Missouri, if the jury return a verdict of guilty, but fail to assess the punishment as provided by statute, the verdict is not defective, and the court may assess the punishment. State *v.* Van Wye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627; State *v.* Foster, 115 Mo. 448, 22 S. W. 468; State *v.* Dennison, 108 Mo. 541, 18 S. W. 926; State *v.* Emery, 76 Mo. 348.

So a verdict of guilty is good which expressly states that the jury leave the punishment to the court. Conrand *v.* State, 65 Ark. 559, 47 S. W. 628.

Specifying mode of inflicting death punishment.— Where a statute provides the way in which the punishment of death shall be inflicted, a verdict of death is not insufficient, because it does not specify the mode in which the accused shall suffer punishment. Greenley *v.* State, 60 Ind. 141.

The words "without capital punishment" may be added to a verdict of guilty of murder or rape, under U. S. Rev. St. (1878) §§ 5339, 5345 [U. S. Comp. St. (1901) pp. 3627, 3630]. Strather *v.* U. S., 13 App. Cas. (D. C.) 132. See also as to a similar provision in Louisiana State *v.* Rohfrischt, 12 La. Ann. 382, holding that the addition of these words to a verdict of guilty is not equivalent to an acquittal.

49. Skelton *v.* State, 149 Ind. 641, 49 N. E. 901; Franks *v.* State, 1 Greene (Iowa) 541; Wickham *v.* State, 7 Coldw. (Tenn.) 525; Com. *v.* Scott, 5 Gratt. (Va.) 697.

Amount of fine.— Where the statute absolutely fixes the punishment by fine, a verdict of guilty, without imposing a specific fine, is sufficient. Inglish *v.* Com., Litt. Sel. Cas. (Ky.) 417; Territory *v.* Romine, 2 N. M. 147; Territory *v.* Webb, 2 N. M. 114.

Under a statute which permits the jury to add a fine to imprisonment, but does not require them to impose a fine if they think defendant should be punished in some other way, a verdict of guilty without assessing a fine does not authorize the court to impose one. Spicer *v.* State, 105 Ala. 123, 16 So. 706; Nelson *v.* State, 46 Ala. 186; Melton *v.* State, 45 Ala. 56.

50. *Ex p.* Goucher, 103 Ala. 305, 15 So. 601; Robinson *v.* State, 23 Tex. App. 315, 4 S. W. 904.

51. Mayfield *v.* State, 101 Tenn. 673, 49 S. W. 742; Evans *v.* State, 35 Tex. Cr. 485, 34 S. W. 285; Jones *v.* Com., 20 Gratt. (Va.) 848.

52. Wilson *v.* State, 28 Ind. 393.

53. The illegal portion of the verdict will be rejected as surplusage if it is possible for the court, in imposing sentence, to separate the punishment which is illegal and invalid from that which is legal and valid.

Alabama.— Henson *v.* State, 120 Ala. 316, 25 So. 23; Washington *v.* State, 117 Ala. 30, 23 So. 697. And see Taylor *v.* State, 114 Ala. 20, 21 So. 947.

Illinois.— Henderson *v.* People, 165 Ill. 607, 46 N. E. 711.

Indiana.— State *v.* Arnold, 144 Ind. 651, 42 N. E. 1095, 43 N. E. 871; Veatch *v.* State, 60 Ind. 291.

Iowa.— Cropper *v.* U. S., Morr. 259.

Louisiana.— State *v.* Burns, 30 La. Ann. 679.

Missouri.— State *v.* Hamey, 168 Mo. 167, 67 S. W. 620, 57 L. R. A. 846.

Texas.— Perry *v.* State, 44 Tex. 473.

Virginia.— Harvey *v.* Com., 23 Gratt. 941.

West Virginia.— State *v.* Greer, 22 W. Va. 800.

See 14 Cent. Dig. tit. "Criminal Law," § 2107.

Commutation of punishment.— Where a statute permits the jury to commute a crime which without commutation it declares capital, a simple verdict of guilty warrants the death penalty. Turner *v.* State, 3 Heisk. (Tenn.) 452. Where a statute permits the jury to commute capital punishment to imprisonment for a period within a certain limited number of years, a commutation for

(IV) *AGE OF ACCUSED.* Although the age of defendant may be material to the character of the punishment, and must be determined by the jury, it is not necessary in jurisdictions where they determine and state the punishment in their verdict to also state defendant's age,[54] unless it is expressly so required by statute.[55]

3. AMENDMENT AND CORRECTION[56] — a. By Court. If the meaning of the jury is clear from the verdict, it is not error for the court, with the assent of the jury and in the presence of the jury and the accused, to correct verbal mistakes in its form,[57] supply omissions,[58] and strike out surplusage.[59]

b. By Jury. If the verdict expresses the intention of the jury, and it is defective in form, the court has the power to refuse to accept it and to require the jury to amend it, and to send them back to their room for that purpose,[60] although it

a period of years not authorized by law renders the sentence a mere nullity, and no judgment can be pronounced thereon. Murphy *v.* State, 7 Coldw. (Tenn.) 516.

The verdict need not specify the place of imprisonment (McGuff *v.* State, 88 Ala. 147, 7 So. 35, 16 Am. St. Rep. 25; Featherstone *v.* People, 194 Ill. 325, 62 N. E. 684; Stroggins *v.* State, 43 Tex. Cr. 605, 68 S. W. 170; Harris *v.* State, 8 Tex. App. 90; Moore *v.* State, 7 Tex. App. 14), the fact of confinement (Reynolds *v.* State, 17 Tex. App. 413), or the requirement that imprisonment is to be with hard labor where it is provided for by the statute (Williams *v.* State, 5 Tex. App. 226), or where it is left by the statute to be determined by the court (Washington *v.* State, 117 Ala. 30, 23 So. 697; State *v.* Van Wye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627).

54. Cole *v.* State, 32 Tex. Cr. 423, 24 S. W. 510. See also Rose *v.* State, 82 Ind. 344. But see Hays *v.* State, 30 Tex. App. 472, 17 S. W. 1063.

55. Cohen *v.* State, 10 Ind. App. 339, 37 N. E. 809.

56. A stipulation that a verdict if defective may be amended after the jury has separated will be presumed to refer to matter of form and not to matter of substance. Williams *v.* People, 44 Ill. 478.

57. *Alabama.*— Oxford *v.* State, 33 Ala. 416.

Georgia.— Sims *v.* State, 87 Ga. 569, 13 S. E. 551; Roberts *v.* State, 14 Ga. 8, 58 Am. Dec. 528.

Idaho.—People *v.* Biles, 2 Ida. (Hasb.) 114, 6 Pac. 120.

Illinois.—Godfreidson *v.* People, 88 Ill. 284.

Kentucky.— Taggart *v.* Com., 104 Ky. 301, 46 S. W. 674, 20 Ky. L. Rep. 493; Blair *v.* Com., 93 Ky. 493, 20 S. W. 434, 14 Ky. L. Rep. 495; Bledsoe *v.* Com., 11 S. W. 84, 10 Ky. L. Rep. 909.

Mississippi.— Gipson *v.* State, 38 Miss. 295.

Tennessee.— Henslie *v.* State, 3 Heisk. 202.

Texas.— Black *v.* State, (Cr. App. 1902) 68 S. W. 683; Hardy *v.* State, 37 Tex. Cr. 55, 38 S. W. 615.

England.— Rex *v.* Parkin, 1 Moody C. C. 45.

See 14 Cent. Dig. tit. "Criminal Law," § 2110.

By prosecuting attorney.— Where the verdict is very informal but its meaning is apparent, it is proper for the court to direct the prosecuting attorney to put it in proper form, where it is afterward affirmed by the jury. State *v.* Davis, 31 W. Va. 390, 7 S. E. 24.

58. Walker *v.* Com., 7 Ky. L. Rep. 44; State *v.* Kinsauls, 126 N. C. 1095, 36 S. E. 31; State *v.* Yancey, 3 Brev. (S. C.) 142.

An assessment of less than the punishment prescribed by statute may be amended under direction of the court. State *v.* Linney, 52 Mo. 40; State *v.* Waterman, 1 Nev. 543.

Special verdicts may be amended before being received, by supplying formal and technical words. Com. *v.* Judd, 2 Mass. 329, 3 Am. Dec. 54.

59. Com. *v.* Lang, 10 Gray (Mass.) 11.

60. *Alabama.*— Lide *v.* State, 133 Ala. 43, 31 So. 953; Allen *v.* State, 79 Ala. 34; Hughes *v.* State, 12 Ala. 458.

California.— People *v.* Jenkins, 56 Cal. 4; People *v.* Dick, 34 Cal. 663.

Florida.— Bryant *v.* State, 34 Fla. 291, 16 So. 177.

Georgia.— Mangham *v.* State, 87 Ga. 549, 13 S. E. 558; Cook *v.* State, 26 Ga. 593; Martin *v.* State, 25 Ga. 494.

Indiana.— McGregg *v.* State, 4 Blackf. 101.

Kansas.— State *v.* Langley, 8 Kan. App. 815, 57 Pac. 556.

Kentucky.— Crockett *v.* Com., 100 Ky. 389, 38 S. W. 676, 18 Ky. L. Rep. 838.

Louisiana.— State *v.* Smith, 104 La. 464, 29 So. 20; State *v.* Keasley, 50 La. Ann. 761, 23 So. 900; State *v.* Harris, 39 La. Ann. 1105, 3 So. 344; State *v.* Gilkie, 35 La. Ann. 53; State *v.* Jessie, 30 La. Ann. 1170; State *v.* Clifton, 30 La. Ann. 951; State *v.* Sales, 30 La. Ann. 916.

New Jersey.— State *v.* Gonncion, 68 N. J. L. 429, 53 Atl. 701.

New York.— People *v.* Graves, 5 Park. Cr. 134; Nelson *v.* People, 5 Park. Cr. 39; People *v.* Busb, 3 Park. Cr. 552.

North Carolina.— State *v.* Bishop, 73 N. C. 44.

Ohio.— Hurley *v.* State, 4 Ohio Cir. Ct. 425.

Pennsylvania.— Com. *v.* Nicely, 130 Pa. St. 261, 18 Atl. 737.

South Carolina.— State *v.* Anderson, 24 S. C. 109; State *v.* Bradley, 9 Rich. 168; State *v.* Motley, 7 Rich. 327.

Texas.— Hopkins *v.* State, (Cr. App. 1899) 50 S. W. 381; Rocha *v.* State, 38 Tex. Cr. 69, 41 S. W. 611; Trent *v.* State, 31 Tex. Cr. 251, 20 S. W. 547; Robinson *v.* State, 23

has been sealed and the jury have separated,[61] provided that it does so before receiving it[62] or discharging the jury.[63] Where the jury reconsider their verdict and alter it, the amended verdict is the real verdict of the jury.[64]

c. After Discharge and Separation of Jury. The jury cannot be recalled to amend a verdict after they have returned it, have been discharged, and have separated.[65]

d. Venire De Novo. Where a general[66] or a special verdict[67] is so bad or defective that no judgment can be rendered thereon, or where it finds no fact from which a legal conclusion as to the guilt of the accused can be deduced,[68] it must be set aside and a venire de novo awarded.

4. Entry, Record, and Objections. The verdict, whether oral or in writing, and whether of acquittal or conviction, ought to be recorded before the jury is discharged.[69] The entry should consist of a note on the minutes of the verdict as

Tex. App. 315, 4 S. W. 904; Taylor *v.* State, 14 Tex. App. 340.

West Virginia.— State *v.* Davis, 31 W. Va. 390, 7 S. E. 24.

United States.— U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441.

England.— Reg. *v.* Yeadon, 9 Cox C. C. 91, 7 Jur. N. S. 1128, L. & C. 81, 31 L. J. M. C. 70, 5 L. T. Rep. N. S. 329, 10 Wkly. Rep. 64.

See 14 Cent. Dig. tit. "Criminal Law," § 2112.

Error in assessing fine.— The assessment of a fine larger than is permitted by statute justifies the court in refusing to receive the verdict and in sending the jury back to amend it. Dentler *v.* State, 112 Ala. 70, 20 So. 592.

Special verdict.— If the case be taken out of the statute by a finding of facts in a special verdict, it is error to instruct on the law and to direct the jury to reconsider their verdict. Duncan *v.* State, 49 Miss. 331.

61. Pehlman *v.* State, 115 Ind. 131, 17 N. E. 270; Hechter *v.* State, 49 Md. 429, 50 Atl. 1041, 56 L. R. A. 457.

62. People *v.* Lee Yune Chong, 94 Cal. 379, 29 Pac. 776; Nemo *v.* Com., 2 Gratt. (Va.) 558.

After recording.— The court may it seems send the jury back to amend an incorrect verdict after the clerk has partly recorded it. State *v.* Disch, 34 La. Ann. 1134.

63. *Alabama.*—State *v.* Underwood, 2 Ala. 744.

Florida.— Bryant *v.* State, 34 Fla. 291, 16 So. 177.

Iowa.— Orton *v.* State, 4 Greene 140.

South Carolina.—State *v.* Corley, 13 S. C. 1.

Virginia.— Sledd *v.* Com., 19 Gratt. 813.

See 14 Cent. Dig. tit. "Criminal Law," § 2112.

64. Reg. *v.* Meany, 9 Cox C. C. 231, 8 Jur. N. S. 1161, L. & C. 213, 32 L. J. M. C. 24, 7 L. T. Rep. N. S. 393, 11 Wkly. Rep. 41.

65. *Alabama.*— Waller *v.* State, 40 Ala. 325.

California.— People *v.* Lee Yune Chong, 94 Cal. 379, 29 Pac. 776.

Georgia.— Wells *v.* State, 116 Ga. 87, 42 S. E. 390.

Illinois.— Farley *v.* People, 138 Ill. 97, 27 N. E. 927; Williams *v.* People, 44 Ill. 478.

Missouri.— State *v.* McBride, 19 Mo. 239.

New York.— People *v.* Graves, 5 Park. Cr. 134.

Ohio.— Sargent *v.* State, 11 Ohio 472; Helmerking *v.* State, 1 Ohio Dec. (Reprint) 444, 10 West. L. J. 66.

Oregon.— State *v.* Weeks, 23 Oreg. 3, 34 Pac. 1095.

South Carolina.—State *v.* Dawkins, 32 S. C. 17, 10 S. E. 772.

Texas.— Ellis *v.* State, 27 Tex. App. 190, 11 S. W. 111.

Wisconsin.— Allen *v.* State, 85 Wis. 22, 54 N. W. 999.

See 14 Cent. Dig. tit. "Criminal Law," § 2109 *et seq.*

An addition by the court after the discharge of the jury is irregular and may be disregarded. Guenther *v.* People, 24 N. Y. 100.

Jury still in court.— Although the court tells the jury that they are discharged, they may be recalled and amend the verdict if they are still in court. Levells *v.* State, 32 Ark. 585; Jackson *v.* State, 45 Ga. 198; Quinn *v.* State, 123 Ind. 59, 23 N. E. 977.

66. Lawrence *v.* People, 2 Ill. 414; Arnburg *v.* People, 68 Ill. App. 80; Merrick *v.* State, 63 Ind. 327; Marcus *v.* State, 26 Ind. 101.

67. State *v.* Bray, 89 N. C. 480; State *v.* Wallace, 25 N. C. 195.

68. State *v.* Yount, 110 N. C. 597, 15 S. E. 231; Charleston *v.* Gadsden, 8 Rich. (S. C.) 180.

69. State *v.* Walters, 15 La. Ann. 648; State *v.* Arrington, 7 N. C. 571.

A verdict in writing is not invalidated by the failure of the clerk to record it before reading it to the jury, and inquiring if it is their verdict. Territory *v.* Harper, 1 Ariz. 399, 25 Pac. 528; People *v.* Smalling, 94 Cal. 112, 29 Pac. 421; People *v.* Smith, 59 Cal. 601; People *v.* Gilbert, 57 Cal. 96; State *v.* Levy, 24 Minn. 362; State *v.* Depoister, 21 Nev. 107, 25 Pac. 1000.

Writing a verdict on the back of the indictment by the jury is a sufficient record to allow them to be discharged. O'Connor *v.* State, 9 Fla. 215. Where the verdict on the indictment varies from the record it may be presumed that the former shows the true intention of the jury. State *v.* Reonnals, 14 La. Ann. 278.

rendered, and a statement that it was received and filed.[70] Failure to object to a defective verdict when it is rendered waives the right to move for a venire de novo.[71] An exception to a verdict that it is contrary to the law and the evidence is not sufficiently specific.[72]

XV. MOTIONS FOR NEW TRIALS AND IN ARREST OF JUDGMENT.

A. Motion For New Trial — 1. Nature and Scope of — a. In General. At common law new trials could not be granted in cases of felony or treason.[73] The contrary was the case in misdemeanors, where a superior court had power to grant new trials on the record being removed from the inferior court by writ of certiorari.[74] In the United States the occasions and procedure for new trials are wholly statutory.[75]

b. Right of Prosecution. In the absence of express statute new trials will not ordinarily be granted on application of the prosecution after an acquittal.[76]

70. Smith *v.* State, 51 Wis. 615, 8 N. W. 410, 37 Am. Rep. 845.

Superfluous matter placed on the record by the clerk, not a part of the verdict, should be erased (Com. *v.* Quann, 2 Va. Cas. 89), and a written recommendation to mercy, which some of the jurors sign as individuals (Roby *v.* State, 61 Ga. 45), or the words "under the direction of the court," following a verdict of guilty (Com. *v.* Dowling, 114 Mass. 259) may be omitted from the record.

Signature by judge to record.— Under a mandatory statute requiring the records of each day's proceedings to be signed by the presiding judge, a verdict, although recorded, has been held invalid where the record was not signed. Johnson *v.* Com., 80 Ky. 377.

71. May *v.* State, 140 Ind. 88, 39 N. E. 701; Com. *v.* Price, 10 Kulp (Pa.) 41.

72. State *v.* Branham, 13 S. C. 389.

73. People *v.* Comstock, 8 Wend. (N. Y.) 549; Atty.-Gen. *v.* Bertrand, L. R. 1 P. C. 520, 10 Cox C. C. 618, 36 L. J. P. C. 51, 16 L. T. Rep. N. S. 752, 4 Moore P. C. N. S. 460, 16 Wkly. Rep. 9, 16 Eng. Reprint 391; 5 Bacon Abr. 251, 252; 4 Blackstone Comm. 354, 355; 1 Chitty Cr. L. 654.

74. Reg. *v.* Whitehouse, Dears. C. C. 1; 13 East 416; 1 Chitty Cr. L. 654.

Applications for new trial and for venire de novo distinguished.— Independently of statute, the proper procedure is to apply for a new trial after a general verdict, and for a venire facias de novo after a special verdict, to bring the merits of the case under consideration. The material difference between these two methods is that the venire is only granted for a mistake appearing on the record (Dolan *v.* State, 122 Ind. 141, 23 N. E. 761), while a new trial will be granted on the ground of improper instructions, misconduct of jurors or counsel, and other causes which do not necessarily appear on the face of the record (1 Chitty Cr. L. 655).

75. People *v.* Dalton, 15 Wend. (N. Y.) 581. And see the statutes of the several states.

A statute conferring the right to a new trial will not by implication be held applicable to criminal cases. Thompson *v.* Territory, 1 Wash. Terr. 547.

On his own motion the trial judge cannot grant a new trial where a constitution provides that the accused may have one on his application. State *v.* Williams, 38 La. Ann. 960.

Where a statute provides that a prisoner shall not be entitled to a new trial for any of certain causes enumerated he cannot have a new trial because two or more of these causes occur, for if one of them is not fatal to the proceedings it is difficult to see how two or more of them could be. King *v.* State, 15 Lea (Tenn.) 51.

76. *California.*— People *v.* Bangeneaur, 40 Cal. 613.

Indiana.— Danenhoffer *v.* State, 79 Ind. 75.

New Jersey.— State *v.* Kanouse, 20 N. J. L. 115; State *v.* De Hart, 7 N. J. L. 172.

North Carolina.—State *v.* Phillips, 66 N. C. 646; State *v.* Martin, 10 N. C. 381; State *v.* Taylor, 8 N. C. 462.

South Carolina.— State *v.* Wright, 2 Treadw. 517; State *v.* Wright, 3 Brev. 421; State *v.* Riely, 2 Brev. 444.

Texas.— State *v.* Burris, 3 Tex. 118.

United States.—Fries' Case, 9 Fed. Cas. No. 5,126, 3 Dall. 515.

Compare State *v.* Czarnikow, 20 Ark. 160; Jones *v.* State, 15 Ark. 261.

See 15 Cent. Dig. tit. "Criminal Law," § 2130; and 1 Chitty Cr. L. 657.

At common law it seems to have been the rule that where a verdict of acquittal was obtained by the fraud of the prisoner, by keeping the prosecuting witnesses away or neglecting to give the prosecution notice of trial, a new trial could be granted. 1 Chitty Cr. L. 657; 2 Hawkins P. C. c. 47, § 12.

In England it has been held that where the prosecution, although criminal in its form and substance, involves merely the determination of a civil right, a new trial may be granted, on the application of the crown, for a misdirection, or a verdict contrary to the evidence. Reg. *v.* Seale, 1 Jur. N. S. 593. But this has been denied on application for a new trial on an indictment for non-repairs to a highway (Reg. *v.* Challicombe, 6 Jur. 481; Rex *v.* Burbon, 5 M. & S. 392, 17 Rev. Rep. 369), and it has also been intimated that if in such a case a new trial was granted after acquit-

e. Right of Defendant — (I) *In General.* Under the various statutes new trials may be granted to defendant in trials for either felony[77] or misdemeanor[78] if sufficient cause be shown.

(II) *Co-Defendants.* Where two or more persons are jointly indicted and jointly or separately tried for the same offense, and one or more acquitted and the others convicted, a new trial may be granted as to those convicted without disturbing the verdict of acquittal.[79] So where several have been convicted of the same crime, a new trial may be granted to one, and judgment entered against the others.[80]

d. Discretion of Court. The granting or refusing of a new trial is said to be in the discretion of the trial judge.[81] Such discretion, however, is not mere whim

tal, it would only be where there had been a very clear miscarriage of justice (Reg. *v.* Russell, 3 E. & B. 942, 18 Jur. 1022, 23 L. J. M. C. 173, 2 Wkly. Rep. 555, 77 E. C. L. 942), and in another case on an indictment for obstructing a highway, the court said that where defendant has been acquitted and has been in peril of imprisonment, it had no jurisdiction to grant a new trial (Reg. *v.* Duncan, 7 Q. B. D. 198, 14 Cox C. C. 571, 45 J. P. 456, 50 L. J. M. C. 95, 44 L. T. Rep. N. S. 521, 30 Wkly. Rep. 61).

77. *Indiana.*— Weinzorpflin *v.* State, 7 Blackf. 186.

Louisiana.— State *v.* Hornsby, 8 Rob. 583, 41 Am. Dec. 314; State *v.* George, 8 Rob. 535; State *v.* Charlot, 8 Rob. 529.

Massachusetts.— Com. *v.* Green, 17 Mass. 515.

New Hampshire.—State *v.* Prescott, 7 N. H. 287.

Virginia.— Grayson *v.* Com., 6 Gratt. 712.

United States.—Fries' Case, 9 Fed. Cas. No. 5,126, 3 Dall. 515; U. S. *v.* Gilbert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19.

See 15 Cent. Dig. tit. "Criminal Law," § 2131.

78. State *v.* Miller, 10 Minn. 313.

79. Sims *v.* State, 87 Ga. 569, 13 S. E. 551; Seborn *v.* State, 51 Ga. 164; U. S. *v.* Campbell, 25 Fed. Cas. No. 14,714, 4 Cranch C. C. 658; Rex *v.* Mawbey, 6 T. R. 619, 3 Rev. Rep. 282.

Principals in the first and second degree.— Where on a trial of one defendant as principal in the second degree the record of the conviction of the other as principal in the first degree is introduced in evidence, and subsequently the principal in the first degree is granted a new trial and acquitted, the principal in the second degree is entitled to a new trial. Jackson *v.* State, 54 Ga. 439.

Where two are jointly indicted and one is acquitted and the other convicted, the latter is not entitled to a new trial as a matter of right, in order that he may have the benefit of the testimony of his acquitted co-defendant, although it appears the latter had full knowledge of the facts and was prevented from testifying for his co-defendant at the trial; but the court intimated that the contrary might be the rule where the conviction was not well sustained by the evidence. Holcomb *v.* State, 8 Lea (Tenn.) 417.

80. Kemp *v.* Com., 18 Gratt. (Va.) 969.

81. *Alabama.*—Jones *v.* State, 104 Ala. 30, 16 So. 135; Knight *v.* State, 103 Ala. 48, 16 So. 7.

Arkansas.— Oliver *v.* State, 34 Ark. 632.

Georgia.— Harmon *v.* State, 111 Ga. 829, 35 S. E. 654; Smith *v.* State, 91 Ga. 188, 17 S. E. 68; Vann *v.* State, 83 Ga. 44, 9 S. E. 945.

Illinois.— Martin *v.* People, 13 Ill. 341.

Indiana.— Weinzorpflin *v.* State, 7 Blackf. 186.

Iowa.— State *v.* Hogan, 115 Iowa 455, 88 N. W. 1074; State *v.* Hutchinson, 95 Iowa 566, 64 N. W. 610; State *v.* Black, 59 Iowa 390, 13 N. W. 345.

Kentucky.— Hughes *v.* Com., 14 S. W. 682, 12 Ky. L. Rep. 580; Brooks *v.* Com., 14 S. W. 416, 12 Ky. L. Rep. 403; Hunt *v.* Com., 12 S. W. 127, 11 Ky. L. Rep. 353.

Louisiana.— State *v.* Hagan, 45 La. Ann. 839, 12 So. 929; State *v.* Ware, 43 La. Ann. 400, 8 So. 878; State *v.* McCrea, 40 La. Ann. 20, 3 So. 380.

Massachusetts.— Com. *v.* White, 147 Mass. 76, 16 N. E. 707; Com. *v.* Green, 17 Mass. 515.

Michigan.—People *v.* Francis, 52 Mich. 575, 18 N. W. 364.

Minnesota.— State *v.* Madigan, 66 Minn. 10, 68 N. W. 179; State *v.* Floyd, 61 Minn. 467, 63 N. W. 1096.

Missouri.— State *v.* Morgan, 1 Mo. App. 22.

Nevada.— State *v.* Salge, 2 Nev. 321.

New Mexico.— U. S. *v.* Biena, 8 N. M. 99, 42 Pac. 70; U. S. *v.* De Amador. 6 N. M. 173, 27 Pac. 488.

New York.— People *v.* Fletcher, 35 Misc. 779, 72 N. Y. Suppl. 386.

North Carolina.— State *v.* Rogers, 94 N. C. 860; State *v.* Gee, 92 N. C. 756; State *v.* Morris, 84 N. C. 756.

Oregon.— State *v.* Huntley, 25 Oreg. 349, 35 Pac. 1065; State *v.* Olds, 19 Oreg. 397, 24 Pac. 394.

Pennsylvania.— Gray *v.* Com., 101 Pa. St. 380, 47 Am. Rep. 733.

South Carolina.— State *v.* Sullivan, 43 S. C. 205, 21 S. E. 4.

Tennessee.— Leeper *v.* State, 5 Lea 261.

Texas.— Cox *v.* State, 32 Tex. 610; Augustine *v.* State, 20 Tex. 450; Branch *v.* State, 35 Tex. Cr. 304, 33 S. W. 356.

Virginia.— Grayson *v.* Com., 6 Gratt. 712; Com. *v.* Jones, 1 Leigh 598.

or caprice, but the exercise of a mature and deliberate judgment, founded on well established and legal principles, having for its object the promotion of justice and the protection of the innocent.[82]

e. Successive Applications. In the absence of statute permitting successive applications defendant is entitled to make but one motion for a new trial.[83]

f. Necessity For Exceptions. As a general rule a new trial will not be granted for erroneous conduct on the part of the court, counsel, or jury, unless timely and sufficient objections and exceptions have been made and taken.[84]

2. Grounds — a. In General. As has been seen the grounds for a new trial in a criminal case are matters of statutory provision.[85] And it has been held that local prejudice against the accused,[86] the acquittal of a co-defendant jointly indicted and tried since defendant's conviction,[87] the intoxication of a witness,[88] the invalidity of the statute under which defendant was convicted,[89] the mere imposition of an improper sentence,[90] the mere non-attendance of a witness,[91] the pregnancy of a female defendant,[92] the refusal of a motion in arrest of judgment,[93] or the surrender of defendant by his bail[94] is insufficient as ground upon which to

United States.— Mattox *v.* U. S., 146 U. S. 140, 13 S. Ct. 50, 36 L. ed. 917.

See 15 Cent. Dig. tit. "Criminal Law," § 2133.

The supreme court has no authority to review the action of the circuit judge in refusing to grant a new trial, or to compel him by mandamus to rescind his order. People *v.* Branch County Cir. Judge, 17 Mich. 67.

82. Cook *v.* U. S., 1 Greene (Iowa) 56; Com. *v.* Schoeppe, 1 Leg. Gaz. (Pa.) 450.

83. State *v.* Musick, 101 Mo. 260, 14 S. W. 212.

That an order for a first new trial was irregularly entered cannot give defendant another chance after a second conviction. Jones *v.* State, 67 Ga. 240.

Where the trial judge dies after overruling a motion for a new trial, but before signing a bill of exceptions, his successor cannot entertain another application, although he may under the statute sign the bill of exceptions and secure to defendant an appeal. State *v.* Walls, 113 Mo. 42, 20 S. W. 883.

84. Thus a new trial for failure of the evidence to sustain the indictment (U. S. *v.* Jenther, 26 Fed. Cas. No. 15,476, 13 Blatchf. 335), because the jury misunderstood the judge's charge (State *v.* Bates, 38 La. Ann. 491; State *v.* McClanahan, 9 La. Ann. 210), because of improper rulings by the trial judge (State *v.* Holcombe, 41 La. Ann. 1066, 6 So. 785), or because of a failure of proof (McLaughlin *v.* State, (Tex. Cr. App. 1896) 34 S. W. 280) will not be granted where no exception was taken at the time. And see *supra*, XIV, D, 2, d; XIV, D, 3, c.

85. See *supra*, XV, A, 1, a.

86. Local prejudice.— A new trial will not be granted solely because there was great public excitement and prejudice against the accused at the time of the trial. Fogarty *v.* State, 80 Ga. 450, 5 S. E. 782; Com. *v.* Flanagan, 7 Watts & S. (Pa.) 415.

87. Acquittal of co-defendant.— A new trial will not be granted because one jointly indicted with defendant has been acquitted since the conviction of defendant, and can therefore testify freely without incriminating himself. Bacon *v.* State, 22 Fla. 51; Burgess *v.* State, 93 Ga. 304, 20 S. E. 331.

88. Intoxication of a witness to such an extent that he is unable to testify is not ground for a new trial. State *v.* Casey, 44 La. Ann. 969, 11 So. 583; State *v.* Underwood, 28 N. C. 96; State *v.* McNinch, 12 S. C. 89.

89. Invalidity of statute.— The question whether the statute under which defendant was convicted is void cannot be determined on a motion for a new trial. State *v.* Main, 31 Conn. 572, where it is held that this question can only be raised by motion in arrest or by appeal or writ of error.

90. Improper sentence.—An objection that the sentence imposed is excessive or for any reason illegal or irregular cannot be made the ground of a motion for a new trial. Bellinger *v.* State, 116 Ga. 545, 42 S. E. 747; Sturkey *v.* State, 116 Ga. 526, 42 S. E. 747; Burgamy *v.* State, 114 Ga. 852, 40 S. E. 991; Montross *v.* State, 72 Ga. 261, 53 Am. Rep. 840. But see Brown *v.* State, 47 Ala. 47.

91. Absence of witness.— The non-attendance of witnesses necessary to sustain defendant's case is not ground for a new trial, where no motion was made for a continuance, and particularly where the state would have admitted what the prisoner was expected to prove by the absent witnesses. Pease *v.* State, 91 Ga. 18, 16 S. E. 113; Boggus *v.* State, 34 Ga. 275; State *v.* McCool, 34 Kan. 617, 9 Pac. 745; State *v.* Simien, 36 La. Ann. 923; Munoz *v.* State, (Tex. Cr. App. 1901) 60 S. W. 759; Clay *v.* State, (Tex. Cr. App. 1893) 22 S. W. 973.

Continuances generally see CONTINUANCES IN CRIMINAL CASES.

92. Pregnancy of female defendant.— Holeman *v.* State, 13 Ark. 105.

93. Refusal of a motion in arrest.— Stokes *v.* State, 84 Ga. 258, 10 S. E. 740.

94. Surrender by bail.— It is not ground for a new trial that defendant at the request of his bail was taken into custody, where it does not appear that his freedom of intercourse and of consultation with his counsel

base a motion for a new trial. But where without laches defendant by unavoidable accident or the fault of another has lost his right of appeal, he should be awarded a new trial.[95]

b. Errors and Irregularities in Preliminary Proceedings. The illegal procedure or the improper action of the officers who summon the jurors,[96] or in the absence of statute the omission of a preliminary examination prior to an information,[97] is not ground for a new trial unless the accused can show that he has in some way been thereby materially prejudiced on his trial.[98] So a refusal to order separate trials for two or more defendants jointly indicted is not ground for a new trial.[99] Nor is the fact that defendant has been erroneously advised to plead guilty and has acted thereon to his prejudice ground for a new trial, if he is informed at the time by the court as to his legal rights and acts in disregard of the court's instructions.[1] And while by statute the accused is usually entitled to a list of the jurors[2] and a copy of the indictment[3] a failure to furnish these is not ground for a new trial, where an objection was not made and exception taken before verdict.[4] On the other hand, however, the denial of a bill of particulars, by which defendant was prevented from making a just defense, is ground for a new trial.[5] Again, where the constitution requires that criminal prosecutions shall be assigned among the judges of the court by lot, and that each judge shall have exclusive control of the case assigned to him, a new trial will be granted after a conviction in a case which was not thus allotted.[6]

c. Defects in Indictment or Information. An objection to an indictment because defective is no ground for a new trial.[7] Nor can objections to the summoning and qualifications of the grand jurors and the organization of the grand jury be urged as ground for a new trial.[8] Again neither an immaterial

was materially interrupted. Turner *v.* State, 70 Ga. 765.

95. Loss of right to appeal.—State *v.* Parks, 107 N. C. 821, 12 S. E. 572; State *v.* Randall, 88 N. C. 611; State *v.* O'Kelly, 88 N. C. 609.

Where a court reporter failed to report the proceedings, and so was unable to furnish a transcript, this rule was applied. Vincent *v.* State, 37 Nebr. 672, 56 N. W. 320.

96. Blemer *v.* People, 76 Ill. 265; Ferris *v.* People, 48 Barb. (N. Y.) 17.

97. People *v.* Bawden, 90 Cal. 195, 27 Pac. 204.

98. See *supra*, X, D, 1, b.

99. State *v.* Thaden, 43 Minn. 325, 45 N. W. 614; U. S. *v.* Harding, 26 Fed. Cas. No. 15,301, 1 Wall. Jr. 127. And see *supra*, XIV, A, 6.

1. Keith *v.* State, 93 Ga. 176, 18 S. E. 551; Vaughn *v.* State, 93 Ga. 174, 18 S. E. 550.

2. See *supra*, XIV, A, 11.

3. See *supra*, XIV, A, 8.

4. Dawson *v.* State, 29 Ark. 116; State *v.* Beeder, 44 La. Ann. 1007, 11 So. 816; State *v.* Vester, 23 La. Ann. 620; State *v.* Cook, 20 La. Ann. 145; Washington *v.* State, 78 Miss. 189, 28 So. 850; Ford *v.* State, (Tex. Cr. App. 1899) 54 S. W. 761.

5. Com. *v.* McClure, 1 Pa. Co. Ct. 182. And see *supra*, XIV, A, 4.

6. State *v.* Addotto, 34 La. Ann. 1.

7. An objection to a defective indictment should be made by demurrer where the defect is apparent on its face, or by motion in arrest of judgment, after verdict. Boswell *v.* State, 114 Ga. 40, 39 S. E. 897; Rucker *v.* State, 114 Ga. 13, 39 S. E. 902; Williams *v.* State, 107 Ga. 721, 33 S. E. 648; Womble *v.* State, 107 Ga. 666, 33 S. E. 630; White *v.* State, 93 Ga. 47, 19 S. E. 49; State *v.* Taylor, 37 La. Ann. 40; Com. *v.* Irwin, 2 Pa. L. J. 329; State *v.* Hamilton, 17 S. C. 462. *Compare* U. S. *v.* Bicksler, 1 Mackey (D. C.) 341.

See 15 Cent. Dig. tit. "Criminal Law," § 2152 *et seq.*

An improper refusal of a motion to set aside an information can only be reviewed by an appeal from the judgment, where the statute enumerates specific grounds for new trials, and this is not one of them. State *v.* Schnepel, 23 Mont. 523, 59 Pac. 927.

Rulings on a demurrer to an accusation and on a motion to quash the warrant are not grounds for a new trial (Bellinger *v.* State, 116 Ga. 545, 42 S. E. 747); nor can the fact that the judge is disqualified be raised for the first time on such a motion (Berry *v.* State, 117 Ga. 15, 43 S. E. 438).

Solicitor-general as prosecutor.— An objection that he appeared as prosecutor and also officially before the grand jury should be taken by an exception to the indictment and not on a motion for a new trial. Baker *v.* State, 97 Ga. 452, 25 S. E. 341.

8. Potsdamer *v.* State, 17 Fla. 895; Mills *v.* State, 57 Ga. 609; Stone *v.* People, 3 Ill. 326; State *v.* Griffin, 38 La. Ann. 502.

Such objections should be taken advantage of by demurrer or motion to quash and are waived by going to trial. Montgomery *v.* State, 3 Kan. 263; State *v.* Washington, 33 La. Ann. 896.

misnomer in the indictment,[9] an immaterial variance between the proof and an allegation in the indictment,[10] duplicity in the indictment,[11] nor the failure to indorse on the indictment the names of the witnesses who were permitted to testify for the prosecution [12] is a sufficient ground for a motion for a new trial. So too neither the overruling of a demurrer,[13] a refusal to quash the indictment,[14] nor the striking out of a plea to the jurisdiction [15] is a ground for a motion for a new trial.

d. Want of Preparation. Where defendant or his counsel fails in diligence [16] in preparing for trial, and there is no surprise, a motion for a new trial for lack of opportunity for preparation may properly be denied.[17]

e. Errors in Conduct of Trial — (i) *In General.* It may be stated as a general rule that no error in the conduct of the trial will constitute a ground for a new trial if such error was not prejudicial to defendant and if it appears upon the whole case that justice has been done.[18] Thus, it seems, that a new trial may be refused where the application is based upon the following grounds: A violation of the rule in regard to the separation of witnesses;[19] discharging the jury on

Defendant's right to challenge grand jurors is lost where he, being in custody, is brought into court when they are impaneled, and he makes no objection at that time. People *v.* Henderson, 28 Cal. 465.

9. An immaterial misnomer in the indictment is not ground for a new trial, where the evidence sufficiently identifies defendant as the person indicted (Brazier *v.* State, 44 Ala. 387; State *v.* Duestoe, 1 Bay (S. C.) 377), and no question as to variance is raised at the trial (State *v.* Senn, 32 S. C. 392, 11 S. E. 292).

10. An immaterial variance between the proof and an allegation, in the absence of statute, is not ground for a new trial. Evans *v.* State, 67 Ind. 68; Com. *v.* Irwin, 2 Pa. L. J. 329. *Contra*, where there is an absolute failure of proof. State *v.* Hamilton, 17 S. C. 462.

11. The remedy for duplicity in an indictment is a motion to quash, and not a motion for a new trial after verdict. Simons *v.* State, 25 Ind. 331; Com. *v.* Bargar, 2 L. T. N. S. (Pa.) 161; Rumage *v.* State, (Tex. Cr. App. 1900) 55 S. W. 64.

12. Failure to indorse names of witnesses. — State *v.* Nettles, 153 Mo. 464, 55 S. W. 70; State *v.* Johnson, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405.

This objection should be taken when such witnesses are offered at the trial. Ray *v.* State, 1 Greene (Iowa) 316, 48 Am. Dec. 379; People *v.* Shea, 147 N. Y. 78, 41 N. E. 505. And see *supra*, XIV, A, 9, f.

13. Veal *v.* State, 116 Ga. 589, 42 S. E. 705; Williams *v.* State, 115 Ga. 588, 41 S. E. 1007; Boswell *v.* State, 114 Ga. 40, 39 S. E. 897; Heard *v.* State, 113 Ga. 444, 39 S. E. 118; Colwell *v.* State, 112 Ga. 75, 37 S. E. 129; Gaines *v.* State, 108 Ga. 772, 33 S. E. 632.

14. Hancock *v.* State, 114 Ga. 439, 40 S. E. 317; Cleveland *v.* State, 109 Ga. 265, 34 S. E. 572.

15. Daniel *v.* State, 115 Ga. 205, 41 S. E. 695.

16. No lack of diligence. — Where the accused is forced to trial immediately after the appointment of counsel, and without an opportunity to consult him (McArver *v.* State, 114 Ga. 514, 40 S. E. 779), or without an opportunity to secure material evidence (Rosencrants *v.* State, 6 Ind. 407; Smith *v.* State, 20 Tex. App. 134), a new trial should be granted.

Continuance asked for. — A new trial will not be granted because of lack of opportunity for preparation, absence of witnesses, or other similar reasons, unless the facts are brought before the court, and a continuance is asked. Thomas *v.* State, 89 Ga. 479, 15 S. E. 537; Tobin *v.* People, 101 Ill. 121; State *v.* Benton, 65 Iowa 482, 22 N. W. 639.

Defendant, being desirous of pleading former acquittal, applied to the clerk for the former indictment and the order of discharge, neither of which could be found. Subsequently, while the jury were out, both these papers were discovered, and it was held that, on a verdict of guilty, a motion for a new trial should be granted. Dacy *v.* State, 17 Ga. 439.

17. Com. *v.* Benesh, Thach. Cr. Cas. (Mass.) 684; McFadden *v.* State, (Tex. Cr. App. 1903) 71 S. W. 972; Webb *v.* State, (Tex. Cr. App. 1902) 68 S. W. 276.

That accused is in prison in default of bail does not excuse his delay in preparing for trial. Yanez *v.* State, 20 Tex. 656.

18. State *v.* Jessie, 30 La. Ann. 1170; State *v.* Frank, 50 N. C. 384; U. S. *v.* Hudson, 26 Fed. Cas. No. 15,412, 1 Hask. 527; U. S. *v.* Martin, 26 Fed. Cas. No. 15,729, 1 Hask. 166; 1 Chitty Cr. L. 657.

The fact that pending the trial it becomes known to the jury that the accused had already been tried and a verdict of guilty annulled is not ground for a new trial. State *v.* Thompson, 109 La. 296, 33 So. 320.

Where the refusal of the court to accede to the request of defendant results in prejudicing him, as would be the case where the court refused an order to serve process to obtain the presence of a material witness confined in the penitentiary, a new trial should be granted. Roberts *v.* State, 72 Ga. 673.

19. A violation of the rule in regard to separating witnesses, not causing material in-

their failure to agree;[20] remarks of the judge during the trial disparaging to the accused, his counsel, or his witnesses;[21] the absence of the judge from the court-room during the trial;[22] defendant's ignorance of the English language;[23] the expression of an opinion by a witness on the stand that defendant is guilty;[24] the illness of defendant at the time of his trial;[25] that counsel for defendant submitted the case to the jury without argument;[26] that defendant failed to put in a defense which was known to him before the verdict;[27] that defendant had no counsel;[28] that the case was called out of its turn on the docket;[29] that the court failed to ask accused, before passing sentence, whether he had anything to say;[30] that the court limited the argument to a reasonable period;[31] that the court refused to excuse a juror for Saturday because of his conscientious scruples;[32] that the judge failed to sign each day's proceedings in a trial on an agreed state of facts;[33] or that the trial judge charged a grand jury in the presence of the jury engaged

jury to the accused, does not entitle him to a new trial, although he objected to the examination of the witness who violated the rule. Betts *v.* State, 66 Ga. 508.

20. An order of the court discharging the jury on their failure to agree cannot be urged as ground for a new trial, unless the accused excepted to it at the time. Long *v.* State, 46 Ind. 582; State *v.* Whitson, 111 N. C. 695, 16 S. E. 332; Morgan *v.* State, 3 Sneed (Tenn.) 475.

21. Where it does not appear that such remarks tended to, or actually did, prejudice defendant. Lowery *v.* State, 98 Ala. 45, 13 So. 498; Hendricks *v.* State, 73 Ga. 577; Burns *v.* People, 45 Ill. App. 70; State *v.* Debnam, 98 N. C. 712, 3 S. E. 742. And see *supra*, XIV, B, 9.

This rule has been applied to a remark of the court that defendant's motion was made for delay (McRae *v.* State, 52 Ga. 290), and to interruptions by the court correcting misstatements of his counsel (Pritchett *v.* State, 92 Ga. 65, 18 S. E. 536; Vann *v.* State, 83 Ga. 44, 9 S. E. 945).

Interrogation of witness by judge see *supra*, XIV, B, 9, g.

22. As a general rule the temporary absence of the judge from the court-room during the trial, not shown to have been prejudicial to the accused and to have been properly objected to by him, is not ground for a new trial. People *v.* Yut Ling, 74 Cal. 569, 16 Pac. 489; O'Shields *v.* State, 81 Ga. 301, 6 S. E. 426. And see *supra*, XIV, B, 2, a.

23. State *v.* Orsini, 22 La. Ann. 93, although it seems this may be a sufficient ground, if it appears that he was embarrassed in the preparation of his defense and materially prejudiced thereby.

24. Ramsey *v.* State, 92 Ga. 53, 17 S. E. 613, unless objection be made at the time.

25. A new trial should not be granted because defendant was so ill at his trial that he could not give proper attention to his defense, where his illness was not brought before the court, and he answered ready, had the advice of counsel, and failed to move for a continuance. Ray *v.* State, 91 Ga. 87, 16 S. E. 311.

Insanity.— By a plea of not guilty defendant estops himself from subsequently moving for a new trial upon the ground that he was insane at the trial or when the crime was committed, where the evidence on which he relies to prove insanity was known to him at the time of the plea. Green *v.* State, 88 Tenn. 614, 14 S. W. 430; Burton *v.* State, 33 Tex. Cr. 138, 25 S. W. 782.

26. If at the request of the jury counsel for defendant refrains from argument, he assuming that they believe the accused to be innocent, he cannot urge that as ground for a new trial. State *v.* Fontenot, 48 La. Ann. 220, 19 So. 112; State *v.* Holden, 42 Minn. 350, 44 N. W. 123.

27. Nothwithstanding this defense might on a new trial operate greatly in his favor. Case *v.* State, 5 Ind. 1; Com. *v.* Benesh, Thach. Cr. Cas. (Mass.) 684.

28. That accused had no counsel is not ground for a new trial, where, knowing his right to have counsel assigned, he failed to request counsel or refused to accept counsel assigned. State *v.* Rollins, 50 La. Ann. 925, 24 So. 664; State *v.* Bingham, 46 La. Ann. 299, 14 So. 905; State *v.* Kelly, 25 La. Ann. 381; Burnett *v.* State, 42 Tex. Cr. 600, 62 S. W. 1063. And see *supra*, XIV, B, 5, e.

29. Where by statute the court has discretion to do so, unless defendant can show actual prejudice thereby. Rosenbrook *v.* State, 78 Ga. 111.

Defendant must object promptly or he cannot urge the error on a motion for a new trial. Willis *v* State, (Tex. Cr. App. 1895) 33 S. W. 341.

30. State *v.* Henry, 6 Baxt. (Tenn.) 539.

31. People *v.* Keenan, 13 Cal. 581, holding, however, that where it appears, particularly in a capital case, that counsel did not have time enough to argue it properly a new trial should be granted.

Where a statute provides that counsel shall not occupy more than one hour in argument, and defendant has the privilege of having two counsel, a new trial may be granted for refusing his counsel two hours for their argument. State *v.* Nyman, 55 Conn. 17, 10 Atl. 161.

32. Especially where the court, in deference to his opinions, refrained from sending the jury out until after sundown on Saturday. U. S. *v.* McKnight, 112 Fed. 982.

33. State *v.* Newkirk, 80 Ind. 131, application made on the part of the prosecution.

in the trial of defendant.[34] On the other hand a new trial has been granted where the application was based upon the following grounds: The intoxication of defendant at his trial;[35] that a material witness was not sworn;[36] that defendant was not present throughout the trial;[37] that defendant was not required to plead to an amended complaint;[38] that one of defendant's witnesses was improperly committed for perjury during the trial;[39] that the instructions were not taken out by the jury as required by statute;[40] that the prosecution was not compelled to elect upon which count of two or more in the indictment the prisoner should be tried;[41] that the term of court was illegally adjourned and defendant convicted at an adjourned term;[42] or that the trial judge summarily imposed a fine for contempt upon counsel for the accused and ordered him into instant custody.[43]

(II) *Failure to Prove Material Facts.* A failure on the part of the prosecution to prove the *corpus delicti*[44] or the venue[45] is a good ground for a motion for a new trial.

(III) *New Trial Recommended by Jury.* Inasmuch as the granting of a new trial is an exercise of the judicial discretion, the recommendation of the jury furnishes no legal reason for granting one.[46]

f. Misconduct of Counsel For Prosecution. Misconduct on the part of the

34. That the trial judge charges a grand jury in the presence of the jury engaged in the trial is not ground for a new trial because allusions were made in the charge to the same crime as that for which the accused was being tried, and other language was used applicable to acts in evidence against the prisoner, particularly where the judge disclaims any reference to the case pending. Johnson *v.* State, 59 Ga. 189.

35. That defendant at his trial was so intoxicated that he was unable to understand and to communicate with his counsel. Taffe *v.* State, 23 Ark. 34.

36. A new trial should be granted the accused where a witness for the prosecution who gave material and damaging testimony was not sworn, if this omission was not discovered by the accused until after verdict (State *v.* Lugar, 115 Iowa 268, 88 N. W. 333); but not where defendant, knowing that the witness was not sworn, cross-examined him (State *v.* Hope, 100 Mo. 347, 13 S. W. 490, 8 L. R. A. 608).

It is necessary to show that both defendant and his counsel were ignorant that the witness was unsworn until after verdict, and that defendant was prejudiced. State *v.* Camp, 23 Vt. 551.

The administration of the oath to a witness by an officer irregularly appointed is not ground for a new trial. State *v.* Dreifus, 38 La. Ann. 877; Mobley *v.* State, 46 Miss. 501.

The fact that a witness sworn for the state is withdrawn without testifying, because she is incompetent by reason of her youth, is not ground for a new trial, upon the theory that her appearance influenced the majority of the jury against defendant. People *v.* Graham, 21 Cal. 261.

37. The accused having an absolute right to be present throughout his trial, any proceedings had during his involuntary absence may be ground for a new trial. Simpson *v.* State, 31 Ind. 90; Payne *v.* Com., 30 S. W. 416, 16 Ky. L. Rep. 839. And see *supra*, XIV, B, 3, a.

38. Com. *v.* Foynes, 126 Mass. 267.

The fact that a jury was impaneled and sworn before he was required to plead is not a ground for a new trial. Hester *v.* State, 17 Ga. 130; State *v.* Cole, 19 Wis. 129, 88 Am. Dec. 678.

39. Linsday *v.* People, 63 N. Y. 143. And see *supra*, XIV, B, 9, l.

40. Where a statute requiring the instructions to be taken out by the jury is mandatory non-compliance is ground for a new trial. Duncan *v.* State, 7 Baxt. (Tenn.) 387.

41. Mackesey *v.* People, 6 Park. Cr. (N. Y.) 114; State *v.* Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766; Simms *v.* State, 10 Tex. App. 131.

Where felony and misdemeanor are embraced in separate counts, by reason of which under a statute defendant is prevented from testifying, the refusal of the prosecuting attorney to elect will give defendant a new trial, when he is convicted of the misdemeanor, to enable him to testify. Com. *v.* Toland, 11 Phila. (Pa.) 433; Com. *v.* Werbine, 12 Lanc. Bar (Pa.) 79.

42. Hoye *v.* State, 39 Ga. 718.

But where no prejudice resulted to the accused an improper adjournment may be disregarded. People *v.* Shainwold, 51 Cal. 468.

43. Such an occurrence in the presence of the jury is bound to prejudice the accused, as they will unquestionably infer therefrom that counsel has been guilty of a grave offense in conducting the case. State *v.* White, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442. And see *supra*, XIV, B, 9, k.

44. State *v.* Hogard, 12 Minn. 293.

45. Walker *v.* State, 35 Ark. 386; Holeman *v.* State, 13 Ark. 105; Evans *v.* State, 17 Fla. 192; Cloud *v.* State, 73 Ga. 126; State *v.* Mills, 33 W. Va. 455, 10 S. E. 808; Hoover *v.* State, 1 W. Va. 336.

46. State *v.* Fontenot, 48 La. Ann. 220, 19 So. 112.

prosecuting attorney may constitute a sufficient ground for granting a new trial. This rule has been applied to improper remarks and arguments;[47] to an offer to prove that a witness for the prosecution had been tampered with;[48] to the abuse of members of the jury;[49] to comments upon the failure of the accused to testify;[50] to the concealment of the presence of material witnesses for the prosecution;[51] and to the concealment by the prosecuting attorney from a witness that he is under indictment for harboring the accused with knowledge that he committed the crime.[52] But where defendant pleads guilty on the promise of the prosecuting attorney to recommend to the jury that a certain punishment be imposed, it is not ground for a new trial that the jury refused to follow the recommendation.[53]

g. Incompetency or Negligence of Counsel For Accused. The incompetency, inexperience, or negligence of his counsel is not ground for a new trial, unless it appears that the accused was prejudiced thereby.[54] An omission by the counsel for defendant to introduce certain evidence,[55] to except to a ruling or to an instruction,[56] or his laches preventing accused from making his statement to the

Discretion of court as to granting new trial see *supra*, XV, A, 1, d.

47. A new trial will be granted where the prosecuting attorney, after a warning by the court, persists in making remarks which are calculated to prejudice the jury against the accused (Heller *v.* People, 22 Colo. 11, 43 Pac. 124; State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38; Laubach *v.* State, 12 Tex. App. 583), provided objection is promptly made and exception reserved (Epson *v.* State, (Tex. Cr. App. 1896) 36 S. W. 584).

A suggestion by the prosecuting attorney to a witness as to his right of not incriminating himself, although improper, is not alone ground for a new trial. Ramsey *v.* State, 92 Ga. 53, 17 S. E. 613.

Necessity for objections to improper matter see *supra*, XIV, E, 6.

48. Nalley *v.* State, 28 Tex. App. 387, 13 S. W. 670, where nothing appears to connect the accused with the tampering, and the jury are not instructed to disregard the remark.

49. A new trial should be granted where members of the jury are abused by counsel, and their characters assailed in a manner calculated to inspire them with fear or resentment. State *v.* Noland, 85 N. C. 576.

50. The failure of the court, where the prosecuting attorney comments upon the failure of the accused to testify, to prohibit any further reference to the matter and to instruct the jury to ignore it is ground for a new trial. Wilson *v.* U. S., 149 U. S. 60, 13 S. Ct. 765, 37 L. ed. 650. And it has also been held that commenting on the failure of defendant to testify is alone ground for a new trial, although the jury were instructed to disregard the comments. Angelo *v.* People, 96 Ill. 209, 36 Am. Rep. 132; State *v.* Snider, (Iowa 1902) 91 N. W. 762. Elsewhere it seems that a prompt objection and a rebuke by the court will cure the error. Yarbrough *v.* State, 70 Miss. 593, 12 So. 551. And see *supra*, XIV, E, 4, d, (VIII).

In Iowa an objection to remarks in argument upon the silence of the accused may be taken on motion for a new trial, although none was made at the trial (State *v.* Snider, (Iowa 1902) 91 N. W. 762), but generally an objection of this character must be made at the trial, and the court requested to charge the jury to disregard the improper remark (State *v.* Hull, 18 R. I. 207, 26 Atl. 191, 20 L. R. A. 609).

51. Where the accused is persuaded to go to trial under the belief that certain material witnesses for the prosecution are absent when they are present, a new trial should be granted. Curtis *v.* State, 6 Coldw. (Tenn.) 9; March *v.* State, 44 Tex. 64.

52. Jackson *v.* State, 39 Ohio St. 37.

53. Curtis *v.* Com., 110 Ky. 845, 62 S. W. 886, 23 Ky. L. Rep. 267.

54. Darby *v.* State, 79 Ga. 63, 3 S. E. 663; Hudson *v.* State, 76 Ga. 727; State *v.* Dreher, 137 Mo. 11, 38 S. W. 567; State *v.* Head, 60 S. C. 516, 39 S. E. 6.

If the incompetency or ignorance of counsel is so great that defendant has been prejudiced, and has been prevented from fairly presenting his defense, a new trial should be granted. State *v.* Jones, 12 Mo. App. 93; State *v.* Lewis, 9 Mo. App. 321.

The application for a new trial must show affirmatively that defendant was actually prejudiced by the incompetency of counsel (State *v.* Benge, 61 Iowa 658, 17 N. W. 100), and also facts from which the court may see that the attorney did not do his duty (Fambles *v.* State, 97 Ga. 625, 25 S. E. 365).

55. Darby *v.* State, 79 Ga. 63, 3 S. E. 663; State *v.* Elliott, 16 Mo. App. 552.

Fear of consequences to defendant.—Where counsel, by reason of fear of mob violence to his client, fails to take some material step beneficial to defendant, the latter is entitled to a new trial by U. S. Const. Amendm. art. 6, guaranteeing the right to a speedy and public trial by an impartial jury, with the assistance of counsel. Roper *v.* Territory, 7 N. M. 255, 33 Pac. 1014. Where the accused is entitled to a written charge, the failure to claim it by his counsel, through fear that the delay in procuring it might weary and thus prejudice the jury against his client, will be ground for a new trial. State *v.* Swayze, 30 La. Ann. 1323.

56. State *v.* Currens, 46 Kan. 750, 27 Pac. 140.

court[57] is not ground for a new trial unless actual prejudice appears to have resulted thereby. Nor will a new trial be granted the accused on account of the withdrawal of his counsel, where he proceeds to trial without any objection or request to have other counsel assigned,[58] or where after such withdrawal he is represented by other competent counsel.[59]

h. Rulings on Evidence — (i) *Improper Reception.* The reception of evidence over objection either to its competency or materiality, where it is prejudicial to defendant, is ground for a new trial.[60] On a motion for a new trial defendant must show that objection was promptly made and exception taken at the time of its offer and admission,[61] and must also show by evidence satisfactory to the court that the testimony was prejudicial to him.[62]

(ii) *Withdrawal of Incompetent Testimony.* The error of admitting illegal evidence over objection is usually cured by its subsequent withdrawal.[63]

(iii) *Receiving Admissions as Confessions.* The reception by the court of statements of the accused which were merely declarations of immaterial facts, as distinguished from confessions, and treating them as the latter, is ground for a new trial, where the incriminating evidence without such declarations was insufficient, and with them of doubtful sufficiency.[64]

(iv) *Opinion Evidence.* The improper admission of expert or opinion evidence for the prosecution is ground for a new trial where the other incriminating evidence is wholly circumstantial.[65]

57. Hudson *v.* State, 76 Ga. 727.

58. State *v.* Walker, 39 La. Ann. 19, 1 So. 269; Madden *v.* State, 1 Tex. App. 204.

59. State *v.* Bradley, 6 La. Ann. 554.

60. People *v.* Dailey, 59 Cal. 600.

61. *Georgia.*—Cunningham *v.* State, 97 Ga. 214, 22 S. E. 954.

Louisiana.— State *v.* Magee, 48 La. Ann. 901, 19 So. 933.

Mississippi.— Ned *v.* State, 33 Miss. 364.

Missouri.— State *v.* Fischer, 124 Mo. 460, 27 S. W. 1109; State *v.* Peak, 85 Mo. 190; State *v.* Burnett, 81 Mo. 119.

Tennessee.— Stone *v.* State, 4 Humphr. 27.

Texas.— Penn *v.* State, 36 Tex. Cr. 140, 35 S. W. 973.

See 15 Cent. Dig. tit. "Criminal Law," § 2206; and *supra*, XIV, D, 3.

62. *Arkansas.*— Bivens *v.* State, 11 Ark. 455.

California.—People *v.* Graham, 21 Cal. 261.

Florida.— Tilly *v.* State, 21 Fla. 242.

Georgia.— Smith *v.* State, 88 Ga. 627, 15 S. E. 675.

Maine.— State *v.* Gray, 39 Me. 353.

Massachusetts.— Com. *v.* Bosworth, 22 Pick. 397; Com. *v.* Green, 17 Mass. 515.

Minnesota.— State *v.* McCartey, 17 Minn. 76.

Nebraska.— Folden *v.* State, 13 Nebr. 328, 14 N. W. 412.

New Hampshire.— State *v.* Blaisdell, 59 N. H. 328.

New York.— People *v.* Buddensieck, 103 N. Y. 487, 9 N. E. 44, 57 Am. Rep. 766.

North Carolina.— State *v.* Jones, 93 N. C. 611.

Rhode Island.— State *v.* Ballou, 20 R. I. 607, 40 Atl. 861.

Tennessee.— McAdams *v.* State, 8 Lea 456.

Texas.— Hinton *v.* State, 24 Tex. 454.

Virginia.— Joyce *v.* Com., 78 Va. 287.

United States.—U. S. *v.* Jones, 32 Fed. 569.

See 15 Cent. Dig. tit. "Criminal Law," § 2207.

Some cases hold that it is enough to show that the evidence may have been prejudicial (State *v.* Jones, 93 N. C. 611; Joyce *v.* Com., 78 Va. 287), or that the chances are equal that it prejudiced defendant (Hoberg *v.* State, 3 Minn. 262), and that the admission of incompetent evidence justifies the granting of a new trial, although the verdict was supported by competent evidence (Frain *v.* State, 40 Ga. 529; State *v.* Allen, 8 N. C. 6, 9 Am. Dec. 616; Lancaster *v.* State, 3 Coldw. (Tenn.) 339, 91 Am. Dec. 288; Shaw *v.* State, 3 Sneed (Tenn.) 86). If the jury are expressly instructed to disregard incompetent testimony (State *v.* Kingsbury, 58 Me. 238), or if the objection made had reference to the credibility and not to the incompetency of the testimony (Hellems *v.* State, 22 Ark. 207), and the court can see that the jury was not influenced by the incompetent testimony (Matthis *v.* State, 33 Ga. 24), a new trial may be denied; but it has also been held that inasmuch as it is extremely difficult, if not impossible, to determine whether a verdict is founded on the illegal evidence or on the legal evidence, a new trial should be awarded even where the court is of the opinion that the verdict is correct (Peek *v.* State, 2 Humphr. (Tenn.) 78).

63. McDonald *v.* State, 72 Ga. 55, holding, however, that where, upon the facts of the particular case, it is probable that notwithstanding such withdrawal the accused was prejudiced thereby a new trial should be granted.

Withdrawal of incompetent testimony generally see *supra*, XIV, C, 6, i.

64. Fletcher *v.* State, 90 Ga. 468, 17 S. E. 100.

65. People *v.* Wright, 136 N. Y. 625, 32 N. E. 629. But compare Hester *v.* State, 17

(v) *Improper Exclusion of Evidence.* The exclusion of relevant or competent evidence is ground for a new trial, where it appears that its exclusion has been prejudicial to defendant;[66] but where the evidence excluded would have had, if admitted, no appreciable weight in favor of defendant,[67] or where it is impeaching only,[68] its exclusion is not ground for a new trial.

(vi) *Reopening Case to Let in Evidence.* The refusal of the court to reopen a case to admit testimony which it appears would not have affected the verdict if admitted is not ground for a new trial.[69]

i. **Instructions and Failure to Instruct** — (i) *Erroneous Instructions* — (a) *Generally.* An erroneous instruction which misdirects or misleads the jury on a material point of law is ground for a new trial,[70] if objected to when given,[71] particularly where there is a conflict of testimony which leaves the case in doubt before the jury.[72] But where in the opinion of the court the evidence is sufficient it has a discretion to deny a new trial, although the instructions are partly erroneous.[73]

(b) *Separate Instructions.* A new trial ought not to be granted upon the ground that some of the instructions are erroneous, where the instructions taken as a whole are a correct statement of the law.[74]

(ii) *Failure to Put Instructions in Writing.* The failure of the court over prompt objections[75] to comply with a statute requiring written instructions is good ground for a new trial.[76]

(iii) *Failure to Give Instructions.* The omission of the court to charge on minor points or doctrines of law, although such charges might with propriety have been given, is not ground for a new trial in the absence of a request on the

Ga. 130, where it was held that allowing a witness to state his opinion as to the identity of the maker of certain footprints was not ground for a new trial.

66. *California.*— People *v.* Murphy, 39 Cal. 52.

Louisiana.— State *v.* Gregory, 33 La. Ann. 737.

Massachusetts.— Com. *v.* Randall, Thach. Cr. Cas. 500.

North Carolina.— State *v.* McCurry, 63 N. C. 33.

Pennsylvania.— Com. *v.* McGowan, 2 Pars. Eq. Cas. 341; Com. *v.* Reid, 1 Leg. Gaz. 182, 3 Leg. Gaz. 185.

Texas.— Williams *v.* State, 4 Tex. App. 5.

See 15 Cent. Dig. tit. "Criminal Law," § 2209.

In the federal courts a new trial may be granted for the improper rejection of evidence, although the court may deem that it was wholly insufficient to establish the issue. Defendant has a right to have the jury pass on all the evidence, and the court cannot, on a motion for a new trial, determine the weight of the testimony. Not only is this the case, but the court on hearing the motion for a new trial is precluded from taking further evidence bearing on any issue at the trial in order to determine whether defendant had been prejudiced. U. S. *v.* De Quilfeldt, 5 Fed. 276.

67. Weeks *v.* State, 79 Ga. 36, 3 S. E. 323; Bird *v.* State, 14 Ga. 43; Boon *v.* State, 42 Tex. 237.

68. Wheeler *v.* State, 23 Ga. 292.

69. Turbaville *v.* State, 58 Ga. 545. And see *supra*, XIV, C, 7, d.

70. Donoghoe *v.* People, 6 Park. Cr. (N. Y.) 120; State *v.* Gaither, 72 N. C. 458; Com. *v.* Taylor, 10 Phila. (Pa.) 184.

To justify granting a new trial, the expression of the opinion of the judge on issues of fact must be distinct and positive (State *v.* Benner, 64 Me. 267), and must appear to have prejudiced the accused (State *v.* Payne, 86 N. C. 609; State *v.* Browning, 78 N. C. 555).

71. Stone *v.* State, 42 Ind. 418.

72. State *v.* Bailey, 60 N. C. 137.

73. Waters *v.* State, 110 Ga. 252, 34 S. E. 212; Westbrook *v.* State, 97 Ga. 189, 22 S. E. 398; Strong *v.* State, 95 Ga. 499, 22 S. E. 299; Done *v.* People, 5 Park. Cr. (N. Y.) 364; State *v.* Harrison, 69 N. C. 264.

Objection and exception see Ayres *v.* State, 21 Tex. App. 399, 17 S. W. 253; Maddox *v.* State, 12 Tex. App. 429.

Overstating the maximum fine and omitting to state the minimum in an instruction, although error, is not ground for a new trial where no prejudice resulted to accused. State *v.* Sands, 77 Mo. 118.

The affidavits for a new trial should affirmatively show wherein the error in the instructions lies. People *v.* Mayes, 113 Cal. 618, 45 Pac. 860.

74. People *v.* Doyell, 48 Cal. 85; Sumner *v.* State, 109 Ga. 142, 34 S. E. 293; Flemister *v.* State, 81 Ga. 768, 7 S. E. 642; State *v.* McLafferty, 47 Kan. 140, 27 Pac. 843; People *v.* Robinson, 2 Park. Cr. (N. Y.) 235. And see *supra*, XIV, G, 28, a.

75. State *v.* Bird, 38 La. Ann. 497; Vanwey *v.* State, 41 Tex. 639; Franklin *v.* State, 2 Tex. App. 8.

76. People *v.* Ah Fong, 12 Cal. 345; Willis *v.* State, 89 Ga. 188, 15 S. E. 32; West *v.*

part of defendant to have the court so charge, where no injury is shown to have resulted to the accused.[77]

(iv) *Instruction Refused.* The refusal to give a proper instruction called for by the evidence or the pleadings, when requested by the accused, or giving it with an erroneous modification, is ground for a new trial,[78] unless the point on which the charge is asked is sufficiently covered by the general charge.[79]

(v) *Cure of Error by Just Verdict.* If the verdict is sustained by the evidence,[80] or if on the whole case substantial justice has been done, and no prejudice to the accused appears,[81] a new trial may properly be refused, although an erroneous or misleading instruction has been given.

j. Summoning and Impaneling Jury — (i) *Disqualification of Officer.* A new trial will not be granted on the ground that the sheriff who summoned the jury was influenced against the accused by the offer of a reward unless the interest of the sheriff in the reward be clearly shown.[82]

(ii) *Ruling on Challenge.* The improper allowance of a challenge by the prosecution,[83] or the erroneous overruling of defendant's challenge to a juror for cause,[84] provided that by reason thereof defendant is compelled to exhaust his peremptory challenges on that juror,[85] is ground for a new trial.

State, 2 Tex. App. 209. And see *supra*, XIV, G, 22, c.

77. *Georgia.*— Thomas *v.* State, 95 Ga. 484, 22 S. E. 315; Jackson *v.* State, 91 Ga. 271, 18 S. E. 298, 44 Am. St. Rep. 22; Barrow *v.* State, 80 Ga. 191, 5 S. E. 64; Brassell *v.* State, 64 Ga. 318; Bowie *v.* State, 19 Ga. 1.

Louisiana.— State *v.* Vickers, 47 La. Ann. 1574, 18 So. 639.

Missouri.— State *v.* Norman, 159 Mo. 531, 60 S. W. 1036.

New Hampshire.— State *v.* Hascall, 6 N. H. 352.

South Carolina.— State *v.* Smith, 10 Rich. 341.

Texas.— Crist *v.* State, 21 Tex. App. 361, 17 S. W. 260.

See 15 Cent. Dig. tit. "Criminal Law," § 2216.

An omission to instruct as to the form of a verdict, if the jury should acquit the accused, is not ground for a new trial, where on the judge's attention being called to it he promptly supplies the omission. Reeves *v.* State, 117 Ga. 38, 43 S. E. 404.

78. Moody *v.* State, 114 Ga. 449, 40 S. E. 242; Terry *v.* State, 17 Ga. 204; Low *v.* People, 2 Park. Cr. (N. Y.) 37; State *v.* Gaskins, 93 N. C. 547; Trammell *v.* State, 10 Tex. App. 467. And see *supra*, XIV, G.

79. *District of Columbia.*— U. S. *v.* McBride, 7 Mackey 371.

Georgia.— Burns *v.* State, 80 Ga. 544, 7 S. E. 88.

Iowa.— State *v.* Schlagel, 19 Iowa 169; State *v.* Rorabacher, 19 Iowa 154.

Missouri.— State *v.* Wissmark, 36 Mo. 592.

North Carolina.—State *v.* Robbins, 48 N. C. 249.

See 15 Cent. Dig. tit. "Criminal Law," § 2217.

80. Ballard *v.* State, 31 Fla. 266, 12 So. 865; Jones *v.* State, 92 Ga. 480, 17 S. E. 859; Wise *v.* State, 34 Ga. 348.

81. *Connecticut.*— State *v.* Thomas, 47 Conn. 546, 36 Am. Rep. 98.

Georgia.— Thurmond *v.* State, 55 Ga. 600; Lewis *v.* State, 33 Ga. 131; Boyd *v.* State, 17 Ga. 194; Johnson *v.* State, 14 Ga. 55.

Illinois.— Long *v.* People, 102 Ill. 331.

Indiana.— Harris *v.* State, 30 Ind. 131.

Michigan.— People *v.* Scott, 6 Mich. 287.

Minnesota.— State *v.* Gut, 13 Minn. 341.

New Jersey.— State *v.* Wells, 1 N. J. L. 424, 1 Am. Dec. 211.

North Carolina.— State *v.* Harris, 46 N. C. 190.

See 15 Cent. Dig. tit. "Criminal Law," § 2218.

82. Armstrong *v.* Com., 22 S. W. 750, 23 S. W. 654, 15 Ky. L. Rep. 344. Thus a sheriff or other officer who is interested in obtaining a reward offered for the conviction of the accused cannot legally summon the jurors. Clapp *v.* State, 94 Tenn. 186, 30 S. W. 214, holding that in such cases it is not necessary that it should affirmatively appear that the rights of the accused were prejudiced.

The relationship of a jury commissioner to the prosecuting witness is not ground for a new trial where it is shown that he did nothing to prejudice the accused. State *v.* Magee, 48 La. Ann. 901, 19 So. 933.

83. People *v.* Stewart, 7 Cal. 140.

Inasmuch as defendant's right to challenge is the right to reject and not the right to select a juror, improperly sustaining an improper challenge by the state is not ground for a new trial if a proper jury is selected. Territory *v.* Roberts, 9 Mont. 12, 22 Pac. 132.

The erroneous rejection of a talesman is not ground for a new trial. Wright *v.* State, 35 Ark. 639; Hurley *v.* State, 29 Ark. 17.

84. Brown *v.* State, 70 Ind. 576.

Failure to challenge, through ignorance of the fact constituting the ground of objection, is not ground for a new trial, where it is not shown that any prejudice resulted. State *v.* Howard, 17 N. H. 171.

85. *California.*— People *v.* McGungill, 41 Cal. 429.

Illinois.— Wilson *v.* People, 94 Ill. 299.

(III) *Errors in Impaneling.* A new trial will not be granted for irregularity in impaneling the jury, unless it has resulted in some actual injury or prejudice to the accused.[86]

(IV) *Form of Oath.* The failure to administer to the jurors the oath prescribed by the statute is ground for a new trial, although another oath was administered, which fact appeared of record.[87]

(V) *Necessity For Timely Objection.* An objection on account of an irregularity in drawing, summoning, returning, or impaneling jurors is waived when it is not made before the verdict, and it cannot thereafter be urged for the first time as ground for a new trial.[88]

k. Disqualification of Jurors — (I) *Discretion of Court and Necessity For Prejudice.* The granting or the refusal of a new trial on account of the disqualification of a juror is within the discretion of the court;[89] but generally

Iowa.— State *v.* Elliott, 45 Iowa 486.

Louisiana.— State *v.* Le Duff, 46 La. Ann. 546, 15 So. 397.

New York.— People *v.* Casey, 96 N. Y. 115.

North Dakota.— Territory *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003.

Texas.— Bolding *v.* State, 23 Tex. App. 172, 4 S. W. 579.

Wisconsin.— Schoeffler *v.* State, 3 Wis. 823.

See 15 Cent. Dig. tit. "Criminal Law," § 2222.

The exhausting of the peremptory challenges before an erroneous ruling on a challenge for cause can be urged as ground for a new trial is held not to be necessary by some courts. The prisoner is not bound to resort to his peremptory challenges unless he desires to do so, and the fact that he does not do so does not preclude him from moving for a new trial on error in overruling a challenge for cause. Brown *v.* State, 70 Ind. 576; People *v.* Bodine, 1 Den. (N. Y.) 281; Dowdy *v.* Com., 9 Gratt. (Va.) 727, 60 Am. Dec. 314.

86. *Georgia.*—Somers *v.* State, 116 Ga. 535, 42 S. E. 779.

Massachusetts.—Com. *v.* Parsons, 139 Mass. 381, 31 N. E. 767.

Minnesota.— State *v.* Brown, 12 Minn. 538.

Mississippi.—Tolbert *v.* State, 71 Miss. 179, 14 So. 462, 42 Am. St. Rep. 454; Browning *v.* State, 33 Miss. 47.

New York.— Ferris *v.* People, 35 N. Y. 125, 31 How. Pr. 140.

South Carolina.— State *v.* Wise, 7 Rich. 412; State *v.* Slack, 1 Bailey 330.

Tennessee.—Hines *v.* State, 8 Humphr. 597.

Virginia.— Tooel *v.* Com., 11 Leigh 714.

See 15 Cent. Dig. tit. "Criminal Law," § 2221.

For example the discharging a juror who had been sworn, on proof of facts occurring out of court (State *v.* Stephens, 11 S. C. 319), or the fact that one not on the venire answers to the name of a juror who was returned and tries the case as such juror (Stripling *v.* State, 77 Ga. 108, 3 S. E. 277; Com. *v.* Spring, 5 Pa. L. J. Rep. 238), or that the accused is prevented by the court from examining a juror for cause, and that no examination is had (U. S. *v.* Alexander, 2 Ida. (Hasb.) 356, 17 Pac. 746), is ground for a new trial.

87. In such case the presumption that the oath prescribed by law was administered, which arises from a simple recital in the record that the jury was sworn, does not apply. Smith *v.* State, 1 Tex. App. 408, 516; State *v.* Davis, 52 Vt. 376.

Failure to swear the jury in the manner provided by statute is not ground for a new trial, unless objected to at the time. Caldwell *v.* State, 12 Tex. App. 302.

88. *California.*— People *v.* McFarlane, 138 Cal. 481, 71 Pac. 568, 72 Pac. 43, 61 L. R. A. 245; People *v.* Coffman, 24 Cal. 230; People *v.* Romero, 18 Cal. 89.

Georgia.— Dover *v.* State, (1900) 34 S. E. 1030; Stewart *v.* State, 66 Ga. 90; Jordan *v.* State, 22 Ga. 545; Mitchell *v.* State, 22 Ga. 211, 68 Am. Dec. 493.

Idaho.— People *v.* Ah Hop, 1 Ida. 698.

Illinois.— Stone *v.* People, 3 Ill. 326.

Louisiana.— State *v.* Robinson, 36 La. Ann. 873; State *v.* Wilson, 36 La. Ann. 864; State *v.* Jackson, 25 La. Ann. 537.

Massachusetts.— Com. *v.* Stowell, 9 Metc. 572.

Missouri.— State *v.* Sansone, 116 Mo. 1, 22 S. W. 617; State *v.* Smith, 114 Mo. 406, 21 S. W. 827.

Nebraska.— Clough *v.* State, 7 Nebr. 320.

New Hampshire.— State *v.* Hascall, 6 N. H. 352.

New York.— People *v.* Cummings, 3 Park. Cr. 343.

North Dakota.— Territory *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003.

Pennsylvania.— Com. *v.* Hoofnagle, 1 Browne 201; Com. *v.* Sallager, 3 Pa. L. J. Rep. 127, 4 Pa. L. J. 511.

South Carolina.— State *v.* Belcher, 13 S. C. 459.

Tennessee.— Johnson *v.* State, 8 Baxt. 450.

Texas.— Garnett *v.* State, (Cr. App. 1900) 60 S. W. 765; Flores *v.* State, (Cr. App. 1899) 53 S. W. 634; Margraves *v.* State, (Cr. App. 1899) 50 S. W. 1016; McMahon *v.* State, 17 Tex. App. 321; Caldwell *v.* State, 12 Tex. App. 302; Hasselmeyer *v.* State, 1 Tex. App. 690; Brill *v.* State, 1 Tex. App. 572; Buie *v.* State, 1 Tex. App. 452.

See 15 Cent. Dig. tit. "Criminal Law," § 2223.

89. *Indiana.*— Moynihan *v.* State, 70 Ind. 126, 36 Am. Rep. 178.

the discretion ought to be exercised to grant a new trial where the objection relates to the moral fitness or partiality of the juror,[90] and the court is of the opinion that injustice has been done the accused by reason of the juror having served.[91]

(II) *Grounds of Disqualification*—(A) *Fixed Opinion.* An opinion by a juror with regard to the guilt of the accused, the expression of which will constitute a disqualification sufficient to furnish ground for a new trial, must be a fixed, deliberate, and determined one[92] or a settled prejudice[93] which cannot be removed or overcome by evidence.

(B) *Prejudicial Expressions After Being Sworn.* The expression of an opinion adverse to defendant during the trial after the evidence is in[94] or after the verdict[95] does not necessarily show that the juror was prejudiced at the time he was sworn and is not ground for a new trial.

(C) *Non-Residence.* A new trial will not be granted solely because a juror was incompetent on account of non-residence, although this fact was unknown to the accused at the trial.[96]

Missouri.— State *v.* Dusenberry, 112 Mo. 277, 20 S. W. 461; State *v.* Taylor, 64 Mo. 358.

Nebraska.—Murphey *v.* State, 43 Nebr. 34, 61 N. W. 491; Lamb *v.* State, 41 Nebr. 356, 59 N. W. 895.

North Carolina.—State *v.* Lambert, 93 N. C. 618.

Pennsylvania.— McClain *v.* Com., 110 Pa. St. 263, 1 Atl. 45.

South Dakota.— State *v.* Andre, 14 S. D. 215, 84 N. W. 783.

Texas.— Shaw *v.* State, 27 Tex. 750.

Virginia.— State *v.* McDonald, 9 W. Va. 456.

See 15 Cent. Dig. tit. "Criminal Law," § 2225.

90. Presbury *v.* Com., 9 Dana (Ky.) 203.

91. *Maine.*— State *v.* Neagle, 65 Me. 468.

New Hampshire.— State *v.* Howard, 17 N. H. 171.

North Carolina.— State *v.* Moore, 120 N. C. 565, 26 S. E. 629.

Texas.— Mays *v.* State, 36 Tex. Cr. 437, 37 S. W. 721; Williamson *v.* State, 36 Tex. Cr. 225, 36 S. W. 444.

Virginia.— Com. *v.* Jones, 1 Leigh 598.

West Virginia.— State *v.* Howes, 26 W. Va. 110; State *v.* Greer, 22 W. Va. 800; State *v.* Williams, 14 W. Va. 851; State *v.* McDonald, 9 W. Va. 456.

See 15 Cent. Dig. tit. "Criminal Law," § 2225.

92. *Florida.*—Jordan *v.* State, 22 Fla. 528.

Georgia.— Ash *v.* State, 56 Ga. 583; McGuffie *v.* State, 17 Ga. 497.

Illinois.— Collins *v.* People, 194 Ill. 506, 62 N. E. 902.

Pennsylvania.— Com. *v.* Fry, 198 Pa. St. 379, 48 Atl. 257.

South Carolina.—State *v.* Hopkins, 15 S. C. 153.

Texas.— Wilkerson *v.* State, (Cr. App. 1899) 57 S. W. 956; Aud *v.* State, 36 Tex. Cr. 76, 35 S. W. 671.

Utah.— State *v.* Mickle, 25 Utah 179, 70 Pac. 856.

Virginia.— Hodges *v.* Com., 89 Va. 265, 15 S. E. 513; *In re* Curran, 7 Gratt. 619.

Illustrations.— An opinion expressed in a hypothetical form, based on facts as to the existence of which no opinion is expressed (Mercer *v.* State, 17 Ga. 146; Mitchum *v.* State, 11 Ga. 615; Bishop *v.* State, 9 Ga. 121; Loeffner *v.* State, 10 Ohio St. 598; Com. *v.* Fry, 198 Pa. St. 379, 48 Atl. 257; Kennedy *v.* Com., 2 Va. Cas. 510; Com. *v.* Hughes, 5 Rand. (Va.) 655; State *v.* Gile, 8 Wash. 12, 35 Pac. 417) or an opinion based on hearsay or mere rumors (Hill *v.* State, 91 Ga. 153, 16 S. E. 976; State *v.* Bone, 52 N. C. 121; Spence *v.* State, 15 Lea (Tenn.) 539; Howerton *v.* State, Meigs (Tenn.) 262; Poore *v.* Com., 2 Va. Cas. 474) is not ground for a new trial.

The test is the mental neutrality of the juror, and if he possesses this, the fact that he has some knowledge of the case or a transient opinion or impression does not disqualify him. If he believes that such impressions will disappear before the evidence he is competent. Myers *v.* State, 97 Ga. 76, 25 S. E. 252.

93. State *v.* Greer, 22 W. Va. 800.

The opinion must be of that fixed character which repels the presumption of innocence, and whereby in the juror's mind the accused is condemned already. People *v.* Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501.

He may explain his statements, and if they were made simply to avoid jury duty, a new trial need not be granted. State *v.* Robinson, 9 Houst. (Del.) 401, 33 Atl. 57; Hill *v.* State, 64 Ga. 453; Simms *v.* State, 8 Tex. App. 230.

94. State *v.* Cook, 52 La. Ann. 114, 26 So. 751.

Where a juror denies on his examination that he is prejudiced against the accused or has formed an opinion on the case, and afterward, during the deliberation of the jury, expresses an opinion adverse to defendant based upon facts within his personal knowledge, a new trial should be granted. State *v.* Parker, 25 Wash. 405, 65 Pac. 776.

95. State *v.* Anderson, 14 Mont. 541, 37 Pac. 1.

96. *Florida.*— State *v.* Madoil, 12 Fla. 151.

Georgia.— Meeks *v.* State, 57 Ga. 329; Costly *v.* State, 19 Ga. 614.

(D) *Relationship.* The fact that unknown to the accused one of the jurors was related to the prosecutor,[97] to a material witness for the prosecution,[98] to the accused,[99] or to the person whom the accused is charged to have killed,[1] or that defendant's wife and the wife of a juror were related within the prohibited degrees,[2] is not alone ground for a new trial.

(E) *Age.* Defendant should have a new trial where, having used due diligence, he and his counsel fail to discover until after the verdict that a juror was incompetent by reason of his age.[3]

(F) *Juror an Atheist.* An objection merely that a juror is an atheist, which fact was not known when he was sworn, is not ground for a new trial.[4]

(G) *Person Personating Juror.* The fact that one not summoned personates one who is on the venire, sits on the jury, and joins in the verdict unknown to the accused and his counsel, and without laches on their part, is ground for a new trial.[5]

(H) *Insanity.* The insanity of a juror is not ground for a new trial if known to the accused or to his counsel at the trial, and he was not challenged.[6]

(I) *Member of Grand Jury or of Previous Jury.* As a general rule the objection that a juror has been a member of the grand jury which found the indictment should be taken by challenge.[7] And so the fact that a juror states on his examination that he did not know defendant, and that if he had ever seen him he had forgotten him, when as a matter of fact he had been a member of

Louisiana.— State *v.* Labauve, 46 La. Ann. 548, 15 So. 172.

Texas.— Martinez *v.* State, (Cr. App. 1900) 57 S. W. 838; Sutton *v.* State, 31 Tex. Cr. 297, 20 S. W. 564; O'Mealy *v.* State, 1 Tex. App. 180.

United States.— Fisher *v.* Yoder, 53 Fed. 565.

See 15 Cent. Dig. tit. "Criminal Law," § 2225 *et seq.*

It is safer for defendant to bring out the non-residence of the juror on the *voir dire.* Hickey *v.* State, 12 Nebr. 490, 11 N. W. 744.

97. Hamilton *v.* State, 101 Tenn. 417, 47 S. W. 695. *Contra,* Brown *v.* State, 28 Ga. 439.

98. Daniels *v.* State, 88 Ala. 220, 7 So. 337; Templeton *v.* State, (Tex. Cr. App. 1900) 57 S. W. 831.

99. Downing *v.* State, 114 Ga. 30, 39 S. E. 927; Sikes *v.* State, 105 Ga. 592, 31 S. E. 567; State *v.* Congdon, 14 R. I. 458.

1. Traviss *v.* Com., 106 Pa. St. 597; Baker *v.* State, 4 Tex. App. 223.

One related by blood or marriage to a party within the ninth degree is disqualified from being a juror at common law. A new trial will be granted where a juror in a capital case was the second cousin of the deceased, although this was unknown to defendant and to the juror until after the verdict. State *v.* Williams, 9 Houst. (Del.) 508, 18 Atl. 949.

2. Cartwright *v.* State, 12 Lea (Tenn.) 620.

3. U. S. *v.* Angney, 6 Mackey (D. C.) 66; State *v.* Nash, 45 La. Ann. 1137, 13 So. 732, 734.

A failure to examine and to challenge in respect to incompetency as to age waives this objection as ground for a new trial. State *v.* Brockhaus, 72 Conn. 109, 43 Atl. 850; Cohron *v.* State, 20 Ga. 752; People *v.* Morrissey, 1 Sheld. (N. Y.) 295.

4. State *v.* Davis, 80 N. C. 412; McClure *v.* State, 1 Yerg. (Tenn.) 206.

5. McGill *v.* State, 34 Ohio St. 228; Com. *v.* Spring, 5 Pa. L. J. Rep. 238. But see Tolbert *v.* State, 71 Miss. 179, 14 So. 462, 42 Am. St. Rep. 454, holding that where a person of the same name as the juror drawn is summoned by mistake and serves on the jury, and there is nothing to impugn the fairness of the trial, a new trial should not be granted.

6. Mackin *v.* People, 115 Ill. 312, 3 N. E. 222; Douthitt *v.* State, 144 Ind. 397, 42 N. E. 907.

7. If therefore defendant neglect to examine for, and make this objection on, the *voir dire,* he cannot move for a new trial on this ground.

Georgia.— Jones *v.* State, 95 Ga. 497, 20 S. E. 211.

Louisiana.— State *v.* Smith, 41 La. Ann. 688, 6 So. 546.

Ohio.— Beck *v.* State, 20 Ohio St. 228.

South Carolina.— State *v.* O'Driscoll, 2 Bay 153.

Tennessee.— Gillespie *v.* State, 8 Yerg. 507, 29 Am. Dec. 137.

Texas.— Franklin *v.* State, 2 Tex. App. 8.

Virginia.— Bristow *v.* Com., 15 Gratt. 634.

See 15 Cent. Dig. tit. "Criminal Law," § 2237.

Where a juror states on his examination that he has not formed or expressed an opinion as to the guilt or innocence of the accused, it may be inferred that he was not a member of the grand jury, and if he was, a new trial should be granted, although he was not directly questioned as to this fact (Rice *v.* State, 16 Ind. 298; U. S. *v.* Christensen, 7 Utah 26, 24 Pac. 618), **particularly where the names of the grand jury are not indorsed on the indictment** (Bennet *v.* State, 24 Wis. 57).

another jury who had tried and convicted defendant, is not ground for a new trial where the statements of the juror were made in good faith.[8]

(J) *Ignorance of English.* The objection that a juror does not understand the English language should be made by challenge, and comes too late when it is urged on a motion for a new trial.[9]

(K) *Alienage.* An objection that one of the jurors is an alien must if known to the accused be taken by challenge, and it cannot be made for the first time on a motion for a new trial.[10]

(L) *Physical Incapacity.* The illness of a juror during the trial is not ground for a new trial, unless it appears that he was so ill as to be unable to give careful and conscientious attention to the evidence and issues, or that the verdict does not express his deliberate conviction of defendant's guilt.[11]

(M) *Deputy Sheriff on Panel.* A new trial should be granted where one of the jurors is a deputy sheriff, and the sheriff has a pecuniary interest in securing a conviction.[12]

(III) KNOWLEDGE OF DISQUALIFICATION AT TIME OF ACCEPTANCE. When an objection would have been good ground to challenge a juror for favor, if known to the accused when he was sworn, it will be ground for a new trial only when discovered after verdict.[13]

8. Fitzpatrick *v.* People, 98 Ill. 269.

9. State *v.* Madigan, 57 Minn. 425, 59 N. W. 490; Drake *v.* State, 5 Tex. App. 649. But see Com. *v.* Jones, 12 Phila. (Pa.) 550.

10. *California.*— People *v.* Chung Lit, 17 Cal. 320.

Colorado.— Jones *v.* People, 2 Colo. 351.

Louisiana.—State *v.* Bird, 38 La. Ann. 497; State *v.* Bower, 26 La. Ann. 383.

Mississippi.— Seal *v.* State, 13 Sm. & M. 286.

South Carolina.— State *v.* Quarrel, 2 Bay 150, 1 Am. Dec. 637.

Texas.— Yanez *v.* State, 6 Tex. App. 429, 32 Am. Rep. 591.

See 15 Cent. Dig. tit. "Criminal Law," § 2229.

If a juror states on his examination that he is a citizen and defendant has no reason to doubt the statement, he need not pursue the investigation further, and if it subsequently appears that the juror is an alien a new trial should be granted. Armendares *v.* State, 10 Tex. App. 44; People *v.* Reece, 3 Utah 72, 2 Pac. 61.

It is defendant's duty to question the jurors on the voir dire as to their qualifications, and if he fails to do so he waives an objection on this point. Com. *v.* Thompson, 4 Phila. (Pa.) 215.

Under a statute which requires jurors to be electors an affidavit that a juror was an unnaturalized alien is insufficient to show that the juror is disqualified, where aliens who have declared their intentions to become citizens and have complied with the statute requiring residence are entitled to vote. People *v.* Rosevear, 56 Mich. 158, 22 N. W. 276; People *v.* Scott, 56 Mich. 154, 22 N. W. 274.

11. Clemmons *v.* State, 43 Fla. 200, 30 So. 699; Surles *v.* State, 89 Ga. 167, 15 S. E. 38; People *v.* Buchanan, 25 N. Y. Suppl. 481; Hogshead *v.* State, 6 Humphr. (Tenn.) 59.

The fact that the hearing of a juror is imperfect, although unknown to accused until after verdict, is not alone ground for a new trial, where he neglects to examine and challenge the juror for this objection when he is impaneled. Drake *v.* State, 5 Tex. App. 649; U. S. *v.* Baker, 24 Fed. Cas. No. 14,499, 3 Ben. 68.

The temporary illness of a juror after retirement, the jury's deliberation being suspended until his recovery (Hughes *v.* People, 116 Ill. 330, 6 N. E. 55), or a juror's illness while counsel for the prisoner was addressing the jury, the juror being, by order of the court, placed upon a pallet, where he drowsed and did not fully comprehend the argument, although he heard all the evidence, defendant knowing he was asleep but making no objection (Baxter *v.* People, 8 Ill. 368), is not ground for a new trial.

The California statute allowing a new trial when the verdict results from any means "other than a fair expression of opinion on the part of all the jurors" does not include the illness of a juror, by which defendant claims he was prevented from exercising that "keen judgment or calm deliberation" required for the discharge of his duties. People *v.* Brown, 76 Cal. 573, 18 Pac. 678.

12. Gaff *v.* State, 155 Ind. 277, 58 N. E. 74, 80 Am. St. Rep. 235.

13. Burroughs *v.* State, 33 Ga. 403; Monroe *v.* State, 5 Ga. 85; State *v.* Whitesides, 49 La. Ann. 352, 21 So. 540; Read *v.* State, (Tex. App. 1889) 12 S. W. 413.

Lack of notice.— The prejudice of the juror, or other objection to his competency, is no ground for a new trial unless it be shown that both defendant and his counsel learned of it for the first time after trial, and that they were diligent in examining the juror as to his qualifications on the *voir dire.*

Arizona.— Chartz *v.* Territory, (1893) 32 Pac. 166.

Connecticut.— State *v.* Tuller, 34 Conn. 280.

Florida.— Kelly *v.* State, 39 Fla. 122, 22 So. 303; Irvin *v.* State, 19 Fla. 872; State *v.* Madoil, 12 Fla. 151.

(IV) *Falsehood by Juror on Voir Dire.* The incompetency of a juror because of bias is ground for a new trial when discovered after verdict, where he denied bias and prejudice on his *voir dire.*[14]

(V) *Waiver of Objection.* Where the accused fails to examine a juror for bias,[15] or, bias being disclosed, fails to challenge,[16] he cannot urge this objection on a motion for a new trial.

Georgia.— Lyman *v.* State, 69 Ga. 404; Keener *v.* State, 18 Ga. 194, 63 Am. Dec. 269; Anderson *v.* State, 14 Ga. 709.

Indiana.— Kennegar *v.* State, 120 Ind. 176, 21 N. E. 917; Mergentheim *v.* State, 107 Ind. 567, 8 N. E. 568; Aehey *v.* State, 64 Ind. 56.

Iowa.— State *v.* Moats, 108 Iowa 13, 78 N. W. 701.

Kansas.— State *v.* Ready, 44 Kan. 697, 700, 26 Pac. 58.

Kentucky.— Fowler *v.* Com., 7 Ky. L. Rep. 528.

Louisiana.— State *v.* Giron, 52 La. Ann. 491, 26 So. 985; State *v.* Glass, 7 La. Ann. 122.

Michigan.— People *v.* Rosevear, 56 Mich. 158, 22 N. W. 270; People *v.* Scott, 56 Mich. 154, 22 N. W. 274.

Mississippi.—Brown *v.* State, 60 Miss. 447; George *v.* State, 39 Miss. 570.

Missouri.— State *v.* Noeton, 121 Mo. 537, 26 S. W. 551.

Nebraska.— Clough *v.* State, 7 Nebr. 320.

Nevada.— State *v.* Marks, 15 Nev. 33.

New Hampshire.—State *v.* Daniels, 44 N. H. 383.

North Carolina.— State *v.* Patrick, 48 N. C. 443.

Oregon.— State *v.* Powers, 10 Oreg. 145, 45 Am. Rep. 138.

South Carolina.— State *v.* Billis, 2 McCord 12; State *v.* Fisher, 2 Nott & M. 261.

Tennessee.— State *v.* Cole, 9 Humphr. 626.

Texas.— Matkins *v.* State, 33 Tex. Cr. 605, 28 S. W. 536; Lester *v.* State, 2 Tex. App. 432; Trueblood *v.* State, 1 Tex. App. 650.

See 15 Cent. Dig. tit. "Criminal Law," § 2225 *et seq.*

Knowledge of accused.— Where the prejudice or bias is known to the accused but not to his counsel it is inexcusable negligence on the part of the former not to inform his counsel. State *v.* Bussamus, 108 Iowa 11, 78 N. W. 700; State *v.* Burns, 85 Mo. 47.

14. *Georgia.*—Turner *v.* State, 111 Ga. 217, 36 S. E. 686.

Illinois.— Sellers *v.* People, 4 Ill. 412.

Iowa.— State *v.* Shelledy, 8 Iowa 477.

Louisiana.— State *v.* Harper, 51 La. Ann. 163, 24 So. 796.

Mississippi.—Jeffries *v.* State, 74 Miss. 675, 21 So. 526.

Missouri.— State *v.* Gonee, 87 Mo. 627; State *v.* Wyatt, 50 Mo. 309; State *v.* Burnside, 37 Mo. 343; State *v.* Ross, 29 Mo. 32.

New York.— Willis *v.* People, 32 N. Y. 715.

Ohio.— Parks *v.* State, 4 Ohio St. 234; Busick *v.* State, 19 Ohio 198.

Oregon.— State *v.* McDaniel, 39 Oreg. 161, 65 Pac. 520.

Tennessee.— Troxdale *v.* State, 9 Humphr. 411.

Texas.— Washburn *v.* State, 31 Tex. Cr. 352, 20 S. W. 715; Graham *v.* State, 28 Tex. App. 582, 13 S. W. 1010.

Utah.— State *v.* Mickle, 25 Utah 179, 70 Pac. 856; State *v.* Thompson, 24 Utah 314, 67 Pac. 789; State *v.* Morgan, 23 Utah 212, 64 Pac. 356.

See 15 Cent. Dig. tit. "Criminal Law," § 2225 *et seq.*

Illustrations.— If a juror tells the person assaulted that he is well acquainted with his ease and will do all that he can for him (Hanks *v.* State, 21 Tex. 526), or if before the trial he shows bias and prejudiee generally as regards the class of crimes of which defendant is accused (U. S. *v.* Upham, 2 Mont. 170), or states that he is determined to hang the prisoner (State *v.* Hopkins, 1 Bay (S. C.) 372), or says that the prisoner ought to be hung (Monerief *v.* State, 59 Ga. 470; Henrie *v.* State, 41 Tex. 573; Fries' Case, 9 Fed. Cas. No. 5,126, 3 Dall. 515), and that the community will not be safe until this is done, and on his examination states that he is impartial, a strong ease of prejudiee is made out, which is ground for a new trial.

Defendant, it has been held, must show by the record that the juror was sworn, when examined as to his expression of an opinion (State *v.* Shelledy, 8 Iowa 477), but usually it will be presumed that the juror was sworn, and if defendant supposed that he had been sworn and relied upon his statement in acceepting him, the state eannot be permitted, where the juror has a fixed opinion, to deprive defendant of his new trial by proof that the juror was not sworn (State *v.* Wright, 112 Iowa 436, 84 N. W. 541).

15. *Arkansas.*— Werner *v.* State, 44 Ark. 122; Collier *v.* State, 20 Ark. 36.

California.— People *v.* Mortimer, 46 Cal. 114 [*following* People *v.* Fair, 43 Cal. 137].

Georgia.— Kelly *v.* State, 19 Ga. 425.

Indiana.— Romaine *v.* State, 7 Ind. 63.

Mississippi.— Brown *v.* State, 60 Miss. 447.

Nevada.— State *v.* Anderson, 4 Nev. 265.

South Carolina.— State *v.* Robertson, 54 S. C. 147, 31 S. E. 868; State *v.* Coleman, 8 S. C. 237.

See 15 Cent. Dig. tit. "Criminal Law," § 2225 *et seq.*

16. Murphey *v.* State, 43 Nebr. 34, 61 N. W. 491; Ogden *v.* State, 13 Nebr. 436, 14 N. W. 165; Givens *v.* State, 6 Tex. 343. *Contra,* Hanks *v.* State, 21 Tex. 526; McMahon *v.* State, 17 Tex. App. 321; Nash *v.* State, 2 Tex. App. 362.

A distinction may be taken between objections whieh are solely grounds of ehallenge and positive disqualifieations of the juror. In the former case the objeetion must be ascertained and the right to challenge exercised

(VI) *TRIER A MEMBER OF PANEL.* An objection that one of the triers on a challenge for bias is on the panel is not ground for a new trial.[17]

(VII) *EXEMPTION FROM SERVICE.* A new trial will not be ordered solely because a juror served who was exempt.[18]

(VIII) *ORDERING A SPECIAL JURY.* Where the court, over the objection of defendant, orders a special jury and proceeds to try a case before the day previously fixed for such trial, and for which the regular jurors had been summoned, a new trial should be granted.[19]

l. Misconduct of Jurors and of Others Affecting Them — (I) *IN GENERAL.* All of the courts no doubt agree that any misconduct on the part of the jurors in a criminal case which was prejudicial to defendant, or any such misconduct on the part of the judge, officer in charge, or outsiders, improperly influencing the jurors, not caused nor waived by defendant, is ground for setting aside a conviction and granting a new trial.[20] On the other hand as a general rule a new trial will not be granted where it clearly appears that defendant has not been injured or prejudiced by the misconduct.[21]

before the juror is sworn, and whether the objection is known to defendant or not, the defect or irregularity is cured by the verdict, and it is not ground for a new trial; but where the disqualification is a positive one, the trial would have been a nullity to the same extent as though it had been without a jury where defendant had a right to it. The positive disqualification usually cannot be waived, although the right to challenge may be. State *v.* Jackson, 27 Kan. 581, 41 Am. Rep. 424.

A general question "whether any juror on the panel knows any reason why he should not sit as a juror in this case" without more, precludes a new trial on objections which might have been discovered by ordinary inquiries. Wood *v.* State, 62 Miss. 220.

17. People *v.* Voll, 43 Cal. 166.

18. The exemption does not disqualify, but is a mere personal privilege which he may waive. U. S. *v.* Lee, 4 Mackey (D. C.) 489, 54 Am. Rep. 293; State *v.* Forshner, 43 N. H. 89, 80 Am. Dec. 132; Com. *v.* Laird, 14 York Leg. Rec. 128.

19. Wilson *v.* State, 42 Ind. 224, holding that a statute authorizing the court to order a special jury whenever the business of the court requires it does not apply to such cases.

20. *Alabama.*— Brister *v.* State, 26 Ala. 107.

Arkansas.— Vaughan *v.* State, 57 Ark. 1, 20 S. W. 588.

California.— People *v.* Mitchell, 100 Cal. 328, 34 Pac. 698; People *v.* Turner, 39 Cal. 370.

Georgia.— Shaw *v.* State, 83 Ga. 92, 9 S. E. 768; Springer *v.* State, 34 Ga. 379.

Indiana.— Brown *v.* State, 137 Ind. 240, 36 N. E. 1108, 45 Am. St. Rep. 180; Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760.

Kansas.— State *v.* Dugan, 52 Kan. 23, 34 Pac. 409.

Louisiana.— State *v.* Langford, 45 La. Ann. 1177, 14 So. 181, 40 Am. St. Rep. 277.

Massachusetts.— Com. *v.* Poisson, 157 Mass. 510, 32 N. E. 906.

Mississippi.— Cartwright *v.* State, 71 Miss. 82, 14 So. 526; Brown *v.* State, 69 Miss. 398, 10 So. 579.

Missouri.— State *v.* Hill, 91 Mo. 423, 4 S. W. 121.

Nebraska.— Richards *v.* State, 36 Nebr. 17, 53 N. W. 1027.

Texas.— Williams *v.* State, 33 Tex. Cr. 128, 25 S. W. 629, 28 S. W. 958, 47 Am. St. Rep. 21; McWilliams *v.* State, 32 Tex. Cr. 269, 22 S. W. 970.

Washington.— State *v.* Place, 5 Wash. 773, 32 Pac. 736.

Wisconsin.— *In re* Keenan, 7 Wis. 695.

See 15 Cent. Dig. tit. "Criminal Law," § 2238 *et seq.*

Prosecuting counsel keeping juror's horse free of charge.—Springer *v.* State, 34 Ga. 379.

Remarks by jurors to outsiders which do not plainly show a disposition to act improperly are not such misconduct as will require a new trial. People *v.* McCurdy, 68 Cal. 576, 10 Pac. 207; State *v.* Stubblefield, 157 Mo. 360, 58 S. W. 337; People *v.* Cullen, 5 N. Y. Suppl. 886. But it was held otherwise where a juror, on a witness for the accused answering a question which the juror had asked, replied that the witness had knowingly testified to a falsehood and that the witness was aware that the juror knew it. Smalls *v.* State, 102 Ga. 31, 29 S. E. 153.

21. *Arkansas.*— Wright *v.* State, 35 Ark. 639.

California.— People *v.* Boggs, 20 Cal. 432; People *v.* Lee, 17 Cal. 76.

Delaware.— State *v.* Harrigan, 9 Houst. 369, 31 Atl. 1052.

Georgia.— Cornwall *v.* State, 91 Ga. 277, 18 S. E. 154; Hunter *v.* State, 43 Ga. 483; State *v.* Fox, Ga. Dec. 35.

Idaho.— State *v.* Reed, 3 Ida. 754, 35 Pac. 706.

Illinois.— Reins *v.* People, 30 Ill. 256.

Indiana.— Medler *v.* State, 26 Ind. 171; Whelchell *v.* State, 23 Ind. 89.

Iowa.— State *v.* Allen, 89 Iowa 49, 56 N. W. 261; State *v.* Bruce, 48 Iowa 530, 30 Am. Rep. 403.

Kansas.— State *v.* Gould, 40 Kan. 258, 19 Pac. 739; State *v.* McKinney, 31 Kan. 570, 3 Pac. 356.

Maryland.— Stout *v.* State, 76 Md. 317, 25 Atl. 299.

(II) *Participation or Waiver by Defendant.* As a rule if the party asking for a new trial participated in the misconduct,[22] or knowing of it failed to call the attention of the court promptly to it and move for the dismissal of the jury,[23] he cannot urge it as ground for a new trial.

(III) *Presumption as to Prejudice.* Beyond this, however, the cases are conflicting. Some hold that if such misconduct might have been prejudicial to defendant, prejudice will be presumed, particularly in capital cases, and that a new trial must be granted unless this presumption is rebutted by affirmatively showing that there was in fact no prejudice.[24] A few cases hold that in capital cases at least prejudice will be conclusively presumed and a new trial granted if there may have been prejudice.[25] Others hold generally that prejudice will not be presumed, at least unless a probability of prejudice appears,[26] and that a new trial will not be granted unless defendant affirmatively shows that he has been prejudiced.[27]

(IV) *Particular Acts of Misconduct* — (A) *Communications or Conversations With or in Presence of Jurors.*[28] It may be laid down as a general rule

Massachusetts.— Com. *v.* White, 148 Mass. 429, 19 N. E. 222; Com. *v.* Roby, 12 Pick. 496.

Minnesota.— State *v.* Madigan, 57 Minn. 425, 59 N. W. 490.

Mississippi.— Pope *v.* State, 36 Miss. 121; Browning *v.* State, 33 Miss. 47.

Missouri.— State *v.* Fairlamb, 121 Mo. 137, 25 S. W. 895.

Nebraska.— Carleton *v.* State, 43 Nebr. 373, 61 N. W. 699.

New Hampshire.—State *v.* Prescott, 7 N. H. 287.

New York.— People *v.* Douglass, 4 Cow. 26, 15 Am. Dec. 332.

North Carolina.— State *v.* Crane, 110 N. C. 530, 15 S. E. 231; State *v.* Gould, 90 N. C. 658.

Pennsylvania.— Com. *v.* Manfredi, 162 Pa. St. 144, 29 Atl. 404.

Rhode Island.— State *v.* O'Brien, 7 R. I. 336.

South Carolina.— State *v.* Way, 38 S. C. 333, 17 S. E. 39.

Tennessee.— King *v.* State, 91 Tenn. 617, 20 S. W. 169.

Texas.— Pickens *v.* State, 31 Tex. Cr. 554, 21 S. W. 362.

Virginia.—Thompson *v.* Com., 8 Gratt. 637.

West Virginia.— State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224.

United States.— U. S. *v.* Daubner, 17 Fed. 793.

See 15 Cent. Dig. tit. "Criminal Law," § 2238 *et seq.*

22. U. S. *v.* Salentine, 27 Fed. Cas. No. 16,213, 8 Biss. 404.

23. State *v.* Floyd, 61 Minn. 467, 63 N. W. 1096; People *v.* Flack, 57 Hun (N. Y.) 83, 10 N. Y. Suppl. 475, 8 N. Y. Cr. 43. *Compare*, however, People *v.* Tyrrell, 3 N. Y. Cr. 142.

24. *Alabama.*— Butler *v.* State, 72 Ala. 179.

Arkansas.— Wood *v.* State, 34 Ark. 341, 36 Am. Rep. 13; McKenzie *v.* State, 26 Ark. 334; Thompson *v.* State, 26 Ark. 323.

California.— People *v.* Thornton, 74 Cal. 482, 16 Pac. 244; People *v.* Turner, 39 Cal. 370; People *v.* Brannigan, 21 Cal. 337; People *v.* Backus, 5 Cal. 275.

Florida.— Gamble *v.* State, (1902) 33 So. 471.

Georgia.— Westmoreland *v.* State, 45 Ga. 225.

Indiana.— Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760.

Kansas.— State *v.* O'Connor, 6 Kan. App. 770, 50 Pac. 949.

Massachusetts.—Com. *v.* Poisson, 157 Mass. 510, 32 N. E. 906.

Mississippi.— Carter *v.* State, 78 Miss. 348, 29 So. 148; Organ *v.* State, 26 Miss. 78.

New Hampshire.— State *v.* Prescott, 7 N. H. 287.

Ohio.— Weis *v.* State, 22 Ohio St. 486.

Utah.— State *v.* Morgan, 23 Utah 212, 64 Pac. 356.

Wisconsin.— State *v.* Dolling, 37 Wis. 396.

See 15 Cent. Dig. tit. "Criminal Law," § 2238 *et seq.*

25. *Louisiana.*— State *v.* Foster, 45 La. Ann. 1176, 14 So. 180.

Minnesota.— Maher *v.* State, 3 Minn. 444.

Missouri.— McLean *v.* State, 8 Mo. 153.

Tennessee.— McLain *v.* State, 10 Yerg. 241, 31 Am. Dec. 573.

Virginia.— Com. *v.* McCaul, 1 Va. Cas. 271.

26. Shaw *v.* State, 83 Ga. 92, 9 S. E. 768; Medler *v.* State, 26 Ind. 171; Whelchell *v.* State, 23 Ind. 89.

27. *California.*— People *v.* Williams, 24 Cal. 31; People *v.* Colmere, 23 Cal. 631; People *v.* Boggs, 20 Cal. 432; People *v.* Lee, 17 Cal. 76.

Iowa.— State *v.* Beasley, 84 Iowa 83, 50 N. W. 570.

Kansas.— State *v.* Gould, 40 Kan. 258, 19 Pac. 739.

Louisiana.— State *v.* Walls, 52 La. Ann. 1002, 27 So. 537.

United States.— U. S. *v.* Daubner, 17 Fed. 793; U. S. *v.* Swett, 28 Fed. Cas. No. 16,427, 2 Hask. 310.

See 15 Cent. Dig. tit. "Criminal Law," § 2238 *et seq.*

28. **Remarks and applause of bystanders** see *infra*, XV, A, 2, l, (IV), (N).

that if the jurors in a criminal case are permitted to converse or communicate with outsiders, or if they so converse or communicate without permission, or if they are permitted by the judge or officer in charge to be or remain where they may hear remarks or conversations of outsiders, or be otherwise subjected to improper influence, and defendant is thereby prejudiced, a new trial must be granted;[29] but a new trial will not be granted if defendant has not been prejudiced by the irregularity.[30] Some of the cases hold that defendant must show

29. *Alabama.*— Butler *v.* State, 72 Ala. 179.

Arkansas.— Vaughan *v.* State, 57 Ark. 1, 20 S. W. 588 (holding that a new trial should be granted where, after the case was submitted to the jury, some of the jurors were allowed to stand on the court-house porch, where they could hear citizens discussing the merits of the case and insisting on defendant's guilt); Woods *v.* State, 34 Ark. 341, 36 Am. Rep. 13.

California.— People *v.* Mitchell, 100 Cal. 328, 34 Pac. 698.

Georgia.— Shaw *v.* State, 83 Ga. 92, 9 S. E. 768.

Illinois.— Dempsey *v.* People, 47 Ill. 323.

Mississippi.— Boles *v.* State, 13 Sm. & M. 398.

Missouri.— State *v.* Degonia, 69 Mo. 485.

New Hampshire.—State *v.* Hascall, 6 N. H. 352.

New York.— People *v.* Gallo, 149 N. Y. 106, 43 N. E. 529.

North Carolina.— State *v.* Brittain, 89 N. C. 481; State *v.* Tilghman, 33 N. C. 513.

Tennessee.— Clapp *v.* State, 94 Tenn. 186, 30 S. W. 214.

Texas.— Darter *v.* State, 39 Tex. Cr. 40, 44 S. W. 850.

Virginia.— Com. *v.* Wormley, 8 Gratt. 712, 56 Am. Dec. 162.

See 15 Cent. Dig. tit. "Criminal Law," §§ 2238, 2240, 2247. And see *supra*, XIV, J, 4, c.

30. *Alabama.*— Butler *v.* State, 72 Ala. 179.

Arkansas.— McKenzie *v.* State, 26 Ark. 334; Thompson *v.* State, 26 Ark. 323; Collier *v.* State, 20 Ark. 36.

California.— People *v.* Kelly, 46 Cal. 355; People *v.* Symonds, 22 Cal. 348; People *v.* Boggs, 20 Cal. 432; People *v.* Lee, 17 Cal. 76.

Colorado.—Chesnut *v.* People, 21 Colo. 512, 42 Pac. 656.

Delaware.— State *v.* Harrigan, 9 Houst. 369, 31 Atl. 1052.

Georgia.— Cornwall *v.* State, 91 Ga. 277, 18 S. E. 154; Surles *v.* State, 89 Ga. 167, 15 S. E. 38; Hill *v.* State, 64 Ga. 453; Burtine *v.* State, 18 Ga. 534; Doyal *v.* State, 70 Ga. 134; Epps *v.* State, 19 Ga. 102.

Indiana.— Masterson *v.* State, 144 Ind. 240, 43 N. E. 138.

Iowa.— State *v.* Allen, 89 Iowa 49, 56 N. W. 261.

Kentucky.— Baskett *v.* Com., 44 S. W. 970, 19 Ky. L. Rep. 1995; Bryan *v.* Com., 33 S. W. 95, 17 Ky. L. Rep. 965; Fowler *v.* Com., 7 Ky. L. Rep. 528.

Louisiana.— State *v.* Dorsey, 40 La. Ann. 739, 5 So. 26.

Massachusetts.— Com. *v.* Roby, 12 Pick. 496.

Mississippi.— Taylor *v.* State, (1901) 30 So. 657; Browning *v.* State, 33 Miss. 47; Boles *v.* State, 13 Sm. & M. 398.

Missouri.—State *v.* Fairlamb, 121 Mo. 137, 25 S. W. 895; State *v.* Howell, 117 Mo. 307, 23 S. W. 263; State *v.* Igo, 21 Mo. 459.

New Hampshire.— State *v.* Ayer, 23 N. H. 301.

New York.— People *v.* Flack, 9 N. Y. Suppl. 279, 24 Abb. N. Cas. 444, 8 N. Y. Cr. 31.

North Carolina.—State *v.* Crane, 110 N. C. 530, 15 S. E. 231; State *v.* Gould, 90 N. C. 658; State *v.* Baker, 63 N. C. 276.

Ohio.— Reighard *v.* State, 22 Ohio Cir. Ct. 340, 12 Ohio Cir. Dec. 382.

South Carolina.— State *v.* Way, 38 S. C. 333, 17 S. E. 39.

South Dakota.— State *v.* Church, 6 S. D. 89, 60 N. W. 143.

Tennessee.— Clapp *v.* State, 94 Tenn. 186, 30 S. W. 214; King *v.* State, 91 Tenn. 617, 20 S. W. 169; Wilson *v.* State, 6 Baxt. 206; Rowe *v.* State, 11 Humphr. 491; Riley *v.* State, 9 Humphr. 646.

Texas.— March *v.* State, 44 Tex. 64; Murphy *v.* State, (Cr. App. 1897) 40 S. W. 978; Shaw *v.* State, 32 Tex. Cr. 155, 22 S. W. 588; Pickens *v.* State, 31 Tex. Cr. 554, 21 S. W. 362; Nance *v.* State, 21 Tex. App. 457, 1 S. W. 448.

Virginia.— Mitchell *v.* Com., 89 Va. 826, 17 S. E. 480; Hall *v.* Com., 6 Leigh 615, 29 Am. Dec. 236; Kennedy *v.* Com., 2 Va. Cas. 510.

Washington.— State *v.* Hunter, 18 Wash. 670, 52 Pac. 247.

West Virginia.— State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; State *v.* Smith, 24 W. Va. 814; State *v.* Miller, 24 W. Va. 802.

United States.— U. S. *v.* Daubner, 17 Fed. 793.

See 15 Cent. Dig. tit. "Criminal Law," §§ 2238, 2240, 2247, 2263 *et seq.*

Interpreter for jury in jury room.— Thomason *v.* Territory, 4 N. M. 150, 13 Pac. 223.

Communications by outsiders with jurors in jury room.— The fact that communications on unimportant matters, or on matters in no way relating to the case, passed between persons outside the jury room and the jurors within is not ground for a new trial, where nothing was said in reference to the trial, or in any way tending to injure defendant. People *v.* Boggs, 20 Cal. 432; Flan-

that he was prejudiced,[31] while others hold that prejudice will be presumed unless the contrary appears or is shown by the prosecution.[32] The rules above stated apply to conversations between the jurors and the prosecuting attorney,[33] or judge,[34] or witnesses.[35] It has been said that the test to determine whether a conversation by a juror with outsiders is ground for a new trial is whether his remarks indicate that he is an unfit person to discharge the duties of a juror.[36]

egan *v.* State, 64 Ga. 52; State *v.* Kennedy, 8 Rob. (La.) 590; Ned *v.* State, 33 Miss. 364; Kennedy *v.* Com., 2 Va. Cas. 510. But where outsiders hold communications with the jurors during which questions are asked and answered as to their agreement upon a verdict, there is ground for a new trial. Farrer *v.* State, 2 Ohio St. 54.

A mere business conversation by a juror with another person in the presence of the sheriff and the other jurors, while reprehensible, does not invalidate a conviction. State *v.* Cotts, 49 W. Va. 615, 39 S. E. 605, 55 L. R. A. 176.

31. Bryan *v.* Com., 33 S. W. 95, 17 Ky. L. Rep. 965; U. S. *v.* Daubner, 17 Fed. 793; and other cases in the note preceding. See also *supra*, XV, A, 2, l, (III).

32. *Alabama.*— Butler *v.* State, 72 Ala. 179.

Arkansas.— Wood *v.* State, 34 Ark. 341, 36 Am. Rep. 13; McKenzie *v.* State, 26 Ark. 334; Thompson *v.* State, 26 Ark. 323.

Kentucky.— Com. *v.* Shields, 2 Bush 81.

Mississippi.— Boles *v.* State, 13 Sm. & M. 398.

North Carolina.— State *v.* Brittain, 89 N. C. 481; State *v.* Tilghman, 33 N. C. 513.

Virginia.— Com. *v.* Wormley, 8 Gratt. 712, 56 Am. Dec. 162.

See also *supra*, XV, A, 2, l, (III).

33. McElrath *v.* State, 2 Swan (Tenn.) 378.

A conversation between the prosecuting attorney and some of the jurors is ground for a new trial where the subject of the conversation is not explained (Com. *v.* Martin, 16 Pa. Co. Ct. 140), or even where the subject of the conversation is explained and it is shown that no wrong was intended, if what was said might have influenced the verdict (Hutchins *v.* State, 140 Ind. 78, 39 N. E. 243. But *compare* State *v.* Fruge, 28 La. Ann. 657). Where there have been repeated communications between the prosecutor and the jury during the trial, the affidavit of the prosecutor that he made no use of any means to influence their decision is insufficient to rebut the presumption of prejudice arising through such misconduct. McElrath *v.* State, 2 Swan (Tenn.) 378.

34. Rafferty *v.* People, 72 Ill. 37.

Communications between judge and jurors. — Where the court has adjourned and the judge has left the building, he carries with him no judicial powers to communicate with the jury. Hence it has been held ground for a new trial for him to send them messages or instructions to be read by them during their retirement, without the consent or knowledge of the accused. Rafferty *v.* People, 72 Ill. 37; State *v.* Alexander, 66 Mo. 148. It has also been held, however, that this is not ground for a new trial, unless the contents of the writing are prejudicial to the accused. People *v.* Kelly, 94 N. Y. 526 [*reversing* 31 Hun 225].

Further instructions.— Sending a message to ask the jury if they want further instructions is not improper. State *v.* Connelly, 7 Mo. App. 40.

The affidavits of jurors are inadmissible to show that a verdict of conviction was induced by an answer to a question to the judge after the case was submitted to the jury. State *v.* Kiefer, (S. D. 1902) 91 N. W. 1117.

Presence of judge in jury room see *supra*, XIV, J, 4, e.

35. Love *v.* Moody, 68 N. C. 200.

Communication between jurors and witnesses.— The mere fact that a juror has been spoken to or has conversed with a witness is not ground for a new trial, where there has been no prejudice. Bryan *v.* Com., 33 S. W. 95, 17 Ky. L. Rep. 965 (holding that the fact that a prosecuting witness shook hands with several of the jurors and spoke to them in an earnest and excited manner did not alone require a new trial); State *v.* Crane, 110 N. C. 530, 15 S. E. 231; State *v.* Way, 38 S. C. 333, 17 S. E. 39. And it has been held that having a witness repeat evidence to the jury in their room, although irregular, was not sufficient ground for a new trial, where he went at the request of the jury and merely repeated what he had previously stated on the trial. State *v.* Martin, Tapp. (Ohio) 323. On the other hand it has been held that the fact that a witness converses with a juror while in the box in reference to the trial, stating to him matter inadmissible as evidence, is ground for a new trial (Love *v.* Moody, 68 N. C. 200), and that the presence of a witness in the jury room creates a presumption of prejudice which the state must disprove beyond a reasonable doubt (State *v.* Cartwright, 20 W. Va. 32).

36. State *v.* Cook, 52 La. Ann. 114, 26 So. 751. The act of a juror in questioning a passer-by near the scene of the crime as to relevant and material facts (State *v.* Perry, 121 N. C. 533, 27 S. E. 997, 61 Am. St. Rep. 683), or his declaration after hearing the case, but before retiring, that he would "wind it up in a short while; one way or the other will suit me" (State *v.* White, 48 La. Ann. 1444, 21 So. 26), clearly shows him to have no conception of his duty as a juror, and is ground for a new trial.

The disclosure of a verdict by the jury in open court, by the direction of the court, before it is actually delivered, is not ground for a new trial, although it might be if dis-

A statement by a juror that indicates his intention to disagree with his fellows is not of necessity ground for a new trial.[37]

(B) *Reading Letters or Newspapers.* Defendant is not entitled to a new trial merely because the jurors received and read letters addressed to them during the trial, if he was not prejudiced, or according to some of the cases if he does not show prejudice;[38] but it is otherwise if it appears that he was prejudiced, and some cases hold that prejudice will be presumed unless the prosecution shows the contrary.[39] The same is true of reading newspapers during the trial. If defendant was or may have been prejudiced a new trial should be granted,[40] but it is otherwise if it appears that he was not prejudiced, or according to many of the cases if it does not appear that he was prejudiced.[41]

(C) *Communications Between Jurors and Officer.* By the common law jurors are absolutely prohibited from speaking to the officer having them in charge, except in answer to his question whether they have agreed on a verdict, and to communicate as to their necessities.[42] The rule, however, has been greatly relaxed in modern times, and a new trial will not be granted on account of other

closed without permission of the court. State *v.* Bryant, 21 Vt. 479.

37. Crawford *v.* Com., 35 S. W. 114, 18 Ky. L. Rep. 16. See also as to the expression of an opinion as to defendant's guilt People *v.* Phelan, 123 Cal. 551, 56 Pac. 424.

38. State *v.* Magee, 48 La. Ann. 901, 19 So. 933; State *v.* Taylor, 44 La. Ann. 783, 11 So. 132; State *v.* Wine, 58 S. C. 94, 36 S. E. 439; Scott *v.* State, 7 Lea (Tenn.) 232.

39. State *v.* McCormick, 20 Wash. 94, 54 Pac. 764; State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799. See also *supra*, XIV, J, 4, c.

40. *Georgia.*— Hunter *v.* State, 43 Ga. 483.

Iowa.— State *v.* Walton, 92 Iowa 455, 61 N. W. 179.

Kansas.— State *v.* Dugan, 52 Kan. 23, 34 Pac. 409.

Mississippi.— Cartwright *v.* State, 71 Miss. 82, 14 So. 526.

Montana.— State *v.* Jackson, 9 Mont. 508, 24 Pac. 213.

Tennessee.— Carter *v.* State, 9 Lea 440.

Texas.— Walker *v.* State, 37 Tex. 366.

West Virginia.— State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

See 14 Cent. Dig. tit. "Criminal Law," § 2050. And see *supra*, XIV, J, 4, c.

41. *California.*— People *v.* Leary, 105 Cal. 486, 39 Pac. 24.

Georgia.— Fogarty *v.* State, 80 Ga. 450, 5 S. E. 782.

Nevada.— State *v.* Anderson, 4 Nev. 265.

New Jersey.— State *v.* Cucuel, 31 N. J. L. 249.

Pennsylvania.— Com. *v.* Haines, 15 Phila. 363.

Tennessee.— Brown *v.* State, 85 Tenn. 439, 2 S. W. 895.

Texas.— Moore *v.* State, 36 Tex. Cr. 88, 35 S. W. 668; Williams *v.* State, 33 Tex. Cr. 128, 25 S. W. 629, 28 S. W. 958, 47 Am. St. Rep. 21.

United States.— U. S. *v.* Reid, 12 How. 361, 13 L. ed. 1023.

See 15 Cent. Dig. tit. "Criminal Law," § 2252.

The character of the newspaper article which was read is to be considered by the court as a guide to the exercise of its discretion. If the account read was a fair statement of the evidence and was free from adverse comments on the character or probable guilt of the accused (People *v.* Gaffney, 1 Sheld. (N. Y.) 304, 14 Abb. Pr. N. S. (N. Y.) 36), or if it was not calculated to bias a person of reasonable intelligence (State *v.* Brown, 7 Oreg. 186), a new trial will not be granted; but it is otherwise where the jurors read newspaper articles which contain imperfect and incorrect reports of the trial (Walker *v.* State, 37 Tex. 366), or appeal to the passion and prejudice of its readers (Cartwright *v.* State, 71 Miss. 82, 14 So. 526; Com. *v.* Johnson, 5 Pa. Co. Ct. 236), or set out in a contradictory manner the arguments of the state and criticize the failure of the courts to bring criminals to justice (State *v.* Walton, 92 Iowa 455, 61 N. W. 179), or intimate that efforts are being made to corrupt the jury (People *v.* Stokes, 103 Cal. 193, 37 Pac 207, 42 Am. St. Rep. 102), or declare the accused guilty, and contain many charges and statements against him which would not have been admissible in evidence, and comment upon his failure to testify in his own behalf (U. S. *v.* Ogden, 105 Fed. 371).

Newspaper containing judge's charge.—And it has been held that where the jury, without the knowledge or consent of the court or of the prisoner or his counsel, obtain and use, in guiding their deliberations, a newspaper containing the judge's charge, it is ground for a new trial, although the charge as published is not shown to be incorrect. Farrer *v.* State, 2 Ohio St. 54.

Reading newspapers in court after verdict. — State *v.* Wilson, 121 Mo. 434, 26 S. W. 357.

Purchase of papers without proof of reading.— U. S. *v.* McKee, 26 Fed. Cas. No. 15,683.

42. 1 Chitty Cr. L. 633. See Rickard *v.* State, 74 Ind. 275; Shaw *v.* State, 79 Miss. 577, 31 So. 209.

communications between the officer and the jurors, where it appears that the communications were not of a character calculated to prejudice the accused.[43] But if the communications are prejudicial, or are reasonably calculated to prejudice the accused, a new trial will be granted.[44]

(D) *Officer or Judge in Jury Room.* In some jurisdictions it has been held reversible error and ground for a new trial for an officer in charge of the jury to remain in the room while they are deliberating,[45] or for the trial judge to visit the room,[46] although at the request of the jury.[47] Other cases hold that the mere fact that the officer in charge of the jury remained in a room while it was occupied by them for sleeping purposes,[48] or in a room in which they were deliberating,[49] although an irregularity and censurable, is not enough to justify a new trial, where it does not appear that he did so with any improper motive, that he took part in their deliberations or talked with any of them about the case. But some

43. *Arkansas.*— McFalls *v.* State, 66 Ark. 16, 48 S. W. 492.

Georgia.— Cornwall *v.* State, 91 Ga. 277, 18 S. E. 154; Collins *v.* State, 78 Ga. 87.

Iowa.— State *v.* Whalen, 98 Iowa 662, 68 N. W. 554; State *v.* Griffin, 71 Iowa 372, 32 N. W. 447.

Kansas.— State *v.* Barker, 43 Kan. 262, 23 Pac. 575.

Kentucky.— Crockett *v.* Com., 7 S. W. 907, 10 Ky. L. Rep. 159.

Louisiana.— State *v.* Robertson, 50 La. Ann. 455, 23 So. 510; State *v.* Cady, 46 La. Ann. 1346, 16 So. 195; State *v.* Summers, 4 La. Ann. 26.

Michigan.— People *v.* Beverly, 108 Mich. 509, 66 N. W. 379.

Mississippi.— Alexander *v.* State, (1898) 22 So. 871; Pope *v.* State, 36 Miss. 121.

Missouri.— State *v.* Shipley, 171 Mo. 544, 71 S. W. 1039; State *v.* Stark, 72 Mo. 37.

New York.— People *v.* Riley, 3 N. Y. Cr. 374.

See 15 Cent. Dig. tit. "Criminal Law," §§ 2271, 2277.

The action of the officer in telling the jury that they may separate after they have agreed and sealed their verdict is permissible. Com. *v.* Heden, 162 Mass. 521, 39 N. E. 181.

The officer may be fined for improper remarks to the jury, although his remarks may not justify a new trial. Reins *v.* People, 30 Ill. 256.

44. Cooper *v.* State, 103 Ga. 63, 29 S. E. 439; State *v.* Langford, 45 La. Ann. 1177, 14 So. 181, 40 Am. St. Rep. 277; Brown *v.* State, 69 Miss. 398, 10 So. 579. And see *supra*, XIV, J, 4, d; *infra*, XV, A, 2, l, (IV), (M), (10).

Illustrations.— Thus a statement by an officer that the accused had been in the penitentiary (State *v.* Dallas, 35 La. Ann. 899), that public opinion was against him (Nelms *v.* State, 13 Sm. & M. (Miss.) 500, 53 Am. Dec. 94), that the jury should send him to the penitentiary (Dansby *v.* State, 34 Tex. 392), his comments upon the weight and credibility of the evidence (State *v.* Wiseman, 68 N. C. 203), and his explaining to the jury the difference between two grades of crime, specifying the punishment of each, and telling the jury that they may bring in a verdict of guilty of either (Wilkerson *v.* State, 78 Miss. 356, 29 So. 170; People *v.* Hartung, 17 How. Pr. (N. Y.) 85, 4 Park. Cr. (N. Y.) 256) is ground for a new trial.

45. Quinn *v.* State, 130 Ind. 340, 30 N. E. 300; Clayton *v.* State, 100 Ind. 201; Rickard *v.* State, 74 Ind. 275; State *v.* Snyder, 20 Kan. 306; People *v.* Knapp, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438; Gandy *v.* State, 24 Nebr. 716, 40 N. W. 302. See also *supra*, XIV, J, 4, e.

Presence prior to deliberation.— The presence of the officer in the jury room prior to deliberation of the jury is not ground for a new trial. State *v.* Caulfield, 23 La. Ann. 148.

46. Hoberg *v.* State, 3 Minn. 262; People *v.* Linzey, 79 Hun (N. Y.) 23, 29 N. Y. Suppl. 560. But see People *v.* Moore, 50 Hun (N. Y.) 356, 3 N. Y. Suppl. 159, holding that, although a technical error, it is not ground for reversal when no prejudice has resulted. A visit by the judge to the jury room during their deliberations is not ground for a new trial, where all he said to the jury was to ask if they could agree. State *v.* Olds, 106 Iowa 110, 76 N. W. 644; Priest *v.* State, (Tex. Cr. App. 1896) 34 S. W. 611. See also *supra*, XIV, J, 4, e.

47. State *v.* Wroth, 15 Wash. 621, 47 Pac. 106.

48. Cornwall *v.* State, 91 Ga. 277, 18 S. E. 154; Kirk *v.* State, 73 Ga. 620; Doyal *v.* State, 70 Ga. 134; Webb *v.* State, (Miss. 1897) 21 So. 133. But see Jones *v.* State, 68 Ga. 760.

49. *Illinois.*— Gainey *v.* People, 97 Ill. 270, 37 Am. Rep. 109.

Iowa.— State *v.* Beste, 91 Iowa 565, 60 N. W. 112; State *v.* Thompson, 87 Iowa 670, 54 N. W. 1077.

New York.— People *v.* Wilson, 8 Abb. Pr. 137, 4 Park. Cr. 619; People *v.* Hartung, 8 Abb. Pr. 132, 4 Park. Cr. 256.

South Carolina.— State *v.* Senn, 32 S. C. 392, 11 S. E. 292.

Texas.— Slaughter *v.* State, 24 Tex. 410; McGuire *v.* State, 10 Tex. App. 125.

Vermont.— State *v.* Flint, 60 Vt. 304, 14 Atl. 178.

Wisconsin.— Crockett *v.* State, 52 Wis. 211, 8 N. W. 603, 38 Am. Rep. 733.

See 15 Cent. Dig. tit. "Criminal Law," § 2277.

cases have held that the mere fact of his presence in the sleeping or deliberating room raises a presumption of injury to the accused, which if not explained is ground for a new trial.[50]

(E) *Separation of Jury.* In some of the earlier cases it was held that a verdict should be set aside and a new trial granted in a capital case if at any time during the trial any of the jurors separated from their fellows and were out of the officer's custody, so that they became accessible to improper outside influence, without regard to whether defendant was prejudiced;[51] and in one case this rule was applied to felonies not capital.[52] Most of the courts, however, now hold that, while a conviction will be set aside and a new trial granted on this ground if it appears that defendant was prejudiced, or if it does not appear that he was not, a new trial will not be granted if it appears that he was not prejudiced.[53] Broadly

50. Jones *v.* State, 68 Ga. 760; Cooney *v.* State, 61 Nebr. 342, 85 N. W. 281.

The reason for this presumption is the probability that the presence of the officer will hinder a free and full discussion of the case. This is particularly probable where the officer or some friend or member of his family has been a witness. People *v.* Knapp, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438; Cooney *v.* State, 61 Nebr. 342, 85 N. W. 281.

The temporary presence of an officer in the jury room while they are in session is not ground for a new trial, if they were not at the time actually deliberating on their verdict, and there was no communication between them and the officer. State *v.* Bailey, 32 Kan. 83, 3 Pac. 769.

Where a statute provides that a new trial shall be granted where a juror converses with any person about the case, the sheriff remaining in the jury room and speaking to the jurors is ground for a new trial. Hogan *v.* State, (Tex. Cr. App. 1894) 28 S. W. 949.

An immediate protest should be made by the prisoner's counsel against the unauthorized presence of the officer in the jury room, when he sees the officer enter the room. Waterman *v.* State, 116 Ind. 51, 18 N. E. 63.

51. Com. *v.* McCaul, 1 Va. Cas. 271. And see State *v.* Foster, 45 La. Ann. 1176, 14 So. 180; Maher *v.* State, 3 Minn. 444; McLean *v.* State, 8 Mo. 153; McLain *v.* State, 10 Yerg. (Tenn.) 241, 31 Am. Dec. 573.

52. Com. *v.* McCaul, 1 Va. Cas. 271.

53. *Alabama.*— Williams *v.* State, 45 Ala. 57.

Arkansas.— Payne *v.* State, 66 Ark. 545, 52 S. W. 276; Dobson *v.* State, (1891) 17 S. W. 3; Wright *v.* State, 35 Ark. 639; Coker *v.* State, 20 Ark. 53; Stanton *v.* State, 13 Ark. 317.

California.— People *v.* Bemmerly, 98 Cal. 299, 33 Pac. 263; People *v.* Tarm Poi, 86 Cal. 225, 24 Pac. 998; People *v.* Brannigan, 21 Cal. 337; People *v.* Backus, 5 Cal. 275.

Colorado.— Elkin *v.* People, 5 Colo. 508.

Florida.— Gamble *v.* State, (1902) 33 So. 471; State *v.* Madoil, 12 Fla. 151.

Georgia.— Cornwall *v.* State, 91 Ga. 277, 18 S. E. 154; Westmoreland *v.* State, 45 Ga. 225; Cohron *v.* State, 20 Ga. 752; Roberts *v.* State, 14 Ga. 8, 58 Am. Dec. 528; State *v.* Negro Peter, Ga. Dec. 46; State *v.* Fox, Ga. Dec. 35.

Illinois.— Russel *v.* People, 44 Ill. 508; Jumpertz *v.* People, 21 Ill. 375; McKinney *v.* People, 7 Ill. 540, 43 Am. Dec. 65.

Indiana.— Drew *v.* State, 124 Ind. 9, 23 N. E. 1098; Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760; Creek *v.* State, 24 Ind. 151; Porter *v.* State, 2 Ind. 435.

Iowa.— State *v.* Wright, 98 Iowa 702, 68 N. W. 440.

Kentucky.— French *v.* Com., 100 Ky. 63, 37 S. W. 269, 18 Ky. L. Rep. 574; Thacker *v.* Com., 63 S. W. 737, 23 Ky. L. Rep. 745.

Louisiana.— State *v.* Magee, 48 La. Ann. 901, 19 So. 933; State *v.* Moss, 47 La. Ann. 1514, 79 So. 507; State *v.* Bellow, 42 La. Ann. 586, 7 So. 782; State *v.* Turner, 25 La. Ann. 573.

Minnesota.— Maher *v.* State, 3 Minn. 444; Bilansky *v.* State, 3 Minn. 427.

Mississippi.— Cartwright *v.* State, 71 Miss. 82, 14 So. 526; Prewitt *v.* State, 65 Miss. 437, 4 So. 346; Woods *v.* State, 43 Miss. 364; Organ *v.* State, 26 Miss. 78.

Missouri.— State *v.* Schaeffer, 172 Mo. 335, 72 S. W. 518; State *v.* Gregory, 158 Mo. 139, 59 S. W. 89; State *v.* Howland, 119 Mo. 419, 24 S. W. 1016; State *v.* Woodward, 95 Mo. 129, 8 S. W. 220; State *v.* Collins, 81 Mo. 652; State *v.* Bell, 70 Mo. 633; Whitney *v.* State, 8 Mo. 165. And see State *v.* Avery, 113 Mo. 475, 21 S. W. 193; State *v.* Washburn, 91 Mo. 571, 4 S. W. 274.

Montana.— State *v.* Gay, 18 Mont. 51, 44 Pac. 411.

Nebraska.— Spaulding *v.* State, 61 Nebr. 289, 85 N. W. 80; Polin *v.* State, 14 Nebr. 540, 16 N. W. 898.

New Hampshire.— State *v.* Prescott, 7 N. H. 287.

New York.— People *v.* Douglass, 4 Cow. 26, 15 Am. Dec. 332.

North Carolina.— State *v.* Barber, 89 N. C. 523; State *v.* Tilghman, 33 N. C. 513.

Pennsylvania.— Com. *v.* Cressinger, 193 Pa. St. 326, 44 Atl. 433; Com. *v.* Eisenhower, 181 Pa. St. 470, 37 Atl. 521, 59 Am. St. Rep. 670; Com. *v.* Manfredi, 162 Pa. St. 144, 29 Atl. 404; Com. *v.* Johnson, 5 Pa. Co. Ct. 236. See Moss *v.* Com., 107 Pa. St. 267.

Rhode Island.— State *v.* O'Brien, 7 R. I. 336.

South Carolina.— State *v.* Nance, 25 S. C. 168.

Tennessee.— Rowe *v.* State, 11 Humphr.

speaking no merely temporary separation of the jury is sufficient to justify a reversal, if during the time of the separation they are in the charge of an officer and he keeps them in his actual sight and hearing, or when this is not possible the circumstances are such that it is apparent that they have not been tampered with or influenced to the prejudice of defendant.[54] It has been held in a number of cases that the mere fact that one or more of the jurors were, after their retirement and before the verdict, separated from the others, is not ground for a new trial unless it appears that defendant was prejudiced thereby.[55] Other cases hold that there is

491; Hines *v.* State, 8 Humphr. 597; Cochran *v.* State, 7 Humphr. 544; McLain *v.* State, 10 Yerg. 241, 31 Am. Dec. 573.

Texas.— Wakefield *v.* State, 41 Tex. 556; Walker *v.* State, 37 Tex. 366; Griffey *v.* State, (Cr. App. 1900) 56 S. W. 335; Lamar *v.* State, (Cr. App. 1897) 39 S. W. 677; Ogle *v.* State, 16 Tex. App. 361; Russell *v.* State, 11 Tex. App. 288; Goode *v.* State, 2 Tex. App. 520; Soria *v.* State, 2 Tex. App. 297.

Virginia.— Jones *v.* Com., 31 Gratt. 830; Philips *v.* Com., 19 Gratt. 485; Overbee *v.* Com., 1 Rob. 756; Thomas *v.* Com., 2 Va. Cas. 479.

West Virginia.— State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224. And see State *v.* Clark, 51 W. Va. 457, 41 S. E. 204.

Wisconsin.— Hempton *v.* State, 111 Wis. 127, 86 N. W. 596; State *v.* Dolling, 37 Wis. 396; Rowan *v.* State, 30 Wis. 129, 11 Am. Rep. 559; Keenan *v.* State, 8 Wis. 132.

United States.— U. S. *v.* Davis, 103 Fed. 457.

See 14 Cent. Dig. tit. "Criminal Law," § 2039. And see *supra*, XIV, J, 3.

54. *Alabama.*— Nabors *v.* State, 120 Ala. 323, 25 So. 529.

Arkansas.— Wright *v.* State, 35 Ark. 639.

California.— People *v.* Tarm Poi, 86 Cal. 225, 24 Pac. 998.

Illinois.— Gott *v.* People, 187 Ill. 249, 58 N. E. 293.

Indiana.— Jones *v.* State, 152 Ind. 318, 53 N. E. 222.

Kentucky.— Blyew *v.* Com., 91 Ky. 200, 15 S. W. 356, 12 Ky. L. Rep. 742; Com. *v.* Shields, 2 Bush 81; Holly *v.* Com., 36 S. W. 532, 18 Ky. L. Rep. 441.

Louisiana.— State *v.* White, 52 La. Ann. 206, 26 So. 849; State *v.* Johnson, 30 La. Ann. 921.

Missouri.— State *v.* Shipley, 171 Mo. 544, 71 S. W. 1039; State *v.* Schmidt, (1897) 38 S. W. 938; State *v.* Howell, 117 Mo. 307, 23 S. W. 263; State *v.* Collins, 86 Mo. 245.

Montana.— Territory *v.* Clayton, 8 Mont. 1, 19 Pac. 293.

New York.— People *v.* Hoch, 150 N. Y. 291, 44 N. E. 976.

North Carolina.— State *v.* Durham, 72 N. C. 447.

Pennsylvania.— Com. *v.* Britton, 1 Leg. Gaz. 513.

Tennessee.— Rowe *v.* State, 11 Humphr. 491.

Texas.— Jenkins *v.* State, 41 Tex. 128; Eredia *v.* State, (Cr. App. 1901) 65 S. W. 188; Walker *v.* State, 40 Tex. Cr. 544, 51 S. W. 234; Taylor *v.* State, 38 Tex. Cr. 552, 43 S. W. 1019.

Vermont.— State *v.* Lawrence, 70 Vt. 524, 41 Atl. 1027.

Virginia.— Trim *v.* Com., 18 Gratt. 983, 98 Am. Dec. 765.

Washington.— State *v.* Burns, 19 Wash. 52, 52 Pac. 316.

West Virginia.—State *v.* Cottrill, 52 W. Va. 363, 43 S. E. 244; State *v.* Belknap, 39 W. Va. 427, 19 S. E. 507.

See 14 Cent. Dig. tit. "Criminal Law," § 2047.

Lodging or meals, etc.— The separation of jurors while dining at a hotel (Wright *v.* State, 35 Ark. 639; Kee *v.* State, 28 Ark. 155; Territory *v.* King, 6 Dak. 131, 50 N. W. 623; Coleman *v.* State, 17 Fla. 206; State *v.* Riley, 41 La. Ann. 693, 6 So. 730; State *v.* Nockum, 41 La. Ann. 689, 6 So. 729; Territory *v.* Hart, 7 Mont. 489, 17 Pac. 718; State *v.* Baker, 63 N. C. 276; Odle *v.* State, 6 Baxt. (Tenn.) 159. *Contra*, State *v.* Gray, 100 Mo. 523, 13 S. W. 806) or the lodging of the members of the jury in different sleeping rooms of the same hotel ranging along and opening upon a common hall (Wright *v.* State, 35 Ark. 639; People *v.* Bush, 68 Cal. 623, 10 Pac. 169; Minor *v.* Com., 5 Ky. L. Rep. 176; State *v.* Devall, 51 La. Ann. 497, 25 So. 384; Kennedy *v.* Com., 2 Va. Cas. 510) is not an improper separation where the officer having them in charge keeps the entire jury within his view and hearing while they are eating, or locks and guards the rooms or portion of the house in which they lodge.

Calls of necessity.— So also the separation of one of the jurors from his fellows to attend a call of necessity is not an illegal or improper separation avoiding a conviction (Neal *v.* State, 64 Ga. 272; Masterson *v.* State, 144 Ind. 240, 43 N. E. 138; State *v.* Veillon, 105 La. 411, 29 So. 883; State *v.* Washburn, 91 Mo. 571, 4 S. W. 274; State *v.* Lytle, 27 N. C. 58; Edwards *v.* Territory, 1 Wash. Terr. 195), provided always the juror separating himself is attended by a bailiff (Carter *v.* State, 78 Miss. 348, 29 So. 148; State *v.* Dyer, 139 Mo. 199, 40 S. W. 768).

55. *Colorado.*— Chesnut *v.* People, 21 Colo. 512, 42 Pac. 656.

Indiana.— Cooper *v.* State, 120 Ind. 377, 22 N. E. 320.

Iowa.— State *v.* Griffin, 71 Iowa 372, 32 N. W. 447; State *v.* Bowman, 45 Iowa 418. And see State *v.* Fertig, 70 Iowa 272, 30 N. W. 633.

a presumption of injury from the mere fact of separation, and that a separation after retirement is ground for a new trial, although it does not affirmatively appear that the jury were tampered with or that the accused was in any way prejudiced.[56] If, however, it affirmatively appears that the jury were not in any way tampered with or influenced the verdict will not be disturbed.[57] In some jurisdictions the separation of the jury after retiring to consider their verdict is made by statute a ground for a new trial.[58]

(F) *Failure of Court to Warn Jury.* It has been held that failure of the court to warn the jury on adjournment not to converse among themselves or with any one on any subject connected with the trial is not ground for a new trial, unless it clearly appears that the accused was injured thereby.[59]

(G) *Use of Intoxicating Liquors.* It is gross misconduct on the part of jurors to use intoxicating liquors to excess during the trial or during their deliberations, and perhaps improper to use them at all; and it is misconduct on the part of the officer in charge or others to furnish them with such liquors or take them where they may obtain the same, but whether a new trial should be granted for this cause depends on the circumstances. If it appears that defendant was prejudiced thereby, or according to some of the cases unless it appears or is clearly shown that he was not prejudiced, a new trial will be granted.[60] It is

Kansas.— State *v.* Dugan, 52 Kan. 23, 34 Pac. 409.

Mississippi.— Skates *v.* State, 64 Miss. 644, 1 So. 843, 60 Am. Rep. 70 [*distinguishing* Organ *v.* State, 26 Miss. 78].

Missouri.— State *v.* Gregory, 158 Mo. 139, 59 S. W. 89; State *v.* Igo, 21 Mo. 459; State *v.* Harlow, 21 Mo. 446; State *v.* Barton, 19 Mo. 227; State *v.* Pollard, 14 Mo. App. 583.

Nebraska.— Spaulding *v.* State, 61 Nebr. 289, 85 N. W. 80.

Nevada.— State *v.* Harris, 12 Nev. 414.

New Mexico.— Roper *v.* Territory, 7 N. M. 255, 33 Pac. 1014; Territory *v.* Nichols, 3 N. M. 76, 2 Pac. 78.

North Carolina.— State *v.* Harper, 101 N. C. 761, 7 S. E. 730, 9 Am. St. Rep. 46.

Pennsylvania.— Goersen *v.* Com., 106 Pa. St. 477, 51 Am. Rep. 534; Com. *v.* Morgan, 3 Pa. Co. Ct. 151; Com. *v.* Clemmer, 2 Pa. Co. Ct. 629.

Texas.— Cannon *v.* State, 3 Tex. 31.

Virginia.— McCarter *v.* Com., 11 Leigh 633.

See 14 Cent. Dig. tit. "Criminal Law," § 2041. And see *supra*, XIV, J, 3.

Capital cases.— The rule of the text has been admitted in capital cases. Creek *v.* State, 24 Ind. 151; State *v.* Miller, 18 N. C. 500; West *v.* State, 7 Tex. App. 150; Cox *v.* State, 7 Tex. App. 1; Davis *v.* State, 3 Tex. App. 91; Early *v.* State, 1 Tex. App. 248, 28 Am. Rep. 409.

56. *Arkansas.*— Cornelius *v.* State, 12 Ark. 782.

California.— People *v.* Thornton, 74 Cal. 482, 16 Pac. 244.

Georgia.— Daniel *v.* State, 56 Ga. 653.

Louisiana.— State *v.* Populus, 12 La. Ann. 710. But see State *v.* Brette, 6 La. Ann. 652.

New York.— Eastwood *v.* People, 3 Park. Cr. 25.

Ohio.— Parker *v.* State, 18 Ohio St. 88; Sargent *v.* State, 11 Ohio 472. But see State *v.* Dougherty, 1 Ohio Dec. (Reprint) 37, 1 West. L. J. 271.

South Dakota.— State *v.* Church, 7 S. D. 289, 64 N. W. 152 [*overruling* 6 S. D. 89, 60 N. W. 143].

The circumstances of the separation are to be considered in determining whether any presumption of tampering exists. A temporary separation of the jury for a short period, as where one of them stays in the room with an officer while the others are at supper, raises no presumption of prejudice. Com. *v.* Gagle, 147 Mass. 576, 18 N. E. 417. And certainly where the juror who is separated remains in the sight and custody of the officer, and the other facts exclude any suspicion of tampering or of the influence of the separation upon the verdict, the presumption should not be recognized. State *v.* Conway, 23 Minn. 291. See also People *v.* Buchanan, 25 N. Y. Suppl. 481 [*affirmed* in 145 N. Y. 1, 39 N. E. 846]. *Compare* as to illness of juror separated from the others Marzen *v.* People, 190 Ill. 81, 60 N. E. 102.

57. People *v.* Wheatley, 88 Cal. 114, 26 Pac. 95; People *v.* Bonney, 19 Cal. 426; Robinson *v.* State, 109 Ga. 506, 34 S. E. 1017; Cornwall *v.* State, 91 Ga. 277, 18 S. E. 154; Green *v.* State, 71 Ga. 487.

58. See Riley *v.* State, 95 Ind. 446; State *v.* McNeil, 59 Kan. 599, 53 Pac. 876; State *v.* Orrick, 106 Mo. 111, 17 S. W. 176, 329.

59. People *v.* Colmere, 23 Cal. 631; State *v.* Gray, 19 Nev. 212, 8 Pac. 456. *Contra*, State *v.* Mulkins, 18 Kan. 16, holding that prejudice to defendant will be presumed from a failure of the court to admonish the jury as required by statute, and that the burden is upon the state to show the contrary. See also *supra*, XIV, J, 3, f.

60. *Arkansas.*— Dolan *v.* State, 40 Ark. 454.

Florida.— Gamble *v.* State, (1902) 33 So. 471.

Indiana.— Brown *v.* State, 137 Ind. 240, 36 N. E. 1108, 45 Am. St. Rep. 180; Davis *v.*

otherwise, however, if it appears that there was no prejudice, and some of the cases hold that prejudice will not be presumed but must be affirmatively shown.[61]

State, 35 Ind. 496, 9 Am. Rep. 760; Creek *v.* State, 24 Ind. 151.

Iowa.— State *v.* Bruce, 48 Iowa 530, 30 Am. Rep. 403; State *v.* Baldy, 17 Iowa 39.

Louisiana.— State *v.* Ned, 105 La. 696, 30 So. 126, 54 L. R. A. 933.

Minnesota.— State *v.* Salverson, 87 Minn. 40, 91 N. W. 1; State *v.* Madigan, 57 Minn. 425, 59 N. W. 490.

New Hampshire.— State *v.* Bullard, 16 N. H. 139.

New York.—People *v.* Douglass, 4 Cow. 26, 15 Am. Dec. 332.

North Carolina.— State *v.* Jenkins, 116 N. C. 972, 20 S. E. 1021.

Texas.— Jones *v.* State, 13 Tex. 168, 62 Am. Dec. 550.

West Virginia.— State *v.* Greer, 22 W. Va. 800.

See 15 Cent. Dig. tit. "Criminal Law," § 2254 *et seq.* And see *supra*, XIV, J, 4, b.

Before acceptance as juror or after verdict. — Drinking intoxicating liquors immediately before being accepted as a juror (State *v.* Andre, 14 S. D. 215, 84 N. W. 783) or immediately after the verdict (State *v.* Reilly, 108 Iowa 735, 78 N. W. 680) is immaterial.

61. *Arkansas.*—McLendon *v.* State, 66 Ark. 646, 51 S. W. 1062; Payne *v.* State, 66 Ark. 545, 52 S. W. 276; Kee *v.* State, 28 Ark. 155.

California.— People *v.* Van Horn, 119 Cal. 323, 51 Pac. 538; People *v.* Leary, 105 Cal. 486, 39 Pac. 24; People *v.* Bemmerly, 98 Cal. 299, 33 Pac. 263.

Colorado.— Jones *v.* People, 6 Colo. 452, 45 Am. Rep. 526.

Delaware.— State *v.* Harrigan, 9 Houst. 369, 31 Atl. 1052.

Georgia.— Westmoreland *v.* State, 45 Ga. 225.

Illinois.— Davis *v.* People, 19 Ill. 74.

Indiana.— Pratt *v.* State, 56 Ind. 179.

Iowa.— State *v.* Morphy, 33 Iowa 270, 11 Am. Rep. 122.

Kansas.— State *v.* Tatlow, 34 Kan. 80, 8 Pac. 267.

Louisiana.— State *v.* Bellow, 42 La. Ann. 586, 7 So. 782.

Mississippi.—Harris *v.* State, 61 Miss. 304; Green *v.* State, 59 Miss. 501; Pope *v.* State, 36 Miss. 121.

Missouri.— State *v.* Taylor, 134 Mo. 109, 35 S. W. 92; State *v.* Washburn, 91 Mo. 571, 4 S. W. 274; State *v.* West, 69 Mo. 401, 33 Am. Rep. 506; State *v.* Upton, 20 Mo. 397.

Montana.— Territory *v.* Burgess, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808; Territory *v.* Hart, 7 Mont. 489, 17 Pac. 718.

Nebraska.— Carleton *v.* State, 43 Nebr. 373, 61 N. W. 699.

Nevada.— State *v.* Joues, 7 Nev. 408.

New Jersey.— State *v.* Cucuel, 31 N. J. L. 249.

New York.— People *v.* Pscherhofer, 64 Hun 483, 19 N. Y. Suppl. 483.

North Carolina.— State *v.* Bailey, 100 N. C. 528, 6 S. E. 372.

Ohio.— State *v.* Dougherty, 1 Ohio Dec. (Reprint) 37, 1 West. L. J. 271.

Pennsylvania.— Com. *v.* Cleary, 148 Pa. St. 26, 23 Atl. 1110; Com. *v.* Salyards, 13 Pa. Co. Ct. 470.

South Dakota.— State *v.* Andre, 14 S. D. 215, 84 N. W. 783.

Tennessee.— Rowe *v.* State, 11 Humphr. 491; Stone *v.* State, 4 Humphr. 27.

Texas.— Stewart *v.* State, 31 Tex. Cr. 153, 19 S. W. 908; Rider *v.* State, 26 Tex. App. 334, 9 S. W. 688.

Virginia.— Thompson *v.* Com., 8 Gratt. 637.

Wisconsin.— Roman *v.* State, 41 Wis. 312.

See 15 Cent. Dig. tit. "Criminal Law," § 2254 *et seq.*

Drinking to excess.— Where during the trial a juror drinks intoxicating liquor to such an extent as to impair his faculties and unfit his mind to intelligently consider the case, so that it appears that justice has not been done because of the juror's delinquency, a new trial must be granted. Brown *v.* State, 137 Ind. 240, 36 N. E. 1108, 45 Am. St. Rep. 180; State *v.* Ned, 105 La. 696, 30 So. 126, 54 L. R. A. 933; State *v.* Demareste, 41 La. Ann. 413, 6 So. 654; State *v.* Broussard, 41 La. Ann. 81, 5 So. 647, 17 Am. St. Rep. 396; State *v.* Salverson, 87 Minn. 40, 91 N. W. 1; State *v.* Jenkins, 116 N. C. 972, 20 S. E. 1021. Where there is any reason to believe that a juror has drunk so much as to unfit him for the proper discharge of his duty, the verdict should not be allowed to stand. People *v.* Gray, 61 Cal. 164, 44 Am. Rep. 549; U. S. *v.* Spencer, 8 N. M. 667, 47 Pac. 715.

Drinking while deliberating on a verdict has been held such misconduct on the part of the jury as to warrant a new trial, whether the jurors were affected by the drinking or not. People *v.* Lee Chuck, 78 Cal. 317, 20 Pac. 719. But see People *v.* Leary, 105 Cal. 486, 39 Pac. 24.

Drinking at expense of prosecuting attorney.— It has been held that the fact that a juror during the course of the trial drank liquor at the expense of the prosecuting attorney is not ground for a new trial where there is nothing to show that defendant was prejudiced thereby. People *v.* Lyle, (Cal. 1884) 4 Pac. 977. But see People *v.* Montague, 71 Mich. 447, 39 N. W. 585. Where no objection is made at the time on account of a juror being given liquor by the prosecuting attorney, it cannot after verdict be urged as a ground for a new trial. Grottkau *v.* State, 70 Wis. 462, 36 N. W. 31.

Drinking with witnesses for the prosecution, and at their invitation and expense, is not alone such misconduct as to warrant a new trial (State *v.* Minor, 106 Iowa 642, 77 N. W. 330; Thompson *v.* Com., 8 Gratt. (Va.) 637), although it has been held that drinking at a bar owned by the principal witness for the prosecution is in connection with other

(H) *Sleeping of Juror.* The fact that a juror was asleep in the jury-box during a portion of the trial is not alone ground for a new trial, where counsel, noticing it, failed to call the court's attention to it promptly, or where it does not appear that defendant was prejudiced.[62]

(I) *Receiving Evidence Out of Court*—(1) UNAUTHORIZED VIEW. The act of the jury in visiting the *locus in quo* without the consent of the court, although in company with an officer, where they examine and comment upon the positions of the deceased and defendant, and of the eye-witnesses, has been held such misconduct as to constitute ground for a new trial.[63] But as a rule the mere fact that the jury visited the spot is not ground for a new trial, where they were not guilty of any misconduct while there, and could not have acquired any information that might influence their verdict.[64]

(2) EXAMINING ARTICLES OF PERSONAL PROPERTY. Permitting the jury to take with them into their room, and to examine during their deliberations, articles of personal property in evidence is not ground for a new trial, where no prejudice resulted to the accused.[65]

(3) TAKING OUT AND CONSULTING PREJUDICIAL DOCUMENTS. The extent to which records and writings may be consulted by the jury during their deliberations is elsewhere considered.[66] In homicide cases new trials have been granted where the jury took with them into their room the record of the coroner's inquest, and depositions.[67] On the other hand new trials have been refused where these were accidentally in the jury room, and it was not shown that the jury read them.[68]

(4) STATEMENTS BY JURORS. Where a juror states to his fellows facts within his personal knowledge regarding the character of defendant, the credibility of a witness, or other material facts, and his statements are shown to have influenced the jurors to bring in a verdict of conviction, a new trial ought to be granted.[69]

(5) READING LAW-BOOKS IN JURY ROOM. The mere fact that law-books are

circumstances sufficient ground for a new trial (People *v.* Hull, 86 Mich. 449, 49 N. W. 288).

Treating by interested officer.— Where a sheriff has paid out considerable money in and about the trial, with no expectation of being repaid except from a reward in case of conviction, it is ground for a new trial for the jury to permit him to take them to saloons and to furnish them with liquor at his expense. People *v.* Myers, 70 Cal. 582, 12 Pac. 719.

62. McClary *v.* State, 75 Ind. 260; People *v.* Morrissey, Sheld. (N. Y.) 295; Keith *v.* State, (Tex. Cr. App. 1900) 56 S. W. 628; U. S. *v.* Boyden, 24 Fed. Cas. No. 14,632, 1 Lowell 266. The length of time during which the juror slept and the importance of the evidence, if any, which was taken during this period, may be considered on the motion for a new trial. Com. *v.* Jongrass, 181 Pa. St. 172, 37 Atl. 207.

63. People *v.* Tyrrell, 3 N. Y. Cr. 142; Nelson *v.* State, (Tex. Cr. App. 1900) 58 S. W. 107.

64. State *v.* Brown, 64 Mo. 367. It should affirmatively appear that the accused was in some way actually prejudiced. Warner *v.* State, 56 N. J. L. 686, 29 Atl. 505, 44 Am. St. Rep. 415; Hardin *v.* State, 40 Tex. Cr. 208, 49 S. W. 607; McDonald *v.* State, 15 Tex. App. 493; Com. *v.* Brown, 90 Va. 671, 19 S. E. 447.

65. People *v.* Gallagher, 75 N. Y. App. Div. 39, 78 N. Y. Suppl. 5, 11 N. Y. Annot. Cas. 348. See also *supra*, XIV, J, 5, b, (IV).

Examining burglars' tools during recess.— The objection that during a recess burglars' tools found on the accused were exhibited to, and their use explained in the presence of, a juror cannot be urged for the first time on motion for a new trial. State *v.* Rand, 33 N. H. 216.

66. See *supra*, XIV, J, 5, b.

67. Atkins *v.* State, 16 Ark. 568; Pound *v.* State, 43 Ga. 88; U. S. *v.* Wilson, 69 Fed. 584.

68. State *v.* Harris, 34 La. Ann. 118; State *v.* Tindall, 10 Rich. (S. C.) 212.

Prejudice.— A statute making it ground for a new trial that the jury received papers not authorized by the court does not apply to papers that could not have influenced the verdict. State *v.* Taylor, 20 Kan. 643. The same rule is applicable independently of statute. Com. *v.* Nash, 135 Mass. 541.

Complaint and warrant.— Permitting the warrant and written complaint and the transcript of the evidence of a witness taken at the preliminary examination to go out to the jury, although by inadvertence and without request of the jury, has been held ground for a new trial. People *v.* Dowdigan, 67 Mich. 92, 34 N. W. 411.

69. *Iowa.*— State *v.* Cross, 95 Iowa 629, 64 N. W. 614.

Kansas.— State *v.* Woods, 49 Kan. 237, 30 Pac. 520.

taken into the jury room and read by some of the jurors is not usually ground for a new trial,[70] as it is necessary, where a juror reads law, to show that he was thereby influenced to the prejudice of defendant.[71] It is otherwise where prejudice appears or may be presumed.[72]

(6) Reading Newspapers. For the jury to read during or before their deliberations newspapers containing reports of the evidence given in the case may be ground for a new trial, but is not necessarily so.[73]

(J) *Taking of Notes by Jurors.* Whether the taking of notes by a juror shall be a good ground for a new trial depends not only upon whether it was improper,[74] but also upon whether defendant promptly objected. He may by his silence have so far acquiesced as to waive objection,[75] but he will not be presumed to have waived the objection, where it does not appear that he or his attorney noticed it.[76]

(K) *Differences of Opinion Among Jurors.* It is not ground for a new trial that the jurors differed among themselves for a time as to the degree of the crime and the amount of the punishment or otherwise.[77]

(L) *Discharge of Juror.* The discharge of a juror by consent of counsel, without the knowledge or consent of the accused, which he failed to notice until the jury was polled, entitles him to a new trial.[78]

(M) *Misconduct, Prejudice, or Disqualification of Officer*[79]—(1) Absence From Jury. The absence of the officer having charge of the jury, for a short period, is not ground for a new trial if the jury were not allowed to separate.[80]

(2) Keeping Jurors in Inconvenient Place. Where a statute provides that the jury shall be kept in a convenient place, the fact that the place in which they were kept was not convenient is not ground for a new trial, where the verdict is not shown to have been affected thereby.[81] The fact that the jury were taken some distance from the court to a hotel through the public streets instead of to

Nebraska.— Richards *v.* State, 36 Nebr. 17, 53 N. W. 1027.

Pennsylvania.— Com. *v.* Kulp, 5 Pa. Dist. 468, 17 Pa. Co. Ct. 561.

Tennessee.— Ryan *v.* State, 97 Tenn. 206, 36 S. W. 930; Donston *v.* State, 6 Humphr. 275; Booby *v.* State, 4 Yerg. 111.

Texas.— Blocker *v.* State, (Cr. App. 1901) 61 S. W. 391; Ysaguirre *v.* State, 42 Tex. Cr. 253, 58 S. W. 1005; Burlesan *v.* State, (App. 1890) 15 S. W. 175; Cox *v.* State, 28 Tex. App. 92, 12 S. W. 493; Lucas *v.* State, 27 Tex. App. 322, 11 S. W. 443; McKissick *v.* State, 26 Tex. App. 673, 9 S. W. 269; Anschicks *v.* State, 6 Tex. App. 524.

See 15 Cent. Dig. tit. "Criminal Law," § 2251. And see *supra,* XIV, J, 5, f.

Presumption.— If the statement by a juror of facts in his personal knowledge would probably influence the jury where the evidence is conflicting, the onus is not on the accused to show that he was prejudiced, as the law will presume this to have been so. Sam *v.* State, 1 Swan (Tenn.) 61.

Statements by a juror made after the verdict may be disregarded. State *v.* Gay, 18 Mont. 51, 44 Pac. 411; Angley *v.* State, 35 Tex. Cr. 427, 34 S. W. 116; Gonzales *v.* State, 32 Tex. Cr. 611, 25 S. W. 781.

70. Fisher *v.* State, 73 Ga. 595; Durham *v.* State, 70 Ga. 264. See also *supra,* XIV, J, 5, b, (II).

71. People *v.* Priori, 164 N. Y. 459, 58 N. E. 668; State *v.* Smith, 6 R. I. 33; Munos *v.* State, 34 Tex. Cr. 472, 31 S. W. 380.

72. Jones *v.* State, 89 Ind. 82, holding that where the jury had a report of a former trial of the same case and it is not shown that they did not read the report, prejudice will be presumed and a new trial granted. See also *supra,* XIV, J, 5, b, (II).

73. Reading newspapers see *supra,* XV, A, 2, l, (IV), (B).

74. Propriety of juror's taking notes see *supra,* XIV, J, 4, f.

75. Cluck *v.* State, 40 Ind. 263.

76. Long *v.* State, 95 Ind. 481; State *v.* Robinson, 117 Mo. 649, 23 S. W. 1066. It has been held that if a juror, after objection by defendant, and being forbidden by the court, persists in taking notes, defendant is entitled to a new trial, as such conduct is calculated to divert the attention of the jurors from the evidence. Cheek *v.* State, 35 Ind. 492. *Compare,* however, *supra,* XIV, J, 4, f.

That the foreman of a jury reported the evidence for a newspaper, where it was consented to by defendant, is not ground for a new trial, where it does not appear that the notes taken were not an accurate statement of the evidence. State *v.* Cottrell, 19 R. I. 724, 37 Atl. 947.

77. Balls *v.* State, (Tex. Cr. App. 1897) 40 S. W. 801.

78. U. S. *v.* Shaw, 59 Fed. 110.

79. Presence of officer in jury room see *supra,* XV, A, 2, l, (IV), (D).

80. People *v.* Boggs, 20 Cal. 432; Hoover *v.* State, 5 Baxt. (Tenn.) 672.

81. Newkirk *v.* State, 27 Ind. 1.

the jury room in the court-house, although censurable in the officer, is not ground for a new trial, where the accused was not prejudiced.[82]

(3) Oath of Officer in Charge. The fact that the officer having charge of the jury was not specially sworn as required by law is not ground for a new trial, where he is a bailiff, sheriff, or other sworn officer and has performed his duty faithfully and properly, and no prejudice to the accused has resulted from his being unsworn.[83]

(4) Prejudice of Officer. The prejudice of the sheriff having charge of the jury against defendant is not ground for a new trial, unless it was so manifested in the presence of the jury as to influence them and affect their verdict.[84]

(5) Disqualification of Officer. The fact that the officer is disqualified because he is a minor,[85] or because he is related to the person for whose murder defendant is on trial,[86] is not alone ground for a new trial.

(6) Admitting Strangers Into Jury Room. It is such misconduct for the officer to permit strangers to mingle with the jury while they deliberate as to bring upon him the condemnation of the court; but the mere fact that outsiders, whether with or without the consent of the jurors, enter and remain in the room during their deliberations is not enough alone to justify a new trial, if it appear that they did not converse on the case with any member of the jury.[87]

(7) Assisting in Reading Instructions. The action of the officer in entering the jury room, and, while the jury are deliberating, reading a portion of the instructions to them, although at their request, is misconduct which will require a new trial, for inasmuch as it cannot be known, except by his oath, whether he read correctly or not, and as he may be assumed to be unworthy of belief because he violated his oath by his misconduct, the court will presume that the accused was prejudiced.[88]

(8) Communicating Progress of Deliberation to Outsiders. The fact that the officer communicates to outsiders from time to time the results of the deliberation and ballots of the jury, while it is such misconduct on his part as will call for severe punishment, is not ground for a new trial unless the accused was injured.[89]

(9) Writing Verdict. The action of the officer in writing out the verdict at the request of one juror acting for all, under the juror's dictation, is not ground for a new trial, where it clearly appears that defendant was not injured.[90]

(10) Conversing With Jurors. Any conversation on the part of the officer with the jury, of a character calculated to influence their verdict, is ground for a new trial, although it is not affirmatively shown that no prejudice resulted.[91]

82. Caleb *v.* State, 39 Miss. 721.

83. People *v.* Hughes, 29 Cal. 257; State *v.* Crafton, 89 Iowa 109, 56 N. W. 257; People *v.* Johnson, 46 Hun (N. Y.) 667; Stone *v.* State, 4 Humphr. (Tenn.) 27; Jarnagin *v.* State, 10 Yerg. (Tenn.) 529. And see Ball *v.* U. S., 163 U. S. 662, 16 S. Ct. 1192, 41 L. ed. 300. And see *supra*, XIV, J, 2, b.

If the jury are left in charge of a person not sworn as an officer, and not under any other oath touching his duties in regard to the jury, a new trial should be granted. Roberts *v.* State, 72 Ga. 673; Hare *v.* State, 4 How. (Miss.) 187.

An omission to take an oath not to communicate with the jury will not vitiate a verdict where it appears that in fact the officer did not communicate with them. State *v.* Frier, 118 Mo. 648, 24 S. W. 220; State *v.* Hays, 78 Mo. 600; State *v.* Hayes, 78 Mo. 307.

84. State *v.* Rush, 95 Mo. 199, 8 S. W. 221.

A bet by the sheriff that the accused will be convicted is not ground for a new trial in a misdemeanor case, where the bet is made after the jury has been selected. State *v.* Howes, 26 W. Va. 110.

85. McCann *v.* People, 88 Ill. 103.

86. Baker *v.* State, 4 Tex. App. 223.

87. State *v.* Degonia, 69 Mo. 485; Luster *v.* State, 11 Humphr. (Tenn.) 169. See *supra*, XV, A, 2, l, (IV), (A).

88. State *v.* Brown, 22 Kan. 222. *Compare*, however, People *v.* Wilson, 8 Abb. Pr. (N. Y.) 137.

89. Com. *v.* Mellert, 2 Woodw. (Pa.) 342.

90. Territory *v.* Edie, 7 N. M. 183, 34 Pac. 46 [*affirming* 6 N. M. 555, 30 Pac. 851, and *distinguishing* Mattox *v.* U. S., 146 U. S. 140, 13 S. Ct. 50, 36 L. ed. 917].

91. State *v.* La Grange, 99 Iowa 10, 68 N. W. 557. See also *supra*, XV, A, 2, l, (IV), (C).

The presumption of prejudice to the accused which arises where the officer told the

(11) AFFIDAVITS TO SHOW INFLUENCE. Although jurors may not impeach their verdict by affidavits showing their own misconduct, it is proper, on a motion for a new trial, to receive their testimony to show that a statement made by the sheriff influenced their verdict.[92]

(N) *Misconduct of Bystanders.*[93] Thoughtless or careless remarks passing between jurors and bystanders, having no relation to the case, are not ground for a new trial.[94] And generally remarks of bystanders unfavorable to the accused, to or in the presence of members of the jury, and overheard by them, although reprehensible, are not ground for a new trial,[95] unless it shall actually appear that a verdict of conviction was produced thereby. The conduct of some of the bystanders in applauding the argument of the prosecuting attorney is not ground for a new trial, where the applause was promptly checked, and it appears probable that the jury were not prejudiced against the accused thereby.[96] The fact that a bystander during the trial handed a juror money in payment of a debt he owed him is not ground for a new trial.[97]

m. Irregularities in Verdict or in Its Reception — (I) *MISUNDERSTANDING AS TO EFFECT OF.* If the jury misapprehend the power of the court and on that account return a verdict of guilty, with a recommendation to mercy, on which the court has no power to act, a new trial should be granted.[98]

(II) *COMPROMISE VERDICT.* The fact that a verdict was rendered only after long consideration and was apparently the result of a compromise is not ground for a new trial, where there is no showing that it was obtained improperly.[99] So also it has been held that the fact that a juror agreed to a verdict because the majority favored it[1] or because he was charged with an intention to cause a disagreement[2] is not ground for a new trial. And the fact that it appears that a verdict was the result of a compromise on an agreement of all the jury to recommend to mercy[3] or on a promise to sign a petition for a pardon[4] is not ground for a new trial.

(III) *INDEFINITE OR INCOMPLETE VERDICT.* Where the jury return a special verdict which is formally defective or is not responsive to the issue, the court may order a new trial.[5]

jury that if they did not agree he would keep them locked up all night is rebutted by showing that this statement was made merely to inform them that the court intended to go home at a certain hour and that if the verdict was not returned by that time it could not be returned until morning. State *v.* Zettler, 15 Wash. 625, 47 Pac. 35.

92. Shaw *v.* State, 79 Miss. 577, 31 So. 209.

93. **Communications between jurors and outsiders** see *supra*, XV, A, 2, l, (IV), (A).

94. People *v.* Boggs, 20 Cal. 432.

95. McTyier *v.* State, 91 Ga. 254, 18 S. E. 140; State *v.* Bird, 1 Mo. 585; State *v.* Cucuel, 31 N. J. L. 249; State *v.* Jackson, 112 N. C. 851, 17 S. E. 149.

96. Debney *v.* State, 45 Nebr. 856, 64 N. W. 446, 34 L. R. A. 851; State *v.* Larkin, 11 Nev. 314; Hamilton *v.* State, 36 Tex. Cr. 372, 37 S. W. 431.

Remarks and applause of bystanders not ground for a new trial.— Burns *v.* State, 89 Ga. 527, 15 S. E. 748; State *v.* Dusenberry, 112 Mo. 277, 20 S. W. 461; State *v.* Jackson, 112 N. C. 851, 17 S. E. 149.

97. Martin *v.* People, 54 Ill. 225.

98. For the jury manifestly intend that the court should commute the sentence. Nelson *v.* State, 10 Humphr. (Tenn.) 518.

Felony and misdemeanor.— Where under the law the jury have nothing to do with the punishment, but are simply required to pass upon the facts, a new trial should not be granted on the ground that the jurors supposed they were convicting of a misdemeanor and that they did not intend by a general verdict of guilty to convict of a felony. Wells *v.* State, 11 Nebr. 409, 9 N. W. 552.

99. People *v.* Long, 44 Mich. 296, 6 N. W. 673.

1. Galvin *v.* State, 6 Coldw. (Tenn.) 283.

2. Montgomery *v.* State, 13 Tex. App. 74.

3. State *v.* Rhea, 25 Kan. 576.

4. State *v.* Turner, 6 Baxt. (Tenn.) 201. And see *supra*, XIV, J, 5, g, (III).

5. State *v.* Arthur, 21 Iowa 322; State *v.* Finlayson, 113 N. C. 628, 18 S. E. 200. And see *supra*, XIV, K, 2, g.

Informal verdict.— A new trial should be granted where the verdict is unintelligible, and it is impossible to ascertain whether it finds the accused guilty as a principal or as aiding and abetting (People *v.* Schoedde, 126 Cal. 373, 58 Pac. 859), and also where the verdict finds the prisoner guilty, and the foreman states that the jury could not agree on the fact of the intent (Com. *v.* Mooar, Thach. Cr. Cas. (Mass.) 410).

(iv) *Irregularity in Calling Names of Jury.* The failure of the clerk in polling the jury to call the name of one of the jurors is not ground for a new trial, where the mistake is corrected before the juror has left the court.[6]

(v) *Reception in Absence of Judge or Defendant.* A verdict should be received in open court by the trial judge, and his delegation of this power to another, although by the consent of the parties, is ground for a new trial.[7] So too the reception of the verdict in the absence of defendant is ground for a new trial.[8]

n. Verdict Contrary to Law. Where the verdict is against the law,[9] and it appears that the trial court stated the law correctly, so that it is evident that the jury disregarded the instructions, a new trial should be granted;[10] but a verdict should not be set aside and a new trial granted except for an omission or error prejudicial to the accused.[11]

o. Verdict Contrary to Evidence. A new trial may be granted the accused where he is convicted on insufficient evidence, but the verdict of the jury will always be entitled to great weight with the court,[12] and will not be set aside because the court is not satisfied beyond all reasonable doubt of the guilt of defendant. Greater latitude is allowed on motions for new trials on the ground of insufficiency of evidence in criminal than in civil cases, and where the evidence of guilt is slight,[13] or where the evidence taken together, being contradic-

6. Russell *v.* State, 68 Ga. 785. And see *supra*, XIV, K, 1, d, (II).

The disobedience of a juror in permitting the verdict to become known after it had been received, with liberty to poll the jury subsequently, is not such an irregularity as would call for a new trial. Collins *v.* State, 73 Ga. 76.

7. McClure *v.* State, 77 Ind. 287. *Contra*, State *v.* Austin, 108 N. C. 780, 13 S. E. 219, holding that except in capital cases the verdict may be received by the clerk if defendant, having an opportunity to object, fails to do so. And see *supra*, XIV, K, 1, a.

8. See *supra*, XIV, B, 3, a.

But the absence of counsel for defendant when the jury render their verdict is not ground for a new trial, unless the jury are not polled by reason of such absence. Penn *v.* State, 62 Miss. 450; State *v.* Jones, 91 N. C. 654; Smith *v.* State, 51 Wis. 615, 8 N. W. 410, 37 Am. Rep. 845.

9. Irwin *v.* State, 54 Ga. 39.

10. **Misunderstanding instructions.**—Where it appears that the jurors misunderstood the instructions (Packard *v.* U. S., 1 Greene (Iowa) 225, 48 Am. Dec. 375) and were entirely mistaken as to the law (Noah's Case, 3 City Hall Rec. (N. Y.) 13; Pilkinton *v.* State, 19 Tex. 214. But see Johnson *v.* State, 27 Tex. 758), a conviction may be set aside and a new trial granted (Dean *v.* Com., 32 Gratt. (Va.) 912; Pryor *v.* Com., 27 Gratt. (Va.) 1009).

11. Where therefore the jury err in bringing in a verdict which is more favorable to him than the evidence would warrant, or of a lesser grade of the offense than is charged in the indictment, a new trial should not be granted. People *v.* Muhlner, 115 Cal. 303, 47 Pac. 128; State *v.* Ross, 26 N. J. L. 224; Phillips *v.* Territory, 1 Wyo. 82.

12. Hicks *v.* State, 25 Fla. 535, 6 So. 441; Jones *v.* State, 112 Ga. 220, 37 S. E. 392; Summerour *v.* State, 112 Ga. 19, 37 S. E. 98; Kirby *v.* State, 3 Humphr. (Tenn.) 289; Black *v.* Thomas, 21 W. Va. 709.

Conflicting evidence.— A new trial will not be granted merely because the evidence is conflicting, where there is some evidence to sustain the verdict.

Arizona.—Territory *v.* Miramontez, (1894) 36 Pac. 35.

Arkansas.— Leach *v.* State, 67 Ark. 314, 55 S. W. 15; State *v.* Crytes, 24 Ark. 183; Dixon *v.* State, 22 Ark. 213.

Florida.— Sherman *v.* State, 17 Fla. 888.

Georgia.— Lowe *v.* State, 112 Ga. 189, 37 S. E. 401; Ford *v.* State, 95 Ga. 501, 20 S. E. 218; Nealy *v.* State, 89 Ga. 806, 15 S. E. 744.

Illinois.—Wickersham *v.* People, 2 Ill. 128.

Kansas.— State *v.* Allen, 45 Kan. 101, 25 Pac. 224.

Mississippi.— Keithler *v.* State, 10 Sm. & M. 192.

Missouri.— State *v.* Moody, 24 Mo. 560.

Nebraska.— Van Buren *v.* State, 63 Nebr. 453, 88 N. W. 671.

New York.— People *v.* Shea, 147 N. Y. 78, 41 N. E. 505; People *v.* Goodrich, 3 Park. Cr. 518.

Pennsylvania.— Com. *v.* Davage, 7 Kulp 524; Com. *v.* Twitchell, 1 Brewst. 551.

South Carolina.—State *v.* Howard, 64 S. C. 344, 42 S. E. 173, 92 Am. St. Rep. 804; State *v.* Scates, 3 Strobh. 106.

Texas.— Monroe *v.* State, 23 Tex. 210, 76 Am. Dec. 58; Schirmacher *v.* State, (Cr. App. 1898) 45 S. W. 802.

Wisconsin.— State *v.* Lamont, 2 Wis. 437.

See 15 Cent. Dig. tit. "Criminal Law," § 2297.

13. Summerour *v.* State, 112 Ga. 19, 37 S. E. 98; Williams *v.* State, 85 Ga. 535, 11 S. E. 859; State *v.* Powers, Ga. Dec. 150; State *v.* Jones, 2 Bay (S. C.) 520.

Where the principal witnesses for the prosecution contradict their former testimony given at an inquest, and the later testimony is also contradicted by other witnesses, a new

tory, preponderates against the verdict a new trial should be granted.[14] So where the issue is one of fact only, and the court, on a review of the whole evidence, is not satisfied that the facts proved justify the verdict found,[15] or where there is no proof of some material fact or proof of such a fact which is plainly insufficient[16] a new trial ought to be granted. But a new trial should not be granted because the evidence, being all circumstantial, did not produce upon the minds of the jurors the same effect that it does upon the mind of the court, or because the court thinks it would have given a different verdict on such circumstantial evidence.[17]

p. Surprise and Mistake — (1) *In General.* New trials on the ground of

trial should be granted. Gibbons *v.* People, 23 Ill. 518.

14. *Arkansas.*— Waller *v.* State, 4 Ark. 87.

Georgia.— Fann *v.* State, 112 Ga. 230, 37 S. E. 378; Reynolds *v.* State, 24 Ga. 427.

Illinois.— Rafferty *v.* People, 72 Ill. 37.

Indiana.— Stout *v.* State, 78 Ind. 492.

Iowa.— State *v.* Hilton, 22 Iowa 241.

Missouri.— State *v.* Prendible, 165 Mo. 329, 65 S. W. 559.

Montana.—Territory *v.* Reuss, 5 Mont. 605, 5 Pac. 885.

New Jersey.— State *v.* Ross, 26 N. J. L. 224.

Ohio.— Crandall *v.* State, 28 Ohio St. 479.

South Carolina.— State *v.* Dilley, Riley 302; State *v.* Kane, 1 McCord 482.

Tennessee.— Leake *v.* State, 10 Humphr. 144.

Texas.— Owens *v.* State, 35 Tex. 361; Saltillo *v.* State, 16 Tex. App. 249; Ellis *v.* State, 10 Tex. App. 540; Brite *v.* State, 10 Tex. App. 368.

Virginia.— Dean *v.* Com., 32 Gratt. 912; Ball *v.* Com., 8 Leigh 726.

See 15 Cent. Dig. tit. "Criminal Law," § 2297.

Clear proof of an alibi by reliable witnesses, with a possibility that the witnesses for the prosecution might be mistaken in the identity of the accused, will justify a new trial for insufficiency of evidence. Lincoln *v.* People, 20 Ill. 364.

Statutory provision.— If the fact that a verdict is contrary to the evidence is under a statute ground for a new trial, the court is bound to determine whether the verdict is contrary to the evidence or not. State *v.* Young, 119 Mo. 495, 24 S. W. 1038.

The question is not whether the court, from the evidence, might come to a different conclusion from that arrived at by the jury, but whether because of the insufficiency of the evidence the jury have rendered an unreasonable and unjust verdict. The court should be able to say from a review of the evidence that its injustice is manifest, and that for that reason it should not stand. And where the evidence is contradictory, so that the question turns upon its credibility, which is a question solely for the jury, the court should hesitate and exercise its discretion with great care in setting aside a conviction as unjust. U. S. *v.* Daubner, 17 Fed. 793.

15. *Colorado.*— Bachman *v.* People, 8 Colo. 472, 9 Pac. 42.

Georgia.— Raines *v.* State, 33 Ga. 571.

Kansas.— State *v.* Spidle, 44 Kan. 439, 24 Pac. 965.

New Mexico.— U. S. *v.* Lewis, 2 N. M. 459.

New York.— People *v.* Bergen, 17 N. Y. Suppl. 296.

South Carolina.—State *v.* Windham, Cheves 75; State *v.* Spenlove, Riley 269; State *v.* Herring, 1 Brev. 159.

Tennessee.— Whiteside *v.* State, 4 Coldw. 175; Bedford *v.* State, 5 Humphr. 552.

Texas.— Gazley *v.* State, 17 Tex. App. 267; Underwood *v.* State, 25 Tex. Suppl. 389.

Virginia.— Dean *v.* Com., 32 Gratt. 912; Pryor *v.* Com., 27 Gratt. 1009; Ball *v.* Com., 8 Leigh 726.

See 15 Cent. Dig. tit. "Criminal Law," § 2298.

16. *Arkansas.*— Holeman *v.* State, 13 Ark. 105.

Florida.— McCoy *v.* State, 17 Fla. 193.

Georgia.— Clark *v.* State, 110 Ga. 911, 36 S. E. 297; Smith *v.* State, 95 Ga. 460, 21 S. E. 45.

Iowa.— State *v.* Woolsey, 30 Iowa 251.

South Carolina.— State *v.* Bunten, 2 Nott & M. 441; State *v.* Wood, 1 Mill 29.

See 15 Cent. Dig. tit. "Criminal Law," § 2298.

Failure to prove the motive for the commission of a crime is not ground for a new trial where the guilt of the prisoner is clear. State *v.* Whitman, 14 Rich. (S. C.) 113.

17. *Virginia.*—Russell *v.* Com., 78 Va. 400; Dean *v.* Com., 32 Gratt. 912; Pryor *v.* Com., 27 Gratt. 1009; Grayson *v.* Com., 6 Gratt. 712.

Washington.—State *v.* Smith, 9 Wash. 341, 37 Pac. 491.

West Virginia.—State *v.* Cooper, 26 W. Va. 338.

Wisconsin.— State *v.* Leppere, 66 Wis. 355, 28 N. W. 376; Williams *v.* State, 61 Wis. 281, 21 N. W. 56.

United States.— U. S. *v.* Ducournau, 54 Fed. 138; U. S. *v.* Martin, 26 Fed. Cas. No. 15,731, 2 McLean 256.

See 15 Cent. Dig. tit. "Criminal Law," § 2297 *et seq.*

If the evidence, being circumstantial, is not on the whole inconsistent with the innocence of the accused (Shannon *v.* State, 57 Ga. 482; Green *v.* State, 12 Tex. App. 51), or if he explains or denies every incriminating circumstance in such a way as to render his guilt extremely doubtful (Wright *v.* State, 21 Nebr. 496, 32 N. W. 576), and if, as it is held in Georgia, the circumstances

surprise or accident are wholly within the discretion of the court;[18] and a new trial should not be granted because of surprise, unless it appears that the surprise was in no wise attributable to defendant's negligence.[19] For example hostile testimony of defendant's own witness,[20] illness of the accused,[21] lack of opportunity to obtain impeaching testimony,[22] mistake as to the accusation against defendant,[23] mistake of defendant or his counsel resulting in a failure to interpose the particular defense,[24] refusal of witness for the prosecution to testify,[25] sudden illness of an unnecessary witness,[26] testimony of a witness different from that which he gave on a previous occasion,[27] or the unexpected testimony of a witness[28] has been held not to constitute such mistake or surprise as to warrant the granting of a new trial to defendant.

do not establish guilt beyond all reasonable doubt (Orr *v.* State, 114 Ga. 527, 40 S. E. 697; Shay *v.* State, 112 Ga. 541, 37 S. E. 884; Fann *v.* State, 112 Ga. 230, 37 S. E. 378), a new trial should be granted.

18. The action of the court will not be reversed unless the discretion is abused. Anderson *v.* State, 41 Ark. 229; Coker *v.* State, 20 Ark. 53; Todd *v.* State, 25 Ind. 212.

But by statute or as a rule of procedure it is usually provided that a new trial ought to be granted where by reason of accident, mistake, or misfortune justice has not been done the accused, and a further hearing is fair and equitable. Buzzell *v.* State, 59 N. H. 61, also holding that a statute allowing a new trial "in any case" applied to criminal cases.

19. U. S. *v.* Smith, 27 Fed. Cas. No. 16,341, 1 Sawy. 277.

Thus surprise arising from a mistake of law by defendant (People *v.* O'Brien, 4 Park. Cr. (N. Y.) 203) or from a failure on his part seasonably to inform his counsel of facts in his possession (Beck *v.* State, 65 Ga. 766) is not ground for a new trial.

Importance of evidence.— A motion for a new trial on the ground of surprise in that defendant had discovered that evidence known to him previously to the trial was more important than he had supposed will not be granted. State *v.* Anderson, 35 La. Ann. 991.

Promise of prosecuting attorney not to prosecute communicated to and relied on by the accused, because of which he failed to summon any witnesses to prove his defense at the trial, in connection with the fact that he discovered new witnesses after his conviction, is ground for a new trial. State *v.* Townsend, 7 Wash. 462, 35 Pac. 367.

20. A new trial will not usually be granted to defendant because one of his witnesses surprised him by testifying in a hostile manner on the stand, where no postponement was asked and no effort was made to supply the expected evidence by other witnesses. Mayfield *v.* State, 44 Tex. 59; Brown *v.* State, (Tex. Cr. App. 1900) 56 S. W. 56; White *v.* State, (Tex. Cr. App. 1899) 50 S. W. 705; Leslie *v.* State, (Tex. Cr. App. 1899) 49 S. W. 73; Simnacher *v.* State, (Tex. Cr. App. 1897) 43 S. W. 512; Burton *v.* State, 9 Tex. App. 605; Webb *v.* State, 9 Tex. App. 490.

Materiality of testimony.— Where it is held that a new trial may be granted for surprise by hostile testimony, it must appear that such testimony was material. Bissot *v.* State, 53 Ind. 408; State *v.* Viers, 82 Iowa 397, 48 N. W. 732.

21. State *v.* Montgomery, 71 Iowa 630, 33 N. W. 143, where it does not appear that his mind or memory was in any way affected.

22. Hitchcock *v.* Princeville, 84 Ill. App. 59, where the evidence for the prosecution is uncontradicted and is sufficient to sustain the conviction.

Mistake as to the presence of a witness whose testimony was desired only to impeach another witness is not a ground for a new trial, where it does not appear that any injury to the accused resulted. Lundy *v.* State, 44 Miss. 669.

23. Where defendant, by reason of his failure or the failure of his counsel to examine the pleadings filed, is mistaken as to the issue raised (McBean *v.* State, 3 Heisk. (Tenn.) 20), or the particular charge which he must produce evidence to meet, he is not entitled to a new trial (Wholford *v.* Com., 4 Gratt. (Va.) 553).

24. Lester *v.* State, 11 Conn. 415; State *v.* Miller, 107 La. 796, 32 So. 191.

25. State *v.* Howerton, 58 Mo. 581.

26. The sudden illness of a witness during a trial, which prevents him from giving testimony, is not such an accident as will give the accused a new trial, if the facts the witness would have proved were testified to by others. Young *v.* Com., 4 Gratt. (Va.) 550.

27. Dillingham *v.* State, (Tex. Cr. App. 1901) 62 S. W. 919; McNeal *v.* State, (Tex. Cr. App. 1897) 43 S. W. 792; State *v.* Webb, 20 Wash. 500, 55 Pac. 935; State *v.* Miller, 24 W. Va. 802.

If in fact defendant is surprised by a material change in the testimony of the prosecuting witness, to a material fact in the case against him, where it appears that this witness testified differently elsewhere, a new trial ought to be granted. Com. *v.* Sminkey, 7 Del. Co. (Pa.) 353.

28. Defendant cannot claim surprise as to any relevant evidence introduced in support of a charge in the indictment against him (Morel *v.* State, 89 Ind. 275; State *v.* Hunter, 18 Wash. 670, 52 Pac. 247), even though it is given by a witness whose name was not indorsed on the indictment; as the rule of surprise as to such witness is the same as to other witnesses (People *v.* Jocelyn, 29 Cal.

(II) *Time of Objection.* As in all cases where a new trial is desired, it is necessary that the objection, because of surprise or accident, should be promptly taken at the time.[29]

q. Newly Discovered Evidence — (I) *In General* — (A) *Looked on With Disfavor.* Applications for new trials because of newly discovered evidence are looked upon by the courts with distrust.[30] In the absence of statute,[31] or where a statute expressly provides for what causes a new trial may be granted, and newly discovered evidence is not one of them,[32] no new trial will be granted on this ground.

(B) *What Is Newly Discovered Evidence* — (1) In General. It must be clearly shown that the evidence on which a new trial is asked is evidence in fact newly discovered.[33]

(2) Another Person Guilty. Evidence not known to defendant at his trial, which will prove or tend to prove that the crime of which he has been convicted was committed by another person, may be ground for a new trial.[34]

562). See also State *v.* Fay, 88 Minn. 269, 92 N. W. 978.

Mistake of counsel.— Where the prisoner is surprised by evidence which his counsel tells him is not admissible against him, he should receive a new trial to enable him to produce rebutting evidence. State *v.* Williams, 27 Vt. 724.

29. Nickens *v.* State, 55 Ark. 567, 18 S. W. 1045; State *v.* McQueen, 108 La. 410, 32 So. 412; State *v.* Chambers, 43 La. Ann. 1108, 10 So. 247; State *v.* Perkins, 40 La. Ann. 210, 3 So. 647; People *v.* Mack, 2 Park. Cr. (N. Y.) 673; Zolliecffer *v.* State, (Tex. Cr. App. 1897) 38 S. W. 775.

Necessity to ask for continuance.— A new trial will not be granted on the ground of surprise, unless the objection was promptly made at the time, and a continuance or postponement was then asked for.

Arkansas.— Overton *v.* State, 57 Ark. 60, 20 S. W. 590.

Illinois.— Spahn *v.* People, 137 Ill. 538, 27 N. E. 688.

Mississippi.— Peebles *v.* State, 55 Miss. 434.

Oregon.— State *v.* Gardner, 33 Oreg. 149, 54 Pac. 809.

Texas.— Cotton *v.* State, 4 Tex. 260; Stewart *v.* State, (Cr. App. 1899) 49 S. W. 95; Bryant *v.* State, 35 Tex. Cr. 394, 33 S. W. 978, 36 S. W. 79; Robinson *v.* State, 35 Tex. Cr. 181, 32 S. W. 900; Robbins *v.* State, 33 Tex. Cr. 573, 28 S. W. 473.

Vermont.— State *v.* White, 70 Vt. 225, 39 Atl. 1085; Badger *v.* State, 69 Vt. 217, 37 Atl. 286.

See 15 Cent. Dig. tit. "Criminal Law," § 2305; and, generally, Continuances in Criminal Cases, 9 Cyc. 163.

The absence or hostility of a witness (Jackson *v.* State, (Tex. Cr. App. 1894) 25 S. W. 632; Cunningham *v.* State, 20 Tex. App. 162; Childs *v.* State, 10 Tex. App. 183; Burton *v.* State, 9 Tex. App. 605; Webb *v.* State, 9 Tex. App. 490; Higginbotham *v.* State, 3 Tex. App. 447), although it be defendant's only witness (Yanez *v.* State, 20 Tex. 656), does not justify a new trial for surprise, where he did not promptly demand a continuance or postponement.

Time to prepare.— Where defendant was allowed an hour after the case was called to prepare, and he did not ask for further time or show why he was not ready, a new trial will not be granted because of surprise. Parker *v.* State, 81 Ga. 332, 6 S. E. 600.

30. They are granted only on the following conditions: (1) The evidence must be in fact newly discovered, that is, discovered since the trial; (2) the party must show facts from which the court may infer that he was diligent in attempting to procure it at the trial; (3) it must not be impeaching evidence alone; (4) it must be material to the issue; (5) the evidence must not be merely cumulative; (6) the facts to be proved must be such as would probably on a new trial produce an acquittal. Howard *v.* State, 36 Fla. 21, 17 So. 84. And see Berry *v.* State, 10 Ga. 511; Territory *v.* Claypool, (N. M. 1903) 71 Pac. 463.

31. State *v.* Harding, 2 Bay (S. C.) 267.

32. People *v.* Bernstein, 18 Cal. 699; State *v.* Cater, 100 Iowa 501, 69 N. W. 880; State *v.* Graff, 97 Iowa 568, 66 N. W. 779; State *v.* King, 97 Iowa 440, 66 N. W. 735; State *v.* Harris, 97 Iowa 407, 66 N. W. 728.

33. White *v.* State, 17 Ark. 404; State *v.* Lockier, 2 Root (Conn.) 84; Scott *v.* State, 1 Root (Conn.) 155; Burgess *v.* State, 93 Ga. 304, 20 S. E. 331; Shackelford *v.* State, (Tex. Cr. App. 1899) 53 S. W. 884; English *v.* State, (Tex. Cr. App. 1897) 38 S. W. 778; Templeton *v.* State, 5 Tex. App. 398.

Newly recollected is not newly discovered evidence within the rule. State *v.* Shanks, Tapp. (Ohio) 13.

That it is the best evidence which the case admits should be shown. People *v.* Sutton, 73 Cal. 243, 15 Pac. 86.

34. People *v.* Kelleher, (Cal. 1887) 16 Pac. 705; State *v.* Armstrong, 48 La. Ann. 314, 19 So. 146; Bates *v.* State, (Miss. 1902) 32 So. 915.

Where another person, after being convicted for the same crime, deposes that he committed the crime alone (State *v.* Verrill, 54 Me. 581) or with the assistance of some person other than defendant (Bowman *v.* State, 95 Ga. 496, 22 S. E. 274) a new trial should be granted.

Where the evidence would be inadmissible in favor of defendant, a new trial should not

(3) Evidence of New Defense. A new trial will not usually be granted where the newly discovered evidence supports a defense which is entirely different from, or inconsistent with, that interposed at the trial.[35]

(4) Facts Within Knowledge of Accused. Facts which were within the knowledge of the accused at the time of his trial are not newly discovered evidence warranting a new trial,[36] and the burden is upon him to show that the evidence came to his knowledge after the verdict.[37] And evidence is not newly discovered which defendant knew, but did not mention to his counsel,[38] or which was known to his counsel and not communicated to defendant.[39]

(5) Further Testimony From Former Witness. Testimony of a witness who was examined at the trial,[40] or who was present and might have been exam-

be granted. Briscoe *v.* State, 95 Ga. 496, 20 S. E. 211; Doyle *v.* Kuchar, 57 Ill. App. 375.

The court on the motion is not bound to accept as true a confession by a third party in one of the moving affidavits, but may consider the probability of its truth with all the other evidence. If it seem probable that the proof of the commission of the crime by another would not be sufficient on a new trial to exonerate the accused the motion may be denied. People *v.* Merkle, 89 Cal. 82, 26 Pac. 642.

35. Wash *v.* State, (Tex. Cr. App. 1898) 47 S. W. 469; Templeton *v.* State, 5 Tex. App. 398.

Reason for rule.— If defendant were permitted to do this and bring in new defenses after the verdict, there would be no end to the litigation. People *v.* Freeman, 92 Cal. 359, 28 Pac. 261.

Thus where the defense was self-defense a new trial will not be granted where the new evidence shows that the defense on the new trial will be insanity. Cooper *v.* State, 120 Ind. 377, 22 N. E. 320.

So where the newly discovered evidence is irreconcilable with the testimony or statement of defendant on his former trial, it is not error to refuse a new trial. People *v.* McCauley, 45 Cal. 146; Brooks *v.* State, 108 Ga. 47, 33 S. E. 812; State *v.* Stain, 82 Me. 472, 20 Atl. 72.

36. *California.*— People *v.* Cesena, 90 Cal. 381, 27 Pac. 300.

Colorado.— Klink *v.* People, 16 Colo. 467, 27 Pac. 1062.

Georgia.— Malone *v.* State, 116 Ga. 272, 42 S. E. 468; Jackson *v.* State, 114 Ga. 861, 40 S. E. 989; Brooks *v.* State, 103 Ga. 50, 29 S. E. 485; Gregory *v.* State, 80 Ga. 269, 7 S. E. 222; Tilley *v.* State, 55 Ga. 557.

Kansas.— State *v.* Currens, 46 Kan. 750, 27 Pac. 140.

Louisiana.— State *v.* Joseph, 51 La. Ann. 1309, 26 So. 275; State *v.* Adams, 39 La. Ann. 238, 1 So. 455.

Oklahoma.— Watkins *v.* U. S., 5 Okla. 729, 50 Pac. 88.

Texas.— Webb *v.* State, (Cr. App. 1902) 68 S. W. 276; Orn *v.* State, (Cr. App. 1900) 57 S. W. 830; West *v.* State, 40 Tex. Cr. 148, 49 S. W. 95; Osgood *v.* State, (Cr. App. 1899) 49 S. W. 94; Butts *v.* State, 35 Tex. Cr. 364, 33 S. W. 866; Barner *v.* State, (Cr. App. 1892) 20 S. W. 559; Bell *v.* State, (Cr. App. 1892) 20 S. W. 362.

See 15 Cent. Dig. tit. "Criminal Law," § 2308.

Where the only newly discovered fact is that the evidence might have been important if it had been introduced, a new trial will not be granted. People *v.* Hovey, 30 Hun (N. Y.) 354.

37. Hardin *v.* State, 107 Ga. 718, 33 S. E. 700; Parsley *v.* State, (Tex. Cr. App. 1901) 64 S. W. 257; Dillingham *v.* State, (Tex. Cr. App. 1901) 62 S. W. 919; Frickie *v.* State, 40 Tex. Cr. 626, 51 S. W. 394.

Presumption of knowledge.— It may often be presumed from the nature of the facts to be proved, aside from any other evidence of his knowledge, that the accused knew them before his trial began. Thus evidence relating to a conversation in which the accused took part (Stewart *v.* State, 66 Ga. 90; State *v.* Hanks, 39 La. Ann. 234, 1 So. 458) or to some act done by himself (State *v.* Foley, 81 Iowa 36, 46 N. W. 746) or evidence of his former acquittal of a similar crime (State *v.* Bates, 38 La. Ann. 491) or evidence of the excessive use of drugs or liquor, and medical treatment therefor, which might tend to show a weakened mental condition at the time of the commission of the crime (People *v.* Hovey, 30 Hun (N. Y.) 354) is not newly discovered evidence that will justify the granting of a new trial.

Where defendant knows that certain witnesses will testify to material facts in his defense, but declines to introduce them because he fears that they will not testify truthfully, he cannot use their evidence as newly discovered. O'Neil *v.* State, 104 Ga. 538, 30 S. E. 843.

38. Moore *v.* State, (Tex. Cr. App. 1899) 53 S. W. 862; Tanner *v.* State, (Tex. Cr. App. 1898) 44 S. W. 489.

39. Bush *v.* State, 95 Ga. 501, 22 S. E. 284; Oneal *v.* State, 47 Ga. 229; Isaacs *v.* People, 118 Ill. 538, 8 N. E. 821.

40. State *v.* Dimmitt, 88 Iowa 551, 55 N. W. 531; Williams *v.* State, (Tex. Cr. App. 1896) 34 S. E. 271.

Proof that prosecuting witness has altered his opinion as to defendant being guilty is not new evidence where the change of opinion was produced solely by a process of reasoning on a suggestion by an outsider. Shields *v.* State, 45 Conn. 266.

Subsequent recollection by a witness of some fact omitted from his testimony or incorrectly stated is ordinarily not sufficient

ined,[41] is not generally regarded as newly discovered evidence; and a new trial will not be granted defendant because a witness would have given certain testimony if the proper questions had been put to him,[42] or if his failure to give such testimony was due to objection on the part of defendant.[43]

(6) Opinion Evidence. The opinion of a person not an expert is not regarded as newly discovered evidence, although facts upon which an opinion may be based may be received as newly discovered.[44]

(7) Perjury of Witness. Where it is discovered after verdict that a witness for the prosecution deliberately perjured himself, and the accused would not have been convicted except for his testimony, he is entitled to a new trial for newly discovered evidence;[45] but if there was sufficient evidence to sustain the verdict without that of the perjured witness a new trial will not be granted.[46]

(8) Showing Involuntary Character of Confession. Evidence discovered since the trial, showing that a confession was procured by promises and persuasion, is ground for a new trial, if the exclusion of the confession would on the new trial probably acquit the accused.[47]

(9) Testimony of Co-Defendant After Acquittal. A new trial will not be granted merely to enable one of several defendants jointly indicted and tried to use the evidence of a co-defendant who was acquitted;[48] but where the evidence is material, and would in connection with the other evidence probably change the result of the trial, a new trial should be granted.[49]

ground for a new trial. Gannon *v.* State, 75 Conn. 576, 54 Atl. 199.

41. State *v.* Shanks, Tapp. (Ohio) 13.

Where the witness who is to give the new evidence was present as a witness for defendant at the trial (People *v.* Griner, 124 Cal. 19, 56 Pac. 625; Bryant *v.* State, 80 Ga. 272, 4 S. E. 853; State *v.* Hall, 97 Iowa 400, 66 N. W. 725; Clay *v.* State, (Tex. Cr. App. 1893) 22 S. W. 973), or was in the court, although not called (People *v.* Luchetti, 119 Cal. 501, 51 Pac. 707; Feinberg *v.* People, 174 Ill. 609, 51 N. E. 798), or where facts constituting reasonable diligence in searching for him are not alleged in the affidavit, and it contains merely an allegation that the accused has used every effort to find an absent witness (Howell *v.* People, 178 Ill. 176, 52 N. E. 873), a new trial will be denied.

42. Richie *v.* State, 58 Ind. 355; State *v.* Ernest, 150 Mo. 347, 51 S. W. 688; State *v.* Cantlin, 118 Mo. 100, 23 S. W. 1091; People *v.* Baker, 27 N. Y. App. Div. 597, 50 N. Y. Suppl. 771; Wynne *v.* State, (Tex. Cr. App. 1899) 51 S. W. 909; Cunningham *v.* State, (Tex. Cr. App. 1898) 43 S. W. 988; Booker *v.* State, (Tex. Cr. App. 1897) 42 S. W. 298.

43. State *v.* Tall, 43 Minn. 273, 45 N. W. 449.

44. Lewis *v.* State, 106 Ga. 362, 32 S. E. 342; Graham *v.* State, 102 Ga. 650, 29 S. E. 582; Wright *v.* State, 91 Ga. 80, 16 S. E. 259; State *v.* White, 33 La. Ann. 1218. And *compare* Hill *v.* State, (Tex. Cr. App. 1899) 53 S. W. 845.

45. Bussey *v.* State, 69 Ark. 545, 64 S. W. 268; Bates *v.* State, (Miss. 1902) 32 So. 915; Mann *v.* State, 44 Tex. 642.

Thus where a witness testified that he and accused committed the crime, the conviction of the accused being based wholly on his evidence, but subsequently stated that the crime was committed by five persons, including himself and the accused, and also other circumstances materially contradicting his testimony, a new trial was granted for newly discovered evidence, which the court said was neither cumulative nor impeaching because if believed its tendency was to defeat a verdict for the state. Dennis *v.* State, 103 Ind. 142, 2 N. E. 349.

So where a person testified that he was hired to commit a crime, that he and defendant conspired to commit it, and that defendant actually committed it, and subsequently swears that he was hired by the person injured to so testify, a new trial should be granted. State *v.* Moberly, 121 Mo. 604, 26 S. W. 364.

The denial of a motion for a new trial upon the ground of perjury of a witness for the state was held to be discretionary under the following circumstances: An accomplice who testified to the commission of the crime by himself and defendant, with corroboration by other testimony, made an affidavit in which he stated that he had wilfully sworn falsely at the trial at the suggestion of the district attorney and a deputy sheriff, and on a promise of money to be given him. These statements were denied in the affidavits of the officials named. People *v.* Tallmadge, 114 Cal. 427, 46 Pac. 282.

46. U. S. *v.* Biena, 8 N. M. 99, 42 Pac. 70.

Where the statute provides that a verdict may be set aside for perjury, there can be no new trial for newly discovered evidence, unless there be first a conviction for perjury. Gant *v.* State, 115 Ga. 205, 41 S. E. 698; Brown *v.* State, 60 Ga. 210.

47. Bird *v.* State, 16 Tex. App. 528.

48. State *v.* Bean, 36 N. H. 122.

The evidence is not strictly speaking newly discovered, and is not alone ground for a new trial (People *v.* Vermilyea, 7 Cow. (N. Y.) 369), but is only an element to be considered in connection with the whole evidence (Cavanah *v.* State, 56 Miss. 299).

49. Lyles *v.* State, 41 Tex. 172, 19 Am. Rep. 38; Grant *v.* State, 42 Tex. Cr. 275,

(10) WITNESS BECOMING COMPETENT AFTER VERDICT. Where, because of the form of the indictment, defendant has been deprived of the testimony of a material witness, a new trial should be granted, where the result of the trial shows him to be legally entitled to the evidence.[50]

(11) WITNESS DISCOVERED TO HAVE BEEN INCOMPETENT. The fact that a witness who testified at the trial has been subsequently to the verdict discovered to have been incompetent when he testified is not ground for a new trial.[51]

(II) *DILIGENCE* — (A) *General Rule.* A new trial will not be granted because of newly discovered evidence, where the accused does not show that he exercised due and reasonable diligence in attempting to procure the evidence in time for use at his trial;[52] and defendant should not have a new trial, where he knew or could

58 S. W. 1025; Chumley *v.* State, 32 Tex. Cr. 255, 26 S. W. 406; Gibbs *v.* State, 30 Tex. App. 581, 18 S. W. 88; Moore *v.* State, (Tex. App. 1890) 15 S. W. 204; Helm *v.* State, 20 Tex. App. 41; Rucker *v.* State, 7 Tex. App. 549; Williams *v.* State, 4 Tex. App. 5; Huebner *v.* State, 3 Tex. App. 458; Rich *v.* State, 1 Tex. App. 206.

If the testimony of the acquitted co-defendant would be uncorroborated or of such doubtful credibility that it would not probably affect the verdict a new trial should not be granted. Jones *v.* State, 23 Tex. App. 501, 5 S. W. 138.

50. Com. *v.* Manson, 2 Ashm. (Pa.) 31.

The fact that a witness has become competent since the verdict is not alone sufficient to entitle defendant to a new trial, although it is important and entitled to much weight. Each case must be determined by its circumstances, and, if the testimony of the witness, with the other evidence, would probably produce a different result from the former trial a new trial should be granted. Cavanah *v.* State, 56 Miss. 299.

51. Walker *v.* State, 39 Ark. 221; Com. *v.* Green, 17 Mass. 515. And see 1 Chitty Cr. L. 656.

52. *Alabama.*— Lowery *v.* State, 98 Ala. 45, 13 So. 498.

Arkansas.— State *v.* Bach Liquor Co., 67 Ark. 163, 55 S. W. 854; Runnels *v.* State, 28 Ark. 121; Pleasant *v.* State, 13 Ark. 360.

California.— People *v.* Warren, 130 Cal. 683, 63 Pac. 86; People *v.* Freeman, 92 Cal. 359, 28 Pac. 261; People *v.* Sutton, 73 Cal. 243, 15 Pac. 86.

Colorado.— Holland *v.* People, 30 Colo. 94, 69 Pac. 519; Liggett *v.* People, 26 Colo. 364, 58 Pac. 144; Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221.

Connecticut.—Lester *v.* State, 11 Conn. 415.

Florida.— Mitchell *v.* State, 43 Fla. 584, 31 So. 242; Howard *v.* State, 36 Fla. 21, 17 So. 84.

Georgia.— Brown *v.* State, 105 Ga. 640, 31 S. E. 557; Campbell *v.* State, 100 Ga. 267, 28 S. E. 71; Dean *v.* State, 93 Ga. 184, 18 S. E. 557; Gaddis *v.* State, 91 Ga. 148, 16 S. E. 936; Ramsey *v.* State, 89 Ga. 198, 15 S. E. 6; Sconyers *v.* State, 85 Ga. 672, 12 S. E. 1069; Fogarty *v.* State, 80 Ga. 450, 5 S. E. 782; Thomas *v.* State, 52 Ga. 509.

Hawaii.— Republic *v.* Saku Tokuji, 9 Hawaii 548.

Illinois.— Lathrop *v.* People, 197 Ill. 169, 64 N. E. 385; Klein *v.* People, 113 Ill. 596.

Indiana.— Whitney *v.* State, 154 Ind. 573, 57 N. E. 398.

Iowa.— State *v.* Reinheimer, 109 Iowa 624, 80 N. W. 669.

Kentucky.— Marcum *v.* Com., 1 S. W. 727, 8 Ky. L. Rep. 418.

Louisiana.—State *v.* McQueen, 108 La. 410, 32 So. 412; State *v.* Bright, 105 La. 341, 29 So. 903; State *v.* Keaveny, 49 La. Ann. 667, 21 So. 730; State *v.* Alverez, 7 La. Ann. 283.

Minnesota.— State *v.* Bagan, 41 Minn. 285, 43 N. W. 5; State *v.* Barrett, 40 Minn. 65, 41 N. W. 459.

Mississippi.— Cooper *v.* State, 53 Miss. 393; Friar *v.* State, 3 How. 422.

Missouri.— State *v.* Cushenberry, 157 Mo. 168, 56 S. W. 737; State *v.* Myers, 115 Mo. 394, 22 S. W. 382.

Montana.— State *v.* Gay, 18 Mont. 51, 44 Pac. 411.

Nebraska.— Cunningham *v.* State, 56 Nebr. 691, 77 N. W. 60; St. Louis *v.* State, 8 Nebr. 405, 1 N. W. 371.

New Hampshire.— State *v.* Carr, 21 N. H. 166, 53 Am. Dec. 179.

New York.— People *v.* Hovey, 30 Hun 354; People *v.* Moore, 29 Misc. 574, 62 N. Y. Suppl. 252, 14 N. Y. Cr. 387; People *v.* Vermilyea, 7 Cow. 369.

Pennsylvania.— Com. *v.* Rogers, 30 Leg. Int. 201; Com. *v.* Pannel, 9 Lanc. Bar 82.

South Carolina.— State *v.* Workman, 15 S. C. 540; State *v.* Gordon, 1 Bay 491.

Tennessee.— Ware *v.* State, 108 Tenn. 466, 67 S. W. 853; Vincent *v.* State, 3 Heisk. 120; Gilbert *v.* State, 7 Humphr. 524.

Texas.— Mosely *v.* State, (Cr. App. 1902) 70 S. W. 546; Prim *v.* State, (Cr. App. 1902) 70 S. W. 545; Randell *v.* State, (Cr. App. 1901) 64 S. W. 255; Ash *v.* State, (Cr. App. 1901) 63 S. W. 881; Sisk *v.* State, (Cr. App. 1897) 42 S. W. 985; Harraway *v.* State, (Cr. App. 1897) 40 S. W. 262; Foreman *v.* State, (Cr. App. 1897) 39 S. W. 942; Carico *v.* State, 36 Tex. Cr. 618, 38 S. W. 37; Powell *v.* State, 36 Tex. Cr. 377, 37 S. W. 322.

Utah.— People *v.* Peacock, 5 Utah 237, 14 Pac. 332; U. S. *v.* Eldredge, 5 Utah 161, 13 Pac. 673.

Vermont.— State *v.* Fogg, 74 Vt. 62, 52

have known by inquiry what the witnesses would testify to.[53] The requirement of diligence is peculiarly applicable to new witnesses to prove an alibi, where their presence could have been easily obtained by defendant.[54]

(B) *Failure to Ask Continuance.* A new trial will not be granted because of newly discovered evidence where the witnesses who are to give it were known to the accused, although they could not be found at the trial, if no continuance or postponement was requested.[55]

(C) *Severance on Trial of Co-Defendants.* Where the new evidence is that of a co-defendant jointly tried with the moving party and acquitted, it should appear that the latter asked for a severance before trial, or for the acquittal of the co-defendant, to use his evidence. A failure to do so is lack of proper diligence.[56]

(III) *Materiality*—(A) *In General.* A new trial should not be granted for newly discovered evidence, unless it appears that the evidence is material and would probably produce a different result and one more favorable to the accused on a new trial.[57] Evidence, although newly discovered, having no tendency to

Atl. 272; Badger *v.* State, 69 Vt. 217, 37 Atl. 286; State *v.* J. W., 1 Tyler 417.

Virginia.— Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364.

Washington.— State *v.* Vance, 29 Wash. 435, 70 Pac. 34; State *v.* Power, 24 Wash. 34, 63 Pac. 1112.

West Virginia.—State *v.* Koontz, 31 W. Va. 127, 5 S. E. 328; State *v.* Betsall, 11 W. Va. 703.

United States.— U. S. *v.* Smith, 27 Fed. Cas. No. 16,341, 1 Sawy. 277.

See 15 Cent. Dig. tit. "Criminal Law," § 2318.

53. If defendant at the trial knows or has ground to suppose that certain persons with whom he is able to communicate, and whom he may examine, possess a knowledge of relevant facts, and he fails to ascertain and prove such facts before verdict, he is by his negligence debarred from proving these facts thereafter as newly-discovered. People *v.* Miller, 33 Cal. 99; Ford *v.* State, 91 Ga. 162, 17 S. E. 103; Statham *v.* State, 86 Ga. 331, 12 S. E. 640; Doyal *v.* State, 70 Ga. 134; Williams *v.* State, (Tex. Cr. App. 1898) 45 S. W. 572; Jefferson *v.* State, (Tex. Cr. App. 1897) 41 S. W. 601; Washington *v.* State, 35 Tex. Cr. 156, 32 S. W. 694.

Excuses for ignorance.— The confinement of the accused in jail up to the time of the trial, which took place very shortly after the crime (Thompson *v.* State, 60 Ga. 619), the fact that when he inquired of a person what he knew about the matter he was told by him that he knew nothing (Phillips *v.* State, 33 Ga. 281), the fact that he was insane and that his sole counsel was a lawyer of little experience (Anderson *v.* State, 43 Conn. 514, 21 Am. Rep. 669), and generally his poverty, lack of friends, and acquaintances, and of an opportunity to obtain the testimony (State *v.* Stowe, 3 Wash. 206, 28 Pac. 337, 14 L. R. A. 609) will excuse his failure to produce it at the trial and may furnish ground for a new trial, if he discovers it after the verdict, for the same strictness will not be observed in motions for new trials on the ground of newly discovered evidence in criminal cases as in civil cases (U. S. *v.* Briggs, 19 D. C. 585).

54. Lynch *v.* State, 84 Ga. 726, 11 S. E. 842; Avery *v.* State, 26 Ga. 233; Whitfield *v.* State, 40 Tex. Cr. 14, 48 S. W. 173.

Knowledge of accused.— The facts to sustain an alibi and the names of the witnesses to prove these are of necessity usually in the knowledge of the accused at the time of his trial and for this reason newly discovered evidence of an alibi is viewed with considerable suspicion. Thompson *v.* State, 5 Humphr. (Tenn.) 138; Walker *v.* State, 3 Tex. App. 70.

The fact that one of the witnesses on whom the accused relies to prove an alibi told him that he would do him no good as a witness and refused to name the others present does not excuse defendant's laches. Bean *v.* People, 124 Ill. 576, 16 N. E. 656.

55. State *v.* Albert, 109 La. 201, 33 So. 196; State *v.* Lamothe, 37 La. Ann. 43; Crawford *v.* State, (Tex. Cr. App. 1895) 29 S. W. 42.

Continuances generally see CONTINUANCES IN CRIMINAL CASES.

56. State *v.* Woodworth, 28 La. Ann. 89.

57. *Arkansas.*— White *v.* State, 17 Ark. 404; Bixby *v.* State, 15 Ark. 395.

California.— People *v.* Soap, 127 Cal. 408, 59 Pac. 771; People *v.* Demasters, 109 Cal. 607, 42 Pac. 236.

Georgia.— Golding *v.* State, 116 Ga. 526, 42 S. E. 744; Hancock *v.* State, 114 Ga. 439, 40 S. E. 317; Pitts *v.* State, 114 Ga. 35, 39 S. E. 873; Carr *v.* State, 106 Ga. 737, 32 S. E. 844; Tolleson *v.* State, 97 Ga. 352, 23 S. E. 993; Carter *v.* State, 46 Ga. 637; Wise *v.* State, 24 Ga. 31.

Illinois.— Sahlinger *v.* People, 102 Ill. 241.

Indiana.— Presser *v.* State, 77 Ind. 274; Rainey *v.* State, 53 Ind. 278.

Iowa.— State *v.* Burge, 7 Iowa 255.

Kansas.— State *v.* Beardsley, 43 Kan. 641, 23 Pac. 1070.

Kentucky.— Ditto *v.* Com., 2 Bibb 17.

Louisiana.— State *v.* Hendrix, 45 La. Ann. 500, 12 So. 621; State *v.* Diskin, 35 La. Ann. 46.

prove the innocence of the accused,[58] or which apparently is not calculated to change the result of the former trial,[59] is not ground for a new trial.

(B) *What Is Material Evidence.* The materiality of the evidence will depend wholly upon the nature of the charge, the nature of the evidence, and the facts of each particular case,[60] it being impossible to safely lay down any rule by which may be determined in any particular case or class of cases what evidence is material, except the very general proposition that evidence to be material must be of such a character as would probably on a new trial result in an acquittal.

(C) *Incompetency of Evidence.* Where the newly discovered evidence would be incompetent on a new trial the motion should be denied.[61]

(D) *Sufficiency of Evidence.* Where the evidence for the prosecution was barely sufficient to sustain a verdict of guilty, and the newly discovered evidence is material, the court will more readily grant a new trial than where the incrimi-

Massachusetts.— Com. *v.* Churchill, 2 Metc. 118.

Michigan.— People *v.* Sackett, 14 Mich. 320.

Mississippi.— Foster *v.* State, 52 Miss. 695.

Missouri.— State *v.* Waters, 144 Mo. 341, 46 S. W. 173; State *v.* Myers, 115 Mo. 394, 22 S. W. 382; State *v.* Campbell, 115 Mo. 391, 22 S. W. 367; State *v.* Murray, 91 Mo. 95, 3 S. W. 397.

New Hampshire.— State *v.* Carr, 21 N. H. 166, 53 Am. Dec. 179.

New York.— Williams *v.* People, 45 Barb. 201.

Oregon.— State *v.* Drake, 11 Oreg. 396, 4 Pac. 1204.

Pennsylvania.— Com. *v.* Kane, 12 Phila. 630; Com. *v.* Thompson, 4 Phila. 215; Com. *v.* Pannell, 9 Lanc. Bar 82; Com. *v.* Schoeppe, 1 Leg. Gaz. 450.

Texas.— McFadden *v.* State, (Cr. App. 1903) 71 S. W. 972; Brock *v.* State, (Cr. App. 1902) 71 S. W. 20, 60 L. R. A. 465; Brown *v.* State, 42 Tex. Cr. 176, 58 S. W. 131; Nite *v.* State, 41 Tex. Cr. 340, 54 S. W. 763; Osgood *v.* State, (Cr. App. 1899) 49 S. W. 94; Bluitt *v.* State, (Cr. App. 1898) 45 S. W. 495; Jefferson *v.* State, (Cr. App. 1897) 41 S. W. 601; Henderson *v.* State, (Cr. App. 1897) 38 S. W. 605; Belcher *v.* State, (Cr. App. 1896) 37 S. W. 428; Childers *v.* State, 36 Tex. Cr. 128, 35 S. W. 980; Gowen *v.* State, (Cr. App. 1896) 34 S. W. 123.

Virginia.— Field *v.* Com., 89 Va. 690, 16 S. E. 865; *In re* Thompson, 8 Gratt. 637.

Washington.—Leschi *v.* Territory, 1 Wash. Terr. 13.

West Virginia.— State *v.* Belsall, 11 W. Va. 703.

United States.— U. S. *v.* Smith, 27 Fed. Cas. No. 16,341, 1 Sawy. 277.

See 15 Cent. Dig. tit. "Criminal Law," § 2324.

Alibi.— Newly discovered evidence which is claimed to support an alibi is regarded with suspicion, and will not justify a new trial, unless it is material and fully covers the period during which the crime must have been committed. Klink *v.* People, 16 Colo. 467, 27 Pac. 1062; Flippo *v.* State, (Tex. Cr. App. 1893) 22 S. W. 139.

58. State *v.* Clark, 8 Rob. (La.) 533.

59. White *v.* State, 100 Ga. 659, 28 S. E. 423; Asher *v.* Territory, 7 Okla. 188, 54 Pac. 445; Prewett *v.* State, 41 Tex. Cr. 262, 53 S. W. 879; Taylor *v.* State, (Tex. Cr. App. 1897) 39 S. W. 372; State *v.* Lane, 44 W. Va. 730, 29 S. E. 1020.

60. See the following cases:

Georgia.— Nix *v.* State, 97 Ga. 211, 22 S. E. 975 (arson); Johnson *v.* State, 85 Ga. 561, 11 S. E. 844; Peterson *v.* State, 50 Ga. 142 (homicide).

Iowa.— State *v.* Foster, 37 Iowa 404, larceny.

Michigan.— People *v.* Hamilton, 76 Mich. 212, 42 N. W. 1131.

Missouri.— State *v.* Stewart, 127 Mo. 290, 29 S. W. 986; State *v.* Bailey, 94 Mo. 311, 7 S. W. 425, assault with intent to kill.

Texas.— Zedlitz *v.* State, (Cr. App. 1894) 26 S. W. 725 (aggravated assault); Pitts *v.* State, 29 Tex. App. 374, 16 S. W. 189 (homicide); Black *v.* State, 27 Tex. App. 495, 11 S. W. 485; Moore *v.* State, 18 Tex. App. 212 (larceny); Heskew *v.* State, 14 Tex. App. 606 (larceny).

See 15 Cent. Dig. tit. "Criminal Law," § 2235.

Evidence of an alibi which is merely corroborative is not ground for a new trial. Whitfield *v.* State, 40 Tex. Cr. 14, 48 S. W. 173.

New evidence that the principal prosecuting witness was an accomplice of the accused is material and is ground for a new trial. Dawson *v.* State, 32 Tex. Cr. 535, 25 S. W. 21, 40 Am. St. Rep. 791.

61. As it would not be admitted it could not influence the verdict, and hence a new trial will be useless.

Alabama.— Lowery *v.* State, 98 Ala. 45, 13 So. 498.

California.— People *v.* Voll, 43 Cal. 166.

Georgia.— Lynes *v.* State, 46 Ga. 208.

Indiana.— Rinkard *v.* State, 157 Ind. 534, 62 N. E. 14; Rater *v.* State, 49 Ind. 507.

Iowa.— State *v.* Burge, 7 Iowa 255.

Missouri.— State *v.* Bauerle, 145 Mo. 1, 46 S. W. 609.

Texas.— Brown *v.* State, (Cr. App. 1902) 70 S. W. 21; Bass *v.* State, (Cr. App. 1901) 65 S. W. 919.

See 15 Cent. Dig. tit. "Criminal Law," § 2324 *et seq.*

nating evidence would have been sufficient if the evidence newly discovered had been introduced to rebut it at the trial.[62]

(IV) *CUMULATIVE EVIDENCE* — (A) *General Rule.* A new trial will not usually be granted where the evidence, although material and newly discovered, is merely cumulative.[63] Accordingly cumulative evidence to prove an alibi is not generally considered of much value as ground for a new trial,[64] although where the testimony on which the conviction was based is circumstantial and of slight weight, and the defense of alibi was supported by numerous respectable witnesses, a new trial should be granted for new and credible evidence of an alibi, although it be somewhat cumulative.[65]

(B) *What Is Cumulative Evidence.* Cumulative evidence, in connection with motions for new trials, may be defined as additional evidence of the same general

Confidential communications between client and attorney is not a ground for a new trial, because the witness cannot be compelled to testify. Hutchins *v.* State, 151 Ind. 667, 52 N. E. 403.

The evidence of a convict witness is not a ground for a new trial as he is incompetent. Wilkerson *v.* State, (Tex. Cr. App. 1899) 57 S. W. 956.

62. Long *v.* State, 54 Ga. 564; Morse *v.* State, 108 Ind. 599, 9 N. E. 455; Young *v.* State, 7 Tex. App. 461. Thus a new trial was granted where the prosecuting witness made contradictory statements out of court, and her evidence at the trial was weak and partly consistent with the innocence of the accused. State *v.* Curtis, 77 Mo. 267; Reed *v.* State, 27 Tex. App. 317, 11 S. W. 372.

63. *Arkansas.*— White *v.* State, 17 Ark. 404.

California.— People *v.* Chrisman, 135 Cal. 282, 67 Pac. 136; People *v.* Benc, 130 Cal. 159, 62 Pac. 404; People *v.* Kloss, 115 Cal. 567, 47 Pac. 459; People *v.* O'Brien, 78 Cal. 41, 20 Pac. 359.

Georgia.— Somers *v.* State, 116 Ga. 535, 42 S. E. 779; Sturkey *v.* State, 116 Ga. 526, 42 S. E. 747; Windom *v.* State, 114 Ga. 36, 39 S. E. 949; Brown *v.* State, 97 Ga. 215, 22 S. E. 403; Walker *v.* State, 97 Ga. 197, 22 S. E. 401; Roane *v.* State, 97 Ga. 195, 22 S. E. 374; Tripp *v.* State, 95 Ga. 502, 20 S. E. 248.

Idaho.— State *v.* Davis, 6 Ida. 159, 53 Pac. 678; People *v.* Biles, 2 Ida. (Hasb.) 114, 6 Pac. 120.

Illinois.— Lathrop *v.* People, 197 Ill. 169, 64 N. E. 385; Langdon *v.* People, 133 Ill. 382, 24 N. E. 874; Klein *v.* People, 113 Ill. 596; Sahlinger *v.* People, 102 Ill. 241; Adams *v.* People, 47 Ill. 376.

Indiana.— Smith *v.* State, 143 Ind. 685, 42 N. E. 913; Stalcup *v.* State, 129 Ind. 519, 28 N. E. 1116; Sutherlin *v.* State, 108 Ind. 389, 9 N. E. 298.

Iowa.— State *v.* Blain, 118 Iowa 466, 92 N. W. 650; State *v.* Phillips, (1902) 89 N. W. 1092; State *v.* Potts, 83 Iowa 317, 49 N. W. 845; State *v.* Gleason, 68 Iowa 618, 27 N. W. 785.

Kansas.— State *v.* Nelson, (Sup. 1898) 52 Pac. 868.

Kentucky.— Williams *v.* Com., 18 S. W. 364, 13 Ky. L. Rep. 753; Marcum *v.* Com., 1 S. W. 727, 8 Ky. L. Rep. 418.

Louisiana.— State *v.* Albert, 109 La. 201, 33 So. 196; State *v.* Maxey, 107 La. 799, 32 So. 206; State *v.* Lejeune, 52 La. Ann. 463, 26 So. 992; State *v.* Green, 49 La. Ann. 60, 21 So. 124; State *v.* Harris, 39 La. Ann. 1105, 3 So. 344.

Minnesota.— State *v.* Barrett, 40 Minn. 65, 41 N. W. 459; State *v.* Dumphey, 4 Minn. 438.

Mississippi.— Newcomb *v.* State, 37 Miss. 383.

Missouri.— State *v.* Allen, 171 Mo. 562, 71 S. W. 1000; State *v.* Soper, 148 Mo. 217, 49 S. W. 1007; State *v.* Campbell, 115 Mo. 391, 22 S. W. 367; State *v.* Potter, 108 Mo. 424, 22 S. W. 89; State *v.* Redemeier, 71 Mo. 173, 36 Am. Rep. 462.

Montana.— State *v.* Brooks, 23 Mont. 146, 57 Pac. 1038.

New York.— People *v.* Hovey, 30 Hun 354; Williams *v.* People, 45 Barb. 201; People *v.* Leighton, 1 N. Y. Cr. 468.

Ohio.— Loeffner *v.* State, 10 Ohio St. 598.

Oklahoma.— Harvey *v.* Territory, 11 Okla. 156, 65 Pac. 837; Douthitt *v.* Territory, 7 Okla. 55, 54 Pac. 312.

Oregon.— State *v.* Hill, 39 Oreg. 90, 65 Pac. 518.

Pennsylvania.— Com. *v.* Flanagan, 7 Watts & S. 415; Com. *v.* Williams, 2 Ashm. 69; Com. *v.* Brown, 7 Kulp 103; Com. *v.* Kane, 12 Phila. 630.

Texas.— Adler *v.* State, (Cr. App. 1899) 50 S. W. 358; Osgood *v.* State, (Cr. App. 1899) 49 S. W. 94; Whitfield *v.* State, 40 Tex. Cr. 14, 48 S. W. 173; Little *v.* State, (Cr. App. 1896) 35 S. W. 659; Scruggs *v.* State, 35 Tex. Cr. 622, 34 S. W. 951; Garner *v.* State, 34 Tex. Cr. 356, 30 S. W. 782.

Utah.— People *v.* Peacock, 5 Utah 237, 14 Pac. 332; U. S. *v.* Eldredge, 5 Utah 161, 13 Pac. 673.

Vermont.— Bradish *v.* State, 35 Vt. 452.

Virginia.— Bond *v.* Com., 83 Va. 581, 3 S. E. 149; Thompson *v.* Com., 8 Gratt. 637.

West Virginia.—State *v.* Kohne, 48 W. Va. 335, 37 S. E. 553; State *v.* Betsall, 11 W. Va. 703.

See 15 Cent. Dig. tit. "Criminal Law," § 2329.

64. Harrison *v.* State, 83 Ga. 129, 9 S. E. 542.

65. Fellows *v.* State, 114 Ga. 233, 39 S. E. 885; State *v.* Stowe, 3 Wash. 206, 28 Pac. 337, 14 L. R. A. 609.

character as former evidence received at the trial to the same fact or point which was the subject of proof at the trial.[66] If, however, the new evidence is of a different character and proves new and independent facts, it is not cumulative, although it may tend to prove a proposition or a ground of defense which was proved or attempted to be proved at the trial.[67]

(v) *Impeachment of Witnesses For Prosecution.* A new trial will not be granted for newly discovered evidence which when produced will merely impeach or discredit a witness who testified at the trial.[68] If the new evidence is impeaching merely it is not material whether it consists of evidence tending to prove that a witness has a bad character for truthfulness,[69] or whether it impeaches

66. Anderson *v.* State, 43 Conn. 514, 21 Am. Rep. 669; People *v.* Leighton, 1 N. Y. Cr. 468; Bradish *v.* State, 35 Vt. 452. And see Cumulative Evidence.

67. Waller *v.* Graves, 20 Conn. 305; Fellows *v.* State, 114 Ga. 233, 39 S. E. 885; Fletcher *v.* People, 117 Ill. 184, 7 N. E. 80; Casey *v.* State, 20 Nebr. 138, 29 N. W. 264.

Additional evidence of the identity of defendant, coming from witnesses who did not testify at the trial and relating to particular facts concerning which there was no evidence, is not cumulative, and is ground for a new trial. Dale *v.* State, 88 Ga. 552, 15 S. E. 287. Where the identity of defendant is in question, and a person alleged to have been with defendant at the time of the commission of the offense testifies that he was not there and knows nothing of the matter, the evidence of a subsequently discovered witness that the persons in question were not defendant and the witness is not cumulative. State *v.* Tyson, 56 Kan. 686, 44 Pac. 609.

In a capital case where the defense is insanity, a better reason exists for not strictly enforcing the rule that the new evidence must not be cumulative than in civil cases. If the new evidence tends to clear up and make more certain that which was doubtful and equivocal, and particularly if it may raise a reasonable doubt of the prisoner's sanity, a new trial should be granted. For, as insanity is not susceptible of direct proof, but is usually established as an inference from a multitude of facts and circumstances, the greater number of facts indicating insanity which the jury will have to consider the more likely are they to acquit. If therefore the new facts to show insanity be credible and material, and relate to different acts and occasions from those testified to at the trial, they are not cumulative. Andersen *v.* State, 43 Conn. 514, 21 Am. Rep. 669.

68. *Arkansas.*— Hudspeth *v.* State, 55 Ark. 323, 18 S. W. 183; Wells *v.* State, (1888) 8 S. W. 826; Holt *v.* State, 47 Ark. 196, 1 S. W. 61.

California.— People *v.* Holmes, 126 Cal. 462, 58 Pac. 917; People *v.* Loui Tung, 90 Cal. 377, 27 Pac. 295; People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161.

Connecticut.— Shields *v.* State, 45 Conn. 266.

Georgia.— Hardy *v.* State, 117 Ga. 40, 43 S. E. 434; Hodge *v.* State, 116 Ga. 852, 43 S. E. 255; Strickland *v.* State, 112 Ga. 222, 41 S. E. 713; Patterson *v.* State, 97 Ga. 361, 23 S. E. 994; Feltman *v.* State, 97 Ga. 344, 23 S. E. 989; Latimer *v.* State, 97 Ga. 218, 22 S. E. 375; Statham *v.* State, 84 Ga. 17 10 S. E. 493.

Illinois.— Lathrop *v.* People, 197 Ill. 169, 64 N. E. 385; Fletcher *v.* People, 117 Ill. 184, 7 N. E. 80; Tobin *v.* People, 101 Ill. 121; Argo *v.* People, 78 Ill. App. 246.

Indiana.— Hutchins *v.* State, 151 Ind. 667, 52 N. E. 403; Smith *v.* State, 143 Ind. 685, 42 N. E. 913; Meurer *v.* State, 129 Ind. 587, 29 N. E. 392; Sutherlin *v.* State, 108 Ind. 389, 9 N. E. 298.

Iowa.— State *v.* Bailor, 104 Iowa 1, 73 N. W. 344.

Kansas.— State *v.* Rohrer, 34 Kan. 427, 8 Pac. 718.

Louisiana.— State *v.* Young, 107 La. 618, 31 So. 993; State *v.* Crenshaw, 45 La. Ann. 496, 12 So. 628; State *v.* Williams, 38 La. Ann. 361; State *v.* Diskin, 35 La. Ann. 46.

Massachusetts.— Com. *v.* Waite, 5 Mass. 261.

Minnesota.— State *v.* Bagan, 41 Minn. 285, 43 N. W. 5; State *v.* Dumphey, 4 Minn. 438.

Mississippi.— De Marco *v.* State, 59 Miss. 355.

Missouri.— State *v.* Lucas, 147 Mo. 70, 47 S. W. 1067; State *v.* Taylor, 126 Mo. 531, 29 S. W. 598; State *v.* Howell, 117 Mo. 307, 23 S. W. 263; State *v.* Rockett, 87 Mo. 666; State *v.* Smith, 65 Mo. 313.

Montana.— State *v.* Anderson, 14 Mont. 541, 37 Pac. 1.

Nebraska.— Ogden *v.* State, 13 Nebr. 436, 14 N. W. 165.

New Mexico.— Faulkner *v.* Territory, 6 N. M. 464, 30 Pac. 905.

Ohio.— State *v.* Shanks, Tapp. 13.

Oregon.— State *v.* Hill, 39 Oreg. 90, 65 Pac. 518; State *v.* Gardner, 33 Oreg. 149, 54 Pac. 809.

Tennessee.— Parham *v.* State, 10 Lea 498.

Texas.— Gay *v.* State, (Cr. App. 1902) 69 S. W. 511; Meyer *v.* State, (Cr. App. 1902) 67 S. W. 109; May *v.* State, (Cr. App. 1902) 67 S. W. 108; Alexander *v.* State, (Cr. App. 1897) 42 S. W. 989; Storms *v.* State, (Cr. App. 1896) 37 S. W. 439.

Virginia.— Thompson *v.* Com., 8 Gratt. 637.

West Virginia.—State *v.* Betsall, 11 W. Va. 703.

See 15 Cent. Dig. tit. "Criminal Law," § 2331.

69. Long *v.* State, 42 Fla. 612, 28 So. 855; Evans *v.* State, 67 Ind. 68; State *v.* Brooks, 84 Minn. 276, 87 N. W. 779.

him by some other method;[70] but if the new evidence is material and not introduced solely for impeaching purposes, it is ground for a new trial, although it may be incidentally impeaching.[71]

(VI) *Credibility or Probable Effect of.* The trial court has the right on the application for a new trial to determine the credibility of the witnesses who are to give the new evidence;[72] and the newly discovered evidence will not be accepted as ground for a new trial unless the court can see that its admission on a new trial will probably result in the acquittal of the accused.[73] The question is

70. Although the witness is the only witness for the prosecution, or the only one on some material point, evidence merely impeaching his testimony is not ground for a new trial. Isham *v.* State, 112 Ga. 406, 37 S. E. 735; Arwood *v.* State, 59 Ga. 391; Taylor *v.* State, (Tex. Cr. App. 1899) 49 S. W. 388.

Contradictory statements.— The statements of a witness for the prosecution which contradict or are inconsistent with his testimony, discovered after verdict, whether made before (People *v.* Loui Tung, 90 Cal. 377, 27 Pac. 295; Jones *v.* State, 35 Fla. 289, 17 So. 284; Isbell *v.* State, 93 Ga. 194, 18 S. E. 651; Aholtz *v.* People, 121 Ill. 560, 13 N. E. 524; State *v.* Garig, 43 La. Ann. 365, 8 So. 934; State *v.* Dumphey, 4 Minn. 438; State *v.* Smith, 65 Mo. 313) or after the verdict (Shields *v.* State, 45 Conn. 266; Carmichael *v.* State, 111 Ga. 653, 36 S. E. 872; Whitney *v.* State, 154 Ind. 573, 57 N. E. 398; State *v.* Williams, 38 La. Ann. 361; State *v.* Johnson, 30 La. Ann. 305; State *v.* Potter, 108 Mo. 424, 22 S. W. 89; Leighton *v.* People, 10 Abb. N. Cas. (N. Y.) 261; State *v.* Workman, 38 S. C. 550, 16 S. E. 770; Driver *v.* State, (Tex. Cr. App. 1901) 65 S. W. 528; Walker *v.* State, (Tex. Cr. App. 1895) 33 S. W. 372; Barber *v.* State, 35 Tex. Cr. 70, 31 S. W. 649; Brown *v.* State, 13 Tex. App. 59) are not ground for a new trial, as the main purpose of proving them is to furnish impeachment merely.

Evidence of strong dislike on the part of the witness toward the accused (Hastings *v.* State, 52 Ga. 334; State *v.* Carr, 21 N. H. 166, 53 Am. Dec. 179; State *v.* De Graff, 113 N. C. 688, 18 S. E. 507; Walker *v.* State, 6 Tex. App. 576) or that on another trial he would testify more favorably for him (U. S. *v.* Mulholland, 50 Fed. 413) is not ground for a new trial.

71. The general rule that newly discovered evidence merely impeaching is not ground for a new trial does not apply if the evidence of the impeached witness was weak and uncorroborated on the trial, and the evidence impeaching him would have been material for the jury to consider, and if heard by them might probably have changed the result. Bailey *v.* State, 36 Nebr. 808, 55 N. W. 241. See also Com. *v.* Robins, 7 Kulp (Pa.) 108.

Testimony of accomplice.— Where the sole prosecuting witness was one jointly indicted, who denied on the trial that he had anything to do with the crime, but subsequently pleaded guilty, a new trial ought to be granted the accused. People *v.* Fridy, 83 Hun (N. Y.) 240, 31 N. Y. Suppl. 399.

72. If on the moving papers or by oral examination the court is satisfied that the new evidence should not be believed by the jury it must deny the motion.

Georgia.— Herndon *v.* State, 110 Ga. 313, 35 S. E. 154; Carroll *v.* State, 108 Ga. 788, 33 S. E. 841.

New Jersey.— State *v.* Lammens, 3 N. J. L. J. 251.

New York.— People *v.* Mayhew, 19 Misc. 313, 44 N. Y. Suppl. 206; People *v.* Shea, 16 Misc. 111, 38 N. Y. Suppl. 821.

Texas.— Rogers *v.* State, (Cr. App. 1902) 69 S. W. 507; Harris *v.* State, (Cr. App. 1900) 56 S. W. 622; Ford *v.* State, (Cr. App. 1900) 56 S. W. 338; Bryant *v.* State, (Cr. App. 1899) 51 S. W. 1125; Shilling *v.* State, (Cr. App. 1899) 51 S. W. 240; Clark *v.* State, 38 Tex. Cr. 30, 40 S. W. 992; Lawrence *v.* State, 36 Tex. Cr. 173, 36 S. W. 90; Williams *v.* State, (Cr. App. 1893) 23 S. W. 14; Smith *v.* State, 28 Tex. App. 309, 12 S. W. 1104; McVey *v.* State, 23 Tex. App. 659, 5 S. W. 174.

Vermont.— State *v.* Manning, (1903) 54 Atl. 181.

See 15 Cent. Dig. tit. "Criminal Law," § 2335.

73. *California.*— People *v.* Benc, 130 Cal. 159, 62 Pac. 404; People *v.* Woodruff, (1899) 58 Pac. 854.

Georgia.— Baker *v.* State, 111 Ga. 141, 36 S. E. 607; Hall *v.* State, 110 Ga. 314, 35 S. E. 153; Phillips *v.* State, 62 Ga. 296.

Louisiana.— State *v.* Lejeune, 52 La. Ann. 463, 26 So. 992.

Minnesota.— State *v.* Blanchard, 88 Minn. 82, 92 N. W. 504.

Nebraska.— Kerr *v.* State, 63 Nebr. 115, 88 N. W. 240.

New York.— People *v.* Priori, 164 N. Y. 459, 58 N. E. 668; People *v.* Hovey, 30 Hun 354. *Compare* People *v.* Shea, 16 Misc. 111, 38 N. Y. Suppl. 821.

Oregon.— State *v.* Mims, 36 Oreg. 315, 61 Pac. 888.

Texas.— Boyce *v.* State, 43 Tex. Cr. 459, 66 S. W. 568; Ash *v.* State, (Cr. App. 1901) 63 S. W. 881; Gass *v.* State, (Cr. App. 1900) 56 S. W. 73; Bryant *v.* State, (Cr. App. 1898) 47 S. W. 373.

Vermont.— Doherty *v.* State, 73 Vt. 380, 50 Atl. 1113; State *v.* Doherty, 72 Vt. 381, 48 Atl. 658, 82 Am. St. Rep. 951, opinion by Taft, C. J.

West Virginia.— State *v.* Kohne, 48 W. Va. 335, 37 S. E. 553.

not what the jury might do, but supposing all the evidence new and old to be before another jury, whether they ought to give another verdict than that given on the former trial.[74]

3. Application For New Trial and Its Effect — a. Jurisdiction. In the absence of statute creating appellate courts, and conferring the power to grant new trials upon them, jurisdiction to grant them is exclusively confined to the court in which the trial is had.[75] And defendant has the right to have his motion for a new trial, when it is based on the ground that the verdict is against the evidence, heard by the judge who presided at the trial, and it is error for the trial judge to refuse to hear this motion.[76] Defendant may by his silence waive an objection that the place of one of the justices who sat at the trial has at the time of his motion been taken by another justice.[77]

b. Time of Making — (I) *In General.* At common law defendant lost his right to a new trial by failing to move for it until the first four days of the next term had expired.[78] In the United States the time within which defendant must move for a new trial is regulated by statute,[79] and defendant loses his right to a new trial if by inexcusable laches he waits until this time has expired.[80] It has been held that a motion for a new trial will not be entertained if made after

See 15 Cent. Dig. tit. "Criminal Law," § 2336.

74. State *v.* Stain, 82 Me. 472, 20 Atl. 72; Com. *v.* Sallager, 4 Pa. L. J. 511; Burns *v.* State, 12 Tex. App. 269.

75. *Connecticut.*— Andersen *v.* State, 43 Conn. 514, 21 Am. Rep. 669.

Delaware.— State *v.* Williams, 9 Houst. 508, 18 Atl. 949.

Maine.— State *v.* Intoxicating Liquors, 80 Me. 57, 12 Atl. 794; State *v.* Gilman, 70 Me. 329; State *v.* Hill, 48 Me. 241.

New York.— Sawyer *v.* People, 27 Hun 286.

North Carolina.— State *v.* Council, 129 N. C. 511, 39 S. E. 814.

See 15 Cent. Dig. tit. "Criminal Law," § 2345.

As to power of a municipal court of record see State *v.* Milwaukee Municipal Ct., 89 Wis. 358, 61 N. W. 1100.

Equitable power.— A court having by constitutional enactment jurisdiction of civil cases, to which the state shall be a party, cannot by virtue of its equitable powers grant new trials in criminal cases, although no other court has jurisdiction to do so and defendant has lost his right to a new trial by the adjournment of the trial court. Paulson *v.* State, 25 Nebr. 344, 41 N. W. 249.

76. Ohms *v.* State, 49 Wis. 415, 5 N. W. 827.

Where the presiding judge died after verdict and before he delivered his opinion on a motion for a new trial, it was held that his successor had no jurisdiction in the matter, and that a new trial should be granted the accused upon the presumption that the deceased trial justice was not content to enter his judgment on the verdict. U. S. *v.* Harding, 26 Fed. Cas. No. 15,301, 1 Wall. Jr. 127.

77. People *v.* Hobson, 17 Cal. 424.

Federal courts.— The judges sitting at a term of the circuit court for the southern district of New York have power under U. S. Rev. St. (1878) § 613 [U. S. Comp. St. (1901) p. 494] to hear a motion for a new trial, where a conviction was had at a former term of the same court before one of these judges. *In re* Claasen, 140 U. S. 200, 11 S. Ct. 735, 35 L. ed. 409.

78. As matter of favor, however, argument might still be heard and it might be granted if the court saw plainly that injustice had been done him. Rex *v.* Teal, 11 East 307; Reg. *v.* Newman, 3 C. & K. 252, Dears. C. C. 85, 1 E. & B. 268, 17 Jur. 617, 22 L. J. Q. B. 156, 72 E. C. L. 268; Reg. *v.* Hetherington, 5 Jur. 529; Rex *v.* Holt, 5 T. R. 436.

79. *Idaho.*— State *v.* Davis, (1901) 66 Pac. 932; State *v.* Dupuis, 7 Ida. 614, 65 Pac. 65; State *v.* Smith, 5 Ida. 291, 48 Pac. 1060.

Minnesota.— State *v.* Heenan, 8 Minn. 44.

Missouri.— State *v.* Maddox, 153 Mo. 471, 55 S. W. 72; State *v.* Arnold, 54 Mo. App. 660.

Nebraska.— Davis *v.* State, 31 Nebr. 240, 47 N. W. 851; Bradshaw *v.* State, 19 Nebr. 644, 28 N. W. 323.

Texas.— Kindred *v.* State, (Cr. App. 1902) 68 S. W. 796.

Utah.— State *v.* Mickle, 25 Utah 179, 70 Pac. 856.

See 15 Cent. Dig. tit. "Criminal Law," § 2349.

80. *Idaho.*— State *v.* Davis, (1901) 66 Pac. 932.

Michigan.— People *v.* Swartz, 118 Mich. 292, 76 N. W. 491.

North Carolina.— State *v.* Murray, 80 N. C. 364.

Rhode Island.— State *v.* Cushing, 11 R. I. 313.

Texas.— Branch *v.* State, 1 Tex. App. 99.

Utah.— State *v.* Mickle, 25 Utah 179, 70 Pac. 856.

See 15 Cent. Dig. tit. "Criminal Law," § 2349.

Where the statute does not specify the time, defendant must be given a reasonable time to prepare his papers, and the refusal of the court to postpone judgment for a short period for this purpose is error. State *v.* Rollins, 50 La. Ann. 925, 24 So. 664; State *v.* Gardner, 10 La. Ann. 25.

a motion in arrest of judgment,[81] if made after judgment and sentence,[82] or if made after exceptions have been overruled in the appellate court and a rescript sent down to the court who tried the case.[83] On the other hand, notwithstanding an appeal has been taken, the court may allow defendant to dismiss the appeal and grant him a new trial, if the motion is made at the same term and within the time limited by statute.[84] So too it has been held that if made within the period limited by statute a motion for a new trial is not too late, although the governor has issued his warrant for execution.[85]

(II) *At What Term.* Under some statutes a motion for a new trial must be made at the term of defendant's conviction,[86] except perhaps in cases of surprise, mistake, or excusable delay;[87] but under other statutes motions for new trials on any ground may be made at the term of court next following the term during which defendant was convicted;[88] and in the absence of such a statute a motion on the ground of newly discovered evidence may be made at a subsequent term.[89]

(III) *Extension of Time.* Although the court will not postpone judgment solely to afford time for defendant to discover evidence,[90] it is generally the rule, where the statute is not absolutely mandatory, that the statutory period within which a motion for a new trial should be made may be extended for good cause shown.[91]

81. As the latter motion assumes the correctness of the verdict, but claims that judgment should not be entered thereon because of a defect in the record or indictment. McComas *v.* State, 11 Mo. 116; Respublica *v.* Lacaze, 2 Dall. (Pa.) 118, 1 L. ed. 313; U. S. *v.* Simmons, 27 Fed. Cas. No. 16,289, 14 Blatchf. 473; 1 Chitty Cr. L. 658.

The rule at common law was first to present the motion for a new trial and if that was overruled to move for arrest of judgment. Mathews *v.* State, 33 Tex. 102.

82. At common law (Hogan *v.* State, 36 Wis. 226), and usually by statute in the states (Burke *v.* State, 72 Ind. 392; Lawson *v.* State, 71 Ind. 296; Willis *v.* State, 62 Ind. 391; State *v.* Bixby, 39 Iowa 465; State *v.* Smith, 46 La. Ann. 1433, 16 So. 372; State *v.* Offutt, 38 La. Ann. 364; State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330; People *v.* Donnelly, 21 How. Pr. (N. Y.) 406; U. S. *v.* Malone, 9 Fed. 897, 20 Blatchf. 137), the motion for a new trial, except perhaps in the case of newly discovered evidence, must be made before judgment and sentence.

In capital cases in some jurisdictions the motion may be made after judgment. Com. *v.* McElhaney, 111 Mass. 439; People *v.* Bradner, 107 N. Y. 1, 13 N. E. 87; People *v.* Dwyer, 30 Misc. (N. Y.) 283, 63 N. Y. Suppl. 495, 14 N. Y. Cr. 404.

83. Com. *v.* Scott, 123 Mass. 418.

84. Fricke *v.* State, 11 Tex. App. 6. But see State *v.* Offutt, 38 La. Ann. 364.

85. Com. *v.* McElhaney, 111 Mass. 439.

86. *Colorado.*— Klink *v.* People, 16 Colo. 467, 27 Pac. 1062.

Georgia.— Eaves *v.* State, 113 Ga. 749, 39 S. E. 318.

Nebraska.— *Ex p.* Holmes, 21 Nebr. 324, 32 N. W. 69.

New York.— People *v.* O'Brien, 4 Park. Cr. 203.

North Carolina.— State *v.* Kinsauls, 126 N. C. 1095, 36 S. E. 31.

Ohio.— Evans *v.* State, 23 Ohio Cir. Ct. 103.

Texas.— White *v.* State, 10 Tex. App. 167.

See 15 Cent. Dig. tit. "Criminal Law," § 2351.

87. See State *v.* Bennett, 93 N. C. 503.

Statutory extension of time see Ray *v.* State, 108 Tenn. 202, 67 S. W. 553.

Vacation.— A motion for a new trial cannot properly be made in vacation, and it is error for the court to take jurisdiction of such a motion, although it is based upon grounds sufficient to justify a new trial if made during the term. Gardner *v.* State, 116 Ga. 537, 42 S. E. 758; Johnson *v.* State, 116 Ga. 535, 42 S. E. 758; Jinks *v.* State, 115 Ga. 243, 41 S. E. 580; Collier *v.* State, 115 Ga. 17, 41 S. E. 261.

88. Frazer *v.* Chapin, 112 Mich. 469, 70 N. W. 1042; People *v.* Marble, 38 Mich. 309.

After sentence.— Under a statute of this kind defendant may move for a new trial after sentence. People *v.* Vanderpool, 1 Mich. N. P. 157.

89. State *v.* David, 14 S. C. 428; Com. *v.* Crump, 1 Va. Cas. 172.

Withdrawal of counsel.— A motion for a new trial made at a subsequent term on the ground that defendant had been abandoned by his counsel, that the verdict was contrary to the law and to the evidence, and that he had newly discovered evidence does not come within the statute providing that on extraordinary grounds new trials may be granted at a subsequent term. Cobb *v.* State, 78 Ga. 801, 3 S. E. 628.

90. U. S. *v.* Randall, 27 Fed. Cas. No. 16,118, Deady 524.

Supplementary proof.— An order denying a motion for a new trial should not be set aside for the purpose of permitting the accused to file additional affidavits, after the motion has been heard on the merits. People *v.* Fice, 97 Cal. 459, 32 Pac. 531; State *v.* Nolan, 13 La. Ann. 276.

91. U. S. *v.* Angney, 6 Mackey (D. C.) 66; Bullock *v.* State, 12 Tex. App. 42; White *v.* State, 10 Tex. App. 167.

Defendant must allege and prove under the

c. Notice of. A notice of the motion, with the papers on which it is based, must be served upon the prosecuting attorney.[92] A defective notice of motion is not cured by filing an amended notice, if the amended notice is not filed within the time limited for filing the original, or if, instead of amending the defects in the original notice, it sets up a new and distinct specification.[93]

d. Statement of Grounds. The moving papers should specify with clearness and certainty the grounds on which a new trial is sought;[94] and this rule has been applied where disqualifications of jurors,[95] erroneous and improper instructions,[96] or rulings as to the admission or exclusion of evidence were relied upon in the application as grounds for which a new trial should be granted.[97] But it

Texas statute that he has not previously filed a motion either for a new trial or in arrest of judgment. Hines *v.* State, (Tex. Cr. App. 1902) 70 S. W. 955.

The matter is wholly within the judicial discretion. State *v.* Dusenberry, 112 Mo. 277, 20 S. W. 461 [*following* State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330]; State *v.* McDaniel, 39 Oreg. 161, 65 Pac. 520.

92. U. S. *v.* Angney, 6 Mackey (D. C.) 66; State *v.* Turner, 36 S. C. 608, 16 S. E. 687.

If the bill of exceptions contains statements that a notice was given and that the grounds were stated therein, and the motion is set forth in full in the record, it will be presumed that the proper notice was duly given and filed within the proper time. State *v.* Dugan, 12 Mont. 300, 30 Pac. 79; State *v.* Ryan, 12 Mont. 297, 30 Pac. 78; State *v.* Fry, 10 Mont. 407, 25 Pac. 1055.

A waiver of service of the notice will be implied where it is filed and counsel on both sides appear and argue the motion on the merits (Territory *v.* Rehberg, 6 Mont. 467, 13 Pac. 132), but not where the prosecuting attorney appears specially and moves to set the notice aside as being defective in not stating the grounds of the motion (State *v.* Pilgrim, 17 Mont. 311, 42 Pac. 856).

Where a motion for a new trial is made in the term and is not disposed of in a vacation during which it was erroneously noticed for, it may be heard during the subsequent term without a new notice. McPhail *v.* State, 116 Ga. 599, 42 S. E. 1001.

Proper party on order to show cause.— The state being the respondent, an order to show cause why a new trial should not be granted need not be addressed to the solicitor-general personally. Gary *v.* State, 94 Ga. 719, 19 S. E. 898.

93. State *v.* Mason, 18 Mont. 362, 45 Pac. 557.

The failure to specify in the notice the errors complained of is not cured by specifying them in a written motion for a new trial filed at the same time. State *v.* Whaley, 16 Mont. 574, 41 Pac. 852, holding further that the defect is not waived by the attorney for the prosecution appearing and moving to strike out the motion on other grounds.

94. *Alabama.*—Lowery *v.* State, 98 Ala. 45, 13 So. 498.

Georgia.— Baker *v.* State, 97 Ga. 452, 25 S. E. 341.

Indiana.— Weireter *v.* State, 69 Ind. 269.

Louisiana.— State *v.* Gallagher, 16 La. Ann. 388.

Missouri.— State *v.* Brown, 168 Mo. 449, 68 S. W. 568.

Montana.— State *v.* Pilgrim, 17 Mont. 311, 42 Pac. 856.

See 15 Cent. Dig. tit. "Criminal Law," § 2363.

Where a statute provides that defendant shall specify errors relied on, a notice of motion not specifying the grounds of the motion is fatally defective, and the defects in the notice are not waived by the prosecuting attorney appearing specially and moving to dismiss the motion because of these defects. State *v.* Pilgrim, 17 Mont. 311, 42 Pac. 856; State *v.* Black, 15 Mont. 143, 38 Pac. 674; State *v.* Fry, 10 Mont. 407, 25 Pac. 1055.

Where the ground for a motion for a new trial is the absence of a witness, the moving party should state in his affidavit the facts he expects to prove by this witness. It is not sufficient to allege that these facts are stated in the brief. Chestnut *v.* State, 112 Ga. 366, 37 S. E. 384.

95. A motion for a new trial based upon the disqualification of a juror should name the juror (Harper *v.* State, 101 Ind. 109; State *v.* Tomasitz, 144 Mo. 86, 45 S. W. 1106), and show that he was properly examined, or that defendant was prevented from doing so by the false statements of the juror (State *v.* Hinkle, 27 Kan. 308).

96. Foster *v.* State, 59 Ind. 481; Brown *v.* State, (Tex. Cr. App. 1894) 28 S. W. 471; Darnell *v.* State, 15 Tex. App. 70. It is not sufficient to allege that the instructions do not properly present the law and are vague and argumentative. Franklin *v.* State, 69 Ga. 36, 47 Am. Rep. 748.

The language of the charge which he claims to be erroneous should be set out. Haywood *v.* State, 90 Ga. 778, 16 S. E. 979.

97. A statement that the court erred in admitting or excluding evidence is not sufficient as it is too general and indefinite. Edmonds *v.* State, 34 Ark. 720; Chestnut *v.* State, 112 Ga. 366, 37 S. E. 384; Dutton *v.* State, 92 Ga. 14, 18 S. E. 545; Benson *v.* State, 119 Ind. 488, 21 N. E. 1109; Stout *v.* State, 90 Ind. 1; Blakely *v.* State, 52 Ind. 161; State *v.* Wilson, 51 Ind. 96; Cheek *v.* State, 37 Ind. 533. *Contra*, State *v.* Noland, 111 Mo. 473, 19 S. W. 715, holding that where a specific objection is made at the time the evidence is offered it need not be repeated in the motion for a new trial.

The moving party should set out clearly the evidence referred to (Scott *v.* State, 117

has been held that failure of proof of the venue[93] or failure to plead[96] may be considered where the alleged ground of the motion is that the verdict is contrary to the law and evidence. Again the motion for a new trial may in the absence of statute be made *viva voce* to the court,[1] but the grounds for the motion are usually required to be in writing and to be filed.[2]

e. **Bill of Exceptions.** It has been held in some states that a motion for a new trial, if based upon facts not apparent on the record, must be supported by a bill of exceptions.[3] On the contrary it has been held that an agreed statement of facts or a bill of exceptions is not necessary where the facts relied on are stated in the moving affidavits.[4] The bill of exceptions must contain recitals supporting the allegations of fact in the motion for the new trial, as only allegations so supported can be considered.[5]

f. **Affidavits and Proofs in General** — (1) *Necessity For Affidavits.* In England at common law,[6] and in most states as matter of practice, the motion for

Ga. 14, 43 S. E. 425; Rucker *v.* State, 97 Ga. 205, 22 S. E. 921; Sweat *v.* State, 90 Ga. 315, 17 S. E. 273; Foster *v.* State, 59 Ind. 481; Anderson *v.* Territory, 4 N. M. 108, 13 Pac. 21), and disclose what objection was made to the admission of the evidence, or the ground on which it was ruled out (Chestnut *v.* State, 112 Ga. 366, 37 S. E. 384).

Insufficient statements.— A statement that the jury has received evidence "that was illegal, admitted by the court" (Wolfington *v.* State, 53 Ind. 343), that the court admitted "irrelevant, incompetent and immaterial evidence" and "rejected competent, material and relevant evidence" (Stout *v.* State, 90 Ind. 1), that the court allowed evidence to go to the jury over objection of defendant's counsel (Pool *v.* State, 87 Ga. 526, 13 S. E. 556), that complains of the admission of dying declarations, without specifying any witness, where several gave testimony of that nature (Battle *v.* State, 92 Ga. 465, 17 S. E. 861), or which refers to the testimony as set out in the brief of evidence (Sheffield *v.* State, 97 Ga. 426, 24 S. E. 143) is not sufficiently specific.

98. Garst *v.* State, 68 Ind. 101.

99. Bowen *v.* State, 108 Ind. 411, 9 N. E. 378.

1. People *v.* Ah Sam, 41 Cal. 645.

Making out and filing an application for a new trial is not making the motion, and if nothing more is done than this, the court may ignore it, as its attention has not thereby been called to the motion. People *v.* Ah Sam, 41 Cal. 645.

2. Hopkins *v.* Com., 3 Bush (Ky.) 480.

Waiver.— Where a motion for a new trial is submitted without any statement in writing of the grounds therefor, such statement will be treated as waived, unless objection be made. Bromley *v.* People, 150 Ill. 297, 37 N. E. 209.

3. White *v.* State, 26 Fla. 602, 7 So. 857; State *v.* Brackett, 45 La. Ann. 46, 12 So. 129; State *v.* Wire, 38 La. Ann. 684; State *v.* Walker, 37 La. Ann. 560.

This is especially necessary where the motion is based on a refusal to admit evidence (Mize *v.* State, 36 Ark. 653), or on newly discovered evidence, in order that the judge may know what the evidence is (People *v.* Bradner, 44 Hun (N. Y.) 233).

The Georgia statute requires a brief of the evidence to be filed within a specified period after the trial. The failure of the moving party to do this is not excused by reason of the failure of the stenographer to write out the evidence (Boatwright *v.* State, 91 Ga. 13, 16 S. E. 101), but ordinarily the time to file the brief may be extended by the court on good cause shown (Hyatt *v.* Cowan, 115 Ga. 608, 41 S. E. 985; Robinson *v.* State, 111 Ga. 841, 36 S. E. 201; Williams *v.* State, 95 Ga. 567, 20 S. E. 211).

4. State *v.* Stanley, 4 Nev. 71.

In New York a motion for a new trial may be heard on the orginal return from the special sessions to the county court, and affidavits and other papers are not admissible for that purpose. People *v.* Hildebrandt, 16 Misc. 195, 38 N. Y. Suppl. 958.

5. State *v.* Maher, 132 Mo. 279, 33 S. W. 1149; State *v.* Foster, 115 Mo. 448, 22 S. W. 468.

A bill of exceptions must be construed as a whole, and where the judge in settling it qualifies certain instructions excepted to by referring to the whole charge, the qualification must be considered. Fletcher *v.* State, 90 Ga. 468, 17 S. E. 100. And where the ground of a motion is that the verdict was against the evidence, the fact that the evidence for defendant is very meagerly set forth in the bill of exceptions, while that of the state is set forth at great length, may determine the granting of a new trial. U. S. *v.* Briggs, 19 D. C. 585.

Abandonment of exceptions.— Where the motion leaves out exceptions that have been taken during the trial, it will be presumed that they were abandoned. Bixby *v.* State, 15 Ark. 395; Waller *v.* State, 4 Ark. 87.

Settlement.— The rules of practice and statutes applicable to the settlement of bills of exceptions generally apply to those required on this motion. Territory *v.* Bryson, 9 Mont. 32, 22 Pac. 147, holding that under the Montana statute the bill of exceptions may be signed by the successor of the judge who tried the case.

6. 1 Chitty Cr. L. 659.

a new trial, when founded on facts not of record, is made on affidavits signed and sworn to by defendant or by some person having knowledge of the circumstances.[7]

(II) *Counter-Affidavits.* Where the motion for a new trial is heard upon affidavits, it is the right of the state to file counter-affidavits,[8] and it is then discretionary with the court to permit defendant to file affidavits in rebuttal.[9]

(III) *Sufficiency of Affidavits* — (A) *In General.* An uncorroborated affidavit of defendant is not sufficient ground for a new trial, although not directly contradicted, where it is controverted by a statement of fact in the record.[10] As to facts not of record, however, the uncontradicted affidavit of the accused is *prima facie* proof;[11] but where all the allegations in the moving papers are met by denials in the counter-affidavits, the motion for a new trial may properly be denied.[12]

(B) *Absence of Defendant at Trial.* The application for a new trial on this ground may be based on affidavits, without any bill of exceptions.[13]

(C) *Absence of Witnesses.* A motion for a new trial upon the ground of the unavoidable absence of a witness at the trial must show by affidavit that the accused used due diligence to secure his attendance, that the evidence which he would have given was material, and that the accused asked for a continuance to enable him to procure this evidence.[14]

(D) *Admission of Guilt by Another Person.* The affidavit of a person who testified against defendant at his trial, but who has subsequently confessed the crime, must be produced on a motion for a new trial based upon the ground that this person is guilty and defendant innocent.[15]

(E) *Disqualification of Jurors* — (1) Character of Affidavits. On an application for a new trial based on this ground, the court may receive affidavits and require witnesses to be orally examined.[16] Generally proof of prejudice on the part of jurors must be sustained not only by the affidavit of the accused, but by that of his counsel.[17] The affidavits should also show that both defendant and his counsel were ignorant of the grounds of challenge at the trial.[18]

7. Fisher *v.* State, 73 Ga. 595; State *v.* Washington, 108 La. 226, 32 So. 396; State *v.* Sweeney, 37 La. Ann. 1; State *v.* Flutcher, 166 Mo. 582, 66 S. W. 429; State *v.* Northway, 164 Mo. 513, 65 S. W. 331; State *v.* Gordon, 153 Mo. 576, 55 S. W. 76; State *v.* Soper, 148 Mo. 217, 49 S. W. 1007; State *v.* Lucas, 147 Mo. 70, 47 S. W. 1067; State *v.* Nagel, 136 Mo. 45, 37 S. W. 821; State *v.* Gonce, 87 Mo. 627; Johnson *v.* State, (Tex. Cr. App. 1893) 24 S. W. 94; Terry *v.* State, 3 Tex. App. 236.

Filing affidavits.— It is discretionary with the court to read affidavits in support of the motion, filed after the moving papers have been filed. U. S. *v.* Angney, 6 Mackey (D. C.) 66.

Irrelevant matter incorporated in the motion may be stricken out by the court. Anderson *v.* State, 39 Tex. Cr. 83, 45 S. W. 15.

Judge's absence from room.— A motion for a new trial, based on the judge's absence from the court-room, must be determined on the affidavits, and not on his belief as to the length of time he was absent. People *v.* Blackman, 127 Cal. 248, 59 Pac. 573.

8. State *v.* Madigan, 66 Minn. 10, 68 N. W. 179; Dignowitty *v.* State, 17 Tex. 521, 67 Am. Dec. 670.

Where the motion is based on the refusal of a continuance for absent witnesses, the state may show by affidavits that the witnesses are fictitious persons, or that they are absent by the procurement of defendant. Sargent *v.* State, 35 Tex. Cr. 325, 33 S. W. 364.

9. State *v.* Taylor, 134 Mo. 109, 35 S. W. 92; State *v.* Welsor, 117 Mo. 570, 21 S. W. 443.

10. Asher *v.* Territory, 7 Okla. 188, 54 Pac. 445; Brown *v.* State, 85 Tenn. 439, 2 S. W. 895; Jordan *v.* State, 10 Tex. 479; Moore *v.* State, (Tex. Cr. App. 1895) 30 S. W. 239; Gordon *v.* State, 29 Tex. App. 410, 16 S. W. 337; Voight *v.* State, 13 Tex. App. 21.

11. Gnykowski *v.* People, 2 Ill. 476; Townsend *v.* State, (Tex. Cr. App. 1893) 22 S. W. 405.

12. State *v.* Black, 59 Iowa 390, 13 N. W. 345; Marion *v.* State, 20 Nebr. 233, 29 N. W. 911, 57 Am. Rep. 825; Com. *v.* Laird, 14 York Leg. Rec. 128; Williamson *v.* State, 36 Tex. Cr. 225, 36 S. W. 444; Ramos *v.* State, (Tex. Cr. App. 1896) 35 S. W. 378.

13. State *v.* Stanley, 4 Nev. 71.

14. Marks *v.* State, 101 Ind. 353.

15. State *v.* Leppere, 66 Wis. 355, 28 N. W. 376.

16. U. S. *v.* McKee, 26 Fed. Cas. No. 15,683.

17. State *v.* Howard, 118 Mo. 127, 24 S. W. 41.

18. Brown *v.* State, 60 Miss. 447; State *v.* Nocton, 121 Mo. 537, 26 S. W. 551; Clough *v.* State, 7 Nebr. 320.

(2) Burden of Proof and Credibility of Evidence. The burden to show partiality and prejudice is on the moving party, and the juror who is attacked may sustain his competency and impartiality by his own testimony.[19] The presumption is that he is competent, and a new trial will not be granted unless the court is satisfied upon the consideration of the affidavits in connection with his conduct and appearance during the trial that he was disqualified when sworn.[20]

(3) Sufficiency of Proof. The verdict creates a presumption that the jurors were qualified and that their proceedings were lawful and regular. Hence where the affidavits are conflicting, unless the court is thoroughly satisfied upon all the affidavits that the juror was in fact disqualified, a new trial will be denied.[21]

(F) *Misconduct of Officer.* Misconduct of an officer may be shown by the affidavits of jurors.[22]

(G) *Misconduct of Jurors*—(1) Character of Affidavits. Proof of the misconduct of jurors may usually be made by affidavits.[23] The allegations of

19. Moon *v.* State, 68 Ga. 687. See also Rogers *v.* State, 40 Tex. Cr. 355, 50 S. W. 338; Driver *v.* State, 37 Tex. Cr. 160, 38 S. W. 1020.

The circumstance that the juror against whom prejudice is alleged was in favor of acquittal, or of a conviction of a low degree of the crime, may determine, particularly in connection with his denial of the facts showing prejudice, that he was competent. Buchanan *v.* State, 24 Ga. 282.

20. *Georgia.*— Fogarty *v.* State, 80 Ga. 450, 5 S. E. 782; Dumas *v.* People, 63 Ga. 600.

Indiana.— Clem *v.* State, 33 Ind. 418.

Kansas.— State *v.* Peterson, 38 Kan. 204, 16 Pac. 263.

Montana.— State *v.* Anderson, 14 Mont. 541, 37 Pac. 1.

Texas.— Harris *v.* State, 40 Tex. Cr. 8, 48 S. W. 502; Duke *v.* State, (Cr. App. 1896) 38 S. W. 43; Lane *v.* State, 29 Tex. App. 310, 15 S. W. 827; Long *v.* State, 10 Tex. App. 186.

Utah.— State *v.* Mickle, 25 Utah 179, 70 Pac. 856.

Virginia.— Heath *v.* Com., 1 Rob. 735; Smith *v.* Com., 2 Va. Cas. 6.

Washington.— State *v.* Hall, 24 Wash. 255, 64 Pac. 153.

Wisconsin.—Grottkau *v.* State, 70 Wis. 462, 36 N. W. 31; Keenan *v.* State, 8 Wis. 132.

See 15 Cent. Dig. tit. "Criminal Law," § 2385.

In view of the facility with which affidavits to show misconduct or incompetency of a juror can be obtained, they should be closely scanned by the court, and unless the court is convinced of their correctness they should not be considered. Territory *v.* Burgess, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808.

The most important question is whether an unjust verdict has resulted from the alleged prejudice of the juror. And if it appears upon the whole record that there is no reasonable doubt of defendant's guilt, and a new trial would inevitably result in a verdict of guilty, a new trial ought not to be granted solely because the juror had a more or less fixed and positive opinion of the guilt of the accused. State *v.* Cleary, 40 Kan. 287, 19 Pac. 776.

21. *Florida.*— Yates *v.* State, 26 Fla. 484, 7 So. 880.

Georgia.— Statham *v.* State, 84 Ga. 17, 10 S. E. 493.

Iowa.— State *v.* Kennedy, 77 Iowa 208, 41 N. W. 609.

Minnesota.— State *v.* Dumphey, 4 Minn. 438.

Missouri.— State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330.

New Hampshire.—Palmer *v.* State, 65 N. H. 221, 19 Atl. 1003.

Ohio.—Blackburn *v.* State, 23 Ohio St. 146.

Tennessee.— Ellis *v.* State, 92 Tenn. 85, 20 S. W. 500.

Texas.— Cockerell *v.* State, 32 Tex. Cr. 585, 25 S. W. 421; Shaw *v.* State, 32 Tex. Cr. 155, 22 S. W. 588 [*distinguishing* Washburn *v.* State, 31 Tex. Cr. 352, 20 S. W. 715].

Virginia.— Brown *v.* Com., 2 Va. Cas. 516.

West Virginia.— State *v.* Strauder, 11 W. Va. 745, 27 Am. Rep. 606.

Wisconsin.— Carthaus *v.* State, 78 Wis. 560, 47 N. W. 629.

United States.— U. S. *v.* Wilson, 69 Fed. 584.

See 15 Cent. Dig. tit. "Criminal Law," § 2386.

Where the ground is that a juror swore falsely that he had not formed an opinion, there should be the affidavits of at least two witnesses, or their equivalent, against the oath of the juror, otherwise it is but oath against oath, with a presumption in favor of the correctness of the verdict. Sumner *v.* State, 109 Ga. 142, 34 S. E. 293; Myers *v.* State, 97 Ga. 76, 25 S. E. 252; Fogarty *v.* State, 80 Ga. 450, 5 S. E. 782; Hudgins *v.* State, 61 Ga. 182; Epps *v.* State, 19 Ga. 102.

22. These affidavits if met only by the denial of the officer and by the statements of other jurors that they did not see his misconduct are enough to justify the granting of a new trial. Heller *v.* People, 22 Colo. 11, 43 Pac. 124.

Prejudice of judge.— Affidavits for a new trial on this ground must state facts and not opinions and beliefs as to the existence of the prejudice. State *v.* Mewherter, 46 Iowa 88.

23. Cogswell *v.* State, 49 Ga. 103.

these affidavits should be upon positive knowledge, for an affidavit of misconduct on information and belief is insufficient.[24] The affidavits should also show that defendant's counsel was ignorant of the misconduct or prejudice, where it is a ground for challenge.[25]

(2) BURDEN OF PROOF. The burden rests upon defendant to prove the misconduct of a juror during the trial.[26]

(3) SUFFICIENCY OF PROOF. The affidavit of one juror that a verdict was reached in an illegal manner is not sufficient on a motion for a new trial, where the majority of the jurors absolutely deny the charge.[27]

g. Statements, Affidavits, and Testimony of Jurors — (1) *IN GENERAL.* On a motion for a new trial the affidavits of jurors are not admissible to impeach their verdict.[28] Applying this rule the affidavit of a juror would be inadmissible

24. *California.*—People *v.* Findley, 132 Cal. 301, 64 Pac. 472; People *v.* Williams, 24 Cal. 31.

Illinois.— Marzen *v.* People, 190 Ill. 81, 60 N. E. 102; Bonardo *v.* People, 182 Ill. 411, 55 N. E. 519.

Indiana.— Hutchins *v.* State, 151 Ind. 667, 52 N. E. 403; McClary *v.* State, 75 Ind. 260.

Iowa.— State *v.* Tucker, 68 Iowa 50, 25 N. W. 924.

Michigan.— People *v.* Martin, 116 Mich. 446, 74 N. W. 653.

Missouri.— State *v.* Stubblefield, 157 Mo. 360, 58 S. W. 337; State *v.* South, 145 Mo. 663, 47 S. W. 790.

Montana.— State *v.* Anderson, 14 Mont. 541, 37 Pac. 1.

Tennessee.— Stone *v.* State, 4 Humphr. 27.

Washington.— State *v.* Murphy, 13 Wash. 229, 43 Pac. 44.

25. Achey *v.* State, 64 Ind. 56.

Copies of the affidavits should be served on the juror or jurors whose conduct is called in question. State *v.* Harding, 2 Bay (S. C.) 267; State *v.* Duestoe, 1 Bay (S. C.) 377.

If defendant's affidavit is admitted to prove misconduct on the part of a juror it ought to be confined to cases where no other proof is practicable, and where a failure of justice might result from its rejection. It should state the name of the juror, and the time and circumstances of the misconduct. State *v.* McLaughlin, 44 Iowa 82; McAvoy *v.* State, (Tex. Cr. App. 1900) 58 S. W. 1010.

26. U. S. *v.* Swett, 28 Fed. Cas. No. 16,427, 2 Hask. 310.

Unless the court is thoroughly satisfied by a clear preponderance of the evidence that the misconduct as alleged actually occurred, and that the accused was actually or probably prejudiced thereby, a new trial should be refused. Hannum *v.* State, 90 Tenn. 647, 18 S. W. 269; Kutch *v.* State, 32 Tex. Cr. 184, 22 S. W. 594.

The fact that defendant's affidavit showing misconduct on the part of the juror is uncontradicted does not compel the court to accept it as true, for against it the law raises the presumption that the jurors had obeyed their oaths. The issue is one of fact upon all the circumstances for the trial court, and if, after weighing this presumption against the affidavit of the prisoner, it sustains the verdict, no abuse of discretion will be presumed. State *v.* Lee, 80 Iowa 75, 45 N. W. 545, 20 Am. St. Rep. 401; Tracey *v.* State, 46 Nebr. 361, 64 N. W. 1069; McAvoy *v.* State, (Tex. Cr. App. 1900) 58 S. W. 1010.

27. Ulrich *v.* State, 30 Tex. App. 61, 16 S. W. 769; McDade *v.* State, 27 Tex. App. 641, 11 S. W. 672, 11 Am. St. Rep. 216.

If the jurors refuse to make affidavits as to the circumstances of their verdict, the court may properly refuse to examine them where the only proof of the incorrectness of the verdict is the unsupported affidavit of defendant. Lancaster *v.* State, 91 Tenn. 267, 18 S. W. 777.

28. *Arkansas.*— Stanton *v.* State, 13 Ark. 317.

California.— People *v.* Findley, 132 Cal. 301, 64 Pac. 472; People *v.* Soap, 127 Cal. 408, 59 Pac. 771; People *v.* Holmes, 118 Cal. 444, 50 Pac. 675; People *v.* Kloss, 115 Cal. 567, 47 Pac. 459.

Colorado.— Heller *v.* People, 22 Colo. 11, 43 Pac. 124.

Dakota.— Territory *v.* King, 6 Dak. 131, 50 N. W. 623.

Florida.— Kelly *v.* State, 39 Fla. 122, 22 So. 303.

Georgia.— Echols *v.* State, 109 Ga. 508, 34 S. E. 1038; Carr *v.* State, 96 Ga. 284, 22 S. E. 570; Cornwall *v.* State, 91 Ga. 277, 18 S. E. 154; Hale *v.* State, 91 Ga. 19, 16 S. E. 105; Hill *v.* State, 64 Ga. 453.

Hawaii.— Rex *v.* Kahalewai, 3 Hawaii 465.

Idaho.— State *v.* Marquardsen, 7 Ida. 352, 62 Pac. 1034; State *v.* Davis, 6 Ida. 159, 53 Pac. 678.

Illinois.— Marzen *v.* People, 190 Ill. 81, 60 N. E. 102.

Indiana.— Reed *v.* State, 147 Ind. 41, 46 N. E. 135; Long *v.* State, 95 Ind. 481; Bennett *v.* State, 3 Ind. 167.

Iowa.— State *v.* La Grange, 99 Iowa 10, 68 N. W. 557; State *v.* Whalen, 98 Iowa 662, 68 N. W. 554; State *v.* Accola, 11 Iowa 246; Stewart *v.* Burlington, etc., R. Co., 11 Iowa 62.

Kansas.— State *v.* Burwell, 34 Kan. 312, 8 Pac. 470.

Kentucky.— Mitchell *v.* Com., 64 S. W. 751, 23 Ky. L. Rep. 1084.

Louisiana.— State *v.* Corcoran, 50 La. Ann. 453, 23 So. 511; State *v.* Richmond, 42 La. Ann. 299, 7 So. 459; State *v.* Bird, 38 La. Ann. 497.

Maine.— State *v.* Pike, 65 Me. 111.

Maryland.— Ford *v.* State, 12 Md. 514.

to show any fact tending to prove that he did not voluntarily assent to the verdict, but that he submitted to the majority,[29] for the purpose of avoiding a "hung jury," [30] or because he believed that a recommendation to mercy would secure a pardon or a commutation of sentence.[31] Nor will the affidavit of a juror be received to show that he assented to a verdict of guilty under a mistake as to its meaning and effect.[32] On the other hand, while the affidavits of jurors cannot be received to impeach the verdict, they are competent to rebut affidavits by others showing misconduct on the part of the jurors.[33]

Massachusetts.—Com. *v.* Drew, 4 Mass. 391.
Michigan.— People *v.* Stimer, 82 Mich. 17, 46 N. W. 28.
Minnesota.— State *v.* Mims, 26 Minn. 183, 2 N. W. 494, 683.
Mississippi.— McGuire *v.* State, 76 Miss. 504, 25 So. 495; Riggs *v.* State, 26 Miss. 51.
Missouri.— State *v.* Palmer, 161 Mo. 152, 61 S. W. 651; State *v.* Schaefer, 116 Mo. 96, 22 S. W. 447; State *v.* Cooper, 85 Mo. 256; State *v.* Fox, 79 Mo. 109.
Nebraska.— Savary *v.* State, 62 Nebr. 166, 87 N. W. 34; Coil *v.* State, 62 Nebr. 15, 86 N. W. 925; Welsh *v.* State, 60 Nebr. 101, 82 N. W. 368.
Nevada.— State *v.* Stewart, 9 Nev. 120.
New Jersey.— State *v.* Vansciver, 7 N. J. L. J. 268.
New York.— People *v.* Hartung, 17 How. Pr. 85, 4 Park. Cr. 256; People *v.* Barker, 2 Wheel. Cr. 19.
North Carolina.— State *v.* Best, 111 N. C. 638, 15 S. E. 930; State *v.* Royal, 90 N. C. 755; State *v.* McLeod, 8 N. C. 344.
South Carolina.— State *v.* Senn, 32 S. C. 392, 11 S. E. 292; State *v.* Tindall, 10 Rich. 212.
South Dakota.— State *v.* Kiefer, (1902) 91 N. W. 1117; State *v.* Andre, 14 S. D. 215, 84 N. W. 783.
Tennessee.— Cartwright *v.* State, 12 Lea 620.
Texas.— Scott *v.* State, 43 Tex. Cr. 591, 68 S. W. 177; Dancy *v.* State, 41 Tex. Cr. 293, 53 S. W. 635, 886; Henry *v.* State, (Cr. App. 1897) 43 S. W. 340; Tolston *v.* State, (Cr. App. 1897) 42 S. W. 988; Rockhold *v.* State, 16 Tex. App. 577.
Virginia.— Gordon *v.* Com., 100 Va. 825, 41 S. E. 746; Read *v.* Com., 22 Gratt. 924.
Washington.— State *v.* Parker, 25 Wash. 405, 65 Pac. 776.
Wisconsin.—Hughes *v.* State, 109 Wis. 397, 85 N. W. 333.
United States.— Mattox *v.* U. S., 146 U. S. 140, 13 S. Ct. 50, 36 L. ed. 917; U. S. *v.* Clements, 25 Fed. Cas. No. 14,817, 3 Hughes 509.
See 15 Cent. Dig. tit. "Criminal Law," § 2392.

29. Mercer *v.* State, 17 Ga. 146; State *v.* Douglass, 7 Iowa 413.

Affidavits of jurors are incompetent to show that their verdict is the result of misunderstanding the court's instructions (Scruggs *v.* State, 90 Tenn. 81, 15 S. W. 1074; Cartwright *v.* State, 12 Lea (Tenn.) 620; Norris *v.* State, 3 Humphr. (Tenn.) 333, 39 Am. Dec. 175; Mitchell *v.* State, 36 Tex. Cr. 278, 33 S. W. 367, 36 S. W. 456; McCulloch *v.* State, 35 Tex. Cr. 268, 33 S. W. 230; People *v.* Flynn, 7 Utah 378, 26 Pac. 1114. *Contra*, Packard *v.* U. S., 1 Greene (Iowa) 225, 48 Am. Dec. 375) to prove irregularities in the jury room (Titus *v.* State, 49 N. J. L. 36, 7 Atl. 621), to show what was said in argument, and what inferences were drawn from the evidence (State *v.* Beste, 91 Iowa 565, 60 N. W. 112), or to show that they entertained a fixed opinion as to defendant's guilt which would have disqualified them if disclosed on the *voir dire* (People *v.* Baker, 1 Cal. 403; McGuffie *v.* State, 17 Ga. 497; State *v.* Rush, 95 Mo. 199, 8 S. W. 221).

A few exceptions have been made to the rule in some states. Thus in Tennessee a juror's affidavit was received to show that he assented to a verdict of guilty on an assertion that the proceedings were defective and that the governor would pardon the accused if he were recommended to mercy (Cochran *v.* State, 7 Humphr. (Tenn.) 544; Crawford *v.* State, 2 Yerg. (Tenn.) 60, 24 Am. Dec. 467), or to show that the juror's assent was not freely given but was procured by the threats of his fellows (Fletcher *v.* State, 6 Humphr. (Tenn.) 249; Crawford *v.* State, 2 Yerg. (Tenn.) 60, 24 Am. Dec. 467. See also McBean *v.* State, 83 Wis. 206, 53 N. W. 497; U. S. *v.* Reid, 12 How. (U. S.) 361, 13 L. ed. 1023).

The affidavit of a third person is not admissible to show statements made to him out of court by a juror in regard to what was said by the juror in the jury room. State *v.* Murphy, 7 Ida. 183, 61 Pac. 462; Com. *v.* Meserve, 156 Mass. 61, 30 N. E. 166.

30. State *v.* Plum, 49 Kan. 679, 31 Pac. 308.

31. State *v.* Bennett, 40 S. C. 308, 18 S. E. 886.

32. *Louisiana.*— State *v.* Wallman, 31 La. Ann. 146.
Missouri.— State *v.* McNamara, 100 Mo. 100, 13 S. W. 938; State *v.* Shock, 68 Mo. 552.
Nebraska.— Wells *v.* State, 11 Nebr. 409, 9 N. W. 552.
North Carolina.— State *v.* Best, 111 N. C. 638, 15 S. E. 930.
West Virginia.— State *v.* Cobbs, 40 W. Va. 718, 22 S. E. 310.
See 15 Cent. Dig. tit. "Criminal Law," § 2393.

33. *California.*— People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161; People *v.* Hunt, 59 Cal. 430. But see People *v.* Backus, 5 Cal. 275.
Georgia.— Hill *v.* State, 91 Ga. 153, 16 S. E. 976.

(II) *To Show Misconduct of Jurors.* A juror's own misconduct or the misconduct of his fellows cannot be proved on a motion for a new trial by the affidavits of the jurors,[34] except that in some states by statute the fact that the verdict was reached by chance or lot may be proved by the affidavits of jurors.[35]

(III) *To Show Misconduct of Others.* While the jurors may testify to any fact showing the existence of an outside influence upon them, they cannot give evidence as to the effect which this influence had upon their minds in bringing about a verdict of guilty.[36]

h. Affidavits as to Newly Discovered Evidence — (I) *In General.* The affidavit on a motion for a new trial on the ground of newly discovered evidence should clearly state what the evidence is,[37] who the new witness is, his residence, occupation, and other facts which will enable the court to judge of his credibility.[38] It should also show that the evidence has become known to defendant

Indiana.— Bradford *v.* State, 15 Ind. 347.

Kentucky.— Howard *v.* Com., 69 S. W. 721, 24 Ky. L. Rep. 612.

Montana.— State *v.* Gay, 18 Mont. 51, 44 Pac. 411.

New Hampshire.— State *v.* Ayer, 23 N. H. 301.

Texas.— Cannon *v.* State, 3 Tex. 31.

See 15 Cent. Dig. tit. "Criminal Law," § 2392 *et seq.*

Their affidavits may be received to disprove charges of misconduct against them (Howard *v.* Com., 69 S. W. 721, 24 Ky. L. Rep. 612; State *v.* Procella, 105 La. 518, 29 So. 967; State *v.* Favre, 51 La. Ann. 434, 25 So. 93), and to rebut or explain alleged expressions of opinions adverse to the accused (Monroe *v.* State, 5 Ga. 85; State *v.* Howard, 17 N. H. 171; State *v.* Cuppett, 2 Ohio Dec. (Reprint) 78, 1 West. L. Month. 329; Rader *v.* State, 5 Lea (Tenn.) 610; Gilleland *v.* State, 44 Tex. 356). Thus a juror's affidavit that the jury was not tampered with (State *v.* Underwood, 57 Mo. 40), to explain the character of improper papers alleged to have been in their possession (Farrer *v.* State, 2 Ohio St. 54), or to deny an affidavit of a person not a juror who alleges that he had overheard the juror make statements of facts on his own knowledge in the jury room (State *v.* Rush, 95 Mo. 199, 8 S. W. 221), or to show that while the affiant was absent from the other jurors he met and talked with no one (State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224), is admissible.

34. *California.*— People *v.* Hughes, 29 Cal. 257. And see People *v.* Azoff, 105 Cal. 632, 39 Pac. 59; People *v.* Doyell, 48 Cal. 85.

Georgia.— Moughon *v.* State, 59 Ga. 308.

Illinois.— Reins *v.* People, 30 Ill. 256.

Iowa.— State *v.* Lauderbeck, 96 Iowa 258, 65 N. W. 158.

Louisiana.— State *v.* Price, 37 La. Ann. 215; State *v.* Beatty, 30 La. Ann. 1266.

Massachusetts.—Com. *v.* Meserve, 156 Mass. 61, 30 N. E. 166. And see Com. *v.* White, 147 Mass. 76, 16 N. E. 707.

Minnesota.— State *v.* Lentz, 45 Minn. 177, 47 N. W. 720.

Missouri.— State *v.* Cooper, 85 Mo. 256; State *v.* Branstetter, 65 Mo. 149; State *v.* Coupenhaver, 39 Mo. 430; State *v.* Swinney, 25 Mo. App. 347; State *v.* Dieckman, 11 Mo. App. 538.

Nevada.— State *v.* Crutchley, 19 Nev. 368, 12 Pac. 113.

New York.— People *v.* Carnal, 2 Edm. Sel. Cas. 202, 1 Park. Cr. 256.

North Carolina.—State *v.* Harper, 101 N. C. 761, 7 S. E. 730, 9 Am. St. Rep. 46; State *v.* McLeod, 8 N. C. 344.

Pennsylvania.—Com. *v.* Thompson, 4 Phila. 215.

Tennessee.— Seott *v.* State, 7 Lea 232; Stone *v.* State, 4 Humphr. 27.

Texas.— Davis *v.* State, 43 Tex. 189.

Utah.— See People *v.* Ritchie, 12 Utah 180, 42 Pac. 209.

Virginia.— Taylor *v.* Com., 90 Va. 109, 17 S. E. 812; Bull *v.* Com., 14 Gratt. 613.

But see Harris *v.* State, 24 Nebr. 803, 40 N. W. 317, holding that an exeeption to the rule should be made with regard to overt acts of misconduct whieh all the jurors present might testify to as having seen or heard.

See 15 Cent. Dig. tit. "Criminal Law," § 2394.

35. Smith *v.* State, 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20; People *v.* Azoff, 105 Cal. 632, 39 Pac. 59; Joyce *v.* State, 7 Baxt. (Tenn.) 273.

36. Heller *v.* People, 22 Colo. 11, 43 Pac. 124; Mattox *v.* U. S., 146 U. S. 140, 13 S. Ct. 50, 36 L. ed. 917.

The affidavits of jurors have been received to show misconduet and improper remarks of the officer (Nelms *v.* State, 13 Sm. & M. (Miss.) 560, 53 Am. Dec. 94; Com. *v.* Johnson, 5 Pa. Co. Ct. 236), that newspapers were introduced by someone into the jury room and read by some of the jury (Mattox *v.* U. S., 146 U. S. 140, 13 S. Ct. 50, 36 L. ed. 917), and that an outsider offered a bribe to one of the jurors (Mathis *v.* State, 18 Ga. 343).

Where evidence that papers prejudicial to the accused were read by the jury is introduced, the affidavits of the jurors are admissible to rebut this fact. State *v.* Hascall, 6 N. H. 352.

37. Hatcher *v.* State, 116 Ga. 617, 42 S. E. 1018; Hutchins *v.* State, 70 Ga. 724; Sarah *v.* State, 28 Ga. 576; State *v.* Curtis, 30 La. Ann. 814; State *v.* Tomasitz, 144 Mo. 86, 45 S. W. 1106. And see Richardson *v.* State, 47 Ark. 562, 2 S. W. 187.

38. State *v.* Fay, 88 Minn. 269, 92 N. W. 978.

since the trial,[39] and in what manner it became known.[40] Facts should be stated from which the court may see that the evidence is or will be material on a new trial.[41]

(II) *Defendant's Affidavit.* The motion for a new trial must be accompanied by the affidavits of defendant and of his counsel, or some satisfactory reason must be given for their absence.[42]

(III) *Affidavits of Other Persons.* As a rule the application and the affidavit of defendant thereto should be corroborated by affidavits of other persons, preferably by those of the witnesses newly discovered.[43]

(IV) *Counter-Affidavits.* Counter-affidavits may be considered by the court in its discretion to show that defendant has not exercised due diligence.[44]

39. Milner *v.* State, 30 Ga. 137; State *v.* Lichliter, 95 Mo. 402, 8 S. W. 720; State *v.* Ray, 53 Mo. 345.

40. People *v.* Kloss, 115 Cal. 567, 47 Pac. 459.

Showing diligence.— It is necessary for defendant to show in the affidavit that he has exercised due and reasonable diligence to procure the attendance of the absent witnesses; and this he must show by facts from which the court may draw the inference of diligence, and not by stating his own conclusion that he has been diligent. Skaggs *v.* State, 108 Ind. 53, 8 N. E. 695. And see *supra*, XV, A, 2, q, (II).

41. State *v.* Luke, 104 Mo. 563, 16 S. W. 242.

An allegation in the affidavit based on information and belief should state the name of the person from whom the information was obtained. Williams *v.* State, 7 Tex. App. 163.

42. *California.*— People *v.* Ross, 134 Cal. 256, 66 Pac. 229.

Georgia.— Malone *v.* State, 116 Ga. 272, 42 S. E. 468; Weeks *v.* State, 79 Ga. 36, 3 S. E. 323.

Mississippi.— Friar *v.* State, 3 How. 422.

Missouri.— State *v.* Laycock, 136 Mo. 93, 37 S. W. 802; State *v.* Nagel, 136 Mo. 45, 37 S. W. 821; State *v.* Campbell, 115 Mo. 391, 22 S. W. 367; State *v.* Crawford, 99 Mo. 74, 12 S. W. 354; State *v.* McLaughlin, 27 Mo. 111; State *v.* Elliott, 16 Mo. App. 552.

Texas.— Brown *v.* State, (Cr. App. 1900) 55 S. W. 176; Carpenter *v.* State, (Cr. App. 1899) 51 S. W. 227; Gamble *v.* State, (Cr. App. 1899) 50 S. W. 458; Hall *v.* State, 33 Tex. Cr. 191, 26 S. W. 72.

See 15 Cent. Dig. tit. "Criminal Law," § 2397.

Defendant should deny in his affidavit having knowledge of the new evidence before the verdict was rendered, and if he fails to do this the motion is properly overruled. Childers *v.* State, 68 Ga. 837; State *v.* Miller, 144 Mo. 26, 45 S. W. 1104; Vick *v.* State, (Tex. Cr. App. 1899) 51 S. W. 1117; Franklin *v.* State, 34 Tex. Cr. 203, 29 S. W. 1088.

43. *Arkansas.*— Robinson *v.* State, 33 Ark. 180; Jackson *v.* State, 29 Ark. 62; Runnels *v.* State, 28 Ark. 121; Bixby *v.* State, 15 Ark. 395; Pleasant *v.* State, 13 Ark. 360.

Florida.— Jones *v.* State, 35 Fla. 289, 17 So. 284.

Kansas.— State *v.* Kellerman, 14 Kan. 135.

Louisiana.—State *v.* Reed, 49 La. Ann. 704, 21 So. 732; State *v.* Oliver, 46 La. Ann. 654, 15 So. 86; State *v.* Covington, 45 La. Ann. 979, 13 So. 266; State *v.* Hanks, 39 La. Ann. 234, 1 So. 458; State *v.* Adams, 39 La. Ann. 238, 1 So. 455; State *v.* Washington, 36 La. Ann. 341.

Texas.— Mabbit *v.* State, (Cr. App. 1893) 22 S. W. 412.

See 15 Cent. Dig. tit. "Criminal Law," § 2398.

In addition to his own affidavit, accused should either produce the affidavit of the proposed witness showing what he will testify to, or he must satisfactorily account for its absence.

Arkansas.— Jackson *v.* State, 29 Ark. 62.

Illinois.— Fisher *v.* People, 103 Ill. 101.

Indiana.— Quinn *v.* State, 123 Ind. 59, 23 N. E. 977; March *v.* State, 117 Ind. 547, 20 N. E. 444; Shipman *v.* State, 38 Ind. 549; Gibson *v.* State, 9 Ind. 264.

Iowa.— Warren *v.* State, 1 Greene 106.

Kansas.— State *v.* Kellerman, 14 Kan. 135.

Louisiana.— State *v.* Hollier, 49 La. Ann. 371, 21 So. 633; State *v.* Valsin, 47 La. Ann. 115, 16 So. 768.

Missouri.— State *v.* McCullough, 171 Mo. 571, 71 S. W. 1002; State *v.* Bowman, 161 Mo. 88, 62 S. W. 996; State *v.* Nettles, 153 Mo. 464, 55 S. W. 70; State *v.* Moses, 139 Mo. 217, 40 S. W. 883; State *v.* Nagel, 136 Mo. 45, 37 S. W. 821; State *v.* Schorn, 12 Mo. App. 590.

Oregon.— State *v.* Drake, 11 Oreg. 396, 4 Pac. 1204.

Tennessee.— Riley *v.* State, 9 Humphr. 646.

Texas.— Campbell *v.* State, 29 Tex. 490; Wilkerson *v.* State, (Cr. App. 1899) 57 S. W. 956; Mabbit *v.* State, (Cr. App. 1893) 22 S. W. 412; Evans *v.* State, 6 Tex. App. 513; Polser *v.* State, 6 Tex. App. 510.

West Virginia.— State *v.* Williams, 14 W. Va. 851.

See 15 Cent. Dig. tit. "Criminal Law," § 2401.

It is no excuse for failure to procure the witness's affidavit that defendant is in custody, as it may be procured without his personal attention (Vandyne *v.* State, 130 Ind. 26, 29 N. E. 392), or that the witness refuses to make the affidavit, since the court upon application will compel him to do so (Gardner *v.* State, 94 Ind. 489; Rater *v.* State, 49 Ind. 507).

44. People *v.* Cesena, 90 Cal. 381, 27 Pac. 300; Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364.

So too such affidavits may be received for the purpose of attacking the credibility of the newly discovered witnesses.[45]

i. Effect of Application. At common law it was in the discretion of the trial court to stay the judgment pending the motion for a new trial,[46] and it has been held that the motion for a new trial may in itself have this effect.[47]

4. Hearing and Determination of Motion — a. In General — (i) *Argument.* The court should hear a reasonable argument by counsel on a motion for a new trial, especially in a capital case,[48] but if no argument is demanded, it is discretionary with the court to pass upon the motion without argument;[49] and even when demanded its refusal is not necessarily error.[50]

(ii) *Adjournment.* It is proper for the court to adjourn the argument of the motion for a new trial for the purpose of giving the accused an opportunity to produce necessary affidavits.[51]

(iii) *Amendment.* The motion cannot be amended after it has been denied and judgment pronounced,[52] or after the expiration of the period after verdict limited for filing the original motion.[53]

(iv) *Evidence.* It is wholly within the discretion of the court to hear oral evidence in support of the motion for a new trial,[54] or to refuse to permit the cross-examination of those who have signed the affidavits.[55]

45. Meeks *v.* State, 57 Ga. 329; Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046.

Where the affidavits in support of the motion are fully contradicted by counter-affidavits on the part of the prosecution, the court may properly refuse to grant a new trial. People *v.* Fice, 97 Cal. 459, 32 Pac. 531.

46. 1 Chitty Cr. L. 660, 661. And see Parker *v.* State, 51 Miss. 535.

47. Louisville Chemical Works *v.* Com., 8 Bush (Ky.) 179. But see Parker *v.* State, 51 Miss. 535; State *v.* Reynolds, 14 Mont. 383, 36 Pac. 449.

48. Hodge *v.* Territory, 12 Okla. 108, 69 Pac. 1077.

The time for hearing and the length of the argument are entirely within the discretion of the court. Wheeler *v.* State, 158 Ind. 684, 63 N. E. 975.

49. Manning *v.* State, 79 Wis. 178, 48 N. W. 209.

50. Hodge *v.* Territory, 12 Okla. 108, 69 Pac. 1077, holding that the refusal of the court to hear argument on a motion for a new trial is not ground for reversal, unless it is clearly shown that there was an abuse of discretion prejudicial to the accused.

Refusing to hear the argument of defendant's counsel because his views and the authorities he quotes were presented to the court during the trial has been held to be within the discretion of the court. Frank *v.* State, 94 Wis. 211, 68 N. W. 657.

51. Shipman *v.* State, 38 Ind. 549; Gibson *v.* State, 9 Ind. 264.

Illness of counsel.— As the power of the court to permit argument is wholly discretionary, it may properly refuse an adjournment on account of the illness of defendant's counsel. Wheeler *v.* State, 158 Ind. 687, 63 N. E. 975.

Rebutting affidavits.—An adjournment will not be granted defendant to enable him to put in rebutting affidavits unless he asks for it before beginning his argument. Lawrence *v.* State, 36 Tex. Cr. 173, 36 S. W. 90.

52. People *v.* Wessel, 98 Cal. 352, 33 Pac. 216.

53. State *v.* Hunt, 141 Mo. 626, 43 S. W. 389.

54. People *v.* Tucker, 117 Cal. 229, 49 Pac. 134; Glidewell *v.* State, 15 Lea (Tenn.) 133; Steagald *v.* State, 22 Tex. App. 464, 3 S. W. 771.

In the absence of statute defendant has no absolute right to introduce oral testimony on the motion (People *v.* Sullivan, 129 Cal. 557, 62 Pac. 101) or to have compulsory process to obtain witnesses for that purpose (State *v.* Gauthreaux, 38 La. Ann. 608; Fulger *v.* State, 58 Miss. 829; State *v.* Magers, 36 Oreg. 38, 58 Pac. 892).

Under a statute providing that the judge shall take the evidence by affidavit or otherwise, he has no power to receive information from private sources on a motion for a new trial. Richardson *v.* State, 28 Tex. App. 216, 12 S. W. 870.

On a motion based on insufficiency of evidence, the judge is not bound to reëxamine the witnesses. He may state the material facts and the evidence from his own notes. Com. *v.* Jones, 1 Leigh (Va.) 598.

Conflict between affidavit and record.— Where an affidavit alleges certain facts as grounds for a new trial and the record shows the contrary, the record is conclusive, and the motion should be overruled. Dolan *v.* State, 122 Ind. 141, 23 N. E. 761.

Taking of testimony for review on appeal. — It is not error for the court to refuse an attachment for the purpose of having testimony taken on the motion for a new trial, and of having it filed of record, so as to bring it up for review on appeal. This is discretionary with the court, and usually evidence taken on the motion is not reviewed on appeal. Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228.

55. People *v.* Lee Chuck, 78 Cal. 317, 20 Pac. 719; Moore *v.* State, 96 Tenn. 209, 83 S. W. 1046.

The New York statute giving the court

b. Presence of Defendant. At common law, when an application was made for a new trial, it was the general rule that all defendants who had been convicted must be actually present.[56] In the several states of the Union it is the general rule, subject to a few exceptions, that the presence of the accused is not necessary at the motion for a new trial.[57] Nor does the fact that on the hearing of the motion testimony is taken for or against it alter the case.[58] The constitutional or statutory right of the accused to be present during his trial does not give him the absolute right to be present on the motion for a new trial,[59] as the word "trial" used in such statutes includes only the proceedings down to verdict, and not motions for new trials or in arrest of judgment.[60]

c. Determination of Motion — (1) *In General.* The order made in passing upon an application for a new trial should properly express the determination of

the power, on a motion for a new trial, to examine and cross-examine persons under oath as to the contents of the affidavits which they have subscribed, does not permit the summoning and examination of persons who are not affiants. People *v.* Moore, 29 Misc. 574, 62 N. Y. Suppl. 252, 14 N. Y. Cr. 387.

56. The reason was that the court might have them in its power, before the motion would be entertained (Rex *v.* Fielder, 2 D. & R. 46, 16 E. C. L. 72; Rex *v.* Teal, 11 East 307, 10 Rev. Rep. 516; Rex *v.* Askew, 3 M. & S. 9, 15 Rev. Rep. 380; Rex *v.* Cochrane, 3 M. & S. 10 note *a*, 15 Rev. Rep. 380 note), for it was suggested that one of several who was most criminal might keep away and procure the court to act upon other defendants whose guilt was less apparent, and then before sentence abscond on the denial of the application (1 Chitty Cr. L. 659).

Where the penalty was a pecuniary one, as by fine, a new trial might be moved for in the absence of defendant upon his furnishing security that his fine would be paid. Reg. *v.* Caudwell, 17 Q. B. 503, 2 Den. C. C. 372 note, 15 Jur. 1011, 21 L. J. M. C. 48, 79 E. C. L. 503; Reg. *v.* Parkinson, 2 Den. C. C. 459, 15 Jur. 1011; 1 Chitty Cr. L. 659.

If defendant was in custody he had to apply for a writ of habeas corpus to bring him up at the motion for a new trial, where his presence was indispensable. Rex *v.* Spragg, 2 Burr. 928.

57. *Alabama.*— Dorsey *v.* State, 107 Ala. 157, 18 So. 199.

Illinois.— Bonardo *v.* People, 182 Ill. 411, 55 N. E. 519; Godfreidson *v.* People, 88 Ill. 284.

Iowa.— State *v.* Decklotts, 19 Iowa 447.

Kentucky.— Howard *v.* Com., 69 S. W. 721, 24 Ky. L. Rep. 612.

Louisiana.— State *v.* Hardaway, 50 La. Ann. 1345, 24 So. 320; State *v.* White, 37 La. Ann. 172; State *v.* Harris, 34 La. Ann. 118; State *v.* Green, 33 La. Ann. 1408; State *v.* Somnier, 33 La. Ann. 237; State *v.* Clark, 32 La. Ann. 558; State *v.* Coleman, 27 La. Ann. 691; State *v.* Hugel, 27 La. Ann. 375.

Massachusetts.—Com. *v.* Costello, 121 Mass. 371, 23 Am. Rep. 277.

Michigan.— People *v.* Ormsby, 48 Mich. 494, 12 N. W. 671.

Missouri.— State *v.* Lewis, 80 Mo. 110; State *v.* Brown, 63 Mo. 439.

Nebraska.— Davis *v.* State, 51 Nebr. 301, 70 N. W. 984.

New Mexico.— Territory *v.* Chenowith, 3 N. M. 225, 5 Pac. 532.

Pennsylvania.— Jewell *v.* Com., 22 Pa. St. 94.

South Carolina.— State *v.* Rippon, 2 Bay 99.

Washington.— State *v.* Greer, 11 Wash. 244, 39 Pac. 874.

See 15 Cent. Dig. tit. "Criminal Law," § 2412.

In Mississippi it was at one time required that the accused must be present, but this rule was subsequently abolished by statute. Simpson *v.* State, 56 Miss. 297.

In Texas a statute requiring that defendant must be personally present at the trial has been construed to require his presence at the motion for a new trial, the court holding that the term "trial" meant a "criminal action" which the Texas code defines as "the whole or any part of the procedure which the law provides for bringing offenders to justice." Garcia *v.* State, 5 Tex. App. 337; Sweat *v.* State, 4 Tex. App. 617; Krautz *v.* State, 4 Tex. App. 534; Berkley *v.* State, 4 Tex. App. 122; Gibson *v.* State, 3 Tex. App. 437.

In Virginia the accused must be present at the motion, and his presence must be shown by the record. Bond *v.* Com., 83 Va. 581, 3 S. E. 149; Jackson *v.* Com., 19 Gratt. 656; Sperry *v.* Com., 9 Leigh 623, 33 Am. Dec. 261.

58. State *v.* White, 52 La. Ann. 206, 26 So. 849; State *v.* West, 45 La. Ann. 928, 13 So. 173.

59. *Indiana.*— Lillard *v.* State, 151 Ind. 322, 50 N. E. 383.

Kentucky.— Howard *v.* Com., 69 S. W. 721, 24 Ky. L. Rep. 612.

Missouri.— State *v.* Hoffman, 78 Mo. 256.

South Carolina.— State *v.* Jefcoat, 20 S. C. 383.

West Virginia.— State *v.* Parsons, 39 W. Va. 464, 19 S. E. 876.

See 15 Cent. Dig. tit. "Criminal Law," § 2412.

60. Ward *v.* Territory, 8 Okla. 12, 56 Pac. 704.

Time for objection.— An objection that the accused was not present at the argument and overruling of the motion for a new trial is

the court,[61] whether it sustains the motion and grants a new trial,[62] overrules the motion and refuses to grant a new trial,[63] or dismisses the motion for defendant's laches in making the application.[64]

(II) *In Case of Joint Defendants.* At common law, where some of several defendants had been convicted and the others acquitted, a new trial might be granted those convicted without affecting those acquitted.[65] But a motion for a new trial made jointly by two or more parties must be granted as to all or overruled as to all.[66]

(III) *Revoking Order.* The court may, where an order for a new trial has been granted improvidently and without sufficient cause, revoke it during the term, and by this the judgment is left in force.[67]

5. Proceedings at New Trial. An order granting a new trial effects a rehearing of the case before a new jury, with both parties in the same position as if the case had never been heard before.[68] Defendant may be tried on the old indictment.[69] It seems that instead of pleading not guilty and going to trial on the facts he may demur to the indictment,[70] although it has been held that he cannot move to quash the indictment or plead in abatement.[71] Where defendant has once been arraigned and has pleaded he cannot demand that he shall be arraigned and required to plead at the new trial.[72] It is not error to have the new trial at

too late if made after sentence. Griffin *v.* State, 34 Ohio St. 299.

61. See Com. *v.* Best, 181 Mass. 545, 63 N. E. 1073, holding that the decision of the trial court upon an issue of fact arising on a motion for a new trial and based upon testimony taken at the motion, and upon what was seen by the judge at the trial, is conclusive, and will not be reviewed on appeal.

62. The motion is properly determined as an entirety, and if it cannot be sustained as presented it is not error to overrule it altogether. Reed *v.* State, (Nebr. 1902) 92 N. W. 321.

63. On a motion for a new trial because of the insufficiency of the evidence, it is error for the court to decline to look into the evidence or pass upon its sufficiency, and he should expressly declare his approval or disapproval of the verdict. State *v.* Bridges, 29 Kan. 138. See also McIntyre *v.* People, 38 Ill. 514, holding that a motion for a new trial based upon irregularities at the trial need not be expressly passed upon by the court or an order made; and that where there is no defect in the indictment or record which would render proper the arrest of the judgment, it is not error to overrule the motion for a new trial by merely entering judgment and pronouncing sentence upon the prisoner.

It is a sufficient expression of approval of the verdict where the court states that the motion is overruled on the ground that his views upon the question of defendant's guilt are not so clear and certain that he ought to interfere with the verdict. Boyle *v.* State, 61 Wis. 440, 21 N. W. 289.

As the judge is not required to state his reasons for overruling the motion, he cannot be held to have acquiesced in such allegations of the motion as the reasons which he does give do not expressly cover. State *v.* Fuselier, 51 La. Ann. 1504, 26 So. 408.

New trial not beneficial.— Where a new trial is asked because of errors in the admission and exclusion of evidence, or because of errors in the instructions, and it appears that the verdict is sufficiently supported by the evidence, and that a different result would not follow on a new trial with correct rulings as to the evidence and proper instructions, a new trial should be denied. Miller *v.* State, 3 Wyo. 657, 29 Pac. 136; U. S. *v.* Daubner, 17 Fed. 793.

64. Where counsel neglects to perfect his papers on a motion for a new trial within the time allowed him by the court for that purpose the motion may be dismissed. Ross *v.* State, 65 Ga. 127.

65. 1 Chitty Cr. L. 659.

66. Dutcher *v.* State, 16 Nebr. 30, 19 N. W. 612; Reg. *v.* Fellowes, 19 U. C. Q. B. 48.

67. Com. *v.* Miller, 6 Dana (Ky.) 315.

In Texas, under the statute relating to new trials, the order granting a new trial is final, and cannot be revoked. Mathis *v.* State, 40 Tex. Cr. 316, 50 S. W. 368 [*overruling Ex p.* Matthews, (Tex. Cr. App. 1899) 49 S. W. 623].

68. No advantage can be taken of the former conviction or of the order granting the new trial. *Ex p.* Bradley, 48 Ind. 548; State *v.* McCord, 8 Kan. 232, 12 Am. Rep. 469; State *v.* Hornsby, 8 Rob. (La.) 583, 41 Am. Dec. 314.

69. State *v.* Stephens, 13 S. C. 285.

70. State *v.* Butler, 72 Md. 98, 18 Atl. 1105.

71. Custis *v.* Com., 87 Va. 589, 13 S. E. 73, holding that the granting of a new trial does not affect the plea of not guilty previously entered, and that unless this plea is withdrawn by leave of court defendant cannot move to quash or plead in abatement.

72. *Alabama.*— Levy *v.* State, 49 Ala. 390.

Georgia.— Atkins *v.* State, 69 Ga. 595; Hayes *v.* State, 58 Ga. 35.

Louisiana.— State *v.* Boyd, 38 La. Ann. 374; State *v.* Johnson, 10 La. Ann. 456.

Mississippi.— Byrd *v.* State, 1 How. 247.

Missouri.— State *v.* Simms, 71 Mo. 538.

New York.—People *v.* McElvaine, 125 N. Y.

the same term as the former trial, if defendant is given time to procure the attendance of his witnesses.[73]

B. Arrest of Judgment — 1. In General — a. Matter Appearing on Record. A motion in arrest of judgment differs from a motion for a new trial, in that the former can be based only upon facts appearing in the record, or upon some matter which ought to appear there but does not appear.[74] The motion in arrest reaches substantial errors which are patent on the record, and which vitiate the proceedings,[75] and not errors on the trial not in the record and which can only appear by a bill of exceptions.[76]

b. Necessity For Writing. In some jurisdictions, as a matter of practice, or by statute, a motion in arrest of judgment must be in writing, and must state the grounds for the same.[77]

2. Particular Grounds For Arrest of Judgment — a. In General — (I) *Preliminary Proceedings.* All defects and irregularities occurring before arraign-

596, 26 N. E. 929; People *v.* Vermilyea, 7 Cow. 108.

South Carolina.— State *v.* Stewart, 26 S. C. 125, 1 S. E. 468.

Texas.— Huff *v.* State, (Cr. App. 1894) 25 S. W. 772 [*reversing* (Cr. App. 1894) 24 S. W. 903]; Cheek *v.* State, 4 Tex. App. 444.

United States.— U. S. *v.* McKnight, 112 Fed. 982.

England.— Rex *v.* Fowler, 4 B. & Ald. 273, 6 E. C. L. 481.

See 15 Cent. Dig. tit. "Criminal Law," § 2422. And see *supra*, XI, B, 1, c.

A rearraignment, although usually unnecessary, is not error, and where defendant on the new trial wishes to change a former plea of guilty to not guilty a rearraignment is properly allowed. Shaw *v.* State, 32 Tex. Cr. 155, 22 S. W. 588.

73. Lott *v.* State, 41 Tex. 121; Garrett *v.* State, 37 Tex. Cr. 198, 38 S. W. 1017, 39 S. W. 108.

74. *Alabama.*— Curry *v.* State, 120 Ala. 366, 25 So. 237; Walker *v.* State, 91 Ala. 76, 9 So. 87; Sparks *v.* State, 59 Ala. 82.

Arkansas.— Atkins *v.* State, 16 Ark. 568.

Florida.— Smith *v.* State, 29 Fla. 408, 10 So. 894; McClerkin *v.* State, 20 Fla. 879.

Georgia.— Herron *v.* State, 93 Ga. 554, 19 S. E. 243; Reinhart *v.* State, 29 Ga. 522; State *v.* Allen, R. M. Charlt. 518.

Indiana.— Case *v.* State, 5 Ind. 1.

Louisiana.— State *v.* Kline, 109 La. 603, 33 So. 618; State *v.* Colomb, 108 La. 253, 32 So. 351; State *v.* Smith, 104 La. 464, 29 So. 20; State *v.* Washington, 104 La. 443, 29 So. 55, 81 Am. St. Rep. 141; State *v.* Evans, 104 La. 343, 29 So. 112; State *v.* White, 52 La. Ann. 206, 26 So. 849; State *v.* Haines, 51 La. Ann. 731, 25 So. 372, 44 L. R. A. 837; State *v.* Casey, 44 La. Ann. 969, 11 So. 583; State *v.* Pete, 39 La. Ann. 1095, 3 So. 284.

Maine.— State *v.* Murphy, 72 Me. 433; State *v.* Carver, 49 Me. 588, 77 Am. Dec. 275; State *v.* Bangor, 38 Me. 592.

Maryland.— Byers *v.* State, 63 Md. 207.

Massachusetts.— Com. *v.* Brown, 150 Mass. 334, 23 N. E. 98.

Minnesota.—State *v.* Conway, 23 Minn. 291.

Mississippi.—McBeth *v.* State, 50 Miss. 81; Heward *v.* State, 13 Sm. & M. 261.

Missouri.— State *v.* Patton, 94 Mo. App. 32, 67 S. W. 970.

New York.— People *v.* Kelly, 94 N. Y. 526; Jacobowsky *v.* People, 6 Hun 524.

North Carolina.— State *v.* Davis, 126 N. C. 1007, 35 S. E. 464; State *v.* Eaves, 106 N. C. 752, 11 S. E. 370, 8 L. R. A. 259; State *v.* Harrison, 104 N. C. 728, 10 S. E. 131; State *v.* Douglass, 63 N. C. 500.

Ohio.— Helmerking *v.* State, 1 Ohio Dec. (Reprint) 444, 10 West. L. J. 66.

Pennsylvania.— Delaware Division Canal Co. *v.* Com., 60 Pa. St. 367, 100 Am. Dec. 570; Com. *v.* Armstrong, 4 Pa. Co. Ct. 5.

South Carolina.— State *v.* Chitty, 1 Bailey 379; State *v.* Scott, 1 Bailey 270.

Tennessee.— King *v.* State, 91 Tenn. 617, 20 S. W. 169; State *v.* Rogers, 6 Baxt. 563.

Texas.— State *v.* Vahl, 20 Tex. 779; Peter *v.* State, 11 Tex. 762.

West Virginia.—State *v.* Martin, 38 W. Va. 568, 18 S. E. 748.

Wyoming.—Territory *v.* Pierce, 1 Wyo. 168.

United States.— U. S. *v.* McKnight, 112 Fed. 982; U. S. *v.* Barnhart, 17 Fed. 579, 9 Sawy. 159; U. S. *v.* Kilpatrick, 16 Fed. 765.

England.— Bellasis *v.* Hester, 1 Ld. Raym. 280.

See 15 Cent. Dig. tit. "Criminal Law," § 2423.

An error in fixing the terms of court in contravention of the statute cannot be made the ground of a motion in arrest. State *v.* Powell, 45 La. Ann. 694, 12 So. 757.

If the record contradicts the allegations on which the motion is based it is conclusive, and the motion must be denied. King *v.* State, 91 Tenn. 617, 20 S. W. 169.

75. State *v.* Thomas, 35 La. Ann. 24; State *v.* Delerno, 11 La. Ann. 648; Com. *v.* McMahon, 133 Mass. 394.

76. Barnard *v.* State, 88 Wis. 656, 60 N. W. 1058.

In Kentucky the only ground for a motion in arrest of judgment is that the facts stated in the indictment do not constitute an offense within the jurisdiction of the court. Travis *v.* Com., 96 Ky. 77, 27 S. W. 863, 16 Ky. L. Rep. 253; Tipper *v.* Com., 1 Metc. 6.

77. Nichols *v.* State, 28 Ind. App. 674, 63 N. E. 783.

ment must be specially pleaded, or they are waived and cannot be urged by motion in arrest of judgment.[78]

(II) *DELAY IN TRIAL.* Where defendant fails to object at the trial, he cannot on a motion in arrest urge that he was not discharged under a statute providing for the early trial or discharge of prisoners not admitted to bail.[79]

(III) *LACK OF JURISDICTION.* An objection that the court had no jurisdiction may in most jurisdictions be urged in arrest of judgment,[80] or the court may on this ground arrest the judgment on its own motion.[81]

(IV) *DISQUALIFICATION OF JUDGE.* That the judge is disqualified to try the case is not ground for a motion in arrest where the disqualification is not apparent on the record,[82] or where the accused voluntarily went to trial without objection.[83]

(V) *WANT OF ARRAIGNMENT AND PLEA.* In some jurisdictions proceeding to trial without any issue joined, as where defendant is not arraigned and does not plead to the indictment,[84] or where, on his standing mute, a plea of not guilty is not entered for him,[85] is held to be ground for an arrest of judgment. In others, however, it is held that if defendant was present and represented by counsel and the trial proceeded regularly in all respects as if a formal plea had been entered, the omission is not ground for a motion in arrest.[86]

(VI) *ELECTION BETWEEN COURTS UPON ARRAIGNMENT.* Under a statute providing that a defendant arraigned upon a capital offense in a county court may elect to be tried in a circuit court having concurrent jurisdiction, it is not ground

78. Teal *v.* State, 22 Ga. 75, 68 Am. Dec. 482; Com. *v.* Le Clair, 147 Mass. 539, 18 N. E. 428; Com. *v.* Melling, 14 Gray (Mass.) 388.

Illustrations.— The failure to have a preliminary examination (People *v.* Bawden, 90 Cal. 195, 27 Pac. 204; Com. *v.* Kingman, 15 Gray (Mass.) 208; Angel *v.* Com., 2 Va. Cas. 231) to bring defendant into court by a capias (Horsey *v.* State, 3 Harr. & J. (Md.) 2), to file a complaint with the information (Jessel *v.* State, 42 Tex. Cr. 72, 57 S. W. 826), to serve on defendant the venire and indictment (McCoy *v.* State, 46 Ark. 141; State *v.* Clark, 23 La. Ann. 194; Smith *v.* State, 8 Ohio 294), or a list of the witnesses (Regopoulas *v.* State, 115 Ga. 232, 41 S. E. 619), the refusal of the examining magistrate to grant a continuance (Morris *v.* Com., 9 Leigh (Va.) 636), defects in the warrant (Com. *v.* Brown, 158 Mass. 168, 33 N. E. 341; Com. *v.* Loghlin, 15 Gray (Mass.) 569), or in its return (Com. *v.* Russell, 147 Mass. 545, 18 N. E. 418), or in the complaint before the examining magistrate (Com. *v.* Mackey, 177 Mass. 345, 58 N. E. 1027; Com. *v.* Brown, 158 Mass. 168, 33 N. E. 341; Fogarty *v.* Connell, 153 Mass. 369, 26 N. E. 880; Com. *v.* Norton, 13 Allen (Mass.) 550), or in the record of the examining magistrate (Com. *v.* Thompson, 2 Allen (Mass.) 507), cannot be taken advantage of for the first time by motion in arrest. And it is not ground for arresting judgment that the indictment was found pending the hearing on habeas corpus in another court, where the court in which the indictment was found had jurisdiction. Clark *v.* Com., 123 Pa. St. 555, 16 Atl. 795; Com. *v.* Hoey, 8 Phila. (Pa.) 370.

79. Heller *v.* People, 2 Colo. App. 459, 31 Pac. 773.

Requiring a recognizance for a later sitting of the court than that at which by statute the case should be entered is not ground for a motion in arrest. Com. *v.* Welsh, 174 Mass. 327, 54 N. E. 841.

Failure to file an information during the term at which a defendant is held to answer, although it would entitle him to be discharged from custody, is not ground for a motion in arrest, where he has pleaded not guilty and gone to trial. Leisenberg *v.* State, 60 Nebr. 628, 84 N. W. 6.

80. *Georgia.*— Tate *v.* Cowart, 48 Ga. 540.

Illinois.— Truitt *v.* People, 88 Ill. 518.

Indiana.— Justice *v.* State, 17 Ind. 56; Hopewell *v.* State, 22 Ind. App. 489, 54 N. E. 127.

Maine.— State *v.* Bonney, 34 Me. 223.

Nevada.— State *v.* O'Connor, 11 Nev. 416.

Virginia.— Ryan *v.* Com., 80 Va. 385.

But see State *v.* Speaks, 95 N. C. 689; State *v.* Reaves, 85 N. C. 553, holding that the proper remedy is to ask for the discharge of defendant or to show lack of jurisdiction on a plea of not guilty.

See 15 Cent. Dig. tit. "Criminal Law," § 2426.

81. Reams *v.* State, 23 Ind. 111.

82. Com. *v.* Edwards, 12 Cush. (Mass.) 187.

83. Skelton *v.* State, 149 Ind. 641, 49 N. E. 901.

84. *Arkansas.*— Lacefield *v.* State, 34 Ark. 275, 36 Am. Rep. 8.

Georgia.—State *v.* Roberts, T. U. P. Charlt. 26; State *v.* Monaquas, T. U. P. Charlt. 16.

Illinois.— Johnson *v.* People, 22 Ill. 314.

Indian Territory.— Dansby *v.* U. S., 2 Indian Terr. 456, 51 S. W. 1083.

Wisconsin.—Anderson *v.* State, 3 Pinn. 367.

See 15 Cent. Dig. tit. "Criminal Law," § 2429. And see *supra*, XI, B.

85. Persefield *v.* People, 100 Ill. App. 488; State *v.* Koerner, 51 Mo. 174.

86. State *v.* Greene, 66 Iowa 11, 23 N. W. 154; State *v.* Cassady, 12 Kan. 550; State *v.* Jerry, 3 La. Ann. 576; People *v.* Oster-

for a motion in arrest that on his arraignment in the county court he pleaded not guilty before making his election, or that on his trial in the circuit court he was not again arraigned.[87]

(VII) *ABSENCE OF DEFENDANT WHEN CASE SET FOR TRIAL.* It is not ground for an arrest of judgment that defendant was not present when his case was set for trial,[88] particularly if the record shows that he was then represented by counsel.[89]

(VIII) *LIMITATION OF PROSECUTION.* According to the weight of authority, it is ground for an arrest of judgment that it appears on the record or indictment that the latter was not found within the period of limitation, although the statute was not pleaded.[90] Some cases, however, hold that the statute must be pleaded and the defense proved at the trial to be available.[91]

(IX) *FORMER JEOPARDY AND ANOTHER INDICTMENT PENDING.* The defense of former conviction, acquittal,[92] or that another indictment for the same crime is pending,[93] or that an appeal from a former judgment of conviction is pending,[94] cannot be urged in arrest of judgment but must be pleaded and proved.[95]

(X) *PROSECUTION UNDER REPEALED OR VOID STATUTE.* It is ground for arrest of judgment that it appears from the indictment that it is based on a statute which had been repealed,[96] or on one which is unconstitutional and void,[97] or which imposes no penalty for its infraction.[98] The repeal of a statute under which a conviction has been had after the verdict but before judgment,[99] or pending an appeal,[1] is ground for arrest of judgment.[2]

hout, 34 Hun (N. Y.) 260. And see *supra*, XI, B, 1.

87. Sutton *v.* Com., 85 Va. 128, 7 S. E. 323.

88. Smith *v.* State, 98 Ala. 55, 13 So. 508.

89. State *v.* Robacker, 31 La. Ann. 651.

Presence of defendant during trial see, generally, *supra*, XIV, B, 3.

90. *Connecticut.*— State *v.* Gibbs, 1 Root 171.

Florida.— Anderson *v.* State, 20 Fla. 381.

Georgia.— McLane *v.* State, 4 Ga. 335.

Maine.— State *v.* Hobbs, 39 Me. 212.

Pennsylvania.— Com. *v.* Bunn, 1 Leg. Op. 114.

See 15 Cent. Dig. tit. "Criminal Law," § 2431.

If the fact that the accused had absconded is not alleged in the indictment, the state cannot show it in opposition to a motion in arrest, but this fact must be proved on the trial. State *v.* Foster, 7 La. Ann. 255.

91. State *v.* Thrasher, 79 Me. 17, 7 Atl. 814; State *v.* Bowling, 10 Humphr. (Tenn.) 52; U. S. *v.* White, 28 Fed. Cas. No. 16,676, 5 Cranch C. C. 73.

Limitation of prosecution see, generally, *supra*, VIII.

92. *Louisiana.*— State *v.* Washington, 28 La. Ann. 129.

Maine.— State *v.* Barnes, 32 Me. 530.

Mississippi.— Miazza *v.* State, 36 Miss. 613.

North Carolina.— State *v.* Morgan, 95 N. C. 641.

Tennessee.— Zachary *v.* State, 7 Baxt. 1.

See 15 Cent. Dig. tit. "Criminal Law," § 2432. See also *supra*, XI, B, 7, h.

Error in submitting pleas of not guilty and of former acquittal to the jury at the same time in a trial for a felony may be taken advantage of by a motion in arrest. Faulk *v.* State, 52 Ala. 415. *Compare supra*, XI, B, 7, h, (VI).

93. Com. *v.* Cody, 165 Mass. 133, 42 N. E. 575; Com. *v.* Murphy, 11 Cush. (Mass.) 472; Bonner *v.* State, 29 Tex. App. 223, 15 S. W. 821. See also *supra*, XI, B, 6, h.

94. Williams *v.* State, 20 Tex. App. 357.

95. But where a second trial is had upon the same indictment in the same court, after the reversal of the former judgment, the entire proceedings constitute one record, and if on the second trial the accused is convicted of a higher degree of the crime than that of which the record shows that he was formerly convicted, and of which the former conviction would operate as an acquittal, it is ground for a motion in arrest. Golding *v.* State, 31 Fla. 262, 12 So. 525.

96. U. S. *v.* Goodwin, 20 Fed. 237.

97. State *v.* Main, 31 Conn. 572; Com. *v.* Hudusko, 10 Pa. Dist. 230. But see State *v.* York, 22 Mo. 462, holding that the constitutionality of the act establishing the county in which the action was brought could not be raised on a motion in arrest.

98. State *v.* Ashley, Dudley (Ga.) 188. But see People *v.* Gardner, 98 Cal. 127, 32 Pac. 880, where it was held that as the failure of the statute to provide a penalty for the offense did not appear on the face of the indictment, the question could not be raised by a motion in arrest.

99. Com. *v.* Pattee, 12 Cush. (Mass.) 501.

1. State *v.* Nutt, 61 N. C. 20.

The repeal of a portion of the penalty to be inflicted under a statute is not ground for arrest of judgment. Com. *v.* McKenney, 14 Gray (Mass.) 1.

2. Effect of repeal see, generally, *supra*, II, C, 3, d, (II).

(xi) *Errors and Irregularities in Conduct of Trial.* As a general rule errors and irregularities in the conduct of the trial not promptly objected to are not ground for arrest of judgment after conviction.[3]

(xii) *Rulings on Evidence.* The improper admission or exclusion of evidence, not being a defect apparent on the record, is not ground for a motion in arrest of judgment. The remedy is by prompt objection and exception, and by a motion for a new trial or an appeal or writ of error.[4]

(xiii) *Questions of Fact.* The objection that the verdict is contrary to the evidence or based on insufficient evidence,[5] or that it is contrary to the instructions,[6] cannot be urged in arrest of judgment. The remedy of defendant is to move for a new trial.[7]

(xiv) *Errors in Instructions or Refusals to Instruct.* Objections and exceptions to instructions, or to refusals to instruct on request, cannot be urged in arrest of judgment.[8] The misdirection of the jury by the court, not being a defect in the record, is not ground for arresting the judgment.[9]

(xv) *Failure to Prove Venue.* An objection that the prosecution has not proved the venue cannot be urged in arrest of judgment.[10]

(xvi) *Disposition of Indictment as to Co-Defendants.* That certain persons jointly indicted with defendant but separately tried have been convicted is not ground for arresting the judgment as to him.[11] The fact that on separate trials an accessary is convicted before the principal is not ground for arrest of judgment, as the conviction of the principal does not appear of record on the trial of the accessary.[12] The acquittal of the co-defendants of a person convicted of a crime, such as conspiracy or riot, which can only be committed by more than one, is not ground for an arrest of judgment as to one defendant convicted, if the indictment charges it to have been committed in company with other persons unknown, as either of defendants tried might have been guilty with such unknown persons;[13] and where only three are charged as engaged in the riot or conspiracy,

3. 1 Chitty Cr. L. 661.

Illustrations.— A failure to read the indictment to the jury, if its reading is not demanded by the accused (Wright *v.* State, 18 Ga. 383; U. S. *v.* Bickford, 24 Fed. Cas. No. 14,591, 4 Blatchf. 337), the fact that the indictment through inadvertence is not sent to the jury room, where it was read to the jury and was in court during the trial (U. S. *v.* Angell, 11 Fed. 34), the fact that an indictment on which is recorded a previous conviction was sent to the jury room (Forbes *v.* Com., 90 Va. 550, 19 S. E. 164), or a failure to ask the accused before passing sentence if he has anything to say (State *v.* Henry, 6 Baxt. (Tenn.) 539) is not ground for a motion in arrest of judgment.

4. 1 Chitty Cr. L. 661. And see the following cases:

Florida.— McClerkin *v.* State, 20 Fla. 879.

Indiana.— Howard *v.* State, 6 Ind. 444.

Maine.— State *v.* Snow, 74 Me. 354.

Mississippi.— Covey *v.* State, 8 Sm. & M. 573.

New York.— Jacobowsky *v.* People, 6 Hun 524.

North Carolina.— State *v.* Jarvis, 129 N. C. 698, 40 S. E. 220.

See 15 Cent. Dig. tit. "Criminal Law," § 2436.

5. *Indiana.*— Bright *v.* State, 90 Ind. 343; State *v.* Rousch, 60 Ind. 304.

Kansas.— State *v.* McCool, 34 Kan. 617, 9 Pac. 745.

Louisiana.— State *v.* Washington, 104 La. 443, 29 So. 55, 81 Am. St. Rep. 141.

Maine.— State *v.* Gerrish, 78 Me. 20, 2 Atl. 129.

New Jersey.— Powe *v.* State, 48 N. J. L. 34, 2 Atl. 662.

Pennsylvania.— Com. *v.* Gurley, 45 Pa. St. 392; Com. *v.* Schollenberger, 17 Pa. Super. Ct. 218; Com. *v.* Hanley, 15 Pa. Super. Ct. 271.

South Carolina.— State *v.* Dawkins, 32 S. C. 17, 10 S. E. 772.

Texas.— Green *v.* State, (Cr. App. 1895) 29 S. W. 1072.

See 15 Cent. Dig. tit. "Criminal Law," § 2437.

No evidence to go to jury.— This objection, bearing on the sufficiency of evidence, is not ground for arrest of judgment. State *v.* Wilson, 121 N. C. 650, 28 S. E. 416; State *v.* Furr, 121 N. C. 606, 28 S. E. 552.

6. Blount *v.* State, 49 Ala. 381.

7. Motion for new trial see *supra*, XV, A, 2, n, o.

8. Howard *v.* State, 6 Ind. 444; State *v.* Hopkins, 33 La. Ann. 34.

9. State *v.* Heyward, 2 Nott & M. (S. C.) 312, 10 Am. Dec. 604.

10. Walker *v.* State, 35 Ark. 386; State *v.* Wilson, 66 Mo. App. 540. But see Respublica *v.* Ross, 2 Yeates (Pa.) 1.

11. State *v.* Jacobs, 107 N. C. 873, 12 S. E. 248.

12. State *v.* Rogers, 6 Baxt. (Tenn.) 563.

13. State *v.* Egan, 10 La. Ann. 698.

if they are separately tried, the acquittal of two of them is not ground for arresting judgment as to the other, who has been previously tried and convicted, such acquittals not being part of the record of his case.[14]

(XVII) *SUMMONING AND IMPANELING OF JURORS.* Errors and irregularities in the summoning, impaneling, and swearing of the jury which tried the accused cannot be urged in arrest of judgment. These objections must be taken by challenge, and if not thus taken they are waived.[15] The acceptance of the jury is a waiver of all objections to its organization.[16]

(XVIII) *DISQUALIFICATION OF JURORS.* Objections to the jurors based upon disqualifications not appearing in the record must be taken by challenge, and cannot be urged in arrest of judgment.[17]

(XIX) *MISCONDUCT OF JURORS.* The misconduct of the jury as a body or the misbehavior of an individual juror, although it may be urged as ground for a new trial, is not ground for a motion in arrest of judgment.[18] Failure of the record to show that a juror was sworn or that the jury when they returned to court were in charge of an officer is not ground for arrest of judgment.[19]

b. Defects in Indictment or Information — (I) *FORMAL OBJECTIONS AND TECHNICAL DEFECTS.* A motion in arrest of judgment based solely on formal objections to the indictment which do not affect the merits will not be sustained. It must be based on objections which go to the substance of the charge.[20] Where

14. State *v.* Allison, 3 Yerg. (Tenn.) 428.

15. *Alabama.*— Thomas *v.* State, 94 Ala. 74, 10 So. 432; State *v.* Pile, 5 Ala. 72.

Georgia.— State *v.* Monaquas, T. U. P. Charlt. 16.

Louisiana.—State *v.* Dickerson, 48 La. Ann. 308, 19 So. 140; State *v.* Price, 41 La. Ann. 594, 6 So. 470; State *v.* Turner, 25 La. Ann. 573.

Missouri.— Samuels *v.* State, 3 Mo. 68.

New York.— People *v.* Herkimer County Gen. Sess., 20 Johns. 310.

South Carolina.— State *v.* Stephens, 11 S. C. 319; State *v.* Coleman, 8 S. C. 237.

Texas.—Kennard *v.* State, (Cr. App. 1901) 61 S. W. 131; Mencheca *v.* State, (Cr. App. 1894) 28 S. W. 203.

See 15 Cent. Dig. tit. "Criminal Law," § 2441.

Illustrations.— An objection that the jurors were not summoned within the time specified by statute (Hurley *v.* State, 6 Ohio 399), that there was a variance or mistake in their names (Munshower *v.* State, 56 Md. 514; Horsey *v.* State, 3 Harr. & J. (Md.) 2), that there was no statute providing for the selection of jurors (State *v.* White, 35 La. Ann. 96), that the jury commissioner was disqualified (State *v.* Miles, 31 La. Ann. 825), that the names of the jurors were not drawn by the clerk (Hasselmeyer *v.* State, 1 Tex. App. 690), that no part of the venire had been delivered to the sheriff (State *v.* Crosby, Harp. (S. C.) 90), that there was illegal delay in its return (State *v.* McElmurray, 3 Strobh. (S. C.) 33), or that the court ordered a juror withdrawn without the consent of defendant (People *v.* Barrett, 2 Cai. (N. Y.) 100) is not ground for arrest of judgment, but should be taken by challenge when the jury is impaneled.

If the writ of venire is void, or is not returned and filed, judgment must be arrested, inasmuch as it is part of the record. People *v.* McKay, 18 Johns. (N. Y.) 212; State *v.* Williams, 1 Rich. (S. C.) 188; State *v.* Dozier, 2 Speers (S. C.) 211.

16. McMahon *v.* State, 17 Tex. App. 321.

17. State *v.* Tuller, 34 Conn. 280; Ford *v.* State, 112 Ind. 373, 14 N. E. 241; State *v.* Ford, 42 La. Ann. 255, 7 So. 696; Hopkins *v.* State, (Tex. Cr. App. 1902) 68 S. W. 986.

Illustrations.— The rule stated in the text has been applied to objections based on the non-residence (Amherst *v.* Hadley, 1 Pick. (Mass.) 38) or alienage of a juror (State *v.* Sopher, 35 La. Ann. 975; State *v.* Hardin, 25 La. Ann. 369), and to those based on the fact that he is over age (Green *v.* State, 59 Md. 123, 43 Am. Rep. 542), an ex-convict (State *v.* Williams, 38 La. Ann. 361; State *v.* Glass, 7 La. Ann. 122), a member of the grand jury that indicted the accused (Battle *v.* State, 54 Ala. 93; State *v.* Thomas, 35 La. Ann. 24; State *v.* Cooler, 30 S. C. 105, 8 S. E. 692, 3 L. R. A. 181), or not an elector (State *v.* Jackson, 27 Kan. 581, 41 Am. Rep. 424).

The statutory exemption of a person from jury duty, if it be waived by him, cannot be urged in arrest. State *v.* Wright, 53 Me. 328. See JURIES.

18. Cooper *v.* State, 88 Ala. 107, 7 So. 47; Williams *v.* State, 48 Ala. 85; Morgan *v.* State, 48 Ala. 65; Franklin *v.* State, 29 Ala. 14; Brister *v.* State, 26 Ala. 107; State *v.* Watkins, 9 Conn. 47, 21 Am. Dec. 712; State *v.* Babcock, 1 Conn. 401; Com. *v.* Drew, 4 Mass. 391.

19. State *v.* Lautenschlager, 23 Minn. 290.

20. *Georgia.*—Hatfield *v.* State, 76 Ga. 499; Jordan *v.* State, 60 Ga. 656; Reinhart *v.* State, 29 Ga. 522; Camp *v.* State, 25 Ga. 689; Bowie *v.* State, 19 Ga. 1.

Illinois.— Winship *v.* People, 51 Ill. 296; Markee *v.* People, 103 Ill. App. 347.

Indiana.— Knight *v.* State, 84 Ind. 73.

Louisiana.— State *v.* Bildstein, 44 La. Ann.

an information contains allegations of all the essential elements of the crime, defects or uncertainties in it which might be fatal on a motion to quash are not good on a motion in arrest.[21] Misspelling[22] or other clerical errors in the indictment[23] will not be enough.[24] A motion in arrest will not be sustained because of mere technical defects in the indictment not tending to prejudice defendant.[25]

(II) *Failure to Charge Offense.* Objections which would be good on demurrer may generally be urged as ground for a motion in arrest of judgment,[26] unless it is otherwise provided by statute,[27] and the court will determine the valid-

778, 11 So. 37; State *v.* Butler, 42 La. Ann. 229, 7 So. 539; State *v.* Nunez, 26 La. Ann. 605; State *v.* Millican, 15 La. Ann. 557; State *v.* Nicholson, 14 La. Ann. 785.

New Jersey.— Mead *v.* State, 53 N. J. L. 601, 23 Atl. 264.

North Carolina.— State *v.* Barnes, 122 N. C. 1031, 29 S. E. 381; State *v.* Walker, 87 N. C. 541.

Pennsylvania.— Com. *v.* Frey, 50 Pa. St. 245.

Texas.— Gibbs *v.* State, 41 Tex. 491; Williams *v.* State, (Cr. App. 1902) 70 S. W. 213; West *v.* State, 6 Tex. App. 485.

Virginia.— Com. *v.* Chalmers, 2 Va. Cas. 76.

See 15 Cent. Dig. tit. "Criminal Law," §§ 2445, 2450.

The omission of the signature of the foreman of the grand jury from the indictment is not ground for a motion in arrest, although a directory statute requires it. The objection should be taken before trial. State *v.* Mertens, 14 Mo. 94.

Erasures and interlineations in the indictment are not ground for an arrest of judgment. Bostock *v.* State, 61 Ga. 635; Com. *v.* Fagan, 15 Gray (Mass.) 194. The alteration of the name of the accused in the indictment does not destroy its sufficiency, where he is identified on the trial as having committed the crime. State *v.* Turner, 25 La. Ann. 573.

21. *Illinois.*— Young *v.* People, 193 Ill. 236, 61 N. E. 1104.

Indiana.— Campton *v.* State, 140 Ind. 442, 39 N. E. 916.

Kentucky.— Tully *v.* Com., 11 Bush 154.

New Jersey.— State *v.* Goldman, 65 N. J. L. 394, 47 Atl. 641.

Pennsylvania.— Com. *v.* Barge, 11 Pa. Super. Ct. 164; Com. *v.* Wood, 2 Pa. Super. Ct. 42.

United States.— U. S. *v.* Kilpatrick, 16 Fed. 765.

See 15 Cent. Dig. tit. "Criminal Law," §§ 2445, 2450.

Construction of indictment.— On a motion in arrest the indictment should receive a liberal construction. An informal or imperfect allegation of an essential fact will be deemed sufficient. U. S. *v.* Dimmick, 112 Fed. 352.

22. State *v.* Smith, 63 N. C. 234; State *v.* Molier, 12 N. C. 263; State *v.* Williamson, 43 Tex. 500; Hudson *v.* State, 10 Tex. App. 215.

23. Terrell *v.* State, 41 Tex. 463.

24. **Illustrations.**— A failure to recite the public statute in the indictment (Com. *v.* McCurdy, 5 Mass. 324), use of initials for christian names (Lyon *v.* State, 61 Ala. 224; Com. *v.* Hamilton, 15 Gray (Mass.) 480), failure of the foreman of the grand jury to sign the indictment (Weaver *v.* State, 19 Tex. App. 547, 53 Am. Rep. 389), defects in the caption or the entire omission of the caption (State *v.* Peterson, 2 La. Ann. 921; State *v.* Thibeau, 30 Vt. 100), the lack of the name of the prosecutor on the indictment (Greene *v.* State, 59 Ga. 859; Com. *v.* Chalmers, 2 Va. Cas. 76; U. S. *v.* Singleton, 27 Fed. Cas. No. 16,293, 1 Cranch C. C. 237; U. S. *v.* Turley, 28 Fed. Cas. No. 16,546, 4 Cranch C. C. 334), and similar defects are not grounds of arrest.

25. *California.*— People *v.* Gardner, 98 Cal. 127, 32 Pac. 880.

Georgia.— Martin *v.* State, 115 Ga. 255, 41 S. E. 576; Berry *v.* State, 92 Ga. 47, 17 S. E. 1006.

Indiana.— Trout *v.* State, 107 Ind. 578, 8 N. E. 618.

Iowa.— State *v.* Crawford, 66 Iowa 318, 23 N. W. 684; State *v.* Raymond, 20 Iowa 582; Winfield *v.* State, 3 Greene 339.

Massachusetts.— Com. *v.* Chiovaro, 129 Mass. 489.

Mississippi.— Morgan *v.* State, 13 Sm. & M. 242.

North Carolina.—State *v.* Noblett, 47 N. C. 418.

Tennessee.— State *v.* Elkins, Meigs 109.

Texas.— Worthan *v.* State, (Cr. App. 1901) 65 S. W. 526.

Virginia.— Stroup *v.* Com., 1 Rob. 754.

United States.— U. S. *v.* Chase, 27 Fed. 807.

See 15 Cent. Dig. tit. "Criminal Law," § 2458.

26. *Alabama.*— Francois *v.* State, 20 Ala. 83.

Florida.— Murray *v.* State, 9 Fla. 246.

Massachusetts.— Com. *v.* Child, 13 Pick. 198.

New Hampshire.— State *v.* Barrett, 42 N. H. 466.

Pennsylvania.— Com. *v.* Clement, 8 Pa. Dist. 705.

Rhode Island.— State *v.* Corbett, 12 R. I. 288.

Texas.— Robertson *v.* State, 31 Tex. 36.

See 15 Cent. Dig. tit. "Criminal Law," §§ 2445, 2454.

Alleging conclusions of law in the indictment instead of the specific facts necessary to charge the crime is ground for a motion in arrest. Strickland *v.* State, 19 Tex. App. 518.

27. Cochrane *v.* State, 6 Md. 400; Com. *v.* Monahan, 170 Mass. 460, 49 N. E. 751; Com. *v.* Wright, 12 Allen (Mass.) 190.

ity of such objections by ascertaining whether they would have prevailed on demurrer.[28] Thus whether the facts are properly alleged, or whether if proved they would constitute a crime, may be considered on arrest of judgment.[29] If, however, the indictment charges substantial facts which constitute a public offense, and one of which the court has jurisdiction, although in very general and indefinite language, judgment should not be arrested.[30] An objection that the indictment is too indefinite and uncertain in the description of the offense,[31] or that it does not charge an offense within the statute may be determined on a motion in arrest;[32] but it is necessary for the accused to show that allegations are omitted which are necessary to insure a fair trial and protection against further prosecution.[33]

(III) *Duplicity and Joinder of Offenses.* As a matter of law there is no insuperable objection to charging two or more distinct felonies in an indictment, and while the court may in its discretion quash an indictment which charges the accused with two or more distinct felonies, this is not ground for arrest of judgment.[34] The objection that an indictment is bad for duplicity should be made by demurrer, by motion to quash, or by motion that the prosecution be required to elect between the offenses, and a failure to do so waives the objection and it cannot be raised by motion in arrest of judgment.[35]

28. Benjamin *v.* State, 121 Ala. 26, 25 So. 917.

29. *Idaho.*— People *v.* Page, 1 Ida. 102.
Kansas.— Rice *v.* State, 3 Kan. 141.
Louisiana.— State *v.* Jackson, 43 La. Ann. 183, 8 So. 440.
Maine.— State *v.* Hart, 34 Me. 36.
Nevada.— State *v.* O'Connor, 11 Nev. 416.
New Hampshire.— State *v.* Smith, 20 N. H. 399.
Washington.— State *v.* Feamster, 12 Wash. 461, 41 Pac. 52.
But see Com. *v.* Chalmers, 2 Va. Cas. 76.
See 15 Cent. Dig. tit. "Criminal Law," § 2454.

30. *California.*—People *v.* Swenson, 49 Cal. 388.
Indiana.— Dawson *v.* State, 65 Ind. 442; Shepherd *v.* State, 64 Ind. 43; Greenley *v.* State, 60 Ind. 141; Laydon *v.* State, 52 Ind. 459; Mullen *v.* State, 50 Ind. 169; Dillon *v.* State, 9 Ind. 408; Sherwood *v.* State, 18 Ind. App. 260, 47 N. E. 936.
Kansas.— State *v.* Henry, 24 Kan. 457; Wessels *v.* Territory, McCahon 100.
Kentucky.— Tully *v.* Com., 11 Bush 154; Com. *v.* Hadcraft, 6 Bush 91; Walston *v.* Com., 16 B. Mon. 15; Parrott *v.* Com., 47 S. W. 452, 20 Ky. L. Rep. 761; Justice *v.* Com., 46 S. W. 499, 20 Ky. L. Rep. 386; Hodges *v.* Com., (1889) 11 S. W. 821; Creech *v.* Com., 5 Ky. L. Rep. 860; Davis *v.* Com., 4 Ky. L. Rep. 717.
Maine.— State *v.* Haines, 30 Me. 65.
Montana.— State *v.* Smith, 12 Mont. 378, 30 Pac. 679.
New Hampshire.— State *v.* Gove, 34 N. H. 510.
New York.— People *v.* Buchanan, 25 N. Y. Suppl. 481.
Tennessee.— Tipton *v.* State, 2 Yerg. 542.
Texas.— Anderson *v.* State, 39 Tex. Cr. 83, 45 S. W. 15.
See 15 Cent. Dig. tit. "Criminal Law," § 2454.

31. State *v.* Stuart, 23 Me. 111.

32. Grant *v.* State, 35 Fla. 581, 17 So. 225, 48 Am. St. Rep. 263; U. S. *v.* Bartow, 10 Fed. 874, 20 Blatchf. 349.

33. State *v.* Lockbaum, 38 Conn. 400; Stevens *v.* State, 18 Fla. 903; Mork *v.* Com., 6 Bush (Ky.) 397.

34. 1 Chitty Cr. L. 253; 2 Hale P. C. 173. And see the following cases:
Alabama.— State *v.* Coleman, 5 Port. 32.
Georgia.— Lampkin *v.* State, 87 Ga. 516, 13 S. E. 523; Williams *v.* State, 60 Ga. 88; Jones *v.* State, 37 Ga. 51. But see Stephen *v.* State, 11 Ga. 225.
Illinois.— Thompson *v.* People, 125 Ill. 256, 17 N. E. 749.
New York.— Kane *v.* People, 8 Wend. 203.
North Carolina.— State *v.* Wilson, 121 N. C. 650, 28 S. E. 416; State *v.* Watts, 82 N. C. 656; State *v.* Reel, 80 N. C. 442; State *v.* Brown, 60 N. C. 448.
Ohio.— Devere *v.* State, 5 Ohio Cir. Ct. 509.
Texas.— Collins *v.* State, (Cr. App. 1897) 43 S. W. 90.
Vermont.— State *v.* Hodgson, 66 Vt. 134, 28 Atl. 1089.
Wisconsin.— State *v.* Fee, 19 Wis. 562.
United States.— U. S. *v.* Bayaud, 16 Fed. 376, 21 Blatchf. 287.
See 15 Cent. Dig. tit. "Criminal Law," § 2453. And see INDICTMENTS AND INFORMATIONS.

Where two distinct offenses with different punishments are charged in one count of an indictment, and a general verdict of guilty on that count is rendered, objection may be raised by a motion in arrest. State *v.* Howe, 1 Rich. (S. C.) 260. See also State *v.* Manchester, etc., R. Co., 52 N. H. 528; State *v.* Merrill, 44 N. H. 624; State *v.* Fowler, 28 N. H. 184; State *v.* Fant, 2 Brev. (S. C.) 487.

35. *California.*—People *v.* Clement, (1894) 35 Pac. 1022; People *v.* Shotwell, 27 Cal. 394.
Pennsylvania.—Com. *v.* Hand, 3 Phila. 403.
South Dakota.— Lead *v.* Klatt, 13 S. D. 140, 82 N. W. 391.

(IV) *ALLEGATIONS OF VENUE.* In the absence of a statute to the contrary failure to allege in the indictment the state[36] or county[37] in which the offense was committed is ground for an arrest of judgment.[38]

(V) *TIME OF OFFENSE.* In the absence of statute the indictment must state the time of the offense, and the failure to do so is ground for a motion in arrest of judgment;[39] but under the statutes of some of the states a motion in arrest will not lie for this cause, except where time is of the substance of the offense.[40] The objection that the indictment charges the crime to have been committed since the finding of the indictment[41] or on an impossible day may be urged in arrest of judgment.[42] If there be but one statute applicable, the indictment need not allege that the crime was committed after it went into operation. This is implied by the allegation that the act was done against the form of the statute, which, being found by the verdict, is part of the record, and a motion in arrest will not lie.[43] And where there are two statutes, the later of which changes the nature of the punishment, the failure of the indictment to refer to the particular statute under which it is found is not ground for an arrest of judgment, where both the date alleged and the proof agree as to whether the offense was committed before or after the later act took effect.[44]

(VI) *PLACE OF HOLDING COURT.* The failure of the record or indictment to show the place where the court was held at which the indictment was found is ground for arrest of judgment.[45] Holding court at a building other than the court-house, where the court-house is not in proper condition to be used, is not ground for arrest of judgment.[46]

(VII) *OMISSION TO SWEAR WITNESSES BEFORE GRAND JURY.* Failure of the indorsement on an indictment to show that the witnesses sent to the grand jury were sworn is not ground for a motion in arrest of the judgment after

Tennessee.— Forrest *v.* State, 13 Lea 103; State *v.* Brown, 8 Humphr. 89.

Wisconsin.— Cornell *v.* State, 104 Wis. 527, 80 N. W. 745.

See 15 Cent. Dig. tit. "Criminal Law," § 2453. And see INDICTMENTS AND INFORMATIONS.

36. People *v.* Webber, 133 Cal. 623, 66 Pac. 38.

37. Searcy *v.* State, 4 Tex. 450.

38. In Kansas, however, where the only grounds for an arrest of judgment are specified by statute, failure of the indictment to show that it was found by a grand jury of the county where the court is held is not ground for a motion in arrest. Guy *v.* State, 1 Kan. 448.

If the court has jurisdiction over only part of the county in which the offense is alleged to have been committed, it is not ground for a motion in arrest that the indictment does not state that the offense was not committed in the part of the county over which the court has no jurisdiction. People *v.* Fredericks, 106 Cal. 554, 39 Pac. 944; People *v.* Collins, 105 Cal. 504, 39 Pac. 16.

39. State *v.* Litch, 33 Vt. 67.

On an indictment for burglary failure to state the hour is not ground for a motion in arrest, where it is stated to have been committed in the night. Leisenberg *v.* State, 60 Nebr. 628, 84 N. W. 6.

40. State *v.* Blaisdell, 49 N. H. 81; State *v.* Peters, 107 N. C. 876, 12 S. E. 74; State *v.* Caudle, 63 N. C. 30.

41. State *v.* Noland, 29 Ind. 212; State *v.* Litch, 33 Vt. 67. *Contra,* Adkins *v.* State, 103 Ga. 5, 29 S. E. 432.

42. State *v.* Dandy, 1 Brev. (S. C.) 395.

In Missouri, by statute, stating the time of the offense as of a date subsequent to the finding of the indictment or on an impossible date is not ground for arrest of judgment. State *v.* Burnett, 81 Mo. 119.

43. State *v.* Wise, 66 N. C. 120; State *v.* Chandler, 9 N. C. 439.

44. State *v.* Fleming, 107 N. C. 905, 12 S. E. 131; State *v.* Halford, 104 N. C. 874, 10 S. E. 524. But if the indictment and proof disagree as to whether the date of the offense was before or after the second act took effect, and the indictment does not show under which act it was found, judgment should be arrested. State *v.* Wise, 66 N. C. 120.

Under an act to go into effect on a certain date, with the proviso that the offense created is not to be indictable until the happening of a certain contingency, failure to allege the happening of the contingency is not ground for a motion in arrest. State *v.* Newcomb, 126 N. C. 1104, 36 S. E. 147.

45. Lusk *v.* State, 64 Miss. 845, 2 So. 256.

Failure to state the place in the caption of the indictment is not ground for a motion in arrest, where it appears from the schedule in the record. State *v.* Peterson, 2 La. Ann. 921.

Where the place within the county is prescribed by statute it is sufficient to state the county in which the court was held. State *v.* Shanks, Tapp. (Ohio) 45.

46. State *v.* Shelledy, 8 Iowa 477.

verdict, as such indorsement on the back of an indictment is not properly speaking a part of the record.[47]

(VIII) *Misnomer of Defendant.* Misnomer of defendant in the indictment should be pleaded before the general plea of not guilty, and where the latter plea is put in, the misnomer is waived as ground for arrest of judgment.[48]

(IX) *Conclusion of Indictment or Information.* At common law every indictment, except for mere non-feasance, must conclude "against the peace" of the king in whose reign the offense was committed, and in this country against the peace of the state, commonwealth, or people;[49] but in some states it is held that the omission of these words is not ground for a motion in arrest.[50] If, however, the conclusion necessary to charge the offense is omitted, the objection may be raised by a motion in arrest.[51]

(X) *Amendment of Indictment or Information.* In the absence of express statutory provision, indictments cannot be amended, as an indictment is the finding of a jury under oath, and its amendment by the court, in matter of substance, is ground for arresting judgment.[52] This rule, however, does not apply to informations, for they are amendable.[53]

(XI) *Variance*—(A) *Between Allegation and Proof.* A variance between the allegations of the indictment and the proof is not ground for arrest of judgment.[54]

(B) *Between Information and Affidavit, Complaint, or Presentment.* The fact that there is a discrepancy in the setting forth of the facts between an information and the affidavit, complaint, or presentment on which it is based is not ground for arrest of judgment.[55]

(XII) *Irregularities in Drawing or Organizing of Grand Jury.* It is not ground for arrest of judgment that the record does not show affirmatively that

47. State *v.* Sheppard, 97 N. C. 401, 1 S. E. 879; State *v.* Lanier, 90 N. C. 714; State *v.* Roberts, 19 N. C. 540. See also State *v.* McEntire, 4 N. C. 267.

48. Miller *v.* State, 54 Ala. 155; State *v.* Valsin, 47 La. Ann. 115, 16 So. 768; State *v.* Thompson, Cheves (S. C.) 31; Foster *v.* State, 1 Tex. App. 531; 1 Chitty Cr. L. 203. And see *supra*, XI, B, 6, g.

A misnomer in the minute-book of the clerk is not ground for arrest of judgment. State *v.* O'Brien, 18 R. I. 105, 25 Atl. 910.

49. 1 Chitty Cr. L. 246; 2 Hale P. C. 188; 2 Hawkins P. C. c. 25, § 92. And see State *v.* Pemberton, 30 Mo. 376; State *v.* Lopez, 19 Mo. 254. See also Indictments and Informations.

50. State *v.* Sonnier, 38 La. Ann. 962; Com. *v.* Murphy, 11 Cush. (Mass.) 472. The omission from the indictment of the words "in the name and behalf of the citizens of Georgia" is not ground for arrest of judgment. Horne *v.* State, 37 Ga. 80, 92 Am. Dec. 49. See Indictments and Informations.

51. State *v.* Wade, 147 Mo. 73, 47 S. W. 1070.

52. 1 Chitty Cr. L. 297, 661. And see State *v.* McCarty, 2 Pinn. (Wis.) 513, 2 Chandl. (Wis.) 199, 54 Am. Dec. 150, holding, however, that as the caption is not a part of the indictment, its amendment is not ground for an arrest of judgment. See also Indictments and Informations.

53. 1 Chitty Cr. L. 298. And see Indictments and Informations.

54. *Louisiana.*— State *v.* Evans, 104 La. 343, 29 So. 112; State *v.* Frey, 35 La. Ann. 106.

New York.—People *v.* Onondaga Gen. Sess., 1 Wend. 296.

North Carolina.— State *v.* McLain, 104 N. C. 894, 10 S. E. 518; State *v.* Craige, 89 N. C. 475, 45 Am. Rep. 698.

Pennsylvania.— Com. *v.* Livingston, 5 Pa. Dist. 666, 18 Pa. Co. Ct. 236; Com. *v.* Moorby, 8 Phila. 615.

South Carolina.— State *v.* Hamilton, 17 S. C. 462; State *v.* Graham, 15 Rich. 310.

Wisconsin.— State *v.* Lincoln, 17 Wis. 579.

See 15 Cent. Dig. tit. "Criminal Law," § 2461.

Time of offense.— Where the indictment alleges an offense committed within the year, and the proof discloses an offense more than a year old, the indictment being good, the objection can only be taken by exception or motion for a new trial, and not by motion in arrest. Strawn *v.* State, 14 Ark. 549.

Describing the owners of stolen property in the indictment as unknown, where the proof shows that one of them was known and testified before the grand jury, is not ground for a motion in arrest. U. S. *v.* Stetson, 27 Fed. Cas. No. 16,390, 3 Woodb. & M. 164.

55. Morris *v.* State, 31 Ind. 189; State *v.* Record, 16 Ind. 111; Dave *v.* State, (Tex. Cr. App. 1895) 29 S. W. 1093; Com. *v.* Jones, 2 Gratt. (Va.) 555; Wells *v.* Com., 2 Va. Cas. 333; Com. *v.* Chalmers, 2 Va. Cas. 76.

the grand jurors were drawn,[56] or impaneled or organized[57] in accordance with the statute. These objections may be taken by challenging the array or by plea in abatement, and if not so taken are waived.[58]

(XIII) *INCOMPETENCY OF GRAND JURORS.* An objection to the indictment based upon the incompetency of one or more of the grand jurors by whom it was found cannot be urged in arrest of judgment. It is ground for a plea in abatement or motion to quash, but pleading and going to trial on the merits waives it.[59]

(XIV) *FAILURE TO ALLEGE OATH OF GRAND JURORS.* At common law an indictment is defective in failing to state that the charge was made upon the oath of the grand jurors,[60] and it has been held that a motion in arrest of judgment will be sustained where the indictment does not contain this allegation.[61]

(XV) *RETURN AND FILING OF INDICTMENT OR PRESENTMENT.* Before a defendant can be tried upon an indictment, it must appear by the record that the indictment was returned. This, according to some of the cases, will not be presumed; and if the record does not show affirmatively that the indictment was returned in open court judgment will be arrested.[62] Other cases hold that the

56. Battle *v.* State, 54 Ala. 93; State *v.* Pile, 5 Ala. 72; Stevenson *v.* State, 69 Ga. 68; Mills *v.* State, 57 Ga. 609; State *v.* Conway, 23 Minn. 291; State *v.* Seaborn, 15 N. C. 305. In Alabama it has been held that where there appears of record an order of the court or action on the part of the judge relating to the formation of the grand jury which is contrary to the statute, or illegal, the objection may be moved in arrest in the appellate court (Harrington *v.* State, 83 Ala. 9, 3 So. 425; O'Byrnes *v.* State, 51 Ala. 25), but aside from this, by statute, a motion in arrest cannot be based on the silence of the record as to facts which will show that the grand jury was properly organized and sworn (Harrington *v.* State, 83 Ala. 9, 3 So. 425).

57. *Alabama.*— Burrage *v.* State, 113 Ala. 108, 21 So. 213.

Indiana.— Veatch *v.* State, 56 Ind. 584, 26 Am. Rep. 44; Meiers *v.* State, 56 Ind. 336.

Louisiana.—State *v.* Dickerson, 48 La. Ann. 308, 19 So. 140; State *v.* Chandler, 36 La. Ann. 177; State *v.* Jackson, 36 La. Ann. 96; State *v.* Swift, 14 La. Ann. 827.

Missouri.—State *v.* Smallwood, 68 Mo. 192.

Rhode Island.— State *v.* O'Brien, 18 R. I. 105, 25 Atl. 910.

Tennessee.—Lowrance *v.* State, 4 Yerg. 145.

Texas.— State *v.* Vahl, 20 Tex. 779; Barber *v.* State, (Cr. App. 1898) 46 S. W. 233.

See 15 Cent. Dig. tit. "Criminal Law," § 2448.

58. Miller *v.* State, 69 Ind. 284. See *supra*, XI, B, 6, e; and GRAND JURIES.

Illustrations.— The rule of the text has been applied to an objection that the full legal number of grand jurors were not summoned (Barron *v.* People, 73 Ill. 256), that the grand jurors were not drawn by all the jury commissioners (Stevenson *v.* State, 69 Ga. 68), that they were not sworn in the statutory form (Bond *v.* State, 52 Ind. 457), that too many names were on the venire (State *v.* McEntire, 4 N. C. 267), that the jury was not composed of the requisite number (State *v.* Vincent, 91 Md. 718, 47 Atl. 1036, 52 L. R. A. 83; State *v.* Davis, 24 N. C. 153), and that the accused, being a negro, was discriminated against by excluding negroes from the grand jury (Davis *v.* State, (Tex. Cr. App. 1902) 69 S. W. 502).

The writ of venire by which the grand jurors are summoned is part of the record, and it has been held that judgment will be arrested where it is void (State *v.* Williams, 1 Rich. (S. C.) 188), or without seal (State *v.* Dozier, 2 Speers (S. C.) 211), or where the record fails to show its return (State *v.* Davidson, 2 Coldw. (Tenn.) 184).

59. *Georgia.*—Johnson *v.* State, 62 Ga. 179.

Louisiana.— State *v.* Griffin, 38 La. Ann. 502; State *v.* McGee, 36 La. Ann. 206; State *v.* Wittington, 33 La. Ann. 1403; State *v.* Nolan, 8 Rob. 513.

Maine.— State *v.* Carver, 49 Me. 588, 77 Am. Dec. 275.

New Mexico.—Territory *v.* Barrett, 8 N. M. 70, 42 Pac. 66.

Wisconsin.— Grubb *v.* State, 14 Wis. 434.

See 15 Cent. Dig. tit. "Criminal Law." § 2449.

Illustrations.— This rule has been applied to objections that the jurors were not freeholders (Horsey *v.* State, 3 Harr. & J. (Md.) 2) or electors (State *v.* Rafe, 56 S. C. 379, 34 S. E. 660), that one of them was over age (Green *v.* State, 59 Md. 123, 43 Am. Rep. 542), a member of the coroner's jury (State *v.* McEntire, 4 N. C. 267), or an alien (Byrne *v.* State, 12 Wis. 519), and to the objection that the prosecuting witness was foreman of the grand jury (State *v.* Cannon, 90 N. C. 711).

60. Heydon's Case, 4 Coke 41*a*; 3 Chitty Cr. L. 750; 1 Chitty Cr. L. 202.

61. State *v.* Sanders, 158 Mo. 610, 59 S. W. 993. See INDICTMENTS AND INFORMATIONS.

62. Green *v.* State, 19 Ark. 178; Sattler *v.* People, 59 Ill. 68; Gardner *v.* People, 20 Ill. 430; Rainey *v.* People, 8 Ill. 71; Chappel *v.* State, 8 Yerg. (Tenn.) 166.

The rule does not apply to presentments which are signed by all the jurors and become part of the record by being filed with the

objection can only be taken by plea and is waived by going to trial.[63] Where the record shows that the indictment was returned and that defendant pleaded to it, he cannot move in arrest for any irregularity or informality in the returning or filing.[64]

c. Defects in Verdict — (I) *In General.* Where the verdict, as shown by the record, is defective, objection may be made by a motion in arrest.[65]

(II) *Absence of Defendant.* The rendition of the verdict in the absence of defendant is ground for arrest of judgment, if prompt objection was made.[66]

(III) *Entry of Verdict.* That the verdict was not entered on the minutes at the term at which it was rendered is not ground for arrest of judgment, as the court may at a subsequent term order it entered *nunc pro tunc*.[67]

(IV) *Conviction of One of Several Offenses Charged.* In most jurisdictions, where an indictment contains several counts, only one of which is good, judgment will not be arrested on a general verdict; if the evidence is sufficient to support the good count the verdict will be applied to it.[68] And if two or more offenses are charged in one count or in an indictment containing one count only, a motion in arrest will not be sustained on a general verdict of guilty, unless the offenses are improperly joined and belong to different classes of crime.[69] Some cases hold that the judgment will not be arrested unless the two offenses require, not only different degrees, but different forms of punishment.[70] Where crimes are charged separately in different counts of the same indictment, judgment will not be arrested on a verdict of guilty, unless the offenses are radically different and require different judgments and punishments, and not merely punishments differing in degree or amount.[71]

clerk without any entry on the minutes of the court. State *v.* Muzingo, Meigs (Tenn.) 112.

63. Ford *v.* State, 112 Ind. 373, 14 N. E. 241; Padgett *v.* State, 103 Ind. 550, 3 N. E. 377 [in effect *overruling* Mitchell *v.* State, 63 Ind. 276; Adams *v.* State, 11 Ind. 304]; Gray *v.* People, 21 Hun (N. Y.) 140; Johnson *v.* State, 7 Tex. App. 210; Jinks *v.* State, 5 Tex. App. 68.

The objection is one of form, and cannot be raised upon a motion in arrest (Niland *v.* State, 19 Tex. App. 166), but should be presented as an exception to the indictment before a plea of not guilty (Houillion *v.* State, 3 Tex. App. 537).

64. Russell *v.* State, 33 Ala. 366; State *v.* Harrison, 104 N. C. 728, 10 S. E. 131.

Omission of a filing date by the clerk on an indictment which was properly signed and on which a capias was issued is not ground for arrest. State *v.* Coupenhaver, 39 Mo. 430.

65. State *v.* McCormick, 84 Me. 566, 24 Atl. 938 (where the jury returned as a sealed verdict a paper unsigned by the foreman, and containing only the word "Guilty"); Slaughter *v.* State, 24 Tex. 410 (where the verdict failed to specify the degree of the crime as required by statute); Haney *v.* State, 2 Tex. App. 504 (where the verdict was unintelligible).

In Indiana the grounds for arrest of judgment are specified by statute and do not include defects in the verdict. Ellis *v.* State, 141 Ind. 357, 40 N. E. 801.

Objection that the verdict is against the law and the evidence should be taken by a motion for a new trial and is not ground for a motion in arrest of judgment. State *v.* Snow, 74 Me. 354.

The verdict as recorded is the verdict of the jury, and the fact that there is indorsed on the indictment a memorandum of a verdict different in form is not ground for arrest of judgment. Com. *v.* Breyessee, 160 Pa. St. 451, 28 Atl. 824, 40 Am. St. Rep. 729.

Form and sufficiency of verdict see *supra*, XIV, K, 2.

66. U. S. *v.* McClure, 107 Fed. 268; U. S. *v.* Shepherd, 27 Fed. Cas. No. 16,274, 1 Hughes 520. See also *supra*, XIV, B, 3.

67. Hall *v.* State, 3 Ga. 18. See *supra*, XIV, K, 4.

68. *Georgia.*— Frain *v.* State, 40 Ga. 529.

North Carolina.— State *v.* Tisdale, 61 N. C. 220.

Pennsylvania.—Com. *v.* Wickert, 6 Pa. Dist. 387, 19 Pa. Co. Ct. 251.

Texas.— Crook *v.* State, 39 Tex. Cr. 252, 45 S. W. 720.

Vermont.— State *v.* Smith, 72 Vt. 366, 48 Atl. 647; State *v.* Bean, 19 Vt. 530.

United States.— U. S. *v.* Potter, 27 Fed. Cas. No. 16,078, 6 McLean 186.

Contra, People *v.* Turner, 113 Cal. 278, 45 Pac. 331.

See 15 Cent. Dig. tit. "Criminal Law," § 2466.

69. People *v.* Rynders, 12 Wend. (N. Y.) 425; U. S. *v.* Peterson, 27 Fed. Cas. No. 16,037, 1 Woodb. & M. 305; Rex *v.* Kingston, 8 East 41, 9 Rev. Rep. 373; Rex *v.* Johnson, 3 M. & S. 539. See Indictments and Informations.

70. Com. *v.* Symonds, 2 Mass. 163; Rex *v.* Johnson, 3 M. & S. 539. See Indictments and Informations.

71. Stevens *v.* State, 66 Md. 202, 7 Atl. 254; Burk *v.* State, 2 Harr. & J. (Md.) 426; State *v.* Jones, 69 N. C. 364; State *v.* Posey,

(v) *VERDICT AGAINST JOINT DEFENDANTS.* Where one of several persons jointly indicted is separately tried, and the jury find "defendant" guilty, there is no ground for arrest of judgment, as the verdict is meant to apply to the defendant on trial,[72] but a verdict assessing a joint fine on defendants jointly convicted is ground for a motion to arrest,[73] unless the statute prescribes what shall be the only grounds for an arrest of judgment, and this is not included.[74]

(vi) *VERDICT NOT RESPONSIVE.* A motion in arrest should be granted where the jury finds the accused guilty of an offense not charged and not included in the one charged in the indictment.[75] Where the indictment and trial are for a misdemeanor, and defendant is found guilty of a felony, judgment will be arrested.[76]

3. MAKING, HEARING, AND DETERMINATION OF MOTION IN ARREST — a. Motion For New Trial Treated as Motion in Arrest. Where a motion for a new trial is based upon facts which would be good on a motion in arrest, it will be treated as such.[77]

b. Statutory Provisions. Where a statute expressly declares upon what grounds judgment may be arrested, other grounds for arrest are by implication excluded.[78]

c. Jurisdiction. The motion in arrest of judgment should be made in the trial court in the first instance.[79] If made and withdrawn it cannot be renewed in the appellate court solely for the purpose of obtaining a review.[80]

d. Time of Making. The motion in arrest of judgment should be made before sentence.[81] In the absence of statute prescribing the time within which it should be filed, the accused is entitled to a reasonable time, and what is a reasonable time is in the fair discretion of the court.[82]

e. Parties. The motion may be made by one of several convicted on a joint indictment for a conspiracy, without joining the others.[83]

f. Statement of Grounds. The moving papers must concisely state the defects

7 Rich. (S. C.) 484; U. S. *v.* Dickinson, 25 Fed. Cas. No. 14,958, 2 McLean 325; U. S. *v.* Sharp, 27 Fed. Cas. No. 16,265, Pet. C. C. 131; Archbold Cr. Pl. 25, 26. See also INDICTMENTS AND INFORMATIONS.

72. Bernhard *v.* State, 76 Ga. 613; State *v.* Lyerly, 52 N. C. 158.

73. Straughan *v.* State, 16 Ark. 37.

74. Lowe *v.* State, 46 Ind. 305.

75. Hogan *v.* State, 42 Fla. 562, 28 So. 763; Wright *v.* State, 5 Ind. 527; State *v.* Scannell, 39 Me. 68. See also *supra*, XIV, K.

Illustrations.— If the jury finds defendant guilty of murder on an indictment for an assault with intent to murder (Manigault *v.* State, 53 Ga. 113), or guilty of malicious mischief on an indictment for setting fire to a dwelling-house (Crockett *v.* State, 80 Ga. 104, 4 S. E. 254), or generally, where the verdict does not conform to the facts charged in the indictment (State *v.* Lohmdn, 3 Hill (S. C.) 67), judgment will be arrested.

76. Allen *v.* State, 86 Ga. 399, 12 S. E. 651.

77. State *v.* Decker, 52 Kan. 193, 34 Pac. 780, where a motion for a new trial was made on the ground that the facts alleged in the information did not constitute an offense.

78. People *v.* Chaves, 122 Cal. 134, 54 Pac. 596; Ellis *v.* State, 141 Ind. 357, 40 N. E. 801; State *v.* Smith, 12 Mont. 378, 30 Pac. 679; People *v.* Cox, 67 N. Y. App. Div. 344, 73 N. Y. Suppl. 774.

79. State *v.* Rankin, 3 S. C. 438, 16 Am. Rep. 737; State *v.* O'Neil, 66 Vt. 356, 29 Atl. 376; State *v.* Hodgson, 66 Vt. 134, 28 Atl. 1089.

80. Freany *v.* Territory, 1 Wash. Terr. 71.

Where, on an appeal from a justice's court, the case is tried de novo, the appellate court cannot entertain a motion to arrest judgment on the ground that the justice had no jurisdiction. State *v.* Deslauries, 13 Mont. 398, 34 Pac. 490.

81. 1 Chitty Cr. L. 663. And see Hampton *v.* State, 133 Ala. 180, 32 So. 230; Sanders *v.* State, 129 Ala. 69, 29 So. 841; Perry *v.* People, 14 Ill. 496; State *v.* O'Neil, 66 Vt. 356, 29 Atl. 376. But see State *v.* Eisenhour, 132 Mo. 140, 33 S. W. 785.

82. 1 Chitty Cr. L. 661. And see State *v.* Cotten, 36 La. Ann. 980; State *v.* Gardner, 10 La. Ann. 25.

The motion may be filed at any time during the term, if judgment has not been entered and sentence pronounced. Freel *v.* State, 21 Ark. 212; State *v.* Leathers, 61 Mo. 381; Com. *v.* Tilghman, 4 Serg. & R. (Pa.) 127.

After a motion for a new trial has been made and refused it is too late to move in arrest of judgment. State *v.* Tinney, 26 La. Ann. 460.

In Missouri by statute a motion in arrest may be filed at any time "within four days after the motion for new trial shall have been determined." State *v.* Gates, 130 Mo. 351, 32 S. W. 971.

83. State *v.* Covington, 4 Ala. 603.

complained of with certainty and definiteness, and must show that they are defects which are apparent on the record.[84]

g. Admission of Oral Evidence. Since, on a motion in arrest, the court cannot go beyond the record,[85] it will not take notice of a stipulation which admits certain facts,[86] or hear evidence to show a fact not of record,[87] as for example to show that the prosecution is barred by the statute of limitations,[88] or that a juror was an alien.[89]

h. Presence of Defendant. In England it has been held to be necessary that defendant shall be present at the argument on his motion in arrest,[90] but in this country, by the weight of authority, his presence may be dispensed with.[91]

i. Curing Record by Amendment When Motion Is Pending. Where a motion in arrest is pending, based on omissions and errors in the record, it is competent for the court to amend the record at any time during the term to conform to the truth.[92]

j. Right to Have Motion Determined Before Sentence. The motion in arrest is properly made between the verdict and the sentence and must be decided before the latter can be pronounced,[93] and hence it has been held to be error for the court to continue the hearing of the motion and pronounce sentence before the motion is finally disposed of.[94] It has also been held, however, that the action of the court in passing final sentence is a sufficient disposition and overruling of a motion in arrest, and that no express determination of the motion is required.[95]

k. Failure to Demand Bill of Particulars. Failure of defendant to demand a bill of particulars does not deprive him of the right to move in arrest of judgment on the ground that the indictment is defective.[96]

4. Effect of Order Arresting Judgment — a. In General. The effect of an order in arrest of judgment is to place the accused as nearly as other and controlling rules of law will permit in the same situation as he was before the indictment. On its entry he must be discharged, unless he is detained in custody by some other legal process or order, which it is in the power of the court to make.[97] The decision is conclusive upon subsequent judges, so that another judge at

84. State *v.* Dorsey, 40 La. Ann. 739, 5 So. 26; State *v.* Malone, 37 La. Ann. 266; State *v.* Bryan, 89 N. C. 531; State *v.* Steele, 3 Heisk. (Tenn.) 135. See *supra*, XV, B, 1, a.

Insufficiency of indictment.— It has been held that where insufficiency of the indictment is alleged as the ground for a motion in arrest the particular defects must be specified. Rolin *v.* State, 70 Ga. 719. But see Denley *v.* State, (Miss. 1893) 12 So. 698, holding that the motion brings into question the sufficiency of the indictment on every ground, whether specifically assigned or not.

85. **Matters not apparent of record** see *supra*, XV, B, 1, a.

86. U. S. *v.* Barnhart, 17 Fed. 579, 9 Sawy. 159.

87. Hamilton *v.* State, 97 Ga. 216, 23 S. E. 824; Byers *v.* State, 63 Md. 207; Com. *v.* Brown, 150 Mass. 334, 23 N. E. 98; State *v.* Bordeaux, 93 N. C. 560.

88. State *v.* Foster, 7 La. Ann. 255.

89. State *v.* Hardin, 25 La. Ann. 369.

90. Rex *v.* Spragg, 2 Burr. 928.

91. State *v.* West, 45 La. Ann. 928, 13 So. 173; State *v.* White, 37 La. Ann. 172; State *v.* Jefcoat, 20 S. C. 383; State *v.* Greer, 11 Wash. 244, 39 Pac. 874. But see Rolls *v.* State, 52 Miss. 391. See *supra*, XIV, B, 3.

Where defendant forfeited his recognizance after a motion in arrest, the court refused to give an opinion on the motion in his absence. See U. S. *v.* Erskine, 25 Fed. Cas. No. 15,057, 4 Cranch C. C. 299.

92. State *v.* Lewis, 39 La. Ann. 1110, 3 So. 343; State *v.* Valere, 39 La. Ann. 1060, 3 So. 186; State *v.* Branch, 25 La. Ann. 115; Mobley *v.* State, 46 Miss. 501; State *v.* Bordeaux, 93 N. C. 560. Where an election between counts is ordered on motion of the accused, and the motion and order are made orally, the court may, at the hearing of a motion in arrest, perfect the record by entering an order *nunc pro tunc* setting forth the facts. Camp *v.* State, 91 Ga. 8, 16 S. E. 379.

93. 1 Chitty Cr. L. 661.

94. Hood *v.* State, 44 Ala. 81. But if the court believes the motion to be frivolous and made merely for the purpose of delay, he may in his discretion refuse to stay proceedings until the motion is heard and exceptions settled, and proceed at once to sentence the accused. People *v.* Wright, 89 Mich. 70, 50 N. W. 792.

95. McIntyre *v.* People, 38 Ill. 514; Weaver *v.* Com., 29 Pa. St. 445.

96. U. S. *v.* Tubbs, 94 Fed. 356.

97. *Ex p.* Hartman, 44 Cal. 32. See also Hood *v.* State, 44 Ala. 81.

the next term after it is granted has no power to annul the order and sentence defendant.[98]

b. Remanding Defendant For New Trial. According to the weight of authority, where judgment is arrested defendant is not entitled to an immediate discharge, but may be remanded or admitted to bail, and a new trial may be had on the same indictment,[99] or a new indictment may be found if necessary.[1]

c. Plea of Former Jeopardy. It has been held that a motion in arrest of judgment does not prevent the accused from pleading former jeopardy.[2] On the other hand, it has been held that where, after a verdict of guilty, judgment is arrested on motion of defendant, he has not been legally in jeopardy and cannot plead the conviction in bar of a subsequent prosecution,[3] and that where judgment is arrested for error committed after the finding of the indictment another trial may be had on the same indictment.[4]

XVI. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

A. Sentence Defined. A sentence denotes the action of the court before which the trial is had declaring the consequences to the convict of the fact of his guilt.[5]

B. Custody of Accused After Verdict. At common law, where defendant was in custody, or if not, where the crime was capital, the accused was remanded to jail in the interval, if any, between conviction and sentence.[6] Where the accused is convicted of a misdemeanor in his absence, a capias should be awarded and issued to bring him in for sentence.[7]

C. Power and Duty of Court to Sentence — 1. In General. It is the duty of the court to render judgment and pronounce sentence on the verdict.[8]

2. By Whom Sentence Pronounced. As a rule the sentence is pronounced by the court before which the trial was had,[9] but it seems that where the jurisdiction

98. Small *v.* State, 61 Ga. 641.

99. *Louisiana.*— State *v.* Heas, 10 La. Ann. 195.

Massachusetts.— Com. *v.* Galligan, 113 Mass. 203.

Missouri.— State *v.* Koerner, 51 Mo. 174.

New York.— People *v.* McKay, 18 Johns. 212.

South Carolina.— State *v.* Goudalock, 1 Brev. 47.

Virginia.— Curtis *v.* Com., 87 Va. 589, 13 S. E. 73.

See 15 Cent. Dig. tit. "Criminal Law," § 2481.

1. State *v.* Holley, 1 Brev. (S. C.) 35.

2. State *v.* Parish, 43 Wis. 395, where it is held that a judgment upon the verdict is not necessary to constitute jeopardy, and that as the arrest of judgment does not set aside the verdict, the conviction is a bar to another prosecution, and that the making of the motion in arrest is not a waiver of the right to plead the prior conviction.

3. Phillips *v.* People, 88 Ill. 160; Bedee *v.* People, 73 Ill. 320; Gerard *v.* People, 4 Ill. 362.

4. Phillips *v.* People, 88 Ill. 160; Com. *v.* Hardy, 2 Mass. 303; State *v.* Goudalock, 1 Brev. (S. C.) 47. See also *supra*, IX, C, 7; IX, I, 9.

5. Com. *v.* Lockwood, 109 Mass. 323, 12 Am. Rep. 699.

Other definitions are: "The imposition of a punishment, or enforcement of a penalty." Com. *v.* Bishoff, 13 Pa. Co. Ct. 503, 504.

"The order of the court, made in the presence of the defendant and entered of record, pronouncing the judgment and ordering the same to be carried into execution in the manner prescribed by law." Pennington *v.* State, 11 Tex. App. 281, 283.

Distinguished from "conviction" see 9 Cyc. 866.

6. 1 Chitty Cr. L. 664.

Admission to bail after conviction see 1 Chitty Cr. L. 93; and, generally, BAIL, 5 Cyc. 72.

7. 4 Blackstone Comm. 375; 1 Chitty Cr. L. 665.

8. Clark Cr. Proc. 494; and cases cited *infra*, note 19 *et seq.*

After receiving a special verdict and discharging the jury, the court cannot set it aside and grant a venire de novo, but must proceed upon the finding. Short *v.* State, 7 Yerg. (Tenn.) 510.

Punishment for crime and extent thereof see *infra*, XIX.

9. See *supra*, XVI, A.

At common law.— It seems to have been doubted whether justices of assize or nisi prius had power at common law to sentence on a conviction before them. It is certain that they had no such power where the indictment was sent from the king's bench by writ of nisi prius, for their commission ceased with the verdict, and they then only had

of the court is not lost the judge sitting at a regular term thereof may pass sentence, although the conviction was had at another term and before another judge.[10]

3. Judicial Commutation of Sentence. A statute conferring on the court the power, at defendant's request, to commute a fine to imprisonment, and if defendant shall have been imprisoned a certain period for the non-payment of costs which he is unable to pay to release him, does not conflict with a constitutional provision vesting in the governor the power to grant reprieves, commutations, and pardons.[11]

4. Effect of Repeal of Statute. Where after conviction and before judgment a statute under which the conviction is had is repealed, without a saving clause, the power to sentence is destroyed.[12]

5. On Agreed Statement of Facts. Inasmuch as no one can be punished for crime except upon his conviction, plea of guilty, or of *nolo contendere*, sentence will not be imposed upon an agreed statement of facts.[13] The contrary has been held in the case of misdemeanors where the punishment is by fine only.[14]

6. Loss of Jurisdiction. A judgment and sentence entered on one of the crimes included in the verdict of guilty, and which has been partly executed by the imprisonment of defendant, ends the prosecution, exhausts the power of the court, and terminates its jurisdiction.[15] But the erroneous entry of judgment

power to return the postea. But by 14 Hen. VI, c. 9, justices at assize were given a discretionary power to sentence, or they might return the postea with the criminal. 1 Chitty Cr. L. 697; 2 Hale P. C. 403.

Justices of oyer and terminer, jail delivery, and of the peace had power to sentence. 1 Chitty Cr. L. 679.

On removal to higher court on certiorari.— Zabriskie *v.* State, 43 N. J. L. 640, 39 Am. Rep. 610.

10. *Alabama.*— Clanton *v.* State, 96 Ala. 111, 11 So. 299; Charles *v.* State, 4 Port. 107.

California.— People *v.* Felix, 45 Cal. 163.

District of Columbia.—U. S. *v.* May, 2 MacArthur 512.

Florida.— *Ex p.* Williams, 26 Fla. 310, 8 So. 425.

Indiana.— Ledgerwood *v.* State, 134 Ind. 81, 33 N. E. 631; Harbin *v.* State, 133 Ind. 698, 33 N. E. 635.

Iowa.— State *v.* Jones, 115 Iowa 113, 88 N. W. 196.

Michigan.— People *v.* Reilly, 53 Mich. 260, 18 N. W. 849.

Pennsylvania.— Com. *v.* Dunleavy, 16 Pa. Super. Ct. 380.

Virginia.— Cleek *v.* Com., 21 Gratt. 777.

Wisconsin.— Lanphere *v.* State, 114 Wis. 193, 89 N. W. 128; Pegalow *v.* State, 20 Wis. 61.

United States.— U. S. *v.* Gordon, 25 Fed. Cas. No. 15,231, 5 Blatchf. 18.

See 15 Cent. Dig. tit. "Criminal Law," § 2483.

At common law after a commission appointing new justices.— 1 Chitty Cr. L. 697; 1 Edw. VI, c. 7; 11 Hen. VI, c. 6.

A court substituted by statute for the trial court, while an appeal is pending, may sentence, but the court which is superseded cannot. People *v.* Bork, 96 N. Y. 188. So a sentence imposed by a court which has been abolished is void. Gorman *v.* People, 17 Colo. 596, 31 Pac. 335, 31 Am. St. Rep. 350.

A court of general jail delivery may sentence on a conviction at a previous court. State *v.* Aaron, 4 N. J. L. 231, 7 Am. Dec. 592.

Permitting accused to go out of custody indefinitely without bail, after pleading guilty, divests the court of jurisdiction to order his rearrest and pronounce sentence upon him at a subsequent term. People *v.* Allen, 155 Ill. 61, 39 N. E. 568, 41 L. R. A. 473.

While sitting for civil business, a court may impose sentence where a statute expressly abolishes criminal terms and provides that the court shall always be open for criminal business. Com. *v.* O'Brien, 175 Mass. 37, 55 N. E. 466.

11. *Ex p.* Parker, 106 Mo. 551, 17 S. W. 658.

The power to commute must be exercised only within the limits marked out by the law, and a statute which gives this power does not confer power to reduce the punishment below the minimum fixed by the law. State *v.* Daniels, 32 Mo. 558.

12. Com. *v.* Kimball, 21 Pick. (Mass.) 373; State *v.* Williams, 97 N. C. 455, 2 S. E. 55. And see *supra*, II, C, 3, b, (II); *infra*, XIX, B, 7.

Judgments upon convictions obtained under an act subsequently amended are not affected by the amendatory act, but may be rendered in conformity with the act under which they are obtained. State *v.* Fletcher, 1 R. I. 193.

The repeal of the statute after judgment of course has no retroactive effect on the judgment. State *v.* Addington, 2 Bailey (S. C.) 516, 23 Am. Dec. 150.

13. State *v.* Cross, 34 Me. 594.

14. State *v.* Jones, 18 Tex. 874.

15. The action of the court in sentencing defendant at a subsequent term on the remaining offenses is wholly without authority and void. *In re* Beck, 63 Kan. 57, 64 Pac. 971; Com. *v.* Foster, 122 Mass. 317, 23 Am. Rep. 326.

pending a motion for a new trial,[16] the entry of a judgment that is without substance and void,[17] or the loss of the information or indictment after verdict but before sentence[18] does not divest the court of authority to pronounce sentence.

7. Time of Pronouncing Sentence. At common law the sentence in capital cases was usually given immediately after conviction, although the court might adjourn it to another day;[19] and this is probably the rule in most crimes in the states.[20] By statute in some of the states it is provided that a certain period shall elapse between conviction and sentence,[21] although defendant may waive the statute and consent to an immediate judgment.[22] The fact that exceptions which have been taken have not been settled does not prevent sentence,[23] and a statute allowing the convict to be sentenced, notwithstanding exceptions, is constitutional.[24]

8. On Plea of Guilty — a. In General. Sentence may be pronounced on a plea of guilty[25] or of *nolo contendere* by the court at the term subsequent to that at which the plea was entered.[26]

b. Degree of Offense. Where the accused pleads guilty to an indictment which charges an offense of which he may be guilty in one of several degrees, the court must, before passing sentence, ascertain the degree,[27] or this may be determined by the jury under an instruction limiting them to the consideration of this question alone.[28]

16. The court may, on the determination of this motion, impose sentence, where the case was regularly continued from time to time. State *v.* Schierhoff, 103 Mo. 47, 15 S. W. 151.

17. The court may at a subsequent term render a proper judgment upon the verdict recorded. Easterling *v.* State, 35 Miss. 210.

18. Klein *v.* State, 157 Ind. 146, 60 N. E. 1036; Mount *v.* State, 14 Ohio 295, 45 Am. Dec. 542; Pate *v.* State, 21 Tex. App. 191, 17 S. W. 461.

19. 1 Chitty Cr. L. 699.

20. See *infra*, XVI, C, 11.

Where defendant desires to move for a new trial, or in arrest, it is within the discretion of the court to postpone sentence. State *v.* Gardner, 10 La. Ann. 25.

The word "forthwith," as used in a statute requiring sentence to be pronounced forthwith, means in the ordinary and orderly course of the business of the court. Such a provision has been held directory, so that where defendant is out on bail when called for sentence the court may legally impose sentence at a later day. Com. *v.* Thompson, 18 Pa. Co. Ct. 487.

21. People *v.* Robinson, 46 Cal. 94; O'Brien *v.* Com., 89 Ky. 354, 12 S. W. 471, 11 Ky. L. Rep. 534; Bush *v.* Com., 80 Ky. 244; Parrish *v.* State, 45 Tex. 51.

22. People *v.* Robinson, 46 Cal. 94.

23. People *v.* Becker, 48 Mich. 43, 11 N. W. 779.

24. Com. *v.* Brown, 167 Mass. 144, 45 N. E. 1.

A motion for a new trial need not be passed upon before sentence, where the statute requires the day of execution to be at least one year from the date of the conviction, as this is a sufficient stay of execution for the purpose of a motion. State *v.* Hoyt, 46 Conn. 330. Where the motion for a new trial may be made at any time during the term, it is not error to render or enter judgment before it is made (Reed *v.* State, 147 Ind. 41, 46 N. E. 135; Quinn *v.* State, 123 Ind. 59, 23 N. E. 977), and the reargument of the motion for a new trial after the verdict does not affect it (Fletcher *v.* State, 37 Tex. Cr. 193, 39 S. W. 116).

25. See *supra*, XI, B, 4, a.

Constitutional right of trial by jury. — As the right to trial by jury, secured to the accused by the federal constitution, is a trial according to the common law, by which the court might proceed to judgment on a plea of guilty, a judgment of conviction rendered on a plea of guilty voluntarily entered and which leaves no issue for trial is not a violation of defendant's constitutional rights. West *v.* Gammon, 98 Fed. 426, 39 C. C. A. 271.

26. Thurman *v.* State, 54 Ark. 120, 15 S. W. 84; Smith *v.* Hess, 91 Ind. 424. And see *supra*, XI, B, 4, b.

On the plea of nolo contendere it is not necessary or proper for the court to adjudge the accused guilty, as that is a legal inference from the plea, and the court may pass sentence at once. Com. *v.* Ingersoll, 145 Mass. 381, 14 N. E. 449.

27. People *v.* Jefferson, 52 Cal. 452; People *v.* Noll, 20 Cal. 164.

Putting the accused under oath after a plea of guilty and questioning him in order to ascertain facts from which the court may determine the degree of the crime, as authorized by statute, does not amount to trying defendant after he has pleaded guilty. People *v.* Miller, 137 Cal. 642, 70 Pac. 735.

28. Giles *v.* State, 23 Tex. App. 281, 4 S. W. 886.

Where the jury determine the degree on a plea of guilty, a conviction will be reversed where it appears that no evidence was received to aid them in determining the degree. Evers *v.* State, 32 Tex. Cr. 283, 22 S. W. 1019.

c. Fixing Punishment.[29] A statute requiring that on a plea of guilty the jury shall assess the punishment is mandatory.[30] In the absence of statute, on a plea of guilty, the court has the same power to fix the punishment that the jury would have under the statute on a verdict of guilty after a trial.[31]

d. On Plea to Two or More Counts. On a plea of guilty to an information which charges the same criminal transaction in two counts and under different statutes, the court may impose a sentence on the second count, although it is greater than that which it might impose on the first count.[32]

9. Insanity After Conviction. Where the prisoner, after conviction of a capital felony, asserts that he is insane, judgment may be postponed until this fact can be ascertained.[33]

10. Pregnancy of Female Convict. Pregnancy may be pleaded by a woman, after conviction, before sentence of death is passed upon her, which shall be tried by a jury of matrons.[34]

11. Suspension of Sentence — a. When Permitted. Whether the court in the absence of statute has power to suspend sentence for an indefinite period is not absolutely decided. It has been held that where there are extenuating circumstances, or a like case is pending on appeal, or where for any sufficient cause an immediate sentence is not required, the court may, with the consent of all parties, and upon terms which to it seem just, suspend sentence.[35] Some cases hold,

29. **Power to fix punishment** generally see *infra*, XVI, C, 15.

30. Nelson *v.* State, 46 Ala. 186; Josef *v.* State, 33 Tex. Cr. 251, 26 S. W. 213; Harwell *v.* State, 19 Tex. App. 423.

31. Territory *v.* Miller, 4 Dak. 173, 29 N. W. 7; Coates *v.* People, 72 Ill. 303; Eastham *v.* Com., 49 S. W. 795, 20 Ky. L. Rep. 1639.

A statute which provides that no person shall be sentenced to death unless the jury shall have so found in their verdict does not conflict with a statute which provides that on plea of guilty the court shall render judgment and execution as though he had been found guilty by the jury. Hamilton *v.* People, 71 Ill. 498.

Examination of witnesses.— A statute which declares that it shall be the duty of the court, where one pleads guilty, and the court possesses a discretion as to the punishment, to examine witnesses as to the aggravation and mitigation of the crime is mandatory. Arrano *v.* People, 24 Colo. 233, 49 Pac. 271. But *compare* People *v.* Miller, 114 Cal. 10, 45 Pac. 986; State *v.* Donahue, 19 R. I. 454, 36 Atl. 1122.

32. People *v.* Morris, 80 Mich. 634, 45 N. W. 591, 8 L. R. A. 685. *Compare* Polinsky *v.* People, 11 Hun (N. Y.) 390, holding that on a plea of guilty a general judgment may be entered which will be valid if applicable to any count, although crimes of varying degrees and punishments are included therein.

33. State *v.* Brinyea, 5 Ala. 241; State *v.* Vann, 84 N. C. 722.

Trial of issue by jury.— It has been held that this issue ought to be tried by a jury (State ex rel. Chandler, 45 La. Ann. 696, 12 So. 884; State *v.* Vann, 84 N. C. 722), but it has also been held that if the judge, upon his own observation of the accused, entertains no doubt of his sanity when he is called for sentence, he may pronounce sentence without a trial of the issue by a jury (People *v.* Knott, 122 Cal. 410, 55 Pac. 154; People *v.* Pico, 62 Cal. 50; Com. *v.* Schmous, 162 Pa. St. 326, 29 Atl. 644; Bonds *v.* State, Mart. & Y. (Tenn.) 143, 17 Am. Dec. 795; State *v.* Nordstrom, 21 Wash. 403, 58 Pac. 248, 53 L. R. A. 584).

In Georgia it has been held that a statutory proceeding to determine the insanity of a convicted prisoner is a judicial proceeding, and that a refusal of the court to order such a proceeding upon proper application is appealable. Sears *v.* Candler, 112 Ga. 381, 37 S. E. 442. On the other hand it has been held in this state that the refusal of the judge imposing sentence to permit an investigation into the mental condition of the accused is not a denial of "due process of law." Baughn *v.* State, 100 Ga. 554, 28 S. E. 68, 38 L. R. A. 577.

Oral evidence is admissible, and no formal plea is required. State *v.* Helm, 69 Ark. 167, 61 S. W. 915.

If the jury believe that defendant is unable to understand the nature of the indictment under which he was convicted, his plea thereto, and the verdict when explained to him by the court, and is unable to comprehend his condition in reference to these proceedings, they are authorized to find him insane. State *v.* Helm, 69 Ark. 167, 61 S. W. 915.

34. State *v.* Arden, 1 Bay (S. C.) 487. *Contra*, at common law, see 1 Chitty Cr. L. 760; 2 Hale P. C. 143.

35. *Hawaii.*— Hawaii *v.* Pedro, 11 Hawaii 287.

Massachusetts.— Com. *v.* Dowdican, 115 Mass. 133.

Michigan.— People *v.* Reilly, 53 Mich. 260, 18 N. W. 849.

New Jersey.— State *v.* Addy, 43 N. J. L. 113, 39 Am. Rep. 547.

New York.— People *v.* Monroe County Ct.

however, that courts have not the power to suspend indefinitely the passing or the execution of the sentence, and that an attempt to do so is a usurpation of the power to pardon or to remit the punishment, which belongs solely to the executive.[36]

b. Effect of Suspension. A suspension of sentence is not a final judgment by which the case is put out of court, but is a mere suspension of active proceedings in the case,[37] and where defendant is again arrested and brought before the same court, charged with another crime,[38] or where he fails to keep his promise to pay the costs or a fine,[39] or to do some other act which is a condition of the suspension, the court may sentence him at the same[40] or at a subsequent term.[41] Where, however, the condition on which sentence is suspended is the doing of something

Sess., 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856.

North Carolina.— State *v.* Crook, 115 N. C. 760, 20 S. E. 513, 29 L. R. A. 260.

Ohio.— Webster *v.* State, 43 Ohio St. 696, 4 N. E. 92.

Tennessee.— Fults *v.* State, 2 Sneed 232.

See 15 Cent. Dig. tit. "Criminal Law," § 2500.

Cannot be assigned as error.— And where the suspension is asked by defendant, and granted on satisfactory reasons appearing to the court, he cannot, where he is subsequently sentenced, assign this as error. People *v.* Patrick, 118 Cal. 332, 50 Pac. 425; Fults *v.* State, 2 Sneed (Tenn.) 232.

36. *Georgia.*— Neal *v.* State, 104 Ga. 509, 30 S. E. 858, 69 Am. St. Rep. 175, 42 L. R. A. 190.

Indiana.— Gray *v.* State, 107 Ind. 177, 8 N. E. 16.

Iowa.— State *v.* Voss, 80 Iowa 467, 45 N. W. 898, 8 L. R. A. 767.

Michigan.— People *v.* Felker, 61 Mich. 110, 27 N. W. 869; People *v.* Brown, 54 Mich. 15, 19 N. W. 571.

New Mexico.— U. S. *v.* Folsom, 8 N. M. 651, 46 Pac. 447.

New York.— People *v.* Morrisette, 20 How. Pr. 118.

North Dakota.— *In re* Markuson, 5 N. D. 180, 64 N. W. 939.

Wisconsin.— *In re* Webb, 89 Wis. 354, 62 N. W. 177, 46 Am. St. Rep. 846, 27 L. R. A. 356.

United States.— U. S. *v.* Wilson, 46 Fed. 748.

See 15 Cent. Dig. tit. "Criminal Law," § 2500.

A distinction is made between a suspension of sentence for an indefinite period, amounting usually to an absolute discharge, and a temporary suspension, for stated periods from time to time. Those cases which hold that an indefinite suspension is not proper concede that the court has inherent power to grant a temporary suspension to allow defendant time to move for a new trial or in arrest, to appeal, to petition for pardon, or to enable the court to ascertain what circumstances may be urged in mitigation or aggravation. And where the court has an absolute discretion under a statute to fix the penalty, mandamus will not lie to compel the court to sentence, where, under the peculiar and extraordinary circumstances of the case, the judge believes that no punishment should be imposed, for if the court has the power to impose only a nominal punishment by its sentence, mandamus will not lie to compel him to perform a useless act which would impose useless expense on the state. People *v.* Blackburn, 6 Utah 347, 23 Pac. 759.

In New York it is held that the supreme court of criminal jurisdiction has inherent authority to suspend sentence, during good behavior, by the common law, and that a statute which makes certain crimes punishable, and devolves the duty upon the court to impose the punishment prescribed does not abrogate this common-law authority. People *v.* Monroe County Ct. Sess., 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856 [*reversing* 66 Hun 550, 21 N. Y. Suppl. 659], holding also that the statute is not in violation of the state constitution, giving the governor the power to grant reprieves and pardons.

37. *California.*—People *v.* Walker, (1900) 61 Pac. 800.

Florida.— *Ex p.* Williams, 26 Fla. 310, 8 So. 425.

Indiana.— Shaffer *v.* State, 100 Ind. 365.

Massachusetts.— Com. *v.* Dowdican, 115 Mass. 133.

Pennsylvania.— Com. *v.* Dunleavy, 16 Pa. Super. Ct. 380.

See 15 Cent. Dig. tit. "Criminal Law," § 2500 *et seq.*

38. People *v.* Graves, 31 Hun (N. Y.) 382.

39. State *v.* Crook, 115 N. C. 760, 20 S. E. 513, 29 L. R. A. 260.

40. Sylvester *v.* State, 65 N. H. 193, 20 Atl. 954; Weber *v.* State, 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472.

41. *Florida.*— *Ex p.* Williams, 26 Fla. 310, 8 So. 425.

Mississippi.— Gibson *v.* State, 68 Miss. 241, 8 So. 329.

New York.— People *v.* Webster, 14 Misc. 617, 36 N. Y. Suppl. 745.

North Carolina.— State *v.* Whitt, 117 N. C. 804, 23 S. E. 452.

England.— Reg. *v.* Richardson, 8 Dowl. P. C. 511, 4 Jur. 104.

See 15 Cent. Dig. tit. "Criminal Law," § 2501.

Where sentence is indefinitely suspended, as distinguished from temporary suspension to determine motions or other proceedings which may occur after verdict, the court cannot thereafter, and especially at a subsequent term, revoke the order and proceed to judg-

which the court can command as a part of its final judgment,[42] the imposing of the condition will be equivalent to a sentence, and the power of the court to sentence is exhausted.[43]

12. SEVERAL SENTENCES ON DEFENDANTS JOINTLY TRIED. Although a joint indictment and a joint trial are proper, a joint sentence or judgment is not. Judgments must be several,[44] so that each individual convict may be punished for his own crime alone.

13. SENTENCE ON SEVERAL COUNTS — a. Cumulative Sentences. Where two counts in an indictment charge different crimes, which are of the same character, and which grow out of the same transaction, yet differ in degree, the sentence, based on a general verdict of guilty, must impose only one penalty, and a separate sentence for each crime, imposing a separate punishment for it, is erroneous and void.[45] Where, however, defendant is convicted by a general verdict on two or

ment. U. S. *v.* Wilson, 46 Fed. 748. See also *In re* Flint, 25 Utah 338, 71 Pac. 531, 95 Am. St. Rep. 853.

42. But where the thing required is something which is no portion of the punishment, the doing of it by defendant is not undergoing or performing a part of the sentence. Thus requiring defendant to pay costs as a condition of suspending sentence, costs being no part of the penalty, does not operate as a discharge. State *v.* Crook, 115 N. C. 760, 20 S. E. 513, 29 L. R. A. 260.

The condition that the execution of the sentence shall be suspended if the accused leave the state, although not to be commended, does not invalidate the judgment where it is not intended to be a part of it, and defendant may be arrested and sentenced although he leaves the state if he return in a short time. State *v.* Hatley, 110 N. C. 522, 14 S. E. 751.

43. State *v.* Addy, 43 N. J. L. 113, 39 Am. Rep. 547.

44. *Alabama.*— McLeod *v.* State, 35 Ala. 395.

Arkansas.—Straughan *v.* State, 16 Ark. 37.

Illinois.—Miller *v.* People, 47 Ill. App. 472.

Indiana.— State *v.* Hopkins, 7 Blackf. 494.

Iowa.— State *v.* Hunter, 33 Iowa 361.

Kentucky.— Curd *v.* Com., 14 B. Mon. 386; Caldwell *v.* Com., 7 Dana 229.

Mississippi.— Gathings *v.* State, 44 Miss. 343.

Missouri.— State *v.* Hollenscheit, 61 Mo. 302; State *v.* Berry, 21 Mo. 504; State *v.* Gay, 10 Mo. 440.

Nevada.— Wiggins *v.* Henderson, 22 Nev. 103, 36 Pac. 459.

New York.— March *v.* People, 7 Barb. 391.

Texas.— Allen *v.* State, 34 Tex. 230; Hays *v.* State, 30 Tex. App. 472, 17 S. W. 1063; Caesar *v.* State, 30 Tex. App. 274, 17 S. W. 258; Flynn *v.* State, 8 Tex. App. 398.

Virginia.— Com. *v.* Hamor, 8 Gratt. 698.

Wisconsin.— Waltzer *v.* State, 3 Wis. 785.

United States.— U. S. *v.* Ismenard, 26 Fed. Cas. No. 15,450, 1 Cranch C. C. 150.

See 15 Cent. Dig. tit. "Criminal Law," § 2503.

A joint judgment for a fine may compel one defendant to pay the entire fine, without being able to exact contribution from his co-defendants by reason of which they will escape punishment. Curd *v.* Com., 14 B. Mon. (Ky.) 386; Caldwell *v.* Com., 7 Dana (Ky.) 229; Bosleys *v.* Com., 7 J. J. Marsh. (Ky.) 598.

Judgment against a firm.— Where two are convicted of a crime, a joint fine may be assessed if they acted as a firm, but a separate fine if they acted as individuals. Lemons *v.* State, 50 Ala. 130; Barada *v.* State, 13 Mo. 94.

Where defendants are jointly tried, a separate fine may be assessed against each, with a joint judgment for costs. Calico *v.* State, 4 Ark. 430.

Where the indictments are consolidated, the court may sentence each defendant to the whole fine imposed by a statute. Turner *v.* U. S., 66 Fed. 280, 13 C. C. A. 436. *Compare* Campbell *v.* Com., 3 Luz. Leg. Obs. (Pa.) 194.

45. *Illinois.*— Parker *v.* People, 97 Ill. 32.

Missouri.— State *v.* James, 63 Mo. 570.

Nebraska.— Barker *v.* State, 54 Nebr. 53, 74 N. W. 427.

New York.— People *v.* Dunn, 90 N. Y. 104 [*reversing* 27 Hun 272].

Ohio.— Woodford *v.* State, 1 Ohio St. 427; Devere *v.* State, 5 Ohio Cir. Ct. 509.

Texas.— Bennett *v.* State, 31 Tex. 303.

United States.— *Ex p.* Joyce, 13 Fed. Cas. No. 7,556.

See 15 Cent. Dig. tit. "Criminal Law," § 2504 *et seq.*

The accused is entitled to be discharged on serving his full term of imprisonment or paying the fine under one judgment. Com. *v.* Harris, 13 Allen (Mass.) 534; *Ex p.* Joyce, 13 Fed. Cas. No. 7,556.

Where an indictment contains a count for a common-law misdemeanor, and one for a statutory misdemeanor, and, although the counts allege them as separate and distinct offenses, they are in reality only various statements of the same transaction, and a general verdict is rendered and the punishments differ, that at common law being greater in the court's discretion than that imposed by the statute, the sentence must be imposed according to the statute, which diminishes the common-law punishment. State *v.* Thompson, 2 Strobh. (S. C.) 12, 47 Am. Dec. 588.

more counts of an indictment charging crimes which are of the same character, although growing out of totally distinct and separate transactions, sentence may be passed and judgment may be entered for a specified term of imprisonment upon each count, which terms must be consecutive; and it is error to sentence for a certain period in gross.[46]

b. Sentence For Highest Degree. Where, as is a common practice, one crime is charged in several good counts in one indictment, in different degrees, and a general verdict of guilty is rendered thereon on sufficient evidence, the accused may be sentenced upon that count of the indictment which charges the highest degree of the crime.[47]

c. Upon Conviction on One Count. Where the verdict convicts defendant on one of several counts and acquits him on the others,[48] or contains no finding as to the others,[49] a judgment of acquittal is proper as to the latter.

d. Sentence on One Count, Suspension on Others. Where the accused has been convicted of several offenses, charged in separate counts, he may be sentenced on one count, and sentence on the others may be suspended.[50]

e. Sentence Based on One Good Count. Where there are several counts in an indictment and one is good, while the others are bad, and the verdict is a general one, a sentence on the verdict will be sustained on the presumption of law that the verdict is based upon the good count only.[51]

Where the same person is charged in different counts with inconsistent crimes, such as larceny and receiving the stolen goods, a general verdict, if valid at all, can be made so only by confining the sentence to the least offense charged. *In re* Franklin, 77 Mich. 615, 43 N. W. 997.

46. *District of Columbia.*— Matter of Fry, 3 Mackey 135; *In re* Jackson, 3 MacArthur 24.

Illinois.— Johnson *v.* People, 83 Ill. 431; Fletcher *v.* People, 81 Ill. 116; Stack *v.* People, 80 Ill. 32; Kroer *v.* People, 78 Ill. 294; Mullinix *v.* People, 76 Ill. 211; Bolun *v.* People, 73 Ill. 488; Dachsenbuehler *v.* People, 89 Ill. App. 493.

Kansas.— State *v.* Emmons, 45 Kan. 397, 26 Pac. 679; State *v.* Hodges, 45 Kan. 389, 26 Pac. 676.

Nebraska.— Hans *v.* State, 50 Nebr. 150, 69 N. W. 838.

Pennsylvania.— Com. *v.* Gurley, 45 Pa. St. 392; Com. *v.* Sylvester, Brightly 331.

Wisconsin.—*In re* McCormick, 24 Wis. 492, 1 Am. Rep. 197.

United States.— *In re* Greenwald, 77 Fed. 590; U. S. *v.* Bennett, 24 Fed. Cas. No. 14,572, 17 Blatchf. 357.

England.— Castro *v.* Reg., 6 App. Cas. 229, 14 Cox C. C. 546, 45 J. P. 452, 50 L. J. Q. B. 497, 44 L. T. Rep. N. S. 350, 29 Wkly. Rep. 669; Rex *v.* Robinson, 1 Moody C. C. 413. But see Reg. *v.* Carter, 9 Jur. 178, where the sentences, although separate, were for concurrent terms.

See 15 Cent. Dig. tit. "Criminal Law," § 2504 *et seq.*

On the contrary a single sentence or judgment imposing the total punishment, but no more, for all the offenses of which the accused has been convicted has also been held proper. Booth *v.* Com., 5 Metc. (Mass.) 535; Cartlon *v.* Com., 5 Metc. (Mass.) 532; U. S. *v.* West, 7 Utah 437, 27 Pac. 84; Mitchell *v.* Com., 93 Va. 775, 20 S. E. 892.

On a verdict of guilty of larceny and embezzlement charged in separate counts, a single sentence for the two crimes is irregular. The sentence must be a separate one for each. Stephens *v.* State, 53 N. J. L. 245, 21 Atl. 1038.

Cumulative punishments see *infra*, XIX, D.

47. *Arkansas.*— Curtis *v.* State, 26 Ark. 439.

Florida.— Cribb *v.* State, 9 Fla. 409.

Georgia.— Bulloch *v.* State, 10 Ga. 47, 54 Am. Dec. 369.

Maine.— State *v.* Hood, 51 Me. 363.

Maryland.— Manly *v.* State, 7 Md. 135.

Massachusetts.— Com. *v.* Hope, 22 Pick. 1.

Missouri.—State *v.* Core, 70 Mo. 491; State *v.* Bean, 21 Mo. 269.

New Jersey.— State *v.* Dugan, 65 N. J. L. 684, 48 Atl. 1118, 65 N. J. L. 65, 46 Atl. 566; Stephens *v.* State, 53 N. J. L. 245, 21 Atl. 1038.

New York.— People *v.* McGeery, 6 Park. Cr. 653.

Ohio.— Breese *v.* State, 12 Ohio St. 146, 80 Am. Dec. 340.

Pennsylvania.— Johnston *v.* Com., 85 Pa. St. 54, 27 Am. Rep. 622.

See 15 Cent. Dig. tit. "Criminal Law," § 2506.

48. State *v.* Bridges, 5 N. C. 134; Sledd *v.* Com., 19 Gratt. (Va.) 813.

49. Chambers *v.* People, 5 Ill. 351; Kirk *v.* Com., 9 Leigh (Va.) 627.

50. U. S. *v.* Blaisdell, 24 Fed. Cas. No. 14,608, 3 Ben. 132.

51. Cribb *v.* State, 9 Fla. 409; Josslyn *v.* Com., 6 Metc. (Mass.) 236; Boose *v.* State, 10 Ohio St. 575; Holloway *v.* Reg., 17 Q. B. 317, 2 Den. C. C. 287, 17 Jur. 825, 79 E. C. L. 317; Reg. *v.* Bullock, Dears. C. C. 653, 25 L. J. M. C. 92.

The punishment imposed by the sentence, however, should not exceed that which might properly be imposed on the good count. Tubbs *v.* U. S., 105 Fed. 59, 44 C. C. A. 357;

14. Sentence on Several Indictments. Where separate indictments for distinct offenses are consolidated and tried, and the verdict finds the accused guilty on each indictment separately, one judgment and sentence providing for imprisonment for a continuous term of years, but specifying the period of imprisonment for each crime, is sufficient, without a separate entry of judgment in each case.[52]

15. Power to Fix Punishment.[53] In jurisdictions where the jury assess the punishment, the judgment must follow the verdict, and the court has no authority to impose either a greater[54] or a less punishment than that assessed by the jury.[55]

D. Mode of Pronouncing Sentence and Requisites and Sufficiency of Sentence — 1. In General. The judgment and sentence should be pronounced in open court, but need not necessarily be public.[56] At common law it was absolutely necessary that the prisoner should be present in person when sentence of death, imprisonment, or the pillory was to be pronounced upon him, although, where the penalty was pecuniary, sentence might be pronounced in his absence if the court under the circumstances saw fit to dispense with his presence.[57] In the United States the rule of the common law is either established by statute or recognized in the absence of a statute.[58] In some states, by statute, it is directed that the accused when he appears for judgment must be informed by the court

Haynes *v.* U. S., 101 Fed. 817, 42 C. C. A. 34; Peters *v.* U. S., 94 Fed. 127, 36 C. C. A. 105.

52. *In re* Packer, 18 Colo. 525, 33 Pac. 578.

A statutory provision which authorizes the joinder of several offenses in one indictment and the imposition of a single sentence on conviction does not constitute all the offenses committed during a certain period a single continuing offense, and hence a single sentence on conviction, under several consolidated indictments for separate offenses committed within a certain period, may cover all such offenses and need not be limited to the sentence prescribed for one of them. *In re* De Bara, 179 U. S. 316, 21 S. Ct. 110, 45 L. ed. 207.

53. **Fixing punishment on plea of guilty** see *supra*, XVI, C, 8, c.

Power of legislature see *infra*, XIX, B.

Extent of punishment see *infra*, XIX, C.

54. Clark *v.* State, 77 Ind. 399.

55. Cole *v.* People, 84 Ill. 216.

If the punishment as assessed by the jury is not in conformity with the statute, they should be sent back for further deliberation that they may correct it (Wilson *v.* State, 28 Ind. 393; Nemo *v.* Com., 2 Gratt. (Va.) 558), and if on being sent back they persist in their finding, or if they are dismissed before their error is discovered, the court should direct a venire de novo (Nemo *v.* Com., 2 Gratt. (Va.) 558).

56. Reed *v.* State, 147 Ind. 41, 46 N. E. 135. See also *supra*, XIV, B, 1, c.

57. 1 Chitty Cr. L. 695; 2 Hawkins P. C. c. 48, § 17. And see Cole *v.* State, 10 Ark. 318; State *v.* Jones, 2 Yerg. (Tenn.) 22; Rex *v.* Constable, 3 B. & Ad. 659, 23 E. C. L. 291, 7 D. & R. 663, 16 E. C. L. 312; Rex *v.* Boltz, 5 B. & C. 334, 8 D. & R. 65, 4 L. J. K. B. O. S. 262, 11 E. C. L. 486; Rex *v.* Hann, 3 Burr. 1786; Anonymous, Lofft. 400; Duke's Case, 1 Salk. 400; Reg. *v.* Templeman, 1 Salk. 55.

58. *Arkansas.*— Cole *v.* State, 10 Ark. 318.

California.— People *v.* Sprague, 54 Cal. 92.

Florida.— Brown *v.* State, 29 Fla. 543, 10 So. 736.

Mississippi.— Rolls *v.* State, 52 Miss. 391; Kelly *v.* State, 3 Sm. & M. 518.

New Jersey.— West *v.* State, 22 N. J. L. 212.

New York.— Son *v.* People, 12 Wend. 344; People *v.* Winchell, 7 Cow. 525 note; People *v.* Clark, 1 Park. Cr. 360.

Texas.— Cain *v.* State, 15 Tex. App. 41.

Virginia.— Com. *v.* Crump, 1 Va. Cas. 172.

Contra, by statute, Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838.

See 15 Cent. Dig. tit. "Criminal Law," § 2511. And see *supra*, XIV, B, 3, a, (I), (B).

A sentence of a fine, with a commitment to jail until paid, requires the presence of the accused. Grimm *v.* Reinbold, 3 Pa. Dist. 668, 13 Pa. Co. Ct. 545.

Where a judgment for a felony is entered nunc pro tunc at a subsequent term, it must be done in the presence of defendant. Gordon *v.* State, 13 Tex. App. 196; Mapes *v.* State, 13 Tex. App. 85.

The ministerial act of the clerk in entering up the judgment after the trial has been finally concluded does not necessitate the presence of defendant. Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153.

Effect of absence.— Where defendant was present at the verdict, his absence at the sentence will not justify a new trial. The case may be remanded, with instructions to sentence according to law. Cole *v.* State, 10 Ark. 318; State *v.* McClain, 156 Mo. 99, 56 S. W. 731. See *supra*, XIV, B, 3, a, (I), (B).

In a misdemeanor case the judgment for a fine may be pronounced in the absence of defendant. Warren *v.* State, 19 Ark. 214, 68 Am. Dec. 214. See also Com. *v.* Cheek, 1 Duv. (Ky.) 26; Blythe *v.* Tompkins, 2 Abb. Pr. (N. Y.) 468. See also, as to presence of defendant in misdemeanor cases, *supra*, XIV, B, 3, a, (II).

On a trial for larceny in Pennsylvania, where the trial is put on the same footing as trials for misdemeanors, it has been held

or by the clerk of the nature of the indictment, his plea, and the verdict, and he must be asked as at common law whether he has anything to say why judgment should not be pronounced.[59]

2. Showing Cause Why Sentence Should Not Be Pronounced — a. In General. At common law it was absolutely necessary in capital offenses that defendant should be asked by the clerk before sentence if he had anything to say why sentence of death should not be pronounced upon him, and that this should appear of record.[60] According to the decisions of most of the states the court need not in pronouncing sentence, except perhaps in capital cases,[61] ask the prisoner if he has anything to say why sentence should not be pronounced against him.[62] In a few jurisdictions, however, it is necessary to do so.[63]

b. Mitigation or Aggravation of Punishment. At common law it was usual to hear what the accused had to say in mitigation without a verification by oath ;[64] but his affidavit has been received,[65] and where affidavits in mitigation and aggra-

that a defendant who voluntarily absents himself may be sentenced in his absence. Lynch *v.* Com., 88 Pa. St. 189, 32 Am. Rep. 445.

59. See Dodge *v.* People, 4 Nebr. 220; Rhea *v.* U. S., 6 Okla. 249, 50 Pac. 992; Benedict *v.* People, 12 Wis. 313. The statute in California is mandatory, and a failure to comply with it deprives defendant of substantial rights. People *v.* Walker, 132 Cal. 137, 64 Pac. 133. As to what information given the accused about to be sentenced is a sufficient compliance with the statutory requirements see People *v.* Jung Qung Sing, 70 Cal. 469, 11 Pac. 755.

60. **By the ancient common-law procedure,** before judgment was pronounced, the crier of the court made proclamation commanding "all manner of persons to keep silent while sentence of death is passed upon the prisoner at the bar, upon pain of imprisonment." It was not necessary that this statement should appear of record, and its omission seems to have been considered immaterial. 1 Chitty Cr. L. 700.

61. State *v.* Ikenor, 107 La. 480, 32 So. 74; Jones *v.* State, 51 Miss. 718, 24 Am. Rep. 658; Edwards *v.* State, 47 Miss. 581; Rizzolo *v.* Com., 126 Pa. St. 54, 17 Atl. 520.

The omission to put this question to defendant found guilty of murder has been held not to require a reversal of the judgment (Gannon *v.* People, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147), particularly where defendant was represented by counsel (Warner *v.* State, 56 N. J. L. 686, 29 Atl. 595, 44 Am. St. Rep. 415).

In New Mexico, where the record does not show that this question was put to the accused before sentence in a capital case, the judgment will be reversed. Territory *v.* Herrera, (1901) 66 Pac. 523 [*overruling* Territory *v.* Webb, 2 N. M. 147].

62. *Georgia.*— Sarah *v.* State, 28 Ga. 576.

Illinois.— Bressler *v.* People, 117 Ill. 422, 8 N. E. 62, 3 N. E. 521.

Kansas.— State *v.* Lund, 51 Kan. 1, 32 Pac. 657.

Louisiana.— State *v.* Askins, 33 La. Ann. 1253; State *v.* Shields, 33 La. Ann. 991; State *v.* Taylor, 27 La. Ann. 393, 21 Am. Rep. 561.

Massachusetts.— Jeffries *v.* Com., 12 Allen 145.

New Jersey.— Dodge *v.* State, 24 N. J. L. 455; West *v.* State, 22 N. J. L. 212.

North Carolina.—State *v.* Johnson, 67 N. C. 55.

Oregon.— State *v.* Sally, 41 Oreg. 366, 70 Pac. 396.

Pennsylvania.— Com. *v.* Preston, 188 Pa. St. 429, 41 Atl. 534.

Tennessee.— State *v.* Frasier, 6 Baxt. 539.

United States.— Turner *v.* U. S., 66 Fed. 287, 289, 13 C. C. A. 443, 445.

See 15 Cent. Dig. tit. "Criminal Law," § 2512.

63. Croker *v.* State, 47 Ala. 53; Mullen *v.* State, 45 Ala. 43, 6 Am. Rep. 691; People *v.* Jung Qung Lung, 70 Cal. 469, 11 Pac. 755; Dodge *v.* People, 4 Nebr. 220.

The statutes to this effect in California and Nebraska are mandatory. People *v.* Walker, 132 Cal. 137, 64 Pac. 133; McCormick *v.* State, (Nebr. 1902) 92 N. W. 606; Tracey *v.* State, 46 Nebr. 366, 64 N. W. 1069.

The fact that defendant has made motions for a new trial and in arrest of judgment before sentence is passed may constitute a waiver of his right to have this question put to him before sentence. Jeffries *v.* Com., 94 Mass. 145; State *v.* Nagel, 136 Mo. 45, 37 S. W. 821; State *v.* Sally, 41 Oreg. 366, 70 Pac. 396. *Contra,* People *v.* Walker, 132 Cal. 137, 64 Pac. 133.

All that accused could properly be asked at this time, according to the English practice, was if he had anything to say why judgment of death should not be pronounced on him (O'Brien *v.* Reg., 2 H. L. Cas. 465), but in one case at least it has been held that other questions may be asked (Tracey *v.* State, 46 Nebr. 361, 64 N. W. 1069).

An omission of the words "against him" is immaterial, where the record shows that the prisoner was asked if "he had any legal cause to show why judgment should not be pronounced." *Ex p.* Salge, 1 Nev. 449.

64. Respublica *v.* Askew, 2 Dall. (Pa.) 189, 1 L. ed. 343.

65. Reg. *v.* ——, 7 Cox C. C. 4.

In England, where defendant was brought in for sentence on a plea of guilty, counsel for the crown was heard before defendant's coun-

vation are filed the court may properly refuse to hear counsel.[66] In the United States the general rule and practice are not to receive affidavits.[67]

c. "Benefit of Clergy." This phrase originally denoted the exemption which was accorded to clergymen from the jurisdiction of the secular courts, or from arrest or attachment on criminal process issuing from these courts in certain cases. Subsequently it meant a privilege of exemption from the punishment of death on conviction of certain crimes accorded to such persons as were clerks or who could read.[68]

d. Plea of Pardon. A pardon when special or under a general act of amnesty might at common law be pleaded at any time, even after conviction;[69] but if not pleaded until after judgment, although the judgment would be reversed so far as the life of the accused was concerned, the pardon would not reverse the attainder.[70]

e. Plea of Non-Identity. The accused may plead before sentence, in reply to the question why sentence should not be pronounced against him, that he is not the party who has been convicted.[71]

3. Judicial Finding That Accused Is Guilty. In the absence of a statute it is not necessary that the court should before sentence find, as its independent judgment upon the facts, as a condition of its power to sentence, that the accused is guilty.[72]

sel, and the affidavits in aggravation before those in mitigation. Reg. *v.* Dignam, 7 A. & E. 593, 34 E. C. L. 316. Where defendant was brought in for sentence after verdict, the affidavits in mitigation were first read, and then those in aggravation, after which defendant's counsel was heard and then counsel for the prosecution. If no affidavit was produced after trial and verdict of guilty, counsel for defendant was heard, then counsel for the prosecution. Rex *v.* Bunts, 2 T. R. 683.

66. Reg. *v.* Gregory, 1 C. & K. 228, 1 Cox C. C. 31, 47 E. C. L. 228.

67. Rooney's Case, 3 City Hall Rec. (N. Y.) 128 [*citing In re* Hagerman's Case, 3 City Hall Rec. (N. Y.) 73].

Restitution in mitigation.—People *v.* Smith, 94 Mich. 644, 54 N. W. 487; People *v.* Hubbard, 86 Mich. 440, 49 N. W. 265.

The court may consider the moral character of the accused as a guide in determining the punishment to be imposed, and may hear such evidence for this purpose as it may deem necessary. State *v.* Summers, 98 N. C. 702, 4 S. E. 120.

Where the degree of the punishment is affected by the age of the offender, the court may determine his age by its own observation without summoning witnesses. People *v.* Justices Ct. Spec. Sess., 10 Hun (N. Y.) 224.

68. Black L. Dict. And see Bacon Abr. tit. "Felony" C; 4 Blackstone Comm. 365; 1 Chitty Cr. L. 667; Comyns Dig. tit. "Justice"; 2 Hale P. C. 323.

In England the plea of benefit of clergy was abolished by 7 Geo. IV, c. 28, § 6.

In the United States the plea was recognized in the early cases in a few states (State *v.* Carroll, 27 N. C. 139; State *v.* Carroll, 24 N. C. 257; State *v.* Kearney, 8 N. C. 53; State *v.* Gray, 5 N. C. 147; State *v.* Bosse, 8 Rich. (S. C.) 276), but in others it was either not recognized as a common-law privilege (Fuller *v.* State, 1 Blackf. (Ind.) 63), or expressly abolished by statute at a very early date (State *v.* Bilansky, 3 Minn. 246). In capital crimes against the United States benefit of clergy was abolished by section thirty of the act of congress of April 30, 1790.

69. 4 Blackstone Comm. 337; 1 Chitty Cr. L. 467; 2 Hawkins P. C. c. 37, § 59.

70. 1 Chitty Cr. L. 467.

71. This plea may be made particularly where the accused since sentence has been out of custody, or where he has escaped and been retaken. 4 Blackstone Comm. 396; 1 Chitty Cr. L. 777.

At common law the form was for the accused to say, without holding up his hand, that he is not the person mentioned in the record, with the reply by the attorney-general that he is the same and that he is ready to verify it. On issue thus joined a trial by a jury must be immediately had. 1 Chitty Cr. L. 777. On this trial, although the prisoner was at common law allowed to have counsel, he was not given time to produce witnesses unless he would positively swear to his non-identity, nor could he be allowed any peremptory challenges. 4 Blackstone Comm. 396.

Where the offender had escaped, he might be chained during the trial, and if the jury found against him on the issue of identity, execution would immediately be awarded under the original sentence. Rex *v.* Rogers, 3 Burr. 1809.

In Texas it is provided by statute that where a person convicted of a felony escapes after conviction, and before sentence, and a person supposed to be the same is arrested, he may, before sentence is pronounced, deny that he is the person convicted, and have the issue of his identity tried before a jury. No appeal will lie from their decision on this issue. Washington *v.* State, 31 Tex. Cr. 84, 19 S. W. 900.

72. *Ex p.* Roberson, 123 Ala. 103, 26 So. 645, 82 Am. St. Rep. 107; People *v.* Murphy, 188 Ill. 144, 58 N. E. 984; State *v.* Rudd, 97 Iowa 389, 66 N. W. 748; State *v.* Cook, 92 Iowa 483, 61 N. W. 185.

It is sufficient that it should announce that

4. Responsiveness to Verdict. The sentence should in its general terms and in the character of the punishment imposed be responsive to the verdict.[73] If the conviction is for one offense, a judgment for another offense, although of a similar character, is error, even though the penalties be the same.[74]

5. Definiteness of Sentence — a. Must Be Certain. The sentence ought to be certain and definite, so that the prisoner and the officer charged with the execution of the sentence may know its length, if imprisonment, and its amount if a fine, without being required to inspect the record.[75]

b. Commencement and Duration of Imprisonment. A sentence of imprisonment is not void because it fails to specify the time for the imprisonment to commence. It is sufficient if it states the duration and place of imprisonment.[76] Such a sentence cannot be set aside as indefinite and uncertain.[77]

c. Sentence of Death. At common law the time of execution for a capital crime was never part of the sentence itself;[78] the court might either appoint the

he has been duly convicted, and thereupon pronounce sentence. This is a judicial determination of the fact of defendant's conviction, and is all that is required. Davis *v.* Territory, 151 U. S. 262, 14 S. Ct. 328, 38 L. ed. 153.

73. Kidd *v.* Territory, 9 Okla. 450, 60 Pac. 114; Rivers *v.* State, 10 Tex. App. 177; Price *v.* Com., 33 Gratt. (Va.) 819, 36 Am. Rep. 797; *In re* Burns, 113 Fed. 987.

The verdict of the jury gives validity and effect to the judgment so far as the character of the crime is concerned. If therefore the jury by their verdict have determined the character of the crime the court cannot go back of it to any fact of record to aid its sentence. Gaither *v.* State, 21 Tex. App. 527, 1 S. W. 456.

A sentence not stating the place of imprisonment is not a departure from the verdict, where the statute provides where the accused shall be imprisoned. Clemons *v.* State, 92 Tenn. 282, 21 S. W. 525.

74. People *v.* Eppinger, 114 Cal. 350, 46 Pac. 97; State *v.* Williams, 30 La. Ann. 1162; Harland *v.* Territory, 3 Wash. Terr. 131, 13 Pac. 453; State *v.* Hupp, 31 W. Va. 355, 6 S. E. 919. Thus a verdict of conviction of robbery will not necessarily sustain a sentence for grand larceny (State *v.* Howard, 19 Kan. 507), nor will a conviction of buying or receiving stolen goods, under a statute, sustain a sentence for concealing stolen goods (Holtz *v.* State, 30 Ohio St. 486).

Where murder is charged without specifying the degree, and the jury, having a right to find the degree, do not find it to be murder in the first degree, a sentence for murder in the first degree is error. People *v.* Hall, 48 Mich. 482, 12 N. W. 665, 42 Am. Rep. 477.

75. Picket *v.* State, 22 Ohio St. 405; *In re* Moore, 14 Ohio Cir. Ct. 237, 7 Ohio Cir. Dec. 575.

It must not be made to depend on a contingency, nor made subject to a future decision. Morris *v.* State, 1 Blackf. (Ind.) 37; Com. *v.* Patterson, 1 Leg. Chron. (Pa.) 73. Thus a sentence that imprisonment shall begin at some future, indefinite time, depending on a contingent event, is void. *In re* Strickler, 51 Kan. 700, 33 Pac. 620; Cheeseman *v.* People, 2 Mich. N. P. 239.

A sentence of imprisonment to commence after the expiration of "former sentences" is too indefinite to be enforced (Larney *v.* Cleveland, 34 Ohio St. 599), and the same rule of construction was applied to a sentence of imprisonment "to begin after the expiration of the first sentence," where the record did not show when such first sentence began, or for how long it was imposed (Wallace *v.* State, 41 Fla. 547, 26 So. 713).

To annex a condition to a sentence providing for its subsequent remission is irregular (State *v.* Bennett, 20 N. C. 170), and a sentence which imposes a fine, and in default thereof to go to jail, is bad for ambiguity, for it is uncertain whether the imprisonment is to compel payment of the fine or as an alternative punishment (Brownbridge *v.* People, 38 Mich. 751).

Indefinite imprisonment see *infra*, XIX, B, 5.

Indeterminate sentences see *infra*, XIX, B, 6.

76. *California.*— People *v.* Hughes, 29 Cal. 257; People *v.* King, 28 Cal. 265.

Maryland.— Clifford *v.* State, 30 Md. 575.

Nevada.— State *v.* Smith, 10 Nev. 106.

North Carolina.—State *v.* Gaskins, 65 N. C. 320.

Oklahoma.— Jones *v.* Territory, 4 Okla. 45, 43 Pac. 1072.

See 15 Cent. Dig. tit. "Criminal Law," § 2523.

Contra.—Kelly *v.* State, 3 Sm. & M. (Miss.) 518.

Date of commencement of punishment.—All sentences in criminal proceedings take effect and begin to operate from the date of their entry, unless a different date be fixed by the court in the judgment. Hence it is not necessary that the date when punishment begins shall be inserted in the judgment. Rhea *v.* U. S., 6 Okla. 249, 50 Pac. 992; Jones *v.* Territory, 4 Okla. 45, 43 Pac. 1072. See also *Ex p.* Gafford, 25 Nev. 101, 57 Pac. 484, 83 Am. St. Rep. 568.

The duration of the term of imprisonment must be definitely stated. People *v.* Webster, 92 Hun (N. Y.) 378, 36 N. Y. Suppl. 995.

77. Matter of Fry, 3 Mackey (D. C.) 135.

78. 4 Blackstone Comm. 404; 1 Chitty Cr. L. 782. And see State *v.* Oscar, 13 La. Ann.

place of execution or leave it to the sheriff;[79] but where an offender was tried at the assize, the place of execution could not be awarded to another county.[80] In some jurisdictions the executive order fixes both the time and the place of execution, and it is improper for any place to be designated in the sentence.[81]

d. Successive Terms of Imprisonment. Judgment on a conviction of two or more offenses, involving imprisonment for two or more terms in succession, should not fix the date on which each term should begin, but should direct it to commence at the expiration of the term prior thereto, which may be shortened by good conduct or otherwise.[82]

e. Place of Imprisonment. A sentence is not invalid because of a misnomer in the name of the prison,[83] or because it does not specify the particular prison in which the accused shall be incarcerated, where the statute designates the prison.[84]

f. Limits of Imprisonment For Non-Payment of Fine. A sentence imposing imprisonment to compel the payment of a fine should be set aside where it does not limit the imprisonment and end it when the fine is paid,[85] unless the statute limits the time of the imprisonment in default of the payment of a fine.[86]

g. Directing to Whom Fine Shall Be Paid. Although customary to do so, it is not necessary that the judgment should direct to whom a fine shall be paid.[87]

297; McDowell *v.* Couch, 6 La. Ann. 365; Webster *v.* Com., 5 Cush. (Mass.) 386; Cathcart *v.* Com., 37 Pa. St. 108; Rex *v.* Rogers, 3 Burr. 1809.

In some of the United States it is provided by statute that the court (Seaborn *v.* State, 20 Ala. 15), and in others that the executive (Webster *v.* Com., 5 Cush. (Mass.) 386; Cathcart *v.* Com., 37 Pa. St. 108) shall appoint the time of the execution.

79. 4 Blackstone Comm. 404; 1 Chitty Cr. L. 783.

80. 2 Hawkins P. C. c. 51, § 2. By 51 Geo. III, c. 100, § 1, it was provided that the court shall have the power to direct execution either within the district where the crime was perpetrated or in that in which the offender was convicted. The court of king's bench always had power to order a defendant, brought up by habeas corpus before it, to be executed in any county. 1 Chitty Cr. L. 540.

81. Lovett *v.* State, 29 Fla. 356, 11 So. 172.

In Massachusetts the executive officer has power to execute the sentence within the walls of the prison, at his discretion. Webster *v.* Com., 5 Cush. (Mass.) 386.

82. *California.*— People *v.* Forbes, 22 Cal. 135.

Illinois.— Johnson *v.* People, 83 Ill. 431.

Kansas.— State *v.* Lewis, 63 Kan. 268, 65 Pac. 257; *In re* White, 50 Kan. 299, 32 Pac. 36.

Nebraska.— *In re* Walsh, 37 Nebr. 454, 55 N. W. 1075.

Texas.— *In re* Hunt, 28 Tex. App. 361, 13 S. W. 145.

See 15 Cent. Dig. tit. "Criminal Law," § 2525.

This is not required where the statute expressly provides that the successive terms shall begin at the expiration of their predecessors' (*Ex p.* Durbin, 102 Mo. 100, 14 S. W. 821; *Ex p.* Jackson, 96 Mo. 116, 8 S. W. 800. See also Fuller *v.* State, 97 Ala. 27, 12 So. 392), and the order of the terms, unless otherwise provided by the court, will be determined by the order in which the judgments are rendered (Mieir *v.* McMillan, 51 Iowa 240, 1 N. W. 525).

Under a statute which authorizes a prisoner to be tried during his term of confinement, a sentence of imprisonment to commence at the expiration of any and all terms of imprisonment he is then undergoing is valid. *Ex p.* Ryan, 10 Nev. 261.

A sentence of a convict for an offense committed in prison, to commence at the expiration of his present term, is valid. People *v.* Huntley, 112 Mich. 569, 71 N. W. 178. See also *In re* Lanphere, 61 Mich. 105, 27 N. W. 882; Bloom's Case, 53 Mich. 597, 19 N. W. 200.

Double punishment see *infra*, XIX, C, 14.

83. *In re* Burger, 39 Mich. 203.

84. Weed *v.* People, 31 N. Y. 465; People *v.* Parr, 4 N. Y. Cr. 545; Clemons *v.* State, 92 Tenn. 282, 21 S. W. 525.

Where the statute does this, a sentence that he shall be confined in some other place of imprisonment is void. People *v.* Cavanagh, 1 Park. Cr. (N. Y.) 588.

85. State *v.* Prince, 42 La. Ann. 817, 8 So. 591; Brownbridge *v.* People, 38 Mich. 571.

Specified time.— Where the sentence commits defendant in default of a fine for a specified time, it need not provide that he may be released at any time upon payment of the fine, as that will be presumed. Flanagan *v.* Treasurer, 44 N. J. L. 118.

86. Jackson *v.* Boyd, 53 Iowa 536, 5 N. W. 734. *Compare Ex p.* Sing Ah Tong, 84 Cal. 165, 24 Pac. 181.

87. Barth *v.* State, 18 Conn. 432. But see Grim *v.* Reinbold, 3 Pa. Dist. 668, 13 Pa. Co. Ct. 545, holding that if the judgment directs the fine to be paid to the commonwealth it will be distributed according to law, but that a judgment merely to pay the fine without any direction whatever is erroneous.

The rule appears to be that the judgment may either be general, leaving the fine to be

h. Imprisonment at Hard Labor. A sentence of the accused to the state's prison need not expressly state that he is to be put at hard labor, where the statute[88] provides that mode of punishment for convicts sentenced thereto.[89] Where it is provided by statute that in cases where punishment in the state prison is awarded the sentence shall be partly to hard labor and partly to solitary confinement, a sentence to imprisonment is erroneous which fails to direct as to either the period of hard labor or of solitary confinement.[90] Under a statute empowering the court in certain cases to impose an additional sentence at hard labor for unpaid costs it is proper for the sentence to specify the amount of the costs, the time defendant is to serve, and at what rate per day;[91] and it is reversible error where the sentence does not specify either the number of days or the rate per day.[92]

6. Construction of Sentence. A sentence that defendants be confined in the penitentiary "all their natural lifetime" means that each one of them shall be so confined.[93] Where an indictment charges in separate counts the commission and

distributed according to law, or it may be special and direct to whom it shall be paid. Orleans Parish *v.* Morgan, 6 Mart. N. S. (La.) 3.

If a statute appropriates a fine in a certain way, it is error if the judgment disposes of it in a different manner. Werfel *v.* Com., 5 Binn. (Pa.) 65.

Where part of a fine goes to the person injured, there should not be a severance of the judgment, but judgment should be rendered in favor of the state for the use of the county, for the whole amount of the fine to be collected as other fines on convictions of misdemeanor. Bass *v.* State, 63 Ala. 108.

88. If the statute does not provide for hard labor as a part of the punishment, it should not be included in the sentence, although it may be a part of the discipline of the state penitentiary where the accused is imprisoned. Gardes *v.* U. S., 87 Fed. 172, 30 C. C. A. 596.

89. *Indiana.*— O'Herrin *v.* State, 14 Ind. 420.

Iowa.— State *v.* Cole, 63 Iowa 695, 17 N. W. 183.

Minnesota.—State *v.* Wolfer, 68 Minn. 465, 71 N. W. 681.

New Jersey.— Gibbs *v.* State, 46 N. J. L. 353, 45 N. J. L. 379, 46 Am. Rep. 782.

New York.— Done *v.* People, 5 Park. Cr. 364.

See 15 Cent. Dig. tit. "Criminal Law," § 2526.

A judgment omitting the words "at hard labor" under such a statute is not void, but merely irregular in form and cannot be collaterally attacked on habeas corpus. State *v.* Wolfer, 68 Minn. 465, 71 N. W. 681.

A sentence "to hard labor" is not erroneous, although the language of the statute merely directs imprisonment in the penitentiary, if under the statutes such imprisonment necessarily involves involuntary labor. Brown *v.* State, 74 Ala. 478.

A sentence to hard labor, by a municipal court, which has power only to fine and imprison, is illegal and void. *Ex p.* Reynolds, 87 Ala. 138, 6 So. 335; *In re* Long, 87 Ala. 46, 6 So. 328; *Ex p.* Kelly, 65 Cal. 154, 3 Pac. 673.

In courts of the United States the judgment must conform strictly to the statute, and the omission of the words "at hard labor" renders the verdict void, although the statute provides that whenever the punishment or any part of it is imprisonment it shall be at hard labor. *Ex p.* Karstendick, 93 U. S. 396, 23 L. ed. 889; Harman *v.* U. S., 50 Fed. 921; *In re* Johnson, 46 Fed. 477. But see *Ex p.* Geary, 10 Fed. Cas. No. 5,293, 2 Biss. 485.

90. Stevens *v.* Com., 4 Metc. (Mass.) 360; Peglow *v.* State, 12 Wis. 534; Benedict *v.* State, 12 Wis. 313; Fitzgerald *v.* State, 4 Wis. 395.

The aggregate of the hard labor and solitary confinement must be kept within the maximum term of imprisonment. Stevens *v.* Com., 4 Metc. (Mass.) 360.

Where a statute prescribes that when imprisonment at hard labor is awarded the sentence must be executed in the state's prison, jail, or house of correction, the form of the sentence, in the case of a sentence to the house of correction, should be that provided for punishment in the state's prison, which requires solitary imprisonment as well as hard labor. Lane *v.* Com., 161 Mass. 120, 36 N. E. 755.

91. Walton *v.* State, 62 Ala. 197; Walker *v.* State, 58 Ala. 393; Coleman *v.* State, 55 Ala. 173.

Failure to specify the amount of the costs or the time of service, while not considered good practice, was not reversible error under the Alabama statute (Tolbert *v.* State, 87 Ala. 27, 6 So. 284; Hill *v.* State, 78 Ala. 1; Walker *v.* State, 58 Ala. 393; McIntosh *v.* State, 52 Ala. 355) until the act of 1895, which expressly requires the court in such cases to "determine the time required to work out such costs" (Linnehan *v.* State, 120 Ala. 293, 25 So. 6).

Where the jury fixes punishment at imprisonment only and no fine is imposed, the court cannot sentence to hard labor for costs. Hollis *v.* State, 123 Ala. 74, 26 So. 231; *Ex p.* Hill, 122 Ala. 114, 26 So. 230.

92. Armstrong *v.* State, 83 Ala. 49, 3 So. 431.

Refusal to fix the rate per day on motion of defendant is error. McDaniel *v.* State, 53 Ala. 522.

93. White *v.* State, 30 Ala. 518.

an attempt to commit a certain crime, and a general verdict of guilty is rendered, a sentence for "the offense in the indictment charged" is for the greater offense only into which the lesser is merged.[94]

7. EXCESSIVE AND PARTLY ERRONEOUS SENTENCES. Although there is some conflict in the cases upon the question whether a sentence which imposes a punishment in excess of the power of the court to impose is void *in toto*, or is void only as to the excess, the weight of authority sustains the proposition that such a sentence is valid to the extent that the court had power to impose it, although void as to the excess.[95] But where the erroneous sentence is not severable into parts, one of which may be complete and valid under the statute, although the other is invalid, the whole sentence is void, and the accused may be discharged on a writ of

94. Cook *v.* State, 24 N. J. L. 843.

A direction that defendant pay a fine to the treasurer of a town does not mean that he shall pay it in person into the hands of the treasurer, but that it shall be paid over ultimately to such person. State *v.* Harding, 39 Conn. 561.

Conflicting sentences for same offense.— If two judgments are rendered and filed at the same time for the same offense, but each contains a different sentence, the real sentence is void for uncertainty (Davis *v.* Catron, 22 Wash. 183, 60 Pac. 131), and where the accused is sentenced at different times to two different punishments, to be inflicted at different places, and of different duration, the last sentence is void, although the first is valid (State *v.* Davis, 31 La. Ann. 249).

95. Hence on the return of a habeas corpus the whole sentence is not void *ab initio*, but it is good so far as it is within the power of the court, and defendant is not entitled to his discharge unless he has served out so much of the sentence as is valid.

Alabama.— *Ex p.* Simmons, 62 Ala. 416.

California.— *Ex p.* Soto, 88 Cal. 624, 26 Pac. 530; *Ex p.* Erdmann, 88 Cal. 579, 26 Pac. 372; Lowrey *v.* Hogue, 85 Cal. 600, 24 Pac. 995; *Ex p.* Mitchell, 70 Cal. 1, 11 Pac. 488.

Florida.— *Ex p.* Bowen, 25 Fla. 214, 6 So. 65.

Illinois.— Armstrong *v.* People, 37 Ill. 459.

Kansas.— *In re* Paschal, 56 Kan. 123, 42 Pac. 373.

Louisiana.— State *v.* Brannon, 34 La. Ann. 942.

Massachusetts.— Sennot's Case, 146 Mass. 489, 16 N. E. 448, 4 Am. St. Rep. 344; *In re* Feeley, 12 Cush. 598.

Nevada.— *Ex p.* Ryan, 17 Nev. 139, 28 Pac. 1040.

New York.— People *v.* Kelly, 97 N. Y. 212 [*affirming* 32 Hun 536]; People v. Baker, 89 N. Y. 460; People *v.* Jacobs, 66 N. Y. 8; People *v.* Liscomb, 60 N. Y. 559, 19 Am. Rep. 211 [*reversing* 3 Hun 760, 6 Thomps. & C. 258]; *In re* Sweatman, 1 Cow. 144.

North Carolina.—State *v.* Taylor, 124 N. C. 803, 32 S. E. 548; State *v.* Crowell, 116 N. C. 1052, 21 S. E. 502.

Ohio.— *Ex p.* Van Hagan, 25 Ohio St. 426; *Ex p.* Shaw, 7 Ohio St. 81, 70 Am. Dec. 55.

South Carolina.— *Ex p.* Bond, 9 S. C. 80, 30 Am. Rep. 20.

South Dakota.— *In re* Taylor, 7 S. D. 382, 64 N. W. 253, 58 Am. St. Rep. 843, 45 L. R. A. 136.

Utah.— *Ex p.* Lewis, 10 Utah 47, 41 Pac. 1077; People *v.* Reggel, 8 Utah 21, 28 Pac. 955.

West Virginia.— *Ex p.* Mooney, 26 W. Va. 36, 53 Am. Rep. 59.

Wisconsin.— *In re* Graham, 76 Wis. 366, 44 N. W. 1105, 74 Wis. 450, 43 N. W. 148, 17 Am. St. Rep. 174; *In re* Pierce, 44 Wis. 411; *In re* Crandall, 34 Wis. 177.

United States.— U. S. *v.* Pridgeon, 153 U. S. 48, 14 S. Ct. 746, 38 L. ed. 631 [*overruling* 57 Fed. 200]; *In re* Bonner, 151 U. S. 242, 14 S. Ct. 323, 38 L. ed. 149; *In re* Swan, 150 U. S. 637, 14 S. Ct. 225, 37 L. ed. 1207; *In re* Graham, 138 U. S. 461, 11 S. Ct. 363, 34 L. ed. 1051; *Ex p.* Lange, 18 Wall. 163, 21 L. ed. 872; Woodruff *v.* U. S., 58 Fed. 766; Harman *v.* U. S., 50 Fed. 921; *In re* Johnson, 46 Fed. 477.

See 15 Cent. Dig. tit. "Criminal Law," § 2528.

In other words the sentence is not void as being beyond the jurisdiction of the court, and the accused is not entitled to a new trial. The judgment is voidable only by proceedings upon writ of error. Sennot's Case, 146 Mass. 489, 16 N. E. 448, 4 Am. St. Rep. 344.

Illustrations of separable sentences.—Where a court has power to sentence to fine "or" imprisonment, and sentences to fine "and" imprisonment, the sentence is separable, and on payment of the fine or on serving the imprisonment, the accused must be discharged. *In re* Feeley, 12 Cush. (Mass.) 598; *In re* Stewart, 16 Nebr. 193, 20 N. W. 255; *Ex p.* Lange, 18 Wall. (U. S.) 163, 21 L. ed. 872. So where the statute fixes the punishment at not exceeding six months' imprisonment or a fine, or both, and the sentence is for three years, the prisoner should be released at the expiration of six months. *Ex p.* Bulger, 60 Cal. 438. A sentence of imprisonment is not void because of the unauthorized addition of "hard labor" during the prisoner's confinement. *Ex p.* Simmons, 62 Ala. 416; U. S. *v.* Pridgeon, 153 U. S. 48, 63, 14 S. Ct. 746, 38 L. ed. 631.

The whole judgment on a commitment for contempt is not void because it attempts to impose upon the party the costs of another proceeding, because it does not specify their amount (*Ex p.* Henshaw, 73 Cal. 486, 15

habeas corpus, especially where the court who hears the application for the writ has no power to pass the proper sentence or to remand the case to the trial court for that purpose.[96]

8. Erroneous Sentence Below Minimum Punishment. In regard to sentences which are lighter than the minimum punishment provided by the statute, the rule in most jurisdictions is that where the punishment imposed is not of a different kind from that which the statute prescribes, the accused cannot claim to have been prejudiced thereby, and is not entitled to an appeal.[97] Nor is such a sentence ground for discharge on habeas corpus because of the insufficiency of the punishment imposed.[98] Hence where a party convicted ought under a statute to be sentenced to two distinct and independent punishments, as fine and imprisonment, it is not error[99] nor ground for his discharge[1] that he is sentenced only to one of such punishments. Other cases hold that any departure in the sentence from the express terms of the statute, whether as to the form or the extent of the punishment, is error;[2] and such is the uniform rule in the federal courts.[3]

9. Modifying, Vacating, and Revising Sentence — a. In General. At any time during the term the court has power to reconsider the judgment, and to revise and correct it by mitigating and even by increasing its severity, where the original sentence has not been executed or put into operation;[4] but where the pris-

Pac. 110; *Ex p.* Crenshaw, 80 Mo. 447), or because it includes items of costs and expenses which ought not to be allowed (People *v.* Jacobs, 66 N. Y. 8).

96. *Alabama.*— *Ex p.* Reynolds, 87 Ala. 138, 6 So. 335; *In re* Long, 87 Ala. 46, 6 So. 328.

California.— *Ex p.* Sylvester, 81 Cal. 199, 22 Pac. 550; *Ex p.* Kelly, 65 Cal. 154, 3 Pac. 673; *Ex p.* Baldwin, 60 Cal. 432.

Idaho.— *Ex p.* Cox, 3 Ida. 530, 32 Pac. 197, 95 Am. St. Rep. 29.

Indiana.— Lefforge *v.* State, 129 Ind. 551, 29 N. E. 34.

Missouri.— *Ex p.* Page, 49 Mo. 291.

Nebraska.— *In re* Stewart, 16 Nebr. 193, 20 N. W. 255.

New York.— People *v.* Carter, 48 Hun 165; People *v.* Riseley, 38 Hun 280.

Pennsylvania.— Krœmer *v.* Com., 3 Binn. 577.

Texas.— *Ex p.* McGrew, 40 Tex. 472.

United States.— *Ex p.* Belt, 159 U. S. 95, 15 S. Ct. 987, 40 L. ed. 88; *In re* Johnson, 46 Fed. 477.

England.— Rex *v.* Bourne, 7 A. & E. 58, 34 E. C. L. 55; Rex *v.* Ellis, 5 B. & C. 395, 11 E. C. L. 512.

See 15 Cent. Dig. tit. "Criminal Law," § 2528.

97. *Illinois.*— Harmison *v.* Lewistown, 153 Ill. 313, 38 N. E. 628, 46 Am. St. Rep. 893; McQuoid *v.* People, 8 Ill. 76; Ballard *v.* Chicago, 69 Ill. App. 638.

Louisiana.— State *v.* Evans, 23 La. Ann. 525.

Michigan.— People *v.* Rouse, 72 Mich. 59, 40 N. W. 57.

Missouri.— Barada *v.* State, 13 Mo. 94.

New York.— People *v.* Bauer, 37 Hun 407.

Tennessee.— Wattingham *v.* State, 5 Sneed 64. But see Murphy *v.* State, 7 Coldw. 516.

See 15 Cent. Dig. tit. "Criminal Law," § 2510 *et seq.*

Harmless error see *infra*, XVII, G, 6, h, (II)-(IV).

98. State *v.* Klock, 48 La. Ann. 67, 18 So. 957, 55 Am. St. Rep. 259; *In re* Williams, 39 Minn. 172, 39 N. W. 65; *Ex p.* Shaw, 7 Ohio St. 81, 70 Am. Dec. 55.

99. McQuoid *v.* People, 8 Ill. 76; Kane *v.* People, 8 Wend. (N. Y.) 203; Dillon *v.* State, 38 Ohio St. 586.

1. State *v.* Klock, 48 La. Ann. 67, 18 So. 957, 55 Am. St. Rep. 259.

2. Taff *v.* State, 39 Conn. 82; Taylor *v.* State, 35 Wis. 298; Haney *v.* State, 5 Wis. 529; U. S. *v.* Harman, 68 Fed. 472; Woodruff *v.* U. S., 58 Fed. 766; Harman *v.* U. S., 50 Fed. 921; Whitehead *v.* Reg., 7 Q. B. 582, 9 Jur. 594, 14 L. J. M. C. 165, 53 E. C. L. 582.

Where the statute requires part of the term of imprisonment to be at hard labor and part in solitary confinement, a sentence directing the whole to be at hard labor, although more favorable to the accused, is error. Stevens *v.* Com., 4 Metc. (Mass.) 360.

3. Woodruff *v.* U. S., 58 Fed. 766; Harman *v.* U. S., 50 Fed. 921.

A sentence to simple imprisonment where the statute prescribes imprisonment at hard labor is void, and the accused may be released on habeas corpus, as the sentence is invalid because not including all of the statutory penalty. *Ex p.* Karstendick, 93 U. S. 396, 23 L. ed. 889; *In re* Johnson, 46 Fed. 477.

4. *California.*— People *v.* Thompson, 4 Cal. 238.

Georgia.— Jobe *v.* State, 28 Ga. 235.

Iowa.—State *v.* Daugherty, 70 Iowa 439, 30 N. W. 685.

Kansas.— State *v.* Hughes, 35 Kan. 626, 12 Pac. 28, 57 Am. Rep. 195.

Massachusetts.— Com. *v.* Weymouth, 2 Allen 144, 79 Am. Dec. 776.

Michigan.— See People *v.* Dane, 81 Mich. 36, 45 N. W. 655.

New York.— Miller *v.* Finkle, 1 Park. Cr. 374. And see People *v.* Trimble, 60 Hun (N. Y.) 364, 15 N. Y. Suppl. 60; People *v.* Davis, 19 N. Y. Suppl. 781.

oner has paid his fine or his imprisonment has begun, the court has no power to recall him to revoke his former sentence and impose one which inflicts a greater punishment.[5] So also where the court has imposed a fine and imprisonment, where it had power under the statute only to punish by fine or imprisonment, and the fine has been paid, it cannot, even during the same term, impose imprisonment instead of the former sentence.[6] The power of the court to alter a sentence during the term should not, be exercised arbitrarily and without sufficient cause.[7]

b. At Subsequent Term. After the term is passed at which the original sentence was imposed, the court has as a general rule no power to modify, amend, or revise it, particularly if the new punishment is in excess of the original sentence.[8] Changes in the sentence, however, which do not alter the punishment but only change the time or place of its infliction may be made at a subsequent term.[9]

c. Presence of Accused. As the time and place of execution are not strictly speaking part of a sentence of death, it is not necessary that the accused should be present when a change is made in them,[10] nor need he be present at the writing out and signing of a prior oral sentence,[11] or where an order is made changing the place of confinement.[12]

North Carolina.— *In re* Brittain, 93 N. C. 587; State *v.* Warren, 92 N. C. 825.

Ohio.— Lee *v.* State, 32 Ohio St. 113.

Oregon.— State *v.* Combs, 19 Oreg. 295, 24 Pac. 235.

Pennsylvania.— Com. *v.* Baranowski, 6 Pa. Co. Ct. 157; Com. *v.* Brown, 12 Phila. 600; Com. *v.* Patterson, 1 Leg. Chron. 73. *Compare* Com. *v.* Mayloy, 57 Pa. St. 291.

Tennessee.— Whitney *v.* State, 6 Lea 247.

Texas.— Purcelly *v.* State, 29 Tex. App. 1, 13 S. W. 993.

Virginia.— Logan's Case, 5 Gratt. 692.

United States.— *Ex p.* Lange, 18 Wall. 163, 21 L. ed. 872; Nichols *v.* U. S., 106 Fed. 672, 46 C. C. A. 405; *Ex p.* Casey, 18 Fed. 86; U. S. *v.* Harmison, 26 Fed. Cas. No. 15,308, 3 Sawy. 556.

England.— Rex *v.* Price, 6 East 323, 2 Smith K. B. 525; Rex *v.* Leicestershire Justices, 1 M. & S. 442; Rex *v.* Fletcher, R. & R. 43; Turner *v.* Barnaby, 2 Salk. 566; Reg. *v.* Fitzgerald, 1 Salk. 401; 1 Chitty Cr. L. 722.

See 15 Cent. Dig. tit. "Criminal Law," § 2531.

5. *Maine.*— Brown *v.* Rice, 57 Me. 55, 2 Am. Rep. 11.

Massachusetts.— Com. *v.* Foster, 122 Mass. 317, 23 Am. Rep. 326.

Michigan.— *In re* Mason, 8 Mich. 70.

Mississippi.— McCarthy *v.* State, 56 Miss. 294.

Nebraska.— *In re* Jones, 35 Nebr. 499, 53 N. W. 468.

New York.— People *v.* Duffy, 5 Barb. 205; People *v.* Brown, 23 Wend. 47.

North Carolina.— State *v.* Crook, 115 N. C. 760, 20 S. E. 513, 29 L. R. A. 260; *In re* Brittain, 93 N. C. 587; State *v.* Warren, 92 N. C. 825.

Ohio.— *In re* Habeas Corpus, 5 Ohio S. & C. Pl. Dec. 571, 7 Ohio N. P. 604.

Oregon.— State *v.* Cannon, 11 Oreg. 312, 2 Pac. 191.

Pennsylvania.—Com. *v.* Workhouse Keeper, 6 Pa. Super. Ct. 420.

United States.— *In re* Hartwell, 11 Fed. Cas. No. 6,173, 1 Lowell 536.

See 15 Cent. Dig. tit. "Criminal Law," § 2531.

Where the first sentence goes into effect the day it was pronounced, and on the following day defendants are brought into court, the original sentence set aside and a new sentence pronounced, the second is void because punishment has been partially served under the first sentence. People *v.* Kelley, 79 Mich. 320, 44 N. W. 615; People *v.* Meservey, 76 Mich. 223, 42 N. W. 1133.

Where a sentence had been begun and the jailer refused to carry it out because not permitted to receive federal prisoners for the term of imprisonment inposed, it was held that the court had authority to recall the prisoner, set aside the sentence, and impose a shorter term. *In re* Graves, 117 Fed. 798.

6. Pifer *v.* Com., 14 Gratt. (Va.) 710; *Ex p.* Lange, 18 Wall. (U. S.) 163, 21 L. ed. 872.

7. Meaders *v.* State, 96 Ga. 299, 22 S. E. 527.

8. *Illinois.*— People *v.* Whitson, 74 Ill. 20.

Massachusetts.— Com. *v.* Foster, 122 Mass. 317, 23 Am. Rep. 326.

Mississippi.— McCarthy *v.* State, 56 Mass. 294.

Pennsylvania.— Com. *v.* Mayloy, 57 Pa. St. 291.

United States.— *Ex p.* Friday, 43 Fed. 916.

See 15 Cent. Dig. tit. "Criminal Law," § 2531.

It is said by Lord Coke: "Yet during the terme wherein any judiciall act is done, the record remaineth in the brest of the judges of the court, and in their remembrance, and therefore the roll is alterable during that terme, as the judges shall direct; but when that terme is past, then the record is in the roll, and admitteth no alteration, averment, or proofe to the contrarie." Coke Litt. 260*a*.

9. State *v.* Cardwell, 95 N. C. 643; Kingen *v.* Kelley, 3 Wyo. 566, 28 Pac. 36, 15 L. R. A. 177.

10. Schwab *v.* Berggren, 143 U. S. 442, 12 S. Ct. 525, 36 L. ed. 218.

11. Plain *v.* State, 60 Ga. 284.

12. *Ex p.* Waterman, 33 Fed. 29.

d. Remission of Part of Penalty. The prosecuting attorney has no authority to remit a part of the sentence where the jury, under an erroneous instruction as to the minimum penalty allowable, have assessed it at an amount greater than that prescribed by statute.[13]

10. Waiver and Correction of Error. It has been held in regard to some irregularities in rendering judgment or pronouncing sentence that any objection must be promptly made or will be deemed to have been waived.[14] The irregularity in failing to ask a prisoner if he has anything to say why sentence should not be pronounced upon him may be cured by again calling him to the bar and imposing the sentence with the proper formalities.[15]

11. Surplusage. Words or phrases in the judgment which do not add to or change the mode of the punishment do not invalidate the sentence, but may be rejected as surplusage.[16]

E. Entry of Judgment and Correction of Record — 1. Necessity and Mode of Entry. Although it is not necessary that the judgment shall be drawn up by the judge,[17] it is necessary that it shall be properly entered by the clerk as the judgment of the court before it can be executed.[18] Sentence may be entered by the clerk from the indictment and other papers without any memoranda in the judge's minutes that sentence has been pronounced.[19]

2. Requisites of Record — a. General Rule as to Form. The record of the entry of the judgment should contain a concise statement of all facts necessary to give jurisdiction, or to show that proper proceedings have been had during the trial from the presentment down to the passing of the sentence, which would sustain a valid judgment.[20] Modern cases have, however, materially departed from the strictness of the early common-law rules as to the facts which the record of the judgment should contain.[21]

13. Defendant in such a case is entitled to a new trial. Allen *v.* Com., 2 Leigh (Va.) 727.

14. This rule has been applied to the case of a judgment rendered within the period which the statute declares must intervene between the verdict and judgment (People *v.* Johnson, 88 Cal. 171, 25 Pac. 1116; People *v.* Mess, 65 Cal. 174, 3 Pac. 670), and to the failure of the court to ask if the accused has anything to say why sentence should not be pronounced, before sentencing him to imprisonment (Grady *v.* State, 11 Ga. 253), or in some jurisdictions even in a capital case (State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89).

15. Reynolds *v.* State, 68 Ala. 502.

16. *Maryland.*—Davis *v.* State, 3 Harr. & J. 154.

Michigan.— People *v.* Wright, 89 Mich. 70, 50 N. W. 792.

Nevada.— *Ex p.* Maher, 25 Nev. 422, 62 Pac. 1.

New Jersey.— Dodge *v.* State, 24 N. J. L. 455.

Pennsylvania.— Weaver *v.* Com., 29 Pa. St. 445.

See 15 Cent. Dig. tit. "Criminal Law," § 2530.

17. State *v.* Lake, 34 La. Ann. 1069.

18. 1 Chitty Cr. L. 720. And see People *v.* Bradner, 44 Hun (N. Y.) 233 [*affirming* 10 N. Y. St. 667].

19. Gonzales *v.* State, 35 Tex. Cr. 339, 33 S. W. 363, 60 Am. St. Rep. 51.

20. *Alabama.*— Wright *v.* State, 103 Ala. 95, 15 So. 506.

New Jersey.— Miller *v.* Camden, 63 N. J. L. 501, 43 Atl. 1069.

Texas.— Boggs *v.* State, (Cr. App. 1897) 40 S. W. 306; Williams *v.* State, (Cr. App. 1897) 40 S. W. 283; Wood *v.* State, 37 Tex. Cr. 89, 38 S. W. 623; Newman *v.* State, (Cr. App. 1897) 38 S. W. 605.

Washington.— Regan *v.* Territory, 1 Wash. Terr. 31.

Wisconsin.— Benedict *v.* State, 12 Wis. 313.

See 15 Cent. Dig. tit. "Criminal Law," § 2532 *et seq.*; and 1 Chitty Cr. L. 720.

"It is therefore considered by the court," etc., is the form used in the English courts. Rex *v.* Kenworthy, 1 B. & C. 711, 3 D. & R. 173, 8 E. C. L. 300, holding that a judgment in the form "It is therefore ordered," is erroneous. This form has been approved in the United States (Lovett *v.* State, 29 Fla. 356, 11 So. 172; Strong *v.* State, 57 Ind. 428), and is a sufficient statement that the guilt of defendant has been adjudicated (Roberson *v.* State, 123 Ala. 55, 26 So. 645). Other forms, however, have been allowed by the courts in some of the states. Driggers *v.* State, 123 Ala. 46, 26 So. 512; Wilkinson *v.* State, 106 Ala. 23, 17 So. 458; People *v.* Johnson, 88 Cal. 171, 25 Pac. 1116; People *v.* Wheatley, 88 Cal. 114, 26 Pac. 95; State *v.* Bassett, 34 La. Ann. 1108; State *v.* Lake, 34 La. Ann. 1069; Jones *v.* Territory, 4 Okla. 45, 43 Pac. 1072.

21. A clear and concise statement of the names of the parties, the character of the offense, the verdict, the sentence passed upon it, and the penalty imposed has been held

b. Description of Offense. Both at common law and now usually by statute the judgment must state concisely and intelligibly the offense of which defendant was convicted.[22] An entry that the accused was convicted of a misdemeanor is proper.[23] Where the judgment record enables the elements and character of the crime to be ascertained by a reference to the indictment,[24] where it contains a reference to the verdict returned against him,[25] or speaks of his having been found guilty or convicted[26] of a particular and specifically mentioned crime, the description of the crime is sufficient.

c. Findings of Facts to Fix Punishment. Under a statute requiring that where a defendant pleads guilty, the court shall proceed to examine witnesses to determine the degree of the crime and give sentence accordingly, it is not necessary that the record should show that such evidence was taken.[27]

d. Signature and Authentication. It is not necessary that the judgment record should be signed by the trial judge, unless it is so required by statute.[28]

sufficient, without setting out all the facts constituting the record.

California.— People *v.* Douglass, 87 Cal. 281, 25 Pac. 417; *In re* Ring, 28 Cal. 247.

Georgia.— Smith *v.* State, 60 Ga. 430.

Louisiana.—State *v.* Reed, 52 La. Ann. 271, 26 So. 826.

Nevada.— *Ex p.* Salge, 1 Nev. 449.

Texas.— Mayfield *v.* State, 40 Tex. 289; Butler *v.* State, 1 Tex. App. 638.

Wisconsin.— Franz *v.* State, 12 Wis. 536.

See 15 Cent. Dig. tit. "Criminal Law," § 2536 *et seq.*

A record which shows what the offense was, and that the sentence was the judgment of the court and of the law, pronounced upon defendant because of his conviction, is a sufficient judgment. White *v.* U. S., 164 U. S. 100, 17 S. Ct. 38, 41 L. ed. 365.

Judgment on several counts.— The record of judgment is not invalidated because no entry is made of the judgment of acquittal on those counts on which there was no conviction, inasmuch as a verdict of acquittal might be proved if necessary without proof of the judgment. West *v.* State, 22 N. J. L. 212.

The record need not show that defendant was personally present at the hearing of, and ruling upon, a motion for a new trial (Williams *v.* State, 42 Fla. 210, 27 So. 869), that the information was read aloud to him (Com. *v.* Fairchild, 9 Kulp (Pa.) 211, 21 Pa. Co. Ct. 310), or set out the order of the court to the sheriff to summon special jurors (Parnell *v.* State, 129 Ala. 6, 29 So. 860).

22. *Ex p.* Dela, 25 Nev. 346, 60 Pac. 217, 83 Am. St. Rep. 603; People *v.* O'Neil, 47 Hun (N. Y.) 155; Matter of Cavanagh, 10 How. Pr. (N. Y.) 27; Longoria *v.* State, (Tex. Cr. App. 1898) 44 S. W. 1089. *Compare* Schirmacher *v.* State, (Tex. Cr. App. 1898) 45 S. W. 802.

A slight misnaming or mistake in describing a crime in the record (Cole *v.* People, 37 Mich. 544) is not material, but the entry of judgment for an entirely different offense from that charged in the information is error. People *v.* Johnson, 71 Cal. 384, 12 Pac. 261.

Where an indictment charges two offenses, and the plea is, "Guilty of the offense charged," the judgment is not sufficiently certain to be a bar to future prosecutions. State *v.* Schuler, 109 Iowa 111, 80 N. W. 213. See also Jacobs *v.* State, 42 Tex. Cr. 353, 59 S. W. 1111.

23. *Ex p.* Murray, 43 Cal. 455; People *v.* Cavanagh, 2 Abb. Pr. (N. Y.) 84, 2 Park Cr. (N. Y.) 650 [*reversing* 10 How. Pr. 27, 1 Park. Cr. 588].

24. Hawkins *v.* State, 9 Ala. 137, 44 Am. Dec. 431; People *v.* Sam Lung, 70 Cal. 515, 11 Pac. 673.

Where the verdict was "guilty in manner and form as charged in the indictment," and the judgment, in its caption, but not in its body, showed the indictment was for murder, it was held that the judgment sufficiently specified the crime, as all parts of the record should be read together. People *v.* Murphy, 188 Ill. 144, 58 N. E. 984.

25. Pointer *v.* U. S., 151 U. S. 396, 14 S. Ct. 410, 38 L. ed. 208.

26. Webb *v.* State, 106 Ala. 52, 18 So. 491; People *v.* Perez, 87 Cal. 122, 25 Pac. 262; State *v.* Cook, 92 Iowa 483, 61 N. W. 185.

27. *Ex p.* Woods, (Cal. 1895) 41 Pac. 796. But see Hays *v.* State, 30 Tex. App. 472, 17 S. W. 1063, holding that the record must show the finding of the jury as to the age of defendant, in cases where his age affects the degree of the punishment.

Any judgment which shows the conclusion derived from the examination is sufficient. People *v.* Noll, 20 Cal. 164.

28. Wilson *v.* State, 69 Ga. 224; Kambieskey *v.* State, 26 Ind. 225; State *v.* Lake, 34 La. Ann. 1069; Com. *v.* Cummings, 3 Pa. L. J. 265.

If the signature of a judge is required, it may be attached by any of the justices in office when the judgment purports to be signed. Stone *v.* State, 20 N. J. L. 404.

Where a statute requires that each day's proceedings shall be entered at large in a book, and shall be signed by the presiding judge, it has been held that his signature to the proceedings of the last day of a term is sufficient to sustain a verdict of guilty entered on a day prior thereto, the record of which he has not signed (Weatherman *v.* Com., 91 Va. 796, 22 S. E. 349. See also Hurley *v.* State, 35 Tex. Cr. 282, 33 S. W. 354), but under a similar statute judgment

e. Effect of Clerical Errors. The presence of clerical errors in the record of the judgment or the omission of immaterial recitals does not invalidate the judgment.[29]

3. AMENDMENT — a. Inherent Power of Court. All cases agree that the court has an inherent power during the term to amend its record as to all ministerial acts therein, and to correct by amendment clerical errors or omissions in any and all of the papers constituting its record, so as to make the record conform to the facts in the case.[30]

b. Before and After Term. The general rule that in the absence of statute no amendment can be made in the record after the term has expired[31] does not

was reversed and a new trial granted, where the judge did not sign the record of the judgment, but only the minute-books of the clerk (Johnson *v.* Com., 4 Ky. L. Rep. 210).

29. *Alabama.*—Bland *v.* State, 75 Ala. 574; Noles *v.* State, 24 Ala. 672.

California.— People *v.* Kelly, 120 Cal. 271, 52 Pac. 587; People *v.* Murback, 64 Cal. 369, 30 Pac. 608.

Illinois.— Hagenow *v.* People, 188 Ill. 545, 59 N. E. 242.

Michigan.— *In re* Parks, 81 Mich. 240, 45 N. W. 824.

Minnesota.— Elbow Lake *v.* Holt, 69 Minn. 349, 72 N. W. 564.

Missouri.— *Ex p.* Kenney, 105 Mo. 535, 16 S. W. 938.

Texas.— Willis *v.* State, (Cr. App. 1900) 55 S. W. 829; *Ex p.* Strey, (Cr. App. 1894) 28 S. W. 811; Stewart *v.* State, 4 Tex. App. 519.

See 15 Cent. Dig. tit. "Criminal Law," § 2543.

A constitutional requirement that all "process" shall run in the name of "The People of the State" and that all prosecutions shall be in their name does not apply to the record of a judgment which is not "process" within the meaning of the constitution. *Ex p.* Ahern, 103 Cal. 412, 37 Pac. 390.

30. *California.*—People *v.* McNulty, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61.

Colorado.—Benedict *v.* People, 23 Colo. 126, 46 Pac. 637.

Florida.— Olive *v.* State, 34 Fla. 203, 15 So. 925.

Idaho.— State *v.* Watkins, 7 Ida. 35, 59 Pac. 1106.

Illinois.— May *v.* People, 92 Ill. 343; Kennedy *v.* People, 44 Ill. 283. *Compare* Knefel *v.* People, 187 Ill. 212, 58 N. E. 388, 79 Am. St. Rep. 217.

Indiana.— Walker *v.* State, 102 Ind. 502, 1 N. E. 856.

Kansas.— *In re* Black, 52 Kan. 64, 34 Pac. 414, 39 Am. St. Rep. 331.

Kentucky.— Keans *v.* Rankin, 2 Bibb 88; Arnold *v.* Com., 55 S. W. 894, 21 Ky. L. Rep. 1566.

Louisiana.—State *v.* Grandison, 49 La. Ann. 1012, 22 So. 308; State *v.* Valere, 39 La. Ann. 1060, 3 So. 186; State *v.* Dilworth, 34 La. Ann. 216; State *v.* Williams, 28 La. Ann. 310. And see State *v.* Monceaux, 48 La. Ann. 101, 18 So. 896.

Maryland.— Weighorst *v.* State, 7 Md. 442.

Massachusetts.—Com. *v.* Taylor, 113 Mass. 1.

Michigan.— People *v.* Bemis, 51 Mich. 422, 16 N. W. 794.

Missouri.— State *v.* McCray, 74 Mo. 303.

Montana.— Territory *v.* Clayton, 8 Mont. 1, 19 Pac. 293.

Nebraska.— Garrison *v.* People, 6 Nebr. 274.

New Mexico.—Borrego *v.* Territory, 8 N. M. 446, 46 Pac. 349.

North Carolina.—State *v.* Calhoon, 18 N. C. 374; State *v.* Seaborn, 15 N. C. 305.

Ohio.— Young *v.* State, 6 Ohio 435.

Pennsylvania.— Sharff *v.* Com., 2 Binn. 514.

Texas.— Burks *v.* State, (Cr. App. 1900) 55 S. W. 824; Collins *v.* State, 39 Tex. Cr. 30, 44 S. W. 846; Kingsbury *v.* State, 37 Tex. Cr. 259, 39 S. W. 365; Doans *v.* State, 36 Tex. Cr. 468, 37 S. W. 751; Carr *v.* State, 36 Tex. Cr. 390, 37 S. W. 426; Short *v.* State, 23 Tex. App. 312, 4 S. W. 903; Metcalf *v.* State, 21 Tex. App. 174, 17 S. W. 142.

Utah.— People *v.* Calton, 5 Utah 451, 16 Pac. 902.

Virginia.— Gibson *v.* Com., 2 Va. Cas. 111.

Washington.— State *v.* Straub, 16 Wash. 111, 47 Pac. 227.

See 15 Cent. Dig. tit. "Criminal Law," § 2544.

At common law there is no difference as to amendments between civil and criminal proceedings. 1 Chitty Cr. L. 297, 304, 753.

It is not only the right but the duty of the presiding judge to have the minutes of the trial so corrected as to truthfully state the facts as they occurred. State *v.* Harris, 39 La. Ann. 1105, 3 So. 344; State *v.* Pierre, 39 La. Ann. 915, 3 So. 60.

An oral amendment has been held sufficient, without entering a formal order for this purpose. Keener *v.* State, 97 Ga. 388, 24 S. E. 28.

Notice to defendant, after sentence, of the amendment of the record to conform to the facts, is not required. State *v.* Fiester, 32 Oreg. 254, 50 Pac. 561.

The accused may lose his right to have the record amended by his failure to object when the record is read in open court. U. S. *v.* Conklin, 25 Fed. Cas. No. 14,845.

31. McCarthy *v.* State, 56 Miss. 294; State *v.* Jeffors, 64 Mo. 376; Com. *v.* Cawood, 2 Va. Cas. 527.

apply to cases where the record itself affords the means for its correction,[32] or to the correction of merely clerical errors;[33] and in some jurisdictions the modern decisions have relaxed the rule in other cases.[34]

c. Entry Nunc Pro Tunc. Delay in entering judgment is not always ground for reversal, particularly where defendant has appealed[35] or has absconded before verdict, and has not been rearrested until the judgment is rendered.[36] The judgment may be entered *nunc pro tunc*[37] and in the absence of defendant.[38]

4. Vacating Judgment. The court may during the term[39] for good cause shown, and in its discretion, set aside a judgment of conviction entered on a plea of guilty,[40] or on a verdict of conviction;[41] and this power may be exercised by

32. *Ex p.* Jones, 61 Ala. 399; Smith *v.* State, 71 Ind. 250; McCarthy *v.* State, 56 Miss. 294.

Amendments in vacation, when authorized by statute, are only such amendments as are founded upon something already existing in the record, and not amendments which will furnish ground for reversing the judgment. Powell *v.* Com., 11 Gratt. (Va.) 822.

The amendment must be based upon some note or entry in the files or on the record, and a fact cannot be incorporated into the record upon what the judge or some other person remembers, or upon *ex parte* affidavits or testimony taken after the term has expired. Hubbard *v.* People, 197 Ill. 15, 63 N. E. 1076; Dougherty *v.* People, 118 Ill. 160, 8 N. E. 673.

33. Marks *v.* State, 135 Ala. 69, 33 So. 657; Knefel *v.* People, 187 Ill. 212, 58 N. E. 388, 79 Am. St. Rep. 217; Gore *v.* People, 162 Ill. 259, 44 N. E. 500; Phillips *v.* People, 88 Ill. 160; State *v.* Gates, 9 La. Ann. 94; State *v.* Wyatt, 6 La. Ann. 701; State *v.* Folke, 2 La. Ann. 744; Com. *v.* Cawood, 2 Va. Cas. 527.

34. *Dakota.*— Territory *v.* Christensen, (1887) 31 N. W. 847.

Georgia.— Holman *v.* State, 79 Ga. 155, 4 S. E. 8.

Iowa.— State *v.* McComb, 18 Iowa 43.

Minnesota.— Bilansky *v.* State, 3 Minn. 427.

North Carolina.—State *v.* Warren, 95 N. C. 674; State *v.* Swepson, 84 N. C. 827.

Ohio.— Benedict *v.* State, 44 Ohio St. 679, 11 N. E. 125.

Texas.— Rhodes *v.* State, 29 Tex. 188. But see Belcher *v.* State, 35 Tex. Cr. 168, 32 S. W. 770.

See 15 Cent. Dig. tit. "Criminal Law," § 2544 *et seq.*; and 1 Chitty Cr. L. 753, 754.

The rule fixed by the old practice, limiting the time for amending records to the term in which they were made up, was adopted on the ground alone that the court and the parties could more safely arrive at the truth while the transaction was fresh in their minds. In cases not within the reason of the rule, as where the facts are undisputed and the only objection is the technical one that the term is past, an amendment should be allowed. Bilansky *v.* State, 3 Minn. 427.

35. *Ex p.* Beard, 41 Tex. 234.

36. Smith *v.* Com., 6 Ky. L. Rep. 305.

37. State *v.* Miller, 6 Baxt. (Tenn.) 513; O'Connell *v.* State, 18 Tex. 343; State *v.* Womack, 17 Tex. 237; McKinney *v.* State, 8 Tex. App. 626; Smith *v.* State, 1 Tex. App. 408, 516. See also Gustie *v.* State, (Tex. Cr. App. 1902) 70 S. W. 751.

After death of accused.— When defendant appeals from a sentence of imprisonment and dies pending the appeal, judgment cannot after his death be entered *nunc pro tunc*, as it would be useless. O'Sullivan *v.* People, 144 Ill. 604, 32 N. E. 192, 20 L. R. A. 143.

A clerical error may be corrected by an entry *nunc pro tunc* at a subsequent term. Marks *v.* State, 135 Ala. 69, 33 So. 657.

38. People *v.* Lenon, 79 Cal. 625, 631, 21 Pac. 967; State *v.* Primm, 61 Mo. 166. *Contra*, Baker *v.* State, 39 Ark. 180.

The fact that the prisoner is in the penitentiary when the sentence is recorded does not render the record and the mitigation of the sentence erroneous as being made in the absence of the prisoner, where the irregularity of committing the prisoner before entry of the judgment was not due to the negligence of the court. Plain *v.* State, 60 Ga. 284.

39. State *v.* Williams, 147 Mo. 14, 47 S. W. 891.

Prolongation of term.— Under a rule of court which provides that a term may be prolonged only for the purpose of signing and settling a bill of exceptions, a judgment entered on the prolongation of the term vacating a prior judgment and the new sentence based thereon are void. *Ex p.* Friday, 43 Fed. 916.

40. Basset *v.* U. S., 9 Wall. (U. S.) 38, 19 L. ed. 548; Whitworth *v.* U. S., 114 Fed. 302, 52 C. C. A. 214.

Unconstitutional statute.— A judgment on a plea of guilty of an offense under a statute which is held unconstitutional may be vacated, and the accused may be permitted to withdraw his plea of guilty and move to quash the indictment. State *v.* Baker, 50 Ind. 506.

41. State *v.* Butler, 72 Md. 98, 18 Atl. 1105; Com. *v.* Thompson, 18 Pa. Co. Ct. 487; Price *v.* Com., 33 Gratt. (Va.) 819, 36 Am. Rep. 797.

A statute providing that a judgment shall not be stayed or reversed for any cause which might have been a ground for a demurrer to the indictment does not limit the power of the court to set aside a judgment during the term at which it is entered. State *v.* Butler, 72 Md. 98, 18 Atl. 1105.

the court within its discretion even where the accused has partially served his term of imprisonment.[42]

5. Writ of Error Coram Nobis. In the absence of a statute abolishing or superseding it the writ of error coram nobis[43] lies to set aside a conviction obtained by duress or fraud, or where by some excusable mistake or ignorance of the accused, and without negligence on his part, he has been deprived of a defense which he could have used at his trial, or where facts have been concealed at the trial which if known would have prevented a conviction.[44]

F. Commitment and Enforcement of Sentence — 1. Commitment or Certified Copy of Judgment. A certified or exemplified copy of the record of the judgment is sufficient authority in the hands of the jailer for his detention of the prisoner.[45] The commitment should run in the name of the state, be under the seal of the court,[46] be written in English,[47] recite the trial and conviction,[48] and set forth the date[49] and the nature of the crime of which the accused was convicted.[50] It should not conclude with a direction to the jailer "until he be dis-

42. *In re* Graves, 117 Fed. 798, holding that where a warden of a state house of correction refused to carry out a sentence of imprisonment therein imposed on the accused by a federal court, the court might, at the term at which the sentence was imposed, recall the prisoner, vacate the sentence, and impose another to a different place of confinement.

43. See 9 Cyc. 976.

44. Wheeler *v.* State, 158 Ind. 687, 63 N. E. 975; Sanders *v.* State, (Ind. 1883) 4 Cr. L. Mag. 359; Collins *v.* State, 66 Kan. 201, 71 Pac. 251, 60 L. R. A. 572; Asbell *v.* State, 62 Kan. 209, 61 Pac. 690.

A conviction on a plea of guilty, forced by fears of mob violence, may be reviewed in the same court by a proceeding in the nature of a writ of coram nobis. State *v.* Calhoun, 50 Kan. 523, 32 Pac. 38, 34 Am. St. Rep. 141, 18 L. R. A. 838.

The writ will lie where defendant desires to bring some new fact before the court which cannot be presented by any existing statutory proceedings. Sanders *v.* State, 85 Ind. 318, 44 Am. Rep. 29. Thus where after the expiration of a term it appears that defendant was insane at the time of the trial, which was not then known, the writ will issue to reverse the judgment and directing a jury to try the issue. Adler *v.* State, 35 Ark. 517, 37 Am. Rep. 48.

The writ does not lie to correct an issue of fact which has been determined (Howard *v.* State, 58 Ark. 229, 24 S. W. 8; Asbell *v.* State, 62 Kan. 209, 61 Pac. 690), nor for alleged false testimony at the trial (State *v.* Pierce County Super. Ct., 15 Wash. 339, 46 Pac. 399), nor for newly discovered evidence (Asbell *v.* State, 62 Kan. 209, 61 Pac. 690).

Where by statute a new trial on appeal is provided for the same objection cannot be reviewed by a writ of error coram nobis. Sanders *v.* State, (Ind. 1883) 4 Cr. L. Mag. 359.

45. *In re* Brown, 32 Cal. 48; *Ex p.* Gibson, 31 Cal. 619, 91 Am. Dec. 546; *In re* Ring, 28 Cal. 247; State *v.* Murphy, 23 Nev. 390, 48 Pac. 628; *Ex p.* Smith, 2 Nev. 338; *Ex p.* Wilson, 114 U. S. 417, 5 S. Ct. 935, 29 L. ed. 89 [*affirming* 18 Fed. 33]; *In re* Osterhaus, 18 Fed. Cas. No. 10,609.

In federal courts.— Where, under the statute, the United States marshal is under certain circumstances authorized to hire or otherwise procure a convenient place in a state to serve as a temporary jail, no special process of commitment is necessary, the detention of the prisoner in jail being only a continuance of his custody by the marshal (Turner *v.* U. S., 19 Ct. Cl. 629); but where by a state statute the use of the state jail is allowed for the imprisonment of federal prisoners, the custody of the jailer is not the custody of the marshal, and the state statute providing for the delivery of a copy of the commitment to the jailer must be observed (Erwin *v.* U. S., 37 Fed. 470, 2 L. R. A. 229).

One commitment for several crimes.— *In re* McLaughlin, 58 Vt. 136, 4 Atl. 862.

46. Goodrich *v.* U. S., 42 Fed. 392; Erwin *v.* U. S., 37 Fed. 470, 2 L. R. A. 229.

47. Macarty's Case, 2 Mart. (La.) 277.

48. State *v.* Huber, 8 Kan. 447; Bugbee *v.* Boyce, 68 Vt. 311, 35 Atl. 330; Erwin *v.* U. S., 37 Fed. 470, 2 L. R. A. 229.

49. Matter of Brown, 19 Misc. (N. Y.) 692, 44 N. Y. Suppl. 1096.

50. *Ex p.* Rohe, 5 Ark. 104; Lee *v.* McClelland, 157 Ind. 84, 60 N. E. 692; People *v.* Wood, 66 N. Y. Suppl. 1123; People *v.* Gray, 67 How. Pr. (N. Y.) 456; People *v.* Cavanagh, 1 Park. Cr. (N. Y.) 588; *In re* Thayer, 69 Vt. 314, 37 Atl. 1042.

A description of the offense as a misdemeanor (People *v.* Cavanagh, 2 Park. Cr. (N. Y.) 650) or a designation of the offense which omits its date and place (People *v.* Sloan, 39 N. Y. App. Div. 265, 56 N. Y. Suppl. 930) is sufficient in New York.

In case the commitment is defective in not stating of what particular crime the accused was convicted, the record may be resorted to in order to determine the legality of the commitment. *In re* Rhodus, 6 Hawaii 343; People *v.* Cavanagh, 2 Park. Cr. (N. Y.) 650.

A defect in a copy of a mittimus or warrant delivered to a jailer does not render

charged by due order of law," but should distinctly state the terms on which the prisoner is entitled to his discharge.[51]

2. Death-Warrant. The date of carrying into effect a judgment of death, although it need not be inserted in the judgment, should be designated in the warrant,[52] but the mode of execution, where it is prescribed by statute, and only one mode is provided, need not be stated.[53]

3. Confinement Pending Execution. The confinement of the prisoner from the date of his sentence to the date of his execution is a necessary incident to the sentence.[54]

4. Stay of Execution — a. Reprieve — (I) *In General.* The term "reprieve" signifies the withdrawing of a sentence for an interval of time, which operates in delay of execution.[55] At the common law reprieves after judgment were of three kinds: (1) At the pleasure of the crown; (2) in the discretion of the court; and (3) of necessity, which latter was in the case of a woman convict alleging pregnancy when called for sentence.[56] In the United States, unless the terms on which a stay of execution may be granted are definitely fixed by statute,[57] the court may stay execution whenever it considers that under the circumstances of the case such action would be right and proper.[58] Thus a stay may be granted to allow the accused opportunity to apply for a pardon,[59] to procure a writ of error,[60] or to secure a certificate of probable cause from the trial judge.[61]

(II) *Effect on Sentence of Death.* The postponement of the date of the execution of a capital sentence by a reprieve does not affect the sentence so as to require a new sentence,[62] or any other order of the court on the expiration

the prisoner's detention illegal, as the paper is merely evidence of the judgment and sentence. Howard *v.* U. S., 75 Fed. 986, 21 C. C. A. 586, 34 L. R. A. 509.

On sentence of a fine and costs, and to stand committed until the same are paid, the failure of the mittimus to recite that the complaint was under oath, to set forth the disposition to be made of the fine, and to designate to which jail the prisoner shall be committed, is immaterial, if the complaint and judgment are correct. Bean *v.* Crosby, 1 Allen (Mass.) 220.

51. Kenney *v.* State, 5 R. I. 385.

52. People *v.* Murphy, 45 Cal. 137.

Date fixed by executive.— It is sometimes provided by statute that the state executive shall fix the time when the death-warrant shall be executed. *In re* Dyer, 56 Kan. 489, 43 Pac. 783. Where this is the case, the fact that the governor delays to fix the date until some time after the expiration of the term of solitary confinement does not invalidate the warrant. State *v.* Gut, 13 Minn. 341.

Defendant is not entitled to be present when the warrant fixing the time and place of his execution is issued. People *v.* Flannelly, 128 Cal. 83, 60 Pac. 670.

53. People *v.* Brush, 128 N. Y. 529, 534, 28 N. E. 533 [*affirming* 60 Hun 399, 15 N. Y. Suppl. 512], holding that a warrant directing the execution of defendant "by putting him to death in the mode, manner and way, and at the place by law prescribed and provided" is sufficient.

54. This confinement is strictly speaking no part of the punishment, and where it is adjudged and directed by the sentence, and a later day is subsequently fixed for the execution, the second sentence is not void, upon the ground that the first sentence had been partially served before the second was pronounced. McGinn *v.* State, 46 Nebr. 427, 65 N. W. 46, 50 Am. St. Rep. 617, 30 L. R. A. 450.

55. 4 Blackstone Comm. 394; Bouvier L. Dict. [*quoted* in George *v.* Lillard, 106 Ky. 820, 51 S. W. 793, 1011, 21 Ky. L. Rep. 483].

Mr. Webster defines "reprieve" as follows: (1) "To delay the punishment of; to suspend the execution of sentence:" and (2) "To relieve for a time, or temporarily." George *v.* Lillard, 106 Ky. 820, 827, 51 S. W. 793, 1011, 21 Ky. L. Rep. 483.

56. 1 Chitty Cr. L. 758, 759; 2 Hale P. C. 412; 2 Hawkins P. C. c. 51, § 8.

57. *In re* Markuson, 5 N. D. 180, 64 N. W. 939.

58. Fults *v.* State, 2 Sneed (Tenn.) 232.

The supreme court of the United States has no power to issue a writ of prohibition to stay the execution of a death-warrant in the hands of a marshal of the circuit court. *Ex p.* Gordon, 1 Blackf. (U. S.) 503, 17 L. ed. 134.

59. Allen *v.* State, Mart. & Y. (Tenn.) 294. See also State *v.* Frink, 1 Bay (S. C.) 168.

Where the law fixes a specific and infamous punishment, the court may properly grant a stay to allow an application for a pardon, but not where the punishment depends upon the discretion of the court. State *v.* Chitty, 1 Bailey (S. C.) 379.

60. State *v.* Hawk, 47 W. Va. 434, 34 S. E. 918.

61. People *v.* Clark, 125 Cal. 251, 57 Pac. 986.

62. People *v.* Hobson, 48 Mich. 27, 11 N. W. 771; *Ex p.* Howard, 17 N. H. 545. And see *infra*, XVI, F, 4, d.

of the reprieve, for, if it were otherwise, the use of the power of reprieve might cause an entire failure of justice.[63]

b. Habeas Corpus Proceedings. An appeal to the supreme court of the United States from the denial by the circuit court of a writ of habeas corpus asked for by the accused, convicted by a state court, upon the ground that his conviction and detention were in violation of the federal constitution, operates as a stay, and the warden of the state's prison is not authorized to execute the death-warrant pending the appeal,[64] nor can the state court fix the day for the execution of sentence pending such appeal.[65]

c. Insanity After Conviction. At common law, where the accused after conviction becomes insane he shall not receive judgment, and if insane after judgment he shall not be ordered for execution.[66] Later it was by statute provided that after a verdict of insanity, the court must order that he be confined in such place and manner as are most convenient until his majesty's further pleasure regarding his disposal.[67]

d. Fixing New Date For Execution.[68] The fact that the day of execution has passed without the sentence of death being executed because of the death of the sheriff,[69] because of his neglect to execute the warrant,[70] because the court granted a postponement of the execution on the application of the accused,[71] or because the accused has obtained a writ of error or taken an appeal to an appellate court[72]

63. Sterling *v.* Drake, 29 Ohio St. 457, 23 Am. Rep. 762.

If the reprieve be granted to a day certain, the sentence should be executed on the day the reprieve expires, and the date of execution need not be again fixed by the court. *In re* Buchanan, 146 N. Y. 264, 40 N. E. 883.

Where pending an appeal the day for execution has passed, in the absence of a statute requiring a resentence, the sheriff may execute the sentence (State *v.* Joshua, 15 La. Ann. 118), and in the case of his failure to do so, it is the duty of the governor to see that the sentence is executed (State *v.* Oscar, 13 La. Ann. 297).

64. *In re* Edgar, 119 Cal. 123, 51 Pac. 29.

65. People *v.* Durrant, 119 Cal. 54, 50 Pac. 1070.

As soon as the judgment of the United States circuit court denying the writ of habeas corpus is affirmed by the supreme court, the state court may sentence to death at once without waiting for the mandate of the supreme court to be issued and filed in the circuit court, since after the affirmance an appeal is no longer pending. *In re* Durrant, 169 U. S. 39, 18 S. Ct. 291, 42 L. ed. 653; Jugiro *v.* Brush, 140 U. S. 291, 11 S. Ct. 770, 35 L. ed. 510.

66. 4 Blackstone Comm. 395; 1 Chitty Cr. L. 761; 1 Hale P. C. 34, 35; 1 Hawkins P. C. c. 1, § 4. And see Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216.

The reason of this is not that the convict having become insane is no longer a fit object of punishment, but that he is incapable of saying anything in bar of execution or assigning any error in the judgment. 4 Blackstone Comm. 396.

It is discretionary with the court to impanel a jury to ascertain whether the prisoner is really insane, and if they find that he is the court must reprieve him until the ensuing session. 4 Blackstone Comm. 396; 1 Hale P. C. 370.

Under a statute which provides that where a practising physician has made an affidavit that a person convicted and sentenced to death has been on his examination discovered to be insane, and that his condition should be tried before a jury, the court has no discretion in the matter, but it is its imperative duty to order a jury trial at once. Sears *v.* State, 112 Ga. 382, 37 S. E. 443. *Compare* Wilson's Case, 2 Pa. Co. Ct. 575.

67. 1 Chitty Cr. L. 649, 762.

68. **Effect of reprieve** on sentence of death see *supra*, XVI, F, 4, a, (II).

69. State *v.* Kitchens, 2 Hill (S. C.) 612, 27 Am. Dec. 410.

70. *Ex p.* Nixon, 2 S. C. 4.

71. *Ex p.* Cross, 20 D. C. 573.

72. State *v.* Haddox, 50 W. Va. 222, 40 S. E. 387.

Under the California statute, an order fixing the date of execution is one "made after final judgment affecting the substantial rights of the defendant," and is appealable, but the appeal does not stay the execution without a certificate of probable cause, and he may be executed pending his appeal where this certificate is not obtained. He may, in case the certificate is refused by the trial court, apply to the justices of the appellate court for it. He should have, under the circumstances, a settled bill of exceptions, and inasmuch as the latter is an absolute prerequisite to the certificate of probable cause, and without it no stay can be procured, to deprive him of his bill of exceptions is to deprive him of an important right, and is error. People *v.* Durrant, 119 Cal. 201, 51 Pac. 185.

Where the term for which the accused is sentenced elapses without imprisonment being suffered by him, he may be brought before the court and a new date specified at which the term shall commence (*Ex p.* Bell, 56 Miss. 282; State *v.* Cockerham, 24

does not entitle the accused to his discharge, and the court may, either with or without a new sentence, fix another day for the execution of the sentence.

5. Resentencing on Capture After Escape. Where a defendant has escaped after sentence of death[73] has been pronounced, and has been recaptured after the time fixed for his execution, he may be resentenced[74] on the original judgment[75] and at the next term of the court.[76]

6. Outlawry. Outlawry is a punishment inflicted on a person for a contempt or contumacy, in refusing to be amenable to, and abide by, the justice of that court which hath lawful authority to call him before it.[77]

7. Unreasonable Detention by Sheriff. One who has been convicted and sentenced to imprisonment in the penitentiary should not be unreasonably detained in the county jail or elsewhere by the sheriff.[78]

XVII. Appeal, Writ of Error, and Certiorari.[79]

A. Form of Remedy, Jurisdiction, and Right to Appeal — 1. Form of Remedy — a. In General. The decisions of the lower criminal courts in England, reviewable in the king's bench, were brought there either by writ of error, writ of certiorari, or writ of false judgment issuing out of the king's bench and directed to the lower court.[80] In this country, owing to the various statutory modifications of the common law, no common or universal procedure exists.[81]

b. Writ of Error. Where the statute has not provided for an appeal in criminal cases,[82] the common-law writ of error is usually recognized.[83]

N. C. 204), and where one term of imprisonment is directed to commence at the termination of another, and the judgment on which the earlier term was based is reversed, the court may direct that the sentence be computed from another date (Mills *v.* Com., 13 Pa. St. 631).

73. Where he escapes during a term of imprisonment, no new award of execution is necessary or proper, but on being retaken he may be confined under the original judgment until the term expires. Haggerty *v.* People, 53 N. Y. 476.

74. See State *v.* Wamire, 16 Ind. 357.

75. Bland *v.* State, 2 Ind. 608.

76. Bland *v.* State, 2 Ind. 608; State *v.* Cardwell, 95 N. C. 643.

77. Bacon Abr. tit. "Outlawry" [*quoted* in Dale County *v.* Gunter, 46 Ala. 118, 138].

This might take place in criminal as well as in civil proceedings. In the United States it is unknown in civil cases, and in criminal cases instances of it are to be found in the early law of one or two states only. See Respublica *v.* Steele, 2 Dall. (Pa.) 92, 1 L. ed. 303; Respublica *v.* Doan, 1 Dall. (Pa.) 86, 1 L. ed. 47; Com. *v.* Anderson, 2 Va. Cas. 245; Com. *v.* Hagerman, 2 Va. Cas. 244.

78. He should deliver the convict to the proper authorities as soon as he can do so. O'Neil *v.* State, 134 Ala. 189, 32 So. 667; *Ex p.* King, 82 Ala. 59, 2 So. 763.

What is a reasonable or an unreasonable time to detain him depends upon the circumstances of each particular case. O'Neil *v.* State, 134 Ala. 189, 32 So. 667, holding that where the prisoner is too sick to be removed, or has been exposed to a contagious disease which he might communicate to others in the prison to which he is sentenced, his detention until he can be safely removed thereto is not unreasonable.

79. **The scope of treatment.**— The principles of law regulating appellate remedies will be discussed here only so far as they relate to and have been adjudicated upon in criminal cases. For the general principles see Appeal and Error, 2 Cyc. 474 *et seq.*

80. See Appeal and Error, 2 Cyc. 507; 1 Chitty Cr. L. 747. And see *Ex p.* Knight, 61 Ala. 482; State *v.* Bailey, 65 N. C. 426.

81. See *infra*, XVII, A, 1, b *et seq.*

82. See *infra*, XVII, A, 1, c.

83. *Alabama.*— *Ex p.* Knight, 61 Ala. 482; Lynes *v.* State, 5 Port. 236, 30 Am. Dec. 557.

California.— *Ex p.* Thistleton, 52 Cal. 220.

Georgia.— Mattox *v.* State, 115 Ga. 212, 41 S. E. 709; Moore *v.* State, 63 Ga. 165.

Hawaii.— *In re* Hoopia, 10 Hawaii 610.

Illinois.— French *v.* People, 77 Ill. 531; Mohler *v.* People, 24 Ill. 26; Perry *v.* People, 14 Ill. 439; Hertel *v.* People, 74 Ill. App. 304; Ferrias *v.* People, 71 Ill. App. 559; Anderson *v.* People, 28 Ill. App. 317.

Iowa.— Ellis *v.* State, 3 Iowa 217; State *v.* Douglass, 1 Greene 550.

Maryland.— Manly *v.* State, 7 Md. 135; Anderson *v.* State, 5 Harr. & J. 174.

Mississippi.— State *v.* Tuomey, 5 How. 50.

New Jersey.— Kohl *v.* State, 59 N. J. L. 195, 35 Atl. 652. And see Roesel *v.* State, 62 N. J. L. 368, 41 Atl. 833; Entries *v.* State, 47 N. J. L. 140.

New York.— Hartung *v.* People, 22 N. Y. 95. And see Carnel *v.* People, 2 Edm. Sel. Cas. 208.

Pennsylvania.— Com. *v.* Schoeppe, 1 Leg. Gaz. 450.

Virginia.— Temple *v.* Com., 1 Va. Cas.

c. Appeal. Subject to constitutional limitations,[84] it is within the power of the legislature to prescribe the conditions and circumstances under which an appeal may be had in criminal proceedings, the courts to which it may be taken and the proceedings by which it shall be conducted.[85] Accordingly in many of the states statutes have been passed providing for appeals in criminal cases, and these statutes have usually, either expressly or by necessary implication, abolished the common-law writ of error.[86] These statutes must be strictly followed, and a

163; Com. *v.* Vawter, 1 Va. Cas. 127; Com. *v.* Crowe, 1 Va. Cas. 125.

Wisconsin.— State *v.* Byron, 33 Wis. 119.

See 15 Cent. Dig. tit. "Criminal Law," § 2565.

A writ of error does not properly lie for matters which could have been taken advantage of by demurrer or motion in arrest of judgment. Davis *v.* State, 39 Md. 355.

According to the authority of Lord Mansfield in Rex *v.* Wilkes, 4 Burr. 2527, a writ of error in a criminal trial, until a late period at common law, was entirely *ex gratia*. The granting of it was in the discretion of the crown and was not usually opposed by the attorney-general. It was conceived as merely the modification of the royal power to pardon, and the crown having thus expressed its willingness to reverse, the king's bench usually reversed upon slight or trivial objections, or upon no error at all. Subsequently it was determined that the writ of error was a matter of right, not of favor (Rex *v.* Wilkes, 4 Burr. 2527), although it still remained in theory at least in the royal discretion (1 Chitty Cr. L. 758). Hence the court of king's bench will not grant the writ unless the attorney-general has issued his fiat. *Ex p.* Lees, E. B. & E. 828, 5 Jur. N. S. 333, 27 L. J. Q. B. 403, 6 Wkly. Rep. 660, 96 E. C. L. 828. And although in a proper case, that is, where there is probable cause of error, the fiat must be issued, yet the attorney-general is to determine on his own responsibility whether such a case is presented, and neither the court of king's bench (Reg. *v.* Newton, 4 E. & B. 869, 1 Jur. N. S. 591, 24 L. J. Q. B. 246, 3 Wkly. Rep. 374, 82 E. C. L. 869; *Ex p.* Lees, E. B. & E. 828, 5 Jur. N. S. 333, 27 L. J. Q. B. 403, 6 Wkly. Rep. 660, 96 E. C. L. 828), nor the lord chancellor (*Re* Pigott, 11 Cox C. C. 311, 19 L. T. Rep. N. S. 114) will review his determination. Although if it be in a misdemeanor case it might be that the court would order him to grant it. Rex *v.* Wilkes, 4 Burr. 2527, 19 How. St. Tr. 981; Reg. *v.* Paty, 14 East 92, 2 Salk. 503; Reg. *v.* Ashby, 14 How. St. Tr. 695, 862, 870, 871; Rex *v.* Rowe, 2 Mollry 27; 4 Bl. Comm. 392.

As to the power of the attorney-general with regard to the issuance of this writ see State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534; Lavett *v.* People, 7 Cow. (N. Y.) 339.

As to statutory modification of writ of error see 2 Cyc. 508, 509.

84. State *v.* Jones, 22 Ark. 331.

85. Anderson *v.* Fowler, 48 S. C. 8, 25 S. E. 900; Cornelius *v.* Dallas, 37 Tex. Cr. 309, 39 S. W. 679; Gerald *v.* State, 4 Tex. App. 308; State *v.* Fitzpatrick, 8 W. Va. 707; State *v.* Allen, 8 W. Va. 680. See also APPEAL AND ERROR, 2 Cyc. 507, 517.

Where appellate jurisdiction is conferred upon the supreme court by the constitution, the right to appeal guaranteed therein does not depend upon the action of the legislature, and exists although the legislature fails to pass a law regulating the exercise of the right. Laturner *v.* State, 9 Tex. 451. The legislature may impose a reasonable condition upon one about to take an appeal, so long as it refers wholly to the remedy and leaves that still reasonable and adequate. Johnson *v.* State, 42 Tex. Cr. 87, 58 S. W. 60, 51 L. R. A. 272. Thus it is not unconstitutional to prohibit a review on appeal of an instruction on the evidence, unless it is complained of by a bill of exceptions, or a motion for a new trial has been made and denied. Johnson *v.* State, 42 Tex. Cr. 103, 58 S. W. 69. But where the constitution divides the state into districts and provides that when the supreme court is sitting in any one of them it shall exercise discretion only over cases originating in that district, a statute providing that one convicted of felony may appeal to the next term of the supreme court, no matter where it may be held, is unconstitutional. State *v.* Steptoe, 61 Mo. 411.

A statute which imposes burdensome conditions on the right to appeal, beyond what is necessary to secure the prosecution of the appeal, is unconstitutional in so far as it impairs the right of appeal. State *v.* Gurney, 37 Me. 156, 58 Am. Dec. 782.

86. *District of Columbia.*—U. S. *v.* Wood, 1 MacArthur 241.

Hawaii.— Rex *v.* Liilii. 8 Hawaii 199.

Illinois.— Hertel *v.* People, 74 Ill. App. 304.

Indiana.— Hornberger *v.* State, 5 Ind. 300.

Iowa.— State *v.* Flinn, 51 Iowa 133, 50 N. W. 495.

Kansas.— Peterson *v.* Ottawa, 41 Kan. 293, 21 Pac. 263; McLean *v.* State, 28 Kan. 372; State *v.* Boyle, 10 Kan. 113.

Kentucky.— Com. *v.* Craig, 15 B. Mon. 534.

Maryland.— Munshower *v.* State, 56 Md. 514; Rawlings *v.* State, 1 Md. 127, 2 Md. 201.

Missouri.— State *v.* Cox, 67 Mo. 46; State *v.* Hamilton, 65 Mo. 667; State *v.* Cutter, 65 Mo. 503; State *v.* Copeland, 65 Mo. 497 [*overruling* State *v.* Peck, 51 Mo. 111; State *v.* Newkirk, 49 Mo. 472].

North Carolina.— State *v.* Lawrence, 81 N. C. 522.

Texas.— Golden *v.* State, 32 Tex. 737; Scott *v.* State, 31 Tex. Cr. 405, 20 S. W. 831.

Virginia.— Bell *v.* Com., 7 Gratt. 201.

matter which can only be regularly brought up by writ of error cannot by consent be made the basis of an appeal.[87]

d. Certiorari. The general rule[88] that certiorari will lie in cases where no other adequate remedy exists,[89] and especially where the proceedings sought to be reviewed were not conducted in accordance with the course of the common law,[90] applies in criminal as well as in civil cases. The writ is allowable as a matter of course on the application of the prosecuting attorney,[91] although defendant cannot obtain it except it be allowed by the court.[92]

See 15 Cent. Dig. tit. "Criminal Law," § 2566.

As to exclusiveness of remedy by appeal see APPEAL AND ERROR, 2 Cyc. 509, 517.

87. Richardson *v.* State, 66 Md. 205, 7 Atl. 43. And see APPEAL AND ERROR, 2 Cyc. 515 *et seq.*

88. See, generally, CERTIORARI, 6 Cyc. 738 *et seq.*

89. State *v.* Handlin, 16 N. J. L. 96; Rex *v.* Seton, 7 T. R. 373.

Where an inferior criminal court is created, and no method of appeal from its decisions is provided, certiorari will lie to review its judgments and proceedings.

Alabama.— John *v.* State, 1 Ala. 95.

Georgia.— McElhannon *v.* State, 112 Ga. 221, 37 S. E. 402; Smith *v.* State. 105 Ga. 831, 31 S. E. 542; Daniel *v.* State, 55 Ga. 222.

Louisiana.— State *v.* Judge, 39 La. Ann. 132, 1 So. 437. See also State *v.* Pettigrew, 109 La. 132, 33 So. 110.

Massachusetts.—Clark *v.* Com., 4 Pick. 125.

Michigan.— People *v.* Murray, 89 Mich. 276, 50 N. W. 995, 28 Am. St. Rep. 294, 14 L. R. A. 809.

Minnesota.—Tierney *v.* Dodge, 9 Minn. 166.

North Carolina.— State *v.* Locke, 86 N. C. 647; State *v.* McGimsey, 80 N. C. 377, 30 Am. Rep. 90; State *v.* Jacobs, 44 N. C. 218.

Oregon.— Barton *v.* La Grande, 17 Oreg. 577, 22 Pac. 111.

Pennsylvania.—Com. *v.* McGinnis, 2 Whart. 113.

Tennessee.— Bob *v.* State, 2 Yerg. 173.

Wisconsin.— Owens *v.* State, 27 Wis. 456.

See 15 Cent. Dig. tit. "Criminal Law," § 2569.

Where no appeal exists, certiorari will lie to review a conviction of the violation of a city ordinance (Walker *v.* Fitzgerald, 103 Ga. 423, 30 S. E. 253; St. Paul *v.* Marvin, 16 Minn. 102; Ridgway *v.* Hinton, 25 W. Va. 554), or to determine whether a municipal court had jurisdiction (Bates *v.* District of Columbia, 1 MacArthur (D. C.) 433; Williams *v.* Augusta, 111 Ga. 849, 36 S. E. 607). Where defendant has lost his right to appeal by the conduct of the adverse party (State *v.* Bennett, 93 N. C. 503), where he is denied it or deprived of it by fraud, accident, or inability to comply with the statute (State *v.* Bill, 35 N. C. 373), or for any reason other than his own laches (*Ex p.* George, T. U. P. Charlt. (Ga.) 80; State *v.* Washington, 6 N. C. 100. But *compare* State *v.* Brown County Dist. Ct., 79 Minn. 27, 81 N. W. 536. The United States supreme court has held that the writ of certiorari to bring the indictment into that court from the circuit court, being discretionary, should not be allowed unless the applicant make a plain case calling for its allowance. *Ex p.* Hitz, 111 U. S. 766, 4 S. Ct. 698, 28 L. ed. 592.

Where the trial court refuses to amend the record upon the ground of a want of power (State *v.* Swepson, 83 N. C. 584), or where it refused to go on with the trial because of the invalidity of the ordinance under which it was instituted (Grand Rapids *v.* Braudy, 105 Mich. 670, 64 N. W. 29, 55 Am. St. Rep. 472, 32 L. R. A. 116) certiorari is the proper remedy.

Where accused has an adequate remedy by an appeal or a writ of error to review the judgment and proceedings of the lower court certiorari will not lie.

Arizona.—Territory *v.* Dunbar, 1 Ariz. 510, 25 Pac. 473.

California.— Morley *v.* Elkins, 37 Cal. 454.

Iowa.— Ransom *v.* Cummins, 66 Iowa 137, 23 N. W. 301.

Louisiana.— State *v.* Judge Twelfth Judicial Dist. Ct., 52 La. Ann. 271, 26 So. 826; State *v.* Allen, 47 La. Ann. 1600, 18 So. 634; State *v.* Judge, 42 La. Ann. 1089, 8 So. 277, 10 L. R. A. 248.

Minnesota.— State *v.* Noonan, 24 Minn. 124; State *v.* Weston, 23 Minn. 366; State *v.* Milner, 16 Minn. 55.

New Jersey.— Nicoulin *v.* Lowery, 49 N. J. L. 391, 8 Atl. 513.

New York.— *In re* Hook, 55 Barb. 257.

Oregon.— Hill *v.* State, 23 Oreg. 446, 32 Pac. 160.

Pennsylvania.— Com. *v.* Wallace, 114 Pa. St. 405, 6 Atl. 685, 60 Am. Rep. 353; Com. *v.* Haas, 57 Pa. St. 443.

See 15 Cent. Dig. tit. "Criminal Law," § 2569.

Under N. Y. Code Civ. Proc. § 2015, which permits one restrained of his liberty to bring certiorari to inquire into the cause of the imprisonment, a certiorari does not lie to review a criminal case, where the accused is at liberty under a bail-bond. People *v.* Pool, 77 N. Y. App. Div. 148, 78 N. Y. Suppl. 1026.

90. Clark *v.* Com., 4 Pick. (Mass.) 125; State *v.* Bill, 35 N. C. 373.

91. State *v.* Zabriskie, 43 N. J. L. 369; People *v.* Runkel, 6 Johns. (N. Y.) 334; Com. *v.* Wallace, 114 Pa. St. 405, 6 Atl. 685, 60 Am. Dec. 353.

92. State *v.* New Jersey Jockey Club, 52 N. J. L. 493, 19 Atl. 976; People *v.* Mayer, 16 Barb. (N. Y.) 362; Com. *v.* Capp, 48 Pa. St. 53.

e. Exceptions. At common law no bill of exceptions was permitted in criminal cases.[93] In this country the common-law rule has been followed where the subject has not been regulated by statute.[94]

f. Reservation and Certification. In many states the statutes authorize the trial courts to reserve or certify difficult and important questions of law arising during the course of the trial to a superior or appellate court for its consideration and adjudication.[95]

g. Cross Appeals. In the absence of a permissive statute[96] a cross appeal cannot be permitted to the prosecution, but the appellate court may, where the accused appeals, pass upon all questions decided against the prosecution to which exceptions have been taken.[97]

h. Successive Reviews. Both at common law and under the statutes one convicted of a crime is entitled to but one writ of error[98] or one opportunity to appeal,[99] unless perhaps the appellant having voluntarily withdrawn his appeal renews it within the time limited by statute.[1]

i. Election of Remedies. In a few of the states it has been held that a writ of error lies, although the judgment may also be appealed from under the

Where writ returnable.— The court granting a writ of error may make it returnable in another district than that in which the trial was had, where all districts are under one jurisdiction. Hazen *v.* Com., 23 Pa. St. 355.

93. The operation of the statute requiring a bill of exceptions to be sealed (13 Edw. I, c. 31) was confined to civil cases (1 Chitty Cr. L. 622). See also *Ex p.* Knight, 61 Ala. 482; 2 Bacon Abr. 114.

It was allowed with some misgivings on an indictment for a misdemeanor. 1 Chitty Cr. L. 622.

94. *Alabama.*— Ned *v.* State, 7 Port. 187.

Maryland.— Smith *v.* State, 44 Md. 530; Queen *v.* State, 5 Harr. & J. 232.

Missouri.— Mitchell *v.* State, 3 Mo. 283, 25 Am. Dec. 442; State *v.* Henry, 2 Mo. 218.

New York.— *Ex p.* Barker, 7 Cow. 143; People *v.* Holbrook, 13 Johns. 90.

Pennsylvania.— See Schoeppe *v.* Com., 65 Pa. St. 51; Middleton *v.* Com., 2 Watts 285.

United States.— U. S. *v.* Gilbert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19.

See 15 Cent. Dig. tit. "Criminal Law," § 2567.

In Massachusetts, by statute, no appeal lies from a judgment on a motion in arrest, or upon a demurrer to defendant's plea, the remedy being a bill of exceptions specifying the particular errors complained of. Com. *v.* Bestin, 11 Gray 54; Com. *v.* Harris, 8 Gray 470; Com. *v.* Crawford, 12 Cush. 271.

95. That the power exists only by statute see People *v.* Farrell, 1 Ida. 49; State *v.* Halliard, 43 N. J. L. 478; Morin *v.* Reg., 18 Can. Supreme Ct. 407; Reg. *v.* Ulasne, 22 C. P. 246.

For a discussion of these statutes see APPEAL AND ERROR, 2 Cyc. 740 *et seq.* See also *Ex p.* Knight, 61 Ala. 482 (reservation a matter of right); Com. *v.* Byrnes, 126 Mass. 248 (reservation discretionary with judge).

Under the Wisconsin statute doubtful questions in criminal actions must be reported for determination before judgment. After judgment the appellate court has no authority to determine questions thus submitted, and the proper remedy then is a writ of error. State *v.* Sheppard, 37 Wis. 395.

In England, under 11 & 12 Vict. c. 78, authorizing questions of law which arise at criminal trials to be reserved, it is held that the question whether there was a mistrial, where one juryman answered, was sworn, and served in the name of another, might be reserved, and that the court had jurisdiction to determine it. Reg. *v.* Mellor, 7 Cox C. C. 454, Dears. & B. 468, 4 Jur. N. S. 214, 27 L. J. M. C. 121, 6 Wkly. Rep. 322. After a plea of guilty it was held that no question could be reserved for the court of criminal appeal by the judge passing sentence, as the statute allows only questions arising at the trial to be reserved. Reg. *v.* Clark, L. R. 1 C. C. 54, 10 Cox C. C. 338, 12 Jur. N. S. 946, 36 L. J. M. C. 16, 15 L. T. Rep. N. S. 190, 15 Wkly. Rep. 48.

96. Thomas *v.* State, 73 Miss. 46, 19 So. 195. And see APPEAL AND ERROR, 2 Cyc. 530.

97. Terrell *v.* Com., 13 Bush (Ky.) 246.

98. Caviness *v.* People, 27 Colo. 283, 60 Pac. 565; Roesel *v.* State, 62 N. J. L. 368, 41 Atl. 833.

99. Peterson *v.* State, 32 Tex. 477. See also Hynes *v.* State, (Tex. Cr. App. 1902) 70 S. W. 955. And see APPEAL AND ERROR, 2 Cyc. 525.

1. State *v.* Chastain, 104 N. C. 900, 10 S. E. 519. And see APPEAL AND ERROR, 2 Cyc. 529.

In Louisiana, on the abandonment of an appeal, the accused may bring certiorari. State *v.* Pettigrew, 109 La. 132, 33 So. 110.

The "extraordinary motion or case" contemplated by the statute, justifying a second bill of exceptions after affirmance of the refusal of a new trial, is such as does not ordinarily occur in the transaction of human affairs; as where, on a conviction of murder, the supposed deceased is found to be still

statute.[2] So too the remedy by appeal does not, in the absence of a statutory provision to that effect, preclude the accused from procuring a review by certiorari.[3]

2. Jurisdiction — a. In General. In determining to what court an appeal should be taken, it is necessary to determine whether a proceeding is civil or whether it is of a criminal or quasi-criminal nature;[4] but when the nature of the proceeding has been determined or is undisputed the rules designating from what courts and to what courts appeals may be taken must be determined by a reference to the various statutory provisions.[5]

alive, or a witness is found guilty of perjury. Cox *v.* Hillyer, 65 Ga. 57.

2. *Kentucky.*—Hayden *v.* Com., 10 B. Mon. 125.

Maine.— Barnett *v.* State, 36 Me. 198.

Maryland.— Rawlings *v.* State, 1 Md. 127; Queen *v.* State, 5 Harr. & J. 232.

Massachusetts.— Thayer *v.* Com., 12 Metc. 9; *In re* Cooke, 15 Pick. 234.

Minnesota.— Bonfanti *v.* State, 2 Minn. 123.

See 15 Cent. Dig. tit. "Criminal Law," § 2570; and Appeal and Error, 2 Cyc. 509.

The reason assigned for this is that the implication that the right to the writ has been taken away by a statutory provision for an appeal, which is recognized in civil cases because of the ease and promptness of the appeal as compared with the writ of error, does not apply in criminal cases; as it not infrequently happens that the accused is wholly unable, by reason of his inability to procure sureties, to prosecute an appeal. Barnett *v.* State, 36 Me. 198; Thayer *v.* Com., 12 Metc. (Mass.) 9; *In re* Cooke, 15 Pick. (Mass.) 234.

In the federal courts the distinction between a writ of error and an appeal is and always has been maintained. See De Lemos *v.* U. S., 107 Fed. 121, 123, 46 C. C. A. 196 (holding that the rule is based on the provision of the federal constitution that "no fact tried by the jury shall be otherwise examined in any court of the United States than according to the rules of the common law." The use of the words "appeal, or writs of error" in a statute creating federal appellate courts does not permit the use of these remedies interchangeably, and does not necessarily, when taken in connection with other provisions of the same statute, confer the right upon the appellate court to review a criminal case by appeal); Bucklin *v.* U. S., 159 U. S. 680, 682, 16 S. Ct. 182, 40 L. ed. 304, 305 (holding that the final judgment of a federal court in the case of a capital or otherwise infamous crime is not reviewable in the supreme court except upon writ of error, although the statute provides that "appeals or writs of error" may, in certain classes of cases, be taken to the supreme court). But *compare Ex p.* Gordon, 1 Black (U. S.) 503, 17 L. ed. 134.

3. State *v.* Seventh Judicial Dist. Ct., 14 Mont. 452, 37 Pac. 9.

In some cases the state has an election between an appeal and a writ of error given by statute. Where this is the case, if the state appeals defendant may be held in custody or required to give bail, while if the state resorts to the statutory writ of error he will be discharged until the case is determined, and he must be again arrested on a new writ if the decision is reversed. Under these statutes the state can only procure a writ of error where there is no trial and acquittal. State *v.* Cunningham, 51 Mo. 479; McGee *v.* State, 8 Mo. 495.

4. See Appeal and Error, 2 Cyc. 541 *et seq.* Thus a prosecution for a violation of an act prohibiting any person not a registered pharmacist from opening or conducting a drug-store for the purpose of compounding or dispensing medicines (Mothers' Remedies Co. *v.* People, 99 Ill. App. 570), an order abating as a public nuisance a dam erected by an individual on private property (White *v.* King, 5 Leigh (Va.) 726), as a general rule bastardy proceedings (*Ex p.* Gowen, 4 Me. 58. See, generally, Bastards, 5 Cyc. 644), and a prosecution under a municipal order for an act which by common law or by express statute is declared to be a crime (Platteville *v.* McKernan, 54 Wis. 487, 11 N. W. 798) are criminal or quasi-criminal.

A proceeding begun by indictment is unquestionably criminal, although its object be to enforce the payment of a fine which had been assessed against the accused for his refusal to work on the public roads. State *v.* Wikoff, 28 La. Ann. 654. See also State *v.* Williams, 7 Rob. (La.) 252.

5. See the following cases:

Georgia.— Welborne *v.* State, 114 Ga. 793, 40 S. E. 857; McElhannon *v.* State, 112 Ga. 221, 37 S. E. 402; Macon *v.* Wood, 109 Ga. 149, 34 S. E. 322.

Illinois.— Bratsch *v.* People, 195 Ill. 165, 62 N. E. 895; Moeller *v.* People, 92 Ill. App. 152.

Indiana.— Wachstetter *v.* State, 42 Ind. 166; State *v.* Phillips, 25 Ind. App. 579, 58 N. E. 727.

Indian Territory.— Brown *v.* U. S., 171 U. S. 631, 19 S. Ct. 56, 43 L. ed. 312.

Louisiana.— State *v.* Deffes, 44 La. Ann. 581, 10 So. 812; State *v.* Clesi, 44 La. Ann. 85, 10 So. 409; State *v.* Williams, 7 Rob. 252; Hyde *v.* Jenkins, 6 La. 427.

Maryland.— State *v.* Ward, 95 Md. 118, 51 Atl. 848.

Mississippi.— Loftin *v.* State, 11 Sm. & M. 358. See also Dawkins *v.* State, 42 Miss. 631.

Missouri.— State *v.* Hamey, 168 Mo. 167,

b. General Requisites — (I) *Jurisdiction in Lower Court.* An appellate court has no jurisdiction to review a proceeding over which the trial court had no jurisdiction.[6]

(II) *Existence of Actual Controversy.* The existence of an actual controversy, being an indispensable requisite to appellate jurisdiction,[7] an appeal in a criminal case based on no real controversy,[8] or in a case where any judgment rendered would be futile,[9] will not be considered by an appellate tribunal.

c. Consent of Parties. In criminal as in civil cases[10] no mere agreement of the parties or waiver of objection can confer jurisdiction on an appellate court which has no jurisdiction of the subject-matter.[11]

d. Character of Offense or Punishment. Under the statutes of many states appellate jurisdiction is dependent upon the character or grade of the offense. In some the highest appellate court will entertain appeals in cases of felony only;[12] while in others, although an appeal in a case of misdemeanor may be taken to the highest appellate court, it must be first taken to an intermediate tribunal.[13] So too in some states the right of the accused to an appeal depends, by virtue of the local statutes, upon the amount of the fine or the character of the punishment imposed upon him.[14]

67 S. W. 620, 57 L. R. A. 846; State *v.* Greenspan, 137 Mo. 149, 38 S. W. 582; State *v.* Lehr, 16 Mo. App. 491.

New Mexico.— Borrego *v.* Territory, 8 N. M. 446, 46 Pac. 349.

North Carolina.— State *v.* Hinson, 123 N. C. 755, 31 S. E. 854.

Texas.— Mahanay *v.* State, (Cr. App. 1901) 60 S. W. 756; Holcomb *v.* State, (Cr. App. 1900) 59 S. W. 892; Monroe *v.* State, 42 Tex. Cr. 277, 59 S. W. 545; Brady *v.* State, (Cr. App. 1900) 58 S. W. 1016. See also Scott *v.* State, 31 Tex. Cr. 405, 20 S. W. 831; Bautsch *v.* State, 27 Tex. App. 342, 11 S. W. 414; Powell *v.* State, 3 Tex. App. 630; Meyer *v.* State, 3 Tex. App. 219.

United States.— Good Shot *v.* U. S., 179 U. S. 87, 21 S. Ct. 33, 45 L. ed. 101. See also U. S. *v.* Plumer, 27 Fed. Cas. No. 16,056, 3 Cliff. 28.

See 15 Cent. Dig. tit. "Criminal Law," § 2577; and, generally, Courts, 11 Cyc. 633 *et seq.*

6. State *v.* Maine, 27 Conn. 281; State *v.* Wiseman, 131 N. C. 795, 42 S. E. 326; Stubbs *v.* State, 39 Tex. 564; Necker *v.* State, 4 Tex. App. 234; Billingsly *v.* State, 3 Tex. App. 686; Klaise *v.* State, 27 Wis. 462. *Contra*, under special constitutional provision, People *v.* Pingree, 61 Cal. 141.

Where by reason of the suspension of the execution of a sentence until the term following that in which it was pronounced, without any motion pending, the court lost jurisdiction, a certificate of division of opinion made upon the denial of a motion in arrest, and made at the term when sentence was passed, will be dismissed. U. S. *v.* Pile, 130 U. S. 280, 9 S. Ct. 523, 32 L. ed. 904.

7. See Appeal and Error, 2 Cyc. 533.

8. People *v.* Wallace, 91 Cal. 535, 27 Pac. 767 (where the application for review was for the mere purpose of testing the legality of the grand jury); State *v.* Baron, 64 N. H. 612, 5 Atl. 718.

9. State *v.* Terrehonne, 45 La. Ann. 25, 12 So. 315; State *v.* Segura, 39 La. Ann. 683, 2 So. 552. Thus a statute permitting the prosecution to have a writ of error on questions of law after defendant's acquittal does not entitle the appellate court to consider abstract questions not necessarily connected with some disposition of the case on review. State *v.* Jones, 22 Ark. 331.

10. See Appeal and Error, 2 Cyc. 536.

11. People *v.* Royal, 2 Ill. 557; *Ex p.* Jones, 34 Tex. Cr. 344, 30 S. W. 806.

But where an appellate court has jurisdiction to hear a case, when removed to it by certiorari, a removal by consent is sufficient to confer jurisdiction. State *v.* Jacobs, 44 N. C. 218.

12. *Arkansas.*— Du Val *v.* Hot Springs, 34 Ark. 560.

California.— People *v.* Jordan, 65 Cal. 644, 4 Pac. 683; People *v.* Meiggs Wharf Co., 65 Cal. 99, 3 Pac. 491; People *v.* Aubrey, 53 Cal. 427; People *v.* Apgar, 35 Cal. 389; People *v.* Johnson, 30 Cal. 98; People *v.* Burney, 29 Cal. 459; People *v.* Cornell, 16 Cal. 187; People *v.* Vick, 7 Cal. 165; People *v.* Shear, 7 Cal. 139; People *v.* Applegate, 5 Cal. 295.

Florida.— Sutton *v.* State, 13 Fla. 670.

Missouri.— State *v.* Nicholson, 116 Mo. 522, 22 S. W. 804; State *v.* Ramsey, 110 Mo. 212, 19 S. W. 711.

Nevada.— State *v.* Quinn, 16 Nev. 89; State *v.* McCormick, 14 Nev. 347.

See 15 Cent. Dig. tit. "Criminal Law," § 2579.

13. Baits *v.* People, 123 Ill. 428, 16 N. E. 483; Weiss *v.* People, 104 Ill. 90; Ingraham *v.* People, 94 Ill. 428.

A statute giving exclusive jurisdiction of appeals in misdemeanors to particularly designated courts by implication permits another appellate court to retain exclusive control of appeals in case of felonies. *Ex p.* Sweeney, 126 Ind. 583, 27 N. E. 127.

14. *Iowa.*— State *v.* Knapf, 61 Iowa 522, 16 N. W. 590.

Kentucky.— See Cheek *v.* Com., 87 Ky. 42, 7 S. W. 403, 9 Ky. L. Rep. 880; Anderson *v.*

3. Matters Reviewable — a. Finality of Judgment or Order — (i) *In General.* At common law a writ of error could never be obtained before judgment, but was granted only to review a final determination of a cause;[15] and this procedure has been generally followed in the states of the United States, by the statutes providing for review.[16] It therefore follows that a writ of error or an appeal will not usually lie, in the absence of a permissive statute, from an interlocutory judgment or order,[17] unless perhaps from an interlocutory judgment or order

Com., 14 Bush 171; Baer *v.* Com., 10 Bush 8; Holden *v.* Com., 2 Bush 36; Tankersly *v.* Com., 9 S. W. 702, 10 Ky. L. Rep. 367; Ball *v.* Com., 9 S. W. 304, 10 Ky. L. Rep. 422; Com. *v.* Presnell, 7 Ky. L. Rep. 285. But see Johnson *v.* Com., 90 Ky. 53, 13 S. W. 520, 12 Ky. L. Rep. 20.

Louisiana.— State *v.* Blanchard, 45 La. Ann. 939, 12 So. 933; State *v.* Smith, 39 La. Ann. 231, 1 So. 452; State *v.* Banks, 28 La. Ann. 92; State *v.* Gary, 22 La. Ann. 460; State *v.* Redding, 21 La. Ann. 188; State *v.* Parish Prison, 15 La. Ann. 347; State *v.* Le Blond, 12 La. Ann. 363; State *v.* Featherston, 7 La. Ann. 109. If the punishment imposed by the judgment consists of a fine less than the amount specified the appeal must be dismissed (State *v.* Case, 47 La. Ann. 1621, 18 So. 623; State *v.* Chapman, 38 La. Ann. 348; State *v.* Wikoff, 28 La. Ann. 654; State *v.* Benit, 15 La. Ann. 406); so too if the indictment is not brought within the statutory period, and must therefore be dismissed, the appeal cannot stand (State *v.* Judge Twelfth Dist. Ct., 52 La. Ann. 271, 26 So. 826).

Oregon.— State *v.* Sheppard, 15 Oreg. 598, 16 Pac. 483.

Texas.—Mahanay *v.* State, (Cr. App. 1901) 60 S. W. 756; Goldman *v.* State, 35 Tex. Cr. 436, 34 S. W. 122; Moore *v.* State, (Cr. App. 1896) 33 S. W. 1082; Tison *v.* State, 35 Tex. Cr. 360, 33 S. W. 872; McKinley *v.* State, (Cr. App. 1895) 32 S. W. 695; Mullon *v.* State, (Cr. App. 1894) 26 S. W. 624; Nelson *v.* State, 33 Tex. Cr. 379, 26 S. W. 623; Neubauer *v.* State, 31 Tex. Cr. 513, 21 S. W. 363; Richardson *v.* State, 3 Tex. App. 69.

See 15 Cent. Dig. tit. "Criminal Law," § 2580.

15. 1 Chitty Cr. L. 747.

16. *Alabama.*— Quinn *v.* State, 121 Ala. 38, 25 So. 694; Bryan *v.* State, 43 Ala. 321.

Idaho.— State *v.* Griffin, 4 Ida. 459, 40 Pac. 60.

Kansas.— *Ex p.* Phillips, 7 Kan. 48.

Louisiana.— State *v.* Tucker, 7 La. Ann. 551.

Minnesota.— State *v.* Noonan, 24 Minn. 174.

Ohio.— Inskeep *v.* State, 35 Ohio St. 482, 36 Ohio St. 145.

See 15 Cent. Dig. tit. "Criminal Law," § 2589.

Judgment on agreed statement of facts.— Keller *v.* State, 12 Md. 322, 71 Am. Dec. 596.

The refusal to discharge a defendant, whether claimed because of delay in his trial (State *v.* Edwards, 35 Kan. 105, 10 Pac. 544), because of a disagreement and the discharge of the jury (State *v.* Brown, 75 Me. 456; State *v.* Daugherty, 39 W. Va. 470, 19 S. E. 872), because he desires to testify against an accomplice (Cummings *v.* State, 4 Kan. 225), or for any other cause not amounting to a final judgment is not reviewable before final judgment (Lee *v.* State, 52 Ala. 321; Green *v.* State, 10 Nebr. 102, 4 N. W. 422). If, however, the effect of a discharge is that no further prosecution can be maintained it is a final judgment and reviewable on a writ of error. Com. *v.* Teneyck, 7 Ky. L. Rep. 216; State *v.* Morgan, 33 Md. 44.

Motion in arrest of judgment.— In the absence of a permissive statute, no appeal can be taken by defendant from an order denying his motion in arrest of judgment. People *v.* Dolan, 96 Cal. 315, 31 Pac. 107; People *v.* Cline, 83 Cal. 374, 23 Pac. 391; People *v.* Henry, 77 Cal. 445, 19 Pac. 830; People *v.* Markham, 64 Cal. 157, 30 Pac. 620, 49 Am. Rep. 700; People *v.* Ah Kim, 44 Cal. 384; People *v.* Tarbox, 30 How. Pr. (N. Y.) 318; Roberts *v.* State, 3 Tex. App. 47. This is true although a statute provides that on appeal by defendant from a judgment the court may review intermediate orders or rulings on the merits or which may affect the judgment, as such denial may be reviewed on an appeal from the final judgment. People *v.* Walker, (Cal. 1900) 61 Pac. 800. *Compare* State *v.* Kingsly, 10 Mont. 537, 26 Pac. 1066.

17. *Colorado.*— People *v.* Myers, 1 Colo. 508.

Delaware.— State *v.* Jones, (1902) 53 Atl. 858.

Indiana.— Wingo *v.* State, 99 Ind. 343.

Iowa.— State *v.* Swearengen, 43 Iowa 336 [*overruling* State *v.* Brandt, 41 Iowa 593].

Kansas.— State *v.* Coffelt, 68 Kan. 750, 71 Pac. 588.

Louisiana.— State *v.* Wilkins, 37 La. Ann. 62.

Maryland.— Clare *v.* State, 30 Md. 163.

Massachusetts.— Com. *v.* Stevens, 10 Cush. 483.

Michigan.— Hosford *v.* Gratiot Cir. Judge, 129 Mich. 302, 88 N. W. 627.

Minnesota.— State *v.* Durnam, 73 Minn. 150, 75 N. W. 1127; State *v.* Noonan, 24 Minn. 174.

New Jersey.— State *v.* Ham, 65 N. J. L. 464, 47 Atl. 508.

New Mexico.— Territory *v.* Pratt, (1902) 70 Pac. 562.

North Carolina.— State *v.* Ellsworth, 131 N. C. 773, 42 S. E. 699; State *v.* Polk, 91 N. C. 652; State *v.* Western North Carolina R. Co., 89 N. C. 584; State *v.* McDowell, 84 N. C. 798; State *v.* Hinson, 82 N. C. 540.

deciding against defendant on a point which if it had been decided in favor of defendant would have acquitted him.[18]

(II) *Refusal to Change Venue.* As the granting of a change of venue is usually discretionary with the trial court, its decision with regard thereto is not ordinarily reviewable on appeal;[19] and when reviewable the appeal must be taken, not from the refusal to change the place of trial, but from the final judgment.[20]

(III) *Overruling of Demurrer or Motion to Quash.* Decisions overruling defendant's demurrer or his motion to quash the indictment are not usually appealable before final judgment.[21]

(IV) *Order in Insanity Inquisition.* Defendant is not entitled to a writ of error to review the verdict of a jury determining in a summary manner that he is insane, or an order thereon committing him to an asylum, as such order is not a final judgment.[22]

South Carolina.— *Ex p.* Bell, 14 Rich. 9.
Texas.— State *v.* Brown, 35 Tex. 357.
Wisconsin.— Jenks *v.* State, 16 Wis. 332.
See 15 Cent. Dig. tit. "Criminal Law," §§ 2589, 2590.

Illustrations.— Defendant cannot appeal from an order permitting the prosecution to enter a *nolle prosequi* (Willingham *v.* State, 14 Ala. 539), from an order directing that a criminal charge ignored by one grand jury be submitted to another (People *v.* Clarke, 42 Cal. 622), from a refusal to allow him to withdraw a plea of not guilty and to demur (State *v.* Marshall, 37 La. Ann. 26), from a refusal to direct the state to file a bill of particulars (Com. *v.* Shivers, 15 Pa. Super. Ct. 579), from a refusal to reduce his bail (*Ex p.* Jacobs, (Tex. Cr. App. 1899) 49 S. W. 104), from an order directing him to pay costs as a condition for a continuance (Cochrane *v.* State, 30 Ohio St. 61), or from an order refusing his discharge (State *v.* Goings, 100 N. C. 504, 6 S. E. 88). It does not always follow, however, that these interlocutory orders may not be reviewed on an appeal from the judgment under special statutes. And where the statute authorizes an appeal from an order affecting a provisional remedy, an appeal will lie from an order refusing a transcript of the evidence at the expense of the county. State *v.* Wright, 111 Iowa 621, 82 N. W. 1013.

An order "filing away" an indictment to be reinstated on motion of the prosecution is sufficiently final to be appealable. Jones *v.* Com., 71 S. W. 643, 24 Ky. L. Rep. 1434.

18. State *v.* Wilkins, 37 La. Ann. 62; State *v.* Vance, 1 Overt. (Tenn.) 481.

19. Wesley *v.* State, 61 Ala. 282; Kelly *v.* State, 52 Ala. 361; McCorkle *v.* State, 14 Ind. 39; State *v.* Seaborn, 15 N. C. 305. See also *supra*, VII, B, 1, d.

20. Murphy *v.* State, 45 Ala. 32; Bryan *v.* State, 43 Ala. 321; People *v.* Stillman, 7 Cal. 117; State *v.* Reed, 3 Ida. 554, 32 Pac. 202; State *v.* Hart, 48 La. Ann. 1008, 20 So. 186. *Contra*, McMillan *v.* State, 68 Md. 307, 12 Atl. 8.

21. *California.*— People *v.* Simmons, 119 Cal. 1, 50 Pac. 844; People *v.* Hall, 45 Cal. 253; People *v.* Ah Fong, 12 Cal. 424.
District of Columbia.— U. S. *v.* Huyck, 6 D. C. 304; *In re* Howgate, 5 App. Cas. 74.
Georgia.— Brown *v.* State, 116 Ga. 559, 42 S. E. 795.
Indiana.—Farrel *v.* State, 7 Ind. 345; State *v.* Wabash Paper Co., 21 Ind. App. 157, 48 N. E. 653.
Iowa.— State *v.* Doty, 109 Iowa 453, 84 N. W. 505.
Kansas.— State *v.* Horneman, 16 Kan. 452; State *v.* Freeland, 16 Kan. 9.
Kentucky.— Franklin *v.* Com., 105 Ky. 237, 48 S. W. 986, 20 Ky. L. Rep. 1137; Downard *v.* Com., 17 S. W. 439, 13 Ky. L. Rep. 472; McDaniel *v.* Com., 6 Bush 326; Marston *v.* Com., 18 B. Mon. 485.
Louisiana.— State *v.* De Baillon, 51 La. Ann. 197, 25 So. 104.
Maine.— State *v.* Putnam, 38 Me. 296.
Maryland.— Ridgely *v.* State, 75 Md. 510, 23 Atl. 1099; Neff *v.* State, 57 Md. 385; Forwood *v.* State, 49 Md. 538; Kearney *v.* State, 46 Md. 422.
Massachusetts.— Com. *v.* Dunleay, 157 Mass. 386, 32 N. E. 356; Com. *v.* Hanley, 121 Mass. 377; Com. *v.* Paulus, 11 Gray 305; Com. *v.* Sallen, 11 Gray 52.
Michigan.— People *v.* Thompson, 108 Mich. 583, 66 N. W. 478.
Minnesota.— State *v.* Abresch, 42 Minn. 202, 43 N. W. 1115.
Missouri.— State *v.* Mullix, 53 Mo. 355; State *v.* Love, 52 Mo. 106; State *v.* Smith, 42 Mo. 550.
New Jersey.— State *v.* Greenwald, 66 N. J. L. 685, 50 Atl. 440.
New York.— People *v.* Rutherford, 47 N. Y. App. Div. 209, 62 N. Y. Suppl. 224, 14 N. Y. Cr. 426; People *v.* Petrea, 30 Hun 98; People *v.* Beman, 22 Hun 283.
North Carolina.— State *v.* Polk, 91 N. C. 652; State *v.* Barnes, 52 N. C. 20. See State *v.* Brannen, 53 N. C. 208.
Ohio.— *Ex p.* Bushnell, 8 Ohio St. 599.
Pennsylvania.—Quay's Petition, 189 Pa. St. 517, 42 Atl. 199.
South Carolina.— State *v.* Mason, 54 S. C. 240, 32 S. E. 357; State *v.* Burbage, 51 S. C. 284, 28 S. E. 937.
Texas.— Chavis *v.* State, 33 Tex. 446; State *v.* Paschal, 22 Tex. 584.
See 15 Cent. Dig. tit. "Criminal Law," § 2591.

22. Crocker *v.* State, 60 Wis. 553, 19 N. W. 435.

(v) *Order Directing Mistrial.* An order directing a mistrial and discharging the jury before verdict, if based on sufficient cause, is not appealable, inasmuch as it is not a final judgment.[23]

b. Necessity of Rendition and Entry of Judgment. It is not only essential that there shall have been a final determination of the cause, but it is also necessary that the judgment be regularly rendered and entered before a writ of error lies therefrom;[24] and the same rule is applicable to appeals which are taken under statutory provisions.[25]

c. Necessity of Sentence. Until sentence has been properly pronounced and entered on the record an appeal will not lie.[26]

If the court is satisfied from its observation that defendant is sane, its action in refusing an order to have his sanity determined, after a capital sentence has been imposed in a regular legal proceeding, is not appealable, although the statute provides for appeals from final orders after judgment affecting substantial rights. State *v.* Nordstrom, 21 Wash. 403, 58 Pac. 248, 53 L. R. A. 584. And see Com. *v.* Schmous, 162 Pa. St. 326, 29 Atl. 644; Webber *v.* Com., 119 Pa. St. 223, 13 Atl. 427, 4 Am. St. Rep. 634; Darnell *v.* State, 24 Tex. App. 6, 5 S. W. 522.

23. State *v.* Twiggs, 90 N. C. 685; State *v.* Bailey, 65 N. C. 426.

24. *Arkansas.*—State *v.* Flynn, 31 Ark. 35.
California.— People *v.* Clarke, 42 Cal. 622.
Illinois.— Healy *v.* People, 193 Ill. 370, 61 N. E. 1051.
Indiana.— State *v.* Uptgraft, 153 Ind. 232, 54 N. E. 802.
Iowa.—State *v.* Kuba, (1901) 87 N. W. 495.
Kentucky.— Smith *v.* Com., 5 Ky. L. Rep. 851.
Louisiana.—State *v.* Tucker, 7 La Ann. 551.
Minnesota.—State *v.* Noonan, 24 Minn. 174.
Mississippi.— Loftin *v.* State, 11 Sm. & M. 358.
Missouri.— State *v.* Gregory, 38 Mo. 501; State *v.* Ruthven, 19 Mo. 382.
Nebraska.— Gartner *v.* State, 36 Nebr. 280, 54 N. W. 516.
New York.— Tabor *v.* People, 90 N. Y. 248 [*affirming* 25 Hun 638]; People *v.* Bork, 78 N. Y. 346; Eighmy *v.* People, 78 N. Y. 330; People *v.* Nestle, 19 N. Y. 583; People *v.* Merrill, 14 N. Y. 74; Woodin *v.* People, 6 Hun 654; Bogert *v.* People, 6 Hun 262.
North Carolina.— State *v.* Keeter, 80 N. C. 472.
Ohio.— Inskeep *v.* State, 35 Ohio St. 482; Johnson *v.* State, 6 Ohio Dec. (Reprint) 1208, 12 Am. L. Rec. 538, 11 Cinc. L. Bul. 54.
Oklahoma.— Cutler *v.* Territory, 8 Okla. 101, 56 Pac. 861.
Pennsylvania.— Miles *v.* Rempublicam, 4 Yeates 319.
Texas.— State *v.* Pierce, 26 Tex. 114; Shannon *v.* State, 7 Tex. 492; Mills *v.* State, 41 Tex. Cr. 447, 53 S. W. 107, 55 S. W. 338; Longoria *v.* State, (Cr. App. 1898) 44 S. W. 1089; Labbaite *v.* State, 4 Tex. App. 169.
Virginia.— Saunders *v.* Com., 79 Va. 522.
England.— 1 Chitty Cr. L. 747; Coke Litt. 288*b*.
See 15 Cent. Dig. tit. "Criminal Law," § 2595.

25. *Alabama.*— Bridges *v.* State, 124 Ala. 90, 27 So. 474; Campbell *v.* State, 123 Ala. 72, 26 So. 224; Thomason *v.* State, 70 Ala. 20.
Arkansas.— State *v.* Falconer, (1887) 5 S. W. 193; State *v.* Jones, 25 Ark. 375.
Indiana.— Pigg *v.* State, 9 Ind. 363.
Iowa.— State *v.* Fleming, 13 Iowa 443.
Michigan.— Patten *v.* People, 18 Mich. 314, 100 Am. Dec. 173.
Minnesota.— State *v.* Ehrig, 21 Minn. 462.
Mississippi.— Bush *v.* State, (1889) 6 So. 647.
Missouri.— State *v.* Wymer, 79 Mo. 277; State *v.* Gregory, 38 Mo. 501.
New Jersey.— State *v.* Ham, 65 N. J. L. 464, 47 Atl. 508.
New York.— Hill *v.* People, 10 N. Y. 463.
North Carolina.— State *v.* Smith, 95 N. C. 680; State *v.* Hazell, 95 N. C. 623; State *v.* Saunders, 90 N. C. 651; State *v.* Woodfin, 85 N. C. 598.
Tennessee.— Nolin *v.* State, 6 Coldw. 12.
Texas.— Hill *v.* State, 41 Tex. 253; Mayfield *v.* State, 40 Tex. 289; Murray *v.* State, 35 Tex. 472; Dooly *v.* State, 33 Tex. 712; Calvin *v.* State, 23 Tex. 577; Burrell *v.* State, 16 Tex. 147; Smith *v.* State, 1 Tex. App. 408, 516.
Washington.— Regan *v.* Territory, 1 Wash. Terr. 31.
Wisconsin.— State *v.* Stone, 37 Wis. 204; Crilley *v.* State, 20 Wis. 231.
See 15 Cent. Dig. tit. "Criminal Law," § 2595.

26. *Connecticut.*— State *v.* Vaughan, 71 Conn. 457, 42 Atl. 640.
Louisiana.— State *v.* Johnson, 36 La. Ann. 306; State *v.* Brown, 27 La. Ann. 236; State *v.* Pratt, 9 La. Ann. 157; State *v.* May, 9 La. Ann. 69; State *v.* Hornsby, 8 Rob. 583, 41 Am. Dec. 314.
Maryland.— Fleet *v.* State, (1891) 21 Atl. 367.
Mississippi.— Lemly *v.* State, 69 Miss. 628, 12 So. 559.
Pennsylvania.— Marsh *v.* Com., 16 Serg. & R. 319.
South Carolina.— State *v.* Hightower, 33 S. C. 598, 11 S. E. 579; State *v.* McKettrick, 13 S. C. 439.
Texas.— Jones *v.* State, 43 Tex. Cr. 419, 66 S. W. 559; Cheatham *v.* State, (Cr. App. 1898) 44 S. W. 1094; Crow *v.* State, (Cr. App. 1896) 36 S. W. 93; Heinzman *v.* State, 34 Tex. Cr. 76, 29 S. W. 156, 482; Gonzales *v.* State, (Cr. App. 1894) 28 S. W. 947; Hart *v.* State, 14 Tex. App. 323.

d. Requisites and Sufficiency of Judgment — (I) *In General.* A judgment or sentence to sustain an appeal must show the precise character and duration of the fine or other punishment which was imposed.[27] A judgment discharging a prisoner and releasing his bail is appealable,[28] but a mere entry sustaining a motion to quash the indictment[29] without an order on the record to that effect is not.[30]

(II) *Judgment on Plea of Guilty.* Defendant may appeal from a judgment, based on his plea of guilty, on the ground that the indictment does not state facts constituting a crime, as such plea does not admit the validity or sufficiency of the indictment;[31] but it has been held that such plea is an admission of all facts well charged in the indictment or complaint, and a waiver of his right of trial by jury thereon.[32]

(III) *Judgment Entered Nunc Pro Tunc.* A judgment in a criminal cause entered *nunc pro tunc* may be appealed from.[33]

e. Orders After Judgment. In some states statutory provision is made for an appeal by defendant in a criminal case from orders made after judgment affecting his substantial rights.[34] Under these provisions it has been held that an order fixing the date of execution may be appealed from.[35] But an order overruling a motion to discharge from imprisonment and one denying a motion to arrest or to vacate the judgment are not appealable, since all such objections may be reviewed by appealing from the judgment.[36]

f. Judgments of Intermediate Court. Under the statutes in some states the

Compare Com. *v.* McCormack, 126 Mass. 258.

See 15 Cent. Dig. tit. "Criminal Law," § 2596.

A stipulation between counsel that an appeal may be determined by the court gives it no jurisdiction where sentence has not been pronounced. Lamb *v.* State, 66 Md. 285, 7 Atl. 399.

27. Guess *v.* State, 6 Ark. 147; Wharton *v.* State, 41 Miss. 680; Anschincks *v.* State, 43 Tex. 587; Roberts *v.* State, 3 Tex. App. 47; Butler *v.* State, 2 Tex. App. 529; Trimble *v.* State, 2 Tex. App. 303; Choate *v.* State, 2 Tex. App. 302.

Illustrations.—A judgment reciting the return of a verdict or the confession of judgment by the accused and the assessment of a fine (Nichols *v.* State, 100 Ala. 23, 14 So. 539; Dowell *v.* State, (Tex. Cr. App. 1893) 22 S. W. 407), or the return of a special verdict and that the court, "being of the opinion the defendant is not guilty," the verdict is so entered (State *v.* Hazell, 95 N. C. 623), or a judgment showing the usual preliminaries, and ordering that defendant be remanded to jail to await the court's further action (Butler *v.* State, 1 Tex. App. 638), or which orders the wrong process to be issued against him (Want *v.* State, 14 Tex. App. 24; Braden *v.* State, 14 Tex. App. 22; Heatherly *v.* State, 14 Tex. App. 21) is not sufficient to sustain an appeal.

28. State *v.* Booth, 21 Utah 88, 59 Pac. 553.

29. State *v.* Fraker, 141 Mo. 638, 43 S. W. 389.

30. State *v.* Bair, 92 Iowa 28, 60 N. W. 486.

A judgment which is void because rendered when the court was not in session is not appealable. *Ex p.* Juneman, 28 Tex. App. 486, 13 S. W. 783. See also Manke *v.* People, 74 N. Y. 415.

31. Arbintrode *v.* State, 67 Ind. 267, 33 Am. Rep. 86. But *compare* Edina *v.* Beck, 47 Mo. App. 234.

Nolo contendere.—Where defendant pleads *nolo contendere* in a police court, and sentence is suspended on condition, and subsequently sentence is imposed, no appeal lies to the supreme court. Leonard *v.* State, 65 N. H. 671, 23 Atl. 621; Philpot *v.* State, 65 N. H. 250, 20 Atl. 955.

Where defendant pleads not guilty but subsequently consents to a judgment of guilty without any evidence being heard, there has been a trial sufficient, under the statute, to permit him to appeal within ten days after the "trial." State *v.* Gardner, 8 Ind. App. 440, 35 N. E. 915.

32. Com. *v.* Mahoney, 115 Mass. 151; Com. *v.* Winton, 108 Mass. 485. And see Com. *v.* Hagarman, 10 Allen (Mass.) 401.

33. Ward *v.* Dunne, 136 Cal. 19, 68 Pac. 105; Scott *v.* State, 26 Tex. 116.

34. People *v.* Walker, 132 Cal. 137, 64 Pac. 133; State *v.* Broadbent, 27 Mont. 63, 69 Pac. 323.

35. People *v.* Durrant, 119 Cal. 201, 51 Pac. 185; People *v.* McNulty, 95 Cal. 594, 30 Pac. 963. See also People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269, in which it was held that the signing of the death-warrant after judgment was entered, not in the presence of or with the knowledge of the accused or his counsel, is appealable. *Contra*, State *v.* Seaton, 27 Wash. 120, 67 Pac. 572. And see State *v.* Levelle, 38 S. C. 216, 16 S. E. 717, 17 S. E. 30.

36. People *v.* Ford, 138 Cal. 140, 70 Pac. 1075; People *v.* Walker, (Cal. 1900) 61 Pac. 800.

An order overruling defendant's motion after sentence, to have the sentence forthwith executed (Johnson *v.* State, 41 Tex. 119),

judgment of an intermediate court in offenses of a certain nature is final.[37] Where, however, the constitution of the state provides that the supreme court shall have jurisdiction to review any decision of the courts below, an appeal may be taken from the decision of an intermediate appellate court;[38] and the same is true where under a statute a writ of error is a matter of right,[39] although it does not lie to an order of an intermediate court reversing a judgment of an inferior court and remanding the accused for a new trial.[40]

4. Time of Review — a. In General. At common law there is no limitation of time within which a writ of error may be brought.[41] The time within which an appeal may be taken is, however, in many of the states limited by statute;[42] and a failure to file notice of appeal[43] or an affidavit[44] as required by statute may

an order after conviction detaining defendant in custody until he can be tried on another charge (Allen *v.* State, 9 Lea (Tenn.) 651), or setting aside the verdict and holding defendant for another trial (State *v.* Brannon, 53 Mo. 244), or an order on the plea of non-identity where the accused before sentence denied that he was the person convicted and the jury found against him (Washington *v.* State, 31 Tex. Cr. 84, 19 S. W. 900) are not appealable. So an order made after judgment refusing to settle a bill of exceptions in a criminal case is not appealable as the party aggrieved may apply by petition to prove his bill of exceptions. People *v.* Jackson, 138 Cal. 32, 70 Pac. 918.

37. State *v.* Otero, 52 La. Ann. 1, 26 So. 812; State *v.* Duggan, 51 La. Ann. 1482, 26 So. 446; Com. *v.* Messenger, 4 Mass. 462; Minor *v.* State, 36 Miss. 630; State *v.* Bour, 10 Ohio Cir. Ct. 58.

In Texas, where a trial *de novo* is had in the county court on an appeal from the police court, there is no further appeal. Loper *v.* State, (App. 1891) 17 S. W. 1090. In other cases an appeal may be had. Robbins *v.* State, (Cr. App. 1892) 20 S. W. 359.

38. State *v.* Ham, 83 N. C. 590.

39. Smith *v.* People, 98 Ill. 407.

A judgment on a writ of error, which removed a judgment of an inferior court into an intermediate appellate court, reversed the same, and remitted the cause for further proceeding, is a final judgment reviewable by a writ of error, inasmuch as by the writ of error a new suit was instituted, the issue of which was the legality of the original judgment. Parks *v.* State, 62 N. J. L. 664, 43 Atl. 52. But see People *v.* Stearns, 21 Wend. (N. Y.) 409.

40. State *v.* Bluefield Drug Co., 41 W. Va. 638, 24 S. E. 649.

Where a judgment of a justice is brought by certiorari into an intermediate appellate court, and the certiorari is quashed and the action remanded, the accused may by writ of error bring the record into the higher appellate court, where if the trial court had no jurisdiction the judgment of the intermediate court will be reversed. Hall *v.* State, 12 Gill & J. (Md.) 329.

41. It may be had even after the execution of a capital (4 Blackstone Comm. 392; 1 Chitty Cr. L. 747. But see State *v.* Brown, 1 Mo. App. 449) or other sentence (Miller *v.* State, 15 Fla. 575).

42. *Arkansas.*— Deshey *v.* State, 69 Ark. 623, 65 S. W. 430.

California.— People *v.* Walker, (1900) 61 Pac. 800.

Iowa.— State *v.* Hodgson, 79 Iowa 462, 44 N. W. 708.

Kansas.— State *v.* Teissedre, 30 Kan. 210, 476, 2 Pac. 108, 650.

Louisiana.— State *v.* Moore, 52 La. Ann. 605, 26 So. 1001.

Michigan.— People *v.* Van Wagner, 51 Mich. 171, 16 N. W. 326.

Montana.— Territory *v.* Rehberg, 6 Mont. 467, 13 Pac. 132.

New York.— People *v.* New York, 3 N. Y. Suppl. 141.

Ohio.— State *v.* Bohn, 55 Ohio St. 555, 45 N. E. 707.

Oklahoma.— Swan *v.* U. S., 2 Okla. 114, 37 Pac. 1061.

Pennsylvania.— Com. *v.* Sassaman, 2 Del. Co. 333.

Wyoming.— State *v.* Blake, 5 Wyo. 107, 38 Pac. 354.

See 15 Cent. Dig. tit. "Criminal Law," § 2692.

Agreement of counsel.— The time of taking an appeal or bringing a writ of error prescribed by statute cannot be extended by an agreement of counsel. State *v.* Fleming, 13 Iowa 443; Spray *v.* Territory, 6 Okla. 1, 37 Pac. 1074.

Where an appeal taken within the proper time is dismissed for lack of prosecution and is not reinstated, a subsequent appeal must also be taken within the proper period from the date of the judgment. State *v.* McFarland, 38 Kan. 664, 17 Pac. 654.

Where defendant escapes after conviction and is captured many years afterward his right to a writ of error is determined by the statute in force at the time of his petition, and passed before his capture, limiting the time within which an appeal may be taken; and not by the law in force when he was sentenced which placed no limitation of time on the right to appeal. State *v.* Gregg, 17 W. Va. 557.

43. Territory *v.* Fallis, 2 Mont. 236. See also Com. *v.* McCready, 2 Metc. (Ky.) 376; State *v.* Madlar, 38 La. Ann. 390.

44. St. Louis *v.* R. J. Gunning Co., 138 Mo. 347, 39 S. W. 788.

deprive the appellate court of jurisdiction, unless it shall appear that the appellant was not guilty of laches.[45] A statute enacting that writs of error shall be taken within a prescribed period does not contravene the constitutional right of the accused to the writ.[46]

b. Analogy to Civil Procedure. Statutes which in general terms limit the time within which an appeal may be taken apply to both criminal and civil cases;[47] but if the time to take an appeal in a criminal case is expressly regulated by statute, such provision must govern.[48]

c. As Dependent Upon Time of Rendition of Judgment. In many states an appeal must be taken at the term at which the judgment is rendered,[49] although the contrary has been held in the absence of a statute requiring such limitation,[50] and in computing the period within which an appeal may be taken it is often necessary to determine when final judgment is entered or rendered.[51] In calculating the time after the judgment, the day on which the judgment was rendered should, it seems, be included.[52]

5. Right of Review — a. In General. Under statutes in terms permitting appeals by the state and by defendant, a judge cannot appeal in his judicial capacity from a decision reversing an order made by him, where the decision affected no substantial right of his or of any person whom he represented.[53]

45. State *v.* Renaud, 50 La. Ann. 662, 23 So. 894; Territory *v.* Mackey, 8 Mont. 168, 19 Pac. 395.

Where a rule of court provides that an appeal or writ of error shall be taken without delay, and the transcript forthwith, or as soon as it can be made out transmitted, the question as to what is a delay which will defeat the appeal must be determined by the character of each case, regard being had mainly to the time it takes to prepare the papers. A delay of twenty-one days or more will justify dismissing the writ. Fleet *v.* State, (Md. 1891) 21 Atl. 367; State *v.* Baer, 70 Md. 544, 17 Atl. 400; Snowden *v.* State, 69 Md. 203, 14 Atl. 528; State *v.* Long, 65 Md. 365, 9 Atl. 427; State *v.* Bowers, 65 Md. 363, 9 Atl. 125.

46. Sayres *v.* Com., 88 Pa. St. 291.

47. Fike *v.* U. S., Morr. (Iowa) 30; Kountz *v.* State, 8 Nebr. 294, 1 N. W. 142; State *v.* Holmes, 36 N. J. L. 62.

A statute which provides that writs of error in criminal cases shall be issued and returned as in civil cases applies only to the manner of the issuing and return and does not limit the time on writs in criminal cases. Collins *v.* State, 33 Fla. 429, 15 So. 214.

48. State *v.* Wallace, 41 Ind. 445; Ottumwa *v.* State, 1 Iowa 507; Blackburn *v.* State, 22 Ohio St. 581; Nickel *v.* State, 6 Ohio Cir. Ct. 601; State *v.* Pitts, 12 S. C. 180, 32 Am. Rep. 508.

49. *Arkansas.*— State *v.* Cox, 29 Ark. 115.

Kentucky.— Com. *v.* Adams, 16 B. Mon. 338; Com. *v.* Fryman, 31 S. W. 281, 17 Ky. L. Rep. 400; Austin *v.* Com., 10 Ky. L. Rep. 197; Gallegher *v.* Com., 5 Ky. L. Rep. 600; Prater *v.* Com., 4 Ky. L. Rep. 370.

Louisiana.— State *v.* Jackson, 44 La. Ann. 975, 11 So. 575; State *v.* Burns, 38 La. Ann. 363; State *v.* Harris, 30 La. Ann. 1340.

Missouri.— State *v.* Roscoe, 93 Mo. 146, 6 S. W. 117; State *v.* Rhodes, 86 Mo. 635.

North Carolina.— State *v.* Dixon, 71 N. C. 204.

Texas.— York *v.* Dallas, (Cr. App. 1895) 30 S. W. 223.

See 15 Cent. Dig tit. "Criminal Law," § 2695.

A motion for a new trial suspends the judgment until it is overruled, and during that time there is no judgment within the meaning of Cal. Cr. Code, § 248, which requires an appeal to be taken at the term during which the judgment was rendered. Com. *v.* Tarvin, (Ky. 1903) 72 S. W. 13. And see Louisville Chemical Works *v.* Com., 8 Bush (Ky.) 179.

50. Mobley *v.* State, 53 Ala. 646.

51. Thus "within three days after sentence" in the case of an appeal by the state means the final quashing of the indictment or some other final disposition of the case. State *v.* Barranger, 106 La. 352, 31 So. 13. If the court adjourns on the day of sentence a motion for an appeal made on the reopening of the court is sufficient. State *v.* Estoup, 39 La. Ann. 906, 3 So. 124.

It has been held that a judgment becomes final on the day that an order is entered reciting a prior verdict and sentence and directing that the sentence he executed on a day specified therein. Ball *v.* U. S., 140 U. S. 118, 11 S. Ct. 761, 35 L. ed. 377.

52. Wood *v.* Com., 11 Bush (Ky.) 220.

On an extension of time for the return of an appeal on the application of the appellant the additional time runs from the date named by him as the original return-day and not from the day the court reassembled after vacation. State *v.* Moore, 52 La. Ann. 603, 26 So. 1001.

53. People *v.* Lawrence, 107 N. Y. 607, 684, 15 N. E. 187.

The proper party to an appeal on behalf of the state is the prosecuting attorney (State *v.* Carter, 49 Md. 8), and a petition in error for the state, signed by private counsel, may be dismissed (State *v.* Halphrey, 14 Nebr. 578, 16 N. W. 823). A writ of error asked for by the friends of defendant, without his

b. Right of Prosecution — (i) *In General.* As a general rule the state has no right to a writ of error or to an appeal from a judgment in favor of defendant, whether upon a verdict of acquittal or upon the determination by the court of a question of law, unless it be expressly conferred by statute in the plainest and most unequivocal terms.[54] In many jurisdictions, however, statutory modifications of the rule have been made allowing a right of review upon the part of the state, under certain conditions or for the decision of certain questions.[55]

(ii) *Arrest of Judgment.* By statute in some states the prosecution may appeal from a judgment sustaining a motion in arrest.[56]

(iii) *Discharge of Accused.* The state has no right to appeal from an order dismissing the case and discharging defendant because of the delay on the part of the prosecution in bringing him to trial;[57] from an order discharging

authority or consent, should not be allowed. *Ex p.* Door, 3 How. (U. S.) 103, 11 L. ed. 514.

54. *Arkansas.*— State *v.* Jones, 22 Ark. 331; State *v.* Biscoe, 12 Ark. 683.

Colorado.— People *v.* Raymond, 18 Colo. 242, 32 Pac. 429, 19 L. R. A. 649.

District of Columbia.— U. S. *v.* Ainsworth, 3 App. Cas. 483.

Florida.— State *v.* Burns, 18 Fla. 185.

Georgia.— Eaves *v.* State, 113 Ga. 749, 39 S. E. 318; State *v.* Johnson, 61 Ga. 640; State *v.* Capers, 61 Ga. 263; State *v.* Lavinia, 25 Ga. 311; State *v.* Jones, 7 Ga. 422.

Idaho.— State *v.* Ridenbaugh, 5 Ida. 710, 51 Pac. 750.

Illinois.— People *v.* Royal, 2 Ill. 557; People *v.* Dill, 2 Ill. 257; People *v.* John York Co., 80 Ill. App. 162; People *v.* Glodo, 12 Ill. App. 348.

Indiana.— State *v.* Overholser, 69 Ind. 145; State *v.* Campbell, 67 Ind. 302; State *v.* Daily, 6 Ind. 9.

Kentucky.— Com. *v.* Sanford, 5 Litt. 289.

Massachusetts.—Com. *v.* Cummings, 3 Cush. 212, 50 Am. Dec. 732.

Minnesota.— State *v.* McGrorty, 2 Minn. 224.

Missouri.— State *v.* Wear, 145 Mo. 162, 46 S. W. 1099; State *v.* Carr, 142 Mo. 607, 44 S. W. 776; State *v.* Bollinger, 69 Mo. 577; State *v.* Heatherly, 4 Mo. 478.

Montana.— State *v.* O'Brien, 20 Mont. 191, 50 Pac. 412.

New York.— People *v.* Corning, 2 N. Y. 9, 49 Am. Dec. 364; People *v.* Snyder, 44 Hun 193.

North Carolina.— State *v.* Davidson, 124 N. C. 839, 32 S. E. 957; State *v.* Ballard, 122 N. C. 1024, 29 S. E. 899; State *v.* Jones, 5 N. C. 257.

Oregon.— Portland *v.* Erickson, 39 Oreg. 1, 62 Pac. 753.

Pennsylvania.— Com. *v.* Wallace, 114 Pa. St. 405, 6 Atl. 685, 60 Am. Rep. 353.

South Dakota.—State *v.* Finsted, (1903) 93 N. W. 640.

Tennessee.— State *v.* Curle, Meigs 190; State *v.* Solomons, 6 Yerg. 360, 27 Am. Dec. 469.

Texas.— State *v.* Daugherty, 5 Tex. 1.

Virginia.— Com. *v.* Harrison, 2 Va. Cas. 202.

Washington.— State *v.* Hubbell, 18 Wash. 482, 51 Pac. 1039.

Wisconsin.— State *v.* Kemp, 17 Wis. 669.

United States.— U. S. *v.* Sanges, 144 U. S. 310, 12 S. Ct. 609, 36 L. ed. 445, opinion delivered by Mr. Justice Gray.

Compare State *v.* Buchanan, 5 Harr. & J. 317, 9 Am. Dec. 534.

See 15 Cent. Dig. tit. "Criminal Law," § 2599.

55. *Alabama.*— State *v.* Harold, 128 Ala. 39, 29 So. 592.

California.— People *v.* Roberts, 114 Cal. 67, 45 Pac. 1016.

Connecticut.— Appeals upon all questions of law arising on the trial may be taken by the state. State *v.* Clerkin, 58 Conn. 98, 19 Atl. 517. See also State *v.* Lee, 65 Conn. 265, 30 Atl. 1110, 48 Am. St. Rep. 202, 27 L. R. A. 498.

Iowa.—Burlington *v.* Unterkircher, 99 Iowa 401, 68 N. W. 795.

Kansas.— State *v.* Rook, 61 Kan. 382, 59 Pac. 653, 49 L. R. A. 186.

Kentucky.— Com. *v.* Dobbins, 9 Bush 1; Com. *v.* Jefferson, 6 B. Mon. 313; Com. *v.* Enders, 8 Ky. L. Rep. 522.

Louisiana.— State *v.* Humphries, 35 La. Ann. 966. See also State *v.* Fournet, 22 La. Ann. 564; State *v.* Ross, 14 La. Ann. 364; State *v.* Rentiford, 14 La. Ann. 214; State *v.* Ellis, 12 La. Ann. 390.

Montana.— State *v.* O'Brien, 19 Mont. 6, 47 Pac. 103.

New Jersey.— State *v.* Meyer, 65 N. J. L. 233, 47 Atl. 485.

North Carolina.— State *v.* Southern R. Co., 126 N. C. 1073, 35 S. E. 619, 1039.

Ohio.— State *v.* Hervey, 59 Ohio St. 218, 52 N. E. 188.

South Dakota.— State *v.* Finstad, (1903) 93 N. W. 640.

Utah.— State *v.* McKenna, 24 Utah 317, 67 Pac. 815.

West Virginia.— State *v.* Bluefield Drug Co., 41 W. Va. 638, 24 S. E. 649.

56. State *v.* Arnold, 144 Ind. 651, 42 N. E. 1095, 43 N. E. 871; State *v.* French, 50 La. Ann. 461, 23 So. 606; State *v.* Brabson, 38 La. Ann. 144; State *v.* Robinson, 37 La. Ann. 673; State *v.* Cason, 20 La. Ann. 48; State *v.* Foster, 2 Mo. 210; U. S. *v.* Salter, 1 Pinn. (Wis.) 278.

57. People *v.* Hollis, 65 Cal. 78, 2 Pac. 893; State *v.* Marshall, 124 Mo. 483, 27 S. W. 1107; State *v.* Ashcraft, 95 Mo. 348, 8 S. W. 216.

defendant after the state had rested because of the insufficiency of the evidence;[58] from an order discharging defendant on sustaining a plea of former acquittal;[59] or from an order discharging defendant on the admission by the state of the facts set out in a plea in bar.[60]

(IV) *JUDGMENT QUASHING INDICTMENT OR SUSTAINING DEMURRER THERETO.* It is in contravention of common-law principles for the state to appeal from a judgment on the quashing or setting aside of an indictment or information.[61] It will be authorized to do so only where the power is expressly conferred by statute, or arises by necessary implication, and then only in the instances specified and enumerated.[62] The right of the state to appeal from a judgment quashing an indictment or sustaining a demurrer thereto has, however, in many states been created by legislative enactment.[63]

(V) *JUDGMENT ON SPECIAL VERDICT.* Where the jury renders a special verdict on the facts and the court enters an acquittal thereon, the state in some jurisdictions may appeal.[64]

(VI) *ORDER OVERRULING DEMURRER TO PLEA.* Where the statute merely permits an appeal or a writ of error to be taken from a judgment for defendant on demurrer to an indictment the state cannot appeal from a judgment rendered against it upon its demurrer to a special plea of defendant.[65]

(VII) *ORDER GRANTING NEW TRIAL.* In the absence of a statute expressly

Discharge for want of jurisdiction.—Under a statute giving the state an appeal only from an order quashing the indictment or arresting judgment on the grounds that the facts pleaded do not constitute a crime, the state cannot appeal from the dismissal of an information because of lack of jurisdiction over defendant. State *v.* Kemp, 5 Wash. 212, 31 Pac. 711.

Where the statute permits an appeal by the prosecuting attorney who has taken exceptions on questions of law, an appeal will not be sustained from a judgment discharging defendant, which is based on an agreed statement of facts. Territory *v.* Jinks, 8 Mont. 135, 19 Pac. 386.

58. State *v.* Hickerson, 55 Kan. 133, 39 Pac. 1045.

59. State *v.* Lane, 78 N. C. 547.

60. State *v.* Smith, 49 Kan. 358, 30 Pac. 522.

Where the court discharges the accused because it considers an ordinance invalid under which he was being prosecuted, the prosecution may appeal, as the discharge is not an acquittal. Grand Rapids *v.* Braudy, 105 Mich. 670, 64 N. W. 20, 55 Am. St. Rep. 472, 32 L. R. A. 116.

61. State *v.* Bartlett, 9 Ind. 569.

62. *California.*— People *v.* Higgins, 114 Cal. 63, 45 Pac. 1004; People *v.* Richter, 113 Cal. 473, 45 Pac. 811.

District of Columbia.— U. S. *v.* Surratt, 6 D. C. 306; U. S. *v.* Ainsworth, 3 App. Cas. 483; U. S. *v.* Phillips, 5 Mackey 250.

Florida.— State *v.* Burns, 18 Fla. 185.

Indiana.— State *v.* Evansville, etc., R. Co., 107 Ind. 581, 8 N. E. 619.

Louisiana.— State *v.* Callum, 28 La. Ann. 49.

Missouri.— State *v.* Rozelle, (1903) 71 S. W. 1070; State *v.* Stegman, 90 Mo. 486, 2 S. W. 798.

New York.— People *v.* Corning, 2 N. Y. 9, 49 Am. Dec. 364; People *v.* Dempsey, 31 Hun 526, 66 How. Pr. 371; People *v.* Loomis, 30 How. Pr. 323.

North Carolina.— State *v.* Lane, 78 N. C. 547.

See 15 Cent. Dig. tit. "Criminal Law," § 2602.

The right of the state to appeal should be exercised only when it is necessary to the correct and uniform practice of the state that the question involved should be settled. State *v.* Withrow, 47 Ark. 551, 2 S. W. 184.

An appeal cannot be taken from an order quashing an indictment as to one charge, where it is still pending as to another. State *v.* Thompson, 41 Tex. 523.

63. *California.*— People *v.* Lee, 107 Cal. 477, 40 Pac. 754; People *v.* War, 20 Cal. 117.

Indiana.— State *v.* Dark, 8 Blackf. 526.

Kansas.— State *v.* Rook, 61 Kan. 382, 59 Pac. 653, 49 L. R. A. 186; Junction City *v.* Keeffe, 40 Kan. 275, 19 Pac. 735.

Kentucky.— Com. *v.* Smithers, 8 Ky. L. Rep. 612; Com. *v.* Greenwell, 8 Ky. L. Rep. 609.

Louisiana.— State *v.* Taylor, 34 La. Ann. 978; State *v.* Hood, 6 La. Ann. 179; State *v.* Jones, 8 Rob. 573.

Missouri.— State *v.* Risley, 72 Mo. 609; State *v.* Bollinger, 69 Mo. 577.

New York.— See People *v.* Bork, 78 N. Y. 346; People *v.* Stone, 9 Wend. 182.

South Carolina.— State *v.* Young, 30 S. C. 399, 9 S. E. 355.

Texas.— State *v.* Wall, 35 Tex. 484; State *v.* Manning, 14 Tex. 402.

See 15 Cent. Dig. tit. "Criminal Law," § 2602.

Demurrer to complaint and indictment distinguished.—State *v.* Morris, 22 Mont. 1, 55 Pac. 360.

64. State *v.* Robinson, 116 N. C. 1046, 21 S. E. 701; State *v.* Ewing, 108 N. C. 755, 13 S. E. 10; State *v.* Lane, 78 N. C. 547.

65. State *v.* Rowe, 22 Mo. 328; State *v.* Minnick, 33 Oreg. 158, 54 Pac. 223.

so providing the state cannot appeal from an order granting defendant a new trial,[66] or from an order quashing a conviction and sentence.[67]

(VIII) *VERDICT OR JUDGMENT OF ACQUITTAL*—(A) *In General.* In view of the common-law rule permitting a former acquittal to be pleaded as an absolute bar to a subsequent prosecution, and of the provisions in the federal and state constitutions that no one shall be twice put in jeopardy for the same offense,[68] it follows that a statute which permits the state to appeal and to retry a case after an acquittal is unconstitutional.[69] Hence an appeal by the state for the purpose of reversing an acquittal cannot be taken,[70] even though the court erred in stating the law to the jury, by reason of which defendant was acquitted.[71] Nor can the parties by an agreement go to the appellate court on questions of law reserved during the trial by consent, after a verdict of acquittal.[72] Provision has, however, been made in some jurisdictions for a writ of error or an appeal upon the part of the state not to afford the state an opportunity for a new trial after an acquittal, but to point out errors in the proceedings, and by so doing to obtain an authoritative exposition of the law to be followed in the future by the courts.[73]

(B) *Under Direction of Court.* The state cannot appeal from a judgment of acquittal and the discharge of the jury, directed by the court, on the ground that

66. *Alabama.*— Benbow *v.* State, 128 Ala. 1, 29 So. 553.

Indiana.— State *v.* Spencer, 92 Ind. 115; State *v.* Ely, 11 Ind. 313.

Louisiana.— State *v.* Welsh, 23 La. Ann. 142.

New York.— People *v.* Beckwith, 42 Hun 366.

North Carolina.—State *v.* Hinson, 123 N. C. 755, 31 S. E. 854; State *v.* Padgett, 82 N. C. 544.

Tennessee.— State *v.* Perry, 4 Baxt. 438.

Washington.— State *v.* Johnson, 24 Wash. 72, 63 Pac. 1124.

See 15 Cent. Dig. tit. "Criminal Law," § 2609.

A statute authorizing an appeal by the state "on a question of law reserved by the state" (State *v.* Bloom, 13 Mont. 551, 35 Pac. 243; State *v.* Northrup, 13 Mont. 522, 35 Pac. 228), or a statute providing for an appeal "from a judgment actually acquitting a defendant, where a question of law has been decided adversely to the state" (State *v.* McDowell, 72 Miss. 138, 17 So. 213), does not authorize an appeal from an order granting a new trial.

67. People *v.* Barry, 10 Abb. Pr. (N. Y.) 225.

68. See *supra*, IX.

At common law a writ of error to review an acquittal does not lie at the instance of the prosecution. State *v.* Shields, 49 Md. 301.

69. People *v.* Webb, 38 Cal. 467; People *v.* Miner, 144 Ill. 308, 33 N. E. 40, 19 L. R. A. 342; State *v.* Van Horton, 26 Iowa 402. *Compare* State *v.* Lee, 65 Conn. 265, 30 Atl. 1110, 48 Am. St. Rep. 202, 27 L. R. A. 498.

70. *Arkansas.*— State *v.* Ashley, 37 Ark. 403; State *v.* Denton, 6 Ark. 259; State *v.* Hand, 6 Ark. 169, 42 Am. Dec. 689.

Indiana.—State *v.* Van Valkenburg, 60 Ind. 302; State *v.* Yount, 4 Ind. 653; State *v.* Davis, 4 Blackf. 345.

Kansas.— State *v.* Phillips, 33 Kan. 100, 5 Pac. 436; State *v.* Carmichael, 3 Kan. 102.

Kentucky.— Com. *v.* Enders, 8 Ky. L. Rep. 522; Com. *v.* Woodall, 6 Ky. L. Rep. 289.

Louisiana.— State *v.* Hood, 6 La. Ann. 179.

Minnesota.— Kennedy *v.* Raught, 6 Minn. 235.

Mississippi.— State *v.* Anderson, 3 Sm. & M. 751.

Missouri.—State *v.* Peck, 51 Mo. 111; State *v.* Palmer, 30 Mo. 385; State *v.* Carroll, 7 Mo. 286; State *v.* Boyle, 1 Mo. App. 18.

North Carolina.— State *v.* Powell, 86 N. C. 640; State *v.* Armstrong, 72 N. C. 193; State *v.* Phillips, 66 N. C. 646; State *v.* Credle, 63 N. C. 506.

Pennsylvania.— Com. *v.* Stillwagon, 13 Pa. Super. Ct. 547.

South Carolina.— State *v.* Gathers, 15 S. C. 370.

Tennessee.— State *v.* Garibaldi, 6 Lea 632; State *v.* Reynolds, 4 Hayw. 110.

Texas.— State *v.* Burris, 3 Tex. 118.

Washington.— State *v.* Armstrong, 19 Wash. 706, 53 Pac. 351; State *v.* Heron, 19 Wash. 706, 53 Pac. 348.

Wisconsin.— U. S. *v.* Salter, 1 Pinn. 278.

See 15 Cent. Dig. tit. "Criminal Law," § 2604.

71. State *v.* West, 71 N. C. 263; Com. *v.* Steimling, 156 Pa. St. 400, 27 Atl. 297.

72. State *v.* Lee, 49 Kan. 570, 31 Pac. 147.

73. State *v.* Phillips, 25 Ind. App. 579, 58 N. E. 727; State *v.* Kinney, 44 Iowa 444; State *v.* Ruedy, 57 Ohio St. 224, 48 N. E. 944; State *v.* Buechler, 57 Ohio St. 95, 48 N. E. 507. See also State *v.* Ward, 75 Iowa 637, 36 N. W. 765.

In Kentucky the state's appeal lies solely for the purpose of settling questions of law (Com. *v.* Van Tuyl, 1 Metc. 1. 71 Am. Dec. 455; Com. *v.* Clubb, 17 S. W. 281, 13 Ky. L. Rep. 416), and a judgment of acquittal for a felony may be reviewed on appeal to secure a uniform and correct administration of justice, although it cannot be reversed (Com. *v.* Bruce, 79 Ky. 560; Com. *v.* Wilson, 32 S. W. 166, 17 Ky. L. Rep. 578).

the statute under which defendant is prosecuted is unconstitutional;[74] nor where the jury is directed to acquit because of the insufficiency of the evidence[75] or indictment.[76]

(IX) *CONVICTION OF DEFENDANT.* Appeals by the state upon questions reserved cannot be taken upon a conviction, where the statute expressly provides that it can be done only on an acquittal.[77]

(X) *DISAGREEMENT OF JURY.* The state may, under some statutes, appeal from a decision on legal points not amounting to final judgment, although the case was never finally disposed of by reason of the discharge of the jury because of their disagreement.[78]

(XI) *JUDGMENT OF INTERMEDIATE COURT.* Whether the state is authorized to appeal from a decision of an intermediate appellate court on an appeal by defendant depends on the express provisions of the statute.[79]

(XII) *WAIVER OF RIGHT*—(A) *In General.* After the right to appeal has accrued to the state no act of the prosecuting attorney can waive it.[80] So the filing of an information directly after an arrest of judgment does not constitute a waiver.[81]

(B) *Payment of Fine.* The payment of a fine imposed as a part of the punishment and its receipt by the clerk or other official does not defeat the right of the state to an appeal.[82]

c. **Right of Defendant**—(I) *IN GENERAL.* At common law, in England, in the federal courts, and in some of the states the writ of error is not a matter of right but is in the discretion of the court.[83] The right of appeal is purely statutory.[84] Hence a statute depriving the accused of the right to an appeal under certain circumstances is not unconstitutional.[85]

(II) *WAIVER OF RIGHT*—(A) *In General.* A waiver will be implied from any act on the part of defendant inconsistent with an intention to take an appeal.[86]

(B) *By Payment of Fine.* As the appellate court will not determine a merely speculative question, it will not consider an appeal from a sentence which

74. State *v.* Moon, 45 Kan. 145, 25 Pac. 614.

75. Territory *v.* Laun, 8 Mont. 322, 20 Pac. 652.

76. Territory *v.* Lee, 3 Wash. Terr. 396, 17 Pac. 884.

77. State *v.* Hamilton, 62 Ind. 409.

Under a statutory provision that the prosecuting attorney may except to a "decision of the court during the prosecution of the cause," the state may appeal from a sentence of imprisonment in a particular prison. Territory *v.* Nelson, 2 Wyo. 346.

78. Com. *v.* Matthews, 89 Ky. 287, 12 S. W. 333, 11 Ky. L. Rep. 505; Com. *v.* Bullock, 67 S. W. 992, 24 Ky. L. Rep. 78.

79. State *v.* Josephs, 43 Ohio St. 457, 3 N. E. 372. And see State *v.* Nicholas, 2 Strobh. (S. C.) 278.

This right may exist by virtue of the state constitution independently of statutory enactment. State *v.* Reakey, 62 Mo. 40. So too the right has been upheld without reference to any statutory or constitutional provision. Shelby *v.* Boenau, 40 Ohio St. 253.

80. State *v.* Arnold, 144 Ind. 651, 42 N. E. 1095, 43 N. E. 871. *Contra*, People *v.* Wooster, 16 Cal. 435.

81. State *v.* Cason, 20 La. Ann. 48.

82. State *v.* Arnold, 144 Ind. 651, 42 N. E. 1095, 43 N. E. 871; State *v.* Tait, 22 Iowa 140.

83. Loftin *v.* State, 11 Sm. & M. (Miss.) 358; Com. *v.* Winnemore, 2 Brewst. (Pa.) 379; Mackin *v.* U. S., 33 Fed. 334.

Where no method is provided for a review in a criminal case, but the state constitution provides that the appellate court shall have jurisdiction to review upon appeal any decisions of a lower court, a defendant is entitled to a writ of error or such other proper writ as the appellate court may see fit to issue. State *v.* Reed, 3 Ida. 554, 32 Pac. 202.

84. See *supra*, XVII, A, 1, c; XVII, A, 3.

85. People *v.* Dunn, 157 N. Y. 528, 52 N. E. 572, 43 L. R. A. 247 [*affirming* 31 N. Y. App. Div. 139, 52 N. Y. Suppl. 968].

A statute giving defendant a right to appeal when proceeded against by indictment does not give him the right to appeal from a conviction on a proceeding by information. State *v.* Brown, 153 Mo. 578, 55 S. W. 76; State *v.* Vaughn, 83 Mo. App. 457; State *v.* Jenkins, 83 Mo. App. 322; State *v.* Kelly, 83 Mo. App. 252; State *v.* Boggess, 83 Mo. App. 121.

86. Thus a motion for a new trial persisted in by defendant is a waiver of a right to rely on exceptions taken at the same time. State *v.* Call, 14 Me. 421.

This rule is subject to an exception in capital cases and where the punishment is life imprisonment. Smith *v.* Com., 14 Serg. & R. (Pa.) 69.

has been acquiesced in.[87] Hence the accused by voluntarily paying the fine imposed on him waives his right to appeal[88] or to have a review by certiorari.[89]

B. Presentation and Reservation in Lower Court of Grounds of Review[90]

— 1. Objections — a. Neeessity — (I) *Rule.* It is a general and almost universal rule that questions not raised at the trial will not be reviewed.[91]

(II) *Application of Rule* — (A) *In General.* The rule that questions which could have been appropriately raised at the trial will not be noticed for the first time on appeal has been invoked and enforced with respect to objections as to the constitutionality of statutes[92] and ordinances;[93] as to criminal liability;[94] as

87. Batesburg *v.* Mitchell, 58 S. C. 564, 37 S. E. 36.

88. State *v.* Westfall, 37 Iowa 575; State *v.* Burthe, 39 La. Ann. 328, 1 So. 652; Payne *v.* State, 12 Tex. App. 160; Madsen *v.* Kenner, 4 Utah 3, 4 Pac. 992. *Contra*, Barthelemy *v.* People, 2 Hill (N. Y.) 248; Hogue *v.* State, 23 Ohio Cir. Ct. 567.

Taking security for fine.— The fact that an official takes security from the accused for the payment of the fine is not a payment which will deprive the accused of his right to appeal. Schlief *v.* State, 38 Ark. 522; Floyd *v.* State, 32 Ark. 200.

A statute which provides that sentence may be imposed notwithstanding exceptions and that no stay shall result from taking exceptions unless a certificate of reasonable doubt is filed by the judge does not prevent the exceptions of defendant from being considered, because he has voluntarily paid his fine. Com. *v.* Fleckner, 167 Mass. 13, 44 N. E. 1053.

89. Powell *v.* People, 47 Mich. 108, 10 N. W. 129; People *v.* Leavitt, 41 Mich. 470, 2 N. W. 812; Com. *v.* Gipner, 118 Pa. St. 379, 12 Atl. 306.

90. See Appeal and Error, 2 Cyc. 660 *et seq.*

91. *Alabama.*— Howell *v.* State, 110 Ala. 23, 20 So. 449.

Arkansas.— Trimble *v.* State, 27 Ark. 397.

Illinois.— McKinney *v.* People, 7 Ill. 540, 43 Am. Dec. 65.

Indiana.— Mulreed *v.* State, 107 Ind. 62, 7 N. E. 884; Hornberger *v.* State, 5 Ind. 300.

Iowa.— State *v.* Cuddy, 40 Iowa 419; State *v.* Hedge, 18 Iowa 581.

Kentucky.— Branson *v.* Com., 92 Ky. 330, 17 S. W. 1019, 13 Ky. L. Rep. 614; Helton *v.* Com., 29 S. W. 331, 16 Ky. L. Rep. 464.

Louisiana.— State *v.* Mouton, 42 La. Ann. 1160, 8 So. 631; State *v.* Holcombe, 41 La. Ann. 1066, 6 So. 785; State *v.* Johnson, 33 La. Ann. 889.

Maryland.— State *v.* Williams, 5 Md. 82.

Michigan.— People *v.* Ecarius, 124 Mich. 616, 83 N. W. 628; People *v.* Graney, 91 Mich. 646, 52 N. W. 66; People *v.* Murray, 72 Mich. 10, 40 N. W. 29.

Missouri.— State *v.* Gatlin, 170 Mo. 354, 70 S. W. 885; State *v.* Flentge, 51 Mo. 141.

Nebraska.— Dolen *v.* State, 15 Nebr. 405, 19 N. W. 627.

New Hampshire.— State *v.* Sias, 17 N. H. 558.

New Mexico.— Territory *v.* Taylor, (1903) 71 Pac. 489.

New York.— Hayen *v.* People, 3 Park. Cr. 175.

North Carolina.— State *v.* Mallett, 125 N. C. 718, 34 S. E. 651.

Oklahoma.— Wamsley *v.* Territory, 3 Okla. 279, 41 Pac. 600.

Oregon.— State *v.* Sally, 41 Oreg. 366, 70 Pac. 396.

Pennsylvania.— Hopkins *v.* Com., 50 Pa. St. 9, 88 Am. Dec. 518.

Texas.— Hodges *v.* State, (Cr. App. 1903) 72 S. W. 179; Gardner *v.* State, 11 Tex. App. 265.

Vermont.— State *v.* Carr, 13 Vt. 571.

See 15 Cent. Dig. tit. "Criminal Law," § 2619.

A motion for a new trial based upon an error which should have been objected and excepted to at the trial does not save the objection for an appeal. State *v.* West, 45 La. Ann. 928, 13 So. 173; Price *v.* State, 36 Miss. 531, 72 Am. Dec. 195.

Under Ky. Cr. Code, § 281, which provides that decisions on motions for new trials shall not be subject to exceptions, objections which are first made on a motion for a new trial cannot be considered on appeal. Brown *v.* Com., 14 Bush 398; Ellis *v.* Com., 7 S. W. 169, 9 Ky. L. Rep. 824; Peters *v.* Com., 6 Ky. L. Rep. 523; Rose *v.* Com., 3 Ky. L. Rep. 693; Bailey *v.* Com., 2 Ky. L. Rep. 436.

As an exception to the general rule it is the duty of the court in the absence of statute to review material defects apparent of record, although no objections were taken at the trial. State *v.* Levy, 119 Mo. 434, 24 S. W. 1026; State *v.* Meyers, 99 Mo. 107, 12 S. W. 516; State *v.* Vaughn, 26 Mo. 29. And under the statutes of some jurisdictions it should examine the whole record and render such judgment as the law demands. State *v.* Potter, 28 Iowa 554.

92. **Statutes.**— State *v.* Romano, 37 La. Ann. 98; People *v.* Luby, 99 Mich. 89, 57 N. W. 1092; State *v.* Raymond, 156 Mo. 117, 56 S. W. 894; Penn *v.* State, 43 Tex. Cr. 608, 68 S. W. 170. And see State *v.* Agee, 83 Ala. 110, 3 So. 856. See also State *v.* Bauerman, 72 Ala. 252.

93. **Ordinances.**— Minden *v.* McCrary, 108 La. 518, 32 So. 468; State *v.* Hennessey, 44 La. Ann. 805, 11 So. 39; State *v.* Burthe, 39 La. Ann. 341, 1 So. 656; State *v.* Tsni Ho, 37 La. Ann. 50.

94. Stallings *v.* State, 33 Ala. 425.

The claim of immunity from prosecution because a sale was made in the original package, as a defense to a prosecution for unlaw-

to preliminary proceedings in general;[95] as to the warrant;[96] as to the grounds of arrest;[97] as to the affidavit for arrest;[98] as to the organization of the grand jury;[99] as to change of venue;[1] as to manner and form of pleading;[2] as to the discharge of a co-defendant;[3] as to the qualification of the trial judge;[4] as to the compe-

fully selling trout which had been shipped into the state, cannot be urged for the first time on appeal. State *v.* Schuman, 36 Oreg. 16, 58 Pac. 661, 47 L. R. A. 153.

95. Preliminary proceedings.— People *v.* Hanifan, 98 Mich. 32, 56 N. W. 1048; Dolan *v.* People, 6 Hun (N. Y.) 493. And see State *v.* Spencer, 15 Utah 149, 49 Pac. 302; State *v.* Abbott, 8 W. Va. 741; State *v.* Stewart, 7 W. Va. 731, 23 Am. Rep. 623.

If on motion for a new trial the objection is made and overruled the rule may not apply. Miller *v.* State, 26 Ind. App. 152, 59 N. E. 287.

96. Warrant.— An objection that a warrant is not sufficient (Santo *v.* State, 2 Iowa 165, 63 Am. Dec. 487), that it contains a clerical error (People *v.* O'Brien, 68 Mich. 468, 36 N. W. 225; People *v.* Meyer, 26 Misc. (N. Y.) 117, 56 N. Y. Suppl. 1097), or that it was directed to the wrong officer and was uncertain as to the ordinance violated (State *v.* Reckards, 21 Minn. 47; Rochester *v.* Upman, 19 Minn. 108) comes too late when first urged on appeal.

After conviction on a trial de novo in a county court an objection that there was no indorsement on the warrant of the appeal by the justice before whom the accused had been originally convicted comes too late. Harrison *v.* Com., 81 Va. 491.

97. Ground of arrest.— People *v.* Johnson, 86 Mich. 175, 48 N. W. 870, 24 Am. St. Rep. 116, 13 L. R. A. 163.

98. Affidavit for arrest.— People *v.* Moore, 50 Hun (N. Y.) 356, 3 N. Y. Suppl. 159; People *v.* Cook, 45 Hun (N. Y.) 34.

As to objection to the jurat of the affidavit see Bell *v.* State, 124 Ala. 94, 27 So. 414.

99. Grand jury.—An objection to the mode of selecting and summoning the grand jurors who found the indictment (Bass *v.* State, 37 Ala. 469; Bishop *v.* Com., 109 Ky. 558, 60 S. W. 190, 22 Ky. L. Rep. 1161, 58 S. W. 817, 22 Ky. L. Rep. 760), that the record does not show the impaneling of the grand jury (Young *v.* State, 23 Ohio St. 577), or that they were not drawn and impaneled according to law (Oriemon *v.* Territory, 13 Hawaii 413; State *v.* Witt, 33 Oreg. 594, 55 Pac. 1053; Gonzales *v.* State, (Tex. Cr. App. 1899) 50 S. W. 1018); that the foreman was not sworn (Roe *v.* State, 82 Ala. 68, 3 So. 2), or that the grand jury was not properly organized (Morgan *v.* State, 19 Ala. 556; Rinkard *v.* State, 157 Ind. 534, 62 N. E. 14; State *v.* Price, 37 La. Ann. 215; Fleming *v.* State, 60 Miss. 434; Brantley *v.* State, 13 Sm. & M. (Miss.) 468; State *v.* Pate, 67 Mo. 488; Conkey *v.* People, 1 Abb. Dec. (N. Y.) 418, 5 Park. Cr. (N. Y.) 31), cannot be raised for the first time on appeal. Nor does a motion for a new trial (Bronson *v.* People, 32 Mich. 34), or a motion to quash the indictment for insufficiency (Berkenfield *v.* People, 191 Ill. 272, 61 N. E. 96 [*affirming* 92 Ill. App. 400]) save this objection for review. But it has been held that an objection that such jury was not composed of the constitutional number required could be first urged on appeal. Rainey *v.* State, 19 Tex. App. 479; *Ex p.* Swain, 19 Tex. App. 323; Williams *v.* State, 19 Tex. App. 265; Smith *v.* State, 19 Tex. App. 95; McNeese *v.* State, 19 Tex. App. 48.

1. Change of venue.— *Arkansas.*— Kinkead *v.* State, 45 Ark. 536; Brown *v.* State, 13 Ark. 96.

Illinois.—Langford *v.* People, 134 Ill. 444, 25 N. E. 1009; Cross *v.* People, 66 Ill. App. 170.

Kansas.— State *v.* Potter, 16 Kan. 80.

Missouri.— State *v.* Taylor, 132 Mo. 282, 33 S. W. 1145; State *v.* Dudley, 56 Mo. App. 450. And see State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743; State *v.* Mann, 83 Mo. 589.

Tennessee.— Green *v.* State, 97 Tenn. 50, 36 S. W. 700.

Texas.— Harbolt *v.* State, 39 Tex. Cr. 129, 44 S. W. 1110; Preston *v.* State, 4 Tex. App. 186; Harrison *v.* State, 3 Tex. App. 558.

See 15 Cent. Dig. tit. "Criminal Law," § 2630.

2. Pleading.— An objection that there was no plea cannot be first made on appeal (Billings *v.* State, 107 Ind. 54, 6 N. E. 914, 7 N. E. 763, 57 Am. Rep. 77; Reed *v.* State, (Nebr. 1902) 92 N. W. 321), and generally objections to the formal character or the sufficiency of a plea (State *v.* Ballenger, 10 Iowa 368; Rutter *v.* Territory, 11 Okla. 454, 68 Pac. 507. And see Nonemaker *v.* State, 34 Ala. 211), or that a plea was made too late (State *v.* Lubin, 42 La. Ann. 79, 7 So. 68), cannot be urged for the first time on appeal.

3. Discharge of co-defendant.— An objection to the discharge of a co-defendant in order that he may be a witness cannot be made for the first time on appeal. Shircliff *v.* State, 96 Ind. 369.

4. An objection to the power of a trial judge to try the case, where the record does not show his want of such power (Watts *v.* State, 33 Ind. 237), or that an order directing the election of a special judge is irregular or improper (Roberts *v.* State, 126 Ala. 74, 28 So. 741; State *v.* Gilmore, 110 Mo. 1, 19 S. W. 218; Harris *v.* State, 100 Tenn. 287, 45 S. W. 438), or an objection that the court was not properly constituted when rendering it (People *v.* Bork, 1 N. Y. Cr. 393), cannot be taken for the first time on appeal, where the accused had opportunity to make objection at the proper time.

An objection that defendant's affidavit to show prejudice of the regular judge was not supported by the oath of two or more reputable persons, as required by statute, cannot be first made on appeal. State *v.* Dodson, 72 Mo. 283.

tency of petit jurors;[5] as to the summoning and impaneling of the trial jury;[6] as to the excusing of trial jurors;[7] as to variance between the indictment or information and the proof;[8] as to the custody and conduct of the trial jury;[9] as to the discharge of the jury;[10] as to the verdict;[11] as to the judgment and the sentence.[12] So too the rule that questions which were not raised at the trial of the

5. *California.*— People *v.* Enwright, 134 Cal. 527, 66 Pac. 726; People *v.* Mortier, 58 Cal. 262. And see People *v.* Cotta, 49 Cal. 166.

Florida.— Potsdamer *v.* State, 17 Fla. 895.

Indiana.— Marcus *v.* State, 26 Ind. 101.

Massachusetts.—Amherst *v.* Hadley, 1 Pick. 38.

Michigan.—See Bronson *v.* People, 32 Mich. 34.

Missouri.— State *v.* Gatlin, 170 Mo. 354, 70 S. W. 885; State *v.* Brown, 119 Mo. 527, 24 S. W. 1027, 25 S. W. 200.

Nebraska.— Russell *v.* State, 62 Nebr. 512, 87 N. W. 344.

New Mexico.— Anderson *v.* Territory, 4 N. M. 108, 13 Pac. 21.

New York.— People *v.* Truck, 170 N. Y. 203, 63 N. E. 281.

Wisconsin.— See Emery *v.* State, 101 Wis. 627, 78 N. W. 145.

United States.— Alexander *v.* U. S., 138 U. S. 353, 11 S. Ct. 350, 34 L. ed. 954.

See 15 Cent. Dig. tit. "Criminal Law," § 2636.

6. *Alabama.*— Cleveland *v.* State, 86 Ala. 1, 5 So. 426.

California.— Spencer *v.* Doane, 23 Cal. 418.

Colorado.— Solander *v.* People, 2 Colo. 48.

Illinois.— Schirmer *v.* People, 33 Ill. 276.

Louisiana.— State *v.* Kitty, 12 La. Ann. 805.

Mississippi.—Alexander *v.* State, (1898) 22 So. 871. And see Newcomb *v.* State, 37 Miss. 383.

Missouri.— State *v.* Gatlin, 170 Mo. 354, 70 S. W. 885; State *v.* Grant, 152 Mo. 57, 53 S. W. 432. And see State *v.* Klinger, 46 Mo. 224.

Nevada.— State *v.* Rigg, 10 Nev. 284.

New Mexico.— U. S. *v.* Chaves, 6 N. M. 180, 27 Pac. 489; U. S. *v.* De Lujan, 6 N. M. 179, 27 Pac. 489; U. S. *v.* De Amador, 6 N. M. 173, 27 Pac. 488.

South Carolina.— State *v.* Howard, 64 S. C. 344, 42 S. E. 173, 92 Am. St. Rep. 804.

See 15 Cent. Dig. tit. "Criminal Law," § 2637.

An objection that the jury was not polled cannot be raised for the first time on appeal, where the accused made no motion to poll the jury when the verdict was rendered. State *v.* Atkinson, 104 La. 570, 29 So. 279.

Objections to the form of the challenges cannot be first considered on appeal. State *v.* Durnam, 73 Minn. 150, 75 N. W. 1127.

Where counsel exceeds the number of challenges allowed by statute, objection must be made promptly or an appeal will not lie. Shackelford *v.* State, (Tex. Cr. App. 1899) 53 S. W. 884.

7. Riley *v.* State, 88 Ala. 193, 7 So. 149; Livar *v.* State, 26 Tex. App. 115, 9 S. W. 552. But see Hill *v.* State, 10 Tex. App. 618.

8. *Alabama.*— Hinds *v.* State, 55 Ala. 145.

Illinois.— Greene *v.* People, 182 Ill. 278, 55 N. E. 341; Harrington *v.* People, 90 Ill. App. 456.

Indiana.— Taylor *v.* State, 130 Ind. 66, 29 N. E. 415.

Mississippi.— Wood *v.* State, 64 Miss. 761, 2 So. 247.

Missouri.— State *v.* O'Connell, 144 Mo. 387, 46 S. W. 175; State *v.* Sharp, 106 Mo. 106, 17 S. W. 225; State *v.* Ballard, 104 Mo. 634, 16 S. W. 525; State *v.* Boogher, 8 Mo. App. 600.

New York.— People *v.* Cruger, 38 Hun 500.

North Carolina.— State *v.* Baxter, 82 N. C. 602; State *v.* Crockett, 82 N. C. 599; State *v.* Jenkins, 51 N. C. 19.

Texas.— Dawson *v.* State, 33 Tex. 491.

See 15 Cent. Dig. tit. "Criminal Law," § 2642.

9. *Alabama.*— Robbins *v.* State, 49 Ala. 394.

California.— People *v.* Deegan, 88 Cal. 602, 26 Pac. 500. And see People *v.* McCoy, 71 Cal. 395, 12 Pac. 272.

District of Columbia.— Price *v.* U. S., 14 App. Cas. 391.

Illinois.— Dreyer *v.* People, 188 Ill. 40, 58 N. E. 620, 59 N. E. 424, 58 L. R. A. 869; Morrison *v.* People, 52 Ill. App. 482.

Indiana.— Shenkenberger *v.* State, 154 Ind. 630, 57 N. E. 519.

Kentucky.— Hunt *v.* Com., 12 S. W. 127, 11 Ky. L. Rep. 353.

Louisiana.— State *v.* Deas, 38 La. Ann. 581.

Missouri.— State *v.* Burks, 132 Mo. 363, 34 S. W. 48.

New York.— Ostrander *v.* People, 28 Hun 38.

Texas.— Cook *v.* State, 4 Tex. App. 265.

See 15 Cent. Dig. tit. "Criminal Law," § 2647.

10. State *v.* Sutfin, 22 W. Va. 771.

11. **Verdict.**— An objection to the propriety of a general verdict cannot be considered on appeal when the objection made by the accused at the trial was solely as to the sufficiency of the indictment and did not raise the question as to the mode of trial or call for an election between counts. People *v.* Dunn, 90 N. Y. 104 [*reversing* 27 Hun 272]. But an objection that the jury failed to find on the special issue of former conviction, and found a verdict of conviction, may if apparent on the record be considered on appeal, although not raised at the trial. Davis *v.* State, 42 Tex. 494.

12. **Judgment and sentence.**— Objections to the form of the judgment (Douglass *v.* State, 72 Ind. 385), to the character of the punishment imposed (Skaggs *v.* State, 108 Ind. 53, 8 N. E. 695), that the accused was sentenced in his absence (Grant *v.* State, 89 Ga. 393, 15 S. E. 488), or to the time when the sentence was pronounced (People *v.* Bar-

case will not be noticed for the first time on appeal, applies as to seasonableness of motion in arrest.[13]

(B) *Objections to Indictment, Information, or Complaint*— (1) IN GENERAL. A mere formal defect in an indictment, information, or complaint, which may be cured by amendment, must be called to the attention of the court and taken advantage of at the trial, and cannot be urged for the first time on appeal;[14] but fatal defects which are not amendable may be considered for the first time on appeal.[15] Thus the objection that the facts stated in the indictment do not con-

ton, 88 Cal. 176, 25 Pac. 1117) cannot be raised for the first time on appeal.

See also as to the necessity for prompt objection to defects and irregularities in judgment and sentence the following cases:

Kansas.— State *v.* Page, 60 Kan. 664, 57 Pac. 514.

Louisiana.— State *v.* Curtis, 44 La. Ann. 320, 10 So. 784.

Massachusetts.— Com. *v.* Hardiman, 7 Allen 583.

South Carolina.— Cross Hill *v.* Owens, 61 S. C. 22, 39 S. E. 184.

Washington.— State *v.* Dunlap, 25 Wash. 292, 65 Pac. 544.

See 15 Cent. Dig. tit. "Criminal Law," § 2650.

13. State *v.* Feamster, 12 Wash. 461, 41 Pac. 52.

14. *Alabama.*— Dotson *v.* State, 88 Ala. 208, 7 So. 259; Gandy *v.* State, 81 Ala. 68, 1 So. 35.

California.— People *v.* Nesbitt, 102 Cal. 327, 36 Pac. 654; People *v.* Gatewood, 20 Cal. 146.

Florida.—Willingham *v.* State, 21 Fla. 761; Bass *v.* State, 17 Fla. 685; Gallaher *v.* State, 17 Fla. 370.

Illinois.—Harrington *v.* People, 90 Ill. App. 456.

Indiana.— Miles *v.* State, 5 Ind. 239.

Iowa.— State *v.* Cure, 7 Iowa 479; State *v.* Burge, 7 Iowa 255.

Kentucky.— Bishop *v.* Com., 109 Ky. 558, 60 S. W. 190, 22 Ky. L. Rep. 1161; Talbott *v.* Com., 5 Ky. L. Rep. 610.

Louisiana.— State *v.* McCort, 23 La. Ann. 326; State *v.* Arthur, 10 La. Ann. 265.

Massachusetts.— Com. *v.* Brigham, 108 Mass. 457.

Michigan.— People *v.* Kelly, 99 Mich. 82, 57 N. W. 1090.

Missouri.— State *v.* Furgerson, 162 Mo. 668, 63 S. W. 101; State *v.* Moore, 156 Mo. 135, 56 S. W. 900; State *v.* Bonine, 85 Mo. App. 462.

Nevada.— State *v.* Roderigas, 7 Nev. 328; State *v.* O'Flaherty, 7 Nev. 153.

New Mexico.— Leonardo *v.* Territory, 1 N. M. 291.

New York.— People *v.* Beatty, 39 Hun 476; Schrumpf *v.* People, 14 Hun 10.

Ohio.— Bartlett *v.* State, 28 Ohio St. 669.

Oklahoma.— Wright *v.* Territory, 5 Okla. 78, 47 Pac. 1069.

Pennsylvania.— Com. *v.* Williams, 149 Pa. St. 54, 24 Atl. 158; Campbell *v.* Com., 59 Pa. St. 266.

Texas.— Fielder *v.* State, (Cr. App. 1899) 49 S. W. 378; Rowlett *v.* State, 23 Tex. App. 191, 4 S. W. 582; Morris *v.* State, 13 Tex. App. 65; Alderson *v.* State, 2 Tex. App. 10.

Utah.— People *v.* Hasbrouck, 11 Utah 291, 39 Pac. 918.

Washington.— State *v.* Rogan, 18 Wash. 43, 50 Pac. 582; Way *v.* Woolery, 6 Wash. 157, 32 Pac. 1082.

Wisconsin.— Emery *v.* State, 101 Wis. 627, 78 N. W. 145; Tandy *v.* State, 94 Wis. 498, 69 N. W. 160.

Wyoming.— Bryant *v.* State, 7 Wyo. 311, 51 Pac. 879, 56 Pac. 596; Tway *v.* State, 7 Wyo. 74, 50 Pac. 188.

See 15 Cent. Dig. tit. "Criminal Law," § 2627.

Duplicity.— An objection to an indictment that it charges more than one offense cannot be made for the first time on appeal. State *v.* Henry, 59 Iowa 391, 13 N. W. 343; Kane *v.* People, 8 Wend. (N. Y.) 203; Scruggs *v.* State, 7 Baxt. (Tenn.) 38; Stevenson *v.* State, 5 Baxt. (Tenn.) 681; Howerton *v.* State, (Tex. Cr. App. 1898) 43 S. W. 1018.

The proper remedy for the defect of duplicity is by motion in arrest of judgment or demurrer. The latter is the better practice and is provided for by statutes in some states. State *v.* Mahoney, 24 Mont. 281, 61 Pac. 647.

Where an information has been lost a copy may be used, and the objection that the copy is not accurate cannot be first heard on writ of error. Long *v.* People, 135 Ill. 435, 25 N. E. 851, 10 L. R. A. 48.

Where no exception is taken to an order quashing an indictment it cannot be reviewed on appeal. State *v.* Campbell, 141 Mo. 597, 43 S. W. 167.

15. *Indiana.*— Pattee *v.* State, 109 Ind. 545, 10 N. E. 421.

Missouri.— State *v.* Schuchmann, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842; State *v.* Fleming, 117 Mo. 377, 22 S. W. 1024; State *v.* Vaughn, 26 Mo. 29; McWaters *v.* State, 10 Mo. 167.

New York.— Cancemi *v.* People, 18 N. Y. 128.

Texas.— Morris *v.* State, 13 Tex. App. 65; White *v.* State, 1 Tex. App. 211.

Virginia.— Matthews *v.* Com., 18 Gratt. 989.

West Virginia.— Lemons *v.* State, 4 W. Va. 755, 6 Am. Rep. 293.

See 15 Cent. Dig. tit. "Criminal Law," § 2627.

But see People *v.* Murphy, 56 Mich. 546, 23 N. W. 215, holding that an objection that an information was fatally defective for want of proper verification could not be made for the first time on appeal.

stitute a crime is not waived by a failure to demur or to move in arrest of judgment, but may be taken for the first time on appeal;[16] and an objection that there is a variance between the verdict and the indictment may be urged on appeal, although no motion for a new trial or in arrest was made.[17]

(2) STATUTORY PROVISIONS. In some states the statutes provide that objections to the indictment shall be taken by motion or by demurrer, and that objections not thus taken cannot be considered on appeal.[18] Where the statute requires the appellate court to examine the record and render such judgment thereon as the law demands, it may consider an objection to the indictment not raised in the court below.[19]

(c) *Objections as to Evidence*—(1) ADMISSION OR EXCLUSION. The necessity of taking objections and exceptions to the exclusion or admission of evidence is the same in criminal cases, although capital, as in civil.[20] In the application therefore of this rule objections to the admission[21] as well as objections

16. *California.*— People *v.* McKenna, 81 Cal. 158, 22 Pac. 488.

Florida.— Brown *v.* State, 42 Fla. 184, 27 So. 869.

Indiana.— Hays *v.* State, 77 Ind. 450; O'Brien *v.* State, 63 Ind. 242; Henderson *v.* State, 60 Ind. 296.

Missouri.— State *v.* Meysenburg, 171 Mo. 1, 71 S. W. 229; State *v.* Hall, 164 Mo. 528, 65 S. W. 248; State *v.* Lawler, 130 Mo. 366, 32 S. W. 979, 51 Am. St. Rep. 575; State *v.* Vaughn, 26 Mo. 29; State *v.* Townsend, 50 Mo. App. 690.

North Carolina.— State *v.* Caldwell, 112 N. C. 854, 16 S. E. 1010.

Ohio.— Geiger *v.* State, 5 Ohio Cir. Ct. 283.

Oregon.— State *v.* Mack, 20 Oreg. 234, 25 Pac. 639.

Texas.— Woolsey *v.* State, 14 Tex. App. 57.

Virginia.— Matthews *v.* Com., 18 Gratt. 989; Old *v.* Com., 18 Gratt. 915.

See 15 Cent. Dig. tit. "Criminal Law," § 2627.

In New York, where there is evidence sufficient to sustain a conviction, the question of the sufficiency of the indictment not raised at the trial cannot be raised on appeal. People *v.* Moran, 161 N. Y. 657, 57 N. E. 1120 [*affirming* 43 N. Y. App. Div. 155, 59 N. Y. Suppl. 312]. See also as to the rule in other states Southern Express Co. *v.* State, 114 Ga. 226, 39 S. E. 899; Pace *v.* State, 152 Ind. 343, 53 N. E. 183.

Where by the constitution an indictment is required to conclude in a certain form, the accused, by failing to demur or to move to quash or for arrest of judgment, does not waive his constitutional right to object on appeal to an improper conclusion. Calvert *v.* State, 8 Tex. App. 538; Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746; Lemons *v.* State, 4 W. Va. 755, 6 Am. Rep. 293.

17. Moore *v.* People, 26 Ill. App. 137; Territory *v.* Duncan, 5 Mont. 478, 6 Pac. 353; Territory *v.* Young, 5 Mont. 242, 5 Pac. 248. And see, generally, INDICTMENTS AND INFORMATIONS.

18. Territory *v.* Pratt, 6 Dak. 483, 43 N. W. 711; Cochrane *v.* State, 6 Md. 400; State *v.* Peterson, 24 Mont. 81, 60 Pac. 809; Haynes *v.* U. S., 9 N. M. 519, 56 Pac. 282.

Apply to formal defects only.— In the judicial construction of statutory provisions of this nature it has been held that formal defects only are thus waived. Com. *v.* Doyle, 110 Mass. 103; People *v.* Smith, 94 Mich. 644, 54 N. W. 487.

19. State *v.* Daniels, 90 Iowa 491, 58 N. W. 891.

20. Clough *v.* State, 7 Nebr. 320, 351. See also APPEAL AND ERROR, 2 Cyc. 693–697.

21. *Arkansas.*— Ragland *v.* State, (1902) 70 S. W. 1039; Houston *v.* State, 66 Ark. 120, 49 S. W. 351; Hamilton *v.* State, 62 Ark. 543, 36 S. W. 1054.

California.— People *v.* Lon Yeck, 123 Cal. 246, 55 Pac. 984; People *v.* Miller, 122 Cal. 84, 54 Pac. 523; People *v.* Moan, 65 Cal. 532, 4 Pac. 545; People *v.* Reinhart, 39 Cal. 449.

Colorado.— Mitchell *v.* People, 24 Colo. 532, 52 Pac. 671; Mora *v.* People, 19 Colo. 255, 35 Pac. 179.

Florida.— Driggers *v.* State, 38 Fla. 7, 20 So. 758; Jones *v.* State, 35 Fla. 289, 17 So. 284.

Georgia.— Hunt *v.* State, 116 Ga. 615, 42 S. E. 1004; White *v.* State, 116 Ga. 573, 42 S. E. 751; Brown *v.* State, 105 Ga. 640, 31 S. E. 557; Fisher *v.* State, 93 Ga. 309, 20 S. E. 329; Jackson *v.* State, 88 Ga. 784, 15 S. E. 677.

Illinois.— Moeck *v.* People, 100 Ill. 242, 39 Am. Rep. 38; Bulliner *v.* People, 95 Ill. 394.

Indiana.— Musser *v.* State, 157 Ind. 423, 61 N. E. 1; Rains *v.* State, 152 Ind. 69, 52 N. E. 450; Graves *v.* State, 121 Ind. 357, 23 N. E. 155; State *v.* Wilson, 52 Ind. 166.

Iowa.— State *v.* Beebe, 115 Iowa 128, 88 N. W. 358; State *v.* Spiegel, 111 Iowa 701, 83 N. W. 722; State *v.* Chambers, 87 Iowa 1, 53 N. W. 1090, 43 Am. St. Rep. 349; State *v.* Day, 60 Iowa 100, 14 N. W. 132; State *v.* McLaughlin, 44 Iowa 82; State *v.* Hamilton, 32 Iowa 572.

Kansas.— State *v.* Greenburg, 59 Kan. 404, 53 Pac. 61.

Kentucky.— Branson *v.* Com., 92 Ky. 330, 17 S. W. 1019, 13 Ky. L. Rep. 614; Fenston *v.* Com., 82 Ky. 549; Clem *v.* Com., 3 Metc. 10; Adwell *v.* Com., 17 B. Mon. 310; Sapp *v.* Com., 48 S. W. 984, 20 Ky. L. Rep. 1126.

Louisiana.— State *v.* Porter, 104 La. 538, 29 So. 273; State *v.* Price, 37 La. Ann. 215; State *v.* Viaux, 8 La. Ann. 514.

Massachusetts.— Com. *v.* Foster, 182 Mass. 276, 65 N. E. 391; Com. *v.* Phillips, 162

to the exclusion[22] of evidence at the trial will not be reviewed on appeal unless made at the trial and an exception taken,[23] or unless a motion to strike the inadmissible evidence out has been made and overruled.[24] An objection that certain evidence is hearsay,[25] that photographs are inadmissible because containing written indorsements damaging to the accused,[26] that parol proof was made where the law requires a writing,[27] that an expert answered a hypothetical question without having heard all the testimony,[28] that the record of a former conviction of the accused was improperly admitted,[29] that an answer by a witness is not responsive,[30] that a proper foundation was not laid for the introduction of a dying declaration,[31] that the accused was cross-examined improperly,[32] that his confession was inadmissible,[33] or that attempts were made to prove other crimes[34] cannot be first taken on appeal.

(2) SUFFICIENCY OF EVIDENCE. An objection to the sufficiency of the evidence upon which a conviction was based cannot be raised for the first time on appeal.[35]

Mass. 504, 39 N. E. 109; Com. *v.* Hogan, 11 Gray 312.

Missouri.— State *v.* Blitz, 171 Mo. 530, 71 S. W. 1027; State *v.* Laycock, 141 Mo. 274, 42 S. W. 723; State *v.* Taylor, 134 Mo. 109, 35 S. W. 92; State *v.* Blan, 69 Mo. 317; State *v.* Baker, 36 Mo. App. 58; State *v.* West, 21 Mo. App. 309.

Nebraska.— Clough *v.* State, 7 Nebr. 320.

New Mexico.—Trujillo *v.* Territory, 7 N. M. 43, 32 Pac. 154.

New York.— People *v.* Murphy, 135 N. Y. 450, 32 N. E. 138; People *v.* Otto, 101 N. Y. 690, 5 N. E. 788; Johnson *v.* People, 55 N. Y. 512; People *v.* McLaughlin, 2 N. Y. App. Div. 419, 37 N. Y. Suppl. 1005.

North Carolina.— State *v.* Williams, 117 N. C. 753, 23 S. E. 250.

Oklahoma.— Drury *v.* Territory, 9 Okla. 398, 60 Pac. 101.

Oregon.— State *v.* Steeves, 29 Oreg. 85, 43 Pac. 947; State *v.* Murray, 11 Oreg. 413, 5 Pac. 55.

Pennsylvania.— Com. *v.* McGowan, 189 Pa. St. 641, 42 Atl. 365, 69 Am. St. Rep. 836.

South Carolina.— State *v.* Aughtry, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199; State *v.* Murphy, 48 S. C. 1, 25 S. E. 43; State *v.* Talbert, 41 S. C. 526, 19 S. E. 852; State *v.* Head, 38 S. C. 258, 16 S. E. 892.

Tennessee.— Keneval *v.* State, 107 Tenn. 581, 64 S. W. 897; King *v.* State, 91 Tenn. 617, 20 S. W. 169.

Texas.— Morris *v.* State, 43 Tex. Cr. 289, 65 S. W. 531; Merritt *v.* State, 40 Tex. Cr. 359, 50 S. W. 384; Gaitan *v.* State, 11 Tex. App. 544; Mills *v.* State, 4 Tex. App. 263; Smith *v.* State, 1 Tex. App. 133.

Vermont.— State *v.* Powers, 72 Vt. 168, 47 Atl. 830.

Virginia.— Russell *v.* Com., 78 Va. 400.

Washington.— State *v.* Craemer, 12 Wash. 217, 40 Pac. 944.

United States.— Luitweiler *v.* U. S., 85 Fed. 957, 29 C. C. A. 504.

See 15 Cent. Dig. tit. "Criminal Law," § 2639.

22. *Florida.*— Boykin *v.* State, 40 Fla. 184, 24 So. 141.

Indiana.— Shenkenberger *v.* State, 154 Ind. 630, 57 N. E. 519.

Missouri.— State *v.* Pitts, 156 Mo. 247, 56 S. W. 887.

Texas.— Brazil *v.* State, (Cr. App. 1901) 63 S. W. 130.

Washington.—State *v.* McGilvery, 20 Wash. 240, 55 Pac. 115.

See 15 Cent. Dig. tit. "Criminal Law," § 2639.

23. Fager *v.* State, 22 Nebr. 332, 35 N. W. 195.

On certiorari to quash the record of a conviction, the evidence given at the trial will not be reviewed unless objections appear of record. Stratton *v.* Com., 10 Metc. (Mass.) 217.

The failure of the court to direct the jury to limit the effect of evidence which is not admissible against all the defendants cannot be reviewed unless objected to at the trial. State *v.* Phillips, 24 Mo. 475.

24. Jackson *v.* State, 93 Ga. 164, 18 S. E. 435; Sanders *v.* State, 86 Ga. 717, 12 S. E. 1058; People *v.* Girdler, 65 Mich. 68, 31 N. W. 624; Howard *v.* State, (Tex. Cr. App. 1892) 20 S. W. 711.

25. People *v.* Harlan, 133 Cal. 16, 65 Pac. 9.

26. People *v.* Smith, 121 N. Y. 578, 24 N. E. 852.

27. Heard *v.* State, 59 Miss. 545.

28. State *v.* Gould, 40 Kan. 258, 19 Pac. 739.

29. Sullivan *v.* People, 122 Ill. 385, 13 N. E. 248.

30. Com. *v.* Campbell, 103 Mass. 436.

31. State *v.* Morgan, 1 Mo. App. 22.

32. State *v.* Grant, 152 Mo. 57, 53 S. W. 432; State *v.* Turner, 110 Mo. 196, 19 S. W. 645.

33. State *v.* Robinson, 117 Mo. 649, 23 S. W. 1066.

34. State *v.* Robinson, 35 S. C. 340, 14 S. E. 766; Johns *v.* State, (Tex. Cr. App. 1897) 38 S. W. 619.

35. *California.*— People *v.* Crowley, 100 Cal. 478, 35 Pac. 84.

Massachusetts.— Com. *v.* Lafayette, 148 Mass. 130, 19 N. E. 26.

Michigan.— Foley *v.* People, 22 Mich. 227.

North Carolina.— State *v.* Glisson, 93 N. C. 506.

Pennsylvania.— Com. *v.* Ferree, 6 Pa. Dist. 639, 20 Pa. Co. Ct. 87.

Texas.— Price *v.* State, 41 Tex. 215.

See 15 Cent. Dig. tit. "Criminal Law," § 2641.

(3) Competency of Witnesses. Similarly objections as to the competency of witnesses must be raised on the trial and not for the first time on appeal.[36]

(D) *Objections as to Irregularities in Conduct of Trial.* Objections to irregularities in the proceedings preliminary to, and at the trial, cannot be first made on appeal;[37] and this applies to remarks or conduct of the presiding judge prejudicial to the accused,[38] as well as to the arguments and conduct of counsel.[39]

A failure to prove the venue (Clarke *v.* State, 78 Ala. 474, 56 Am. Rep. 45; Huggins *v.* State, 41 Ala. 393; Burnett *v.* State, 72 Miss. 994, 18 So. 432; People *v.* Pugh, 167 N. Y. 524, 60 N. E. 770; Wagner *v.* People, 4 Abb. Dec. (N. Y.) 509, 2 Keyes (N. Y.) 684), the intent (People *v.* Smith, 106 Mich. 431, 64 N. W. 200), or the time of the crime (Wagner *v.* People, 54 Barb. (N. Y.) 367 [*affirmed* in 4 Abb. Dec. 509, 2 Keyes 684]) is not reviewable if not urged at the trial.

A refusal to set aside a verdict because not supported by the evidence (State *v.* Kiger, 115 N. C. 746, 20 S. E. 456) or the failure or omission of the court to instruct that the evidence was insufficient to authorize a conviction (Skinner *v.* State, 30 Ala. 524) is not reviewable unless an objection to the sufficiency of the evidence was made at the trial.

36. *Arkansas.*—Redd *v.* State, 65 Ark. 475, 47 S. W. 119.

Iowa.— Ray *v.* State, 1 Greene 316, 48 Am. Dec. 379.

Kansas.— State *v.* Schmidt, 34 Kan. 399, 8 Pac. 867.

Michigan.— People *v.* De France, 104 Mich. 563, 62 N. W. 709, 28 L. R. A. 139.

Mississippi.— Ned *v.* State, 33 Miss. 364.

Missouri.— State *v.* Davidson, 44 Mo. App. 513.

New York.— People *v.* Sanders, 3 Hun 16.

Texas.— Skipworth *v.* State, 8 Tex. App. 135. And see Coleman *v.* State, 43 Tex. Cr. 15, 63 S. W. 322; Moore *v.* State, 39 Tex. Cr. 266, 45 S. W. 809.

See 15 Cent. Dig. tit. "Criminal Law," § 2640.

37. Vezain *v.* People, 40 Ill. 397; State *v.* Howard, 118 Mo. 127, 24 S. W. 41; State *v.* Polhamus, 65 N. J. L. 387, 47 Atl. 470. Thus an objection that the officer in charge of the jury was not sworn (Knouff *v.* People, 6 Ill. App. 154), that the indictment was not read to the jury (Craig *v.* Com., 5 Ky. L. Rep. 329) or served on the accused by copy as prescribed by statute (Record *v.* State, 36 Tex. 521), that accused was tried in the absence of the stenographer (State *v.* Johnson, 43 S. C. 123, 20 S. E. 988), that evidence was heard in the absence of the jury (People *v.* Evans, (Cal. 1895) 41 Pac. 444), that counsel was not given an opportunity for argument when he did not request it (Farmer *v.* State, 91 Ga. 720, 18 S. E. 987), that defendants jointly indicted and tried cannot be separately defended by counsel (Com. *v.* Powers, 109 Mass. 353), and generally objections to the consolidation of an indictment against the accused with indictments against others (Bucklin *v.* U. S., 159 U. S. 680, 682, 16 S. Ct. 182, 40 L. ed. 304, 305), to the consolidation of separate informations against the accused (Chestnut *v.* People, 21 Colo. 512, 42 Pac. 656), to the appointment of a trier (People *v.* Voll, 43 Cal. 166), or to irregularity in the service of the indictment and the list of jurors) Barnett *v.* State, 83 Ala. 40, 3 So. 612; Freel *v.* State, 21 Ark. 212; State *v.* Howard, 118 Mo. 127, 24 S. W. 41), or in setting the cause down for trial (McDaniel *v.* State, 97 Ala. 14, 12 So. 241) cannot be urged for the first time on appeal.

38. *California.*— People *v.* Bruzzo, 24 Cal. 41.

Florida.— Roten *v.* State, 31 Fla. 514, 12 So. 910.

Illinois.— Collins *v.* People, 194 Ill. 506, 62 N. E. 902.

Indiana.— Dibble *v.* State, 48 Ind. 470.

Michigan.— People *v.* Shelters, 99 Mich. 333, 58 N. W. 362; People *v.* Harper, 83 Mich. 273, 47 N. W. 221.

Minnesota.— State *v.* Lewis, 86 Minn. 174, 90 N. W. 318; State *v.* Lautenschlager, 22 Minn. 514.

Mississippi.— Gibson *v.* State, 76 Miss. 136, 23 So. 582.

New York.— People *v.* Noonan, 14 N. Y. Suppl. 519.

Texas.— West *v.* State, 7 Tex. App. 150.

See 15 Cent. Dig. tit. "Criminal Law," § 2644.

39. *Alabama.*— Nuckols *v.* State, 109 Ala. 2, 19 So. 504.

California.— People *v.* Bishop, 134 Cal. 682, 66 Pac. 976; People *v.* Brittan, 118 Cal. 409, 50 Pac. 664; People *v.* Kramer, 117 Cal. 647, 49 Pac. 842; People *v.* Lane, 101 Cal. 513, 36 Pac. 16; People *v.* Beaver, 83 Cal. 419, 23 Pac. 321; People *v.* Shem Ah Fook, 64 Cal. 380, 1 Pac. 347.

Colorado.— Torris *v.* People, 19 Colo. 438, 36 Pac. 153.

Florida.— Michael *v.* State, 40 Fla. 265, 23 So. 944; Smith *v.* State, 25 Fla. 517, 6 So. 482.

Georgia.— Kearney *v.* State, 101 Ga. 803, 29 S. E. 127, 65 Am. St. Rep. 344.

Illinois.— Collins *v.* People, 194 Ill. 506, 62 N. E. 902; Campbell *v.* People, 109 Ill. 565, 50 Am. Rep. 621; Mayes *v.* State, 106 Ill. 306, 46 Am. Rep. 698; Bulliner *v.* State, 95 Ill. 394; Wilson *v.* People, 94 Ill. 299.

Indiana.— Currier *v.* State, 157 Ind. 114, 60 N. E. 1023; Robb *v.* State, 144 Ind. 569, 43 N. E. 642; Pierce *v.* State, 109 Ind. 535, 10 N. E. 302; Richie *v.* State, 59 Ind. 121.

Iowa.— State *v.* Hossack, 116 Iowa 194, 89 N. W. 1077.

Kansas.— State *v.* Tennison, 42 Kan. 330, 22 Pac. 429; State *v.* Stockman, (App. 1899) 58 Pac. 1006.

Kentucky.— O'Brien *v.* Com., 89 Ky. 354, 12 S. W. 471, 11 Ky. L. Rep. 534; Patterson

(E) *Objections as to Instructions.* An objection to an instruction, whether directed to its form or matter, as erroneously stating the law,[40] or an objection to a refusal to give instructions requested cannot be first considered on appeal.[41] So too an omission to charge upon any particular portion of the evidence or upon a

v. Com., 86 Ky. 313, 5 S. W. 765, 9 Ky. L. Rep. 481; Johnson v. Com., 55 S. W. 437, 21 Ky. L. Rep. 1421.

Michigan.— People v. Ecarius, 124 Mich. 616, 83 N. W. 628; People v. Haley, 48 Mich. 495, 12 N. W. 671.

Missouri.— State v. Gartrell, 171 Mo. 489, 71 S. W. 1045; State v. Holloway, 156 Mo. 222, 56 S. W. 734; State v. Williams, 121 Mo. 399, 26 S. W. 339; State v. Welsor, 117 Mo. 570, 21 S. W. 443; State v. McChesney, 16 Mo. App. 259; State v. Pollard, 14 Mo. App. 583.

Montana.— State v. Bloor, 20 Mont. 574, 52 Pac. 611; State v. Gay, 18 Mont. 51, 44 Pac. 411; State v. Cadotte, 17 Mont. 315, 42 Pac. 857.

Nebraska.— Catron v. State, 52 Nebr. 389, 72 N. W. 354; Bohanan v. State, 18 Nebr. 57, 24 N. W. 390, 53 Am. Rep. 791; Bradshaw v. State, 17 Nebr. 147, 22 N. W. 361.

Nevada.— State v. McMahon, 17 Nev. 365, 30 Pac. 1000.

North Carolina.— State v. Powell, 106 N. C. 635, 11 S. E. 191; State v. Lewis, 93 N. C. 581.

Oregon.— State v. Abrams, 11 Oreg. 169, 8 Pac. 327.

Pennsylvania.— Com. v. Eisenhower, 181 Pa. St. 470, 37 Atl. 521, 59 Am. St. Rep. 670.

South Carolina.— State v. Green, 48 S. C. 136, 26 S. E. 234; State v. Sullivan, 43 S. C. 205, 21 S. E. 4; State v. Johnson, 43 S. C. 123, 20 S. E. 988; State v. Turner, 36 S. C. 534, 15 S. E. 602.

Texas.— Hoyle v. State, (Cr. App. 1902) 70 S. W. 94; Moore v. State, (Cr. App. 1902) 70 S. W. 89; Boscow v. State, 33 Tex. Cr. 390, 26 S. W. 625; McKinney v. State, 31 Tex. Cr. 583, 21 S. W. 683; Wolfforth v. State, 31 Tex. Cr. 387, 20 S. W. 741; Weathersby v. State, 29 Tex. App. 278, 15 S. W. 823; Kennedy v. State, 19 Tex. App. 618; Young v. State, 19 Tex. App. 536.

Utah.— State v. Haworth, 24 Utah 398, 68 Pac. 155.

Washington.— State v. Fenton, 30 Wash. 325, 70 Pac. 741.

Wisconsin.— Martin v. State, 79 Wis. 165, 48 N. W. 119.

United States.— Shelp v. U. S., 81 Fed. 694, 26 C. C. A. 570.

See 15 Cent. Dig. tit. "Criminal Law," § 2645.

40. *Arkansas.*— Mabry v. State, 50 Ark. 492, 8 S. W. 823.

California.— People v. Chu Quong, 15 Cal. 332.

Florida.— McCoy v. State, 40 Fla. 494, 24 So. 485; Driggers v. State, 38 Fla. 7, 20 So. 758.

Georgia.—Wilson v. State, 66 Ga. 591. And see Bell v. State, 69 Ga. 752.

Iowa.— State v. Hathaway, 100 Iowa 225, 69 N. W. 449; State v. Callahan, 96 Iowa 304, 65 N. W. 150.

Kansas.— State v. English, 34 Kan. 629, 9 Pac. 761.

Kentucky.— Edgerton v. Com., 7 Bush 142; Lanham v. Com., 3 Bush 528; Partin v. Com., 31 S. W. 874, 17 Ky. L. Rep. 499.

Louisiana.— State v. Fuselier, 51 La. Ann. 1317, 26 So. 264; State v. Reed, 50 La. Ann. 990, 24 So. 131; State v. Sweeney, 37 La. Ann. 1; State v. Sheard, 35 La. Ann. 543; State v. Bob, 11 La. Ann. 192.

Michigan.— People v. Murphy, 56 Mich. 546, 23 N. W. 215.

Mississippi.— Price v. State, 36 Miss. 531, 72 Am. Dec. 195.

Missouri.— State v. Rosenberg, 162 Mo. 358, 62 S. W. 435, 982; State v. Rapp, 142 Mo. 443, 44 S. W. 270; State v. Foster, 136 Mo. 653, 38 S. W. 721; State v. Arnewine, 136 Mo. 130, 37 S. W. 799; State v. Burk, 89 Mo. 635, 2 S. W. 10.

Nebraska.— Maxfield v. State, 54 Nebr. 41, 74 N. W. 401; Rema v. State, 52 Nebr. 375, 72 N. W. 474; Morgan v. State, 51 Nebr. 672, 71 N. W. 788; Heldt v. State, 20 Nebr. 492, 30 N. W. 626, 57 Am. Rep. 835. And see Jolly v. State, 43 Nebr. 857, 62 N. W. 300.

New Mexico.— Padilla v. Territory, 8 N. M. 562, 45 Pac. 1120; Territory v. O'Donnell, 4 N. M. 66, 12 Pac. 743.

South Carolina.— State v. Dill, 48 S. C. 249, 26 S. E. 567. And see State v. Davis, 27 S. C. 609, 4 S. E. 567.

Texas.— Bailey v. State, (Cr. App. 1898) 45 S. W. 708; Darter v. State, 39 Tex. Cr. 40, 44 S. W. 850; Chevarrio v. State, 17 Tex. App. 390; Davis v. State, 15 Tex. App. 594; Gardner v. State, 11 Tex. App. 265.

Vermont.— State v. Warner, 69 Vt. 30, 37 Atl. 246.

Virginia.— Crump v. Com., (1895) 23 S. E. 760.

Wisconsin.— Graves v. State, 12 Wis. 591.

Wyoming.— Cook v. Territory, 3 Wyo. 110, 4 Pac. 887.

See 15 Cent. Dig. tit. "Criminal Law," § 2646.

41. *Florida.*—McCoy v. State, 40 Fla. 494, 24 So. 485; Milton v. State, 40 Fla. 251, 24 So. 60.

Iowa.— State v. Knutson, 91 Iowa 549, 60 N. W. 129.

Missouri.— State v. Fisher, 162 Mo. 169, 62 S. W. 690; State v. Huff, 161 Mo. 459, 61 S. W. 900, 1104; State v. Palmer, 161 Mo. 152, 61 S. W. 651.

Texas.—Faulkner v. State, (Cr. App. 1897) 38 S. W. 616.

Washington.— State v. Anderson, 20 Wash. 193, 55 Pac. 39.

See 15 Cent. Dig. tit. "Criminal Law," § 2646.

special theory of defense is not reviewable unless the particular charge was requested.[42]

(F) *Objections as to Jurisdiction.* An objection that the trial court was without jurisdiction may be raised for the first time on appeal.[43]

b. Ruling on. In order that an objection may be considered on appeal, it is necessary to show that there was a definite ruling on it by the trial judge.[44]

c. Scope and Effect. Usually a general objection to the ruling of the court will not be reviewed. The objection and exception must point out specifically the particular grounds upon which error is alleged to have occurred;[45] and appel-

42. *Florida.*— Kurtz *v.* State, 26 Fla. 351, 7 So. 869.

Georgia.— Huff *v.* State, 104 Ga. 521, 30 S. E. 808.

Minnesota.— State *v.* Johnson, 37 Minn. 493, 35 N. W. 373.

Missouri.— State *v.* Woodward, 171 Mo. 593, 71 S. W. 1015; State *v.* Nickens, 122 Mo. 607, 27 S. W. 339; State *v.* Brewer, 109 Mo. 648, 19 S. W. 96.

Nebraska.— Reynolds *v.* State, 53 Nebr. 761, 74 N. W. 330.

North Dakota.— State *v.* Haynes, 7 N. D. 352, 75 N. W. 267.

Texas.— Windom *v.* State, (Cr. App. 1903) 72 S. W. 193; Dodson *v.* State, (Cr. App. 1899) 49 S. W. 78; Jordan *v.* State, 37 Tex. Cr. 222, 38 S. W. 780, 39 S. W. 110; Rector *v.* State, (Cr. App. 1897) 38 S. W. 776; Finlan *v.* State, (App. 1890) 13 S. W. 866.

Washington.— State *v.* Johnson, 19 Wash. 410, 53 Pac. 667.

See 15 Cent. Dig. tit. "Criminal Law," § 2646.

Exceptions to the rule stated in the text have been made. Thus where affirmative error appears in a charge (State *v.* Goering, 106 Iowa 636, 77 N. W. 327); or where there appears a gross error on the face of the charge or on the record undoubtedly prejudicial to the accused (State *v.* Reed, 50 La. Ann. 990, 24 So. 131; State *v.* Ferguson, 37 La. Ann. 51; Bishop *v.* State, 43 Tex. 390; Gonzales *v.* State, 35 Tex. Cr. 339, 33 S. W. 363, 60 Am. St. Rep. 51; Jackson *v.* State, 22 Tex. App. 442, 3 S. W. 111); or where the court misdirects the jury as to the penalty (Veal *v.* State, 8 Tex. App. 474; Spears *v.* State, 8 Tex. App. 467), the error may be urged on appeal, although not objected to at the trial. And where by statute the charge is required to be in writing and filed and made a part of the record an erroneous instruction tending to prejudice the accused will be considered by the appellate court, although no objection was taken at the time. Thompson *v.* People, 4 Nebr. 524.

43. State *v.* Malish, 15 Mont. 506, 39 Pac. 739; Territory *v.* Carland, 6 Mont. 14, 9 Pac. 578; State *v.* McNally, 23 Utah 277, 64 Pac. 765; State *v.* Morrey, 23 Utah 273, 64 Pac. 764; Ryan *v.* Com., 80 Va. 385. See also Territory *v.* Taylor, (N. M. 1903) 71 Pac. 489. But *compare* Thompson *v.* Com., 103 Ky. 685, 45 S. W. 1039, 46 S. W. 492, 698, 20 Ky. L. Rep. 397.

Where, however, the record shows the case to have been fairly determined, a conviction ought not to be reversed because of some doubt as to the jurisdiction. Com. *v.* McMahon, 14 Pa. Super. Ct. 621.

Objections as to the disqualification of the prosecuting attorney see People *v.* Bussey, 82 Mich. 49, 46 N. W. 97.

44. Sanders *v.* State, 131 Ala. 1, 31 So. 564; Ortiz *v.* State, 30 Fla. 256, 11 So. 611; State *v.* Reilly, 104 Iowa 13, 73 N. W. 356; Throckmorton *v.* Com., 49 S. W. 474, 20 Ky. L. Rep. 1508. Thus where the counsel for the accused informed the court in a private conversation that he desired to make and insisted upon making an additional argument, a denial by the judge of such request in private conversation is not a ruling sufficient to be reviewed on appeal. Grant *v.* State, 97 Ga. 789, 25 S. E. 399.

Merely objecting and excepting to the remarks of counsel, without obtaining the court's ruling upon the objections, are not sufficient to have the remarks considered on appeal. Territory *v.* Collins, 6 Dak. 234, 50 N. W. 122; Driggers *v.* State, 38 Fla. 7, 20 So. 758; Reed *v.* State, 141 Ind. 116, 40 N. E. 525; State *v.* Biggerstaff, 17 Mont. 510, 43 Pac. 709.

45. *Alabama.*— Linnehan *v.* State, 120 Ala. 293, 25 So. 6.

Georgia.— Peavy *v.* State, 114 Ga. 260, 40 S. E. 234; Thompson *v.* State, 55 Ga. 47, both murder cases.

Indiana.— Manhattan Oil Co. *v.* State, 26 Ind. App. 693, 60 N. E. 732.

Iowa.— State *v.* Beebe, 115 Iowa 128, 88 N. W. 358.

Kansas.— State *v.* Everett, 62 Kan. 275, 62 Pac. 657.

Louisiana.— State *v.* Wiggins, 45 La. Ann. 416, 12 So. 630.

Michigan.— People *v.* Haas, 79 Mich. 449, 44 N. W. 928.

North Carolina.— State *v.* Edwards, 126 N. C. 1051, 35 S. E. 540.

South Carolina.— State *v.* Mason, 54 S. C. 240, 32 S. E. 357.

Texas.— Hudson *v.* State, (Cr. App. 1902) 70 S. W. 764; Johnson *v.* State, 42 Tex. Cr. 298, 59 S. W. 898; Castlin *v.* State, (Cr. App. 1900) 57 S. W. 827; Gass *v.* State, (Cr. App. 1900) 56 S. W. 73; Payne *v.* State, 40 Tex. Cr. 290, 50 S. W. 363; Carter *v.* State, 40 Tex. Cr. 225, 47 S. W. 979, 49 S. W. 74, 619; Dudley *v.* State, 40 Tex. Cr. 31, 48 S. W. 179.

Vermont.— See State *v.* Brunelle, 57 Vt. 580.

Virginia.— Wash *v.* Com., 16 Gratt. 530.

lant is confined on appeal to the specific grounds of objection stated by him in the court below.[46]

d. Abandonment. The accused on appeal cannot abandon a particular and specific objection to the admissibility of evidence made at the trial and assign new grounds.[47]

2. Exceptions — a. Necessity For — (i) *General Rule.* It is a general rule, equally applicable to both civil and criminal proceedings, that rulings of the trial court which are alleged to be erroneous will not be reviewed unless an exception to the alleged error was promptly taken after objection overruled.[48] It is not

See 15 Cent. Dig. tit. "Criminal Law," § 2654.

46. *Alabama.*— Carpenter *v.* State, 23 Ala. 84.

Florida.— Wallace *v.* State, 41 Fla. 547, 26 So. 713.

Missouri.— State *v.* Shipley, 171 Mo. 544, 71 S. W. 1039.

Oregon.— State *v.* Morse, 35 Oreg. 462, 57 Pac. 631.

Texas.— Still *v.* State, (Cr. App. 1899) 50 S. W. 355.

Vermont.— State *v.* Hodgson, 66 Vt. 134, 28 Atl. 1089.

See 15 Cent. Dig. tit. "Criminal Law," § 2654.

47. *California.*— People *v.* McCauley, 45 Cal. 146.

Georgia.— Harris *v.* State, 114 Ga. 436, 40 S. E. 315; Wells *v.* State, 97 Ga. 209, 22 S. E. 958; Bone *v.* State, 86 Ga. 108, 12 S. E. 205.

Iowa.— State *v.* Heacock, 106 Iowa 191, 76 N. W. 654.

Michigan.— Campbell *v.* People, 34 Mich. 351.

New York.— Shufflin *v.* People, 6 Thomps. & C. 215; People *v.* Otto, 4 N. Y. Cr. 149.

Oklahoma.— Drury *v.* Territory, 9 Okla. 398, 60 Pac. 101.

Vermont.— State *v.* Schoolcraft, 72 Vt. 223, 47 Atl. 786.

Wyoming.— Arnold *v.* State, 5 Wyo. 439, 40 Pac. 967.

See 15 Cent. Dig. tit. "Criminal Law," § 2655.

48. *Alabama.*— Bond *v.* State, 103 Ala. 90, 15 So. 893.

California.— People *v.* Miller, 122 Cal. 84, 54 Pac. 523; People *v.* Ferguson, 34 Cal. 309.

Georgia.— Bellinger *v.* State, 116 Ga. 545, 42 S. E. 747; Ellis *v.* State, 114 Ga. 36, 39 S. E. 881.

Indiana.— Mullinix *v.* State, 10 Ind. 5; Wheeler *v.* State, 8 Ind. 113.

Kentucky.— York *v.* Com., 82 Ky. 360; Stricklin *v.* Com., 10 S. W. 465, 10 Ky. L. Rep. 747.

Louisiana.— State *v.* Arbuno, 105 La. 719, 30 So. 163; State *v.* Jones, 44 La. Ann. 1120, 11 So. 827.

Maryland.— Kearney *v.* State, 46 Md. 422.

Mississippi.— Hardeman *v.* State, (1894) 16 So. 876.

Missouri.— State *v.* Lynn, 169 Mo. 664, 70 S. W. 127; State *v.* Hall, 164 Mo. 528, 65 S. W. 248; State *v.* McGinnis, 158 Mo. 105, 59 S. W. 83; State *v.* Gray, 149 Mo. 458, 51 S. W. 85; State *v.* Clark, 147 Mo. 20, 47 S. W. 886; State *v.* Todd, 146 Mo. 295, 47 S. W. 923; State *v.* Woods, 137 Mo. 6, 38 S. W. 722; State *v.* Foster, 136 Mo. 653, 38 S. W. 721.

Montana.— State *v.* Hurst, 23 Mont. 484, 59 Pac. 911.

New Mexico.— U. S. *v.* De Amador, 6 N. M. 173, 27 Pac. 488.

New York.— Slatterly *v.* People, 58 N. Y. 354; Brotherton *v.* People, 14 Hun 486.

North Carolina.— State *v.* Winchester, 113 N. C. 641, 18 S. E. 657; State *v.* Braddy, 104 N. C. 737, 10 S. E. 261; State *v.* Keath, 83 N. C. 626; State *v.* Hinson, 82 N. C. 597; State *v.* Daniel, 30 N. C. 21.

Oregon.— State *v.* Foot You, 24 Oreg. 61, 32 Pac. 1031, 33 Pac. 537; State *v.* Cody, 18 Oreg. 506, 23 Pac. 891, 24 Pac. 895.

Texas.— McDonald *v.* State, 33 Tex. 339; Valles *v.* State, (Cr. App. 1903) 71 S. W. 598; Hargrove *v.* State, (Cr. App. 1901) 65 S. W. 1070; Heilbron *v.* State, 2 Tex. App. 537; Haynes *v.* State, 2 Tex. App. 84; Epps *v.* State, (Cr. App. 1896) 33 S. W. 975; Rodgers *v.* State, (Cr. App. 1894) 25 S. W. 632.

Utah.— U. S. *v.* Duggins, 11 Utah 430, 40 Pac. 707.

Wisconsin.—Williams *v.* State, 61 Wis. 281, 21 N. W. 56.

United States.— Brand *v.* U. S., 4 Fed. 394, 18 Blatchf. 384.

See 15 Cent. Dig. tit. "Criminal Law," § 2656.

Statutory provisions in New York.— The New York statutes (Code Cr. Proc. § 527, and Laws (1855), p. 613, c. 337, § 3), which conferred the power to grant a new trial because the verdict is against the evidence or the law, or because justice requires it, whether any exception shall have been taken or not, applied to appeals to the supreme court alone (People *v.* Donovan, 101 N. Y. 632, 4 N. E. 181; People *v.* Nileman, 8 N. Y. St. 300), and to convictions only for a capital offense or an offense of which the least punishment was imprisonment for life (Wilke *v.* People, 53 N. Y. 525. But see People *v.* Chartoff, 72 N. Y. App. Div. 555, 75 N. Y. Suppl. 1088). The earlier statute was applicable only to cases brought from the court of general sessions in and for the city and county of New York and not to appeals from courts of oyer and terminer. McKee *v.* People, 36 N. Y. 113, 3 Abb. Pr. N. S. 216, 34 How. Pr. 230; Done *v.* People, 5 Park. Cr. 364. Laws (1887), p. 626, c. 493, § 528, empowers the court of

sufficient merely to object. The objection must be followed by an exception.[49] It has been held, however, that a statute providing that no judgment shall be reversed unless the record shows that exceptions were made does not apply where there is an absolute failure of proof that a criminal offense has been committed.[50] And if an error appear on the face of the record it may be corrected, although not excepted to.[51]

(II) *Application of Rule*—(A) *In General.* A ruling on a motion to quash the indictment must in some jurisdictions be excepted to,[52] while in others the contrary has been held.[53] The refusal of the court to require the state to elect on which count of the indictment it will proceed will not be reviewed where no exception was taken.[54]

(B) *Motion For Continuance.* An appellant who has failed to except to a ruling refusing him a continuance cannot have the ruling reviewed on appeal.[55] It is insufficient to raise objection to such ruling for the first time on a motion for a new trial.[56]

(C) *Competency of Jurors.* A juror's competency will not be reviewed on appeal, where he was not challenged when he was accepted by the court,[57] and the rulings of the court during the selection and impaneling of the jury will not be reviewed unless exceptions were promptly taken.[58]

(D) *Errors in Admission or Exclusion of Evidence.* Rulings of the trial court admitting or excluding evidence will not be reviewed, where no exception thereto was taken in that court.[59] So too a ruling on the competency

appeals to order a new trial in capital cases where the verdict was against the weight of evidence or against law, or where justice requires a new trial, whether any exception shall have been taken or not, but does not confer upon defendant as matter of right the benefit of errors occurring on the trial, not excepted to. People *v.* Lyons, 110 N. Y. 618, 17 N. E. 391.

49. Territory *v.* Hicks, 6 N. M. 596, 30 Pac. 872.

50. Bryant *v.* State, 65 Miss. 435, 4 So. 343.

51. Rollins *v.* State, 59 Wis. 55, 17 N. W. 689.

52. Laycock *v.* State, 136 Ind. 217, 36 N. E. 137; State *v.* Fortune, 10 Mo. 466; Columbia *v.* Dorsey, 63 Mo. App. 626.

53. Baker *v.* People, 105 Ill. 452.

54. Johnson *v.* State, 29 Ala. 62, 65 Am. Dec. 383.

55. State *v.* Mayfield, 104 La. 173, 28 So. 997; State *v.* Barfield, 49 La. Ann. 1695, 22 So. 922; State *v.* Brodden, 47 La. Ann. 375, 16 So. 874; State *v.* Hunter, 171 Mo. 435, 71 S. W. 675; State *v.* Gamble, 108 Mo. 500, 18 S. W. 1111; Foster *v.* State, (Tex. Cr. App. 1903) 71 S. W. 971; Adcock *v.* State, 41 Tex. Cr. 288, 53 S. W. 845; Maeyers *v.* State, (Tex. Cr. App. 1899) 49 S. W. 381; West *v.* State, 40 Tex. Cr. 148, 49 S. W. 95; Phillips *v.* State, (Tex. Cr. App. 1898) 45 S. W. 709; Shaw *v.* State, 39 Tex. Cr. 161, 45 S. W. 597; Kilpatrick *v.* State, 39 Tex. Cr. 10, 44 S. W. 830; Hoffman *v.* State, (Tex. Cr. App. 1897) 42 S. W. 309; McKinney *v.* State, 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710.

56. State *v.* Mayfield, 104 La. 173, 28 So. 997.

57. State *v.* Bronstine, 147 Mo. 520, 49 S. W. 512.

The refusal of a new trial because of the disqualification of a juror cannot be reviewed in the absence of a bill of exceptions. Jones *v.* State, (Tex. Cr. App. 1899) 54 S. W. 585.

58. Loving *v.* Com., 4 Ky. L. Rep. 457; State *v.* Marshall, 36 Mo. 400; Jones *v.* State, (Tex. Cr. App. 1899) 54 S. W. 585; Hobbs *v.* State, (Tex. Cr. App. 1894) 28 S. W. 814.

59. *Florida.*— Shepherd *v.* State, 36 Fla. 374, 18 So. 773.

Iowa.— State *v.* Trauger, (1900) 81 N. W. 452; State *v.* Wart, 51 Iowa 587, 2 N. W. 405.

Louisiana.— State *v.* Wright, 45 La. Ann. 57, 12 So. 129.

Missouri.— State *v.* Cunningham, 154 Mo. 161, 55 S. W. 282; State *v.* Hope, 100 Mo. 347, 13 S. W. 490, 8 L. R. A. 608; State *v.* Back, 99 Mo. App. 34, 72 S. W. 466; State *v.* Craig, 79 Mo. App. 412; State *v.* Hayden, 61 Mo. App. 662; State *v.* Johnson, 58 Mo. App. 479.

Montana.— State *v.* Pepo, 23 Mont. 473, 59 Pac. 721.

Nebraska.— Thompson *v.* State, 44 Nebr. 366, 62 N. W. 1060.

New Mexico.—Territory *v.* Gonzales, (1902) 68 Pac. 923.

North Carolina.—State *v.* Downs, 118 N. C. 1242, 24 S. E. 531.

Pennsylvania.— Com. *v.* Bezek, 168 Pa. St. 603, 32 Atl. 109; Com. *v.* Bunnell, 20 Pa. Super. Ct. 51.

South Carolina.— State *v.* Petsch, 43 S. C. 132, 20 S. E. 993.

Tennessee.— Williams *v.* State, 3 Heisk. 376.

Texas.— Hill *v.* State, (Cr. App. 1902) 70 S. W. 754; Latham *v.* State, (Cr. App. 1903) 72 S. W. 182; Washington *v.* State, (Cr. App.

of a witness cannot be reviewed in the appellate court unless such ruling was duly excepted to in the court below.[60]

(E) *Sufficiency of Evidence.* The sufficiency of the evidence to support a verdict of conviction cannot be reviewed, unless an exception was taken before verdict to a ruling of the court thereon.[61] This is the rule where the record fails to show proof of venue, if it does not appear that an exception was taken.[62]

(F) *Proceedings at Trial in General.* The rulings of the trial judge on technical irregularities in the proceedings,[63] or the propriety of remarks made by him in commenting on the conduct of defendant or his counsel,[64] will not be reviewed on appeal where exceptions thereto were not duly taken. So too the ruling of the trial court denying the accused the privilege of making a statement after his counsel had spoken,[65] or refusing absolutely to hear him or his counsel,[66] or refusing further time for argument,[67] or its action in arranging the order in which counsel should open and close,[68] cannot be reviewed unless prompt exception was taken.

(G) *Improper Remarks of Counsel.* Improper remarks of counsel must be promptly objected and excepted to, and the court requested to instruct the jury to disregard them in order that they may be reviewed on appeal.[69] And exception should be taken to the refusal or the omission of the court to so instruct the jury.[70]

1900) 57 S. W. 671; Wilkins *v.* State, (Cr. App. 1900) 55 S. W. 819; Willis *v.* State, (Cr. App. 1900) 55 S. W. 495; Bogard *v.* State, (Cr. App. 1900) 55 S. W. 494; Edwards *v.* State, (Cr. App. 1899) 54 S. W. 589; Jones *v.* State, (Cr. App. 1899) 54 S. W. 585; Neal *v.* State, (Cr. App. 1899) 52 S. W. 856.

Vermont.— State *v.* Sawyer, 67 Vt. 239, 31 Atl. 285.

Washington.— State *v.* Coates, 22 Wash. 601, 61 Pac. 726.

See 15 Cent. Dig. tit. "Criminal Law," § 2662.

60. Walker *v.* State, 34 Fla. 167, 16 So. 80, 43 Am. St. Rep. 186; State *v.* McAfee, 148 Mo. 370, 50 S. W. 82; Pay *v.* State, (Tex. Cr. App. 1902) 70 S. W. 744; Nichols *v.* State, 32 Tex. Cr. 391, 23 S. W. 680. But see Brock *v.* State, (Tex. Cr. App. 1902) 71 S. W. 20, 60 L. R. A. 465, where a statute declared that a wife should not be a competent witness against her husband even with his consent.

61. Williams *v.* State, 54 Ala. 131, 25 Am. Rep. 665; Slatterly *v.* People, 58 N. Y. 354; People *v.* Thompson, 41 N. Y. 1; Shufflin *v.* People, 4 Hun (N. Y.) 16; State *v.* Huggins, 126 N. C. 1055, 35 S. E. 606. *Compare* Higginbotham *v.* State, 23 Tex. 574; West *v.* State, 2 Tex. App. 209.

62. Lea *v.* State, 64 Miss. 201, 1 So. 51.

63. *California.*— People *v.* McCauley, 1 Cal. 379.

Kansas.— State *v.* Baxter, 41 Kan. 516, 21 Pac. 650.

Louisiana.— State *v.* Robinson, 37 La. Ann. 673.

Mississippi.— Lipscomb *v.* State, 76 Miss. 223, 25 So. 158.

New York.— Woodford *v.* People, 62 N. Y. 117, 20 Am. Rep. 464.

See 15 Cent. Dig. tit. "Criminal Law," § 2665.

64. Thomas *v.* State, 126 Ala. 4, 28 So. 591; People *v.* Abbott, 101 Cal. 645, 36 Pac. 129; Spiars *v.* State, 40 Tex. Cr. 437, 50 S. W. 947. And see *supra*, XIV, B, 9.

65. Eastman *v.* People, 93 Ill. 112.

66. Weaver *v.* Com., 29 Pa. St. 445.

67. Robinson *v.* State, 152 Ind. 304, 53 N. E. 223.

68. Cornell *v.* State, 104 Wis. 527, 80 N. W. 745.

69. *Iowa.*— State *v.* Sale, 119 Iowa 1, 92 N. W. 680, 95 N. W. 193.

Kentucky.— Smith *v.* Com., 8 S. W. 192, 9 Ky. L. Rep. 1005.

Massachusetts.— Com. *v.* Byce, 8 Gray 461.

Missouri.—State *v.* Armstrong, (Sup. 1902) 66 S. W. 961; State *v.* Hilsabeck, 132 Mo. 348, 34 S. W. 38; State *v.* Johnson, 129 Mo. 26, 31 S. W. 339; State *v.* Green, 117 Mo. 298, 22 S. W. 952; State *v.* Pagels, 92 Mo. 300, 4 S. W. 931.

Nebraska.— Hill *v.* State, 42 Nebr. 503, 60 N. W. 916.

New York.— People *v.* Brooks, 15 N. Y. Suppl. 362.

Texas.— Tackaberry *v.* State, (Cr. App. 1903) 72 S. W. 384; Gossett *v.* State, (Cr. App. 1902) 70 S. W. 319; Nelson *v.* State, (Cr. App. 1902) 66 S. W. 775; Wilborn *v.* State, (Cr. App. 1901) 64 S. W. 1058; Willis *v.* State, (Cr. App. 1900) 55 S. W. 495.

Washington.— State *v.* Bailey, 31 Wash. 89, 71 Pac. 715.

West Virginia.— State *v.* Johnson, 49 W. Va. 684, 39 S. E. 665.

See 15 Cent. Dig. tit. "Criminal Law," § 2666.

70. *Alabama.*— Stone *v.* State, 105 Ala. 60, 17 So. 114.

Colorado.— Rowe *v.* People, 26 Colo. 542, 59 Pac. 57.

Indiana.— Cromer *v.* State, 21 Ind. App. 502, 52 N. E. 239.

Missouri.— State *v.* Edie, 147 Mo. 535, 49

(H) *Instructions and Refusals to Instruct.* In most jurisdictions the improper refusal or neglect of the court to charge on a particular point, or its action in granting and giving improper instructions, will not be reviewed on appeal, unless specially excepted to on the trial,[71] and this rule applies to instructions given by the court of its own motion.[72] An exception to this rule is made, however, in some states in capital cases, and an improper instruction may be reviewed if it appears to have prejudiced the accused, although no exception was taken.[73]

(I) *Judgments.* In the absence of a statute requiring it, a judgment of the court, being matter of record, need not be excepted to in order that it may be reviewed on appeal.[74]

b. Time of Exceptions. Exceptions must be taken during the trial, and generally at the time of the ruling complained of,[75] and as a rule they will not be

S. W. 563; State *v.* Williams, 121 Mo. 399, 26 S. W. 339.

Texas.— Whitesides *v.* State, 42 Tex. Cr. 151, 58 S. W. 1016; McKinney *v.* State, (Cr. App. 1900) 55 S. W. 175; Wade *v.* State, (Cr. App. 1899) 54 S. W. 582.

See 15 Cent. Dig. tit. "Criminal Law," § 2666. See also *supra* XIV, E.

71. *Colorado.*— Holland *v.* People, 30 Colo. 94, 69 Pac. 519; Chipman *v.* People, 24 Colo. 520, 52 Pac. 677.

Florida.— Phillips *v.* State, 28 Fla. 77, 9 So. 826.

Georgia.— Barnes *v.* State, 113 Ga. 189, 38 S. E. 396; Frazier *v.* State, 112 Ga. 868, 38 S. E. 349; Skinner *v.* State, 98 Ga. 127, 26 S. E. 475; Lewis *v.* State, 91 Ga. 168, 16 S. E. 986.

Illinois.— Steffy *v.* People, 130 Ill. 98, 22 N. E. 861.

Indiana.— Vanderkarr *v.* State, 51 Ind. 91.

Iowa.— State *v.* Williams, 115 Iowa 97, 88 N. W. 194.

Kentucky.— Nicely *v.* Com., 58 S. W. 995, 22 Ky. L. Rep. 900.

Louisiana.— State *v.* Weston, 107 La. 45, 31 So. 383; State *v.* Mangrum, 35 La. Ann. 619.

Mississippi.—Brown *v.* State, 32 Miss. 433; Scott *v.* State, 31 Miss. 473.

Missouri.— State *v.* Vinso, 171 Mo. 576, 71 S. W. 1034; State *v.* McMullin, 170 Mo. 608, 71 S. W. 221; State *v.* Gregory, 170 Mo. 598, 71 S. W. 170; State *v.* Gregory, 158 Mo. 139, 59 S. W. 89; State *v.* Weber, 156 Mo. 249, 56 S. W. 729; State *v.* Sprague, 149 Mo. 409, 50 S. W. 901; State *v.* Hilsabeck, 132 Mo. 348, 34 S. W. 38.

Nebraska.— Bush *v.* State, 47 Nebr. 642, 66 N. W. 638.

New Mexico.— Leonardo *v.* Territory, 1 N. M. 291.

New York.— People *v.* Burt, 170 N. Y. 560, 62 N. E. 1099 [*affirming* 51 N. Y. App. Div. 106, 64 N. Y. Suppl. 417, 15 N. Y. Cr. 43]; People *v.* Reich, 110 N. Y. 660, 18 N. E. 104.

Oregon.— State *v.* Cody, 18 Oreg. 506, 23 Pac. 891, 24 Pac. 895.

South Carolina.— State *v.* Coleman, 17 S. C. 473.

Texas.— Webb *v.* State, (Cr. App. 1902) 70 S. W. 954; Barber *v.* State, (Cr. App. 1902) 69 S. W. 515; Abbott *v.* State, 42 Tex. Cr. 8, 57 S. W. 97; Stewart *v.* State, (Cr. App. 1899) 50 S. W. 459; Dunbar *v.* State, 34 Tex. Cr. 596, 31 S. W. 401. The earlier cases held that an exception might not be necessary where the charge was calculated to injure the rights of defendant. Davis *v.* State, 15 Tex. App. 594; Wiseman *v.* State, 32 Tex. Cr. 454, 24 S. W. 413; White *v.* State, 23 Tex. App. 154, 3 S. W. 710; Hill *v.* State, 22 Tex. App. 579, 3 S. W. 764; Henry *v.* State, 9 Tex. App. 358. But this rule did not apply to misdemeanors, and in such cases exceptions to instructions were always necessary. Mooring *v.* State, 42 Tex. 85.

Washington.— State *v.* Williams, 13 Wash. 335, 43 Pac. 15.

Wisconsin.— Knoll *v.* State, 55 Wis. 249, 12 N. W. 369, 42 Am. Rep. 704.

Contra, People *v.* McGuire, 89 Mich. 64, 50 N. W. 786; People *v.* Macard, 73 Mich. 15, 40 N. W. 784; People *v.* Murray, 72 Mich. 10, 40 N. W. 29.

See 15 Cent. Dig. tit. "Criminal Law," § 2668. And see *supra,* XIV, H.

Assignment of error in the instructions on a motion for a new trial is not sufficient. Brown *v.* State, 32 Miss. 433.

72. State *v.* O'Donald, 3 Ida. 343, 39 Pac. 556; People *v.* Biles, 2 Ida. (Hasb.) 114, 6 Pac. 120; State *v.* Bouton, 26 Nev. 34, 62 Pac. 595.

73. Falk *v.* People, 42 Ill. 331; People *v.* Barberi, 149 N. Y. 256, 43 N. E. 635, 52 Am. St. Rep. 717; Hill *v.* State, 35 Tex. Cr. 371, 33 S. W. 1075.

74. State *v.* Miller, 26 W. Va. 106; Nelson *v.* U. S., 30 Fed. 112.

Where a statute provides that parties in criminal actions shall be entitled to bills of exceptions in the same manner as in civil cases, and no questions in civil cases will be considered unless exceptions were taken, a verdict and a judgment in a criminal case will not be reviewed unless excepted to. Mitchell *v.* State, 82 Md. 527, 34 Atl. 246.

Exception to decision.— Under a statute providing that defendant may except to any "decision" of the court, an exception to the "opinion" of the court has been held sufficient. Pierce *v.* State, 109 Ind. 535, 10 N. E. 302.

75. Bolling *v.* State, 78 Ala. 469; Lester *v.* State, 37 Fla. 382, 20 So. 232; Veal *v.*

reviewed unless prepared and presented to and certified by the trial judge during the term of the trial.[76] It is too late to take exceptions for the first time on motion for a new trial.[77]

c. Sufficiency of Exceptions. The exception should be specifically directed to the particular error objected to. An exception which is general and does not distinctly point out the particular error will not be considered.[78] If the alleged error be in the admission of testimony, the exception should disclose what the testimony was.[79]

3. Motions and Objections by Motion — a. In General. In the absence of a statute a motion to set aside a verdict as against the law and the evidence can be heard only in the trial court, and cannot be made on appeal.[80] But where the indictment is not sufficient to support the judgment, the latter may be reviewed on appeal, although no motion for a new trial or in arrest of judgment was made.[81] And it has been held that where the whole record is before the appellate court and it sees errors therein, or the judgment is not warranted upon the whole record, judgment may be arrested, although no motion in arrest was made below.[82] If the defect is one which would have been cured or obviated by a continuance, motion must have been made therefor or it cannot be considered on appeal.[83]

State, 116 Ga. 589, 42 S. E. 705; Corley *v.* State, 95 Ga. 465, 20 S. E. 212; Bruce *v.* State, 87 Ind. 450; State *v.* Rabourn, 14 Ind. 300. See also *supra*, XIV, D, 3, c; XIV, E, 6, a.

76. Robson *v.* State, 83 Ga. 166, 9 S. E. 610; Keeton *v.* State, 10 Tex. App. 686; State *v.* Bierbach, 47 Wis. 529, 3 N. W. 14.

77. McDowell *v.* Com., 4 Ky. L. Rep. 353; Cook *v.* State, 22 Tex. App. 511, 3 S. W. 749.

78. *Alabama.*— Smith *v.* State, 130 Ala. 95, 30 So. 432.

Arkansas.— Bonville *v.* State, 70 Ark. 613, 69 S. W. 544.

Florida.— Jones *v.* State, (1902) 32 So. 793; Gass *v.* State, (1902) 32 So. 109.

Indian Territory.— Bias *v.* U. S., 3 Indian Terr. 27, 53 S. W. 471; Brown *v.* U. S., 2 Indian Terr. 582, 52 S. W. 56.

Iowa.— State *v.* Williams, 115 Iowa 97, 88 N. W. 194.

Louisiana.— State *v.* Pitre, 106 La. 606, 31 So. 133.

Missouri.— State *v.* McMullin, 170 Mo. 608, 71 S. W. 221; State *v.* McGinnis, 158 Mo. 105, 59 S. W. 83.

New Mexico.— Territory *v.* Guillen, (1901) 66 Pac. 527.

New York.— People *v.* Noelke, 1 N. Y. Cr. 252; Carnal *v.* People, 1 Park. Cr. 272.

North Carolina.— State *v.* Hicks, 130 N. C. 705, 41 S. E. 803; State *v.* Kinsauls, 126 N. C. 1095, 36 S. E. 31.

South Carolina.— State *v.* Whittle, 59 S. C. 297, 37 S. E. 923; State *v.* Turner, 18 S. C. 103.

Texas.— Washington *v.* State, (Cr. App. 1901) 62 S. W. 747; Johnson *v.* State, 42 Tex. Cr. 298, 59 S. W. 898; McMullen *v.* State, (Cr. App. 1900) 59 S. W. 891; Lewis *v.* State, (Cr. App. 1900) 59 S. W. 886.

Utah.— State *v.* Campbell, 25 Utah 342, 71 Pac. 529; State *v.* Haworth, 24 Utah 398, 68 Pac. 155.

Virginia.— Lawrence *v.* Com., 86 Va. 573, 10 S. E. 840.

United States.— Davis *v.* U. S., 107 Fed. 753, 46 C. C. A. 619.

See 15 Cent. Dig. tit. "Criminal Law," § 2671. See also *supra*, XIV, D, 1, d; XIV, E, 6; XIV, I.

79. Brown *v.* State, 42 Fla. 184, 27 So. 869; Moore *v.* State, 114 Ga. 256, 40 S. E. 295; Taylor *v.* State, 105 Ga. 846, 33 S. E. 190; Rahm *v.* State, 30 Tex. App. 310, 17 S. W. 416, 28 Am. St. Rep. 911; Reilley *v.* U. S., 106 Fed. 896, 46 C. C. A. 25. See *supra*, XIV, D, 3, e.

80. State *v.* Locklin, 81 Me. 251, 16 Atl. 895.

Judgment by default.— A judgment for a fine in a misdemeanor case is within W. Va. Code, c. 134, § 5, requiring that when judgment by default has been rendered, a motion for a reversal must be made before a writ of error can be taken. State *v.* Slack, 28 W. Va. 372.

81. Moore *v.* People, 26 Ill. App. 137; Philpot *v.* Com., 69 S. W. 959, 24 Ky. L. Rep. 757; Randall *v.* Com., 24 Gratt. (Va.) 644.

82. State *v.* Burns, 99 Mo. 471, 542, 12 S. W. 801, 13 S. W. 686; State *v.* Fayette, 17 Mo. App. 587; State *v.* Roanoke R., etc., Co., 109 N. C. 860, 13 S. E. 719; Thurston *v.* State, 3 Coldw. (Tenn.) 115. But see Fleet *v.* State, 74 Md. 552, 22 Atl. 624; State *v.* McWilliams, 7 Mo. App. 99.

Discharge of jurors.— Defendant may except to the action of the court in illegally discharging jurors summoned, and with whose names he was furnished, although he does not move for a venire de novo, where he acts promptly, and the court in overruling his objection holds that there was no ground for such motion. Parsons *v.* State, 22 Ala. 50.

83. This is true for example of the objection that the accused was refused time to confer with his counsel in order to prepare for trial (Nelson *v.* Com., 62 S. W. 1018, 23 Ky. L. Rep. 320; State *v.* Romero, 5 La. Ann. 24), or that an attachment against an absent witness was refused him (State *v.* Benjamin, 7 La. Ann. 47).

The admission of evidence received without objection but on appeal alleged to be inadmissible will not be reviewed where no motion was made to strike it out.[84]

b. Motion For New Trial — (1) *Necessity in General.* In most of the states motions for new trials are absolutely necessary to preserve errors for the consideration of the appellate court, and errors not brought to the attention of the trial court in this manner cannot be revieved.[85] And where there is a motion for a new trial, previous exceptions not incorporated therein are waived.[86] A motion for a new trial is necessary to save the objection and exception that there has been no arraignment or waiver thereof, or plea by defendant,[87] that the trial court erred in refusing a continuance,[88] or that there was misconduct on the part of one or more of the jurors.[89] And generally errors in the trial proceedings are

84. *California.*— People *v.* Swist, 136 Cal. 520, 69 Pac. 223.

Dakota.— Territory *v.* Keyes, 5 Dak. 244, 38 N. W. 440.

Iowa.—State *v.* Day, 60 Iowa 100, 14 N. W. 132.

Kansas.— State *v.* Earnest, 56 Kan. 31, 42 Pac. 359; State *v.* Gray, 55 Kan. 135, 39 Pac. 1050.

New York.— People *v.* Carpenter, 102 N. Y. 238, 6 N. E. 584, 4 N. Y. Cr. 177 [*affirming* 38 Hun 490]; People *v.* Murphy, 3 N. Y. Cr. 338.

Texas.— Lanham *v.* State, 7 Tex. App. 126.

See 15 Cent. Dig. tit. "Criminal Law," § 2674. And see *supra*, XIV, D, 2.

Time of motion.— A motion to strike out improper testimony should be made before the jury is charged, and where it does not appear that the motion was made in time, its denial will not be reviewed. Wright *v.* State, 81 Ga. 745, 7 S. E. 806. See also *supra*, XIV, D, 2, d.

85. *California.*— People *v.* Torres, 38 Cal. 141.

Georgia.— Hill *v.* State, 112 Ga. 32, 400, 37 S. E. 441.

Illinois.— Collins *v.* People, 194 Ill. 506, 62 N. E. 902; Markee *v.* People, 103 Ill. App. 347.

Indiana.— Crawford *v.* State, 155 Ind. 692, 57 N. E. 931; Lewis *v.* State, 142 Ind. 30, 41 N. E. 310; Allen *v.* State, 74 Ind. 216.

Kansas.— State *v.* Jockheck, 47 Kan. 733, 28 Pac. 1007; State *v.* Tuchman, 47 Kan. 726, 28 Pac. 1004.

Kentucky.— Philpot *v.* Com., 69 S. W. 959, 24 Ky. L. Rep. 757; Howard *v.* Com., 67 S. W. 1003, 24 Ky. L. Rep. 91; Griffin *v.* Com., 66 S. W. 740, 23 Ky. L. Rep. 2148; Nicely *v.* Com., 58 S. W. 995, 22 Ky. L. Rep. 900; Baker *v.* Com., 47 S. W. 864, 20 Ky. L. Rep. 879; Lewis *v.* Com., 42 S. W. 1127, 19 Ky. L. Rep. 1139. But see Johnson *v.* Com., 9 Bush 224.

Louisiana.— State *v.* Robertson, 50 La. Ann. 455, 23 So. 510.

Missouri.— State *v.* Maddox, 153 Mo. 471, 55 S. W. 72; State *v.* Headrick, 149 Mo. 396, 51 S. W. 99; State *v.* Harlan, 130 Mo. 381, 32 S. W. 997; Polk *v.* State, 4 Mo. 544; State *v.* Quinn, 40 Mo. App. 627.

Montana.— State *v.* Whaley, 16 Mont. 547, 41 Pac. 852.

Nebraska.— Bush *v.* State, 62 Nebr. 128, 86 N. W. 1062; Sullivan *v.* State, 58 Nebr. 796, 79 N. W. 721; Dillon *v.* State, 39 Nebr. 92, 57 N. W. 986.

New Mexico.— Territory *v.* Christman, 9 N. M. 582, 58 Pac. 343; Territory *v.* Archibeque, 9 N. M. 403, 54 Pac. 758.

North Carolina.— State *v.* Edwards, 126 N. C. 1051, 35 S. E. 540.

Oklahoma.— Stutsman *v.* Territory, 7 Okla. 490, 54 Pac. 707; Hays *v.* Territory, (1897) 52 Pac. 950.

Texas.— Boone *v.* State, (Cr. App. 1901) 60 S. W. 759; Bell *v.* State, (Cr. App. 1900) 58 S. W. 71; Ford *v.* State, 41 Tex. Cr. 1, 51 S. W. 935, 53 S. W. 869; Edmonds *v.* State, (Cr. App. 1899) 51 S. W. 393.

West Virginia.— State *v.* Thompson, 26 W. Va. 149.

Wisconsin.— Yanke *v.* State, 51 Wis. 464, 8 N. W. 276.

Wyoming.— Casteel *v.* State, 9 Wyo. 267, 62 Pac. 348; Ross *v.* State, 8 Wyo. 351, 57 Pac. 924; Boulter *v.* State, 6 Wyo. 66, 42 Pac. 606; Cook *v.* Territory, 3 Wyo. 110, 4 Pac. 887.

See 15 Cent. Dig. tit. "Criminal Law," § 2676.

A record on appeal which shows no motion for a new trial brings up nothing but the sufficiency of the indictment. Philpot *v.* Com., 69 S. W. 959, 24 Ky. L. Rep. 757.

86. Collier *v.* State, 20 Ark. 36; Hill *v.* State, 112 Ga. 32, 400, 37 S. E. 441; Lowery *v.* State, 72 Ga. 649; State *v.* Gatlin, 170 Mo. 354, 70 S. W. 885; State *v.* Whitesell, 142 Mo. 467, 44 S. W. 332.

Where the statute enumerates certain errors only as ground for a new trial, exceptions to other errors may be brought up by bill of exceptions, without a motion for a new trial. Cain *v.* State, 44 Ind. 435; Trisler *v.* State, 39 Ind. 473; Bohanan *v.* State, 15 Nebr. 209, 18 N. W. 129.

87. Shoffner *v.* State, 93 Ind. 519; Miller *v.* State, 26 Ind. App. 152, 59 N. E. 287.

88. State *v.* Jewell, 90 Mo. 467, 3 S. W. 77; State *v.* Mann, 83 Mo. 589; State *v.* Fletchall, 31 Mo. App. 297.

89. People *v.* Lee Chuck, 78 Cal. 317, 20 Pac. 719; Lybarger *v.* State, 2 Wash. 552, 27 Pac. 449, 1029.

The refusal to discharge a jury in the midst of their deliberations, on account of the prejudice of one of them, of which defendant was not previously informed, will

not reviewable unless they are made the basis of a motion for a new trial, an exception taken to its overruling, and the motion included in a bill of exceptions.[90] But it has been held that the refusal of the court to direct a verdict, if properly presented in a bill of exceptions, may be reviewed, although it was not made a ground of motion for a new trial.[91]

(II) *Admission, Exclusion, and Sufficiency of Evidence.* The improper admission or exclusion of evidence, whereby the accused was prejudiced, is ground for a new trial; and a motion therefor must be made on this ground before the action of the court will be reviewed on appeal,[92] unless an exception is made by statute.[93] Where the appellate court has power to review the sufficiency of the evidence to sustain the verdict, it will not do so, unless a motion has been made in the trial court to set aside the verdict on the ground that it is against the evidence, an exception taken, and all the evidence certified in the bill of exceptions.[94]

(III) *Instructions.* Errors in the instructions to the jury or in omitting or refusing to instruct cannot be reviewed unless they have been assigned as cause for a new trial on a motion therefor and an exception has been taken to the overruling of the motion,[95] or it seems unless the verdict of conviction is clearly unjustified under the instruction which was given.[96]

c. Necessity For Ruling on Motions and Exceptions. The motion for a new trial must be determined and a ruling by the trial court be obtained thereon before an appeal can be prosecuted.[97] An assignment of error for the overruling

not be reviewed unless the objection is renewed as one of the grounds of his motion for a new trial. Phillips *v.* State, 62 Ark. 119, 34 S. W. 539.

90. Ison *v.* Com., 66 S. W. 184, 23 Ky. L. Rep. 1805; Territory *v.* Chavez, 9 N. M. 282, 50 Pac. 324.

Illustrations.— Thus improper conduct or remarks of the prosecuting attorney prejudicial to defendant (People *v.* Sansome, 98 Cal. 235, 33 Pac. 202; Grier *v.* Johnson, 88 Iowa 99, 55 N. W. 80; Walrath *v.* State, 8 Nebr. 80), the denial by the court of the right of defendant to open and close (Abshire *v.* State, 52 Ind. 99), the failure of the court reporter properly to report the proceedings (Vincent *v.* State, 37 Nebr. 672, 56 N. W. 320), error in overruling challenges to the jurors (Ford *v.* State, 46 Nebr. 390, 64 N. W. 1082; McCann *v.* People, 3 Park. Cr. (N. Y.) 272), error in giving instructions in the absence of the accused or his counsel (State *v.* Nichols, 15 Wash. 1, 45 Pac. 647), and error in discharging the jury and ordering a special venire (Chambers *v.* State, (Ark. 1888) 8 S. W. 822) must all be incorporated in the motion for a new trial.

91. Lawless *v.* State, 114 Wis. 189, 89 N. W. 891.

92. *Arkansas.*— Walker *v.* State, 39 Ark. 221; Straughan *v.* State, 16 Ark. 37.

Georgia.— Bowdoin *v.* State, 113 Ga. 1150, 39 S. E. 478.

Indiana.— Siberry *v.* State, 149 Ind. 684, 39 N. E. 936; Delhaney *v.* State, 115 Ind. 499, 18 N. E. 49; Evans *v.* State, 67 Ind. 68; Todd *v.* State, 25 Ind. 212; State *v.* Manly, 15 Ind. 8.

Missouri.— State *v.* Pollard, 132 Mo. 288, 34 S. W. 29; State *v.* Johnson, 115 Mo. 480, 22 S. W. 463; State *v.* Horn, 115 Mo. 416, 22 S. W. 381; State *v.* Mitchell, 98 Mo. 657, 12 S. W. 379.

Nebraska.— Walrath *v.* State, 8 Nebr. 80.

See 15 Cent. Dig. tit. "Criminal Law," § 2679.

93. Turnbull *v.* Com., 3 Ky. L. Rep. 275; State *v.* O'Brien, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399.

94. *Illinois.*— Graham *v.* People, 115 Ill. 566, 4 N. E. 790.

Iowa.— State *v.* Pitts, 11 Iowa 343; State *v.* Hockenberry, 11 Iowa 269.

Maryland.— Jones *v.* State, 70 Md. 326, 17 Atl. 89, 14 Am. St. Rep. 362.

Missouri.— State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113.

Texas.— Maloy *v.* State, 33 Tex. 599.

See 15 Cent. Dig. tit. "Criminal Law," § 2680.

95. *Indiana.*— Weireter *v.* State, 69 Ind. 269; Wagner *v.* State, 63 Ind. 250.

Kentucky.— Adams *v.* Com., 2 Ky. L. Rep. 388.

Missouri.— State *v.* Headrick, 149 Mo. 396, 51 S. W. 99; State *v.* Kaiser, 124 Mo. 651, 28 S. W. 182; State *v.* Cantlin, 118 Mo. 100, 23 S. W. 1091; State *v.* Nelson, 101 Mo. 477, 14 S. W. 718, 10 L. R. A. 39; State *v.* McCray, 74 Mo. 303.

Nebraska.— Jolly *v.* State, 43 Nebr. 857, 62 N. W. 300.

Oklahoma.— Beberstein *v.* Territory, 8 Okla. 467, 58 Pac. 641; Swaggart *v.* Territory, 6 Okla. 344, 50 Pac. 96.

Wyoming.— Gustaveson *v.* State, 10 Wyo. 300, 68 Pac. 1006.

See 15 Cent. Dig. tit. "Criminal Law," § 2683.

96. Baldwin *v.* State, 12 Nebr. 61, 10 N. W. 463.

97. Louisville Chemical Works *v.* Com., 8 Bush (Ky.) 179.

Rehearing of motion.— Where, after a bill of exceptions is filed, defendant moves for a rehearing of his motion for a new trial on

of a motion for a continuance will not be considered on appeal, where the record fails to disclose that such motion was ever passed upon.[98] The ruling of the court refusing a new trial cannot be reviewed on appeal unless excepted to at the time. The failure to except waives all objections raised at the trial,[99] even though the ruling of the court is in the record with the evidence.[1]

4. Reservation or Certification of Cases. Under the statutes providing that cases may be certified to an appellate court for review, it is usually necessary that the trial court shall have rendered judgment before their certification,[2] unless the provisions of the statute refer only to certifications before judgment.[3] And where a statute provides that questions which have arisen under certain circumstances may be certified to an appellate court, it must affirmatively appear by the record that the questions certified arose as required by the statute, in order to give the appellate court jurisdiction.[4] Where the statute provides for the reservation of questions of law, questions of fact cannot be reserved.[5] The record sent up should state specifically the question or questions on which the opinion of the court is required.[6]

the ground that he has discovered new and important evidence, and the court does not pass upon the motion for a rehearing, but orders it, with the bill of exceptions and other papers, to be sent to the appellate court, the latter will not consider them until the motion for a rehearing has been passed upon. Crawford *v.* State, 50 Ga. 249.

98. Bush *v.* State, 47 Nebr. 642, 66 N. W. 638.

99. *Arkansas.*— Robinson *v.* State, 5 Ark. 659; Waller *v.* State, 4 Ark. 87.

California.— People *v.* Ah Sam, 41 Cal. 645; People *v.* Hobson, 17 Cal. 424.

Idaho.— State *v.* Smith, 4 Ida. 733, 44 Pac. 554.

Indiana.— Dougherty *v.* State, 5 Ind. 453.

Kentucky.— Vinegar *v.* Com., 104 Ky. 106, 46 S. W. 510, 20 Ky. L. Rep. 412.

Louisiana.— State *v.* Hall, 109 La. 290, 33 So. 218; State *v.* Washington, 104 La. 443, 29 So. 55, 81 Am. St. Rep. 141; State *v.* McTier, 45 La. Ann. 440, 12 So. 516.

Missouri.— State *v.* Irvin, 171 Mo. 558, 71 S. W. 1015; State *v.* Hunter, 152 Mo. 569, 54 S. W. 442; State *v.* Murray, 126 Mo. 526, 29 S. W. 590; State *v.* Gilmore, 110 Mo. 1, 19 S. W. 218; State *v.* Harvey, 105 Mo. 316, 16 S. W. 886.

New Mexico.— Territory *v.* Christman, 9 N. M. 582, 58 Pac. 343; Territory *v.* Archibeque, 9 N. M. 403, 54 Pac. 758; Territory *v.* Chavez, 9 N. M. 282, 50 Pac. 324.

Texas.— Pennington *v.* State, (Cr. App. 1898) 48 S. W. 507; Washington *v.* State, (App. 1891) 16 S. W. 653.

Wyoming.— Smith *v.* State, 10 Wyo. 157, 67 Pac. 977.

See 15 Cent Dig tit. "Criminal Law," § 2686.

1. State *v.* Jackson, 35 La. Ann. 769.

In New York, where Code Cr. Proc. § 528, under certain circumstances permits a new trial to be awarded without exceptions, and requires the court to give judgment without regard to technical errors, the court is not called upon to award new trials in capital cases by the appearance in the record of some error in the proceedings which no exception points out, unless the substantial rights of the accused can be seen to have been prejudiced and justice demands a new trial. People *v.* Hoch, 150 N. Y. 291, 44 N. E. 976.

2. State *v.* Harkins, 6 Ala. 57; State *v.* Parish, 42 Wis. 625; State *v.* Kneifle, 12 Wis. 439.

3. State *v.* Sheppard, 37 Wis. 395. Under a statute which provided that the trial term might adjourn a question of law, with the consent of the accused, it was held in Com. *v.* Nix, 11 Leigh (Va.) 636, that where defendant's counsel requested an instruction that the evidence did not prove the crime charged, and directing an acquittal, the court did not err in discharging the jury, adjourning the question on this motion, and continuing the case.

4. State *v.* Wedge, 23 Minn. 32 note; State *v.* Hoag, 23 Minn. 31; State *v.* Byrud, 23 Minn. 29. Where a statute provides that doubtful or important questions may be referred on the trial of any prisoner convicted, and that the judge, with the consent or by the desire of defendant, may report the case, his report must show that defendant was tried and convicted under an indictment or information charging some offense punishable under the law, in order to give the appellate court jurisdiction (State *v.* Wentler, 76 Wis. 89, 44 N. W. 841, 45 N. W. 816), as the statute does not authorize cases prosecuted on a complaint in a municipal court to be certified (State *v.* Allison, 47 Wis. 548, 2 N. W. 1141). Under the Virginia statute, the consent of the accused to the certification of a question of law was necessary. Com. *v.* Garth, 3 Leigh (Va.) 761.

5. State *v.* Gross, 62 Wis. 41, 21 N. W. 802. Thus a question embracing both law and fact as on a motion for a new trial, on the ground that the verdict is against the evidence, for the reason that the facts proved or probably proved do not make out the crime cannot be reserved. People *v.* Adwards, 5 Mich. 22.

6. State *v.* Call, 1 Fla. 92; State *v.* Cornhauser, 74 Wis. 42, 41 N. W. 959; State *v.*

C. Proceedings For Transfer of Cause[7] — **1. Parties — a. Joinder of Defendants.** Where two are jointly charged and severally sentenced they may join in a writ of error[8] or each may severally appeal[9] or bring a writ of error[10] without joining the other.

b. Abatement by Death of Defendant. Inasmuch as the state and federal constitutions expressly provide that no conviction shall work corruption of blood or forfeiture of estate,[11] a writ of error or an appeal cannot be supported upon common-law grounds after the death of the accused, and hence an appeal abates by the death of the appellant pending the decision.[12]

2. Term to Which Appeal Should Be Taken. The appeal ought generally to be taken to the next term of the appellate court,[13] and where this is a statutory requirement a strict compliance therewith cannot be dispensed with.[14]

3. Application. A petition or application for a writ of error or for the allowance of an appeal is almost universally necessary.[15] And the applicant must show sufficient grounds for the granting of his petition or application.[16] In criminal cases a writ of error will not lie without an order of the court allowing

Jenkins, 60 Wis. 599, 19 N. W. 406; State *v.* Anson, 20 Wis. 651.

7. Time of taking proceedings see *supra*, XVII, A, 4.

8. Sumner *v.* Com., 3 Cush. (Mass.) 521.

9. State *v.* Jolly, 20 N. C. 108, 32 Am. Dec. 656.

10. Wright *v.* Reg., 14 Q. B. 148, 2 Cox C. C. 91, 11 Jur. 103, 16 L. J. Q. B. 10, 68 E. C. L. 148.

11. 4 Bl. Comm. 392; 1 Chitty Cr. L. 747.

12. *Georgia.*— Herrington *v.* State, 53 Ga. 552.

Illinois.— O'Sullivan *v.* People, 144 Ill. 604, 32 N. E. 192, 20 L. R. A. 143.

Kentucky.— Hale *v.* Com., 71 S. W. 902, 24 Ky. L. Rep. 1573.

Missouri.— State *v.* Perrine, 56 Mo. 602; State *v.* Woods, 56 Mo. App. 55.

Oregon.— State *v.* Martin, 30 Oreg. 108, 47 Pac. 196.

Texas.— March *v.* State, 5 Tex. App. 450; Hardin *v.* State, (Cr. App. 1896) 36 S. W. 82; Pustiofsky *v.* State, (Cr. App. 1894) 28 S. W. 947.

See 15 Cent. Dig. tit. "Criminal Law," § 2701.

The right to appeal is not revived in the executor because there is a judgment for costs which is enforceable against the estate of the accused. State *v.* Martin, 30 Oreg. 108, 47 Pac. 196. *Compare* State *v.* Ellvin, 51 Kan. 784, 33 Pac. 547.

13. State *v.* Ivey, 11 Ala. 47; State *v.* Randall, 88 N. C. 611; State *v.* O'Kelly, 88 N. C. 609.

14. Browning *v.* State, 41 Fla. 271, 26 So. 639; Simmons *v.* State, 40 Fla. 467, 25 So. 62. And see State *v.* Deyton, 119 N. C. 880, 26 S. E. 159.

15. Bourne *v.* State, 8 Port. (Ala.) 458; Reed *v.* State (Nebr.) 1902) 92 N. W. 321.

To obtain certiorari it is proper to ask for a rule to show cause why the writ should not issue. State *v.* Jefferson, 66 N. C. 309.

16. He need not, however, convince the court to a certainty that the trial court erred as to the law. People *v.* Hendrickson, 1 Park. Cr. (N. Y.) 396.

If the judge has any doubt as to the validity of the conviction or as to the accuracy of the rulings in the lower court he must allow the writ. People *v.* Hartung, 17 How. Pr. (N. Y.) 151; Stout *v.* People, 4 Park. Cr. (N. Y.) 132; Com. *v.* Winnemore, 2 Brewst. (Pa.) 378; U. S. *v.* Whittier, 13 Fed. 534, 11 Biss. 356. If, however, the case has been fairly tried (Com. *v.* Pennock, 3 Serg. & R. (Pa.) 199), the rulings below appear correct (Com. *v.* Ferrigan, 44 Pa. St. 386); and the court is satisfied as to the legality of the conviction (People *v.* Wood, 3 Park. Cr. (N. Y.) 681; Com. *v.* Ferguson, 32 Leg. Int. (Pa.) 127; Com. *v.* Jacoby, 6 Pittsb. Leg. J. (Pa.) 302; Donovan *v.* Territory, 3 Wyo. 91, 2 Pac. 532) it may refuse the writ.

In the supreme court of the United States, while an application for a writ of error to a state court may be made in open court, because of the urgency and importance of the case, it is the duty of the court, not only to ascertain whether any questions reviewable were decided in the state court, but also whether the character of these questions is such as to justify bringing them into the supreme court for examination. If on the face of the record it appears that the decision of the federal question in the state court was so plainly right as not to require argument, particularly where it is consistent with former decisions of the federal court, the writ ought not to be allowed. *Ex p.* Spies, 123 U. S. 131, 8 S. Ct. 21, 31 L. ed. 80 [*citing* Twitchell *v.* Com., 7 Wall. (U. S.) 321, 19 L. ed. 223].

The applicant for a certiorari must show cause before he can obtain the writ. State *v.* Zabriskie, 43 N. J. L. 369; Com. *v.* Kirkpatrick, Add. (Pa.) 193 note.

An affidavit that petitioner for certiorari has not had a fair trial and that he had been wrongfully and illegally convicted is necessary. Pitts *v.* State, 59 Ga. 764.

Verification of an affidavit or of a petition filed on applying for a certiorari or with exceptions "on information and belief" may be rejected as insufficient. Morrison *v.* State, 64 Ga. 751; *In re* Curry, (Mass. 1889) 22 N. E. 628.

it;[17] and the allowance of an appeal or of a writ of error ought always to be manifested by some entry or order.[18] The refusal of a writ of error is neither an adjudication that error has not been committed, nor a bar to the allowance of the writ by another judge,[19] and when thus allowed the first refusal is no bar to a review upon the merits.[20]

4. Costs and Security Therefor — a. Necessity For Payment or Security — (i) *In General.* Where by statute[21] or by the order of the court[22] the appellant is required to file an appeal-bond, to deposit money to cover his probable costs, or to give security that he will comply with the judgment, the appeal will be dismissed if he fails to do so, unless he has secured permission to prosecute *in forma pauperis*.[23]

(ii) *Fees of Clerk or Stenographer.* In many states by statutes a defendant who appeals is exempt from paying the fees of the clerk or stenographer from whom he receives a transcript.[24]

17. *Florida.*— Wright *v.* State, 32 Fla. 472, 14 So. 43; McIver *v.* Marshall, 24 Fla. 42, 4 So. 563.

Maryland.— State *v.* Boyle, 25 Md. 509.

New York.— People *v.* Rogers, 13 Abb. Pr. N. S. 370; Stout *v.* People, 4 Park. Cr. 132; Colt *v.* People, 1 Park. Cr. 611.

Ohio.— Van Buskirk *v.* Newark, 26 Ohio St. 37; Farris *v.* State, 1 Ohio St. 188; Miller *v.* Bellefontaine, 1 Ohio Cir. Dec. 407.

Pennsylvania.— Com. *v.* Capp, 48 Pa. St. 55; Com. *v.* McGinnis, 2 Whart. 113; Com. *v.* Meyer, 2 Serg. & R. 453; Com. *v.* Profit, 4 Binn. 424; Com. *v.* Sassaman, 2 Del. Co. Rep. 333.

United States.— Mackin *v.* U. S., 23 Fed. 334.

See 15 Cent. Dig. tit. "Criminal Law," § 2703.

A certiorari may be allowed by a judge at chambers. State *v.* Morris Canal, etc., Co., 13 N. J. L. 192; Anonymous, 9 N. J. L. 2.

18. It has been held, however, that a finding of fact by the trial judge, for the purpose of an appeal, sufficiently shows his allowance of the same as required by the statute. State *v.* Lee, 65 Conn. 265, 30 Atl. 1110, 48 Am. St. Rep. 202, 27 L. R. A. 498.

A writ of error must be tested by the chief judge of the court (Stewart *v.* State, 42 Fla. 196, 28 So. 56; Rockhold *v.* State, 5 How. (Miss.) 291. See also State *v.* Gibbons, 4 N. J. L. 40), and authenticated by the seal of the court (State *v.* Boyle, 25 Md. 509; Hinman *v.* People, 8 Hun (N. Y.) 647). It may be awarded and made returnable at the same term judgment is rendered. Lazier *v.* Com., 10 Gratt. (Va.) 708.

Form of writ of error see Mansell *v.* Reg., Dears. & B. 375, 8 E. & B. 54, 4 Jur. N. S. 432, 27 L. J. M. C. 4, 92 E. C. L. 54.

19. People *v.* Rogers, 13 Abb. Pr. N. S. (N. Y.) 370.

20. Huntzinger *v.* Com., 97 Pa. St. 336.

21. *Hawaii.*— Rex *v.* McGregor, 1 Hawaii 265.

Kentucky.— Norton *v.* Com., 78 Ky. 501.

Mississippi.— Lum *v.* State, 66 Miss. 389, 5 So. 689.

North Carolina.—State *v.* Spurtin, 80 N. C. 362; State *v.* Patrick, 72 N. C. 217.

Texas.— York *v.* Dallas, (Cr. App. 1895) 30 S. W. 223; Robinson *v.* State, 25 Tex. App. 111, 7 S. W. 531.

See 15 Cent. Dig. tit. "Criminal Law," § 2708.

It violates no constitutional provision for the legislature to require the accused to give a bond on an appeal from a conviction. *Ex p.* Reese, 112 Ala. 63, 21 So. 56.

22. State *v.* Patrick, 72 N. C. 217; State *v.* Hawkins, 72 N. C. 180.

The court has the inherent power to require a bond, although not authorized to do so by statute, as in the absence of statutory restriction a court granting an appeal may impose reasonable conditions. Everly *v.* State, 10 Ind. App. 15, 37 N. E. 556.

23. State *v.* Kerns, 90 N. C. 650.

In forma pauperis see *infra*, XVII, C, 4, d.

Bond in federal court.— The fact that defendant after conviction in a state court brings proceedings in habeas corpus in a federal court and, on appealing from a decision against him thereon, gives a bond, does not exempt him from giving security on his appeal in the state courts and his appeal will not be considered but continued. State *v.* Humason, 4 Wash. 413, 30 Pac. 718.

On appeals by the state no bond is required since the state cannot be required to pay costs. State *v.* Taylor, 34 La. Ann. 978.

24. *Indiana.*— State *v.* Wallace, 41 Ind. 445.

Louisiana.— State *v.* Mayo, 42 La. Ann. 640, 8 So. 52.

Missouri.— State *v.* Wofford, 121 Mo. 61, 25 S. W. 851; State *v.* Daily, 45 Mo. 153.

New Mexico.—Aguilar *v.* Territory, 8 N. M. 496, 46 Pac. 342.

North Carolina.— State *v.* Nash, 109 N. C. 822, 13 S. E. 733.

See 15 Cent. Dig. tit. "Criminal Law," § 2717.

In Illinois the clerk of the court to which an appeal is taken from a justice's court cannot demand a fee as a condition of having the case, which is there to be tried *de novo*, docketed. Defendant cannot be compelled to pay costs in advance, as he cannot on an acquittal recover them from the state. McArthur *v.* Artz, 129 Ill. 352, 21 N. E. 802

b. Nature of Security. In some states statutes require defendant to file a recognizance to prosecute the appeal,[25] or where a writ of certiorari is sued out,[26] to secure his appearance and his submission to the judgment.[27]

c. Requisites and Validity of Security — (i) *In General.* The character and contents of a recognizance or appeal-bond are usually prescribed by statute, a substantial compliance with which is ordinarily sufficient.[28] Unnecessary clauses in a bond will not vitiate it, but may be disregarded as surplusage.[29] A recognizance must, however, state the grounds of the appeal, and the proceedings that

[*affirming* 28 Ill. App. 466]. See also Speller *v.* Speller, 119 N. C. 356, 26 S. E. 160.

In Louisiana the statute does not apply to appeals from proceedings for violations of city ordinances. State *v.* Heuchert, 42 La. Ann. 270, 7 So. 329.

Stenographer's fees.—A constitutional provision that " in no instance shall any accused person, before final judgment, be compelled to advance money or fees " does not apply to a payment demanded by a stenographer for a transcript of the evidence taken at the trial, where his employment by the county or state was not compulsory. And the words " final judgment " refer to the judgment at the trial, and not the judgment on appeal. Stowe *v.* State, 2 Wash. 124, 25 Pac. 1085. *Compare* Argabright *v.* State, 46 Nebr. 822, 65 N. W. 886 (where the payment of the reporter's legal fees was held a condition precedent to procuring the transcript); *In re* Nan, 20 D. C. 420; District of Columbia *v.* Lyon, 7 Mackey (D. C.) 222.

The docketing of an appeal being necessary to confer jurisdiction, an appeal not docketed because defendant has not paid the requisite fee may be dismissed. State *v.* Martin, 52 Mo. App. 71; State *v.* Caughron, 49 Mo. App. 311.

25. Dennison's Case, 4 Me. 541.

26. Mullen *v.* State, 67 N. J. L. 451, 51 Atl. 461.

27. State *v.* Craft, Walk. (Miss.) 537.

Such statutes are mandatory and an appeal may be dismissed if they are not complied with (Com. *v.* Dunham, 22 Pick. (Mass.) 11; Lindsey *v.* State, (Tex. Cr. App. 1901) 65 S. W. 905; Kounce *v.* State, (Tex. Cr. App. 1901) 60 S. W. 966; Mayo *v.* State, (Tex. Cr. App. 1900) 55 S. W. 337; Ward *v.* State, (Tex. Cr. App. 1898) 43 S. W. 985), even though the appellant remains in custody (State *v.* Johnson, 21 Ind. App. 313, 52 N. E. 422; Com. *v.* Richards, 17 Pick. (Mass.) 295; Com. *v.* Brigham, 16 Pick. (Mass.) 10).

In Texas a recognizance is dispensed with where it appears to the satisfaction of the court by the certificate of the sheriff that defendant has been continuously confined since his conviction. McHenry *v.* State, (Tex. Cr. App. 1901) 60 S. W. 880; Faulkner *v.* State, (Tex. Cr. App. 1900) 55 S. W. 60.

The filing of an ordinary bond instead of a recognizance is not sufficient. De Anda *v.* State, (Tex. Cr. App. 1894) 26 S. W. 73; Herron *v.* State, 27 Tex. 337; Laturner *v.* State, 9 Tex. 451; Hammons *v.* State, 8 Tex. 272. *Contra*, Vierling *v.* State, 33 Ind. 218, construing 2 Gav. & H. Ind. St. 638.

An appeal by the state will be dismissed for want of jurisdiction where it does not appear that the appellee was required to enter into a recognizance as required by the statute. State *v.* Ivy, 33 Tex. 646; State *v.* Watson, 33 Tex. 337; State *v.* Bledsoe, 31 Tex. 39; State *v.* Stout, 28 Tex. 327; State *v.* Fatheree, 23 Tex. 202.

Failure to prosecute appeal.— Where a defendant on appealing gives a recognizance to enter and prosecute his appeal, not at the next term, as required by law, but at a subsequent term, and fails to appear on the return, it is within the discretion of the court to issue a capias against him, and on his being brought in thereon to sentence him under his conviction. Com. *v.* Dow, 5 Metc. (Mass.) 329; State *v.* Boren, 21 Tex. 591.

28. Minden *v.* McCrary, 108 La. 518, 32 So. 468; Territory *v.* Milroy, 7 Mont. 559, 19 Pac. 209; Grier *v.* State, 29 Tex. 487; Thielen *v.* State, (Tex. Cr. App. 1901) 65 S. W. 533; Elkins *v.* State, 26 Tex. App. 220, 9 S. W. 491; Cavanaugh *v.* Ft. Worth, 26 Tex. App. 85, 9 S. W. 273; Cyechawaich *v.* State, 23 Tex. App. 430, 5 S. W. 119; Allen *v.* State, 1 Tex. App. 514. And see APPEAL AND ERROR, 2 Cyc. 897.

An appeal-bond conditioned that defendant shall pay such judgment as may be rendered against him is valid, although imprisonment may be a part of the punishment. Ott *v.* State, 35 Ind. 365. So a bond to " pay and satisfy the said judgment . . . and otherwise abide the judgment of the said court " is proper where a statute requires a bond that appellant will pay the judgment and render himself in execution. State *v.* Thompson, 81 Mo. 163.

Description of offense.— In Texas it has been repeatedly held that an appeal-bond not naming some statutory offense charged, or not stating facts which will constitute the offense of which defendant was convicted, is incurably defective, and the appeal may be dismissed. Webb *v.* State, 32 Tex. 652; Hasty *v.* State, 32 Tex. 97; Breeding *v.* State, 31 Tex. 94; Collins *v.* State, 39 Tex. Cr. 30, 44 S. W. 846; Stewart *v.* State, (Cr. App. 1898) 44 S. W. 513; Tiner *v.* State, 9 Tex. App. 674; Coney *v.* State, 1 Tex. App. 62.

29. Stephens *v.* People, 13 Ill. 131.

Analogy to civil cases.—A statute containing a provision requiring that proceedings on criminal appeals shall be the same as proceedings on civil appeals does not necessitate the filing of a bond notwithstanding the fact that by statute in civil appeals plaintiff in error is required to file a bond. State *v.* Polacheck, 101 Wis. 427, 77 N. W. 708.

show the authority of the court to consider it.[30] The appeal may be dismissed where the bond is for a less amount than is prescribed by statute.[31] It is, however, generally sufficient if it covers the fine and costs accrued, and in the absence of express statute it need not cover subsequent costs.[32]

(II) *Estoppel to Impeach Validity.* An acceptance of the benefit of an appeal, as fully as though the recognizance had been within the statute, estops one from claiming that he did not in fact appeal, or that his recognizance was informal.[33]

(III) *Parties — Joint Defendants.* In case of joint defendants, each should execute a separate bond, and a joint recognizance by two or more jointly convicted is insufficient to support their joint appeal, since a forfeiture cannot be enforced for a several breach.[34]

(IV) *Amendment or Filing New Security.* In the absence of a permissive statute appeal-bonds are not amendable.[35] Nor can the court pending an appeal permit the entry of a valid bond or recognizance in place of one which is defective, where the entry of a valid recognizance is a prerequisite to an appeal.[36]

d. Proceedings in Forma Pauperis — (I) *In General.* At common law the court has an inherent power to permit the accused to defend,[37] and in England, probably by statute, to prosecute a writ of error *in forma pauperis*.[38] In the

30. State *v.* Beneke, 9 Iowa 203; State *v.* Smith, 2 Me. 62; Com. *v.* Downey, 9 Mass. 520.

In Texas the appeal-bond must state the number of the suit, so as to identify the judgment appealed from (Scarborough *v.* State, (Tex. Cr. App. 1892) 20 S. W. 584), the date of the judgment (Scarborough *v.* State, (Tex. Cr. App. 1892) 20 S. W. 584), the crime of which the accused has been convicted (Wade *v.* State, 31 Tex. Cr. 580, 56 S. W. 337), the character and amount of a fine or other punishment assessed against him (Greer *v.* State, (Tex. Cr. App. 1902) 70 S. W. 23; Weber *v.* State, (Tex. Cr. App. 1902) 68 S. W. 269; De Valeria *v.* State, (Tex. Cr. App. 1902) 67 S. W. 1020; Crowley *v.* State, (Tex. Cr. App. 1902) 66 S. W. 559; Standifer *v.* State, (Tex. Cr. App. 1902) 66 S. W. 550; Waits *v.* State, (Tex. Cr. App. 1901) 65 S. W. 917; Austin *v.* State, (Tex. Cr. App. 1901) 64 S. W. 1041; Lovic *v.* State, (Tex. Cr. App. 1901) 62 S. W. 748; Seguin *v.* State, (Tex. Cr. App. 1901) 62 S. W. 753; Murphy *v.* State, (Tex. Cr. App. 1901) 61 S. W. 405; Moore *v.* State, (Tex. Cr. App. 1901) 61 S. W. 395; Wellborn *v.* State, (Tex. Cr. App. 1901) 61 S. W. 306; McClarney *v.* State, (Tex. Cr. App. 1901) 61 S. W. 122; Erwin *v.* State, (Tex. Cr. App. 1901) 60 S. W. 961; Thomas *v.* State, (Tex. Cr. App. 1901) 60 S. W. 759), must state correctly the court in which the conviction was had (Chappell *v.* State, (Tex. Cr. App. 1901) 61 S. W. 928), and must be conditioned as the statute requires or the appeal may be dismissed (Little *v.* State, 26 Tex. 110; Harkey *v.* State, (Tex. Cr. App. 1902) 66 S. W. 559. See also Lee *v.* State, (Tex. Cr. App. 1903) 72 S. W. 186; Spradling *v.* State, (Tex. Cr. App. 1902) 71 S. W. 17; Hogue *v.* State, (Tex. Cr. App. 1902) 70 S. W. 217; Skidmore *v.* State, (Tex. Cr. App. 1896) 37 S. W. 859; Walker *v.* State, (Tex. Cr. App. 1894) 25 S. W. 123; Watson *v.* State, 20 Tex. App. 382; Conrad *v.* State, 9 Tex. App. 674; Taylor *v.* State, 1 Tex. App. 663; Lawrence *v.* State, 1 Tex. App. 392).

31. Miller *v.* State, 21 Tex. App. 275, 17 S. W. 429; Fletcher *v.* State, 9 Tex. App. 674. And see Appeal and Error, 2 Cyc. 899.

32. Drum *v.* Ft. Worth, 25 Tex. App. 664, 8 S. W. 819.

The estimate of costs by a justice approving a bond made before the costs have been finally taxed will be allowed to stand as the amount of the bond, if the sum estimated is sufficient to cover ordinary cases like the one in question, although it is not in strict compliance with the statute. Zidek *v.* State, (Tex. Cr. App. 1893) 22 S. W. 143.

33. Wachstetter *v.* State, 42 Ind. 166.

The state, after the appeal has been remitted by the appellate court for a new trial, cannot ask that the appeal be dismissed for want of a bond, especially where the accused has been in custody since his conviction. State *v.* Mitchell, 19 N. C. 237.

34. Standifer *v.* State, (Tex. Cr. App. 1902) 66 S. W. 550; McHam *v.* State, (Tex. Cr. App. 1901) 65 S. W. 911; Lee *v.* State, (Tex. Cr. App. 1900) 57 S. W. 97.

A statute which prohibits a class of persons from being recognized or giving bonds in criminal proceedings, being in derogation of private right, must be strictly construed. State *v.* Costello, 61 Conn. 497, 23 Atl. 868.

35. Ham *v.* People, 15 Ill. 302; Walsh *v.* People, 12 Ill. 77; Swafford *v.* People, 2 Ill. 289.

36. Holman *v.* State, 10 Tex. 558; Peck *v.* State, (Tex. Cr. App. 1899) 51 S. W. 229; Youngman *v.* State, 38 Tex. Cr. 429, 42 S. W. 988, 43 S. W. 519; Miller *v.* State, 21 Tex. App. 275, 17 S. W. 429. *Compare* Collins *v.* State, 34 Tex. Cr. 95, 29 S. W. 274.

37. 1 Chitty Cr. L. 413; Comyns Dig. tit. "Forma Pauperis."

38. See 11 Hen. VII, c. 12 [cited in 7 Bacon Abr. tit. "Pauper"]. And see also Appeal and Error, 2 Cyc. 896.

United States as a general rule, an indigent defendant appealing from a conviction is entitled as of right to a transcript of the testimony at the expense of the county or state;[39] and a bond to secure the payment of costs may be dispensed with if the appellant shall file an affidavit of inability to furnish it.[40]

(II) *AFFIDAVIT.* The affidavit of a defendant seeking to avoid the payment of costs or fees by appealing *in forma pauperis* must show his indigence,[41] that he has been advised by counsel that he has reasonable grounds for an appeal, and that his appeal is taken in good faith.[42]

5. NOTICE OF APPEAL. The mode and time of giving notice of appeal are usually regulated by statutes which must usually be substantially if not strictly complied with, and a failure to give notice in conformity with their terms may cause the appeal to be dismissed.[43] Defendant must usually serve his notice of appeal on the prosecuting attorney,[44] and in most cases by statute he must also serve a notice on the clerk of the court from which he appeals,[45] and if he fails to

39. State *v.* Height, (Iowa 1901) 88 N. W. 331; State *v.* Gray, (Iowa 1901) 87 N. W. 416; State *v.* Wright, (Iowa 1900) 82 N. W. 1013; State *v.* Second Judicial Dist. Ct., 24 Mont. 566, 63 Pac. 389; People *v.* Jones, 34 Hun (N. Y.) 620; State *v.* Fenimore, 2 Wash. 370, 26 Pac. 807.

A contrary rule has been laid down in Indiana. *Ex p.* Morgan, 122 Ind. 428, 23 N. E. 863. And *compare* Merrick *v.* State, 63 Ind. 327.

40. State *v.* Kerns, 90 N. C. 650. And see APPEAL AND ERROR, 2 Cyc. 897.

41. State *v.* Earl, 66 Iowa 84, 23 N. W. 275; State *v.* Divine, 69 N. C. 390; Currie *v.* State, 10 Tex. App. 90.

42. State *v.* Harris, 114 N. C. 830, 19 S. E. 154; State *v.* Rhodes, 112 N. C. 856, 16 S. E. 930; State *v.* Jackson, 112 N. C. 849, 16 S. E. 906; State *v.* Shoulders, 111 N. C. 637, 15 S. E. 877; State *v.* Wylde, 110 N. C. 500, 15 S. E. 5; State *v.* Duncan, 107 N. C. 818, 12 S. E. 382; State *v.* McCoury, 103 N. C. 352, 9 S. E. 412; State *v.* Tow, 103 N. C. 350, 9 S. E. 411; State *v.* Jones, 93 N. C. 617; State *v.* Payne, 93 N. C. 612; State *v.* Moore, 93 N. C. 500; State *v.* Morgan, 77 N. C. 510.

A pauper affidavit must be filed in the trial court, and be embraced in the transcript. The court has no discretion to permit it to be filed and sent up afterward, when the case is found to be absolutely without merit. Thorpe *v.* State, 92 Ga. 470, 17 S. E. 693.

Bond on certiorari.— A statute which requires one who sues as a pauper to swear "that he is unable, from his poverty, to pay the costs" is mandatory, and the affidavit is a condition to the granting of a writ of certiorari, if the applicant gives no bond. Farmer *v.* State, 77 Ga. 134.

43. Buell *v.* State, 69 Ind. 125; McLaughlin *v.* State, 66 Ind. 193; State *v.* Brooks, 83 Iowa 754, 50 N. W. 43; State *v.* Moran, 8 Iowa 399; Bailey *v.* Territory, 9 Okla. 461, 60 Pac. 117; State *v.* Blazier, 36 Oreg. 97, 60 Pac. 203. See also Lewis *v.* State, (Tex. Cr. App. 1897) 39 S. W. 370. Hence if a statute requires that the notice of an appeal shall be filed with the clerk an oral notice in open court is insufficient. Hunter *v.* Territory, (Ariz. 1894) 36 Pac. 175; Long *v.* State, 3 Tex. App. 321; Cole *v.* Territory, 3 Wash. Terr. 99, 13 Pac. 664. And where the statute provides that an appeal may be taken by the service of a notice upon certain persons, the appeal may be considered to have been taken as of the date upon which the notice was served. Price *v.* State, 74 Ind. 553; State *v.* Quick, 73 Ind. 147; Winsett *v.* State, 54 Ind. 437; Nichols *v.* State, 27 Ind. App. 444, 61 N. E. 694.

Formal requisites of notice.—The appellant must in some way manifest by his notice that he intends to appeal. Lawrence *v.* State, 14 Tex. 432. A notice that he appeals from the verdict is insufficient, and is unknown to the law. State *v.* Gibbs, 10 Mont. 210, 25 Pac. 288, 10 L. R. A. 749.

Signature to notice.— The notice may be signed by another attorney than the attorney of record for the accused, where a formal substitution of attorneys is not required. *Ex p.* Clarke, 62 Cal. 490. Notice on the part of the state should be signed by the official taking the appeal. Hence where the appeal is taken by the prosecuting attorney it is proper for him and not the attorney-general to sign the notice of appeal, and to prepare and sign assignments of error. State *v.* Sopher, 157 Ind. 360, 61 N. E. 785.

Presumption as to date of service.— An indorsement showing that a notice was filed on the day of its date, with an admission of service indorsed, raises a presumption that the notice was served the day it was filed. People *v.* Ah Yute, 56 Cal. 119.

Proof that a notice was served "soon after the trial" is not proof that it was served within ten days after trial as required by statute. State *v.* Johnson, 109 N. C. 852, 13 S. E. 843.

44. People *v.* Bell, 70 Cal. 33, 11 Pac. 327; Darr *v.* State, 82 Ind. 11. But see Hammons *v.* State, 8 Tex. 272, holding that it was not necessary that defendant give express notice to the state that he appeals.

The state may waive a notice of an appeal which is required by statute to be given it by appellant. Summers *v.* State, 51 Ind. 201.

45. Manning *v.* Wichmer, (Iowa 1896) 66 N. W. 756; State *v.* Rogers, 71 Iowa 753, 32 N. W. 7; Carr *v.* State, 1 Kan. 331; Territory *v.* Hanna, 5 Mont. 246, 5 Pac. 250.

do so when thus required his appeal may be dismissed.[46] Notice of an appeal by the state ought to be served on the accused personally if he can be found, and if he resides in the county.[47]

6. Notice of Writ of Error. It is usually necessary, either by virtue of the statute or rule of court, to serve a notice of the suing out of a writ of error upon the attorney of the adverse party.[48]

7. Notice of Certiorari. Notice of the sanction of a writ of certiorari obtained by accused and the time and place of hearing, must be served on the public prosecuting officer.[49]

8. Supersedeas or Stay — a. Right to Demand. In the absence of a statute[50] conferring the absolute right to a supersedeas or stay pending appeal, the granting of a stay of execution to a convict who appeals is in the court's discretion,[51] and may be refused where the accused does not give security for the fees.[52]

b. Grounds — (i) *In General.* In capital cases a stay should be granted if the court has a reasonable doubt whether error has been committed.[53] And while

46. State *v.* Horner, 36 Oreg. 68, 59 Pac. 549; Young *v.* State, 41 Tex. Cr. 247, 53 S. W. 1028; Hurlock *v.* State, (Tex. Cr. App. 1898) 43 S. W. 992; Truss *v.* State, 38 Tex. Cr. 291, 43 S. W. 92; Neimire *v.* State, (Tex. Cr. App. 1897) 38 S. W. 783; Dilworth *v.* State, (Tex. Cr. App. 1897) 38 S. W. 615; Mason *v.* State, (Tex. Cr. App. 1897) 38 S. W. 610; White *v.* State, (Tex. Cr. App. 1896) 38 S. W. 199.

Notice of an appeal from a judgment of a municipal court, in which the city prosecutes, must be served on the city or its attorney. Graham *v.* State, 1 Ark. 79; State *v.* Sexton, 42 Minn. 154, 43 N. W. 845. But *compare* State *v.* Miller, 41 La. Ann. 53, 5 So. 258, 7 So. 672, in which no citation was required to be served by defendant on appeal.

47. People *v.* Wallace, 23 Cal. 93; State *v.* Quick, 73 Ind. 147; Nichols *v.* State, 27 Ind. App. 444, 61 N. E. 694; State *v.* Brandon, 6 Kan. 243; State *v.* King, 1 Kan. 466; State *v.* Brown, 5 Oreg. 119.

If he be a non-resident, or if his whereabouts are unknown, substituted service may be made according to the local rules of practice. State *v.* Baird, 9 Kan. 60.

48. State *v.* Dunning, 11 S. D. 585, 79 N. W. 846.

Scire facias to hear errors must be served on the public prosecutor who has fourteen days thereafter to reply. So held in Christian *v.* Com., 5 Metc. (Mass.) 334.

Where notice to the United States is necessary, the United States attorney is the only representative upon whom service can be made, and service upon his assistant is insufficient. Bennet *v.* U. S., 2 Wash. Terr. 179, 3 Pac. 272.

49. Culbreth *v.* State, 115 Ga. 242, 41 S. E. 594; McElhannon *v.* State, 112 Ga. 221, 37 S. E. 402; Moore *v.* State, 96 Ga. 309, 22 S. E. 960. And see, generally, Certiorari.

50. By statute the right to a stay is often conferred especially in capital cases, and in such case a judge to whom proper application is made has no discretion in the matter. John *v.* State, 2 Ala. 290; People *v.* Cancemi, 5 Abb. Pr. (N. Y.) 490.

Mandamus.— Where the accused was convicted of a capital crime the granting of a supersedeas is a matter of course and will if needful be compelled by mandamus. Spann *v.* Clark, 47 Ga. 369.

The statutory power of the court to stay proceedings does not conflict with a statute that provides that no judge or officer other than the governor shall have authority to reprieve or suspend the execution of the death sentence. The object of the latter statute is to prevent a conflict between the executive and the judicial departments of the government, and not to repeal the power of the judge to direct that a stay shall accompany a writ of error. Carnel *v.* People, 2 Edm. Sel. Cas. (N. Y.) 208, 1 Park. Cr. (N. Y.) 262.

51. *Alabama.*— John *v.* State, 1 Ala. 95.

Arkansas.— *Ex p.* Bixley, 13 Ark. 286.

Colorado.— Ritchey *v.* People, 22 Colo. 251, 43 Pac. 1026.

Iowa.— State *v.* McCloskey, 4 Iowa 496.

New Mexico.— Brooks *v.* U. S., 6 N. M. 75, 27 Pac. 510.

New York.—People *v.* Tweed, 67 Barb. 496; People *v.* Holmes, 5 Abb. Pr. 420; People *v.* Hartung, 17 How. Pr. 151; People *v.* Restell, 3 How. Pr. 251; People *v.* Wood, 3 Park. Cr. 681.

Oregon.— *Ex p.* Warren, 41 Oreg. 309, 71 Pac. 644.

United States.— Mackin *v.* U. S., 23 Fed. 334.

See 15 Cent. Dig. tit. "Criminal Law," § 2728.

A justice of the United States supreme court may issue a supersedeas on allowing a writ of error to a circuit court in case of a conviction of an infamous crime. See *In re* Claasen, 140 U. S. 200, 11 S. Ct. 735, 35 L. ed. 409.

In California where the court denies an application for a certificate of probable cause which would operate as a stay it is the duty of the court to grant a temporary stay to have a bill of exceptions settled. People *v.* Lane, 96 Cal. 596, 31 Pac. 580.

52. Warren County *v.* Worrell, 67 Miss. 154, 6 So. 629.

53. State *v.* Hayward, 62 Minn. 114, 64 N. W. 90; People *v.* O'Reilly, 9 Abb. N. Cas. (N. Y.) 77; People *v.* Clark, 2 Edm. Sel. Cas. (N. Y.) 280.

the same rule applies in cases not capital,[54] the court has full discretion in the latter class of cases to deny a stay if the exceptions are technical, insufficient to work a reversal and the moral guilt of the accused is clearly established.[55]

(II) *Certificates of Reasonable Doubt and Probable Cause.* In New York the statute provides that a stay may be granted where there is filed "a certificate of the judge who presided at the trial, or of a justice of the supreme court, that, in his opinion, there is reasonable doubt whether the judgment should stand."[56] In other states statutes provide for the issuance of a certificate by the court that there is probable cause for the appeal, and that such certificate may operate as a stay of execution.[57]

c. Operation of Appeal or Writ of Error. While at common law the writ of error operated as a supersedeas of all proceedings on the judgment in the court below, from the time it was sued out and notice of it served on the other party,[58] in this country the issuance of a writ of error or the giving of a notice of appeal does not in the absence of statute operate as a stay without an express order of the court to that effect,[59] which order should not be granted unless error clearly appears, or special circumstances render the stay necessary.[60] In many states, however, the statutes provide that an appeal or writ of error suspends proceedings in the lower court until the case in the appellate court is determined.[61] Under these

54. People *v.* Wentworth, 3 N. Y. Cr. 111; Clifford *v.* State, 58 Wis. 127, 16 N. W. 25; Mackin *v.* U. S., 23 Fed. 334; U. S. *v.* Whittier, 13 Fed. 534, 11 Biss. 356.

55. People *v.* O'Reilly, 9 Abb. N. Cas. (N. Y.) 77; Vincent *v.* People, 15 Abb. Pr. (N. Y.) 234, 5 Park. Cr. (N. Y.) 88; U. S. *v.* Williams, 28 Fed. Cas. No. 16,722.

56. N. Y. Code Cr. Proc. § 527.

Mere technical errors, such as the comments of the trial judge, not sufficient to influence a fair jury, are not grounds for the certificate. People *v.* Doody, 34 Misc. (N. Y.) 463, 69 N. Y. Suppl. 724.

Probable errors substantially prejudicial to the defendant, as for example where the public is excluded from the trial, notwithstanding the constitutional provision for a public trial (People *v.* Hall, 23 Misc. (N. Y.) 479, 49 N. Y. Suppl. 158), where defendant's admissions of the commission of similar crimes are admitted in evidence (People *v.* Bushnell, 71 N. Y. Suppl. 253), where his counsel is not given sufficient time to prepare for argument (People *v.* McLaughlin, 13 Misc. (N. Y.) 287, 35 N. Y. Suppl. 73), or the insufficiency of the evidence (People *v.* Erwin, 33 Misc. (N. Y.) 501, 68 N. Y. Suppl. 808, 15 N. Y. Cr. 290) will authorize the court to grant him a service of reasonable doubt.

The examination of the whole case on the application is necessary, except where a part of the record or of the evidence reveals error, and hence ordinarily a certificate may be refused if only a part of the record or of the evidence is submitted. People *v.* Hess, 6 Misc. (N. Y.) 246, 26 N. Y. Suppl. 630.

This statute having resulted in the granting of numerous certificates of reasonable doubt, by which unreasonable delay occurred and the course of justice was impeded, it was afterward enacted that if appeals were not brought on for argument within a specified time after the granting of a certificate, the district attorney might on two days' notice apply to any judge of the appellate court for an order vacating it. This act applies to actions in existence when it took effect. People *v.* Lyons, 29 N. Y. App. Div. 174, 51 N. Y. Suppl. 811.

57. Cal. Pen. Code, § 1243; Mont. Pen. Code, § 2278; Hill Anno. Laws Oreg. § 1440.

Such certificate should be granted if the judge thinks that the case presented is debatable. *In re* Adams, 81 Cal. 163, 22 Pac. 547; People *v.* Valencia, 45 Cal. 304.

The petition for the certificate should be verified by oath (State *v.* Broadbent, 27 Mont. 63, 69 Pac. 323), and a bill of exceptions should be presented (People *v.* Durrant, 119 Cal. 201, 51 Pac. 185; *Ex p.* Warren, 41 Oreg. 309, 71 Pac. 644; *Ex p.* Wachline, 32 Oreg. 204, 51 Pac. 1094. See also State *v.* Davis, 7 Ida. 776, 65 Pac. 429), although if the execution of defendant has been fixed at such a date as renders this impossible the certificate may be issued without a bill of exceptions (People *v.* Durrant, 119 Cal. 201, 51 Pac. 185; State *v.* McDonald, 27 Mont. 66, 69 Pac. 323).

The renewal of the application before another judge after its denial is permissible (People *v.* Durrant, 119 Cal. 201, 51 Pac. 185), but the statute will not permit a certificate of probable cause to be granted by a single justice on an appeal from an order for the execution of a capital sentence, but the application should be made to the court (People *v.* Ross, 135 Cal. 59, 67 Pac. 13). As to the necessity of showing the refusal of the certificate on a subsequent application see State *v.* Broadbent, 27 Mont. 63, 69 Pac. 323.

58. See Appeal and Error, 2 Cyc. 889.

59. Stout *v.* People, 4 Park. Cr. (N. Y.) 132; Colt *v.* People, 1 Park. Cr. (N. Y.) 611; Com. *v.* Hill, 185 Pa. St. 385, 39 Atl. 1055; Conner *v.* Com., 2 Va. Cas. 30; U. S. *v.* Whittier, 13 Fed. 534, 11 Biss. 356.

60. Clifford *v.* State, 58 Wis. 127, 16 N. W. 25.

61. *Alabama.*— John *v.* State, 1 Ala. 95.

statutes it has been held that the lower court loses all power to act except to amend and correct its minutes or to substitute lost or destroyed papers,[62] and a judgment entered *nunc pro tunc* is void.[63] But an appeal does not vacate the judgment appealed from,[64] nor does it divest the lower court of jurisdiction of proceedings against the appellant for other similar offenses.[65]

d. Custody of Accused Pending Appeal. Where defendant has been sentenced and sent to the penitentiary and is taken out on an appeal he may be committed to the sheriff during the pendency,[66] but in a capital case he may be held in the state prison although execution has been stayed.[67]

Florida.— State *v.* Mitchell, 29 Fla. 302, 10 So. 746; Rabon *v.* State, 7 Fla. 10.

Kansas.— *In re* Simmons, 39 Kan. 125, 17 Pac. 660; Miltonvale *v.* Lanoue, 35 Kan. 603, 12 Pac. 12; State *v.* Volmer, 6 Kan. 379.

Massachusetts.— Bryan *v.* Bates, 12 Allen 201.

Michigan.— People *v.* Braman, 30 Mich. 460.

New Mexico.— Territory *v.* Hicks, 6 N. M. 596, 30 Pac. 872.

New York.— People *v.* Brush, 60 Hun 399, 15 N. Y. Suppl. 512.

South Carolina.— State *v.* Prater, 27 S. C. 599, 4 S. E. 562.

Texas.— Greenwood *v.* State, 34 Tex. 334; Quarles *v.* State, 40 Tex. Cr. 353, 50 S. W. 457; Bozier *v.* State, 5 Tex. App. 220.

Washington.— *In re* Norris, 26 Wash. 323, 67 Pac. 72; *Ex p.* Jones, 2 Wash. 551, 27 Pac. 172.

See 15 Cent. Dig. tit. "Criminal Law," § 2731.

The appeal must be perfected by service of proper notice and the filing of the transcript, in order that it shall operate as a stay. *In re* Chambers, 30 Kan. 450, 2 Pac. 646.

In Kentucky by statute the appeal does not operate as a stay unless a supersedeas is filed and a certificate of the same filed with the clerk of the appellate court. Com. *v.* Howard, 4 Ky. L. Rep. 674.

Frivolous exceptions.— Under a statute which provides that sentence may be passed in criminal cases, notwithstanding the allowance of exceptions, where the exceptions appear to the trial judge to be frivolous, or intended for delay, it was held that the judge overruling the motion for a new trial may decide that the exceptions taken to his motion are frivolous, and may proceed to sentence (Com. *v.* Meserve, 156 Mass. 61, 30 N. E. 166), and it is not material that the exceptions are subsequently allowed (Com. *v.* Clifford, 145 Mass. 97, 13 N. E. 345).

The stay is terminated and an appeal is finally disposed of when it is declared abandoned by competent authority. State *v.* Johnson, 52 S. C. 505, 30 S. E. 592.

62. State *v.* Perry, 51 La. Ann. 1074, 25 So. 944; State *v.* Reid, 18 N. C. 377, 28 Am. Dec. 572. But see Hill *v.* State, 4 Tex. App. 559.

Where an appeal from an order is pending the trial court has no power to change the order. People *v.* Mayne, 118 Cal. 516, 50 Pac. 654, 62 Am. St. Rep. 256.

63. Sheegog *v.* State, 39 Tex. Cr. 126, 44 S. W. 1109; Estes *v.* State, 38 Tex. Cr. 506, 43 S. W. 982.

The accused may lawfully waive the return of the remittitur showing the affirmance of his conviction and voluntarily enter on his imprisonment; and if he does so his confinement is legal. Wiggins *v.* Tyson, 112 Ga. 744, 38 S. E. 86.

64. Therefore when an appeal abates by the death of the prisoner, the judgment in the court below is left in full force for the costs and disbursements of the action. Whitley *v.* Murphy, 5 Oreg. 328, 20 Am. Rep. 741.

In North Carolina it was at one time held that an appeal vacated the judgment appealed from, and the subsequent determination of the appellate court was not a judgment, but simply an order of the court below "to proceed to judgment and sentence, agreeable to this decision, and the laws of the State." State *v.* Miller, 94 N. C. 908; State *v.* Applewhite, 75 N. C. 229. But by Acts (1887), c. 191, § 1, an appeal no longer vacates the judgment, but upon giving bond or appealing *in forma pauperis* there shall be granted a stay of execution during the pendency of the appeal. Where defendant has lost his right to an appeal and procures a writ of certiorari in lieu thereof, he is entitled to the same stay of execution as he would have had on an appeal. State *v.* Walters, 97 N. C. 489, 2 S. E. 539, 2 Am. St. Rep. 310.

65. State *v.* Davey, 39 La. Ann. 507, 2 So. 44.

66. *Ex p.* Rodley, 132 Cal. 40, 64 Pac. 91; *Ex p.* Jones, 2 Wash. 551, 27 Pac. 172.

Where a statute provides that if judgment of confinement has been executed before the certificate of appeal is delivered to the sheriff, defendant shall remain in the state prison pending the appeal, he is not entitled, after having been lodged in the penitentiary before the service of the supersedeas, to be sent back to the county jail, but may be admitted to bail. *Ex p.* Lawrence, (Ark. 1902) 70 S. W. 470.

67. *Ex p.* Fredericks, 104 Cal. 400, 38 Pac. 51.

Under a statute which permits appellant to give a bond and stays execution thereon defendant who fails to give the bond is entitled under the express terms of the statute to remain with the sheriff and cannot be sent to the penitentiary. *In re* Ready, 44 Kan. 702, 25 Pac. 234.

Under a statute staying the execution of a judgment of conviction on an appeal the ac-

D. Record and Proceedings Not in Record — 1. General Requisites and Essentials — a. As Affecting Validity of Conviction — (I) *In General.* The record should show affirmatively that all steps have been properly taken during the trial which are necessary to sustain the conviction, either by statute or under the rules of practice recognized in the trial court.[68] The record of a conviction under a statute must set out the facts which constitute the statutory offense, and show the evidence, the conviction, and the judgment.[69]

(II) *Preliminary Steps.* As a general rule unless objections were made to the proceedings preliminary to the finding of the indictment,[70] or to the filing of an information,[71] they may be presumed regular, legal, and in accordance with the statutes and their regularity need not appear of record.[72]

(III) *Jurisdiction and Transfer.* The record of the court, particularly when it is a court of limited jurisdiction, should show every fact necessary to confer jurisdiction;[73] and where this does not appear judgment may be arrested

cused is entitled to remain in jail until the determination of his appeal, and cannot be taken to the penitentiary (*Ex p.* Jones, 2 Wash. 551, 27 Pac. 172); but a statute which provides that the execution of a judgment of death shall be stayed by an appeal applies only to the death penalty and does not prevent the confinement of the accused in the penitentiary pending the appeal (People *v.* Brush, 60 Hun (N. Y.) 399, 15 N. Y. Suppl. 512).

68. Crain *v.* State, 45 Ark. 450; State *v.* Depass, 45 La. Ann. 1151, 14 So. 77; Stubbs *v.* State, 49 Miss. 716. See Appeal and Error, 2 Cyc. 1025 *et seq.*

If the record does not affirmatively show all the proceedings in the several stages of the prosecution, trial, and sentence, as the organization of the grand jury, the presentment of the indictment, the joinder of issue, the submission to the jury, the rendition of the verdict, the award of judgment, etc., the judgment may be reversed on appeal. Gaiter *v.* State, 45 Miss. 441; Dyson *v.* State, 26 Miss. 362; Com. *v.* Nisbit, 34 Pa. St. 398.

Past tense.—The proceedings may be stated in the record in the past instead of in the present tense. State *v.* Reeves, 30 N. C. 19. See also Taylor *v.* Com., 44 Pa. St. 131.

Joinder in demurrer.— The record need not show a joinder of issue by the state on a demurrer to the indictment. Com. *v.* McCormack, 126 Mass. 258.

69. Elmer *v.* Danzenbacker, 37 N. J. L. 363; Buck *v.* Danzenbacker, 37 N. J. L. 359.

Where the law requires that all prosecutions shall be apportioned among the judges by lot, the record need only show that an allotment was made without stating how it was done. State *v.* Beeder, 44 La. Ann. 1007, 11 So. 816.

70. *California.*— People *v.* Smith, 59 Cal. 365.

Indiana.— Behler *v.* State, 22 Ind. 345.

New Mexico.— Faulkner *v.* Territory, 6 N. M. 464, 30 Pac. 905.

Texas.— Hardy *v.* State, 1 Tex. App. 556.

Virginia.—Com. *v.* Murray, 2 Va. Cas. 504; Com. *v.* McCaul, 1 Va. Cas. 271.

Washington.— State *v.* De Paoli, 24 Wash. 71, 63 Pac. 1102.

See 15 Cent. Dig. tit. "Criminal Law," § 2744.

71. White *v.* People, 8 Colo. App. 289, 45 Pac. 539.

72. **The record must contain the affidavit on which an information is based,** where an appeal from a conviction for violation of the local option law is taken. Wadgymar *v.* State, 21 Tex. App. 459, 2 S. W. 768. And see Lackey *v.* State, 14 Tex. App. 164.

If the warrant of commitment be set forth by the accused in his bill of exceptions, it becomes a part of the record of the preliminary examination. Com. *v.* Murray, 2 Va. Cas. 504.

Where it is claimed a preliminary examination was had when the justice had lost jurisdiction and it appears that the accused was committed for examination while the court had jurisdiction, it is not necessary that it shall appear from the record that the examination occupied the time intervening, as this may be presumed. People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269.

73. *Alabama.*— State *v.* Ely, 43 Ala. 568.

Georgia.— Scroggins *v.* State, 55 Ga. 380.

Mississippi.— State *v.* Dunlap, (1897) 21 So. 242.

Missouri.— State *v.* Cowdon, 85 Mo. App. 403.

Pennsylvania.— Com. *v.* Read, 8 Del. Co. 52.

Tennessee.— Boyd *v.* State, 6 Coldw. 1.

West Virginia.— State *v.* McGahan, 48 W. Va. 438, 37 S. E. 573.

See 15 Cent. Dig. tit. "Criminal Law," §§ 2738, 3020. And see Appeal and Error, 2 Cyc. 1033.

An application for a writ of error from the United States supreme court to a state court based upon the reception of evidence, which it was claimed had been taken from the premises of defendant without a search warrant or other legal process, in violation of the constitution of the United States, will be denied where the record of the state court does not show, as required by U. S. Rev. St. (1878) § 709, that any right, title, privilege, or immunity under the constitution of the United States, or under any treaty or federal

on appeal, although lack of jurisdiction is not one of the objections urged.[74] Where an indictment found in one court has been transferred to and tried in another an order transferring it must appear in the record.[75]

(iv) *Time and Place of Trial and Adjournments.* It has been held that the record must show affirmatively exactly where the court was held at which the trial was had,[76] although the statute requires it to be held at designated places at stated times.[77] But the term at which a trial was had will be presumed to have been a legal and regular term where the record is silent on that point, particularly where the statute regulates the terms.[78] The presumption is that a cause not tried at once after indictment was regularly continued from term to term, and neither the fact of adjournments[79] nor the reason for them[80] need appear of record.[81]

(v) *Number and Qualification of Judges.* The failure of the record to show that as many judges as are necessary to constitute a quorum were present in the trial court is fatal to a conviction.[82] It has also been held that where a trial is had before a special judge, his selection or appointment and qualifications must appear of record.[83]

(vi) *Appointment and Assignment of Counsel.* The record need not show expressly and affirmatively that the accused was represented by counsel,[84] that the court assigned him counsel under a statute, where he requested it,[85] or that an attorney-general *pro tempore* took the statutory oath.[86] Nor need it show the

statute, has been set up or claimed by the accused, or that the decision of the state court was against any such right, title, privilege, or immunity so set up. *Ex p.* Spies, 123 U. S. 131, 8 S. Ct. 21, 22, 31 L. ed. 80.

74. People *v.* Hodges, 27 Cal. 340.

75. Joyner *v.* State, 78 Ala. 448; Goodloe *v.* State, 60 Ala. 93; Johnson *v.* State, 11 Ind. 481; Doty *v.* State, 7 Blackf. (Ind.) 427; Holt *v.* State, 58 N. J. L. 11, 32 Atl. 663; Cruiser *v.* State, 18 N. J. L. 206; May *v.* People, 12 Hun (N. Y.) 380. *Contra,* under statute, Leighton *v.* People, 88 N. Y. 117.

Change of venue.—The reasons for a transfer on a change of venue (Curry *v.* State, 17 Fla. 683) and the indictment (Doty *v.* State, 7 Blackf. (Ind.) 427) must appear in the record of the trial court, although the latter need not appear in the transcript of proceedings on the change, as its transmission to the court to which the venue was changed may be presumed (Powers *v.* State, 87 Ind. 144; Duncan *v.* State, 84 Ind. 204).

76. Com. *v.* Hogan, 113 Mass. 7; Fox *v.* State, (Miss. 1890) 7 So. 221; Carpenter *v.* State, 4 How. (Miss.) 163, 34 Am. Dec. 116.

77. Com. *v.* Hogan, 113 Mass. 7. But see Com. *v.* Carney, 152 Mass. 566, 26 N. E. 94, where it was held that under Mass. Pub. St. c. 154, § 23, the record on appeal from a police court need not show the place in the judicial district where the court was held. See also State *v.* Nelson, 36 La. Ann. 674; West *v.* State, 22 N. J. L. 212.

78. *Kentucky.*— Vaugh *v.* Com., 23 S. W. 371, 15 Ky. L. Rep. 256; Simmons *v.* Com., 18 S. W. 534, 13 Ky. L. Rep. 839.

Louisiana.— State *v.* Nelson, 36 La. Ann. 674.

Massachusetts.— Turns *v.* Com., 6 Metc. 224.

Missouri.— State *v.* Byrne, 24 Mo. 151.

New York.— See Real *v.* People, 55 Barb. 551, 8 Abb. Pr. N. S. 314.

See 15 Cent. Dig. tit. "Criminal Law," § 2739.

Called term.— Where a trial takes place at a called term, the record must show the request for the term, the order of the judge thereon, and due publication of notice of the holding of the court as required by statute. Burley *v.* State, 1 Nebr. 385.

79. *Ex p.* Owens, 52 Ala. 473; Vanderkarr *v.* State, 51 Ind. 91.

80. State *v.* Enke, 85 Iowa 35, 51 N. W. 1146; State *v.* Marshall, 115 Mo. 383, 22 S. W. 452.

81. An adjournment from day to day of the term need not appear in the record, as the term is regarded as but one day. Berrian *v.* State, 22 N. J. L. 9; Taylor *v.* Com., 44 Pa. St. 131.

82. Holt *v.* State, 58 N. J. L. 11, 32 Atl. 663.

83. Blanchette *v.* State, 29 Tex. App. 46, 14 S. W. 392; McMurry *v.* State, 9 Tex. App. 207. *Contra,* Roberts *v.* State, 126 Ala. 74, 28 So. 741. Where an attorney is appointed to act as judge under a statute permitting this to be done, where there is an objection to a judge, the record must show that his appointment was in writing and entered on the order-book, and that he was sworn to support the constitution and to discharge his duty faithfully, or judgment may be void for lack of jurisdiction (Kennedy *v.* State, 53 Ind. 542); but it is not necessary to show that the objectionable judge made an effort to secure another judge to take his place (Kane *v.* State, 71 Ind. 559).

84. State *v.* Ziord, 30 La. Ann. 867; Cathcart *v.* Com., 37 Pa. St. 108.

85. Brown *v.* State, 12 Ark. 623.

86. Staggs *v.* State, 3 Humphr. (Tenn.) 372.

regularity or propriety of the appointment of an attorney to assist the public prosecuting officer, where no objection appears.[87]

(VII) *Organization of Grand Jury.* It is presumed *prima facie* that the grand jury was properly organized,[88] and therefore the record need not show that it was legally summoned, sworn, or impaneled,[89] or that the grand jurors were qualified to serve,[90] or the time when they acted.[91]

(VIII) *Appointment of Day For Trial.* It has been held that a provision of the law requiring the court to set a day for the trial of a defendant who may be punished capitally is mandatory and the act judicial, and that a compliance therewith must appear of record.[92] In another jurisdiction, where the trial was fairly had, the omission of a recital that a day for trial was appointed was held not to be reversible error.[93]

(IX) *Indictment, Information, or Complaint* — (A) *In General.* The record should bring up the indictment, or information,[94] or the complaint,[95] as the case may be, and if the instrument has been lost a substitution must be made or the record will be insufficient.[96] The record according to the weight of authority must also show that the indictment was returned or presented in court,[97] although

87. Price *v.* State, 35 Ohio St. 601; Woods *v.* State, 6 Baxt. (Tenn.) 426; Moody *v.* State, 6 Coldw. (Tenn.) 299.

88. Easterling *v.* State, 35 Miss. 210.

89. *Alabama.*— Preston *v.* State, 63 Ala. 127.

Indiana.— Holloway *v.* State, 53 Ind. 554; Alley *v.* State, 32 Ind. 476.

Massachusetts.— Turns *v.* Com., 6 Metc. 224.

Missouri.— State *v.* Griffin, 87 Mo. 608.

New Jersey.—Engeman *v.* State, 54 N. J. L. 247, 23 Atl. 676.

North Carolina.— State *v.* Kimbrough, 13 N. C. 431. But see State *v.* Johnston, 93 N. C. 559.

Pennsylvania.— Com. *v.* Jackson, 1 Grant 262.

Texas.— Fuller *v.* State, 19 Tex. App. 380.

Virginia.— Robinson *v.* Com., 88 Va. 900, 14 S. E. 627.

Contra, Lyman *v.* People, 7 Ill. App. 345.

See 15 Cent. Dig. tit. "Criminal Law," § 2745.

If the record shows that the precept for the grand jurors was properly issued and returned, it need not be set out (Werfel *v.* Com., 5 Binn. (Pa.) 65), nor need the record state the names of the grand jurors (Turns *v.* Com., 6 Metc. (Mass.) 224; State *v.* Jimmerson, 118 N. C. 1173, 24 S. E. 494. *Contra*, Mahan *v.* State, 10 Ohio 232).

90. Parks *v.* State, 4 Ohio St. 234.

91. State *v.* Breaux, 104 La. 540, 29 So. 222.

92. Bowen *v.* State, 119 Ala. 7, 24 So. 551; Spicer *v.* State, 69 Ala. 159.

93. Wallace *v.* State, 28 Ark. 531.

94. *Arkansas.*— Ross *v.* State, 23 Ark. 198.

Illinois.— Collins *v.* People, 194 Ill. 506, 62 N. E. 902.

Indiana.— Clare *v.* State, 68 Ind. 17; Case *v.* State, 18 Ind. 444; Gonzales *v.* State, 18 Ind. 90.

Oregon.— State *v.* McCaffrey, 26 Oreg. 570, 38 Pac. 932.

Texas.— Field *v.* State, (App 1890) 15 S. W. 175; Miller *v.* State. (App. 1890) 14 S. W. 458; Bridges *v.* State, 17 Tex. App. 579; Harwood *v.* State, 16 Tex. App. 416; Beardall *v.* State, 4 Tex. App. 631. And see Saragosa *v.* State, 40 Tex. Cr. 64, 46 S. W. 250, 48 S. W. 190.

Compare State *v.* Shelledy, 8 Iowa 477; Spivey *v.* State, 58 Miss. 743, holding that if no objection was made in the court below to the absence of the indictment, a reversal would not be ordered, it appearing from the record that appellant was tried, found guilty, and senteneed.

See 15 Cent. Dig. tit. "Criminal Law," § 2746.

An indictment becomes a part of the record when filed, without any further action of the court. Stewart *v.* State, 24 Ind. 142.

95. Gresham *v.* State, (Tex. Cr. App. 1902) 69 S. W. 506; McVea *v.* State, 35 Tex. Cr. 1, 26 S. W. 834, 28 S. W. 469; Rose *v.* State, 19 Tex. App. 470.

96. Hitcheock *v.* State, 21 Ind. 279. *Compare*, however, Smith *v.* State, 4 Greene (Iowa) 189. The record must show that a substitution for a lost indictment was made by permission of the court. State *v.* Burks, 132 Mo. 363, 34 S. W. 48; Graham *v.* State, 43 Tex. 550; Burrage *v.* State, (Tex. Cr. App. 1898) 44 S. W. 169.

97. *Alabama.*— Cross *v.* State, 117 Ala. 73, 23 So. 784.

Arkansas.— Ford *v.* State, 34 Ark. 649; State *v.* Check, 25 Ark. 206; Milan *v.* State, 24 Ark. 346; Green *v.* State, 19 Ark. 178.

Florida.— Collins *v.* State, 13 Fla. 651.

Illinois.—Aylesworth *v.* People, 65 Ill. 301; Sattler *v.* People, 59 Ill. 68; Kelly *v.* People, 39 Ill. 157; People *v.* Hessing, 28 Ill. 410; Rainey *v.* People, 8 Ill. 71.

Indiana.— State *v.* Dixon, 97 Ind. 125, Hall *v.* State, 21 Ind. 268; Jackson *v.* State, 21 Ind. 171; Conner *v.* State, 19 Ind. 98.

Iowa.— State *v.* Glover, 3 Greene 249.

Louisiana.— State *v.* Sandoz, 37 La. Ann. 376; State *v.* Shields, 33 La. Ann. 991; State *v.* Onnmacht, 10 La. Ann. 198.

Mississippi.— Caehute *v.* State, 50 Miss. 165.

it has been held that if the record is silent it will be presumed that the statutory requirements as to presentment of indictments in court were complied with.[98] A judgment of conviction will not be reversed because the record does not affirmatively show that the indictment was indorsed "a true bill" by the grand jury.[99]

(B) *Witnesses Before Grand Jury.* The record need not show, even in a capital case, that the witnesses examined before the grand jury by whom the indictment was found were sworn.[1] Nor need the record show that the names of the witnesses appearing before the grand jury were indorsed on the indictment[2] or show their names.[3]

(C) *Specification of Indictment or Count Sustaining Conviction.* Where the record shows the return of two or more indictments against the accused, its failure to show upon which the conviction was had is ground for reversal.[4] But the record need not show upon which of several counts in an indictment a conviction was had, or whether proof was made of the different offenses therein charged, as the sentence will be presumed to be in accordance with the law applicable to the proof offered.[5]

(X) *Service of Indictment and List of Jurors and Witnesses.* The record need not show affirmatively that a copy of the indictment and a list of the jurors and witnesses were served on defendant, as required by statute, as in the absence of an objection of record this will be presumed to have been done.[6]

(XI) *Arraignment and Plea*—(A) *In General.* As a general rule it is necessary that the record should show that the accused was arraigned and pleaded or, if he refused to plead, that a plea of not guilty was entered for him.[7] Many

New Jersey.— Holt *v.* State, 58 N. J. L. 11, 32 Atl. 663.

Tennessee.— Hite *v.* State, 9 Yerg. 198; Chappel *v.* State, 8 Yerg. 166.

See 15 Cent. Dig. tit. "Criminal Law," § 2747.

98. State *v.* McIntire, 59 Iowa 267, 13 N. W. 287; People *v.* Lee, 2 Utah 441; State *v.* Klein, 19 Wash. 368, 53 Pac. 364.

99. Henning *v.* State, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756; Padgett *v.* State, 103 Ind. 550, 3 N. E. 377; Townsend *v.* State, 2 Blackf. (Ind.) 151; State *v.* Harwood, 60 N. C. 226; U. S. *v.* Davis, 25 Fed. Cas. No. 14,928.

1. U. S. *v.* Murphy, MacArthur & M. (D. C.) 375, 48 Am. Rep. 754; King *v.* State, 5 How. (Miss.) 730; State *v.* Harwood, 60 N. C. 226; Gilman *v.* State, 1 Humphr. (Tenn.) 59.

2. McKinney *v.* People, 7 Ill. 540, 43 Am. Dec. 65; State *v.* Sheppard, 97 N. C. 401, 1 S. E. 879.

3. Harriman *v.* State, 2 Greene (Iowa) 270.

4. Parks *v.* State, 20 Ind. 513; Allen *v.* State, 12 Lea (Tenn.) 424; Clinton *v.* State, 6 Baxt. (Tenn.) 507; Vincent *v.* State, 3 Heisk. (Tenn.) 120; Anderson *v.* State, 3 Heisk. (Tenn.) 86.

5. Kite *v.* Com., 11 Metc. (Mass.) 581; Crowley *v.* Com., 11 Metc. (Mass.) 575.

6. *Alabama.*— Shelton *v.* State, 73 Ala. 5; Spicer *v.* State, 69 Ala. 159; Rodgers *v.* State, 50 Ala. 102; Ben *v.* State, 22 Ala. 9, 58 Am. Dec. 234.

Colorado.— Parker *v.* People, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803.

New Jersey.—Patterson *v.* State, 48 N. J. L. 381, 4 Atl. 449.

Tennessee.— Davis *v.* State, 6 Baxt. 429.

Washington.— Leonard *v.* Territory, 2 Wash. Terr. 381, 7 Pac. 872; Lytle *v.* Territory, 1 Wash. Terr. 435.

See 15 Cent. Dig. tit. "Criminal Law," § 2752.

The sheriff's return that the indictment and list of jurors were delivered to the accused, set out in the record, conclusively establishes the fact. Walker *v.* State, 52 Ala. 192.

His admission of service in the record is equally conclusive, and dispenses with all other inquiry or further recital, although to uphold a conviction the service of these papers was required to appear affirmatively. Wesley *v.* State, 52 Ala. 182.

7. *Alabama.*— Jackson *v.* State, 91 Ala. 55, 8 So. 773, 24 Am. St. Rep. 860. And see Bowen *v.* State, 98 Ala. 83, 12 So. 808.

California.— People *v.* Gaines, 52 Cal. 479.

Colorado.— Wright *v.* People, 22 Colo. 143, 43 Pac. 1021.

Florida.— Warrace *v.* State, 27 Fla. 362, 8 So. 748.

Illinois.— Aylesworth *v.* People, 65 Ill. 301.

Indiana.— Weir *v.* State, 115 Ind. 210, 16 N. E. 631; Hicks *v.* State, 111 Ind. 402, 12 N. E. 522; Bowen *v.* State, 108 Ind. 411, 9 N. E. 378; Tindall *v.* State, 71 Ind. 314; Manhattan Oil Co. *v.* State, 26 Ind. App. 693, 60 N. E. 732; Miller *v.* State, 26 Ind. App. 152, 59 N. E. 287.

Louisiana.— State *v.* Preston, 107 La. 521, 32 So. 67; State *v.* Fontenette, 45 La. Ann. 902, 12 So. 937.

Michigan.— Grigg *v.* People, 31 Mich. 471.

Mississippi.— Cachute *v.* State, 50 Miss. 165.

Missouri.— State *v.* Walker, 119 Mo. 467, 24 S. W. 1011; State *v.* Taylor, 111 Mo. 448, 20 S. W. 193; State *v.* Vanhook, 88 Mo. 105;

cases, however, hold that the omission of the record to show these facts is not fatal error where the record shows that issue was joined and a fair trial had without objection by defendant.[8] So also where the record shows either an arraignment or a plea, but is silent as to the other, it may be presumed.[9] The record need not show that the indictment or information was read to the accused.[10] And a replication to defendant's plea need not appear in the record.[11]

(B) *Voluntary Character of Plea of Guilty.* Where the plea of guilty is entered, the record must show affirmatively that the court admonished the accused of the consequences of his plea, as required by statute,[12] and that it made such an examination as would show that the plea was voluntary.[13]

(XII) *Date of Crime.* Where a record shows that the date of the crime as proved was subsequent to the indictment,[14] or where the date does not appear of record,[15] judgment must be reversed.

(XIII) *Proof of Venue.* Where the record purports to contain the evidence

State *v.* West, 84 Mo. 440; State *v.* Billings, 72 Mo. 662; State *v.* Montgomery, 63 Mo. 296; State *v.* Geiger, 45 Mo. App. 111; State *v.* Wallace, 17 Mo. App. 330.

Ohio.— Hanson *v.* State, 43 Ohio St. 376, 1 N. E. 136.

Tennessee.— Lynch *v.* State, 99 Tenn. 124, 41 S. W. 348.

Texas.— Prior to the act of March 3, 1897, the failure of the record to show the plea of defendant could be taken advantage of on appeal; this statute, however, provided that irregularities of this nature, unless made issues in the court below, or brought up by bill of exceptions, should not be considered sufficient ground for reversal. Webb *v.* State, (Cr. App. 1900) 55 S. W. 493. For the rule of practice in this state previous to such statute see Oliver *v.* State, (Cr. App. 1897) 40 S. W. 273; Click *v.* State, (Cr. App. 1897) 39 S. W. 370; Gilmore *v.* State, 37 Tex. Cr. 178, 39 S. W. 105; Templin *v.* State, (Cr. App. 1895) 32 S. W. 542; Clark *v.* State, 32 Tex. Cr. 412, 24 S. W. 29; Munson *v.* State, (App. 1889) 11 S. W. 114; Avara *v.* State, 2 Tex. App. 419 (holding that plea and arraignment in a capital case cannot be waived by any proceedings at the trial); Pringle *v.* State, 2 Tex. App. 300.

Utah.— People *v.* Heller, 2 Utah 133.

Virginia.— Lawrence *v.* Com., 30 Gratt. 845.

United States.— Crain *v.* U. S., 162 U. S. 625, 16 S. Ct. 952, 40 L. ed. 1097; Shelp *v.* U. S., 81 Fed. 694, 26 C. C. A. 570.

See 15 Cent. Dig. tit. "Criminal Law," § 2753. See also *supra*, XI, B. 1.

Sufficiency of record see State *v.* Allen, 45 W. Va. 65, 30 S. E. 209. And see *supra*, XI, B, 1, *e*.

8. *Arkansas.*— Hayden *v.* State, 55 Ark. 342, 18 S. W. 239; Moore *v.* State, 51 Ark. 130, 10 S. W. 22. *Compare* Perry *v.* State, 37 Ark. 54.

Hawaii.— Territory *v.* Marshall, 13 Hawaii 76.

Idaho.— People *v.* Ah Hop, 1 Ida. 698; People *v.* Waters, 1 Ida. 560.

Indiana.— Weir *v.* State, 115 Ind. 210, 16 N. E. 631; Johns *v.* State, 104 Ind. 557, 4 N. E. 153, holding that this is the rule where the action has its inception in a justice's court.

Iowa.— State *v.* Bowman, 78 Iowa 519, 43 N. W. 302; State *v.* Foster, 40 Iowa 303.

Kentucky.— Meece *v.* Com., 1 Ky. L. Rep. 337.

Massachusetts.— Com. *v.* McKenna, 125 Mass. 397.

Missouri.— See Lexington *v.* Curtin, 69 Mo. 626, holding that the rule that the record must show an arraignment and plea by defendant had never been extended to cases other than proceedings by indictment, and did not apply to a prosecution for violation of a city ordinance prohibiting the keeping of a bawdy-house.

Montana.— Territory *v.* Shipley, 4 Mont. 468, 2 Pac. 313.

Nebraska.—Allyn *v.* State, 21 Nebr. 593, 33 N. W. 212.

New Jersey.—State *v.* Passaic County Agricultural Soc., 54 N. J. L. 260, 23 Atl. 680.

South Carolina.— State *v.* Brown, 33 S. C. 151, 11 S. E. 641.

South Dakota.— State *v.* Reddington, 7 S. D. 368, 64 N. W. 170.

See 15 Cent. Dig. tit. "Criminal Law," § 2753. And see *supra*, XI, B, 1.

9. Steagald *v.* State, 22 Tex. App. 464, 3 S. W. 771; Wilson *v.* State, 17 Tex. App. 525; Plasters *v.* State, 1 Tex. App. 673.

10. People *v.* Wheatley, 88 Cal. 114, 26 Pac. 95; Harman *v.* State, 11 Ind. 311; McGuire *v.* State, 76 Miss. 504, 25 So. 495; White *v.* State, 18 Tex. App. 57.

11. State *v.* Aler, 39 W. Va. 549, 20 S. E. 585.

12. Frosh *v.* State, 11 Tex. App. 280. See *supra*, XI, B, 4, a, (IV).

13. Clark *v.* People, 44 Mich. 308, 6 N. W. 682; Edwards *v.* People, 39 Mich. 760; Coleman *v.* State, 35 Tex. Cr. 404, 33 S. W. 1083. And see People *v.* Ferguson, 48 Mich. 41, 11 N. W. 777, holding, however, that it need not appear of record in what manner the court proceeded to satisfy itself that the prisoner acted freely in pleading guilty.

14. Glass *v.* State, (Tex. App. 1890) 15 S. W. 403.

15. Grisby *v.* State, 9 Tex. App. 51; Bingham *v.* State, 2 Tex. App. 21.

given on the trial, it must show proof of the venue of the crime, or the judgment will be reversed,[16] at least if proper exception was taken in the court below.[17]

(XIV) *MATTERS RELATING TO PETIT JURY*—(A) *In General.* The record need not show all the procedure employed in the summoning and impaneling of the petit jury, as it will be presumed that the statute regulating these matters was complied with, in the absence of objections appearing of record.[18] It is not necessary that the record should show that the jurors were freeholders,[19] or that they were good and lawful men,[20] as this will be presumed from the return of the sheriff. The record, however, must show that there was a writ of venire facias,[21] that it was properly returned,[22] and that the jurors came from the county;[23] although it need not set out the writ in full.[24] It is necessary that the record show that the jury consisted of the legal number,[25] but where the proper number is shown it is

16. *Alabama.*— Bowdon *v.* State, 91 Ala. 61, 8 So. 694; Cawthorn *v.* State, 63 Ala. 157; Riddle *v.* State, 49 Ala. 389; Frank *v.* State, 40 Ala. 9.

Arkansas.— McQuistian *v.* State, 25 Ark. 435.

Georgia.— Dyson *v.* State, 99 Ga. 44, 25 S. E. 618; Davis *v.* State, 82 Ga. 205, 8 S. E. 184; Carter *v.* State, 48 Ga. 43.

Illinois.— Dougherty *v.* People, 118 Ill. 160, 8 N. E. 673; Jackson *v.* People, 40 Ill. 405; Rice *v.* People, 38 Ill. 435.

Indiana.— Baker *v.* State, 34 Ind. 104.

Mississippi.— Thompson *v.* State, 51 Miss. 353; Green *v.* State, 23 Miss. 509.

Missouri.— State *v.* Hughes, 82 Mo. 86; State *v.* Apperger, 80 Mo. 173; State *v.* Wheeler, 79 Mo. 366; State *v.* Inman, 76 Mo. 548; State *v.* Hartnett, 75 Mo. 251; State *v.* Miller, 71 Mo. 89.

Tennessee.— Yates *v.* State, 10 Yerg. 549; Hite *v.* State, 9 Yerg. 357; Ewell *v.* State, 6 Yerg. 364, 27 Am. Dec. 480.

Texas.— Burch *v.* State, 43 Tex. 376; Winerich *v.* State, (Cr. App. 1897) 40 S. W. 969; Robinson *v.* State, (Cr. App. 1897) 39 S. W. 678; Williams *v.* State, 21 Tex. App. 256, 17 S. W. 624; Temple *v.* State, 15 Tex. App. 304, 49 Am. Rep. 200; Cross *v.* State, 11 Tex. App. 84; Perry *v.* State, 9 Tex. App. 410; Pippin *v.* State, 9 Tex. App. 269.

West Virginia.— State *v.* McGahan, 48 W. Va. 438, 37 S. E. 573.

See 15 Cent. Dig. tit. "Criminal Law," § 2757.

A record is irregular where it shows the county but does not show the state. Scott *v.* State, 31 Tex. 409.

Constitutional guaranty.— A statute which prohibits a reversal because the bill of exceptions does not state that the venue was proven contravenes a constitutional guaranty of a trial by jury in the county in which the crime was committed. Alexander *v.* State, 3 Heisk. (Tenn.) 475; Mayes *v.* State, 3 Heisk. (Tenn.) 430 [*overruling* Timms *v.* State, 4 Coldw. (Tenn.) 138].

17. Wesley *v.* State, 52 Ala. 182.

18. *Alabama.*— Brassell *v.* State, 91 Ala. 45, 8 So. 679; Rash *v.* State, 61 Ala. 89.

California.— People *v.* O'Brien, 88 Cal. 483, 26 Pac. 362.

Georgia.— Ruden *v.* State, 73 Ga. 567.

Illinois.— Schirmer *v.* People, 33 Ill. 276.

Michigan.— People *v.* Ecarius, 124 Mich. 616, 83 N. W. 628.

Mississippi.— Byrd *v.* State, 1 How. 247.

North Carolina.— State *v.* Barfield, 30 N. C. 344.

Virginia.— Longley *v.* Com., 99 Va. 807, 37 S. E. 339.

West Virginia.— State *v.* Strauder, 11 W. Va. 745, 27 Am. Rep. 606.

See 15 Cent. Dig. tit. "Criminal Law," § 2758. And see APPEAL AND ERROR, 2 Cyc. 1036.

A challenge to the jury in writing, sworn to as required by statute and submitted to the court, as apparent by the record, is a part of the record without the necessity of being incorporated in the bill of exceptions. State *v.* Vance, 29 Wash. 435, 70 Pac. 34.

A challenge to a juror for cause is a part of the record, and it may be reviewed without being incorporated in a bill of exceptions. People *v.* Vermilyea, 7 Cow. (N. Y.) 108.

Where a statute provides that where the jury is discharged for certain reasons, such reasons shall be entered of record, the omission thereof is ground for reversing the judgment. State *v.* Shuchardt, 18 Nebr. 454, 25 N. W. 722. See also *Ex p.* Maxwell, 11 Nev. 428.

19. Shoemaker *v.* State, 12 Ohio 43; Com. *v.* Stephen, 4 Leigh (Va.) 679.

20. West *v.* State, 22 N. J. L. 212; State *v.* Yancey, 3 Brev. (S. C.) 142; Mansell *v.* Reg., Dears. & B. 375, 8 E. & B. 54, 4 Jur. N. S. 432, 27 L. J. M. C. 4, 92 E. C. L. 54.

21. Myers *v.* Com., 90 Va. 785, 20 S. E. 152.

22. Conner *v.* State, 4 Yerg. (Tenn.) 137, 26 Am. Dec. 217; Barker *v.* Com., 90 Va. 820, 20 S. E. 776.

23. White *v.* Com., 6 Binn. (Pa.) 179, 6 Am. Dec. 443.

24. Combs *v.* Com., 90 Va. 88, 17 S. E. 881.

25. Where it appears that the jury consisted of more or less than twelve judgment may be reversed. Carpenter *v.* State, 4 How. (Miss.) 163, 34 Am. Dec. 116; State *v.* Van Matre, 49 Mo. 268; State *v.* Ball, 27 Mo. 324; Doebler *v.* Com., 3 Serg. & R. (Pa.) 237; Stell *v.* State, 14 Tex. App. 59; Heubner *v.* State, 3 Tex. App. 458.

usually sufficient to show that they were legally drawn and summoned, appeared and answered to their names, and were then impaneled and sworn.[26]

(B) *Oath, Custody, and Presence.* As a general rule the record must show that the jurors were sworn,[27] but it is not necessary that it should appear on the record where or before whom they were sworn.[28] The record need not show that the court admonished the jurors on each separation as required by statute as this will be presumed.[29] It ought to show, however, that on an adjournment the jury was committed to the custody of an officer,[30] and that he was admonished not to speak to them or allow any one else to do so,[31] although it need not show that they returned to court in his charge.[32] The record should show that the jury was present during the taking of the evidence, or a reversal may be had, particularly in a capital case.[33] The presumption is, where the record is silent, that the officer has been specially sworn, as required by statute.[34] Hence it need not affirmatively show that a deputy sheriff or bailiff who had charge of the jury was sworn.[35]

(XV) *Identity of Accused.* Where the record shows an arraignment and trial of, and a verdict against, a person named in the record he is sufficiently identified as the accused, although the verdict of guilty does not give his name.[36]

26. Burton *v.* State, 115 Ala. 1, 22 So. 585; McCoy *v.* State, 40 Fla. 494, 24 So. 485; Jeffries *v.* Com., 12 Allen (Mass.) 145.

An omission of the names of the jurors from the record is not material. Skeen *v.* State, (Miss. 1894) 16 So. 495; Morton *v.* State, 3 Tex. App. 510.

27. *Alabama.*—Lacey *v.* State, 58 Ala. 385; Perry *v.* State, 43 Ala. 21.

Arkansas.— Chiles *v.* State, 45 Ark. 143; Barbour *v.* State, 37 Ark. 61; Botsford *v.* Yates, 25 Ark. 282; Lawson *v.* State, 25 Ark. 106. But see Ruble *v.* State, 51 Ark. 126, 10 S. W. 23, holding that defendant could waive his right to have the special statutory oath administered to the jury in a case of misdemeanor.

Florida.— Zapf *v.* State, 35 Fla. 210, 17 So. 225; Brown *v.* State, 29 Fla. 543, 10 So. 736.

Louisiana.— State *v.* Calvert, 32 La. Ann. 224; State *v.* Douglass, 28 La. Ann. 425; State *v.* Phillips, 28 La. Ann. 387.

Mississippi.— Irwin *v.* Jones, 1 How. 497.

Tennessee.— Bass *v.* State, 6 Baxt. 579.

Texas.— Nels *v.* State, 2 Tex. 280; Cochran *v.* State, 36 Tex. Cr. 115, 35 S. W. 968; Stiles *v.* State, (Cr. App. 1894) 25 S. W. 424; Anderson *v.* State, 32 Tex. Cr. 528, 24 S. W. 897; Curiel *v.* State, 20 Tex. App. 130; Stewart *v.* State, 18 Tex. App. 626; Howard *v.* State, 8 Tex. App. 612.

Washington.— Shapoonmash *v.* U. S., 1 Wash. Terr. 188.

Compare, however, State *v.* Schlagel, 19 Iowa 169, holding that where it did not appear by the record that the jury were not sworn, and no objection was raised in the court below, the presumption would be entertained that the jury had been properly sworn. See also State *v.* Scott, 1 Kan. App. 748, 42 Pac. 264.

See 15 Cent. Dig. tit. "Criminal Law," § 2760.

28. State *v.* Price, 11 N. J. L. 203.

A recital that the jury was impaneled implies that they were sworn. Reynolds *v.* People, 17 Abb. Pr. (N. Y.) 413.

Form of oath.— It is not necessary that the form of oath should be inserted in the record. Beale *v.* Com., 25 Pa. St. 11; Preston *v.* State, 8 Tex. App. 30; Lawrence *v.* Com., 30 Gratt. (Va.) 845; State *v.* Barkuloo, 18 Wash. 141, 51 Pac. 350; Leschi *v.* Territory, 1 Wash. Terr. 13.

29. People *v.* Waters, 1 Ida. 560; State *v.* Rogers, 56 Kan. 362, 43 Pac. 256; Langford *v.* State, 32 Nebr. 782, 49 N. W. 766; St. Louis *v.* State, 8 Nebr. 405, 1 N. W. 371; Brink *v.* Territory, 3 Okla. 588, 41 Pac. 614; Redman *v.* Territory, 2 Okla. 360, 37 Pac. 826.

30. Jones *v.* State, 2 Blackf. (Ind.) 475.

Sufficiency of the record to show that the jurors were in the sheriff's custody see Bush *v.* State, 62 Nebr. 128, 86 N. W. 1062.

31. Barnes *v.* Com., 92 Va. 794, 23 S. E. 784.

32. Scott *v.* State, 7 Lea (Tenn.) 232; Robertson *v.* State, 4 Lea (Tenn.) 425.

33. State *v.* Allen, 64 Mo. 67. A statement that at the hour of adjournment the jury were committed to the care of the sheriff sufficiently shows their presence in court on that day. State *v.* Allen, 45 W. Va. 65, 30 S. E. 209.

34. *Idaho.*— People *v.* Waters, 1 Ida. 560.

Illinois.— Pate *v.* People, 8 Ill. 644.

Iowa.— State *v.* Pitts, 11 Iowa 343.

Tennessee.— Lea *v.* State, 94 Tenn. 495, 29 S. W. 900.

Virginia.— Bennett *v.* Com., 8 Leigh 745.

See 15 Cent. Dig. tit. "Criminal Law," § 2762.

A recital in the record that the officer was "duly sworn according to law" is sufficient, without reciting that he was sworn "to take charge of the jury." Lemons *v.* State, 97 Tenn. 560, 37 S. W. 552; Taylor *v.* State, 6 Lea (Tenn.) 234.

35. State *v.* Ryan, 13 Minn. 370; Clark *v.* State, 8 Baxt. (Tenn.) 591. A statement that the jury retired in charge of a sworn bailiff is sufficient. State *v.* Barkuloo, 18 Wash. 141, 51 Pac. 350.

36. State *v.* Yancey, 3 Brev. (S. C.) 142. And see Com. *v.* Cavey, 97 Mass. 541. But

(XVI) *PRESENCE OF ACCUSED.* As a general rule the record should show affirmatively that the accused was present in person during the trial,[37] particularly when the verdict was rendered,[38] and when sentence was passed upon him.[39] An express recital of this fact, however, has not in all cases been held indispensable, it being held in some cases that it is sufficient if his presence appears by implication.[40] And in some cases it has been held that where the record shows nothing to the contrary the presence of the accused will be presumed.[41]

(XVII) *INSTRUCTIONS.* Where the statute requires a charge to be in writing, it has been held that the transcript on appeal must contain such charge.[42] On the

where the record is so far uncertain in naming the accused that if he were again indicted it might be difficult for him to establish a prior conviction, judgment will be reversed. People *v.* Ah Cow, 17 Cal. 101.

37. *Alabama.*— Burton *v.* State, 115 Ala. 1, 22 So. 585; Hames *v.* State, 113 Ala. 674, 21 So. 341; Waller *v.* State, 40 Ala. 325.

Arkansas.— Bearden *v.* State, 44 Ark. 331; Brown *v.* State, 24 Ark. 620.

Florida.— Palmquist *v.* State, 30 Fla. 73, 11 So. 521; Lovett *v.* State, 29 Fla. 356, 11 So. 172; Warrance *v.* State, 27 Fla. 362, 8 So. 748.

Louisiana.— State *v.* Davenport, 33 La. Ann. 231; State *v.* Calvert, 32 La. Ann. 224; State *v.* Smith, 31 La. Ann. 406; State *v.* Revells, 31 La. Ann. 387.

Mississippi.— Long *v.* State, 52 Miss. 23; Scaggs *v.* State, 8 Sm. & M. 722.

Missouri.— State *v.* Able, 65 Mo. 37; State *v.* Dooly, 64 Mo. 146; State *v.* Allen, 64 Mo. 67; State *v.* Jones, 61 Mo. 232; State *v.* Barnes, 59 Mo. 154.

Oklahoma.— Le Roy *v.* Territory, 3 Okla. 596, 41 Pac. 612.

Pennsylvania.— Dunn *v.* Com., 6 Pa. St. 384.

Virginia.— Coleman *v.* Com., 90 Va. 635, 19 S. E. 161; Shelton *v.* Com., 89 Va. 450, 16 S. E. 355.

West Virginia.— State *v.* Allen, 45 W. Va. 65, 30 S. E. 209.

See 15 Cent. Dig. tit. "Criminal Law," § 2766. And see *supra*, XIV, B, 3.

38. *Alabama.*— Cawley *v.* State, 133 Ala. 128, 32 So. 227.

Illinois.— Hubbard *v.* People, 197 Ill. 15, 63 N. E. 1076.

Louisiana.— State *v.* Johnson, 35 La. Ann. 208.

Missouri.— State *v.* Able, 65 Mo. 37; State *v.* Dooly, 64 Mo. 146; State *v.* Ott, 49 Mo. 326.

Nebraska.— Burley *v.* State, 1 Nebr. 385.

Washington.— Shapoonmash *v.* U. S., 1 Wash. Terr. 188.

West Virginia.— State *v.* Sutfin, 22 W. Va. 771.

See 15 Cent. Dig. tit. "Criminal Law," § 2766. And see *supra*, XIV, B, 3.

39. *Alabama.*— Sudduth *v.* State, 124 Ala. 32, 27 So. 487; Eliza *v.* State, 39 Ala. 693; Peters *v.* State, 39 Ala. 681; Young *v.* State, 39 Ala. 357.

Arkansas.— Coit *v.* State, 28 Ark. 417.

Illinois.— Harris *v.* People, 130 Ill. 457, 22 N. E. 826.

Pennsylvania.— Hamilton *v.* Com., 16 Pa. St. 129, 55 Am. Dec. 485; Purcell *v.* Com., 1 Walk. 243.

Wisconsin.— French *v.* State, 85 Wis. 400, 55 N. W. 566, 39 Am. St. Rep. 855, 21 L. R. A. 402.

United States.— Ball *v.* U. S., 140 U. S. 118, 11 S. Ct. 761, 35 L. ed. 377.

See 15 Cent. Dig. tit. "Criminal Law," § 2766. And see *supra*, XIV, B, 3.

40. *Florida.*—Martin *v.* State, 42 Fla. 194, 27 So. 865; McCoy *v.* State, 40 Fla. 494, 24 So. 485.

Illinois.— Bolen *v.* People, 184 Ill. 338, 56 N. E. 408.

New Jersey.— West *v.* State, 22 N. J. L. 212.

New York.— Stephens *v.* People, 19 N. Y. 549.

North Carolina.— State *v.* Craton, 28 N. C. 164.

See 15 Cent. Dig. tit. "Criminal Law," § 2766. And see *supra*, XIV, B, 3.

41. *California.*— People *v.* Collins, 105 Cal. 504, 39 Pac. 16; People *v.* Cline, 83 Cal. 374, 23 Pac. 391; People *v.* Sing Lum, 61 Cal. 538.

Indiana.— Rhodes *v.* State, 23 Ind. 24.

Iowa.— State *v.* Kline, 54 Iowa 183, 6 N. W. 184; State *v.* O'Hagan, 38 Iowa 504.

Kansas.— State *v.* Daugherty, 63 Kan. 473, 65 Pac. 695.

Missouri.— State *v.* Miller, 100 Mo. 606, 13 S. W. 832, 1051, 14 S. W. 311.

Ohio.— Martin *v.* State, 17 Ohio Cir. Ct. 406, 9 Ohio Cir. Dec. 621.

See 15 Cent. Dig. tit. "Criminal Law," § 2766. And see *supra*, XIV, B, 3.

A statement that the accused was present at the beginning of the trial, there being nothing in the record to show that an adjournment was taken, raises a presumption that he was present during the whole trial. State *v.* Allen, 45 W. Va. 65, 30 S. E. 209; Hughes *v.* State, 109 Wis. 397, 85 N. W. 333. See *supra*, XIV, B, 3, a, (I), (A).

42. Brown *v.* State, (Tex. Cr. App. 1894) 27 S. W. 137; Granger *v.* State, 11 Tex. App. 454; Parchman *v.* State, 3 Tex. App. 225; Haynie *v.* State, 3 Tex. App. 223; Smith *v.* State, 1 Tex. App. 408; Hopt *v.* Utah, 114 U. S. 488, 5 S. Ct. 972, 29 L. ed. 183.

The failure of the record to disclose the charge, where it does not appear that a request was made that the charge be put in writing, is not error. Territory *v.* Christensen, 4 Dak. 410, 31 N. W. 847.

other hand it has been held that the record need not affirmatively show that the charge was in writing, but that it will be presumed that it was given in the manner required by law.[43]

(XVIII) *QUESTIONING ACCUSED BEFORE SENTENCE.* In some jurisdictions it has been held that the judgment should be reversed where the record does not show affirmatively that the accused was asked if he had anything to say why judgment should not be pronounced against him,[44] while in other jurisdictions it is held that this question will be presumed to have been asked, unless the record affirmatively shows that such was not the case.[45] In some jurisdictions the record must show a proper interrogation of the accused, only on conviction of a capital offense.[46]

b. To Sustain Jurisdiction of Appellate Court — (I) *IN GENERAL.* An appeal or writ of error will be dismissed for lack of jurisdiction where the record fails to show affirmatively the taking of such steps and the existence of such facts as are necessary to confer jurisdiction upon the appellate court.[47] Thus the original writ of error must be returned by the clerk of the trial court,[48] and sometimes the record must contain an affidavit by the accused or his counsel that the appeal is not taken for delay.[49]

(II) *JUDGMENT AND SENTENCE.* The record in felony must show the rendition and entry of a final and appealable judgment and a sentence imposed in the trial court.[50] If this does not appear, the appellate court has no jurisdiction and the appeal will be dismissed.[51] The record must also show a compliance with the

43. People *v.* Garcia, 25 Cal. 531; People *v.* Chung Lit, 17 Cal. 320.

44. *Louisiana.*— State *v.* Hugel, 27 La. Ann. 375.

Missouri.— State *v.* Ball, 27 Mo. 324.

New York.— Messner *v.* People, 45 N. Y. 1; Hilderbrand *v.* People, 1 Hun 19, 3 Thomps. & C. 82; Graham *v.* People, 63 Barb. 468; Safford *v.* People, 1 Park. Cr. 474.

Pennsylvania.— Hamilton *v.* Com., 16 Pa. St. 129, 55 Am. Dec. 485.

Texas.— Johnson *v.* State, 14 Tex. App. 306; Bohannon *v.* State, 14 Tex. App. 271.

See 15 Cent. Dig. tit. "Criminal Law," § 2769.

45. Spigner *v.* State, 58 Ala. 421; Taylor *v.* State, 42 Ala. 529; Ayers *v.* State, 88 Ind. 275; State *v.* Wood, 17 Iowa 18; State *v.* Stiefle, 13 Iowa 603; Bartlett *v.* State, 28 Ohio St. 669; Carper *v.* State, 27 Ohio St. 572; Bond *v.* State, 23 Ohio St. 349. *Compare* Crim *v.* State, 43 Ala. 53; Perry *v.* State, 43 Ala. 21.

46. Blount *v.* State, 30 Fla. 287, 11 So. 547; Hodge *v.* State, 29 Fla. 500, 10 So. 556; West *v.* State, 22 N. J. L. 212.

47. See APPEAL AND ERROR, 2 Cyc. 1025.

Certiorari.— In some states the record must show that a petition for the certiorari was filed and sanctioned within the period after the trial specified by statute (Johnson *v.* State, 69 Ga. 732; Morrison *v.* State, 64 Ga. 751); and the record sent up on certiorari must contain the whole proceedings and not merely the original indictment and papers (State *v.* Gibbons, 4 N. J. L. 40; Bennac *v.* People, 4 Barb. (N. Y.) 164).

Where a statute provides for noticing the settlement of a statement of facts and bill of exceptions the record must contain the notice of settlement and show that it was served. State *v.* Hinchey, 5 Wash. 326, 31 Pac. 870.

48. People *v.* Baron, 6 How. Pr. (N. Y.) 81; Rolke *v.* State, 12 Wis. 570.

49. Rhinehart *v.* State, 45 Md. 454; Weir *v.* State, 39 Md. 434.

50. *Alabama.*— Joyner *v.* State, 78 Ala. 448; Ayers *v.* State, 71 Ala. 11.

Florida.— Jackson *v.* State, (1902) 32 So. 926; Milton *v.* State, 39 Fla. 711, 23 So. 409.

Iowa.— State *v.* Daggett, (1899) 78 N. W. 705; State *v.* Haworth, 85 Iowa 712, 50 N. W. 676; State *v.* Briggs, 73 Iowa 456, 35 N. W. 521; State *v.* Wheeler, 65 Iowa 619, 22 N. W. 898.

Kentucky.— Com. *v.* Cole, 9 Ky. L. Rep. 685.

North Carolina.— State *v.* Saunders, 90 N. C. 651.

Pennsylvania.— Com. *v.* Beale, 19 Pa. Super. Ct. 434.

Texas.— Murray *v.* State, 35 Tex. 472; Dent *v.* State, (Cr. App. 1900) 59 S. W. 267; McHowell *v.* State, 41 Tex. Cr. 227, 53 S. W. 630; Mirelles *v.* State, 13 Tex. App. 346; Pennington *v.* State, 11 Tex. App. 281; Young *v.* State, 1 Tex. App. 64.

See 15 Cent. Dig. tit. "Criminal Law," § 2772.

In Colorado an order showing appellant's conviction and sentence, certified by the clerk as a complete copy of the order and filed in the appellate court, is a sufficient showing of final judgment. Barry *v.* People, 29 Colo. 395, 68 Pac. 274.

51. *Indiana.*— State *v.* Hallowell, 91 Ind. 376.

Iowa.— State *v.* Quigley, 62 Iowa 758, 17 N. W. 584.

Minnesota.— State *v.* Anderson, 59 Minn. 484, 61 N. W. 448.

formalities required by statute and by rules of practice in passing sentence.[52] So too the sentence itself must appear, and a mere recital that defendant was sentenced is insufficient.[53]

(III) *NOTICE OF APPEAL.* If the record does not show that notice of appeal was served and filed in conformity with the statute, the appeal may be dismissed, as these facts are jurisdictional.[54] A recital of the service and filing in the bill of exceptions is not sufficient.[55] Nor can these facts be presumed from the appellant's compliance with other statutory requirements.[56]

(IV) *FILING OF SECURITY.* The record must include the appeal-bond or a copy thereof, where one is required,[57] or an order dispensing with one,[58] or the appeal may be dismissed. And where, under the statute, appellant must either enter into a recognizance or be placed in jail pending appeal, the court has no jurisdiction if the record shows that neither was done.[59]

2. SCOPE AND CONTENTS OF RECORD — a. In General. Only such proceedings and facts as the law or the rules of practice require to be enrolled constitute a part of the record.[60]

New York.— People *v.* O'Donnell, 46 Hun 358; Hilderbrand *v.* People, 1 Hun 19; Dawson *v.* People, 5 Park. Cr. 118.

North Carolina.— State *v.* Gaylord, 85 N. C. 551.

Texas.— Moore *v.* State, 37 Tex. Cr. 552, 40 S. W. 287; Coleman *v.* State, (Cr. App. 1894) 28 S. W. 951; Nowlen *v.* State, (Cr. App. 1894) 24 S. W. 902; Alderman *v.* State, (Cr. App. 1893) 22 S. W. 1096.

See 15 Cent. Dig. tit. "Criminal Law," § 2772. See also APPEAL AND ERROR, 2 Cyc. 1029.

52. Jones *v.* Territory, 4 Okla. 45, 43 Pac. 1072; Evers *v.* State, 32 Tex. Cr. 283, 22 S. W. 1019; Sanders *v.* State, 18 Tex. App. 372; Turner *v.* State, 17 Tex. App. 587; Paul *v.* State, 17 Tex. App. 583; Harris *v.* State, 17 Tex. App. 559; Wallace *v.* State, 10 Tex. App. 407; Saunders *v.* State, 10 Tex. App. 336.

53. Read *v.* Com., 90 Va. 168, 17 S. E. 855; Peglow *v.* State, 12 Wis. 534.

54. *Alabama.*— Brigman *v.* State, 46 Ala. 72.

California.— People *v.* Swearinger, (1895) 38 Pac. 972; People *v.* Bell, 70 Cal. 33, 11 Pac. 327; People *v.* Clark, 49 Cal. 455.

Idaho.— People *v.* Lynch, 1 Ida. 358.

Iowa.— State *v.* Doss, 110 Iowa 713, 80 N. W. 1069; State *v.* Daggett, (1899) 78 N. W. 705; State *v.* Steele, (1898) 74 N. W. 1; State *v.* Benard, 99 Iowa 743, 68 N. W. 433; State *v.* Farrington, 85 Iowa 731, 51 N. W. 256; State *v.* Leslie, 65 Iowa 305, 21 N. W. 649.

Kansas.— *In re* Chambers, 30 Kan. 450, 2 Pac. 646; State *v.* Teissedre, 30 Kan. 210, 476, 2 Pac. 108, 650; State *v.* Ashmore, 19 Kan. 544.

Louisiana.— State *v.* D'Aquin, 49 La. Ann. 1091, 22 So. 39.

Texas.— Hughes *v.* State, 33 Tex. 683; McArthor *v.* State, (Cr. App. 1902) 66 S. W. 555; Conoley *v.* State, 37 Tex. Cr. 510, 40 S. W. 295; Simmons *v.* State, (Cr. App. 1896) 36 S. W. 95; Whipple *v.* State, (Cr. App. 1896) 33 S. W. 1080; Pace *v.* State, (Cr. App. 1895) 32 S. W. 700; Solari *v.* State, 3 Tex. App. 482.

See 15 Cent. Dig. tit. "Criminal Law," § 2776. See also *supra*, XVII, C, 5, 6; and APPEAL AND ERROR, 2 Cyc. 1028.

Where notice of an appeal by the state was served on counsel for the accused and not on the accused the return must show that the latter was not a resident of the county. State *v.* Brown, 5 Oreg. 119.

55. People *v.* Phillips, 45 Cal. 44.

56. Lorance *v.* State, (Tex. Cr. App. 1892) 20 S. W. 361.

57. State *v.* McCloskey, 4 Iowa 496.

58. State *v.* Gaylord, 85 N. C. 551. See APPEAL AND ERROR, 2 Cyc. 1027. And see *supra*, XVII, C, 4.

59. State *v.* Paschal, 22 Tex. 584; Buechert *v.* State, (Tex. Cr. App. 1900) 55 S. W. 492; Vaughan *v.* State, (Tex. Cr. App. 1897) 40 S. W. 263; Foster *v.* State, (Tex. Cr. App. 1896) 37 S. W. 744; Taylor *v.* State, (Tex. Cr. App. 1896) 37 S. W. 740; Dupree *v.* State, (Tex. Cr. App. 1896) 37 S. W. 739.

60. See APPEAL AND ERROR, 2 Cyc. 1053.

The statement of the text should be considered in connection with the rule permitting certain facts and rulings to be incorporated in the record by a bill of exceptions, agreed statement of facts, or case settled. See *infra*, XVII, D, 3, 4.

For example the general charge to a grand jury (English *v.* State, 31 Fla. 340, 356, 12 So. 689), the record in another case, offered and excluded at the trial (Pounders *v.* State, 37 Ark. 399), or the bill of exceptions in another case (State *v.* Lee, 95 Iowa 427, 64 N. W. 284), a certificate of the clerk (State *v.* Turney, 77 Iowa 269, 42 N. W. 190; Neal *v.* State, 32 Nebr. 120, 49 N. W. 174), or the opinion of the court below on a motion, although filed according to the statute (People *v.* Tapia, 131 Cal. 647, 63 Pac. 1001; Cathcart *v.* Com., 37 Pa. St. 108; Com. *v.* Church, 1 Pa. St. 105, 44 Am. Dec. 112), cannot be considered on review unless incorporated in the record by a bill of exceptions.

Where, by an order, the court directs a certificate of the clerk qualifying the postea to be annexed to the record, the certificate must be taken as a part of the record, and re-

b. In Joint Trial of Indictments. When two indictments are tried together by consent, a record should be made up in each case as if tried separately.[61]

c. Ministerial Acts. The record need not show acts by the court or its officers which are of a ministerial and not a judicial character.[62]

d. Affidavits. The affidavits which are used on motions for any purpose during the trial are not generally part of the record,[63] and will not be considered on appeal unless incorporated therein by a bill of exceptions. Nor are they made a part of the record by an order that they shall be filed with the clerk.[64]

e. Motions. Motions in a cause, the petition or affidavits therefor, and the decisions and exceptions thereon, are no part of the record and must be inserted in a bill of exceptions to be reviewed by the appellate court,[65] and this has been

garded as such on appeal. Cancemi *v.* People, 18 N. Y. 128.

61. Roop *v.* State, 58 N. J. L. 487, 34 Atl. 885.

Pleas of several jointly indicted.— Where two persons are jointly indicted, and no severance is ordered, the plea of guilty of one is part of the record of the trial of both. State *v.* Jackson, 106 Mo. 174, 17 S. W. 301.

62. For where the record is silent the appellate court will presume that they have properly performed their duty. Washington *v.* State, 81 Ala. 35, 1 So. 18; State *v.* Rolland, 14 La. Ann. 40.

Only those entries which the clerk is required to make by statute as a part of his official duty are properly shown by the record. Vanderkarr *v.* State, 51 Ind. 91.

Entries on the calendar and docket are no part of the record. They are merely memoranda for the convenience of the judge or the clerk. State *v.* Manley, 63 Iowa 344, 19 N. W. 211; Barker *v.* State, 54 Nebr. 53, 74 N. W. 427.

63. *Arkansas.*— Wright *v.* State, 35 Ark. 639.

California.— People *v.* McMahon, 124 Cal. 435, 57 Pac. 224; People *v.* Mahoney, 77 Cal. 529, 20 Pac. 73; People *v.* Honshell, 10 Cal. 83. See also People *v.* Philbon, 138 Cal. 530, 71 Pac. 650.

Georgia.— Russell *v.* State, 94 Ga. 594, 20 S. E. 422; Fisher *v.* State, 73 Ga. 595.

Illinois.— Murphy *v.* People, 37 Ill. 447.

Indiana.— Graybeal *v.* State, 145 Ind. 623, 44 N. E. 641; Rains *v.* State, 137 Ind. 83, 36 N. E. 532; Townsend *v.* State, 132 Ind. 315, 31 N. E. 797; State *v.* Vanderbilt, 116 Ind. 11, 18 N. E. 266, 9 Am. St. Rep. 820; Gandolpho *v.* State, 33 Ind. 439; Harman *v.* State, 22 Ind. 331; Round *v.* State, 14 Ind. 493; Names *v.* State, 20 Ind. App. 168, 50 N. E. 401.

Iowa.— State *v.* Berger, (1902) 90 N. W. 621; State *v.* Watson, 102 Iowa 651, 72 N. W. 283.

Kansas.— State *v.* Sortor, 52 Kan. 531, 34 Pac. 1036; State *v.* Devine, 49 Kan. 252, 30 Pac. 522.

Louisiana.— State *v.* Callian, 109 La. 346, 33 So. 363; State *v.* Tally, 23 La. Ann. 677.

Michigan.— Hill *v.* People, 16 Mich. 351; Crippen *v.* People, 8 Mich. 117.

Missouri.— State *v.* Clark, 147 Mo. 20, 47 S. W. 886; State *v.* Williams, 147 Mo. 14, 47 S. W. 891; State *v.* Schuchmann, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842; State *v.* Baber, 11 Mo. App. 585.

Nebraska.— Kerr *v.* State, 63 Nebr. 115, 88 N. W. 240; Korth *v.* State, 46 Nebr. 631, 65 N. W. 792; Wright *v.* State, 45 Nebr. 44, 63 N. W. 147; Dolen *v.* State, 15 Nebr. 405, 19 N. W. 627.

New York.— Gaffney *v.* People, 50 N. Y. 416.

North Carolina.— State *v.* De Graff, 113 N. C. 688, 18 S. E. 507; State *v.* Barfield, 30 N. C. 344.

Oregon.— State *v.* Olberman, 33 Oreg. 556, 55 Pac. 866; State *v.* McGinnis, 17 Oreg. 332, 20 Pac. 632.

Tennessee.— Stewart *v.* State, 7 Coldw. 338.

Texas.— Fields *v.* State, 39 Tex. Cr. 488, 46 S. W. 814; Rodgers *v.* State, (Cr. App. 1894) 28 S. W. 948.

Washington.— State *v.* Vance, 29 Wash. 435, 70 Pac. 34; State *v.* Wroth, 15 Wash. 621, 47 Pac. 106.

See 15 Cent. Dig. tit. "Criminal Law," § 2789; and APPEAL AND ERROR, 2 Cyc. 1064.

64. McDonald *v.* State, 72 Ga. 55.

An order amending an affidavit should be shown by the record, and not by the bill of exceptions. Simpson *v.* State, 111 Ala. 6, 20 So. 572.

Incorporation by reference.— The bill of exceptions must set out the affidavit in full, for it can incorporate by reference only such instruments as are already properly in the record. Colee *v.* State, 75 Ind. 511.

Where a statute provides that papers used on the hearing of a motion for a new trial, and the evidence so far as it is reduced to writing, shall constitute a bill of exceptions, affidavits used to obtain a change of venue are part of the record and need not otherwise be brought up on appeal. Anderson *v.* State, 2 Wash. 183, 26 Pac. 267.

65. *Arkansas.*— State *v.* Hicklin, 5 Ark. 190.

Colorado.— Bradford *v.* People, 22 Colo. 157, 43 Pac. 1013.

Illinois.— McElwee *v.* People, 77 Ill. 493; Earll *v.* People, 73 Ill. 329.

Indiana.— Oats *v.* State, 153 Ind. 436, 55 N. E. 226; Robb *v.* State, 144 Ind. 569, 43 N. E. 642; State *v.* Cooper, 103 Ind. 75, 2 N. E. 238.

Missouri.— State *v.* Burdett, 145 Mo. 674, 47 S. W. 796; State *v.* Taylor, 134 Mo. 109,

held to be true even where they have been copied in the record sent up to the appellate court.[66]

f. Testimony at Trial. The evidence, although taken down by a stenographer and written out in longhand,[67] is in the absence of an express statute no part of the record,[68] and will not be considered or reviewed on appeal, unless brought up by bill of exceptions. The same rule applies to exhibits offered in evidence.[69]

g. Arguments of Counsel. The arguments of counsel and his remarks in examining or cross-examining witnesses are not part of the record [70] and will not be considered unless they are made part of it by a bill of exceptions.

h. Instructions. Instructions given or refused are not part of the record,[71]

35 S. W. 92; State *v.* Gilmore, 110 Mo. 1, 19 S. W. 218; State *v.* Henderson, 109 Mo. 292, 19 S. W. 239; State *v.* Griffin, 98 Mo. 672, 12 S. W. 358; State *v.* Vincent, 91 Mo. 662, 4 S. W. 430; State *v.* Reed, 89 Mo. 168, 1 S. W. 225; State *v.* Gee, 79 Mo. 313; State *v.* Robinson, 79 Mo. 66; State *v.* Sweeney, 68 Mo. 96.

New Mexico.— Territory *v.* Archibeque, 9 N. M. 403, 54 Pac. 758; Territory *v.* Barrett, 8 N. M. 70, 42 Pac. 66.

Washington.— State *v.* Humason, 5 Wash. 499, 32 Pac. 111.

See 15 Cent. Dig. tit. "Criminal Law," § 2790; and APPEAL AND ERROR, 2 Cyc. 1058.

This practice is not, however, universal, and in some jurisdictions it is held that a motion in arrest of judgment (Durrett *v.* State, 133 Ala. 119, 32 So. 234; Kelly *v.* State, (Fla. 1902) 33 So. 235; Olds *v.* State, (Fla. 1902) 33 So. 296), or for a new trial (Johnson *v.* State, 43 Ark. 391 [*overruling* Gaines *v.* Summers, 39 Ark. 482; Farquharson *v.* Johnson, 35 Ark. 536]), or to quash an indictment (Hampton *v.* State, 133 Ala. 180, 32 So. 230), are parts of the record.

66. *California.*— People *v.* Fredericks, 106 Cal. 554, 39 Pac. 944.

Illinois.— Bedee *v.* People, 73 Ill. 320.

Indiana.— Pattee *v.* State, 109 Ind. 545, 10 N. E. 421; Kennedy *v.* State, 66 Ind. 370.

Missouri.— State *v.* Treace, 66 Mo. 124.

Ohio.— Schultz *v.* State, 32 Ohio St. 276.

Oklahoma.— Fisher *v.* U. S., 1 Okla. 252, 31 Pac. 195.

67. People *v.* Armstrong, 44 Cal. 326; State *v.* McClintock, 37 Kan. 40, 14 Pac. 511; State *v.* Larkin, 11 Nev. 314.

68. *California.*— People *v.* Bemmerly, 98 Cal. 299, 33 Pac. 263; People *v.* Faulke, 96 Cal. 17, 30 Pac. 837; People *v.* Brown, 48 Cal. 253.

Florida.— Richardson *v.* State, 28 Fla. 349, 9 So. 704; Broward *v.* State, 9 Fla. 422.

Illinois.— Burns *v.* People, 126 Ill. 282, 18 N. E. 550.

Indiana.— State *v.* Bercaw, 132 Ind. 260, 31 N. E. 798; Fahlor *v.* State, 108 Ind. 387, 9 N. E. 297.

Kansas.— State *v.* Kness, 56 Kan. 478, 43 Pac. 782; State *v.* Tilney, 44 Kan. 581, 24 Pac. 945; State *v.* Cash, 36 Kan. 623, 14 Pac. 283.

Louisiana.— State *v.* Pitre, 106 La. 606, 31 So. 133; State *v.* Lacombe, 12 La. Ann. 195.

Missouri.— State *v.* Buck, 130 Mo. 480, 32 S. W. 975.

Montana.— State *v.* Chandonette, 10 Mont. 280, 25 Pac. 438.

Nevada.— State *v.* Rigg, 10 Nev. 284.

United States.— Stubbs *v.* U. S., 104 Fed. 988, 44 C. C. A. 292.

See 15 Cent. Dig. tit. "Criminal Law," § 2794; and APPEAL AND ERROR, 2 Cyc. 1062.

69. Goldsmith *v.* State, 30 Ohio St. 208.

70. *Arizona.*—Dickson *v.* Territory, (1899) 56 Pac. 971.

Illinois.— Gannon *v.* People, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147.

Oregon.— State *v.* Drake, 11 Oreg. 396, 4 Pac. 1204.

Pennsylvania.— Com. *v.* Nicely, 130 Pa. St. 261, 18 Atl. 737; Fulmer *v.* Com., 97 Pa. St. 503.

South Carolina.— State *v.* Leonard, 32 S. C. 201, 10 S. E. 1007.

See 15 Cent. Dig. tit. "Criminal Law," § 2796.

Affidavits containing the objectionable remarks of counsel, and used on a motion for a new trial, may be considered where they are returned as part of the record certified by the judge. People *v.* Rose, 52 Hun (N. Y.) 33, 4 N. Y. Suppl. 787. But see Hannum *v.* State, 90 Tenn. 647, 18 S. W. 269.

71. *Arkansas.*— Anderson *v.* State, 5 Ark. 444.

California.— People *v.* Ah Lee Doon, 97 Cal. 171, 31 Pac. 933; People *v.* Beaver, 83 Cal. 419, 23 Pac. 321; People *v.* Hart, 44 Cal. 598; People *v.* Lockwood, 6 Cal. 205.

Florida.— Hodge *v.* State, 29 Fla. 500, 10 So. 556.

Indiana.—Adams *v.* State, 156 Ind. 596, 59 N. E. 24; Stillwell *v.* State, 155 Ind. 552, 58 N. E. 709; Robb *v.* State, 144 Ind. 569, 43 N. E. 642; Leverich *v.* State, 105 Ind. 277, 4 N. E. 852; Campbell *v.* State, 3 Ind. App. 206, 29 N. E. 418.

Kansas.— State *v.* Smith, 38 Kan. 194, 16 Pac. 254; State *v.* McClintock, 37 Kan. 40, 14 Pac. 511; State *v.* Blunk, 4 Kan. App. 780, 46 Pac. 998.

Kentucky.— Evans *v.* Com., 12 S. W. 768, 769, 11 Ky. L. Rep. 573; Colley *v.* Com., 12 S. W. 132, 11 Ky. L. Rep. 346; Com. *v.* Clark, 5 Ky. L. Rep. 599.

Mississippi— Peden *v.* State, 61 Miss. 267; Haynie *v.* State, 32 Miss. 400; Preston *v.* State, 25 Miss. 383.

Missouri.— State *v.* Williams, 141 Mo. 264, 42 S. W. 937; State *v.* Gilbreath, 130 Mo. 500, 32 S. W. 1023.

Texas.—Bracken *v.* State, 29 Tex. App. 362, 16 S. W. 192.

but to be reviewed on appeal must be authenticated and made a part of it by a bill of exceptions. The mere fact that the clerk has actually copied the instructions in the record does not make them properly a part of it.[72]

i. Orders and Judgments. Orders made by the court determining some interlocutory motion are properly part of the record, and must appear as such, in order that the judicial determination may be properly expressed.[73]

j. Bill of Exceptions. A bill of exceptions properly constituted and authenticated, as required by the statute, becomes a part of the record on appeal, and as such will be examined by the court and judgment given on the whole record in so far as the errors apparent thereon are injurious to the accused.[74]

3. Bill of Exceptions — a. Necessity — (1) *Rule Stated.* Rulings, the correctness of which cannot be determined from the record proper, must be made a part of the record by a bill of exceptions,[75] a statement of facts, or a similar method

Wyoming.—Van Horn *v.* State, 5 Wyo. 501, 40 Pac. 964.

See 15 Cent. Dig. tit. "Criminal Law," § 2797; and Appeal and Error, 2 Cyc. 1066.

Contra, by statute, see Morrison *v.* State, 42 Fla. 149, 28 So. 97; Lee *v.* U. S., 7 Okla. 558, 54 Pac. 792.

72. Archibald *v.* State, 122 Ind. 122, 23 N. E. 758; Brown *v.* State, 111 Ind. 441, 12 N. E. 514; Bates *v.* State, 72 Ind. 434; Evarts *v.* State, 48 Ind. 422; Com. *v.* Carter, 7 Ky. L. Rep. 304; Huddleston *v.* State, 7 Baxt. (Tenn.) 55; West *v.* State, 2 Tex. App. 209.

The charge must appear by the transcript to have been signed by the judge and filed by the clerk. Long *v.* State, 4 Tex. App. 81; Lindsay *v.* State, 1 Tex. App. 584. The mere indorsements "given" and "refused," with the judge's signature, do not make the requested charges a part of the record. Nuckols *v.* State, 109 Ala. 2, 19 So. 504; Jones *v.* State, (Tex. Cr. App. 1895) 31 S. W. 172. Nor is such the effect of a statute requiring the judge to furnish the jury with a copy of his charge on retiring. Huddleston *v.* State, 7 Baxt. (Tenn.) 55. And under a statute requiring the record to contain merely the written instructions, a charge by the court on its own motion must be brought up by a bill of exceptions. State *v.* Burns, 8 Nev. 251; State *v.* Forsha, 8 Nev. 137.

73. Washington *v.* State, 81 Ala. 35, 1 So. 18.

In such cases it is the judge's duty to find the facts and set them out with his order in the record so that his decision may be reviewed. State *v.* Jefferson, 66 N. C. 309.

The questions of law determined by the trial court must appear in the record, and cannot be shown by an agreement of counsel. State *v.* Williams, 85 Md. 231, 36 Atl. 823.

An order convening and charging the grand jury is not properly a part of the record, and, although copied into it, cannot be considered on appeal for the purpose of showing that an information on which the trial is based was filed while the grand jury were in session. Hobbs *v.* State, 133 Ind. 404, 32 N. E. 1019, 18 L. R. A. 774.

74. Williams *v.* State, 47 Ala. 659; State *v.* Jones, 5 Ala. 666; People *v.* Trim, 37 Cal. 274; Calvert *v.* State, 91 Ind. 473; Fehn *v.* State, 3 Ind. App. 568, 29 N. E. 1137; Baldwin *v.* State, 6 Ohio 15.

Certification by clerk.— It is safest, and in some cases absolutely necessary, that the bill of exceptions after filing shall be certified by the clerk as a part of the record. Frieze *v.* People, 12 Ill. App. 349.

The record on appeal must affirmatively show that the bill of exceptions was properly presented in strict accordance with the requirements of the statute, and that all conditions precedent to its use were complied with within the periods allowed by statute. State *v.* Pooler, 37 Wis. 305.

Where by law it is prescribed what a record shall contain, a bill of exceptions relating to matters which should be a part of the record proper, but as to which the record is silent, will not supply the place of the record and cannot be reviewed. Garrett *v.* State, 97 Ala. 18, 14 So. 327; Diggs *v.* State, 77 Ala. 68; State *v.* Atkinson, 33 S. C. 100, 11 S. E. 693. Thus a ruling on a demurrer (Carleton *v.* State, 100 Ala. 130, 14 So. 472; Peters *v.* State, 100 Ala. 10, 14 So. 896), or the refusal of a new trial (Jefferson *v.* State, 52 Miss. 767), being matter which should appear in the record, will not be reviewed where it appears only in the bill of exceptions.

75. *Alabama.*— *Ex p.* Knight, 61 Ala. 482.

Arizona.— Meara *v.* Territory, (1899) 56 Pac. 718; Parker *v.* Territory, (1898) 52 Pac. 361.

California.— People *v.* Keyser, 53 Cal. 183; People *v.* Padillia, 42 Cal. 535.

Florida.— Gladden *v.* State, 12 Fla. 562.

Illinois.— Tarble *v.* People, 111 Ill. 120.

Indiana.— Blume *v.* State, 154 Ind. 343, 56 N. E. 771; Hannan *v.* State, 149 Ind. 81, 47 N. E. 628.

Kentucky.—Kennedy *v.* Com., 14 Bush 340; Young *v.* Com., 42 S. W. 1141, 19 Ky. L. Rep. 929.

Louisiana.— State *v.* Wilson, 109 La. 74, 33 So. 85; State *v.* Lafargue, 49 La. Ann. 1597, 22 So. 831; State *v.* Reed, 49 La. Ann. 704, 21 So. 732; State *v.* Pujo, 41 La. Ann. 346, 6 So. 339; State *v.* Comstock, 36 La. Ann. 308; State *v.* Behan, 20 La. Ann. 389; State *v.* Bob, 11 La. Ann. 192.

Mississippi.— Young *v.* State, (1898) 24 So. 316; Organ *v.* State, 26 Miss. 78.

provided by statute.[76] Where a statute requires that a bill of exceptions shall be settled and filed, an agreed statement of facts, a written stipulation as to the rulings of the court, or any other writing cannot be substituted for it.[77] Nor can facts which should appear in a bill of exceptions be shown by affidavits.[78] Again in the absence of a statutory requirement a bill of exceptions is not required for each matter to be reviewed, and all matters arising on the trial may be incorporated in one bill.[79]

(II) *RULE APPLIED.* In applying the general rules just stated it has been held that the rulings of the trial court on a motion to dismiss a criminal case;[80] the rulings of the trial court upon an application for change of venue;[81] the rulings

Missouri.— State *v.* Finn, 170 Mo. 29, 70 S. W. 130; State *v.* Rigall, 169 Mo. 659, 70 S. W. 150; State *v.* Robinson, 141 Mo. 351, 42 S. W. 937; State *v.* Gagle, 141 Mo. 350, 42 S. W. 939; State *v.* Dillon, 132 Mo. 183, 33 S. W. 790; State *v.* Hayes, 81 Mo. 574; State *v.* Marshall, 36 Mo. 400.

Nevada.— State *v.* Murphy, 21 Nev. 332, 31 Pac. 513; State *v.* Lamb, 20 Nev. 181, 19 Pac. 33; State *v.* Fellows, 8 Nev. 311.

New York.— Wynehamer *v.* People, 2 Park. Cr. 377.

Oregon.— State *v.* Chee Gong, 17 Oreg. 635, 21 Pac. 882.

Texas.— Merrell *v.* State, (Cr. App. 1902) 70 S. W. 979; Krueschel *v.* State, (Cr. App. 1902) 70 S. W. 81; Coleman *v.* State, (Cr. App. 1902) 70 S. W. 19; Kyle *v.* State, (Cr. App. 1899) 53 S. W. 846; Owens *v.* State, (Cr. App. 1896) 34 S. W. 614; McDaniel *v.* State, 5 Tex. App. 475.

Virginia.— Whalen *v.* Com., 90 Va. 544, 19 S. E. 182.

Wisconsin.— Franz *v.* State, 12 Wis. 536; Peglow *v.* State, 12 Wis. 534; Benedict *v.* State, 12 Wis. 313.

United States.— Porter *v.* U. S., 91 Fed. 494, 33 C. C. A. 652.

See 15 Cent. Dig. tit. "Criminal Law," § 2807; and APPEAL AND ERROR, 3 Cyc. 23.

Defendant who has been sentenced on his plea of guilty may have a bill of exceptions to the action of the court on his motion to set aside the judgment. State *v.* Kring, 71 Mo. 551.

76. See APPEAL AND ERROR, 2 Cyc. 1076.

77. *Alabama.*— Cobb *v.* State, 19 Ala. 18.

Arizona.— Territory *v.* Neligh, (1886) 10 Pac. 367; Territory *v.* Monroe, (1885) 6 Pac. 478.

Kansas.— State *v.* Carr, 37 Kan. 421, 15 Pac. 603; State *v.* Bohan, 19 Kan. 28.

New York.— Messner *v.* People, 45 N. Y. 1.

Texas.— Nelson *v.* State, 1 Tex. App. 41. And see Wakefield *v.* State, 3 Tex. App. 39.

Virginia.— See Clark *v.* Com., 90 Va. 360, 18 S. E. 440.

See 15 Cent. Dig. tit. "Criminal Law," § 2804.

78. State *v.* Duncan, 116 Mo. 288, 22 S. W. 699; State *v.* Smith, 114 Mo. 406, 21 S. W. 827; State *v.* Musick, 101 Mo. 260, 14 S. W. 212; Martin *v.* State, (Nebr. 1903) 93 N. W. 161; Merrell *v.* State, (Tex. Cr. App. 1902) 70 S. W. 979.

Even in a capital case it was held that in the absence of a bill of exceptions the appellate court cannot reverse a conviction, although morally certain error had been committed. Com. *v.* Ware, 137 Pa. St. 465, 20 Atl. 806.

79. Lees *v.* U. S., 150 U. S. 476, 14 S. Ct. 163, 37 L. ed. 1150.

Where defendant omits some of his exceptions from the minutes of the trial, and the same is signed by the court and used by defendant in his motion for arrest of judgment and for a new trial, no further bill of exceptions should be allowed after the issuance of a writ of error, inasmuch as defendant will be held to have waived the exceptions omitted from the minutes. U. S. *v.* Claasen, 46 Fed. 67.

Where two exceptions taken at a trial are so inconsistent with each other that both cannot stand, the former will be presumed to be withdrawn or waived, and the appellate court will take cognizance of the latter. State *v.* Wing, 32 Me. 581. And see Com. *v.* Dow, 5 Metc. (Mass.) 329.

Where two are tried together, a bill of exceptions reserved by one of them who is afterward acquitted confers no advantage upon the other, unless it appears thereby on the record that he has been prejudiced by the error. State *v.* Logan, 104 La. 760, 29 So. 336.

80. Motion to dismiss.— Beard *v.* State, 57 Ind. 8.

Nolle prosequi.— So an objection to a refusal to allow a prosecuting attorney to enter a *nolle prosequi* can only be preserved by bill of exceptions. State *v.* Wear, 145 Mo. 162, 46 S. W. 1099.

81. Change of venue.— A ruling on an objection to an application for a change of venue (Harrison *v.* State, 3 Tex. App. 558), or a ruling denying the application (Jones *v.* State, 77 Ala. 98; State *v.* Johnson, 104 La. 417, 29 So. 24, 81 Am. St. Rep. 139; State *v.* Williams, 30 La. Ann. 1028; State *v.* Ware, 69 Mo. 332; Kutch *v.* State, 32 Tex. Cr. App. 184, 22 S. W. 594; Pruitt *v.* State, 20 Tex. App. 129; Makinson *v.* State, 16 Tex. App. 133), or making the change to a wrong county (State *v.* Gamble, 119 Mo. 427, 24 S. W. 1030), cannot be reviewed unless the application and objection with the proof taken (King *v.* State, (Tex. Cr. App. 1901) 64 S. W. 245; Underwood *v.* State, 38 Tex. Cr. 193, 41 S. W. 618; Smith *v.* State, 31 Tex. Cr. 14, 19 S. W. 252) and the ruling are brought up by a bill of exceptions.

of the trial court upon the denial of a motion for a continuance;[82] the rulings of the trial court as to the competency of the trial jurors;[83] the mode of impaneling the trial jury;[84] the administration of the oaths to officers and trial jurors;[85] the rulings of the trial court on evidence, whether admitting or excluding it;[86] objections to the competency of witnesses;[87] the giving or the refusal to give instructions requested by defendant;[88] the arguments and misconduct of counsel, such

82. *California.*— People *v.* Weaver, 47 Cal. 106; People *v.* Ashnauer, 47 Cal. 98.

Louisiana.— State *v.* Charlot, 8 Rob. 529.

Missouri.— State *v.* Palmer, 161 Mo. 152, 61 S. W. 651; State *v.* Wiley, 82 Mo. App. 61.

Texas.— Jackson *v.* State, (Cr. App. 1903) 71 S. W. 972; Valdes *v.* State, (Tex. Cr. App. 1896) 35 S. W. 372; Willis *v.* State, (Tex. Cr. App. 1895) 33 S. W. 341; Sutton *v.* State, (Tex. Cr. App. 1894) 28 S. W. 537. And see Nelson *v.* State, 1 Tex. App. 41, even though the case be a capital one.

Washington.— State *v.* Anderson, 20 Wash. 193, 55 Pac. 39.

See 15 Cent. Dig. tit. "Criminal Law," § 2812.

A recital in the judgment that a continuance was refused, with the exception thereto, will not dispense with the production of the bill of exceptions. Hays *v.* State, (Tex. Cr. App. 1892) 20 S. W. 548; Prator *v.* State, 15 Tex. App. 363.

83. State *v.* Jackson, 12 La. Ann. 679; State *v.* Howard, 118 Mo. 127, 24 S. W. 41; Nubel *v.* State, (Tex. Cr. App. 1901) 65 S. W. 374; Goodson *v.* State, (Tex. Cr. App. 1897) 41 S. W. 604.

On the challenge being overruled the bill of exceptions must show that the juror challenged served on the jury. Lee *v.* State, (Tex. Cr. App. 1898) 44 S. W. 835; Hardy *v.* State, (Tex. Cr. App. 1896) 38 S. W. 196. And the bill should always show whether challenges for cause were overruled or sustained. Taul *v.* State, (Tex. Cr. App. 1901) 61 S. W. 394.

84. State *v.* Duncan, 116 Mo. 288, 22 S. W. 699.

The evidence relating to the impaneling of the jury must appear in the bill to enable the appellate court to review the rulings of the trial court on a challenge for cause. Dinsmore *v.* State, 61 Nebr. 418, 85 N. W. 445.

A challenge to the jury in writing submitted to the court, as shown in its journal, becomes a part of the record without a bill or a statement of facts. State *v.* Vance, 29 Wash. 435, 70 Pac. 34.

85. Samschen *v.* State, 8 Tex. App. 45; Hartigan *v.* Territory, 1 Wash. Terr. 447.

86. *Alabama.*— Wilson *v.* State, 113 Ala. 104, 21 So. 487.

California.— People *v.* Mendenhall, 135 Cal. 344, 67 Pac. 325; People *v.* Buckley, 116 Cal. 146, 47 Pac. 1009.

Colorado.— Short *v.* People, 27 Colo. 175, 60 Pac. 350; Miller *v.* People, 23 Colo. 95, 46 Pac. 111.

Florida.— Coleman *v.* State, 43 Fla. 543, 30 So. 684; Wright *v.* State, 42 Fla. 239, 27 So. 863.

Illinois.— Stack *v.* People, 80 Ill. 32.

Indiana.— Townsend *v.* State, 147 Ind. 624, 47 N. E. 19, 62 Am. St. Rep. 477, 37 L. R. A. 294.

Iowa.— State *v.* Behrens, 109 Iowa 58, 79 N. W. 387; State *v.* Taylor, 53 Iowa 759, 6 N. W. 39.

Kentucky.— Adwell *v.* Com., 17 B. Mon. 310; Bugg *v.* Com., 38 S. W. 684, 18 Ky. L. Rep. 844.

Louisiana.— State *v.* Harris, 107 La. 196, 31 So. 646; State *v.* Moise, 104 La. 63, 28 So. 902; State *v.* Robinson, 52 La. Ann. 616, 27 So. 124; State *v.* Wright, 48 La. Ann. 1525, 21 So. 160.

New Jersey.— Johnson *v.* State, 29 N. J. L. 453 [*affirming* 26 N. J. L. 313].

New Mexico.— Territory *v.* Murray, 6 N. M. 454, 30 Pac. 872; Territory *v.* Davis, 6 N. M. 452, 30 Pac. 871.

New York.— People *v.* Garrahan, 19 N. Y. App. Div. 347, 46 N. Y. Suppl. 497.

Texas.— Jowell *v.* State, (Cr. App. 1902) 71 S. W. 286; Fredericson *v.* State, (Cr. App. 1902) 70 S. W. 754; Lega *v.* State, 36 Tex. Cr. 38, 34 S. W. 926, 25 S. W. 381; Clements *v.* State, 34 Tex. Cr. 616, 31 S. W. 642; Simms *v.* State, 32 Tex. Cr. 277, 22 S. W. 876.

Utah.— U. S. *v.* Duggins, 11 Utah 430, 40 Pac. 707.

Virginia.— Longley *v.* Com., 99 Va. 807, 37 S. E. 339; Kibler *v.* Com., 93 Va. 804, 26 S. E. 858.

See 15 Cent. Dig. tit. "Criminal Law," § 2816.

87. Ray *v.* State, 1 Greene (Iowa) 316, 48 Am. Dec. 379 (objection that witness was not competent because his name was not indorsed upon the indictment) Magee *v.* State, (Tex. Cr. App. 1897) 43 S. W. 98; Jackson *v.* State, (Tex. Cr. App. 1897) 38 S. W. 990; Anderson *v.* State, (Tex. Cr. App. 1894) 24 S. W. 644 (objection that witness was incompetent because he violated the rule of separation).

88. *Alabama.*—Dannelley *v.* State, 130 Ala. 132, 30 So. 452.

California.— People *v.* Rogers, 81 Cal. 209, 22 Pac. 592.

Colorado.— Packer *v.* People, 26 Colo. 306, 57 Pac. 1087.

Indiana.— Merrill *v.* State, 156 Ind. 99, 59 N. E. 322; Neeld *v.* State, 25 Ind. App. 603, 58 N. E. 734.

Iowa.— State *v.* Harris, 97 Iowa 407, 66 N. W. 728.

Louisiana.— State *v.* Riculfi, 35 La. Ann. 770; State *v.* Curtis, 34 La. Ann. 1213.

Nevada.— State *v.* Darling, 4 Nev. 413.

Tennessee.— Foutch *v.* State, (1898) 45 S. W. 678; Owens *v.* State, 16 Lea 1.

Texas.—Scott *v.* State, 206 Tex. 116; Lankster *v.* State, (Cr. App. 1902) 72 S. W. 388;

as remarks claimed to be objectionable;[89] the remarks or conduct of the trial judge claimed to be objectionable;[90] misconduct on the part of the trial jury;[91] and the rulings of the trial court, as well as the evidence received and affidavits used on a motion for a new trial[92] are among the particular things which must be presented for review by a bill of exceptions. On the other hand no bill of exceptions being necessary, where its sole purpose is to bring up matters and rulings which are of record,[93] objections to the form and validity of an indictment,

Howard *v.* State, (Cr. App. 1902) 68 S. W. 274; Garza *v.* State, 11 Tex. App. 345.

Washington.— Yelm Jim *v.* Territory, 1 Wash. Terr. 63.

United States.— Clune *v.* U. S., 159 U. S. 590, 16 S. Ct. 125, 40 L. ed. 269.

See 15 Cent. Dig. tit. "Criminal Law," § 2818.

The same rule applies to instructions given by the court of its own motion. People *v.* Walter, 1 Ida. 386; State *v.* Mack, 45 La. Ann. 1155, 14 So. 141; State *v.* Beaird, 34 La. Ann. 104.

The rule does not apply where under the statute an instruction is required to be handed to the jury in writing and is thereby made a part of the record. State *v.* Ricks, 32 La. Ann. 1098; State *v.* Stanley, 4 Nev. 71.

89. *Iowa.*— State *v.* Burton, 103 Iowa 28, 72 N. W. 413; State *v.* Helm, 97 Iowa 378, 66 N. W. 751; State *v.* Clemons, 78 Iowa 123, 42 N. W. 562; State *v.* Peterson, 67 Iowa 564, 25 N. W. 780.

Kentucky.—Knoxville Nursery Co. *v.* Com., 108 Ky. 6, 55 S. W. 691, 21 Ky. L. Rep. 1483.

Louisiana.— State *v.* Hebert, 104 La. 227, 28 So. 898.

Missouri.— State *v.* Grant, 144 Mo. 56, 45 S. W. 1102; State *v.* Miller, 144 Mo. 26, 45 S. W. 1104; State *v.* Paxton, 126 Mo. 500, 29 S. W. 705; State *v.* Zumbunson, 13 Mo. App. 592.

Texas.— Kelley *v.* State, (Cr. App. 1902) 70 S. W. 20; Garza *v.* State, (Cr. App. 1902) 66 S. W. 1098; Foreman *v.* State, (Cr. App. 1897) 39 S. W. 942; Garrett *v.* State, 37 Tex. Cr. 98, 38 S. W. 1017, 39 S. W. 108; Spencer *v.* State, 34 Tex. Cr. 65, 29 S. W. 159.

See 15 Cent. Dig. tit. "Criminal Law," § 2819.

The incorporation of a counsel's improper remarks in the bill of exceptions allowed by the court makes them a part of the record without other proof that he uttered them. State *v.* Tennison, 42 Kan. 330, 22 Pac. 429.

90. State *v.* La Grange, 99 Iowa 10, 68 N. W. 557; State *v.* Hall, 79 Iowa 674, 44 N. W. 914; Keats *v.* State, (Tex. Cr. App. 1894) 24 S. W. 643; Copeney *v.* State, 10 Tex. App. 473.

Where the conduct complained of was the interruption by the court of the argument of defendant's counsel, the bill should set out what that argument was and what the court said in interrupting it. State *v.* Bulling, 104 Mo. 204, 15 S. W. 367, 16 S. W. 830.

91. State *v.* Hessian, 58 Iowa 68, 12 N. W. 77; State *v.* Given, 32 La. Ann. 782; Wheatly *v.* State, (Tex. Cr. App. 1897) 39 S. W. 672.

92. *California.*— People *v.* Ah Fat, 47 Cal. 631.

Colorado.—Edwards *v.* People, 26 Colo. 539, 59 Pac. 56.

Florida.— Higginbotham *v.* State, 42 Fla. 573, 29 So. 410, 89 Am. St. Rep. 237.

Idaho.— State *v.* Smith, 5 Ida. 291, 48 Pac. 1060; State *v.* Larkins, 5 Ida. 200, 47 Pac. 945.

Illinois.— Harris *v.* People, 130 Ill. 457, 22 N. E. 826; Gill *v.* People, 42 Ill. 321; Dachsenbuehler *v.* People, 89 Ill. App. 493.

Indiana.— Campbell *v.* State, 148 Ind. 527, 47 N. E. 221; Reynolds *v.* State, 147 Ind. 3, 46 N. E. 31.

Iowa.— State *v.* Chapman, (1900) 81 N. W. 783.

Louisiana.— State *v.* Slutz, 106 La. 637, 31 So. 179; State *v.* Napoleon, 104 La. 164, 28 So. 972; State *v.* Reed, 49 La. Ann. 704, 21 So. 732; State *v.* Williams, 35 La. Ann. 742; State *v.* Chatman, 34 La. Ann. 881.

Missouri.— State *v.* Handley, 144 Mo. 118, 45 S. W. 1088; State *v.* Pollard, 139 Mo. 220, 40 S. W. 949; State *v.* Laycock, 136 Mo. 93, 37 S. W. 802.

Texas.— Henderson *v.* State, (Cr. App. 1901) 62 S. W. 752; Kearly *v.* State, (Cr. App. 1898) 43 S. W. 990; Sullivan *v.* State, (Cr. App. 1897) 43 S. W. 342; Royal *v.* State, (Cr. App. 1897) 39 S. W. 666.

See 15 Cent. Dig. tit. "Criminal Law," § 2822.

The purpose of the bill is to place on the record the motion, the reasons assigned to support it, the judgment thereon, and the evidence given on the trial. Haynie *v.* State, 32 Miss. 400.

93. *Indiana.*—Cooper *v.* State, 79 Ind. 206.

Iowa.— State *v.* Strong, 6 Iowa 72.

Kentucky.— Prater *v.* Com., 4 Ky. L. Rep. 370.

Louisiana.— State *v.* Harris, 50 La. Ann. 989, 23 So. 618.

Missouri.— State *v.* Barnett, 63 Mo. 300; State *v.* Connell, 49 Mo. 282.

Tennessee.— Riddick *v.* State, 99 Tenn. 655, 42 S. W. 926.

United States.— Nelson *v.* U. S., 30 Fed. 112.

See 15 Cent. Dig. tit. "Criminal Law," § 2805.

A statute passed after conviction, conferring an absolute right to a writ of error, does not by implication provide for a bill of exceptions to accompany the writ, where defendant had no right to a bill of exceptions when he was convicted. *In re* Claasen, 140 U. S. 200, 11 S. Ct. 735, 35 L. ed. 409.

It is not the purpose of a bill of exceptions to correct or modify the record, but to sup-

being apparent of record, need not be brought up by a bill of exceptions.[94] So no bill of exceptions need be settled or filed where under a statute questions arising on a trial, being deemed important by the judge, are certified to the appellate court for review.[95]

b. Form and Contents — (I) *Compliance With Statutory Requirements.* The form and contents of bills of exceptions are usually regulated and prescribed by statutes, a strict compliance with which is usually required.[96]

(II) *Contents* — (A) *In General.* The bill should state clearly and specifically the errors and rulings complained of,[97] and the grounds for the objections, although not necessarily the reasons for overruling the same.[98] Unnecessary matters inserted in the bill may be stricken out on motion.[99]

(B) *Incorporation of Evidence.* The evidence, so far as it relates to the point presented for review, should either be incorporated in the bill of exceptions,[1] or

plement it by supplying that which properly cannot be made a part of the record in the lower court. Prater *v.* Com., 4 Ky. L. Rep. 370; Hogan *v.* State, 36 Wis. 226.

94. Wiggins *v.* State, 23 Fla. 180, 1 So. 693.

Motion in arrest.— No bill is necessary to review the questions of law arising on a motion in arrest of judgment, based on a defect in the indictment. U. S. *v.* Haynes, 29 Fed. 691.

Motion to quash.— In some jurisdictions a bill has been held unnecessary to present an exception to the rulings of the trial court on a motion to quash an indictment (Hearn *v.* State, 43 Fla. 151, 29 So. 433; Raines *v.* State, 42 Fla. 141, 28 So. 57; State *v.* Judy, 60 Ind. 138; State *v.* Day, 52 Ind. 483), while in others the opposite is held (People *v.* Long, 121 Cal. 494, 53 Pac. 1097; Banks *v.* State, 114 Ga. 115, 39 S. E. 947; State *v.* White, 37 La. Ann. 172; State *v.* Hicks, 160 Mo. 468, 61 S. W. 193; State *v.* Wilhoit, 142 Mo. 619, 44 S. W. 718; State *v.* Fraker, 137 Mo. 258, 38 S. W. 909; State *v.* Thruston, 83 Mo. 271; State *v.* Russell, 69 Mo. App. 441).

95. Bonfanti *v.* State, 2 Minn. 123.

96. *Florida.*— Smith *v.* State, 20 Fla. 839.

Georgia.— Williams *v.* State, 88 Ga. 460, 14 S. E. 706; Baugh *v.* State, 85 Ga. 506, 11 S. E. 839.

Iowa.— State *v.* Fay, 43 Iowa 651.

Louisiana.— State *v.* Napoleon, 104 La. 164, 28 So. 972; State *v.* Salter, 48 La. Ann. 197, 19 So. 265. And see State *v.* Wilson, 109 La. 74, 33 So. 85.

Mississippi.— Helm *v.* State, 66 Miss. 537, 6 So. 322.

Texas.— Richardson *v.* State, (Cr. App. 1902) 70 S. W. 320.

Wisconsin.— State *v.* Clifford, 58 Wis. 113, 16 N. W. 25.

See 15 Cent. Dig. tit. "Criminal Law," § 2828.

Necessity for caption.— A bill of exceptions if duly signed may be sufficient, although without a formal caption. Dennis *v.* State, 103 Ind. 142, 2 N. E. 349.

97. *Arizona.*— Territory *v.* Miramontez, (1894) 36 Pac. 35.

California.— People *v.* Faulke, 96 Cal. 17, 30 Pac. 837; People *v.* Getty, 49 Cal. 581.

Indiana.— Hughes *v.* State, 65 Ind. 39.

Louisiana.— State *v.* Chopin, 10 La. Ann. 458; State *v.* Patten, 10 La. Ann. 299, 63 Am. Dec. 594.

Ohio.— Morgan *v.* State, 48 Ohio St. 371, 27 N. E. 710.

Texas.— Thom *v.* State, (Cr. App. 1893) 22 S. W. 877.

See 15 Cent. Dig. tit. "Criminal Law," § 2831; and Appeal and Error, 3 Cyc. 29.

A mere narrative by the trial judge of the proceedings, showing no ruling and no exceptions, is insufficient. Schlungger *v.* State, 113 Ind. 295, 15 N. E. 269.

Inferences will not be indulged in to supply omissions. McGlasson *v.* State, 38 Tex. Cr. 351, 43 S. W. 93; Gonzales *v.* State, 32 Tex. Cr. 611, 25 S. W. 781; Hooper *v.* State, 29 Tex. App. 614, 16 S. W. 655.

That exceptions were promptly taken and that appellant was actually injured must appear. Fife *v.* Com., 29 Pa. St. 429.

In Alabama the bill must contain "the point, charge, opinion, or decision, wherein the court is supposed to err, with such a statement of the facts as is necessary to make it intelligible." Strawbridge *v.* State, 48 Ala. 308.

98. State *v.* Drew, 32 La. Ann. 1043; People *v.* Judge Calhoun Cir. Ct., 28 Mich. 268; Sims *v.* State, 30 Tex. App. 605, 18 S. W. 410.

Both the court and the adverse party should be sufficiently apprised of the precise objection. State *v.* Blanchard, 108 La. 110, 32 So. 397; State *v.* Smith, 106 La. 735, 31 So. 132; Donnelly *v.* State, 26 N. J. L. 463; State *v.* Clements, 15 Oreg. 237, 14 Pac. 410.

99. Hartung *v.* People, 4 Park. Cr. (N. Y.) 319.

1. *Arkansas.*— Winkler *v.* State, 32 Ark. 539.

California.— People *v.* Terrill, 131 Cal. 112, 63 Pac. 141; People *v.* Keyser, 53 Cal. 183; People *v.* Getty, 49 Cal. 581.

Florida.— Browning *v.* State, 41 Fla. 271, 26 So. 639; Tuberson *v.* State, 26 Fla. 472, 7 So. 858.

Indiana.— State *v.* Hunt, 137 Ind. 537, 37 N. E. 409.

Louisiana.— State *v.* Fields, 51 La. Ann. 1239, 26 So. 99; State *v.* Brown, 4 La. Ann. 505.

referred to and by express terms made a part of it.[2] Merely appending a document to a bill of exceptions will not make it a part of the bill, unless it is expressly referred to and incorporated by a reference identifying the document.[3] In some jurisdictions it is sufficient by statute to identify a document, to mark in the place where it should be inserted the words "clerk here insert," or otherwise order it to be made a part of the bill, where it is not actually in it.[4]

(III) *Who Must Prepare.* The statutes usually provide that the appellant shall prepare the bill of exceptions.[5]

c. Settlement, Signing, and Filing — (I) *In General* — (A) *Notice of Presentation For Settlement.* The statutory requirements as to the time and character of notice of presentation of a bill of exceptions for settlement are mandatory,[6]

Texas.— Baldwin *v.* State, 39 Tex. Cr. 245, 45 S. W. 714; Bryant *v.* State, 35 Tex. Cr. 394, 33 S. W. 978, 36 S. W. 79; Higginbotham *v.* State, 3 Tex. App. 447.

See 15 Cent. Dig. tit. "Criminal Law," § 2832; and APPEAL AND ERROR, 3 Cyc. 26.

The bill should state what the party expected to prove by the evidence excluded (Tipper *v.* Com., 1 Metc. (Ky.) 6), should plainly show the materiality of such testimony (Counts *v.* State, 19 Tex. App. 450), that it was objected to promptly when offered (Thomas *v.* State, 17 Tex. App. 437), stating the objections very specifically (Bryant *v.* State, 18 Tex. App. 107), and that it was admitted over objections and went to the jury (Wilson *v.* State, 32 Tex. Cr. 22, 22 S. W. 39), and the conditions and circumstances under which the court admitted it (Maynard *v.* State, (Tex. Cr. App. 1897) 39 S. W. 667). The evidence should be set out sufficiently to enable the court to determine whether it is relevant or not. McElhannon *v.* State, 99 Ga. 672, 26 S. E. 501.

The bill must clearly show that it contains all evidence elicited on the point (Bender *v.* State, 26 Ind. 285; Mootry *v.* State, 35 Tex. Cr. 450, 33 S. W. 877, 34 S. W. 126), and if the evidence is contradictory the court may not be required to show what the evidence was, but may state that it was contradictory (Grayson *v.* Com., 6 Gratt. (Va.) 712). If the trial judge certifies that the bill is imperfect and does not show all the evidence the appeal may be dismissed. Wiggins *v.* State, 23 Fla. 180, 1 So. 693.

The judge's certificate, being the only writ of error provided for in Georgia, should state that the bill of exceptions "specifies all of the record material to a clear understanding of the errors complained of," and where this is not done the writ may be dismissed. Pendley *v.* State, 87 Ga. 186, 13 S. E. 443.

The laches of the appellant, where he knows that the stenographer is dangerously ill, in not procuring a transcript until he is prevented from doing so by the stenographer's death, which results in the entire absence of the testimony from the bill of exceptions, may cause the appeal to be dismissed and judgment to be affirmed. State *v.* Thompson, 130 Mo. 438, 32 S. W. 975.

2. Clark *v.* State, 125 Ind. 1, 24 N. E. 744; Ostler *v.* State, 3 Ind. App. 122, 29 N. E. 270; State *v.* Gibson, 52 Kan. 22, 34 Pac. 408.

Evidence outside of the bill will not be considered unless so expressly referred to as to identify it. People *v.* Taing, 53 Cal. 602.

3. *Alabama.*— Dannelley *v.* State, 130 Ala. 132, 30 So. 452.

California.— People *v.* Wallace, 94 Cal. 497, 29 Pac. 950.

Georgia.— Heard *v.* State, 114 Ga. 90, 39 S. E. 909.

Indiana.— Merrick *v.* State, 63 Ind. 327.

Louisiana.— State *v.* Evans, 104 La. 343, 29 So. 112; State *v.* Tally, 23 La. Ann. 677.

New Jersey.—State *v.* Ackerman, 62 N. J. L. 456, 41 Atl. 697.

Wisconsin.— Rooney *v.* State, 111 Wis. 125, 86 N. W. 547.

See 15 Cent. Dig. tit. "Criminal Law," § 2832.

The notes of the stenographer cannot be made a part of the bill of exceptions by stipulation, where the statute provides that it must be settled and signed by the judge. People *v.* Bradner, 44 Hun (N. Y.) 233.

4. State *v.* Laycock, 136 Mo. 93, 37 S. W. 802; State *v.* Dalton, 106 Mo. 463, 17 S. W. 700. *Compare* State *v.* Wear, 101 Mo. 414, 14 S. W. 115. And see APPEAL AND ERROR, 3 Cyc. 27.

Where this direction is required the clerk has no authority to insert the writing if it be omitted, and if he does insert it without authority it is no part of the record and will not be considered on appeal. Klepfer *v.* State, 121 Ind. 491, 23 N. E. 287; Endsley *v.* State, 76 Ind. 467; Bryan *v.* State, 4 Iowa 349; State *v.* Gordon, 117 Mo. 387, 22 S. W. 952.

5. It is not the duty of the trial judge to prepare them, although it is by statute usually his duty to sign the bill (Pendley *v.* State, 87 Ga. 186, 13 S. E. 443; Helm *v.* State, 66 Miss. 537, 6 So. 322), and in doing so he has a right and it is his duty to examine it to see that it states the facts correctly (State *v.* Cason, 28 La. Ann. 40).

If the bill does not state the facts truly and fairly the court may point out to the appellant the error and require him to correct it, or correct it himself before signing it. Davis *v.* State, 38 Md. 15; Seibright *v.* State, 2 W. Va. 591.

6. Page *v.* San Francisco, 122 Cal. 209, 54 Pac. 730 (construing Pen. Code, § 1171); People *v.* Hill, 78 Cal. 405, 20 Pac. 862; People *v.* Sprague, 53 Cal. 422; State *v.* Smith, 5 Ida. 291, 48 Pac. 1060; State *v.* Moffat,

and in some cases their non-observance is ground for a refusal by the judge to settle the bill.

(B) *Submission to Adverse Party.* Under the statutes or rules of court in some jurisdictions the proposed bill of exceptions should be submitted to the adverse party for examination or amendment.[7] The person on whom service is to be made seems to be a matter of local practice.[8]

(C) *Signature by Trial Judge*—(1) IN GENERAL. It is generally essential that a bill of exceptions be signed by the trial judge[9] and he cannot delegate his judicial power to do this.[10]

20 Mont. 371, 51 Pac. 823; State *v.* Gawith, 19 Mont. 48, 47 Pac. 207. And see APPEAL AND ERROR, 3 Cyc. 35.

A waiver of notice, when relied upon, should be in writing or entered of record (People *v.* Hill, 78 Cal. 405, 20 Pac. 862), although in some cases a waiver has been implied from conduct (People *v.* Gonzales, 136 Cal. 666, 69 Pac. 487; Van Eman *v.* San Francisco, 106 Cal. 643, 40 Pac. 14; State *v.* Larkins, 5 Ida. 200, 47 Pac. 945).

Effect of adjourning motion.—Where a notice of settlement is properly given, but the bill of exceptions is not settled on the day for which it was noticed, and the judge subsequently leaves the state for some time, a subsequent settlement and signature of the bill without new notice is sufficient, where there was no suggestion that it was incorrect and the bill was promptly filed. State *v.* Payne, 6 Wash. 563, 34 Pac. 317.

7. Crow *v.* State, 111 Ga. 645, 36 S. E. 858; State *v.* Dupuis, 3 Ida. 614, 65 Pac. 65; State *v.* Johnson, 107 La. 546, 32 So. 74. And see APPEAL AND ERROR, 2 Cyc. 34.

8. It has been held in one jurisdiction that service on the solicitor-general *pro tem.* (Moughon *v.* State, 54 Ga. 698; Hackey *v.* State, 15 Ga. 400) or on an assistant counsel of the state's attorney (Meeks *v.* State, 87 Ga. 331, 13 S. E. 556; Oliver *v.* State, 66 Ga. 243) is insufficient, and that the bill must be served on the solicitor-general of the supreme court (Cooper *v.* State, 103 Ga. 405, 30 S. E. 249; Hall *v.* State, 100 Ga. 311, 27 S. E. 179; Starke *v.* State, 93 Ga. 217, 19 S. E. 242; Brockett *v.* State, 90 Ga. 452, 16 S. E. 102; McColers *v.* State, 74 Ga. 411).

The ordinary rules as to proof of service of writs apply. Proof may be made by the affidavit of the party serving the bill (Cloud *v.* State, 50 Ga. 369), by the return of the sheriff or other officer (Cloud *v.* State, 50 Ga. 369), or by an acknowledgment of service, by counsel for respondent (State *v.* Bridges, 64 Ga. 146).

9. *Arizona.*—Territory *v.* Kay, (1889) 21 Pac. 152.

Arkansas.—Watkins *v.* State, 37 Ark. 370.

California.—People *v.* Armstrong, 44 Cal. 326; People *v.* Martin, 32 Cal. 91. But see People *v.* Almendares, 136 Cal. 660, 69 Pac. 492.

Illinois.—Steffy *v.* People, 130 Ill. 98, 22 N. E. 861; Fielden *v.* People, 128 Ill. 595, 21 N. E. 584; Tarble *v.* People, 111 Ill. 120; Kruse *v.* People, 84 Ill. App. 620; Duchardt *v.* People, 12 Ill. App. 299.

Indiana.—Williams *v.* State, 157 Ind. 94, 60 N. E. 942; Utterback *v.* State, 153 Ind. 545, 55 N. E. 420; Hannan *v.* State, 149 Ind. 81, 47 N. E. 628; Drake *v.* State, 145 Ind. 210, 41 N. E. 799, 44 N. E. 188; Guenther *v.* State, 141 Ind. 593, 41 N. E. 13; Stewart *v.* State, 113 Ind. 505, 16 N. E. 186; Galvin *v.* State, 56 Ind. 51.

Louisiana.—State *v.* Read, 52 La. Ann. 271, 26 So. 826; State *v.* Haines, 51 La. Ann. 731, 25 So. 372, 44 L. R. A. 837; State *v.* Harris, 39 La. Ann. 228, 1 So. 446; State *v.* Bob, 11 La. Ann. 192.

Missouri.—State *v.* Briscoe, 135 Mo. 660, 37 S. W. 828; State *v.* Jones, 58 Mo. 506; State *v.* Keatley, 21 Mo. App. 484.

Nevada.—State *v.* Huff, 11 Nev. 17; People *v.* Gleason, 1 Nev. 173.

New York.—Wood *v.* People, 1 Hun 381, 3 Thomps. & C. 506; Morse *v.* Evans, 6 How. Pr. 445; Birge *v.* People, 5 Park. Cr. 9.

North Carolina.—State *v.* Hart, 51 N. C. 389.

Ohio.—Goodin *v.* State, 16 Ohio St. 344.

Texas.—Nelson *v.* State, 43 Tex. Cr. 553, 67 S. W. 320; Wells *v.* State, 43 Tex. Cr. 451, 67 S. W. 1020; Gerstenkorn *v.* State, (Cr. App. 1902) 66 S. W. 568; Rushing *v.* State, 25 Tex. App. 607, 8 S. W. 807; Esher *v.* State, 13 Tex. App. 607.

West Virginia.—State *v.* Hughes, 22 W. Va. 743.

Wyoming.—Booth *v.* Territory, 3 Wyo. 159, 9 Pac. 936.

See 15 Cent. Dig. tit. "Criminal Law," §§ 2836, 2837; and APPEAL AND ERROR, 3 Cyc. 43.

No formal mode of signing is required in the absence of statute. Signature by initials is sufficient. Carter *v.* State, 22 Fla. 553.

Where the appellant escapes from jail after he has appealed, the trial judge may properly refuse to sign his bill of exceptions. State *v.* Logan, 125 Mo. 22, 28 S. W. 176; People *v.* Genet, 59 N. Y. 80, 17 Am. Rep. 315.

10. People *v.* Ferguson, 34 Cal. 309.

A judge who did not preside at the trial may sign the bill by the consent of the parties (Wood *v.* People, 59 N. Y. 117), or where the judge who tried the case died suddenly his successor may sign (Sims *v.* State, 4 Lea (Tenn.) 357). And in some cases by statute a party may apply to another judge. People *v.* Hodgdon, 55 Cal. 72, 36 Am. Rep. 30.

Where the record does not show any appointment or authority in another person than the trial judge to sign the bill of ex-

(2) Refusal to Sign — (a) Mandamus. The refusal of the judge to sign a bill of exceptions in a criminal case, if erroneous, cannot be corrected by an appeal;[11] the aggrieved party should in such case apply for a writ of mandamus where this is the legal remedy, and not attempt to bring the matter up by a bill of exceptions.[12] Whatever may be the motive of the appellant, it is the duty of the judge, if the bill of exceptions is in proper form, to attest it by his signature, and if he refuse to do so a mandamus will lie to compel him to perform that duty;[13] but this remedy will not be granted where it is shown that the complaining party has been negligent in the preparation and presentation of his bill.[14]

(b) Affidavits of Bystanders. By statutes in some cases where the judge refuses to sign or certify a bill or to incorporate certain matters therein, the contents of the bill or the matters which the appellant desires to include therein may be shown by the certificates or affidavits of bystanders,[15] which may in turn be controverted by the affidavits of others present who heard the evidence and the rulings, and if the latter evidence preponderates against the bill it will not be considered.[16]

(c) Petition to Prove Exceptions. Again in some jurisdictions by statute the appellant, on the refusal of the trial court to allow exceptions, may petition the appellate court for leave to prove the same.[17]

ceptions, or that some part of the trial took place before such person, any paper signed by him as a bill of exception will be disregarded. Danneburg *v.* State, 20 Ind. 181.

11. State *v.* Logan, 125 Mo. 22, 28 S. W. 176.

12. State *v.* Ford, 37 La. Ann. 443. But see State *v.* Calkins, 48 La. Ann. 1283, 20 So. 720.

13. Jackson *v.* Clark, 52 Ga. 53; State *v.* Judge Third Dist., 50 La. Ann. 1125, 24 So. 189; State *v.* Drew, 32 La. Ann. 1043; State *v.* Gunter, 30 La. Ann. 536; State *v.* Dickinson, 58 Nebr. 56, 78 N. W. 382; State *v.* Hawes, 43 Ohio St. 16, 1 N. E. 1. And see People *v.* Kahl, 18 Cal. 432; Smith *v.* State, 143 Ind. 685, 42 N. E. 913.

The judge's return that he did not sign the bill of exceptions because it did not truly state the facts, but that he did sign and settle one that did truly state the facts, is sufficient as a reply to a rule for contempt for failure to obey a mandamus. State *v.* Cunningham, 33 W. Va. 607, 11 S. E. 76.

14. McElvain *v.* Bradshaw, 30 Oreg. 569, 48 Pac. 424; State *v.* Brockwell, 16 Lea (Tenn.) 683.

A judge will not be ordered to sign a bill in which are statements that he alleges are untrue, when he is willing to sign a proper bill. State *v.* Judge Nineteenth Dist. Ct., 45 La. Ann. 1218, 14 So. 117.

The trial judge is not justified in refusing to sign a bill of exceptions, because it does not contain a complete transcript of all the testimony, or because he has other official business to attend to (State *v.* Heth, 60 Kan. 560, 57 Pac. 108), or because it was not approved by the state's attorney or certified by the official reporter, or because he did not remember the matter set forth in the bill, it being his duty to ascertain by inquiry the correctness of the bill (People *v.* Holdom, 193 Ill. 319, 61 N. E. 1014).

Where a judge does not remember whether exceptions are true or not, and his loss of recollection is due to the fact that the bill of exceptions is by agreement of counsel presented a long time after the statutory date for filing exceptions, he will not be compelled by mandamus to sign them. State *v.* St. Louis Cir. Ct. Judges, 41 Mo. 598.

15. *Arkansas.*— Vaughan *v.* State, 57 Ark. 1, 20 S. W. 588.

Kentucky.— Patterson *v.* Com., 86 Ky. 313, 5 S. W. 765, 9 Ky. L. Rep. 481.

Mississippi.— Rawls *v.* State, 8 Sm. & M. 599.

Missouri.— State *v.* Snyder, 98 Mo. 555, 12 S. W. 369; State *v.* De Mosse, 98 Mo. 340, 11 S. W. 731.

Texas.— Johnson *v.* State, 42 Tex. Cr. 298, 59 S. W. 898; Osborne *v.* State, (Cr. App. 1900) 56 S. W. 53; Johnson *v.* State, (Cr. App. 1899) 53 S. W. 105; Angley *v.* State, 35 Tex. Cr. 427, 34 S. W. 116.

See 15 Cent. Dig. tit. "Criminal Law," § 2840.

A provision that this may be done in civil cases is applied to criminal cases by a statute which provides that bills of exceptions in criminal cases shall be prepared, settled, and signed as in civil cases. Com. *v.* Hourigan, 89 Ky. 305, 12 S. W. 550, 11 Ky. L. Rep. 509. And see State *v.* Taylor, 103 Iowa 22, 72 N. W. 417.

16. State *v.* Hronek, 95 Mo. 79, 8 S. W. 227.

Where the affidavits for and against the bill are irreconcilable, the refusal of the trial judge to sign it will be sustained. State *v.* Jones, 102 Mo. 305, 14 S. W. 946, 15 S. W. 556.

17. Cal. Pen. Code, § 1174; Mass. St. (1851) c. 261, § 2.

The petition should set out specifically wherein the bill as settled was incorrect, and the facts to be proved. People *v.* Bitaucourt, 74 Cal. 188, 15 Pac. 744. And see People *v.* Pratt, 78 Cal. 345, 20 Pac. 731.

Notice of the application must be served on the court below and on the adverse party.

(D) *Modifications or Amendments.* The court has power in settling a bill of exceptions to amend or correct it so far as it is untrue or defective.[18] And this may be done even where the bill has been prepared and agreed to by the attorneys of both parties.[19] Where appellant files the bill as modified he is on appeal estopped from denying the correctness of the modification.[20] The court cannot, however, strike out a correct bill of exceptions because the prosecuting attorney objects thereto.[21]

(E) *Filing.* In many cases statutes, which are usually considered mandatory, provide that a bill of exceptions must be filed by the clerk,[22] and if not so filed they are no part of the record.[23]

(II) *Time For Settlement, Signing, and Filing* — (A) *In General.* Usually under the statutes of the several states it is provided that the bill must be signed and filed during the term of court at which the trial was had,[24] and a

People *v.* Bitancourt, 73 Cal. 1, 14 Pac. 372; Com. *v.* Wilson, 99 Mass. 427.

A commissioner will be appointed by the appellate court on the petition to take the depositions of witnesses produced by either party (Com. *v.* Marshall, 15 Gray (Mass.) 202), although exceptions alleged but not taken or differing materially from those proven will not be considered (Com. *v.* Cody, 165 Mass. 133, 42 N. E. 575).

18. *Florida.*— Bryan *v.* State, 41 Fla. 643, 26 So. 1022.

Georgia.— Mitchell *v.* State, 22 Ga. 211, 68 Am. Dec. 493.

Kentucky.— Blyew *v.* Com., 91 Ky. 200, 15 S. W. 356, 12 Ky. L. Rep. 742.

Louisiana.— State *v.* Logan, 104 La. 362, 29 So. 110.

Texas.— Grimsinger *v.* State, (Cr. App. 1901) 69 S. W. 583; Moseley *v.* State, 43 Tex. Cr. 559, 67 S. W. 414.

See 15 Cent. Dig. tit. "Criminal Law," § 2838; and APPEAL AND ERROR, 3 Cyc. 50.

The court may alter or strike out a bill of exceptions during the term on notice when necessary to show the truth. Cain *v.* State, 42 Tex. Cr. 210, 59 S. W. 275. Whether the judge may incorporate his corrections in the bill or make it a separate bill depends upon the local practice. Owens *v.* State, 43 Tex. Cr. 249, 63 S. W. 634; Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 358. And it has been held that where the appellant minutely recites the evidence, the court should make its own recital thereof, and not simply declare that the statements were only the accused's version of the testimony (State *v.* Robinson, 52 La. Ann. 616, 27 So. 124), nor should the court add to the bill of exceptions a statement that there was nothing to which any exception or objection could be taken, as this is a mere conclusion (State *v.* Robinson, 52 La. Ann. 616, 27 So. 124).

19. Beavers *v.* State, 58 Ind. 530.

20. Grimsinger *v.* State, (Tex. Cr. App. 1901) 69 S. W. 583.

The authentication of a bill by the judge does not establish the validity of the ground for the exception. It merely certifies its presentation and the disposition which the court has made of it; the bill itself must set out the facts relevant to the ground for the motion that the court may decide upon their legality. Hennessy *v.* State, 23 Tex. App. 340, 5 S. W. 215.

21. McWhorter *v.* State, 13 Tex. App. 523.

In Georgia affidavits and depositions *ex parte*, although taken on notice, are not admissible to amend a bill of exceptions set out in the record. Fonville *v.* State, 91 Ala. 39, 8 So. 688.

22. Merrill *v.* State, 156 Ind. 99, 59 N. E. 322; Harris *v.* State, 155 Ind. 265, 56 N. E. 916; Drake *v.* State, 145 Ind. 210, 41 N. E. 799, 44 N. E. 188; Rivers *v.* State, 144 Ind. 16, 42 N. E. 1021; Guenther *v.* State, 141 Ind. 593, 41 N. E. 13; Stewart *v.* State, 113 Ind. 505, 16 N. E. 186; Walbert *v.* State, 17 Ind. App. 350, 46 N. E. 827; State *v.* Jessie, 30 La. Ann. 1170; State *v.* Ah Mook, 12 Nev. 369; Haynes *v.* U. S., 9 N. M. 519, 56 Pac. 282.

The filing may be evidenced by the record or the file-mark of the clerk. State *v.* Rolley, 135 Mo. 677, 37 S. W. 827. But *compare* as to proof of filing Harris *v.* State, 155 Ind. 265, 56 N. E. 916.

23. Shannon *v.* People, 5 Mich. 36.

No journal entry.— A bill of exceptions properly filed and ordered to be made part of the record is not void because no journal entry is made thereon. State *v.* Fry, 40 Kan. 311, 19 Pac. 742. And see Craig *v.* State, 108 Ga. 776, 33 S. E. 653.

24. *Indiana.*— State *v.* Kirk, 157 Ind. 113, 60 N. E. 939; Utterback *v.* State, 153 Ind. 545, 55 N. E. 420; Robinson *v.* State, 152 Ind. 304, 53 N. E. 223; Stewart *v.* State, 24 Ind. 142; Nichols *v.* State, 28 Ind. App. 674, 63 N. E. 783.

Indian Territory.— Young *v.* U. S., 1 Indian Terr. 556, 45 S. W. 115.

Kansas.— State *v.* Smith, 38 Kan. 194, 16 Pac. 254; State *v.* Schoenewald, 26 Kan. 288; Emporia *v.* Haussler, 6 Kan. App. 747, 50 Pac. 979.

Missouri.— St. Louis *v.* Saitz, 160 Mo. 74, 60 S. W. 1062; State *v.* Williams, 147 Mo. 14, 47 S. W. 891; State *v.* Broderick, 70 Mo. 622; State *v.* Ware, 69 Mo. 332; State *v.* Duckworth, 68 Mo. 156.

New Mexico.— Territory *v.* Hall, (1902) 67 Pac. 732.

New York.— Wood *v.* People, 1 Hun 381, 3 Thomps. & C. 506; Birge *v.* People, 5 Park. Cr. 9.

bill of exceptions not signed[25] or filed[26] within the time allowed by statute will in many cases be struck out, although if the appellant has manifested an intention to conform to the statutory period he may not lose his right to an appeal because through circumstances beyond his control his bill is not settled and filed in time,[27] and the court may under exceptional circumstances, and where the appellant is not in fault, grant him a reasonable extension of time in which to prepare and to have signed a bill of exceptions.[28]

(B) *Extension of Time.* A bill of exceptions may be signed after the adjournment and in vacation, where the time is extended by an order of the court[29] or by the consent and agreement of counsel,[30] although in some juris-

Ohio.— Kerr *v.* State, 36 Ohio St. 614.

Tennessee.— Eason *v.* State, 6 Baxt. 431; Staggs *v.* State, 3 Humphr. 372.

Texas.— Galloway *v.* State, (Cr. App. 1902) 70 S. W. 211; Howard *v.* State, (Cr. App. 1902) 68 S. W. 274; Russell *v.* State, 35 Tex. Cr. 8, 29 S. W. 43; Campbell *v.* State, (Cr. App. 1894) 28 S. W. 808; Massey *v.* State, (App. 1892) 18 S. W. 299; Stewart *v.* State, 24 Tex. App. 418, 6 S. W. 317.

Wisconsin.— Oleson *v.* State, 19 Wis. 560.

See 15 Cent. Dig. tit. "Criminal Law," §§ 2846, 2847.

After motion for new trial.— A bill of exceptions or a statement may be settled by the judge after the motion for a new trial, provided all statutory requirements are complied with. People *v.* Howill, 56 Cal. 117; State *v.* Huff, 11 Nev. 17.

Settlement and signing nunc pro tunc.—Inasmuch as the bill of exceptions must appear to have been taken and signed at the trial, although in practice it is usually signed afterward, if it appears to have been signed afterward it must appear on its face as *nunc pro tunc.* U. S. *v.* Gilbert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19.

25. Beall *v.* State, 99 Ala. 234, 13 So. 783; Baits *v.* People, 26 Ill. App. 431; State *v.* Holmes, 36 N. J. L. 62.

26. *Arkansas.*— Crowell *v.* State, 34 Ark. 432.

Georgia.— Harris *v.* State, 117 Ga. 13, 43 S. E. 419; Evans *v.* State, 112 Ga. 763, 38 S. E. 78; Jones *v.* State, 100 Ga. 579, 28 S. E. 396; Broom *v.* State, 99 Ga. 197, 24 S. E. 846; Thomas *v.* State, 90 Ga. 437, 16 S. E. 94.

Indiana.— Pierce *v.* State, 75 Ind. 199; Hoch *v.* State, 20 Ind. App. 64, 50 N. E. 93.

Kentucky.— Tweedy *v.* Com., 2 Metc. 378.

Maryland.— Crouse *v.* State, 57 Md. 327.

Massachusetts.— Com. *v.* Greenlaw, 119 Mass. 208.

Missouri.— State *v.* Clark, 119 Mo. 426, 24 S. W. 1011; State *v.* Britt, 117 Mo. 584, 23 S. W. 771; State *v.* Seaton, 106 Mo. 198, 17 S. W. 169.

New Jersey.— Donnelly *v.* State, 26 N. J. L. 463.

Pennsylvania.— Haines *v.* Com., 99 Pa. St. 410.

Tennessee.— Muse *v.* State, 106 Tenn. 181, 61 S. W. 80.

Texas.— Culp *v.* State, (Cr. App. 1897) 40 S. W. 488.

West Virginia.— State *v.* McGlumphy, 37 W. Va. 805, 17 S. E. 315.

Wisconsin.— Miller *v.* State, 77 Wis. 271, 45 N. W. 1129.

See 15 Cent. Dig. tit. "Criminal Law," § 2847.

27. Colee *v.* State, 75 Ind. 511; Merrick *v.* State, 63 Ind. 327.

28. *California.*— People *v.* Martin, 6 Cal. 477.

Louisiana.— State *v.* Judge Third Dist., 50 La. Ann. 1125, 24 So. 189.

Michigan.— Crofoot *v.* People, 19 Mich. 254.

Nebraska.— Richards *v.* State, 22 Nebr. 145, 34 N. W. 346.

Nevada.— State *v.* Baker, 8 Nev. 141; State *v.* Salge, 1 Nev. 455.

See 15 Cent. Dig. tit. "Criminal Law," § 2850.

It is generally the court's duty on application to continue the term long enough to give parties a reasonable opportunity to prepare and present the bill. State *v.* Smith, 38 Kan. 194, 16 Pac. 254.

29. Davis *v.* People, 23 Colo. 495, 48 Pac. 513; People *v.* Hawes, 25 Ill. App. 326; State *v.* Ryan, 120 Mo. 88, 22 S. W. 486, 25 S. W. 351; State *v.* Hill, 98 Mo. 570, 12 S. W. 340; Bettis *v.* State, 103 Tenn. 339, 52 S. W. 1071.

A refusal to allow extra time to incorporate all the evidence in the bill is not error, where the accused during the time the motion for a new trial was pending had a reasonable time in which to do so, and it did not appear that he was prejudiced. State *v.* Parker, 106 Mo. 217, 17 S. W. 180.

Limits of extension.— Under a statutory enactment permitting the court to extend the time to reduce exceptions to writing or to file them the time cannot be extended to a subsequent term. Winter *v.* People, 10 Colo. App. 510, 51 Pac. 1006; Davidson *v.* State, 62 Ind. 276; Dunn *v.* State, 29 Ind. 259; Vandever *v.* Griffith, 2 Metc. (Ky.) 425; Tweedy *v.* Com., 2 Metc. (Ky.) 378; State *v.* Jacobs, 39 Mo. App. 122. And see Adkins *v.* Com., 102 Ky. 94, 42 S. W. 834, 44 S. W. 132, 19 Ky. L. Rep. 1300.

Reason for extension.— Where a bill is settled after the period required by statute, the reason of the court's action will not be inquired into, but will be presumed sufficient. People *v.* Raschke, 73 Cal. 378, 15 Pac. 13; People *v.* White, 34 Cal. 183; People *v.* Lee, 14 Cal. 510.

30. *Ex p.* Mayfield, 63 Ala. 203; Stephens *v.* State, 47 Ala. 696; State *v.* Rice, 7 Ida. 762, 66 Pac. 87 [*overruling* State *v.* Dupuis,

dictions it is held that the time cannot be extended by agreement of counsel.[31] The appellant should ask for an extension of time to file and settle his bill before the statutory period has expired.[32] Under the statutes of some jurisdictions such application should be made during the trial and not after judgment.[33]

(c) *Computation of Period.* The time for filing, when stated in days, is computed by including the first and excluding the last day.[34] An order allowing a month in which to file a bill will be construed as meaning a calendar month,[35] and if the last day of such month falls on a Sunday the bill may be filed the day following.[36]

4. Case Made and Statement of Facts — a. In General. In some jurisdictions alleged errors or irregularities not disclosed by the record are brought to the attention of the appellate court by a "case made" or statement of facts.[37] Errors in ruling on the admission or sufficiency of evidence or the granting or refusing of instructions may be brought up by this method.[38] A case made or statement of facts should contain enough of the proceedings to enable the appellate court to intelligently review the errors complained of.[39]

7 Ida. 614, 65 Pac. 65]; State *v.* Wyatt, 124 Mo. 537, 27 S. W. 1096 [*distinguishing* State *v.* Ryan, 120 Mo. 88, 22 S. W. 486, 25 S. W. 351]; State *v.* Hilterbrand, 116 Mo. 543, 22 S. W. 805; State *v.* Boogher, 7 Mo. App. 573; Rothbauer *v.* State, 22 Wis. 468.

A written stipulation extending the time should be filed. Brown *v.* State, 133 Ala. 152, 32 So. 256.

31. Bartley *v.* State, 111 Ind. 358, 12 N. E. 503; State *v.* Bohan, 19 Kan. 28; Territory *v.* O'Brien, 7 Mont. 38, 14 Pac. 631.

32. Bruce *v.* State, 141 Ind. 464, 40 N. E. 1069; Adkins *v.* Com., 102 Ky. 94, 42 S. W. 834, 44 S. W. 132, 19 Ky. L. Rep. 1300; State *v.* Schuchmann, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842; State *v.* Chain, 128 Mo. 361, 31 S. W. 20; State *v.* Mosley, 116 Mo. 545, 22 S. W. 804; State *v.* Apperson, 115 Mo. 470, 22 S. W. 375; State *v.* Scott, 113 Mo. 559, 20 S. W. 1076; State *v.* Harrison, 62 Mo. App. 112; State *v.* Sweeney, 54 Mo. App. 580; People *v.* Lungite, 31 Abb. N. Cas. (N. Y.) 419, 30 N. Y. Suppl. 272.

A written agreement extending the time, made after the statutory time has expired, will not be recognized. Brown *v.* State, 133 Ala. 152, 32 So. 256.

33. Hotsenpiller *v.* State, 144 Ind. 9, 43 N. E. 234; Guenther *v.* State, 141 Ind. 593, 41 N. E. 13; Hunter *v.* State, 102 Ind. 428, 1 N. E. 361.

The trial includes all steps taken from the time the case is submitted to the jury to the time judgment is rendered. Jenks *v.* State, 39 Ind. 1.

Where the statute gives the court the power to extend the time after the term, the order extending the time, made in vacation, must be made with the consent of the opposing party. State *v.* Mayor, 99 Mo. 602, 13 S. W. 88. See also State *v.* Jones, 124 Mo. 479, 27 S. W. 1102; State *v.* Jacobs, 39 Mo. App. 122.

34. State *v.* Flutcher, 166 Mo. 582, 66 S. W. 429; State *v.* Woolwine, 128 Mo. 347, 31 S. W. 20; State *v.* Simmons, 124 Mo. 443, 27 S. W. 1108; State *v.* Harris, 121 Mo. 445, 26 S. W. 558.

35. Bacon *v.* State, 22 Fla. 46.

36. Bacon *v.* State, 22 Fla. 46.

37. *California.*—People *v.* Maguire, 26 Cal. 635.

Montana.— Territory *v.* Young, 5 Mont. 242, 5 Pac. 248.

North Carolina.— State *v.* Byrd, 93 N. C. 624; State *v.* Crook, 91 N. C. 536; State *v.* Thompson, 83 N. C. 595.

Texas.—Stroggins *v.* State, 43 Tex. Cr. 605, 68 S. W. 170; Jamison *v.* State, (Cr. App. 1902) 70 S. W. 24; McFarland *v.* State, (Cr. App. 1902) 70 S. W. 21; Tollett *v.* State, (Cr. App. 1901) 60 S. W. 964; Sanches *v.* State, (Cr. App. 1900) 55 S. W. 44.

Washington.— State *v.* Tommy, 19 Wash. 270, 53 Pac. 157; State *v.* Brew, 4 Wash. 95, 29 Pac. 762, 31 Am. St. Rep. 904.

See 15 Cent. Dig. tit. "Criminal Law," § 2862.

38. State *v.* Moore, 49 S. C. 438, 27 S. E. 454; Chitwood *v.* State, (Tex. Cr. App. 1903) 71 S. W. 973; Ablowich *v.* State, (Tex. Cr. App. 1903) 71 S. W. 598; Kitchens *v.* State, (Tex. Cr. App. 1902) 70 S. W. 95; Morton *v.* State, (Tex. Cr. App. 1902) 70 S. W. 93; Henderson *v.* State, (Tex. Cr. App. 1902) 70 S. W. 88; Johnson *v.* State, (Tex. Cr. App. 1902) 70 S. W. 85; McFarland *v.* State, (Tex. Cr. App. 1902) 70 S. W. 21.

In Louisiana the jurisdiction of the appellate court being limited to "questions of law" no statement of fact is necessary or proper, and questions may be presented by bills of exceptions or assignments of error. State *v.* Tompkins, 32 La. Ann. 620; State *v.* Bogan, 2 La. Ann. 838; State *v.* Fant, 2 La. Ann. 837.

Agreed statements of facts used at the trial serve the same purpose as special verdicts. The facts as agreed are a part of the record in the trial court, and questions of law arising thereon will be reviewed. Keller *v.* State, 12 Md. 322, 71 Am. Dec. 596. See also Bramble *v.* State, 88 Md. 683, 42 Atl. 222.

39. Hyde *v.* Territory, 8 Okla. 59, 56 Pac. 848; State *v.* Jasper, 21 Wash. 707, 57 Pac. 796. The statement of facts need not contain the argument of counsel (Territory *v.*

b. Settlement and Signing. A statement of facts, to be considered on appeal, must ordinarily be agreed to and signed by counsel[40] and approved by the trial judge,[41] the settlement and approval by the judge being essential;[42] and a statement not signed by the respective attorneys will not be considered on appeal if the judge does not certify their disagreement and his consequent preparation thereof.[43] Where without the fault of defendant the trial judge refuses or neglects to act upon a statement of facts, by which defendant is deprived of an important right, a judgment of conviction will be reversed.[44] In some states by statute it is the duty of the trial judge to prepare the case on appeal.[45] Usually, however, the judge need not prepare a statement of facts unless counsel have failed to agree upon one,[46] and if owing to circumstances the trial judge is unable to prepare it, he may compel counsel to do so under penalty of contempt.[47] A notice required by statute to be given the adverse party of the settlement of a statement of facts is jurisdictional, and cannot be dispensed with unless it is waived.[48]

c. Service of Case and Counter Case. A defendant who appeals must serve on the public prosecutor a statement of the case for acceptance or rejection by him,[49] and the public prosecutor may serve a counter case.[50] Delay on his part in serving and filing a counter case beyond the time allowed therefor justifies a refusal of the judge to consider it.[51] Where the time to serve a counter case has been extended, a failure to serve it within the time stipulated entitles the appellant to have the case stated by him taken as true.[52]

d. Filing. A case made or statement of facts which does not appear to have been filed with the clerk of the trial court, as required by the statute, cannot be considered on appeal;[53] and it must have been filed within the time prescribed by law, which is usually during the term, unless by order the time to file it is extended after adjournment, or good reason is shown for the delay.[54] A failure

Bryson, 9 Mont. 32, 22 Pac. 147), nor exceptions to the exclusion of testimony (Blackwell *v.* State, 33 Tex. Cr. 278, 26 S. W. 397, 32 S. W. 128). A statement of facts made up entirely of questions and answers will be stricken out. Dunn *v.* State, (Tex. Cr. App. 1899) 51 S. W. 1121.

40. Opperman *v.* State, 35 Tex. 364; Moss *v.* State, (Tex. Cr. App. 1900) 56 S. W. 622; Anz *v.* State, (Tex. Cr. App. 1895) 31 S. W. 174; *Ex p.* Malone, 35 Tex. Cr. 297, 31 S. W. 665, 33 S. W. 360.

41. Peterson *v.* State, (Tex. Cr. App. 1902) 70 S. W. 977; *Ex p.* Arthur, (Tex. Cr. App. 1902) 70 S. W. 750; Guera *v.* State, (Tex. Cr. App. 1902) 67 S. W. 1018; Young *v.* State, (Tex. Cr. App. 1902) 66 S. W. 567; State *v.* Maines, 26 Wash. 160, 66 Pac. 431.

42. State *v.* Laborde, 48 La. Ann. 1491, 21 So. 87; State *v.* Warren, 18 Nev. 459, 5 Pac. 134; People *v.* Bradner, 44 Hun (N. Y.) 233; Napier *v.* State, (Tex. Cr. App. 1900) 57 S. W. 649; Bryant *v.* State, (Tex. Cr. App. 1899) 50 S. W. 950; Crane *v.* State, (Tex. Cr. App. 1897) 40 S. W. 300; Myers *v.* State, 9 Tex. App. 157.

43. Powell *v.* State, Tex. Cr. App. 1893) 24 S. W. 515; Hess *v.* State, 30 Tex. App. 477, 17 S. W. 1099 [*distinguishing* Williams *v.* State, 4 Tex. App. 178; Bowden *v.* State, 2 Tex. App. 56].

44. Sara *v.* State, 22 Tex. App. 639, 3 S. W. 339; Johnson *v.* State, 16 Tex. App. 372; Ruston *v.* State, 15 Tex. App. 336, 377; Trammell *v.* State, 1 Tex. App. 121. And see People *v.* Lee, 14 Cal. 510; People *v.* Woppner, 14 Cal. 437.

45. State *v.* Randall, 88 N. C. 611.

46. Carter *v.* State, 5 Tex. App. 458; Longley *v.* State, 3 Tex. App. 611.

47. Babb *v.* State, 8 Tex. App. 173.

48. Mooney *v.* State, 2 Wash. 487, 28 Pac. 363. *Compare* State *v.* Williams, 109 N. C. 846, 13 S. E. 880.

49. State *v.* Cameron, 121 N. C. 572, 28 S. E. 139.

50. State *v.* Price, 110 N. C. 599, 15 S. E. 116.

51. State *v.* Freeman, 127 N. C. 544, 37 S. E. 206.

52. State *v.* Price, 110 N. C. 599, 15 S. E. 116.

53. State *v.* Hackney, 35 S. C. 592, 14 S. E. 110; Breeland *v.* State, (Tex. Cr. App. 1899) 50 S. W. 722; Strickland *v.* State, (Tex. Cr. App. 1898) 47 S. W. 470; English *v.* State, (Tex. Cr. App. 1898) 45 S. W. 713; State *v.* Hinchey, 5 Wash. 326, 31 Pac. 870.

54. State *v.* Hackney, 35 S. C. 592, 14 S. E. 110; Hicklin *v.* State, 31 Tex. 492; Morton *v.* State, (Tex. Cr. App. 1902) 70 S. W. 93; Henderson *v.* State, (Tex. Cr. App. 1902) 70 S. W. 88; Johnson *v.* State, (Tex. Cr. App. 1902) 70 S. W. 85; State *v.* Landes, 26 Wash. 325, 67 Pac. 72; State *v.* Hinchey, 5 Wash. 326, 31 Pac. 870.

See 15 Cent. Dig. tit. "Criminal Law," §§ 2875, 2876.

The order extending the time must appear in the record. Turner *v.* State, (Tex. Cr.

to settle and file a statement of facts is not excused by the poverty of the appellant.[55] Where such statement has been filed out of time, it will not be considered unless it clearly appears that appellant used due diligence to prepare and file it in the time allowed,[56] and the burden is on him to prove such diligence.[57] Under the statutes of some jurisdictions a statement of facts may be considered on appeal, although not filed in time, when it is shown that appellant was diligent and that the failure was produced by causes beyond his control.[58] If the failure of the prosecuting attorney to agree to the appellant's statement or reject it promptly or the delay of the judge deprives defendant of his statement without fault on his part the judgment will be reversed.[59]

5. Abstract of Record, and Transcript or Return — a. Abstract of Record. In some jurisdictions it is made necessary, by virtue either of a statute or of a rule of court, to file an abstract of the record and brief of the evidence with the appeal, and a compliance with the statute or rule is generally essential.[60] The abstract should contain the notices of appeal served on the clerk and public prosecutor,[61] and those parts of the record which will fully present all objections raised in the trial court, and the parts of the record which it purports to contain must be complete.[62] It need not, however, show that a writ of error was issued, as the court will take judicial notice of its own record.[63]

b. Transcript. Under the statutes of some jurisdictions a transcript of the

App. 1895) 32 S. W. 700; Blackshire *v.* State, 33 Tex. Cr. 160, 25 S. W. 771.

A statement of facts authorized by order to be filed within ten days after adjournment cannot be considered if filed thereafter. Williams *v.* State, (Tex. Cr. App. 1895) 29 S. W. 1070; Perkins *v.* State, (Tex. App. 1890) 13 S. W. 790; Gerrold *v.* State, 13 Tex. App. 345.

55. State *v.* Picani, 5 Wash. 343, 31 Pac. 878.

56. State *v.* McFail, 36 S. C. 605, 606, 15 S. E. 511; Muse *v.* State, (Tex. Cr. App. 1897) 38 S. W. 607.

A statement filed too late, without reason or excuse for the delay, may be stricken out. Tollett *v.* State, (Tex. Cr. App. 1901) 60 S. W. 964.

Filing nunc pro tunc.— A statement of facts not presented in the prescribed time cannot be ordered to be filed *nunc pro tunc.* Carmona *v.* State, (Tex. Cr. App. 1901) 65 S. W. 928; Irby *v.* State, 34 Tex. Cr. 283, 30 S. W. 221; Lewis *v.* State, 34 Tex. Cr. 126, 29 S. W. 384, 774, 30 S. W. 231.

57. Denton *v.* State, (Tex. Cr. App. 1901) 60 S. W. 670; English *v.* State, (Tex. Cr. App. 1898) 46 S. W. 637; Crawford *v.* State, (Tex. Cr. App. 1898) 44 S. W. 1088; Record *v.* State, (Tex. Cr. App. 1897) 43 S. W. 114; Farris *v.* State, 26 Tex. App. 105, 9 S. W. 487; Turner *v.* State, 22 Tex. App. 42, 2 S. W. 619.

Due diligence is shown where it appears that the judge promised to approve and file the statement within the prescribed time but neglected to approve it. Jackson *v.* State, 93 Ga. 216, 18 S. E. 558; Wright *v.* State, (Tex. Cr. App. 1898) 44 S. W. 151.

58. Adler *v.* State, (Tex. Cr. App. 1899) 50 S. W. 358.

59. Davis *v.* State, 41 Tex. Cr. 223, 53 S. W. 638; Ham *v.* State, (Tex. Cr. App. 1897) 42 S. W. 295; Prieto *v.* State, 35 Tex. Cr. 69, 31 S. W. 665; Bryans *v.* State, 29 Tex. App. 247, 15 S. W. 288.

To hand the statement of facts to the county attorney, with a request that he sign it and hand it to the county clerk, and at the same time to neglect to find out if he would do so in time to present a proper statement to the judge for signature, is inexcusable negligence. Ranirez *v.* State, (Tex. Cr. App. 1897) 40 S. W. 278. See also Croomes *v.* State, 40 Tex. Cr. 672, 51 S. W. 924, 53 S. W. 882.

60. Roberts *v.* State, 92 Ga. 451, 17 S. E. 262; Porter *v.* State, 89 Ga. 422, 15 S. E. 495; Malott *v.* State, 26 Ind. 93; State *v.* Warner, 98 Iowa 337, 67 N. W. 250; State *v.* Day, 58 Iowa 678, 12 N. W. 733.

An abstract of the evidence on a former appeal cannot be considered on a second appeal from a conviction of the same offense, although the evidence introduced on both trials was identical. State *v.* Wolf, 118 Iowa 564, 92 N. W. 673.

61. Peters *v.* U. S., 2 Okla. 116, 33 Pac. 1031.

62. Peters *v.* U. S., 2 Okla. 116, 33 Pac. 1031. See also Dubois *v.* People, 26 Colo. 165, 57 Pac. 187. An abstract which merely contains a few questions and answers and a single instruction, but contains neither the evidence nor the instructions in the record, and does not show that any exception was preserved to any of them or to anything that occurred at the trial, is absolutely insufficient on an appeal. Hobbs *v.* People, 183 Ill. 336, 55 N. E. 692. But if an instruction appears to be erroneous as applied to the facts actually disclosed by the record, a reversal will not be refused because the abstract does not affirmatively show that it contains all the facts. State *v.* Miner, 107 Iowa 656, 78 N. W. 679.

63. State *v.* Evans, 12 S. D. 473, 81 N. W. 893.

record or of the judgment to be reviewed, properly certified, must be transmitted by the clerk of the trial court to the appellate court before the latter will review;[64] and it has been held that such requirement cannot be waived by stipulation.[65] The transcript should consist of a complete verbatim copy of the record of the court below.[66] Ordinarily, original papers should not be sent up on appeal, as certified copies are all that are usually required.[67] If ordered to be sent up with the transcript they should not be made a part of it, but should be forwarded with it properly identified.[68]

c. Authentication and Certification. What purports to be an abstract or transcript of the evidence or of the whole record in the case cannot be considered unless certified to by the clerk of the trial court as being true and correct,[69] and if it is not so certified it will be rejected and the appeal will be dismissed.[70] The certification should state that the document sent up is a full and correct transcript of the record of the cause,[71] and matter copied and certified by the clerk which is not of record may be disregarded.[72] The court to which the transcript

64. Jackson *v.* State, (Fla. 1902) 32 So. 936; State *v.* McGlasson, 86 Iowa 44, 52 N. W. 226; State *v.* Furney, 40 Kan. 17, 19 Pac. 361; Champion *v.* State, 6 Ohio Cir. Dec. 82, 9 Ohio Cir. Ct. 315.

65. Harris *v.* People, 148 Ill. 96, 35 N. E. 756; Moore *v.* People, 148 Ill. 48, 35 N. E. 755; State *v.* Robbins, 106 Iowa 688, 77 N. W. 463.

66. State *v.* Young, 106 La. 269, 30 So. 838; State *v.* Powers, 52 La. Ann. 1254, 27 So. 654; State *v.* Johnson, 37 La. Ann. 621; Russell *v.* State, 62 Nebr. 512, 87 N. W. 344; Matzaun *v.* State, 4 Ohio Dec. (Reprint) 394, 2 Clev. L. Rep. 98; *Ex p.* Patterson, (Tex. Cr. App. 1900) 56 S. W. 912; Crockett *v.* State, 14 Tex. App. 226.

The transcript should show the organization of the court, the impaneling of the grand jury, the return of the indictment, and the arraignment (State *v.* Harris, 150 Mo. 56, 51 S. W. 481); that a notice of appeal was given and entered of record (Scott *v.* State, (Tex. Cr. App. 1900) 56 S. W. 926); and that a bill of exceptions was preserved (Bergdahl *v.* People, 27 Colo. 302, 61 Pac. 228). The transcript should show that the shorthand notes of the evidence have been written out and should contain an abstract thereof, or questions depending upon it cannot be considered. State *v.* Owens, 109 Iowa 143, 80 N. W. 226. And see State *v.* Kuhuer, 77 Iowa 250, 42 N. W. 182.

A bill of exceptions properly certified by the clerk to contain true copies of the information, verdict, judgment, etc., may be treated as a transcript. State *v.* Nickerson, 30 Kan. 545, 2 Pac. 654.

A transcript in two sections, one of which was apparently a bill of exceptions, although not headed or authenticated, and the other merely a statement that a bill of exceptions had been filed, without referring to or identifying the first section as the bill, was refused consideration in State *v.* Weinegard, 168 Mo. 490, 68 S. W. 357.

67. Farris *v.* Com., 111 Ky. 236, 63 S. W. 615, 23 Ky. L. Rep. 580; Crilley *v.* State, 20 Wis. 231. And see Butler *v.* State, 22 Ala. 43.

68. State *v.* Morris, 43 Tex. 372.

A transcript sent up on writ of certiorari need not be affixed to the latter, although this is proper, if it is clearly apparent to the court that the transcript certified is the one required. State *v.* Carroll, 27 N. C. 139.

69. People *v.* McIntyre, 127 Cal. 423, 59 Pac. 779; Klein *v.* State, 157 Ind. 146, 60 N. E. 1036; State *v.* Tower, 96 Iowa 101, 64 N. W. 764; State *v.* Havercamp, 53 Iowa 737, 4 N. W. 837; State *v.* Gatliff, 44 Kan. 427, 24 Pac. 954; State *v.* Miner, (Kan. App. 1899) 58 Pac. 274.

Certification by deputy.— A statutory requirement that the clerk of the district court in which the appeal is allowed shall certify the transcript is complied with by a certification in the name of the clerk by his deputy. Territory *v.* Christman, 9 N. M. 582, 58 Pac. 343.

Clerk pro tem.— A record, signed by another person than the clerk, as clerk *pro tem.* need not state the statutory contingency for the appointment of such clerk, if it is properly attested by the clerk. Com. *v.* Clark, 16 Gray (Mass.) 88.

70. State *v.* Plum, 49 Kan. 679, 31 Pac. 308; State *v.* Fink, 49 Kan. 577, 31 Pac. 144; State *v.* McFarland, 38 Kan. 664, 17 Pac. 654; Ryan *v.* State, 60 N. J. L. 552, 38 Atl. 672; Acker *v.* State, 52 N. J. L. 259, 19 Atl. 258; Com. *v.* Church, 17 Pa. Super. Ct. 39; Ramsey *v.* State, (Tex. Cr. App. 1901) 65 S. W. 187; Malton *v.* State, 29 Tex. App. 527, 16 S. W. 423; Pearson *v.* State, 7 Tex. App. 279.

Forgery.— On appeal from a conviction of forgery the original paper alleged to have been forged cannot be considered to determine whether it varies from the paper alleged in the indictment, where it is not certified by the clerk or in any way identified. Kennedy *v.* State, 33 Tex. Cr. 183, 26 S. W. 78; Brewer *v.* State, 32 Tex. Cr. 74, 22 S. W. 41, 40 Am. St. Rep. 760.

71. State *v.* Burwell, 51 Kan. 403, 32 Pac. 1123. See also State *v.* Lund, 28 Kan. 280.

72. Dutchardt *v.* People, 12 Ill. App. 299; Vanderkarr *v.* State, 51 Ind. 91. And see State *v.* Hemrick, 62 Iowa 414, 17 N. W. 594.

is transmitted is the sole judge as to whether or not it is properly certified and verified.[73]

d. Transmission, Filing, and Printing — (I) *In General.* The transcript is filed by its delivery to the clerk, and his indorsement of the date is not essential.[74] Under some statutes the transcript cannot be filed except by leave of court;[75] and if filed at an improper place or time it may be regarded as an abandonment of the appeal.[76]

(II) *Time of Filing and Excuse For Delay.* The time after judgment within which a transcript of the record must be filed is usually fixed by statute, a compliance with which is necessary.[77] Where the duty of filing the transcript in proper time is a personal one devolving on the appellant, a delay is not excused by showing that the clerk was requested and had promised to file the same;[78] but where under the law it is the duty of the clerk to forward promptly the record on appeal, his neglect or inadvertence should not operate to the detriment of appellant.[79] Nor will a delay be fatal where the appellant has at all times been diligent in pursuing his appeal.[80] A stipulation or agreement by counsel for delay does not, however, justify a disregard of the statute.[81]

(III) *Printing.* The transcript or abstract of the record is often required to be printed at the cost of the appellant.[82] In some jurisdictions, however, this requirement may be waived, and an abstract in writing may be prepared and submitted.[83]

6. Defects, Objections, and Amendment or Correction — a. Conclusiveness of Recitals in Record. As a general rule recitals contained in the record import an absolute verity of what took place at the trial and must be taken as true.[84] Thus

73. State *v.* Lambert, 93 N. C. 618.

74. Powers *v.* State, 87 Ind. 144.

75. State *v.* Page, 12 Nebr. 355, 11 N. W. 459.

76. Com. *v.* F. S. Ashbrook Co., 43 S. W. 399, 19 Ky. L. Rep. 1337; State *v.* Barranger, 106 La. 352, 31 So. 13; State *v.* Jolivette, 43 La. Ann. 509, 9 So. 121; State *v.* Cohn, 38 La. Ann. 42; State *v.* Joseph, 38 La. Ann. 33. And see State *v.* Cox, 29 Ark. 115.

General statutes regulating the filing of transcripts on appeal have been by implication confined to civil cases. Territory *v.* Hicks, 6 N. M. 596, 30 Pac. 872; State *v.* Bovee, 11 Oreg. 57, 4 Pac. 520.

As to material errors in certification of transcript see State *v.* Weddington, 103 N. C. 364, 9 S. E. 577.

77. *Arkansas.*— Smith *v.* State, 48 Ark. 148, 2 S. W. 661.

California.— People *v.* Frink, (1887) 12 Pac. 616.

Georgia.— Pearson *v.* State, 93 Ga. 216, 18 S. E. 648; Winship *v.* State, 93 Ga. 215, 18 S. E. 649; Calhoun *v.* State, 91 Ga. 112, 16 S. E. 379; Calloway v. State, 91 Ga. 112, 16 S. E. 379; Roebuck *v.* State, 54 Ga. 699; Philo *v.* State, 54 Ga. 697.

Indiana.— Price *v.* State, 74 Ind. 553; McLaughlin *v.* State, 66 Ind. 103; Winsett *v.* State, 54 Ind. 437; Lichtenfels *v.* State, 53 Ind. 161; Hubertz *v.* State, 50 Ind. 374.

Iowa.— State *v.* Windahl, 95 Iowa 470, 64 N. W. 420.

Kansas.— State *v.* McEwen, 12 Kan. 37.

Kentucky.— Com. *v.* Howard, 81 Ky. 57; Com. *v.* Adams, 16 B. Mon. 338; Com. *v.* Cole, 9 Ky. L. Rep. 685; Metcalf *v.* Com., 8 Ky. L. Rep. 547, 1 S. W. 878; Prater *v.* Com., 4 Ky. L. Rep. 370.

Louisiana.— State *v.* Rutledge, 46 La. Ann. 548, 15 So. 397; State *v.* Joseph, 40 La. Ann. 5, 3 So. 405; State *v.* Cocoran, 38 La. Ann. 649; State *v.* Francis, 38 La. Ann. 464.

Maryland.— Clark *v.* State, 68 Md. 181, 11 Atl. 762.

Montana.— Territory *v.* Fallis, 2 Mont. 236. *Compare* Territory *v.* Flowers, 2 Mont. 392.

New Mexico.— Territory *v.* Archibeque, 9 N. M. 341, 54 Pac. 233.

Texas.— Moore *v.* State, 33 Tex. 603; Millican *v.* State, 26 Tex. 365; Hardt *v.* State, 13 Tex. App. 426; Perry *v.* State, 9 Tex. App. 371.

See 15 Cent. Dig. tit. "Criminal Law," § 2891.

78. State *v.* Caldwell, 21 Mo. App. 645.

When papers have been mislaid in the lower court, because of which the transcript cannot be filed in time, an order extending the time must be procured or the appellate court may not entertain the appeal. Stratton *v.* Com., 84 Ky. 190, 1 S. W. 83, 8 Ky. L. Rep. 77.

79. State *v.* Bevell, 47 La. Ann. 48, 16 So. 568.

80. State *v.* Wilson, 7 Wash. 502, 35 Pac. 377.

81. Siverberg *v.* State, 30 Ark. 39; Com. *v.* McCready, 2 Metc. (Ky.) 376.

82. People *v.* Bristol, 22 Mich. 299; People *v.* ——, 4 How. Pr. (N. Y.) 417.

83. State *v.* Earl, 66 Iowa 84, 23 N. W. 275.

Certificate of inability to print.— People *v.* ——, 4 How. Pr. (N. Y.) 417.

84. *Alabama.*— Gray *v.* State, 63 Ala. 66; State *v.* Greenwood, 5 Port. 474.

California.— People *v.* Rozelle, 78 Cal. 84, 20 Pac. 36.

the certificate to a bill of exceptions[85] or the certificate of the trial court as to the disposition of a case[86] will be accepted as true. On account of the conclusive character of the record it cannot be impeached by affidavits,[87] by the certificate of the clerk,[88] or by extrinsic evidence.[89] Nor can it be amended by agreement of counsel to show a fact which it did not originally show.[90]

b. Conflict Between Parts of Appeal Papers. In most states, if there be a contradiction between the recitals of fact in the bill of exceptions or in a case stated and those in the record, the latter will prevail.[91] In Texas, however, if the bill

Florida.— Bryan *v.* State, 41 Fla. 643, 26 So. 1022; Reynolds *v.* State, 34 Fla. 175, 16 So. 78; Cherry *v.* State, 6 Fla. 679.

Illinois.— Eastman *v.* People, 93 Ill. 112; Schirmer *v.* People, 33 Ill. 276.

Iowa.— State *v.* Seery, 95 Iowa 652, 64 N. W. 631.

Kentucky.— Cummins *v.* Com., 5 Ky. L. Rep. 200.

Louisiana.— State *v.* Moore, 52 La. Ann. 605, 26 So. 1001; State *v.* Prade, 50 La. Ann. 914, 24 So. 642; State *v.* Leftwich, 46 La. Ann. 1194, 15 So. 411; State *v.* Perkins, 45 La. Ann. 689, 12 So. 752; State *v.* Marcus, 44 La. Ann. 978, 11 So. 576.

Massachusetts.— Com. *v.* Thornton, 14 Gray 43.

Mississippi.— Vaughan *v.* State, 3 Sm. & M. 553.

Montana.— *In re* Thompson, 9 Mont. 381, 23 Pac. 933.

Nebraska.— Morgan *v.* State, 51 Nebr. 672, 71 N. W. 788.

North Carolina.—State *v.* Chaffin, 125 N. C. 660, 34 S. E. 516; State *v.* Debnam, 98 N. C. 712, 3 S. E. 742; State *v.* Cox, 28 N. C. 440; State *v.* Reid, 18 N. C. 377, 28 Am. Dec. 572.

Pennsylvania.— Taylor *v.* Com., 44 Pa. St. 131.

Tennessee.— Lynch *v.* State, 99 Tenn. 124, 41 S. W. 348; Lemons *v.* State, 97 Tenn. 560, 37 S. W. 552.

Texas.— Fields *v.* State, 43 Tex. 214; Villereal *v.* State, (Cr. App. 1901) 61 S. W. 715; Jones *v.* State, 33 Tex. Cr. 7, 23 S. W. 793; Crist *v.* State, 21 Tex. App. 361, 17 S. W. 260; Cross *v.* State, 11 Tex. App. 84; Kennedy *v.* State, 9 Tex. App. 399.

Virginia.—Anderson *v.* Com., 100 Va. 860, 42 S. E. 865.

Washington.— State *v.* Dunn, 22 Wash. 67, 60 Pac. 49.

West Virginia.—Younger *v.* State, 2 W. Va. 579, 98 Am. Dec. 791.

See 15 Cent. Dig. tit. "Criminal Law," § 2894; and APPEAL AND ERROR, 3 Cyc. 152.

Statements of trial judge conclusive.— State *v.* Hill, 39 La. Ann. 927, 3 So. 117; State *v.* Waggoner, 39 La. Ann. 919, 3 So. 119; State *v.* Broussard, 39 La. Ann. 671, 2 So. 422. *Compare* State *v.* Madison, 47 La. Ann. 30, 16 So. 566; State *v.* Nash, 45 La. Ann. 974, 13 So. 265; State *v.* Bowser, 42 La. Ann. 936, 8 So. 474; State *v.* Euzebe, 42 La. Ann. 727, 7 So. 784; State *v.* Callegari, 41 La. Ann. 578, 7 So. 130.

85. Woolf *v.* State, 104 Ga. 536, 30 S. E. 796; Jones *v.* State, 100 Ga. 579, 28 S. E. 396; Ryan *v.* State, 60 N. J. L. 33, 36 Atl. 706. See APPEAL AND ERROR, 3 Cyc. 152.

86. Brown *v.* State, 43 Tex. Cr. 272, 64 S. W. 1056.

87. *California.*— People *v.* Jordan, 66 Cal. 10, 4 Pac. 773, 56 Am. Rep. 73.

Colorado.— Van Houton *v.* People, 22 Colo. 53, 43 Pac. 137.

Illinois.— Hughes *v.* People, 116 Ill. 330, 6 N. E. 55.

Indiana.— Ferris *v.* State, 156 Ind. 224, 59 N. E. 475; Case *v.* State, 5 Ind. 1.

Michigan.— People *v.* Brennan, 79 Mich. 362, 44 N. W. 618.

Missouri.— State *v.* Blunt, 110 Mo. 322, 19 S. W. 650.

Washington.— State *v.* Holmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887.

See 15 Cent. Dig. tit. "Criminal Law," § 2896.

88. Watson *v.* Com., 85 Va. 867, 9 S. E. 418.

89. Gray *v.* State, 63 Ala. 66; People *v.* Smalling, 94 Cal. 112, 29 Pac. 421; State *v.* Callegari, 41 La. Ann. 578, 7 So. 130.

Under the Texas constitution, which gives the appellate court power to ascertain facts necessary to its jurisdiction, by affidavits or otherwise, the court is not confined to the record, which may be contradicted by a certificate of the judge or by other appropriate evidence outside the record. Vance *v.* State, 34 Tex. Cr. 395, 30 S. W. 792; Smith *v.* State, 4 Tex. App. 626.

90. Oder *v.* Com., 4 Ky. L. Rep. 18.

91. *Alabama.*— Stone *v.* State, 105 Ala. 60, 17 So. 114.

Colorado.— Christ *v.* People, 3 Colo. 394.

Georgia.— Roebuck *v.* State, 57 Ga. 154.

Illinois.— Parkinson *v.* People, (Sup. 1890) 24 N. E. 772.

North Carolina.— State *v.* Ramsour, 113 N. C. 642, 18 S. E. 707.

Texas.— Long *v.* State, 1 Tex. App. 709.

Vermont.— State *v.* Noakes, 70 Vt. 247, 40 Atl. 249.

But *compare* People *v.* Holmes, 118 Cal. 444, 50 Pac. 675; McNeely *v.* Com., 7 Ky. L. Rep. 227.

See 15 Cent. Dig. tit. "Criminal Law," § 2895.

If the record shows affirmatively that defendant did not plead, and the bill of exceptions states that he pleaded "not guilty," the former will control and the judgment will be reversed for want of a plea. Childs *v.* State, 97 Ala. 49, 12 So. 441.

A statement in a bill of exceptions will control a recital in the assignments of error (People *v.* Ferry, 84 Cal. 31, 24 Pac. 33), and so far as defendant is concerned his bill of exceptions, properly signed and used by him

of exceptions contradicts the statement of facts the former will control.[92] And where the decision of the court on a motion in a recital of fact flatly contradicts a prior docket entry of the same fact by the clerk, the former will prevail, as the decision of the court controls the record of the clerk.[93]

e. Defects and Errors — (I) *In General.* Immaterial defects in a record or transcript are not grounds for the dismissal of an appeal where it contains all that is necessary for decision as to the errors complained of.[94] If, however, the transcript is palpably insufficient and does not show that the appellant was free from laches the appeal may be dismissed.[95] The presumption will be indulged that the record as it comes from the court below is correct.[96] By joining in error defendant admits the completeness of the transcript[97] and that it was properly filed.[98]

(II) *Alterations.* Alterations in the record, when made, will not be considered on appeal,[99] unless there is evidence that they were properly made by the proper court or officer.[1]

(III) *Loss of Record.* Where by reason of a loss of the record the appellant is unable by no fault of his to perfect his appeal, he will be excused from producing the transcript and the judgment will be reversed.[2]

d. Amendment and Correction — (I) *In General.* Defects or errors in a transcript or return when not jurisdictional and when not arising through the fault or laches of the appellant are generally amendable.[3]

as a part of the record, cannot subsequently be impeached by him (Ratliff *v.* State, 122 Ala. 104, 26 So. 123; State *v.* Dorman, 9 S. D. 528, 70 N. W. 848).

As between the transcript of the record and the case on appeal, statements in the former prevail over the latter, where there is a discrepancy between them. State *v.* Truesdale, 125 N. C. 696, 34 S. E. 646.

92. Hardy *v.* State, 31 Tex. Cr. 289, 20 S. W. 561; Ezzell *v.* State, 29 Tex. App. 521, 16 S. W. 782; Briscoe *v.* State, 27 Tex. App. 193, 11 S. W. 113; Smith *v.* State, 4 Tex. App. 626; Harris *v.* State, 1 Tex. App. 74.

93. Ford *v.* State, 12 Md. 514.

94. *Massachusetts.*— Com. *v.* McGrath, 115 Mass. 150.

Mississippi.— McCarthy *v.* State, 56 Miss. 294.

Missouri.— State *v.* McNamara, 100 Mo. 100, 13 S. W. 938.

Nebraska.— Ballard *v.* State, 19 Nebr. 609, 28 N. W. 271.

North Carolina.— State *v.* Upton, 12 N. C. 268.

Ohio.— State *v.* Thompson, Wright 617.

See 15 Cent. Dig. tit. "Criminal Law," § 2897.

95. State *v.* May, 118 N. C. 1204, 24 S. E. 118; State *v.* Frizell, 111 N. C. 722, 16 S. E. 409. And see Robles *v.* State, 5 Tex. App. 346, where the judgment was reversed because the offense was charged to have been committed subsequent to the indictment, although the defect was clearly clerical.

96. State *v.* O'Bryan, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399. Thus it will be presumed that the charges were indorsed as required by statute (Allen *v.* State, 74 Ala. 557); that the instructions were in writing (People *v.* Wright, 45 Cal. 260; People *v.* Shuler, 28 Cal. 490; People *v.* Chung Lit, 17 Cal. 320); that the oral charge which appears in the transcript of record was taken down by the shorthand reporter (People *v.* Barton, 88 Cal. 176, 25 Pac. 1117; People *v.* Johnson, 88 Cal. 171, 25 Pac. 1116; People *v.* McGregar, 88 Cal. 140, 26 Pac. 97; People *v.* Wheatley, 88 Cal. 114, 26 Pac. 95; People *v.* Bourke, 66 Cal. 455, 6 Pac. 89); and that the judge signed the bill of exceptions when presented, and the clerk filed it when signed (Stewart *v.* State, 24 Ind. 142). But see State *v.* Brown, 12 Minn. 538, holding that the court will not assume the correctness of copies of the indictment, venire, jury lists, etc., which have not been certified by the court below.

97. Schirmer *v.* People, 40 Ill. 66, holding however, that he might move the court for leave to withdraw his joinder for the purpose of enabling him to suggest a diminution of the record, and to supply the deficiency by an additional transcript, under a subsequent motion.

98. State *v.* Walters, 64 Ind. 226; Mackey *v.* Com., 4 Ky. L. Rep. 179. See also Polin *v.* State, 14 Nebr. 540, 16 N. W. 898.

99. Reynolds *v.* State, 33 Fla. 301, 14 So. 723; Crocke *v.* State, 7 Baxt. (Tenn.) 89.

1. Scott *v.* People, 63 Ill. 508.

2. State *v.* McCarver, 113 Mo. 602, 20 S. W. 1058.

In Texas, however, by statute, if any portion of the record is lost after notice of appeal, it may be substituted in the lower court and the transcript sent up, and if the lower court is not in session, the appellate court shall postpone the appeal until the next term thereof. Boone *v.* State, (Tex. Cr. App. 1900) 59 S. W. 266. As to the earlier statute see Mottley *v.* State, 2 Tex. App. 191; Lunsford *v.* State, 1 Tex. App. 448, 28 Am. Rep. 414.

3. *Arkansas.*— Freel *v.* State, 21 Ark. 212.

California.— People *v.* Kahl, 18 Cal. 432.

(II) *Jurisdiction to Amend.* Defects and omissions in the record may be amended in all cases in the lower court before the record is filed in the appellate court.[4] As to the power of the lower court to amend after the transcript or papers have been filed in the appellate court, except so far as it may correct trivial errors, the decisions are conflicting. In a number of cases this power is affirmed,[5] while in others it is denied.[6] After the filing of the appeal or the issuance of a writ of error the appellate court cannot amend the record of the court below,[7] although it may compel the court below to furnish such a record as the statute requires.[8]

(III) *By Stipulation.* It has been held that counsel cannot by stipulation

Colorado.— Rowe *v.* People, 26 Colo. 542, 59 Pac. 57.

Louisiana.— State *v.* Wilson, 109 La. 74, 33 So. 85; State *v.* Tessier, 32 La. Ann. 1227; State *v.* Judge Sixth Judicial Dist., 31 La. Ann. 557; State *v.* Onnmacht, 10 La. Ann. 198.

Massachusetts.— Crimm *v.* Com., 119 Mass. 326.

Michigan.— The Milwaukie *v.* Hale, 1 Dougl. 306.

Minnesota.— State *v.* Laliyer, 4 Minn. 368.

Missouri.— State *v.* Rohertson, 71 Mo. 446.

New Jersey.— Lefferts *v.* State, 49 N. J. L. 26, 6 Atl. 521.

North Carolina.— State *v.* Underwood, 77 N. C. 502; State *v.* Upton, 12 N. C. 513.

Pennsylvania.— Brown *v.* Com., 78 Pa. St. 122.

Rhode Island.— State *v.* Littlefield, 3 R. I. 124.

Texas.— Burt *v.* State, 38 Tex. Cr. 397, 40 S. W. 1000, 43 S. W. 344.

Wisconsin.— State *v.* Parish, 43 Wis. 395; Lynch *v.* State, 15 Wis. 38.

See 15 Cent. Dig. tit. "Criminal Law," § 2903.

To show defendant's presence.— The record may be amended in a capital case to show defendant's presence during the trial and at sentence, while an appeal is pending. Com. *v.* Silcox, 161 Pa. St. 484, 29 Atl. 105.

Adding exception.— And another exception may be added to the bill of exceptions by an amendment. State *v.* Faile, 41 S. C. 551, 19 S. E. 690.

Where the bill is sent back for amendment by one of the parties, it is open to amendments proposed by either. State *v.* Clark, 67 Wis. 229, 30 N. W. 122.

The court may compel the appellant to present a correct record by a particular date, as such is his duty, even though the respondent does not object. If he fails to do so his appeal or writ of error may be dismissed. Rhodes *v.* People, 48 Ill. App. 24.

4. Choice *v.* State, 31 Ga. 424; State *v.* Riculfi, 35 La. Ann. 770; State *v.* Howard, 34 La. Ann. 369; State *v.* Roberts, 19 N. C. 540.

5. *California.*— People *v.* Murback, 64 Cal. 369, 30 Pac. 608; People *v.* Romero, 18 Cal. 89.

Colorado.— Williams *v.* People, 25 Colo. 251, 53 Pac. 509.

Louisiana.— State *v.* Smith, 31 La. Ann. 406; State *v.* Revells, 31 La. Ann. 387. And see State *v.* Joseph, 45 La. Ann. 903, 12 So. 934.

Nevada.— State *v.* Bouton, 26 Nev. 34, 62 Pac. 595.

New York.— People *v.* Wayne County Ct. Sess., 15 How. Pr. 385.

Pennsylvania.— Com. *v.* Van Horn, 4 Lack. Leg. N. 63.

Tennessee.— Low *v.* State, 108 Tenn. 127, 65 S. W. 401.

Texas.— Stephens *v.* State, 10 Tex. App. 120.

West Virginia.— Seibright *v.* State, 2 W. Va. 591.

See 15 Cent. Dig. tit. "Criminal Law," § 2904.

6. *Georgia.*— Minhinnett *v.* State, 106 Ga. 141, 32 S. E. 19; Jones *v.* State, 64 Ga. 697.

Illinois.— Devine *v.* People, 100 Ill. 290.

Indiana.— Saxon *v.* State, 116 Ind. 6, 18 N. E. 268.

Missouri.— State *v.* Winningham, 124 Mo. 423, 27 S. W. 1107.

Montana.— State *v.* Moffatt, 20 Mont. 371, 51 Pac. 823.

New Jersey.— Cruiser *v.* State, 18 N. J. L. 206.

Ohio.— Haberty *v.* State, 8 Ohio Cir. Ct. 262; State *v.* Flinn, 1 Ohio Dec. (Reprint) 551, 10 West. L. J. 363.

Oklahoma.— Le Roy *v.* Territory, 3 Okla. 596, 41 Pac. 612; Day *v.* Territory, 2 Okla. 409, 37 Pac. 806.

Texas.— Turner *v.* State, 16 Tex. App. 318; Gerard *v.* State, 10 Tex. App. 690. But see Stephens *v.* State, 10 Tex. App. 120.

See 15 Cent. Dig. tit. "Criminal Law," § 2904.

7. *Indiana.*— Cluck *v.* State, 40 Ind. 263.

Michigan.—People *v.* O'Brien, 68 Mich. 468, 36 N. W. 225.

Missouri.— State *v.* Russell, 88 Mo. 648.

Montana.— State *v.* Gibbs, 10 Mont. 212, 25 Pac. 289.

New Jersey.— Cruiser *v.* State, 18 N. J. L. 206.

But see People *v.* Bradner, 107 N. Y. 1, 13 N. E. 87.

See 15 Cent. Dig. tit. "Criminal Law," § 2904.

8. People *v.* Priori, 163 N. Y. 99, 57 N. E. 85; People *v.* Conroy, 151 N. Y. 543, 45 N. E. 946. An amendment of the record, when necessary, must be made by the trial court whence it came, and to which it may be returned for this purpose. *Ex p.* Spies, 123

insert in the record rulings on the trial which were not originally a part of it.[9] But in a capital case it has been held, where defendant only excepted to the charge "as given," that specific exceptions might be inserted *nunc pro tunc* on appeal by consent.[10]

(IV) *By Reference.* In some cases errors or omissions in some parts of the record as sent up may be amended by reference to correct statements of the same fact in other portions.[11] Thus it has been held that an omission in the record may be cured by the language of the bill of exceptions.[12] On the other hand it has been held that the record cannot be corrected by reference to an assignment of error, by the brief of counsel,[13] by reference to the record of a former appeal,[14] or by statements in the judge's charge.[15]

(V) *Time of Amendment.* Amendments must be applied for and made within a reasonable time to be determined by the circumstances of each particular case.[16] If a time for amendments and corrections is fixed by statute application beyond such time may be denied.[17] It has been held that where the record on a writ of error shows a defect, the court may withhold its decision in order to give the prosecutor an opportunity to have the record amended.[18]

e. Certiorari to Bring Up Record — (I) *Jurisdiction to Issue.* Upon the principle that all courts have the power to issue any writs necessary to the exercise of their rights and duties,[19] it is held that an appellate court is vested with complete authority to issue writs of certiorari or to make similar orders directing the return of a full and complete transcript when the one before it is defective.[20] And if one writ fails to bring up a complete record a second may be issued.[21]

U. S. 131, 8 S. Ct. 21, 22, 31 L. ed. 80. See also Appeal and Error, 3 Cyc. 141.

9. Falk *v.* U. S., 15 App. Cas. (D. C.) 446; Oder *v.* Com., 80 Ky. 32.

10. State *v.* Kinsauls, 126 N. C. 1095, 36 S. E. 31. See also Appeal and Error, 3 Cyc. 147.

11. State *v.* McLafferty, 47 Kan. 140, 27 Pac. 843; State *v.* Blunt, 110 Mo. 322, 19 S. W. 650 [*distinguishing* State *v.* Griffin, 98 Mo. 672, 12 S. W. 358]; Hyde *v.* Territory, 8 Okla. 59, 56 Pac. 848.

The minutes of the proceedings of the trial court, which the clerks are required by statute to keep, may be of service in confirming the record. Thus an amended return to a writ of error may be confirmed by a certified transcript of the entries in the clerk's minute-book. Peterson *v.* State, 45 Wis. 535.

12. Padfield *v.* People, 146 Ill. 660, 35 N. E. 469.

13. Helms *v.* U. S., 2 Indian Terr. 595, 52 S. W. 60.

14. Burton *v.* State, 115 Ala. 1, 22 So. 585.

15. Johnson *v.* State, (Tex. Cr. App. 1898) 44 S. W. 834.

16. Cory *v.* State, 55 Ga. 236. See Appeal and Error, 3 Cyc. 142.

In New York neither the clerk nor any other person or tribunal can, without notice to defendant, make any changes or amendments in the stenographer's minutes after they have been filed with the clerk. People *v.* Conroy, 151 N. Y. 543, 45 N. E. 946.

17. See Appeal and Error, 3 Cyc. 143.

Amendments usually should be made within the term (State *v.* Calhoon, 18 N. C. 374) and may not be allowed at a subsequent term unless the propriety of the amendment can be determined from the record itself (Dougherty *v.* People, 118 Ill. 160, 8 N. E. 673; Wallahan *v.* People, 40 Ill. 103. See also Fielden *v.* People, 128 Ill. 595, 21 N. E. 584).

18. Acker *v.* State, 52 N. J. L. 259, 19 Atl. 258; Hoffman *v.* State, 88 Wis. 166, 59 N. W. 588. *Compare* State *v.* Thompson, 95 Iowa 464, 64 N. W. 419.

19. State *v.* Collins, 14 N. C. 117.

20. *Florida.*— Rabon *v.* State, 7 Fla. 9.

Illinois.— Schirmer *v.* People, 40 Ill. 66.

Indiana.— Drake *v.* State, 145 Ind. 210, 41 N. E. 799, 44 N. E. 188; Hurt *v.* State, 26 Ind. 100.

Louisiana.— State *v.* Gates, 9 La. Ann. 94.

Massachusetts.— Webster *v.* Com., 5 Cush. 386.

Mississippi.— Shrader *v.* State, (1897) 21 So. 307.

North Carolina.— State *v.* Surles, 117 N. C. 720, 23 S. E. 324; State *v.* Gay, 94 N. C. 821; State *v.* Kennedy, 89 N. C. 589; State *v.* Randall, 87 N. C. 571; State *v.* Collins, 14 N. C. 117.

Tennessee.— Barnes *v.* State, 5 Yerg. 182.

Texas.— Shaffer *v.* State, (Cr. App. 1901) 65 S. W. 1072; Searcy *v.* State, 40 Tex. Cr. 460, 50 S. W. 699, 51 S. W. 1119, 53 S. W. 344; Dement *v.* State, 39 Tex. Cr. 271, 45 S. W. 917; Mitchell *v.* State, 1 Tex. App. 725.

West Virginia.—State *v.* Tingler, 32 W. Va. 546, 9 S. E. 935, 25 Am. St. Rep. 830.

See 15 Cent. Dig. tit. "Criminal Law," § 2912.

21. State *v.* Munroe, 30 N. C. 258.

Where it affirmatively appears that the appeal is without merit the writ will not issue. State *v.* Johnston, 93 N. C. 559; State *v.* McDowell, 93 N. C. 541.

(II) *Grounds of Issuance.* The applicant for a writ of certiorari must show affirmatively in what respect the record is deficient.[22] If the record below is correct, a writ of certiorari will not be granted merely to ascertain the reasons of the trial judge in excluding certain testimony not originally contained in the record,[23] or to bring up parts of the record which do not relate to the rulings under consideration.[24] Nor will the writ issue to the clerk of the appellate court to return a transcript to the clerk of the trial court that counsel may inspect it.[25]

(III) *Time of Application, Procedure, and Return.* A writ of certiorari should be applied for promptly. An application after submission of the case[26] or after argument in the appellate court[27] comes too late. The same is true, and with better reason, of an application after decision in the appellate court.[28] The writ of certiorari should be directed to the court below, and an order to return the record made on that court. This may be served on the clerk in vacation, and he may make the return immediately.[29] On the return of a writ of certiorari only the transcript and not the record itself need be sent up.[30] If the return is defective the transcript and other papers may be sent back that a proper return may be made.[31] A statement in the return of the reason that certain instructions were not inserted in the case made is conclusive.[32]

f. Remission of Record For Correction. If on the return to a writ of certiorari or by any other means, it is discovered that amendable defects or errors exist in the record on appeal, it is proper to send the record back to the trial court for the purpose of having the same amended.[33]

7. Questions Presented For Review — a. In General. The record furnished the appellate court must be so complete as to show intelligibly the question which is to be reviewed. If such is not the case the appeal will be dismissed or the judgment affirmed, according to the practice.[34] Thus where the record contains

After plea of guilty.— If the trial judge fails to comply with the statute requiring him to investigate the circumstances of a plea of guilty, to ascertain if it was voluntary, a writ of certiorari lies in aid of the writ of error to obtain from him a complete return. Henning *v.* People, 40 Mich. 733.

22. Yawn *v.* State, 37 Tex. Cr. 205, 38 S. W. 785, 39 S. W. 105. See Appeal and Error, 3 Cyc. 150.

23. State *v.* Smith, 106 La. 33, 30 So. 248.

24. State *v.* Shelton, 3 Stew. (Ala.) 343.

If a defendant joining in an appeal takes no exceptions and asslgns no errors his application for a writ of certiorari to bring up the record may be refused as useless. State *v.* Chastain, 104 N. C. 900, 10 S. E. 519.

25. Nunn *v.* State, 40 Tex. Cr. 435, 50 S. W. 713.

26. State *v.* Foreman, 45 La. Ann. 1047, 13 So. 797.

27. State *v.* Blackburn, 80 N. C. 474.

28. Drake *v.* State, 145 Ind. 210, 41 N. E. 799, 44 N. E. 188.

29. Lambert *v.* People, 7 Cow. (N. Y.) 103.

30. *In re* Nicholls, 5 N. J. L. 539.

31. State *v.* Gibbons, 4 N. J. L. 40. And see Manke *v.* People, 74 N. Y. 415.

The clerk should certify under his hand and seal of office that he has sent the annexed record (State *v.* Martin, 24 N. C. 101), and if his certificate is defective the appeal will not be dismissed, but he will he required to send up another transcript duly authenticated (Lockwood *v.* State, 1 Tex. App. 749).

32. State *v.* Sloan, 97 N. C. 499, 2 S. E. 666. See also People *v.* Brown, 54 Mich. 15, 19 N. W. 571.

33. State *v.* Gibbs, 10 Mont. 212, 25 Pac. 289; West *v.* State, 22 N. J. L. 212; State *v.* Jones, 9 N. J. L. 2; State *v.* King, 119 N. C. 910, 26 S. E. 261; State *v.* Farrar, 103 N. C. 411, 9 S. E. 449, 104 N. C. 702, 10 S. E. 159; Bird *v.* State, 103 Tenn. 343, 52 S. W. 1076. Thus where the record consisted of loose and disconnected papers not amounting to a history of the case it was sent back to be perfected. State *v.* Jones, 82 N. C. 691.

34. *Arkansas.*— Scott *v.* State, 26 Ark. 521.

California.— People *v.* Terrill, 131 Cal. 112, 63 Pac. 141; People *v.* Gillis, 97 Cal. 542, 32 Pac. 586.

Florida.— McCune *v.* State, 42 Fla. 192, 27 So. 867, 89 Am. St. Rep. 225.

Georgia.— Keith *v.* State, 27 Ga. 483.

Illinois.— Hall *v.* People, 197 Ill. 567, 64 N. E. 543; Strohm *v.* People, 160 Ill. 582, 43 N. E. 822.

Indiana.— Brown *v.* State, 140 Ind. 374, 39 N. E. 701; State *v.* Thomas, 29 Ind. 109.

Iowa.— State *v.* Benge, 61 Iowa 658, 17 N. W. 100.

Kansas.— State *v.* Ricker, 40 Kan. 14, 19 Pac. 357.

Kentucky.— Mitchell *v.* Com., 78 Ky. 204, 39 Am. Rep. 227; Withers *v.* Com., 36 S. W. 14, 18 Ky. L. Rep. 285; Moore *v.* Com., (1890) 14 S. W. 278.

Louisiana.— State *v.* Procella, 105 La. 518, 29 So. 967; State *v.* Posey, 105 La. 350, 29

neither a bill of exceptions nor assignment of errors the case cannot be reviewed.[35] A bill of exceptions to be reviewable should specifically state that the exceptions therein were taken at the trial,[36] and should point out the errors complained of. A general statement that defendant excepted to the whole charge,[37] or the expression, "Defendant's exceptions noted,"[38] is generally insufficient. But an exception to each and every one of certain instructions given is sufficient.[39] An assignment of error based on the overruling of a motion for a separate trial of joint defendants will not be considered where the motion and affidavits in support thereof are not in the record;[40] nor will the refusal of a severance be reviewed where there is nothing in the record to show that the accused was injured thereby.[41]

b. Indictment and Plea. Defendant cannot have the sufficiency of the indictment,[42] or of an affidavit and information,[43] or the sufficiency or correctness of a plea[44] reviewed on appeal unless they are made to appear in the record. And an objection that there is a variance between the indictment and the copy served on defendant will not be reviewed where the copy served is not made a part of the record.[45] So also an objection that a motion to quash was improperly overruled will not be considered where the record does not show that the affidavits read were all the proofs heard or that any exception was taken to the court's ruling,[46] or where the record does not show other matters necessary to enable the appellate court to pass on the propriety of the ruling.[47] The same principle applies to

So. 897; State *v.* Tiernan, 40 La. Ann. 525, 4 So. 477; State *v.* Paul, 39 La. Ann. 795, 2 So. 496.

Minnesota.— State *v.* Framness, 43 Minn. 490, 45 N. W. 1098.

Mississippi.— *Ex p.* Phillips, 57 Miss. 357.

Missouri.— State *v.* Janson, 80 Mo. 97; State *v.* Pints, 64 Mo. 317; Campbell *v.* State, 9 Mo. 355; Nicholas *v.* State, 6 Mo. 6.

Nebraska.— Vincent *v.* State, 37 Nebr. 672, 56 N. W. 320.

Nevada.— Libby *v.* Dalton, 9 Nev. 23.

New York.— People *v.* Valentine, 1 Johns. Cas. 336.

North Carolina.—State *v.* Blankenship, 117 N. C. 808, 23 S. E. 455; State *v.* Wilson, 61 N. C. 237.

Ohio.— Brown *v.* State, 2 Ohio Cir. Ct. 129.

Pennsylvania.— Vanpool *v.* Com., 13 Pa. St. 391; Sampson *v.* Com., 5 Watts & S. 385.

Tennessee.— Wickham *v.* State, 7 Coldw. 525.

Texas.— Shutt *v.* State, (Cr. App. 1902) 71 S. W. 18; Thompson *v.* State, 29 Tex. App. 208, 15 S. W. 206; Wilson *v.* State, 6 Tex. App. 427.

Utah.— People *v.* March, 11 Utah 432, 40 Pac. 708; People *v.* Farrell, 11 Utah 414, 40 Pac. 703; People *v.* Chalmers, 5 Utah 274, 15 Pac. 2; People *v.* Callaghan, 4 Utah 49, 6 Pac. 49.

Washington.— State *v.* Weydeman, 3 Wash. 399, 28 Pac. 749.

Wisconsin.— Davies *v.* State, 72 Wis. 54, 38 N. W. 722; Kneifle *v.* State, 13 Wis. 369.

See 15 Cent. Dig. tit. "Criminal Law," § 2918.

35. State *v.* Scott, 12 La. Ann. 386; State *v.* Adams, 8 Rob. (La.) 571; State *v.* Major, 8 Rob. (La.) 553; State *v.* Orrell, 44 N. C. 217; State *v.* McGinnis, 17 Oreg. 332, 20 Pac. 632.

36. Howard *v.* State, 73 Ind. 528.

The bill ought to show that the point saved was material (Com. *v.* Carey, 108 Mass. 484) and set forth the facts relevant to the ruling excepted to (Hennessy *v.* State, 23 Tex. App. 340, 5 S. W. 215).

37. State *v.* Nipper, 95 N. C. 653.

38. Walker *v.* State, 39 Ark. 221.

39. Alston *v.* State, 109 Ala. 51, 20 So. 81.

40. Holt *v.* People, 23 Colo. 1, 45 Pac. 374.

41. State *v.* Ducoté, 43 La. Ann. 185, 8 So. 439.

42. Johnson *v.* People, 197 Ill. 48, 64 N. E. 286; State *v.* Burks, 132 Mo. 363, 34 S. W. 48.

43. Shoffner *v.* State, 93 Ind. 519; Wright *v.* State, 45 Nebr. 44, 63 N. W. 147.

44. Garrett *v.* State, 97 Ala. 18, 14 So. 327; Moore *v.* State, 51 Ark. 130, 10 S. W. 22; Davis *v.* State, 58 Ga. 170; Campbell *v.* State, (Tex. Cr. App. 1894) 28 S. W. 808.

45. Fay *v.* State, (Tex. Cr. App. 1902) 70 S. W. 744; St. Clair *v.* State, (Tex. Cr. App. 1901) 64 S. W. 238.

46. Keedy *v.* People, 84 Ill. 569.

47. A refusal to quash the indictment cannot be reviewed unless the abstract contains the evidence (State *v.* Butterfield, 73 Iowa 86, 34 N. W. 750), or at least such a statement of it as will enable the appellate court to pass upon the propriety of the ruling (State *v.* Frost, 95 Iowa 448, 64 N. W. 401); and a motion to quash on the ground of a material change in the indictment will not be considered where the bill of exceptions fails to show what the change is (State *v.* Pollard, 14 Mo. App. 583). Where the evidence introduced on a refusal to quash an indictment for the reason that it was found without evidence does not appear in the record, the court below will be presumed to have

a refusal to grant a motion to compel the state to elect between counts or offenses.[48]

e. Change of Venue and Continuances. The action of the trial judge on an application for a change of venue will not be reviewed unless the application and the affidavits in support thereof,[49] and the evidence, if any, heard on the application, appear in the record.[50] Nor will the action of the court on an application for a continuance be reviewed where the record does not contain the application and affidavits,[51] and the other evidence, if any was received.[52]

d. Selection, Summoning, and Impaneling of Jury. Errors in the selection, summoning, and impaneling of the jury will not be reviewed unless the evidence and proceedings substantially appear in the record.[53] Thus a ruling on a motion to quash the venire will not be reviewed where the evidence on which the motion was based does not appear.[54] Nor will questions as to a juror's competency be reviewed where the record does not show that he served as such and that defendant had exhausted his challenges before he was accepted.[55] So also the record

ruled correctly, and the matter will not be reviewed. State *v.* Cole, 145 Mo. 672, 47 S. W. 895.

48. The refusal to grant a motion to compel the state to elect between counts will not be reviewed where the bill does not set forth the grounds of the motion or those of the trial court denying it. State *v.* Bassenger, 39 La. Ann. 918, 3 So. 55. See also State *v.* Rigall, 169 Mo. 659, 70 S. W. 150. And the refusal to require the prosecution to elect between several conspiracies disclosed by the evidence will not be reviewed unless the record contains all the evidence, in order that it may be apparent upon what grounds the trial court denied the motion. Barrett *v.* U. S., 169 U. S. 218, 18 S. Ct. 327, 42 L. ed. 723.

49. Edwards *v.* State, 49 Ala. 334; State *v.* Ball, 67 Iowa 517, 25 N. W. 757; Hamilton *v.* State, 40 Tex. Cr. 464, 51 S. W. 217; Lacy *v.* State, 30 Tex. App. 119. 16 S. W. 761; Harrison *v.* State, 3 Tex. App. 558; Barnes *v.* Com., 92 Va. 794, 23 S. E. 784.

50. *Alabama.*— Hawk *v.* State, 84 Ala. 6, 4 So. 283.

Colorado.— Van Houton *v.* People, 22 Colo. 53, 43 Pac. 137.

Iowa.— State *v.* Leis, 11 Iowa 416.

Louisiana.— State *v.* Ford, 37 La. Ann. 443; State *v.* Daniel, 31 La. Ann. 91.

Texas.— Wynne *v.* State, 41 Tex. Cr. 504, 55 S. W. 837; Wright *v.* State, 40 Tex. Cr. 447, 50 S. W. 940; Miller *v.* State, 31 Tex. Cr. 609, 21 S. W. 925, 37 Am. St. Rep. 836; Smith *v.* State, 31 Tex. Cr. 14, 19 S. W. 252.

See 15 Cent. Dig. tit. "Criminal Law," § 2925.

The record must show the reasons which were alleged for asking a change of venue. Taylor *v.* State, 48 Ala. 180.

51. *California.*— People *v.* Douglass, 100 Cal. 1, 34 Pac. 490.

Florida.— Waldron *v.* State, 41 Fla. 265, 26 So. 701.

Indiana.— Colee *v.* State, 75 Ind. 511; Ostler *v.* State, 3 Ind. App. 122, 29 N. E. 270.

Kentucky.— Glass *v.* Com., 26 S. W. 811, 16 Ky. L. Rep. 108; Turner *v.* Com., 3 Ky. L. Rep. 794.

Louisiana.— State *v.* Charlot, 8 Rob. 529.

Missouri.— State *v.* Gatlin, 170 Mo. 354, 70 S. W. 885; State *v.* Hancock, 148 Mo. 488, 50 S. W. 112; State *v.* Jones, 134 Mo. 254, 35 S. W. 607.

Texas.— Mays *v.* State, (Cr. App. 1902) 67 S. W. 109; Toler *v.* State, 41 Tex. Cr. 659, 56 S. W. 917; Harris *v.* State, (Cr. App. 1900) 56 S. W. 622; Swift *v.* State, 8 Tex. App. 614.

See 15 Cent. Dig. tit. "Criminal Law," § 2926.

52. Glass *v.* Com., 26 S. W. 811, 16 Ky. L. Rep. 108; McDaniel *v.* State, 8 Sm. & M. (Miss.) 401, 47 Am. Dec. 93; State *v.* Huting, 21 Mo. 464; Flowers *v.* State, (Tex. Cr. App. 1899) 51 S. W. 216; Gamble *v.* State, (Tex. Cr. App. 1899) 50 S. W. 458; Green *v.* State, (Tex. Cr. App. 1898) 43 S. W. 1003; Holland *v.* State, 31 Tex. Cr. 345, 20 S. W. 750.

The record should show whether the application was for a first or subsequent continuance. Washington *v.* State, 35 Tex. Cr. 154, 32 S. W. 693; Attaway *v.* State, 31 Tex. Cr. 475, 20 S. W. 925.

53. *Kansas.*— State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318.

Maryland.— Busey *v.* State, 85 Md. 115, 36 Atl. 257.

Missouri.— State *v.* Sanders, 106 Mo. 188, 17 S. W. 223; State *v.* Wilson, 85 Mo. 134.

Nevada.— State *v.* Roderigas, 7 Nev. 328.

Ohio.— Cooper *v.* State, 16 Ohio St. 328.

South Carolina.— State *v.* Stephens, 11 S. C. 319.

See 15 Cent. Dig. tit. "Criminal Law," § 2927.

An objection that the jury was not properly sworn cannot be considered unless the bill of exceptions shows the form of oath actually administered. Bartlett *v.* State, 28 Ohio St. 669.

54. Sewell *v.* State, 99 Ala. 183, 13 So. 555; State *v.* Corcoran, 7 Ida. 220, 61 Pac. 1034; State *v.* Richard, 42 La. Ann. 83, 6 So. 897; Trim *v.* State, (Miss. 1903) 33 So. 718.

55. State *v.* Wright, 112 Iowa 436, 84 N. W. 541; State *v.* Brownlee, 84 Iowa 473, 51 N. W. 25; Territory *v.* Campbell, 9 Mont. 16, 22 Pac. 121; Anderson *v.* Territory, 4

should show the grounds of objection or challenge[56] and the reasons for the ruling thereon.[57]

e. Conduct of Trial in General. Alleged errors in the conduct of the trial will not be reviewed unless the facts connected therewith so appear in the record that the court can see that defendant has been prejudiced.[58] The rule applies to the action of the court in discharging the jury because of their disagreement,[59] to the objection that defendant was absent from the court during the trial,[60] to improper argument or remarks of counsel,[61] and to various other objections.[62]

f. Questions in Relation to Evidence — (i) *In General.* Generally questions which depend upon the evidence are not reviewable, where the evidence is not set out in the record.[63] Where no evidence appears of record, the appellate court

N. M. 108, 13 Pac. 21; Jones *v.* State, 37 Tex. Cr. 433, 35 S. W. 975; Segars *v.* State, 35 Tex. Cr. 45, 31 S. W. 370; Kramer *v.* State, 34 Tex. Cr. 84, 29 S. W. 157; Henning *v.* State, 24 Tex. App. 315, 6 S. W. 137.

56. *Illinois.*—Wilson *v.* People, 94 Ill. 299.

Nevada.— State *v.* Squaires, 2 Nev. 226.

New Mexico.—Territory *v.* Murray, 6 N. M. 454, 30 Pac. 872; Territory *v.* Davis, 6 N. M. 452, 30 Pac. 871.

North Carolina.— State *v.* Dove, 32 N. C. 469.

Texas.—Aistrop *v.* State, 31 Tex. Cr. 467, 20 S. W. 989.

Wisconsin.— Shoeffler *v.* State, 3 Wis. 823.

See 15 Cent. Dig. tit. "Criminal Law," § 2927.

57. Bias *v.* U. S., 3 Indian Terr. 27, 53 S. W. 471; State *v.* Watt, 47 La. Ann. 630, 17 So. 164.

58. Oakley *v.* State, 135 Ala. 15, 33 So. 23; Conrad *v.* State, 144 Ind. 290, 43 N. E. 221; Pearsoll *v.* State, 14 Ind. 432; Bryan *v.* Com., 27 Pa. St. 284.

Permitting the jury to taste and smell a preparation sold by defendant and claimed by the prosecution to be an intoxicant cannot be reviewed when the record does not show the effect of such test on the jury. Dane *v.* State, 36 Tex. Cr. 84, 35 S. W. 661.

59. State *v.* McCaffery, 16 Mont. 33, 40 Pac. 63, holding that such action cannot be reviewed when it does not appear of record how long they had the case under consideration.

60. People *v.* Bealoba, 17 Cal. 389, holding that the objection will not be considered unless evidence appears in the record showing the time and circumstances of his absence.

61. Alleged improper remarks by counsel in argument should be incorporated in the record in order that they may be reviewed.

Arkansas.— Overton *v.* State, 57 Ark. 60, 20 S. W. 590.

Indiana.— Reed *v.* State, 147 Ind. 41, 46 N. E. 135; Masterson *v.* State, 144 Ind. 240, 43 N. E. 138.

Iowa.— State *v.* Sale, 119 Iowa 1, 92 N. W. 680. 95 N. W. 193; State *v.* Keenan, 111 Iowa 286, 82 N. W. 792; State *v.* Bigelow, 101 Iowa 430, 70 N. W. 600.

Kentucky.— Saylor *v.* Com., 57 S. W. 614, 22 Ky. L. Rep. 472.

Michigan.— People *v.* Baker, 112 Mich. 211, 70 N. W. 431.

Missouri.— State *v.* Woodward, 171 Mo. 593, 71 S. W. 1015; State *v.* Gatlin, 170 Mo. 354, 70 S. W. 885; State *v.* Steen, 115 Mo. 474, 22 S. W. 461; State *v.* McDaniel, 94 Mo. 301, 7 S. W. 634.

New Mexico.— Territory *v.* Hicks, 6 N. M. 596, 30 Pac. 872.

New York.— People *v.* Loomis, 76 N. Y. App. Div. 243, 78 N. Y. Suppl. 578.

North Carolina.— State *v.* Caveness, 78 N. C. 484.

Pennsylvania.— Com. *v.* Zappe, 153 Pa. St. 498, 26 Atl. 16.

Texas.— Shutt *v.* State, (Cr. App. 1902) 71 S. W. 18; Kelley *v.* State, (Cr. App. 1902) 70 S. W. 20; Martinez *v.* State, (Cr. App. 1900) 57 S. W. 829.

See 15 Cent. Dig. tit. "Criminal Law," § 2929.

Objections and exceptions.— It should also appear by the record that appellant took all proper steps by objecting, excepting, and asking to have the jury instructed to disregard the remarks, and that a ruling was had thereon. State *v.* Taylor, 98 Mo. 240, 11 S. W. 570; Penn *v.* State, 36 Tex. Cr. 140, 35 S. W. 973. See *supra*, XVII, B, 1, a; XVII, B, 2, a, (II), (G).

62. The language of the court as set out in the record, being unprejudicial, an exception to it cannot be sustained. People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161. The action of the court in appointing an attorney to assist the prosecution (State *v.* Shinner, 76 Iowa 147, 40 N. W. 144), in failing to appoint competent counsel for defendant (State *v.* Holden, 35 Kan. 31, 10 Pac. 11), in limiting the number of witnesses (Gardner *v.* State, 4 Ind. 632), or in permitting witnesses to remain in the court-room (State *v.* Sumpter, 153 Mo. 436, 55 S. W. 76) will not be reviewed in the absence of the facts from the record. Alleged error in compelling defendant to testify will be reviewed only where the record affirmatively shows that he was not examined at his own request. State *v.* Lessing, 16 Minn. 75.

63. *Indiana.*— Guenther *v.* State, 141 Ind. 593, 41 N. E. 13.

Iowa.— State *v.* Blanchard, 74 Iowa 628, 38 N. W. 519.

Louisiana.— State *v.* Charlot, 8 Rob. 529.

Missouri.— State *v.* Jones, 5 Mo. App. 587.

Pennsylvania.— Com. *v.* Barton, 20 Pa. Super. Ct. 447.

Texas.— Greene *v.* State, (Cr. App. 1903) 71 S. W. 599.

will presume that facts necessary to confer jurisdiction were proved,[64] and where the whole of the evidence is not preserved in the bill of exceptions or some other part of the record the appellate court will not review objections based upon the insufficiency of the evidence.[65] The record must expressly show that it contains all the evidence.[66] That it does will not be presumed.[67] And an express statement in the bill of exceptions that it contains all the evidence is not conclusive if it clearly shows that it does not.[68]

(II) *Exclusion and Admission of Evidence.* A ruling rejecting evidence or refusing to permit a witness to answer a question will not be reviewed where the record does not show the question and the expected answer.[69] Where the pur-

See 15 Cent. Dig. tit. "Criminal Law," § 2921.

Where neither evidence nor instructions are in the record, the only question the court can consider is the sufficiency of the indictment to sustain the verdict. Cook *v.* Com., 18 S. W. 356, 13 Ky. L. Rep. 702; State *v.* Wyman, 42 Minn. 182, 43 N. W. 1116; State *v.* Miller, 23 Minn. 352; Garrard *v.* State, 25 Miss. 469; State *v.* Purdin, 69 Mo. 450. See also Henrie *v.* State, 41 Tex. 573; Koontz *v.* State, 41 Tex. 570; Longley *v.* State, 3 Tex. App. 611; Robson *v.* State, 3 Tex. App. 497; Davis *v.* State, 2 Tex. App. 162; Talley *v.* State, 1 Tex. App. 688.

64. Wickham *v.* State, 7 Coldw. (Tenn.) 525.

65. *Arkansas.*— Thatcher *v.* State, 48 Ark. 60, 2 S. W. 343; Ballentine *v.* State, 48 Ark. 45, 2 S. W. 340; Wigley *v.* State, 41 Ark. 225.

California.— People *v.* Perdue, 49 Cal. 425; People *v.* Woods, 43 Cal. 176; People *v.* McAuslan, 43 Cal. 55.

Florida.— Marshall *v.* State, 32 Fla. 462, 14 So. 92; Kurtz *v.* State, 26 Fla. 351, 7 So. 869.

Georgia.— Griffin *v.* State, 116 Ga. 562, 42 S. E. 752; Carmichael *v.* State, 111 Ga. 653, 36 S. E. 872.

Idaho.—Territory *v.* Neilson, 2 Ida. (Hasb.) 614, 23 Pac. 537.

Indiana.— Pace *v.* State, 152 Ind. 343, 53 N. E. 183; Holland *v.* State, 131 Ind. 568, 31 N. E. 359; Landaner *v.* State, 42 Ind. 483; Mullinix *v.* State, 10 Ind. 5; Foultz *v.* State, 24 Ind. App. 141, 56 N. E. 262.

Iowa.— State *v.* Kennedy, (1895) 62 N. W. 673; State *v.* Sexauer, 88 Iowa 722, 54 N. W. 431; State *v.* Hunter, 68 Iowa 447, 27 N. W. 375.

Kansas.— State *v.* Herold, 9 Kan. 194.

Louisiana.— State *v.* Reilly, 37 La. Ann. 5; State *v.* Ward, 14 La. Ann. 673.

Minnesota.—State *v.* Graffmuller, 26 Minn. 6, 46 N. W. 445.

Missouri.— State *v.* Clarkson, 96 Mo. 364, 9 S. W. 925; State *v.* Fritterer, 65 Mo. 422.

Montana.— State *v.* Shepphard, 23 Mont. 323, 58 Pac. 868.

Nevada.— State *v.* Campbell, 20 Nev. 122, 17 Pac. 620; State *v.* Larkin, 11 Nev. 314; State *v.* Bonds, 2 Nev. 265.

New York.— Mahoney *v.* People, 3 Hun 202, 5 Thomps. & C. 329; Vincent *v.* People, 15 Abb. Pr. 234, 5 Park. Cr. 88.

North Carolina.— State *v.* Baker, 106 N. C. 758, 11 S. E. 360.

Oregon.— State *v.* Gardner, 33 Oreg. 149, 54 Pac. 809.

South Dakota.— State *v.* Brennan, 2 S. D. 384, 50 N. W. 625.

Tennessee.— Sible *v.* State, 3 Heisk. 137; Wickham *v.* State, 7 Coldw. 525; Melton *v.* State, 3 Humphr. 389.

Texas.— Foster *v.* State, (Cr. App. 1903) 71 S. W. 971; Page *v.* State, (Cr. App. 1902) 71 S. W. 286; Scott *v.* State, (Cr. App. 1902) 70 S. W. 744; Denton *v.* State, (Cr. App. 1902) 70 S. W. 217; Esser *v.* State, (Cr. App. 1902) 66 S. W. 776.

Utah.— U. S. *v.* Groesbeck, 4 Utah 487, 11 Pac. 542.

Virginia.— Massie *v.* Com., 30 Gratt. 841.

Washington.— State *v.* Morgan, 20 Wash. 708, 54 Pac. 936; State *v.* Webb, 20 Wash. 500, 55 Pac. 935; State *v.* Robinson, 12 Wash. 491, 41 Pac. 884.

See 15 Cent. Dig. tit. "Criminal Law," § 2938.

66. *Alabama.*— Griggs *v.* State, 58 Ala. 425, 29 Am. Rep. 762.

Illinois.— Tarble *v.* People, 111 Ill. 120.

Indiana.— Peters *v.* Koepke, 156 Ind. 35, 59 N. E. 33; Siple *v.* State, 154 Ind. 647, 57 N. E. 544; Saxon *v.* State, 116 Ind. 6, 18 N. E. 268; Ward *v.* State, 52 Ind. 454.

Iowa.— State *v.* French, 96 Iowa 255, 65 N. W. 156; State *v.* Stone, 88 Iowa 724, 55 N. W. 6.

New York.—People *v.* Bradner, 44 Hun 233.

Ohio.— Cantwell *v.* State, 18 Ohio St. 477; Mimms *v.* State, 16 Ohio St. 221.

Texas.— Stuart *v.* State, (Cr. App. 1896) 34 S. W. 121.

Wisconsin.— McAllister *v.* State, 112 Wis. 496, 88 N. W. 212.

Wyoming.— Phillips *v.* Territory, 1 Wyo. 82.

See 15 Cent. Dig. tit. "Criminal Law," § 2939.

67. Gill *v.* State, 43 Ala. 38; Herzinger *v.* State, 70 Md. 278, 17 Atl. 81; Woods *v.* State, 7 Coldw. (Tenn.) 335; State *v.* Carey, 4 Wash. 424, 30 Pac. 729.

68. Morrow *v.* State, 48 Ind. 432.

69. *Alabama.*— Goley *v.* State, 87 Ala. 57, 6 So. 287; Tolbert *v.* State, 87 Ala. 27, 6 So. 284.

Arkansas.—Carpenter *v.* State, 58 Ark. 233, 24 S. W. 247.

District of Columbia.— U. S. *v.* Neverson, 1 Mackey 152.

Georgia.— Weaver *v.* State, 116 Ga. 550,

pose of testimony is not apparent and is not stated in the record,[70] and its relevancy and materiality does not appear therein,[71] as because of the failure to incorporate other evidence or statements of fact affecting the materiality of the objectionable portion,[72] its exclusion cannot be reviewed. Error in the admission of evidence will not be reviewed unless the record shows the evidence admitted[73]

42 S. E. 745; Fordham *v.* State, 112 Ga. 228, 37 S. E. 391.

Indiana.— Siple *v.* State, 154 Ind. 647, 57 N. E. 544; Campbell *v.* State, 148 Ind. 527, 47 N. E. 221; Hollingsworth *v.* State, 111 Ind. 289, 12 N. E. 490; Wood *v.* State, 92 Ind. 269; Miller *v.* State, 56 Ind. 187.

Iowa.— State *v.* Butterfield, 73 Iowa 86, 34 N. W. 750; State *v.* Johnson, 72 Iowa 393, 34 N. W. 177; State *v.* Vance, 17 Iowa 138.

Kentucky.— Brown *v.* State, 14 Bush 398; Gentry *v.* State, 5 Ky. L. Rep. 242.

Louisiana.— State *v.* Harris, 51 La. Ann. 1105, 26 So. 64.

Massachusetts.— Com. *v.* Bingham, 158 Mass. 169, 33 N. E. 341.

Mississippi.— Peoples *v.* State, (1903) 33 So. 289; Edwards *v.* State, 47 Miss. 581.

Missouri.— St. Louis *v.* Babcock, 156 Mo. 148, 56 S. W. 732; State *v.* Hermann, 117 Mo. 629, 23 S. W. 1071; State *v.* Nell, 79 Mo. App. 243.

Nebraska.— Likens *v.* State, 63 Nebr. 249, 88 N. W. 506.

New Jersey.— Disque *v.* State, 49 N. J. L. 249, 8 Atl. 281.

North Carolina.—State *v.* McNair, 93 N. C. 628.

Ohio.— Bolen *v.* State, 26 Ohio St. 371; Rufer *v.* State, 25 Ohio St. 464; Gandolfo *v.* State, 11 Ohio St. 114.

Oregon.— State *v.* Bartmess, 33 Oreg. 110, 54 Pac. 167.

Texas.—Alexander *v.* State, (Cr. App. 1902) 67 S. W. 319; Thorn *v.* State, (Cr. App. 1902) 66 S. W. 300; Hurley *v.* State, 30 Tex. App. 333, 17 S. W. 455, 28 Am. St. Rep. 916; May *v.* State, 25 Tex. App. 114, 7 S. W. 588; Massey *v.* State, 1 Tex. App. 563.

Virginia.— Jackson *v.* Com., 98 Va. 845, 36 S. E. 487.

See 15 Cent. Dig. tit. "Criminal Law," § 2932.

Exclusion of threats.— A bill of exceptions to the exclusion of evidence of threats of deceased against the prisoner should state the nature of the threats and whether made recently. Gray *v.* Com., 92 Va. 772, 22 S. E. 858.

Omission of the names of witnesses whom the accused intended to call, and of their testimony on a certain subject cannot deprive him of the benefit of his exception to the refusal of the court to hear any evidence whatever on that subject. Carter *v.* Texas, 177 U. S. 442, 20 S. Ct. 687, 44 L. ed. 839 [*reversing* 39 Tex. Cr. 345, 46 S. W. 236, 48 S. W. 508].

70. Foster *v.* State, (Tex. Cr. App. 1898) 45 S. W. 803; Mallory *v.* State, 37 Tex. Cr. 482, 36 S. W. 751; Levine *v.* State, 35 Tex. Cr. 647, 34 S. W. 969; Ball *v.* State, (Tex. Cr. App. 1896) 34 S. W. 753; Loakman *v.* State, 32 Tex. Cr. 561, 25 S. W. 20; Walker *v.* State, 28 Tex. App. 503, 13 S. W. 860.

71. Allen *v.* State, 73 Ala. 23; Cummins *v.* State, 58 Ala. 387; Floyd *v.* State, 30 Ala. 511; Buchanan *v.* State, 24 Tex. App. 195, 5 S. W. 847; Mixon *v.* State, (Tex. Cr. App. 1895) 31 S. W. 408; Langhorne *v.* Com., 76 Va. 1012.

72. *California.*— People *v.* Williams, 45 Cal. 25.

Indiana.— Wiley *v.* State, 52 Ind. 475; Delano *v.* State, 29 Ind. 211.

Kentucky.— Brooks *v.* Com., 14 S. W. 416, 12 Ky. L. Rep. 403.

Maryland.— Dorbert *v.* State, 68 Md. 209, 11 Atl. 707.

Massachusetts.— Com. *v.* Salmon, 136 Mass. 431. See also Com. *v.* Carr, 111 Mass. 423.

Missouri.— State *v.* Clarkson, 96 Mo. 364, 9 S. W. 925; McMillen *v.* State, 13 Mo. 30.

Texas.— Penn *v.* State, 36 Tex. Cr. 140, 35 S. W. 973; Jaquez *v.* State, (App. 1892) 19 S. W. 767; Livar *v.* State, 26 Tex. App. 115, 9 S. W. 552; Walker *v.* State, 9 Tex. App. 200.

Virginia.—Anthony *v.* Com., 88 Va. 847, 14 S. E. 834.

See 15 Cent. Dig. tit. "Criminal Law," § 2934.

73. *Alabama.*— Cartiledge *v.* State, 132 Ala. 17, 31 So. 553; Thomas *v.* State, 107 Ala. 13, 18 So. 229; Burns *v.* State, 49 Ala. 370.

Arkansas.— Lawrence *v.* State, (1902) 71 S. W. 263.

California.— People *v.* Bemmerly, 98 Cal. 299, 33 Pac. 263; People *v.* Olsen, 80 Cal. 122, 22 Pac. 125; People *v.* Marseiler, 70 Cal. 98, 11 Pac. 503; People *v.* White, 34 Cal. 183.

Georgia.— Hays *v.* State, 114 Ga. 25, 40 S. E. 13; Stovall *v.* State, 106 Ga. 443, 32 S. E. 586; Bush *v.* State, 95 Ga. 501, 22 S. E. 284; Adams *v.* State, 93 Ga. 166, 18 S. E. 553.

Illinois.— Gilman *v.* People, 178 Ill. 19, 52 N. E. 967.

Indiana.— Riley *v.* State, 149 Ind. 48, 48 N. E. 345; Vanderkarr *v.* State, 51 Ind. 91.

Iowa.— State *v.* Keeler, 28 Iowa 551.

Louisiana.— State *v.* Batson, 108 La. 479, 32 So. 478.

Massachusetts.— Com. *v.* Harmon, 2 Gray 289.

Michigan.— People *v.* La Munion, 64 Mich. 709, 31 N. W. 593.

Mississippi.— Turey *v.* State, 8 Sm. & M. 104, 47 Am. Dec. 74.

Missouri.— State *v.* Vogel, 64 Mo. App. 161.

Oregon.— State *v.* Fitzhugh, 2 Oreg. 227.

Texas.— Kelly *v.* State, (Cr. App. 1903) 71 S. W. 756; McMillan *v.* State, (Cr. App. 1902) 71 S. W. 279; Denton *v.* State, (Cr.

and the fact that it was admitted,[74] and the character of the objection is clearly stated.[75] The record should state the specific grounds of the exceptions or objections.[76] Rulings admitting or excluding documentary evidence will not be reviewed where the bill of exceptions does not set out the writing or document in question.[77] A ruling rejecting a competent witness cannot be reviewed where the record does not show what his testimony would have been,[78] and a ruling permitting an incompetent witness to testify will not be reviewed unless the record shows what he testified to.[79]

App. 1902) 70 S. W. 217; Jones *v.* State, (Cr. App. 1902) 70 S. W. 215; Coleman *v.* State, (Cr. App. 1902) 70 S. W. 19.

Wisconsin.— Grimshaw *v.* State, 98 Wis. 612, 74 N. W. 375.

See 15 Cent. Dig. tit. "Criminal Law," § 2933.

74. *Alabama.*—Billingslea *v.* State, 85 Ala. 323, 5 So. 137.

California.— People *v.* Le Chuck, 78 Cal. 317, 20 Pac. 719.

Illinois.— People *v.* Lott, 36 Ill. 447.

Massachusetts.— Com. *v.* Bosworth, 6 Gray 479.

New York.— People *v.* Bradner, 44 Hun 233.

Texas.— Stroube *v.* State, 40 Tex. Cr. 581, 51 S. W. 357; Stevens *v.* State, (Cr. App. 1899) 49 S. W. 105; Hurley *v.* State, 36 Tex. Cr. 73, 35 S. W. 371; Harris *v.* State, 1 Tex. App. 74.

Vermont.— State *v.* Buck, 74 Vt. 29, 51 Atl. 1087.

See 15 Cent. Dig. tit. "Criminal Law," § 2931.

75. Odom *v.* State, 102 Ga. 608, 29 S. E. 427; Witherspoon *v.* State, 39 Tex. Cr. 65, 44 S. W. 164, 1096.

An objection that a conversation was not admissible against the accused because he was not present at it cannot be reviewed where the record does not show that he was not present. People *v.* Williams, 45 Cal. 25; Diaz *v.* State, (Tex. Cr. App. 1899) 53 S. W. 632.

An objection that leading questions were put to the witnesses for appellant will not be reviewed where the record does not disclose the circumstances under which they were asked, as the matter is largely discretionary. State *v.* Williams, 6 R. I. 207.

Objections to testimony on the ground that due notice that it would be offered was not given, cannot be considered, when the notices served are not shown. State *v.* Johnson, 82 Iowa 753, 48 N. W. 726.

76. *Alabama.*— Boswell *v.* State, 63 Ala. 307, 35 Am. Rep. 20.

Georgia.— Nix *v.* State, 97 Ga. 211, 22 S. E. 975; Gardner *v.* State, 94 Ga. 403, 20 S. E. 132; Reilly *v.* State, 82 Ga. 568, 9 S. E. 332.

Indiana.— Peachee *v.* State, 63 Ind. 399.

Michigan.— Morrissey *v.* People, 11 Mich. 327.

Missouri.— State *v.* Gilmore, 95 Mo. 554, 8 S. W. 359, 912; State *v.* King, 44 Mo. 238.

Texas.— Wilkins *v.* State, 35 Tex. Cr. 525, 34 S. W. 627; Blackwell *v.* State, 33 Tex. Cr. 278, 26 S. W. 397, 32 S. W. 128; Schoenfeldt *v.* State, 30 Tex. App. 695, 18 S. W. 640; Goforth *v.* State, 22 Tex. App. 405, 3 S. W. 332.

See 15 Cent. Dig. tit. "Criminal Law," § 2935.

77. *Alabama.*— Burton *v.* State, 107 Ala. 108, 18 So. 284; Hurt *v.* State, 55 Ala. 214.

Indiana.— Musser *v.* State, 157 Ind. 423, 61 N. E. 1; Conrad *v.* State, 132 Ind. 254, 31 N. E. 805; Williams *v.* State, 127 Ind. 471, 26 N. E. 1082; Ehlert *v.* State, 93 Ind. 76.

Iowa.— State *v.* Postlewait, 14 Iowa 446.

Maryland.— Ridgely *v.* State, 75 Md. 510, 23 Atl. 1099.

Mississippi.— Peoples *v.* State, (1903) 33 So. 289.

Missouri.— State *v.* Hathaway, 115 Mo. 36, 21 S. W. 1081.

Montana.— State *v.* Tighe, 27 Mont. 327, 71 Pac. 3.

Texas.— Dudley *v.* State, (Cr. App. 1900) 58 S. W. 111.

See 15 Cent. Dig. tit. "Criminal Law," § 2936.

Statements in briefs.— Where the writing is not embodied in the bill of exceptions, it is not permissible for the court to take from the briefs statements of what are therein alleged to be copies of the writing. State *v.* Potts, 20 Nev. 389, 22 Pac. 754.

78. Deatley *v.* Com., 29 S. W. 741, 31 S. W. 722, 16 Ky. L. Rep. 893; Gutierrez *v.* State, 44 Tex. 587; McGinnes *v.* State, 4 Wyo. 150, 31 Pac. 978, 53 Pac. 492. But see Stokes *v.* State, 4 Baxt. (Tenn.) 47, holding that in a trial for murder the rejection of a competent witness is ground for reversal, although the materiality of his testimony is not shown by the record. It has also been held that where a witness is rejected, not on account of the incompetency of his testimony, but because he is under a legal disability, the materiality of his testimony will not be considered. Scott *v.* State, 49 Ark. 156, 4 S. W. 750, holding that it will be presumed that his testimony if permitted would have been material.

79. U. S. *v.* Neverson, 1 Mackey (D. C.) 152; State *v.* Shenkle, 36 Kan. 43, 12 Pac. 309.

Where witnesses were objected to because their names were not indorsed on the information, the court held that the record should show the facts occurring when the objection was made, the tendency of their testimony, and that defendant was not informed as to the nature of the testimony which they would give. Boulter *v.* State, 6 Wyo. 66, 42 Pac. 606.

g. Instructions and Refusal or Failure to Instruct — (I) *In General.* The giving or the refusal or failure to give instructions will not be reviewed where they are not set out in the bill of exceptions or record,[80] together with a statement that the particular instructions were given or refused;[81] and in reviewing instructions given the court will consider only the language used and not the tone of voice or manner in which the words were pronounced.[82] It is further necessary to a review of the giving or refusal of an instruction that the entire charge of the trial court shall appear of record,[83] unless the instruction complained of or refusal to instruct is so erroneous that it could not have been cured by another proper instruction.[84] Where the instructions actually given do not appear, it will be presumed that they fully covered the point on which an instruction was refused and all other necessary questions,[85] and that the court gave all necessary and proper instructions of its own motion.[86] A refusal to instruct will not be reviewed unless it affirmatively appears from the record that a request was made

80. *Arkansas.*— Cheaney *v.* State, 36 Ark. 74.

California.— People *v.* Marseiler, 70 Cal. 98, 11 Pac. 503; People *v.* Tetherow, 40 Cal. 286; People *v.* Thompson, 28 Cal. 214.

Colorado.— Bergdahl *v.* People, 27 Colo. 302, 61 Pac. 228.

Illinois.— Call *v.* People, 201 Ill. 499, 66 N. E. 243.

Indiana.— Smith *v.* State, 154 Ind. 107, 56 N. E. 19; State *v.* Hunt, 137 Ind. 537, 37 N. E. 409.

Iowa.— State *v.* Smith, 88 Iowa 721, 54 N. W. 431; State *v.* Burge, 7 Iowa 255.

Kentucky.— Mitchell *v.* Com., 78 Ky. 204, 39 Am. Rep. 227.

Missouri.— State *v.* Buck, 130 Mo. 480, 32 S. W. 975.

Texas.— Sausier *v.* State, (Cr. App. 1903) 71 S. W. 597; Page *v.* State, (Cr. App. 1902) 71 S. W. 286; Denton *v.* State, (Cr. App. 1902) 70 S. W. 217.

Vermont.— State *v.* McDonnell, 32 Vt. 491.

See 15 Cent. Dig. tit. "Criminal Law," § 2940.

81. People *v.* Bemmerly, 87 Cal. 117, 25 Pac. 266; State *v.* Jenkins, 21 S. C. 595; Wheelock *v.* State, 15 Tex. 253.

A recital in the record that the appellant moved for a new trial because the jury disregarded instructions is sufficient to show that the instructions were given. Hamilton *v.* State, 35 Miss. 214.

To obtain a review of error in giving oral instructions against defendant's consent, it must appear affirmatively from the record that the consent was not given. State *v.* Preston, 4 Ida. 215, 38 Pac. 694.

82. Territory *v.* O'Donnell, 4 N. M. 66, 12 Pac. 743. See also Territory *v.* Gertrude, 1 Ariz. 74, 25 Pac. 473.

83. *California.*— People *v.* Vital, (1893) 34 Pac. 617.

Florida.— Reynolds *v.* State, 34 Fla. 175, 16 So. 78.

Georgia.— Spears *v.* State, 53 Ga. 252.

Idaho.— State *v.* Preston, 4 Ida. 215, 38 Pac. 694.

Illinois.— Logg *v.* People, 92 Ill. 598; Humpeler *v.* State, 92 Ill. 400.

Indiana.— Barton *v.* State, 154 Ind. 670, 57 N. E. 515; Ehlert *v.* State, 93 Ind. 76; Diehl *v.* State, (App. 1901) 62 N. E. 51.

Iowa.— State *v.* Lauderbeck, 96 Iowa 258, 65 N. W. 158; State *v.* Hamilton, 32 Iowa 572.

Kentucky.— Jane *v.* Com., 3 Metc. 18; Clem *v.* Com., 3 Metc. 10.

Missouri.— State *v.* Hendy, 148 Mo. 300, 49 S. W. 988.

North Carolina.— State *v.* Sloan, 97 N. C. 499, 2 S. E. 666.

Texas.— English *v.* State, (Cr. App. 1898) 45 S. W. 713.

See 15 Cent. Dig. tit. "Criminal Law," § 2943.

Sufficiency of certificate that record contains all instructions.— It is not necessary that the record shall expressly state that it contains all the instructions which were given, but any equivalent expression or language from which it may be reasonably implied that all the instructions are set forth, or which conveys that idea with reasonable certainty, is sufficient. Jane *v.* Com., 3 Metc. (Ky.) 18.

Statements that the court was asked "to give the following instructions," or "to instruct the jury as follows," have been held insufficient. Jane *v.* Com., 3 Metc. (Ky.) 18; Clem *v.* Com., 3 Metc. (Ky.) 10. But see Mickey *v.* Com., 9 Bush (Ky.) 593; Smith *v.* Com., 1 Duv. (Ky.) 224.

84. Graves *v.* State, 12 Wis. 591.

85. *California.*— People *v.* Von, 78 Cal. 1, 20 Pac. 35.

Georgia.— Neill *v.* State, 79 Ga. 779, 4 S. E. 871.

Indiana.— Reinhold *v.* State, 130 Ind. 467, 30 N. E. 306; Delhaney *v.* State, 115 Ind. 499, 18 N. E. 49.

Kansas.— Millar *v.* State, 2 Kan. 174.

Missouri.— State *v.* Hodges, 144 Mo. 50, 45 S. W. 1093; State *v.* Burk, 89 Mo. 635, 2 S. W. 10.

United States.— Andrews *v.* U. S., 162 U. S. 420, 16 S. Ct. 798, 40 L. ed. 1023.

See 15 Cent. Dig. tit. "Criminal Law," § 2943.

86. People *v.* McMahan, 133 Cal. 278, 65 Pac. 571; Garrett *v.* State, 109 Ind. 527, 10

promptly and in proper form;[87] and where a statute requires requested charges to be submitted in writing the record must show a compliance with the statute.[88]

(II) *Necessity of Setting Out Evidence.* The refusal or failure to give an instruction will not be reviewed unless the evidence, or so much thereof as would warrant the charge, is in the record,[89] for without evidence showing that the instruction refused was relevant, nothing appears but an abstract question;[90] and where instructions given are correct as abstract propositions of law, and no evidence is brought up showing them to be inapplicable to the case at bar, the judgment will be affirmed.[91] So where the charge is correct in any supposable

N. E. 570; Foutch *v.* State, 100 Tenn. 334, 45 S. W. 678.

87. People *v.* Storke, 128 Cal. 486, 60 Pac. 1090 [*reversing* (Cal. 1900) 60 Pac. 420]; People *v.* Hettick, 126 Cal. 425, 58 Pac. 918; Ransbottom *v.* State, 144 Ind. 250, 43 N. E. 218; State *v.* Richardson, 47 S. C. 18, 24 S. E. 1038; Thompson *v.* State, (Tex. Cr. App. 1896) 33 S. W. 972; Richards *v.* State, 3 Tex. App. 423.

88. Bellinger *v.* State, 92 Ala. 86, 9 So. 399; Walker *v.* State, 91 Ala. 76, 9 So. 87; Green *v.* State, 66 Ala. 40, 41 Am. Rep. 744; Jacobson *v.* State, 55 Ala. 151.

89. *Alabama.*— Goodwin *v.* State, 106 Ala. 670, 18 So. 694; Noblin *v.* State, 100 Ala. 13, 14 So. 767.

California.— People *v.* Clark, 121 Cal. 633, 54 Pac. 147; People *v.* Bourke, 66 Cal. 455, 6 Pac. 89.

Connecticut.— State *v.* Jerome, 33 Conn. 265.

Indiana.— State *v.* Kern, 127 Ind. 465, 26 N. E. 1076; Stewart *v.* State, 111 Ind. 554, 13 N. E. 59.

Iowa.— State *v.* Oleson, 70 Iowa 762, 30 N. W. 611; State *v.* Johnson, 19 Iowa 230.

Kansas.— State *v.* English, 34 Kan. 629, 9 Pac. 761.

Louisiana.— State *v.* Harris, 51 La. Ann. 1105, 26 So. 64.

Massachusetts.— Com. *v.* Richardson, 175 Mass. 202, 55 N. E. 988; Com. *v.* Sargent, 179 Mass. 115; Com. *v.* Gilson, 128 Mass. 425.

Minnesota.— State *v.* Sackett, 39 Minn. 69, 38 N. W. 773.

Mississippi.— Fleming *v.* State, 60 Miss. 434.

Missouri.— Kansas City *v.* O'Connor, 36 Mo. App. 594.

Nevada.— State *v.* Pierce, 8 Nev. 291.

Oregon.— State *v.* Brown, 28 Oreg. 147, 41 Pac. 1042.

South Carolina.— State *v.* Robinson, 35 S. C. 340, 14 S. E. 766.

Texas.— Chitwood *v.* State, (Cr. App. 1903) 71 S. W. 973; Mosley *v.* State, (Cr. App. 1902) 70 S. W. 546; Tollett *v.* State, (Cr. App. 1901) 60 S. W. 964; Cairy *v.* State, (Cr. App. 1900) 58 S. W. 103.

Vermont.— State *v.* Bedell, 65 Vt. 541, 27 Atl. 208.

Virginia.— Vawter *v.* Com., 87 Va. 245, 12 S. E. 339.

See 15 Cent. Dig. tit. "Criminal Law," § 2942.

90. State *v.* McEwen, (Ind. 1898) 51 N. E. 1053.

Refusal of an instruction based on an admission by the prosecution will not be reviewed where the record does not show such admission. Bryant *v.* State, 34 Fla. 291, 16 So. 177.

An instruction on the competency of the accused as a witness and on the weight of his evidence must be held properly refused as inapplicable, where the record does not show that he was sworn as a witness or gave testimony. Bradshaw *v.* State, 17 Nebr. 147, 22 N. W. 361.

91. *Alabama.*— King *v.* State, 120 Ala. 329, 25 So. 178; Lyman *v.* State, 47 Ala. 686; Temple *v.* State, 40 Ala. 350.

California.—People *v.* McNabb, 79 Cal. 419, 21 Pac. 843; People *v.* Strong, 46 Cal. 302; People *v.* Best, 39 Cal. 690; People *v.* Dick, 34 Cal. 663.

Colorado.— Short *v.* People, 27 Colo. 175, 60 Pac. 350.

Illinois.— Thompson *v.* People, 125 Ill. 256, 17 N. E. 749.

Indiana.— Marshall *v.* State, 123 Ind. 128, 23 N. E. 1141; State *v.* Dillon, 9 Ind. App. 554, 37 N. E. 25.

Iowa.— State *v.* Moore, 77 Iowa 449, 42 N. W. 367; State *v.* Koll, 71 Iowa 760, 32 N. W. 259; State *v.* Coon, 68 Iowa 55, 25 N. W. 927.

Kansas.— State *v.* Walker, 65 Kan. 92, 68 Pac. 1095; State *v.* Heth, 60 Kan. 560, 57 Pac. 108.

Kentucky.— Reed *v.* Com., 7 Bush 641; Ford *v.* Com., 5 Ky. L. Rep. 776.

Michigan.— People *v.* Dupree, 98 Mich. 26, 56 N. W. 1046.

Minnesota.—State *v.* Owens, 22 Minn. 238.

Mississippi.—Kellum *v.* State, 64 Miss. 226, 1 So. 174.

Missouri.— State *v.* Williams, 141 Mo. 264, 42 S. W. 937; State *v.* Vaughn, 26 Mo. 29.

Montana.— State *v.* Gill, 21 Mont. 151, 53 Pac. 184.

Nebraska.— Willis *v.* State, 27 Nebr. 98, 42 N. W. 920.

Nevada.— State *v.* Keith, 9 Nev. 15.

North Carolina.— State *v.* Hardin, 19 N. C. 407.

Oklahoma.— Rhea *v.* U. S., 6 Okla. 249, 50 Pac. 992.

Texas.— Jackson *v.* State, (Cr. App. 1903) 71 S. W. 972; Fay *v.* State, (Cr. App. 1902) 70 S. W. 744; Moore *v.* State, (Cr. App. 1902) 67 S. W. 102.

Washington.— Thompson *v.* Territory, 1 Wash. Terr. 547.

state of the evidence relevant to the issue under the indictment, it will be presumed that evidence was received which justified the same.[92] If, however, the charge is wrong under any conceivable state of facts, the court may reverse the conviction, although the record does not contain the evidence.[93]

h. Ruling on Motion For a New Trial. A denial by the trial court of a motion for a new trial will not be reviewed unless the record contains the motion,[94] a showing that it was acted on,[95] and the grounds on which it was based.[96] Where the motion relates only to matters growing out of the evidence, the refusal thereof will not be reviewed if the evidence is not in the record.[97] Thus the denial of a new trial asked for on the ground of newly discovered evidence will be presumed correct where such evidence is not set out in the record.[98] The evidence including the affidavits used on the hearing of the motion must be placed before the appellate court,[99] and in the absence of such evidence it will be presumed that the action of the court in overruling the motion was correct.[1]

i. Ruling on Motion in Arrest of Judgment. The refusal of the lower court to grant a motion in arrest of judgment will not be reviewed where the grounds of the motion[2] and the evidence in support of it[3] are not set forth. If the

See 15 Cent. Dig. tit. "Criminal Law," § 2941.

92. McIntosh *v.* State, 151 Ind. 251, 51 N. E. 354; State *v.* Loveless, 17 Nev. 424, 30 Pac. 1080; Lee *v.* U. S., 7 Okla. 558, 54 Pac. 792; Wilkerson *v.* State (Tex. Cr. App. 1898) 45 S. W. 805.

93. People *v.* Long, 39 Cal. 694; People *v.* Levison, 16 Cal. 98, 76 Am. Dec. 505; Sigsbee *v.* State, 43 Fla. 524, 30 So. 816; Smathers *v.* State, 46 Ind. 447.

94. *Arkansas.*— Sigment *v.* State, 34 Ark. 420.

Colorado.— Rowe *v.* People, 26 Colo. 542, 59 Pac. 57.

Kansas.— State *v.* Grinstead, (Sup. 1901) 64 Pac. 55.

Missouri.— State *v.* Wray, 124 Mo. 542, 27 S. W. 1100.

Texas.— Smith *v.* State, (Cr. App. 1900) 58 S. W. 101; Valla *v.* State, (Cr. App. 1900) 57 S. W. 669; Scott *v.* State, (Cr. App. 1895) 32 S. W. 692.

See 15 Cent. Dig. tit. "Criminal Law," § 2946.

95. Laird *v.* State, 15 Tex. 317.

96. People *v.* Lenon, 77 Cal. 308, 19 Pac. 521; Slocumb *v.* State, 116 Ga. 514, 42 S. E. 749; May *v.* State, 90 Ga. 793, 17 S. E. 108; Silva *v.* Territory, 9 N. M. 650, 43 Pac. 690. See also Dunn *v.* State, 116 Ga. 515, 42 S. E. 772; Boynton *v.* State, 115 Ga. 587, 41 S. E. 995.

97. *Georgia.*— Williams *v.* State, 115 Ga. 586, 41 S. E. 987.

Indiana.— Clare *v.* State, 68 Ind. 17; Dorman *v.* State, 56 Ind. 454; Beard *v.* State, 54 Ind. 413; Enners *v.* State, 47 Ind. 126.

Ohio.— Fouts *v.* State, 8 Obio St. 98.

Texas.— Moss *v.* State, (Cr. App. 1900) 56 S. W. 622; Andrews *v.* State, (Cr. App. 1899) 49 S. W. 108; Sarvis *v.* State, (Cr. App. 1898) 47 S. W. 463.

Virginia.— Com. *v.* Brown, 90 Va. 671, 19 S. E. 447.

See 15 Cent. Dig. tit. "Criminal Law," § 2947.

98. *Indiana.*— O'Dea *v.* State, 57 Ind. 31; O'Brian *v.* State, 14 Ind. 469; Sloan *v.* State, 8 Ind. 312.

Kentucky.— Stafford *v.* Com., 18 S. W. 11, 13 Ky. L. Rep. 665.

Louisiana.— State *v.* Belden, 35 La. Ann. 823.

Missouri.— State *v.* Lockett, 168 Mo. 480, 68 S. W. 563.

Texas.— Brown *v.* State, (Cr. App. 1900) 55 S. W. 59; Davis *v.* State, (Cr. App. 1898) 47 S. W. 978; Lewis *v.* State, (Cr. App. 1897) 43 S. W. 82.

See 15 Cent. Dig. tit. "Criminal Law," § 2947.

99. *Colorado.*— Jordan *v.* People, 19 Colo. 417, 36 Pac. 218.

Indiana.— Naanes *v.* State, 143 Ind. 299, 42 N. E. 609; Kleespies *v.* State, 106 Ind. 383, 7 N. E. 186; Shuler *v.* State, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211.

Iowa.— State *v.* Brendle, 81 Iowa 760, 46 N. W. 1063.

Missouri.— State *v.* Whalen, 128 Mo. 467, 31 S. W. 2; State *v.* Jewell, 90 Mo. 467, 3 S. W. 77.

Nevada.— State *v.* McMahon, 17 Nev. 365, 30 Pac. 1000.

Ohio.— Cooper *v.* State, 16 Ohio St. 328.

Texas.— Green *v.* State, (Cr. App. 1900) 58 S. W. 99; Bell *v.* State (Cr. App. 1900) 58 S. W. 71.

Utah.— State *v.* Morgan, 22 Utah 162, 61 Pac. 527.

Virginia.— Jones *v.* Com., 31 Gratt. 830.

See 15 Cent. Dig. tit. "Criminal Law," § 2948.

1. Garner *v.* State, 31 Fla. 170, 12 So. 638; Townsend *v.* State, 132 Ind. 315, 31 N. E. 797; McClure *v.* State, 116 Ind. 169, 18 N. E. 615.

2. State *v.* Frost, 95 Iowa 448, 64 N. W. 401; Archer *v.* State, 45 Md. 457; State *v.* Earnest, 98 N. C. 740, 4 S. E. 495; Williams *v.* State, (Tex. Cr. App. 1892) 20 S. W. 370.

3. Robin *v.* State, 40 Ala. 72; Rosenstein *v.* State, 9 Ind. App. 290, 36 N. E. 652;

facts to sustain the motion are not set forth it will be presumed that they did not exist.[4]

j. Sentence and Judgment. The appellate court will not determine whether a sentence is excessive, in the absence of the evidence or other statements in the record from which its justness may be determined.[5]

8. Matters Not Apparent of Record. Using the term "record" in its broad sense, as including the transcript and the case stated or bill of exceptions, the general rule is that the appellate court cannot consider any question that is not in some manner contained in or raised thereby.[6] Thus evidence *dehors* the record, whether by affidavit or otherwise, will not be heard in the appellate court.[7] Matters, however, of which the appellate court may take judicial notice need not be incorporated in the record.[8] An appellate court will take notice of its own records when properly suggested,[9] but it has been held that it will not take notice of a prior appeal in the same case,[10] or of the action of the court on a former indictment for the same crime.[11]

E. Assignment of Errors and Briefs — 1. Assignment of Errors[12] — a. Necessity For. In many jurisdictions assignments of errors are indispensable in criminal cases, and where there is no assignment the reviewing court will not consider any error, but the judgment will be affirmed.[13] In other jurisdictions,

Parker *v.* Com., 8 B. Mon. (Ky.) 30; Patswald *v.* U. S., 5 Okla. 351, 49 Pac. 57.

4. Garner *v.* State, 42 Ga. 203.

5. State *v.* Conners, 95 Iowa 485, 64 N. W. 295; State *v.* Turney, 77 Iowa 269, 42 N. W. 190; State *v.* Durston, 52 Iowa 635, 3 N. W. 678; State *v.* Patton, 19 Iowa 458; Chapman *v.* State, (Tex. Cr. App. 1902) 70 S. W. 544.

6. State *v.* Hoffman, 75 Mo. App. 380; Cathcart *v.* Com., 37 Pa. St. 108; Abrams *v.* State, 31 Tex. Cr. 449, 20 S. W. 987 [*following* Slaven *v.* Wheeler, 58 Tex. 23]; Agnew *v.* U. S., 165 U. S. 36, 17 S. Ct. 235, 41 L. ed. 624. See Regopoulas *v.* State, 116 Ga. 596, 42 S. E. 1014. See also Appeal and Error, 3 Cyc. 176; and *supra*, XVII, D, 1, 2, 3.

7. Epps *v.* State, 19 Ga. 102; Brown *v.* Com., 14 Bush (Ky.) 398; Smith *v.* Com., 31 S. W. 724, 17 Ky. L. Rep. 439; State *v.* Godwin, 27 N. C. 401, 44 Am. Dec. 42; Weatherford *v.* State, 31 Tex. Cr. 530, 21 S. W. 251, 37 Am. St. Rep. 828; Rainey *v.* State, 20 Tex. App. 473.

Illustrations.— The fact that a third person confesses that he committed the crime and that defendant is innocent cannot be shown to the appellate court or considered by it. People *v.* Bowers, (Cal. 1888) 18 Pac. 660. Nor can the court consider defendant's insanity disclosed subsequent to the trial. People *v.* Schmitt, 106 Cal. 48, 39 Pac. 204. It seems, however, that evidence would be received to determine the materiality of the exceptions taken (People *v.* Thompson, 41 N. Y. 1), and on certiorari facts which might have ousted the inferior jurisdiction may be set out in the affidavits of the relator and considered by the court (Jackson *v.* People, 9 Mich. 111, 77 Am. Dec. 491).

Errors shown by affidavit as basis for an appeal see People *v.* Glen, 173 N. Y. 395, 66 N. E. 112.

8. See Appeal and Error, 3 Cyc. 179. The court cannot, however, in the absence of any showing as to the particular facts of the case, take judicial notice of the fact that a detention by the sheriff of the prisoner for six days after sentence is unreasonable. *Ex p.* King, 82 Ala. 59, 2 So. 763. See also State *v.* Warren, 57 Mo. App. 502.

9. See Appeal and Error, 3 Cyc. 179.

10. Siberry *v.* State, 149 Ind. 684, 39 N. E. 936; Arcia *v.* State, 28 Tex. App. 198, 12 S. W. 599.

11. Wroe *v.* State, 20 Ohio St. 460.

12. Nature and object of assignment of errors see Appeal and Error, 2 Cyc. 980.

13. *California.*— People *v.* Goldbury, 10 Cal. 312.

Colorado.— Rowe *v.* People, 26 Colo. 542, 59 Pac. 57.

Florida.— Johnston *v.* State, 29 Fla. 558, 10 So. 686.

Georgia.— Branham *v.* State, 96 Ga. 307, 22 S. E. 957; Ozburn *v.* State, 87 Ga. 173, 13 S. E. 247; Brown *v.* State, 28 Ga. 199.

Illinois.— Obermark *v.* People, 24 Ill. App. 259.

Indiana.— Burst *v.* State, 88 Ind. 341; State *v.* Baker, 56 Ind. 117; Reinhart *v.* State, 45 Ind. 147; State *v.* Ensey, 42 Ind. 480.

Kansas.— State *v.* Stewart, 24 Kan. 250.

Maryland.— State *v.* Brown, (1889) 16 Atl. 722.

Massachusetts.— Com. *v.* Dunleay, 157 Mass. 386, 32 N. E. 356.

North Carolina.— State *v.* Gaylord, 85 N. C. 551.

Pennsylvania.— Omit *v.* Com., 21 Pa. St. 426.

Texas.— State *v.* Cartwright, 10 Tex. 280; Work *v.* State, 3 Tex. App. 233; Booker *v.* State, 3 Tex. App. 227; Phants *v.* State, 2 Tex. App. 398.

United States.— O'Neil *v.* Vermont, 144 U. S. 323, 12 S. Ct. 693, 36 L. ed. 450.

England.— Reg. *v.* King, 9 Jur. 551, 14 L. J. Q. B. 86.

usually by virtue of an express statutory provision, it is the duty of the appellate court to examine the record and, disregarding technical defects and errors, to render judgment on the merits.[14]

b. Form and Requisites in General. An assignment of errors must conform to statutory requirements,[15] and to reasonable rules of court laid down for the presentation of cases on review.[16] It must correctly state the full names of the parties;[17] when relating to the admission of testimony it must show that an objection was promptly made;[18] and it should refer particularly to the page of the record where the ruling can be found.[19] It should be signed by the appellant or his attorney.[20]

c. Specification of Errors. The assignment of errors must point out definitely and specifically the errors relied upon, and if it is too general or uncertain it will not be considered.[21] In some cases it has been held necessary to state the reasons

See 15 Cent. Dig. tit. "Criminal Law," §§ 2954–2964.

14. *Alabama.*— Finley *v.* State, 61 Ala. 201; Brazier *v.* State, 44 Ala. 387; Robertson *v.* State, 43 Ala. 325; Weatherford *v.* State, 43 Ala. 319.

Arkansas.— Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54.

Connecticut.— Crandall *v.* State, 10 Conn. 339.

Idaho.— People *v.* Du Rell, 1 Ida. 44.

Iowa.— State *v.* Daniels, 41 Iowa 700; State *v.* Pratt, 20 Iowa 267.

Louisiana.— State *v.* Balize, 38 La. Ann. 542; State *v.* Hanks, 38 La. Ann. 468.

Michigan.— Patten *v.* People, 18 Mich. 314, 100 Am. Dec. 173. See also Wattles *v.* People, 13 Mich. 446.

Missouri.— State *v.* Dotson, 115 Mo. 399, 22 S. W. 375; State *v.* Clawson, 30 Mo. App. 139; State *v.* Pfaff, 20 Mo. App. 335; State *v.* Heffernan, 20 Mo. App. 327.

Oregon.— State *v.* Ellis, 3 Oreg. 497.

South Carolina.— State *v.* McNinch, 12 S. C. 89.

See 15 Cent. Dig. tit. "Criminal Law," §§ 2954–2964.

15. State *v.* Bass, 12 La. Ann. 862; Lytle *v.* Territory, 1 Wash. Terr. 435.

In Washington, where the method of appeal is entirely statutory, the assignment of errors must be only in the *precipe,* that is, notice which is filed with the clerk of the appellate court. Lytle *v.* Territory, 1 Wash. Terr. 435.

Amendment.— In Indiana an assignment of errors is not amendable unless appellant used due diligence to have it complete in the first instance. His delay in noticing the contents of the record by which he might have secured a correct assignment will deprive him of the right to amend. State *v.* Ross, 4 Ind. App. 480, 31 N. E. 90. As to amendments see, generally, APPEAL AND ERROR, 2 Cyc. 1005.

16. Harless *v.* U. S., 92 Fed. 353, 34 C. C. A. 400 [*affirming* 1 Indian Terr. 447, 45 S. W. 133].

17. State *v.* Hodgin, 139 Ind. 498, 39 N. E. 161; Calvert *v.* State, 91 Ind. 473; Burke *v.* State, 47 Ind. 528. See also Pinney *v.* State, 156 Ind. 167, 59 N. E. 383.

18. Huff *v.* State, 85 Ga. 336, 11 S. E. 619.

19. Siple *v.* State, 154 Ind. 647, 57 N. E. 544; Siberry *v.* State, 149 Ind. 684, 39 N. E. 936; May *v.* State, 140 Ind. 88, 39 N. E. 701.

20. Thoma *v.* State, 86 Ind. 182.

Where several defendants jointly indicted are sentenced to different punishments, the assignment of error should be made by the particular defendant claiming error on his own behalf, stating specifically only his objections. An assignment that the court erred in the sentence which it passed on defendants is too general and indefinite to be considered. McDonald *v.* U. S., 63 Fed. 426, 12 C. C. A. 339. See also Durden *v.* State, 52 Ga. 664.

21. *Colorado.*— Giano *v.* People, 30 Colo. 20, 69 Pac. 504; Edwards *v.* People, 26 Colo. 539, 59 Pac. 56.

Connecticut.— State *v.* Lee, 65 Conn. 265, 30 Atl. 1110, 48 Am. St. Rep. 202, 27 L. R. A. 498.

Florida.— Anthony *v.* State, (1902) 32 So. 818; Maloy *v.* State, 39 Fla. 432, 22 So. 719; Charles *v.* State, 36 Fla. 691, 18 So. 369.

Georgia.— Somers *v.* State, 116 Ga. 535, 42 S. E. 779; Roberts *v.* State, 92 Ga. 451, 17 S. E. 262; Roberts *v.* State, 80 Ga. 772, 6 S. E. 587; Fleming *v.* State, 67 Ga. 767.

Idaho.— State *v.* McGann, (1901) 66 Pac. 823.

Illinois.— Hereford *v.* People, 197 Ill. 222, 64 N. E. 310.

Indiana.— Conrad *v.* State, 144 Ind. 290, 43 N. E. 221; Dye *v.* State, 130 Ind. 87, 29 N. E. 771.

Iowa.— State *v.* Sater, 8 Iowa 420.

Louisiana.— State *v.* Williams, 107 La. 789, 32 So. 172.

Maryland.— State *v.* Scarborough, 55 Md. 345.

Montana.— State *v.* Allen, 23 Mont. 118, 57 Pac. 725.

Nebraska.— Hawkins *v.* State, 60 Nebr. 380, 83 N. W. 198; Baer *v.* State, 59 Nebr. 655, 81 N. W. 856.

Nevada.— State *v.* Giulieri, 26 Nev. 1, 62 Pac. 497.

New Mexico.—Territory *v.* Cordova, (1902) 68 Pac. 919.

Pennsylvania.— Com. *v.* Greason, 204 Pa. St. 64, 53 Atl. 539; McFadden *v.* Com., 23 Pa. St. 12, 62 Am. Dec. 308.

why the ruling complained of was erroneous,[22] while in others the contrary has been held.[23] As a rule each error relied on must be separately and definitely assigned, and an assignment of error to several rulings without specifying which one is erroneous will not be considered unless all are erroneous.[24] Under the practice in some jurisdictions, however, it is sufficient if the errors specified appear in the record, and no independent specification of errors accompanying a statement on appeal need be made.[25]

d. Filing. In the absence of statute an assignment of error need not be filed in the court below.[26] It must, however, be promptly filed in the appellate court, and if not filed before the submission of the cause it may be disregarded.[27]

e. Plea or Joinder. It seems that no express plea to or joinder in the assignment of errors is necessary in criminal cases,[28] unless it is required by a statute or

South Carolina.— State *v.* Washington, 55 S. C. 372, 33 S. E. 453; State *v.* Aughtry, 49 S. C. 285; 26 S. E. 619, 27 S. E. 199.

Texas.— Johnson *v.* State, (Cr. App. 1902) 67 S. W. 412; Margraves *v.* State, (Cr. App. 1899) 50 S. W. 1016; Williams *v.* State, (Cr. App. 1898) 44 S. W. 1103; Campbell *v.* State, 15 Tex. App. 506; Booker *v.* State, 3 Tex. App. 227.

Washington.— State *v.* Zettler, 15 Wash. 625, 47 Pac. 35.

Wisconsin.— O'Toole *v.* State, 105 Wis. 18, 80 N. W. 915.

See 15 Cent. Dig. tit. "Criminal Law," § 2957; and APPEAL AND ERROR, 2 Cyc. 986.

Illustrations.— Assignments of error that evidence was irrelevant (Wade *v.* State, 37 Tex. Cr. 401, 35 S. W. 663); that the verdict was contrary to law and evidence (Cavanaugh *v.* State, 31 Ind. 229; State *v.* Derrick, 44 S. C. 344, 22 S. E. 337); that the charge was unfair and one-sided without specifically pointing out the objectionable passage (Com. *v.* Orr, 138 Pa. St. 276, 20 Atl. 866); that the court erred in admitting evidence of certain facts not designated (Berneker *v.* State, 40 Nebr. 810, 59 N. W. 372; Bradshaw *v.* State, 17 Nebr. 147, 22 N. W. 361); that the court was informally and illegally constituted (State *v.* Bob, 11 La. Ann. 192); that the whole proceedings were informal, illegal, and insufficient (State *v.* Shaw, 5 La. Ann. 342); that the court erred in acquitting defendant (State *v.* Van Valkenburg, 60 Ind. 302; State *v.* Harper, 38 Ind. 13); and that the entire charge is erroneous (Anderson *v.* State, 72 Ga. 98) have been held too vague, indefinite, and uncertain to be considered.

In a capital case the rule of the text may be relaxed and the record examined where the prosecution does not urge the insufficiency of the assignment. State *v.* Leehman, 2 S. D. 171, 49 N. W. 3.

22. *California.*— People *v.* McLean, 135 Cal. 306, 67 Pac. 770; People *v.* Breen, 130 Cal. 72, 62 Pac. 408.

Florida.— Hodge *v.* State, 26 Fla. 11, 7 So. 593.

Georgia.— Daniel *v.* State, 115 Ga. 205, 41 S. E. 695; Mitchell *v.* State, 101 Ga. 578, 28 S. E. 916; Wallace *v.* State, 95 Ga. 470, 20 S. E. 250; Young *v.* State, 95 Ga. 456, 20 S. E. 270; Hayden *v.* State, 69 Ga. 731.

Maryland.— State *v.* Norris, 70 Md. 91, 16 Atl. 445.

New Jersey.—Donnelly *v.* State, 26 N. J. L. 463.

Texas.— Castlin *v.* State, (Cr. App. 1900) 57 S. W. 827.

See 15 Cent. Dig. tit. "Criminal Law," § 2957; and APPEAL AND ERROR, 2 Cyc. 987.

23. Territory *v.* Rehberg, 6 Mont. 467, 13 Pac. 132.

24. *Colorado.*—Edwards *v.* People, 26 Colo. 539, 59 Pac. 56.

District of Columbia.— De Forest *v.* U. S., 11 App. Cas. 458.

Florida.— Kirby *v.* State, (1902) 32 So. 836; Easterlin *v.* State, 43 Fla. 565, 31 So. 350; Shiver *v.* State, 41 Fla. 630, 27 So. 36.

Georgia.— Dixon *v.* State, 105 Ga. 787, 31 S. E. 750; Franklin *v.* State, 69 Ga. 36, 47 Am. Rep. 748.

Indiana.— Crawford *v.* State, 155 Ind. 692, 57 N. E. 931; Hannan *v.* State, 149 Ind. 81, 47 N. E. 628; Masterson *v.* State, 144 Ind. 240, 43 N. E. 138.

Michigan.— People *v.* De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. Rep. 863; People *v.* Sweeney, 55 Mich. 586, 22 N. W. 50.

Nebraska.— Bush *v.* State, 62 Nebr. 128, 86 N. W. 1062; Thompson *v.* State, 44 Nebr. 366, 62 N. W. 1060.

Pennsylvania.— Com. *v.* Schmous, 162 Pa. St. 326, 29 Atl. 644; Com. *v.* Swayne, 1 Pa. Super. Ct. 547.

See 15 Cent. Dig. tit. "Criminal Law," § 2958.

An assignment that the court erred in overruling "the motion" for a continuance is insufficient where the record shows two motions for continuances. May *v.* State, 140 Ind. 88, 39 N. E. 701. And see People *v.* De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. Rep. 863.

25. Territory *v.* Rehberg, 6 Mont. 467, 13 Pac. 132.

26. State *v.* Stephenson, 20 Tex. 151; State *v.* Norton, 19 Tex. 102.

27. Keith *v.* State, 157 Ind. 376, 61 N. E. 716; State *v.* Malone, 37 La. Ann. 266; State *v.* Bass, 12 La. Ann. 862.

28. State *v.* Pratt, 20 Iowa 267; State *v.* Clawson, 30 Mo. App. 139. And see Finley *v.* State, 61 Ala. 201.

rule of court.[29] If a plea or joinder in error is required, the appellant, after he has obtained a writ of certiorari on the suggestion of a diminution of the record, cannot require a plea or joinder until the return of the writ.[30] An appearance and joinder in error are a waiver of a notice of appeal.[31]

f. Scope of Assignment. An assignment of errors to one ruling raises no question as to the correctness of another,[32] but an assignment of errors to the overruling of a motion for a new trial is specific as to each and every ground of the motion.[33] Under such an assignment counsel may urge objections to the rejection or admission of evidence, to instructions given or refused, and to the sufficiency of the evidence.[34] Under an assignment that the verdict is contrary to law and evidence, an objection that the venue was not proved may be considered.[35]

2. Briefs[36] — a. Necessity For. It is almost universally required that the appellant shall furnish the appellate court with a brief on the merits, pointing out to the court and to opposing counsel the errors on which a reversal is sought; and if this requirement is not complied with, the appeal may be dismissed or the judgment affirmed.[37] In some jurisdictions, however, it is the duty of the court to examine the record and render judgment thereon, in the absence of briefs,[38] and in others, while it was not its duty to do so, it has done so with reluctance.[39] In a capital case, the court has felt itself constrained to look into the record, notwithstanding the rule requiring a brief has been disregarded.[40]

b. Form and Contents. By statutes and rules of court briefs are usually required to be either typewritten or printed,[41] and the furnishing of a typewritten brief is not a compliance with a rule requiring a printed one.[42] The brief

29. A joinder in error is not necessarily conclusive upon defendant in respect of the sufficiency of the transcript of the record; but he may move to withdraw his joinder for the purpose of suggesting a diminution of the record and supply its deficiencies, if any are made to appear. Gibbs *v.* Blackwell, 40 Ill. 66.

30. Schirmer *v.* People, 40 Ill. 66.

31. State *v.* Hattabough, 66 Ind. 223.

32. See Appeal and Error, 2 Cyc. 988.

An information may be assailed for the first time by an assignment of errors, but the assignment will fail if the information charges a crime, although it may be defective. Pattee *v.* State, 109 Ind. 545, 10 N. E. 421.

33. Futch *v.* State, 90 Ga. 472, 16 S. E. 102. See also Allen *v.* State, 74 Ind. 216.

34. Shaw *v.* People, 81 Ill. 150. Such an assignment, however, is not sufficient to bring up the contention that the act was not prohibited by statute. State *v.* Hays, 38 Minn. 475, 38 N. W. 365.

35. Futch *v.* State, 90 Ga. 472, 16 S. E. 102.

36. Definition of and rules governing preparation and submission of briefs see Appeal and Error, 2 Cyc. 1013–1019.

37. *Alabama.*— Campbell *v.* State, 133 Ala. 158, 32 So. 635; Robinson *v.* State, 46 Ala. 9.

California.— People *v.* Poggi, (1902) 70 Pac. 292; People *v.* Fahey, (1901) 66 Pac. 726; People *v.* Woon Tuck Wo, 120 Cal. 294, 52 Pac. 833.

Florida.— Mitchell *v.* State, 42 Fla. 603, 29 So. 404.

Indiana.— Cutler *v.* State, 62 Ind. 398; State *v.* Lieben, 57 Ind. 106.

Nebraska.— George *v.* State, 44 Nebr. 757, 62 N. W. 1094.

Oklahoma.— Foust *v.* Territory, 10 Okla. 214, 61 Pac. 923; Wellman *v.* Territory, 2 Okla. 152, 37 Pac. 1066.

Texas.—Frost *v.* State, (Cr. App. 1900) 57 S. W. 669; Conrad *v.* State, 9 Tex. App. 674.

See 15 Cent. Dig. tit. "Criminal Law," § 2965.

Although the court may waive compliance with the rule requiring plaintiff in error to point out his exceptions in a brief as to matters at the foundation of the prosecution, it will not do so as to technical exceptions to the admission of evidence. Tubbs *v.* U. S., 105 Fed. 59, 44 C. C. A. 357.

The parties cannot consent to dispense with the rule requiring briefs to be filed. Territory v. Brady, 4 Okla. 514, 46 Pac. 573.

The rule as to the time of filing a brief is not applied as strictly in criminal as in civil cases. Presser *v.* People, 98 Ill. 406.

38. State *v.* Cox, (Iowa 1895) 65 N. W. 304; State *v.* Dotson, 115 Mo. 399, 22 S. W. 375; State *v.* Heffernan, 20 Mo. App. 327; State *v.* Zimmerman, 16 Mo. App. 547.

39. White *v.* Territory, 11 Okla. 172, 65 Pac. 835. And see Territory *v.* Stanton, 8 Mont. 157, 19 Pac. 593; Territory *v.* Mooney, 8 Mont. 151, 19 Pac. 595.

40. State *v.* McGinnis, 17 Oreg. 332, 20 Pac. 632.

41. See Appeal and Error, 2 Cyc. 1020.

42. State *v.* Oleson, 9 Wash. 186, 37 Pac. 419.

Failure of appellant to file a printed brief is not excused by his poverty, where it appears that the trial court authorized the printing of the brief at the county's expense.

should specifically point out the errors on account of which a reversal is sought,[43] and should refrain from any scandalous, abusive, or disrespectful language in reference to the trial judge,[44] or the appellate court may on its own motion strike out the brief and affirm the judgment.[45]

F. Dismissal, Hearing, and Rehearing — 1. Dismissal — a. By Defendant. Under the practice of some jurisdictions it seems that an appellant has the right to withdraw his appeal in case of misdemeanor,[46] while in other jurisdictions the withdrawal is not a matter of right but can be had only with the consent of the court or opposite party.[47]

b. By Consent. In criminal as in civil cases an appeal may usually be dismissed or withdrawn with the consent of all parties.[48]

c. By Court Sua Sponte. A petition for a writ of error filed too late may be dismissed by the court of its own motion.[49]

d. On Motion — (1) *When and by Whom Made.* A motion to dismiss will not be considered until after the appellate court has acquired jurisdiction under the statute prescribing how the appeal or writ of error shall be perfected.[50] Ordinarily where the accused appeals the public prosecuting officer is the proper person to move to dismiss.[51]

State *v.* Rowe, 36 Oreg. 79, 60 Pac. 203. And while the rule in regard to printing abstracts may be waived where it is shown by the affidavit of defendant that he is unable to pay for the printing, and by the affidavit or professional statement of his counsel that there is merit in the appeal, yet in such case it is the printing only and not the abstract that is waived. State *v.* Earl, 66 Iowa 84, 23 N. W. 275.

43. *California.*— People *v.* Cebulla, 137 Cal. 314, 70 Pac. 181.

Indiana.— Riley *v.* State, 149 Ind. 48, 48 N. E. 345.

Missouri.— State *v.* Hicks, 92 Mo. 431, 4 S. W. 742.

Montana.— State *v.* Shepphard, 23 Mont. 323, 58 Pac. 868.

Texas.— Brooks *v.* State, (Cr. App. 1898) 45 S. W. 488.

Washington.— State *v.* Devine, 6 Wash. 587, 34 Pac. 154.

See Appeal and Error, 2 Cyc. 1014.

Civil and criminal cases.— The rules as to the specification of errors are less strict in criminal than in civil actions, and this is particularly true in capital cases, where the court will examine the whole record for error. State *v.* Meshek, 61 Iowa 316, 16 N. W. 143.

A mere statement that a reversal is asked and that the court erred in admitting evidence, without giving any reason or citing any authorities, and without any argument showing how the court erred, is not sufficient. People *v.* Cebulla, 137 Cal. 314, 70 Pac. 181.

44. See Appeal and Error, 2 Cyc. 1017.

45. Tomlinson *v.* Territory, 7 N. M. 195, 33 Pac. 950.

46. Wartelsky *v.* State, 38 Tex. Cr. 629, 44 S. W. 510.

47. Wisehart *v.* State, 104 Ind. 407, 4 N. E. 156; State *v.* Brewer, 98 N. C. 607, 3 S. E. 819; State *v.* Leak, 90 N. C. 655; State *v.* Sutcliffe, 4 Strobh. (S. C.) 372.

In case of a felony it has been held that the appeal could not be withdrawn by appellant's attorney, although he himself might perhaps do so by written application signed by himself in person, with the signature duly authenticated by the clerk of the court which tried the case. Paul *v.* State, 17 Tex. App. 583. And see Campbell *v.* Com., 3 Ky. L. Rep. 625.

A motion to discontinue a writ of error because plaintiff's counsel was unable to prepare the case on account of the illness of his assistant was denied in McGuire *v.* Com., 3 Wall. (U. S.) 382, 18 L. ed. 164.

48. State *v.* Brewer, 98 N. C. 607, 3 S. E. 819.

In felony it should affirmatively appear that the prisoner advisedly consents to the withdrawal of his appeal. State *v.* Leak, 90 N. C. 655.

49. State *v.* Baer, 70 Md. 544, 17 Atl. 400.

On the other hand the court has no power of its own motion to dismiss a writ of certiorari applied for to review a judgment rendered against the prosecutor, where he does not appear. Wilkins *v.* Camden County Quarter Sess., 58 N. J. L. 555, 34 Atl. 935. And see Appeal and Error, 3 Cyc. 182.

50. See Appeal and Error, 3 Cyc. 193. Thus where no writ of error has in fact issued, although steps to that end have been taken (State *v.* Mitchell, 29 Fla. 302, 10 So. 746), where no appeal has been perfected by the performance of the proper statutory conditions (State *v.* James, 34 S. C. 579, 13 S. E. 899), or where no statement of facts has been served or filed (State *v.* Blanck, 10 Wash. 292, 38 Pac. 1012) a motion to dismiss is premature and will be denied.

If the questions involved in the motion to dismiss are very intimately connected with the questions arising on the merits of the appeal, the motion may be denied and all questions be considered together. State *v.* Sullivan, (S. C. 1893) 17 S. E. 694.

51. Carnel *v.* People, 2 Edm. Sel. Cas. (N. Y.) 208, holding that the power of the district attorney in New York to move to quash a writ of error is concurrent with the

(II) *Grounds*—(A) *Lack of Jurisdiction and Defect in Proceedings.* The lack of jurisdiction in the appellate court,[52] the fact that no writ of error has been issued,[53] that no judgment has been entered in the lower court,[54] that no appeal at all lies in the case,[55] the omission of facts from the record,[56] and a failure to give appeal-bonds or recognizance[57] are grounds for a dismissal. So on the affirmance of a conviction a prior appeal from a refusal of bail will be dismissed;[58] but an appeal will not be dismissed because the period covered by the sentence has expired,[59] or because the court has neglected to take a recognizance from the accused or to commit him according to the statute.[60]

(B) *Pardon of Accused.* The fact that the accused has been pardoned does not alone authorize the dismissal of his writ of error, as he may be entitled to a reversal which will remove the infamy of his conviction.[61]

(C) *Escape After Conviction*—(1) In General. The escape of defendant from custody after conviction deprives him of the benefit of a review, and whether he escapes before or pending his appeal it may be dismissed on motion, unless he surrenders himself before the matter is determined or within a time fixed by the court;[62] and this is the rule by statute in some

power of the attorney-general, and that this motion cannot be objected to because made by the latter official.

52. Jones *v.* State, (Ga. 1902) 42 S. E. 271; Wright *v.* People, 92 Ill. 596; State *v.* Moore, 52 La. Ann. 603, 26 So. 1001; State *v.* Clark, 49 La. Ann. 780, 22 So. 257; State *v.* Lehr, 16 Mo. App. 491.

Lack of jurisdiction in the trial court is ground for reversal of the judgment, and cannot be urged on a motion to dismiss a writ of error. Castleberry *v.* State, 68 Ga. 49.

53. State *v.* Miller, 146 Mo. 229, 47 S. W. 907. See also State *v.* Rasberry, 109 La. 265, 33 So. 308.

On death of appellant a motion to abate and dismiss will be granted. Hudson *v.* State, (Tex. Cr. App. 1902) 70 S. W. 82.

54. Small *v.* State, (Tex. Cr. App. 1897) 38 S. W. 798.

55. Ball *v.* Com., 9 S. W. 304, 10 Ky. L. Rep. 422.

As for example where the record does not show that notice of appeal was given and filed and that sentence was pronounced. Sudderth *v.* State, (Tex. Cr. App. 1897) 42 S. W. 301; Barfield *v.* State, (Tex. Cr. App. 1897) 41 S. W. 610.

56. Green *v.* State, 59 Md. 123, 43 Am. Rep. 542.

The incompleteness of the transcript is no ground for dismissal, as this may be cured by applying for a writ of certiorari to complete the transcript. State *v.* Weil, 89 Ind. 286; Shrader *v.* State, (Miss. 1897) 21 So. 307.

57. State *v.* Hamby, 126 N. C. 1066, 35 S. E. 614; Maxey *v.* State, 41 Tex. Cr. 556, 55 S. W. 823; McCrummen *v.* State, (Tex. Cr. App. 1899) 49 S. W. 370; Sims *v.* State, (Tex. Cr. App. 1898) 47 S. W. 463.

As to reinstatement of appeal, where a copy of a recognizance was given in place of a former one pronounced defective see Spradling *v.* State, (Tex. Cr. App. 1902) 71 S. W. 17.

58. *Ex p.* Gonzales, (Tex. Cr. App. 1894) 25 S. W. 782.

59. Lark *v.* State, 55 Ga. 435; Com. *v.* Fleckner, 167 Mass. 13, 44 N. E. 1053; Roby *v.* State, 96 Wis. 667, 71 N. W. 1046.

An appeal from an order fixing the day for execution will be dismissed where the day fixed has passed. People *v.* Thompson, 115 Cal. 160, 46 Pac. 912.

60. State *v.* Clarkson, 59 Mo. 149.

61. Eighmy *v.* People, 78 N. Y. 330.

The contrary view has been held and the appeal was dismissed, where the executive commuted the death penalty to life imprisonment, and the prisoner accepted the commutation. State *v.* Mathis, 109 N. C. 815, 13 S. E. 917.

62. *California.*— People *v.* Redinger, 55 Cal. 290, 36 Am. Rep. 32.

Florida.— Woodson *v.* State, 19 Fla. 549.

Georgia.— Madden *v.* State, 70 Ga. 383.

Indiana.— Heath *v.* State, 101 Ind. 512; Sargent *v.* State, 96 Ind. 63.

Kansas.— Holton *v.* Mannix, 6 Kan. App. 105, 49 Pac. 679.

Kentucky.— Wilson *v.* Com., 10 Bush 526, 19 Am. Rep. 76.

Louisiana.—State *v.* Robertson, 51 La. Ann. 159, 24 So. 774; State *v.* Thibodeaux, 48 La. Ann. 600, 19 So. 680; State *v.* Butler, 35 La. Ann. 392.

Maine.— Anonymous, 31 Me. 590.

Massachusetts.— Com. *v.* Andrews, 97 Mass. 543.

New Mexico.— Territory *v.* Trinkhouse, 4 N. M. 158, 13 Pac. 341.

New York.— *In re* Genet, 1 Hun 292 [*affirmed* in 59 N. Y. 80, 17 Am. Rep. 315].

North Carolina.— State *v.* Cody, 119 N. C. 908, 26 S. E. 252, 56 Am. St. Rep. 692; State *v.* Anderson, 111 N. C. 689, 16 S. E. 316.

South Carolina.— State *v.* Carpenter, 41 S. C. 549, 19 S. E. 692; State *v.* Murrell, 33 S. C. 83, 11 S. E. 682; State *v.* Rippon, 2 Bay 99.

Texas.— Isom *v.* State, (Cr. App. 1902) 70 S. W. 23; Johnson *v.* State, 41 Tex. Cr.

states.[63] In the absence of statute[64] the fact of escape may properly be brought to the knowledge of the court by affidavits of officers having actual knowledge.[65]

(2) REINSTATEMENT UPON SURRENDER.[66] The court may in its discretion give the accused who has escaped and is at large a reasonable time to surrender himself, with a provision that upon his so doing his appeal may be reinstated,[67] or the court may simply suspend the determination of the appeal until the rearrest of the accused.[68]

(D) *Appeal Returnable to Wrong Place or Time.* An appeal made returnable on the appellant's suggestion[69] at an improper time and place may be dismissed.[70]

(E) *Appeals Frivolous or For Delay.* An appeal by the state may be dismissed where the prosecuting officials admit that it is without merit;[71] but gener-

9, 54 S. W. 598; Carter *v.* State, (Cr. App. 1898) 47 S. W. 979; Insoll *v.* State, (Cr. App. 1897) 40 S. W. 792; Sanders *v.* State, (Cr. App. 1897) 40 S. W. 495; Gatliff *v.* State, (Cr. App. 1894) 28 S. W. 466; Zardenta *v.* State, (Cr. App. 1893) 23 S. W. 684.

Utah.— People *v.* Tremayne, 3 Utah 331, 3 Pac. 85.

Virginia.—Leftwich *v.* Com., 20 Gratt. 716; Sherman *v.* Com., 14 Gratt. 677.

Washington.— State *v.* Handy, 27 Wash. 469, 67 Pac. 1094.

West Virginia.— State *v.* Sites, 20 W. Va. 13; State *v.* Conners, 20 W. Va. 1.

United States.— Smith *v.* U. S., 94 U. S. 97, 24 L. ed. 24, 32.

See 15 Cent. Dig. tit. "Criminal Law," § 2975.

The rule of the text is not based upon the common-law theory that the personal appearance of the accused in the appellate court is necessary to confer jurisdiction, which is not recognized in the United States, but upon the fact that the determination of the appeal while the accused is at large would be a useless form, for if judgment is affirmed he will not return, while if a new trial is granted he may or may not, as suits his interest. Warwick *v.* State, 73 Ala. 486, 49 Am. Rep. 59 [*overruling* Parsons *v.* State, 22 Ala. 50].

The fact that the appeal has been heard before he escaped does not prevent it from being dismissed, or entitle the escaped criminal to a decision of the appeal on its merits. Gentry *v.* State, 91 Ga. 669, 17 S. E. 956. But see Leftwich *v.* Com., 20 Gratt. (Va.) 716, where the accused escaped after the judgment had been reversed, and the court refused to set the reversal aside.

63. Hamilton *v.* State, (Tex. Cr. App. 1893) 23 S. W. 683; Pate *v.* State, 21 Tex. App. 191, 17 S. W. 461; Loyd *v.* State, 19 Tex. App. 137.

Statutes constitutional.—Statutes authorizing the dismissal of an appeal on the ground of the escape of the accused are constitutional (Loyd *v.* State, 19 Tex. App. 137; Lunsford *v.* State, 10 Tex. App. 118; Brown *v.* State, 5 Tex. App. 126), and do not deprive the accused of a speedy trial or of the confrontation by adverse witnesses (Loyd *v.* State, 19 Tex. App. 137).

An escape before sentence is not an escape "pending an appeal" under the statute. Walters *v.* State, 18 Tex. App. 8.

To reinstate the appeal, under the Texas statute, a voluntary surrender of the accused to the sheriff who had him in custody or to his successor or a deputy is required. Hammons *v.* State, (Tex. Cr. App. 1895) 29 S. W. 780. His recapture does not give the court jurisdiction. *Ex p.* Wood, 19 Tex. App. 46; Lunsford *v.* State, 10 Tex. App. 118. The statute applies to an appeal from a refusal on habeas corpus to admit to bail (*Ex p.* Wood, 19 Tex. App. 46), where the sheriff had allowed the prisoner to go home on his promise to surrender himself if his appeal was not sustained (*Ex p.* Cole, 14 Tex. App. 579).

64. If a statute provides that the report of the sheriff shall be sufficient evidence to authorize a dismissal of the appeal, his report must set forth the facts and circumstances of the escape, and a mere statement that defendant escaped is insufficient. Loyd *v.* State, 19 Tex. App. 137.

65. Warwick *v.* State, 73 Ala. 486, 49 Am. Rep. 59; Gentry *v.* State, 91 Ga. 669, 17 S. E. 956.

66. Reinstatement generally see *infra,* XVII, F, 5.

67. *California.*—People *v.* Elkins, 122 Cal. 654, 55 Pac. 599.

Georgia.— Gentry *v.* State, 91 Ga. 669, 17 S. E. 956.

Illinois.— McGowan *v.* People, 104 Ill. 100, 44 Am. Rep. 87.

Missouri.— State *v.* Carter, 98 Mo. 431, 11 S. W. 979, 4 L. R. A. 621.

Montana.— State *v.* Dempsey, 26 Mont. 504, 68 Pac. 1114.

South Carolina.— State *v.* Johnson, 44 S. C. 556, 21 S. E. 806.

See 15 Cent. Dig. tit. "Criminal Law," § 2975.

68. State *v.* McMillan, 94 N. C. 945.

69. Where this mistake is committed by the judge the appeal will not be dismissed. State *v.* Balize, 38 La. Ann. 542; State *v.* West, 33 La. Ann. 1261; State *v.* Dellwood, 33 La. Ann. 1229.

70. State *v.* Jackson, 44 La. Ann. 975, 11 So. 575; State *v.* Lyon, 41 La. Ann. 952, 6 So. 722; State *v.* Cloud, 40 La. Ann. 618, 4 So. 497; State *v.* Granger, 40 La. Ann. 619, 6 So. 107; State *v.* Stephens, 38 La. Ann. 928.

71. State *v.* Stewart, 46 La. Ann. 117, 14 So. 306.

ally appeals will not be dismissed because frivolous or taken for delay, but the court will affirm the judgment below.[72]

(F) *Waiver of Grounds.* Treating an appeal as valid and proceeding without objection to defects and irregularities may be regarded as a waiver of the right to have the appeal dismissed for failure to conform to preliminary requirements.[73]

2. Striking Case From Calendar. Where the accused has escaped pending a writ of error and does not return within the term,[74] or where the record shows no appeal or writ of error,[75] the case will be stricken from the calendar.

3. Hearing — a. In General. The argument and hearing of the appeal is regulated largely by court rules which must be referred to in each particular case.[76]

b. Time For. The appellant may lose his right to have his appeal heard where he has failed to perfect it for many years after sentence;[77] but the fact that an appeal has been prematurely filed does not prevent it from being heard, or if not heard, the hearing may be postponed.[78]

c. Notice of. Notice of the time and place of hearing must be promptly and properly served.[79]

d. Presence of Accused. The hearing of the argument on appeal is not a trial within the constitutional provision entitling the accused to be present.[80]

e. Counsel. The appointment of counsel by the trial court for the trial authorizes the same counsel to prosecute a writ of error.[81]

f. Advancing or Postponing Hearing. Inasmuch as a prompt determination

72. See Appeal and Error, 2 Cyc. 188.

A statute which provides that an appeal may be dismissed if it is irregular in any substantial particular does not permit an appeal to be dismissed because frivolous. People *v.* McNulty, 95 Cal. 594, 30 Pac. 963.

Under a statute which prohibits delay, the question of what amounts to such delay as will defeat the appeal must be determined by the character of each case. State *v.* Bowers, 65 Md. 363, 9 Atl. 125, holding that where the preparation of the necessary papers would require less than an hour a delay of twenty-one days is fatal.

73. Mackey *v.* Com., 80 Ky. 345, 4 Ky. L. Rep. 179; State *v.* West, 10 Tex. 553. And see Appeal and Error, 3 Cyc. 191.

Appearance by the respondent, and his failure to move to dismiss the appeal, waives the objection that an appeal does not lie. Brady *v.* People, 51 Ill. App. 112.

74. Bonahan *v.* Nebraska, 125 U. S. 692, 8 S. Ct. 1390, 31 L. ed. 854.

75. State *v.* Kanooster, 12 Mo. App. 589.

76. See Appeal and Error, 3 Cyc. 210.

Cases reserved on the same point for two different prisoners will in England be heard separately unless counsel consent to their consolidation. Reg. *v.* Frost, 9 C. & P. 129, 38 E. C. L. 87.

The right to open and close generally belongs to the appellant. Anonymous, 1 Overt. (Tenn.) 437.

77. Turner *v.* Com., 89 Ky. 78, 1 S. W. 475, 8 Ky. L. Rep. 350.

78. Rust *v.* State, 14 Tex. App. 19.

A statute which provides that appeals must be heard and determined within a specific time, unless continued with the consent of defendant, has been held directory, so that a failure to render a decision does not entitle defendant to a discharge. People *v.* Staples, 91 Cal. 23, 27 Pac. 523.

Where a statute provides that the appeal shall be tried at the term at which the transcript is filed, unless continued, the appellant cannot postpone the hearing beyond the term by naming a later day in his notice of appeal. State *v.* Fitzpatrick, 88 Iowa 615, 55 N. W. 529.

79. Butts *v.* State, 90 Ga. 450, 16 S. E. 96.

The service may be proved by the admission of the attorney of the adverse party in open court. McAlister *v.* State, 77 Ga. 599, 3 S. E. 163.

80. Donnelly *v.* State, 26 N. J. L. 463; State *v.* Overton, 77 N. C. 485; Tooke *v.* State, 23 Tex. App. 10, 3 S. W. 782. See also State *v.* McCulloch, Dall. (Tex.) 357; State *v.* Nulty, 57 Vt. 543.

The right to be present at one's trial applies only to a trial by jury. Com. *v.* Cody, 165 Mass. 133, 42 N. E. 575. Hence even in a capital case his presence may be dispensed with during the argument and at the rendition of the decision thereon. Donnelly *v.* State, 26 N. J. L. 601; People *v.* Clark, 2 Edm. Sel. Cas. (N. Y.) 308, 1 Park. Cr. (N. Y.) 360; State *v.* David, 14 S. C. 428; Richards *v.* Reg., [1897] Q. B. 574, 61 J. P. 389, 66 L. J. Q. B. 459.

81. State *v.* Williamson, 72 Wis. 61, 39 N. W. 135.

If the plaintiff in error has no counsel the court should assign him counsel to prosecute the writ of error, or it may permit him to appear and conduct his cause in person. Donnelly *v.* State, 26 N. J. L. 463.

But the court will not appoint counsel to carry on an appeal for a poor person, where the power is not expressly conferred by a statute providing for the payment of such

of a writ of error is demanded in fairness to the accused, a hearing may not be postponed, although counsel on both sides consent.[82] In some cases a writ of error or an appeal may be taken up out of its order on notice to the other side.[83]

4. REHEARING. An appellate court has usually inherent power to grant a rehearing at any time before the remittitur has been filed with the clerk of the lower court.[84] The rehearing will not be granted unless it clearly appears that some question decisive of the case and actually submitted has been overlooked, or that the decision is in conflict with an express statute or previous decision to which the attention of the court was not called, or which has been overlooked by it.[85] New points purely technical in their character will not be considered;[86] nor will the court consider *ex parte* affidavits on a motion for a rehearing alleging errors which do not appear in the record.[87] The fact that the court has not expressly ruled upon errors in its original opinion will not warrant a rehearing where there does not appear to have been any controversy as to them,[88] or where they were necessarily determined by the decision, although not expressly mentioned.[89]

5. REINSTATEMENT.[90] While it is discretionary with the court to reinstate an appeal which has been dismissed or abandoned, it will do so only when good cause has been shown [91] and the merits of the appeal appear.[92]

person's counsel fees by the county. Howard *v.* State, 113 Wis. 248, 89 N. W. 110.

82. Calloway *v.* State, 91 Ga. 112, 16 S. E. 379.

The application of defendant for a postponement of the appeal, asked apparently for delay, is properly refused. State *v.* Green, (S. C. 1896) 27 S. E. 663.

83. Stone *v.* State, 20 N. J. L. 404; Barron *v.* People, 1 Barb. (N. Y.) 136.

In the absence of statute this is in the judicial discretion of the court, and where the prosecution moves to advance a criminal cause it must show facts that will enable the court to judge whether the motion should be granted. U. S. *v.* Norton, 91 U. S. 558, 23 L. ed. 250.

In Louisiana the prisoner has, but the state has not, the right to have an appeal advanced and tried out of its usual order. State *v.* Peter, 13 La. Ann. 232.

84. People *v.* Bruggy, (Cal. 1891) 26 Pac. 965; State *v.* Jones, 64 Iowa 349, 17 N. W. 911, 20 N. W. 470; Drake *v.* State, 29 Tex. App. 265, 15 S. W. 725; Bailey *v.* State, 11 Tex. App. 140.

Application for a rehearing made after the term see Grant *v.* State, (Ga. 1896) 25 S. E. 939.

While a rehearing is not matter of right in the absence of statute, a court may by virtue of its appellate jurisdiction suspend the issuance of the remittitur and rehear the case on a motion of the state, but it can only do so during the term at which the appeal was heard. Powers *v.* Com., 71 S. W. 494, 24 Ky. L. Rep. 1350.

85. State *v.* Eaton, 6 Kan. App. 94, 49 Pac. 686.

By rule of court in Texas an argument on a motion for a rehearing must be confined to a brief explanation of its grounds, with a reference to the statutes and decisions, unless further argument is required by the court. Gonzales *v.* State, 35 Tex. Cr. 33, 29 S. W. 1091, 30 S. W. 224.

Change in personnel of court.—It has been held that a rehearing will not be granted when asked for by the prosecution after the personnel of the court has changed, as the accused cannot be deprived of the benefit of the decision of the judges who first passed on his appeal. People *v.* Kurtz, 6 N. Y. St. 394.

86. People *v.* Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129; People *v.* Tidwell, 5 Utah 88, 12 Pac. 638; State *v.* Harding, 20 Wash. 556, 56 Pac. 399, 929.

87. Parker *v.* State, 33 Tex. Cr. 111, 21 S. W. 604, 25 S. W. 967.

Correction of record.— Inasmuch as it is well settled that amendments of the record will not be permitted after the decision, a rehearing will not be granted merely to enable the party to correct or perfect the record upon certiorari. Drake *v.* State, 145 Ind. 210, 41 N. E. 799, 44 N. E. 188; State *v.* Pierre, 49 La. Ann. 1159, 22 So. 373.

88. People *v.* Tidwell, 5 Utah 88, 12 Pac. 638.

89. English *v.* State, 31 Fla. 356, 12 So. 689.

A rehearing should not be granted merely to have the court listen to the same arguments and authorities (McArthur *v.* State, 41 Tex. Cr. 635, 57 S. W. 847; People *v.* Tidwell, 5 Utah 88, 12 Pac. 638; People *v.* Olson, 5 Utah 87, 12 Pac. 638), or where the motion for a reargument is on a manifestly frivolous pretext, for which there can be no possible excuse, and where it is made for the evident purpose of securing a delay in the execution of the sentence (People *v.* Jugigo, 128 N. Y. 589, 28 N. E. 139, 123 N. Y. 630, 25 N. E. 317).

90. **Reinstatement upon surrender** see *supra*, XVII, F, 1, d, (II), (C), (2).

91. Bunkley *v.* State, 91 Ga. 44, 16 S. E. 256; Stevens *v.* State, 69 Ga. 755; State *v.* Wine, 55 S. C. 193, 33 S. E. 1; Ross *v.* State, (Tex. Cr. App. 1894) 25 S. W. 774; Davis *v.* State, 23 Tex. App. 637, 5 S. W. 149; Downs *v.* State, 7 Tex. App. 483. And see APPEAL AND ERROR, 3 Cyc. 202.

92. People *v.* Busby, 113 Cal. 181, 45 Pac. 191.

G. Review — 1. Scope and Extent — a. In General. The power of appellate courts as defined by constitutions and statutes is strictly limited. Unless it has been expressly conferred by statute they have usually no original jurisdiction, and in the exercise of their appellate jurisdiction they are limited to a review of the proceedings of the lower court as evidenced by the record, and can consider no original matters not acted upon below.[93] As has been heretofore stated the court will often in criminal cases examine the whole record for errors,[94] and consequently the accused may in such cases challenge any part of it as error.[95] The ruling of the trial judge may be reviewed, although he assigns no reasons for it.[96] On the other hand the appellate court is not limited to a consideration of the reasons assigned in or by the lower court;[97] nor will it reverse a ruling of the lower court, for which an erroneous reason was assigned, if there were good grounds for the ruling.[98] The constitutionality of a penal statute will not be considered on appeal unless this is necessary to a decision of the case on the merits.[99]

b. Extent of Review as Determined by Mode — (I) *Appeal.* The questions which an appellant may have considered on his appeal are in almost every instance determined by the statutes conferring the right to appeal, which should in each case be consulted.[1] In the absence of a statute only questions arising on exceptions to rulings taken below can be considered.[2] Where the appeal is brought up under the statute with a bill of exceptions, the court is usually confined to the exceptions stated, and may not review the record for such irregularities as would be considered on certiorari or writ of error.[3]

(II) *Writ of Error.* On a writ of error defendant is entitled to have considered only the record or matters in the nature thereof, together with the bill of exceptions, unless a different rule is established by statute.[4] The writ does not lie

After the remittitur has been sent down the appellate court has no further jurisdiction of the appeal, and it cannot recall the remittitur and reinstate the appeal, although counsel show good grounds for reinstatement. People *v.* McDermott, 97 Cal. 247, 32 Pac. 7; Bunkley *v.* State, 91 Ga. 44, 16 S. E. 256; Hayes *v.* State, 91 Ga. 43, 16 S. E. 270.

93. State *v.* Yee Wee, 7 Ida. 188, 61 Pac. 588; Louisville *v.* Wemhoff, 68 S. W. 650, 24 Ky. L. Rep. 438; State *v.* Langford, 44 N. C. 436; Nash *v.* Republic, Dall. (Tex.) 631; Hardiman *v.* State, (Tex. Cr. App. 1899) 53 S. W. 121. The appellate court cannot direct an inquiry into the insanity of the accused arising since his conviction. Brown *v.* Com., 14 Bush (Ky.) 398. It must confine itself to the record (State *v.* Rhodes, 35 Mo. App. 360), and it cannot consider matters which arose subsequently to the judgment (People *v.* Casey, 72 N. Y. 393). See also *supra*, XVII, A, 2, 3. And see Appeal and Error, 3 Cyc. 220.

94. Brazier *v.* State, 44 Ala. 387. See *supra*, XVII, E, 1, a.

95. People *v.* Du Rell, 1 Ida. 44.

96. People *v.* Rathbun, 105 Mich. 699, 63 N. W. 973.

97. Com. *v.* Cain, 14 Bush (Ky.) 525; State *v.* Blitz, 171 Mo. 530, 71 S. W. 1027. See Appeal and Error, 3 Cyc. 221.

Arguments of counsel.— The appellate court, in determining the correctness of the rulings of the trial court on the evidence, will not consider the arguments made to the jury by counsel on the evidence. Martin *v.* State, (Tex. Cr. App. 1902) 70 S. W. 973.

98. State *v.* Ross, 34 Ark. 376.

99. State *v.* Darlington, 153 Ind. 1, 53 N. E. 925.

Constitutionality of another statute.— Where a prosecution is in accordance with the statute, the constitutionality of another statute will not be considered, although the trial judge declared that he would sentence the accused under the latter. Reddish *v.* People, 84 Ill. App. 509.

1. In Arkansas questions which might have been raised by motion in arrest of judgment may be considered so far as they are not cured by the verdict. Sweeden *v.* State, 19 Ark. 205.

In Maryland the statute permitting appeals on the evidence does not change the law relative to assignments of error, and authorizes nothing to be heard on an appeal except questions arising on the evidence. Lamb *v.* State, 66 Md. 285, 7 Atl. 399. Under another Maryland statute both the exceptions and a judgment on demurrer may be considered. State *v.* Floto, 81 Md. 600, 32 Atl. 315; Avirett *v.* State, 76 Md. 510, 25 Atl. 676, 987.

Judgments and orders which are appealable see *supra*, XVII, A, 3.

2. People *v.* McCormick, 135 N. Y. 663, 32 N. E. 26.

3. State *v.* Nixon, 18 Vt. 70, 46 Am. Dec. 135.

4. People *v.* Casey, 72 N. Y. 393; Gaffney *v.* People, 50 N. Y. 416; People *v.* Thompson, 41 N. Y. 1; Grant *v.* People, 4 Park. Cr. (N. Y.) 527; Safford *v.* People, 1 Park. Cr. (N. Y.) 474. But *compare* Middleton *v.* Com., 2 Watts (Pa.) 285.

to consider proceedings arising after the judgment, and which form no part of the record,[5] and the operation of the writ is not extended to matters not in the record proper by a motion in arrest of judgment, since such motion can only be based on a defect in the record.[6]

(III) *CERTIORARI.* Where the record is brought up by certiorari, the general rule is that the court will examine it only to ascertain whether it is regular and conformable to the law.[7] It has been held that the court will not review the evidence to determine its sufficiency,[8] although it may consider rulings on the admission and exclusion of evidence.[9]

(IV) *QUESTIONS RESERVED OR CERTIFIED.* Where points are reserved and certified to the appellate court, the latter cannot in the absence of a writ of error review any question not so reserved and certified[10] or pass upon any question not passed upon and determined by the court below.[11]

e. On Appeal From Final Judgment. Although, as is elsewhere pointed out,[12] a writ of error or appeal will not lie from an interlocutory ruling before final judgment, yet in most cases by statute it is the rule that on an appeal from a final judgment interlocutory orders and orders overruling a motion for a new trial may be reviewed.[13]

d. Decision in Separate Proceeding. Where defendant was jointly indicted with another, but subsequently separately informed against, the rulings under the indictment will not be considered on an appeal from a judgment under the information.[14]

e. Decisions of Intermediate Courts. The appellate court in considering an appeal from an intermediate appellate court will not review errors committed at *nisi prius* which were not alleged in or passed upon by the intermediate court.[15]

f. Former Decision as Law of Case. It is a general rule that the determination of an appellate court as to all questions which are or might have been

The writ does not bring up an order refusing a new trial (Anderson *v.* State, 5 Harr. & J. (Md.) 174), or a continuance because of the absence of witnesses (Webster *v.* People, 92 N. Y. 422, 1 N. Y. Cr. 190; Eighmy *v.* People, 79 N. Y. 546).

5. Brantley *v.* State, 87 Ga. 149, 13 S. E. 257; Pontius *v.* People, 82 N. Y. 339; Hunt *v.* People, 76 N. Y. 89.

6. People *v.* Thompson, 41 N. Y. 1.

Scope and form of writ of error see *supra*, XVII, A, 1, b.

Necessity for final judgment and sentence see *supra*, XVII, A, 3, a.

7. Palmer *v.* People, 43 Mich. 414, 5 N. W. 450; Com. *v.* James, 142 Pa. St. 32, 21 Atl. 805. See also APPEAL AND ERROR, 3 Cyc. 149.

8. Barringer *v.* People, 14 N. Y. 593; People *v.* Reagle, 60 Barb. (N. Y.) 527; Pulling *v.* People, 8 Barb. (N. Y.) 384; People *v.* Butler, 3 Park. Cr. (N. Y.) 377; Com. *v.* Gillespie, 146 Pa. St. 546, 23 Atl. 393.

9. Jackson *v.* People, 9 Mich. 111, 77 Am. Dec. 491.

Nature and use of writ of certiorari see *supra*, XVII, A, 1, d.

10. Moore *v.* State, 16 Ala. 411.

11. State *v.* Wedge, 23 Minn. 32 note; State *v.* Hoag, 23 Minn. 31; State *v.* Byrud, 23 Minn. 29.

Reservation and certification of questions see *supra*, XVII, A, 1, f.

12. See *supra*, XVII, A, 3, a, b.

13. Territory *v.* Rehberg, 6 Mont. 467, 13 Pac. 132; People *v.* Wilson, 151 N. Y. 403, 45 N. E. 862; People *v.* Callahan, 29 Hun (N. Y.) 580; People *v.* Mangano, 29 Hun (N. Y.) 259.

Appeals from orders after judgment see *supra*, XVI, A, 3, e.

14. Van Houton *v.* People, 22 Colo. 53, 43 Pac. 137. See also APPEAL AND ERROR, 3 Cyc. 221.

15. *Iowa.*—Hintermeister *v.* State, 1 Iowa 101.

Massachusetts.—Com. *v.* Vincent, 108 Mass. 441; Com. *v.* Sheehan, 108 Mass. 432 note; Com. *v.* Calhane, 108 Mass. 431.

Missouri.— St. Louis *v.* Pahl, 114 Mo. 32, 21 S. W. 448.

Nebraska.— Bailey *v.* State, 30 Nebr. 855, 47 N. W. 208.

South Dakota.— Chamberlain *v.* Putnam, 10 S. D. 360, 73 N. W. 201.

Texas.— Parker *v.* State, (Cr. App. 1893) 21 S. W. 370.

See 15 Cent. Dig. tit. "Criminal Law," § 3001. See also APPEAL AND ERROR, 3 Cyc. 389, 390.

In New York the court of appeals, on an appeal from an affirmance by the appellate division of a judgment of conviction, cannot inquire into the sufficiency of the evidence to go to the jury (People *v.* Helmer, 154 N. Y. 596, 49 N. E. 249 [*reversing* 13 N. Y. App. Div. 426, 43 N. Y. Suppl. 642, 12 N. Y. Cr. 134]) or into the question of fact involved in the meaning of documents (People *v.* Most, 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509).

raised and decided will be the law of the case for the future.[16] Hence a decision on a prior appeal in the same case that the evidence did not authorize a conviction is the law of the case on a subsequent appeal, where practically the same evidence is involved.[17] So too as a general rule an affirmance of the judgment will preclude a subsequent appeal on any interlocutory ruling which was or might have been determined in the judgment.[18] Where different questions arise on the second appeal, however, or the record presents a different state of facts, the former decision is not controlling.[19]

2. Parties Who May Allege Error — a. In General. An objection made and an exception taken at the trial by one of several co-defendants jointly tried, who was acquitted, cannot be made the basis of a review by an appellant who was convicted but who was not injured by the error.[20] And the prosecution on an appeal cannot allege error committed against defendant.[21]

b. Estoppel to Allege Error. As a general rule an appellant or plaintiff in error will not be permitted to allege error in which he himself acquiesced, or which he invited or induced the trial court to commit,[22] or which was the natural consequence of his own actions.[23] The rule applies for example to error in instructions which were given at appellant's request,[24] or which were founded on a state

16. *California.*—People *v.* Bennett, (1897) 50 Pac. 703.

Florida.— Knight *v.* State, (1902) 32 So. 110.

Georgia.— Wellman *v.* State, 103 Ga. 559. 29 S. E. 761.

Illinois.— Harris *v.* People, 138 Ill. 63, 27 N. E. 706.

Kentucky.— Ross *v.* Com., (1900) 59 S. W. 28.

Minnesota.— Mims *v.* State, 26 Minn. 494, 5 N. W. 369.

Missouri.— State *v.* Morse, 66 Mo. App. 303.

Nebraska.— Argabright *v.* State, 62 Nebr. 402, 87 N. W. 146.

North Carolina.— State *v.* Miller, 97 N. C. 450, 3 S. E. 234; State *v.* Speaks, 95 N. C. 689.

See 15 Cent. Dig. tit. "Criminal Law," §§ 3002–3004. See also Appeal and Error, 3 Cyc. 395.

The affirmance of a judgment on a writ of error is a bar to a second writ as to errors of record brought before the court on the first. Booth *v.* Com., 7 Metc. (Mass.) 285.

17. Stephens *v.* State, (Ga. 1899) 32 S. E. 344; Argabright *v.* State, 62 Nebr. 402, 87 N. W. 146.

18. State *v.* Summers, 9 Nev. 399.

Where a judgment is modified on the only error assigned thereto in the bill of exceptions, the court will not determine on a second writ other exceptions taken before the judgment was modified. *In re* Ryan, 80 Wis. 414, 50 N. W. 187; McDonald *v.* State, 80 Wis. 407, 50 N. W. 185.

19. Harrold *v.* Com., (Ky. 1888) 8 S. W. 194. And see People *v.* Hamilton, 103 Cal. 488, 37 Pac. 627.

20. *Alabama.*— Segars *v.* State, 88 Ala. 144, 7 So. 46; Finch *v.* State, 81 Ala. 41, 1 So. 565.

Arkansas.— Mann *v.* State, 37 Ark. 405. And see Willis *v.* State, 67 Ark. 234, 54 S. W. 211.

Florida.— Richard *v.* State, (1900) 29 So. 413.

Kentucky.— Bishop *v.* Com., 60 S. W. 190, 22 Ky. L. Rep. 1161.

Maryland.— Goldman *v.* State, 75 Md. 621, 23 Atl. 1097.

Missouri.— State *v.* Hopper, 71 Mo. 425.

North Carolina.— State *v.* Martin, 24 N. C. 101.

Pennsylvania.— Com. *v.* Doughty, 139 Pa. St. 383, 21 Atl. 228.

Washington.— State *v.* McCann, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216.

See 15 Cent. Dig. tit. "Criminal Law," § 3005. And see Appeal and Error, 3 Cyc. 240.

21. People *v.* Noregea, 48 Cal. 123; State *v.* Dubois, 39 La. Ann. 676, 2 So. 558.

22. *Arkansas.*— Price *v.* State, (1903) 71 S. W. 948.

Indian Territory.— Carter *v.* U. S., 1 Indian Terr. 342, 37 S. W. 204.

Louisiana.—State *v.* Porte, 9 La. Ann. 105.

Massachusetts.— Com. *v.* Locke, 114 Mass. 288.

Missouri.— State *v.* Pohl, 170 Mo. 422, 70 S. W. 695; State *v.* Baker, 136 Mo. 74, 37 S. W. 810; Porter *v.* State, 5 Mo. 538.

North Carolina.— State *v.* McLean, 121 N. C. 589, 28 S. E. 140, 42 L. R. A. 721.

Tennessee.— Fontaine *v.* State, 6 Baxt. 514.

Texas.— Grimsinger *v.* State, (Cr. App. 1901, 69 S. W. 583.

Washington.— Hartigan *v.* Territory, 1 Wash. Terr. 447.

United States.— Thiede *v.* Utah, 159 U. S. 510, 16 S. Ct. 62, 40 L. ed. 237.

See 15 Cent. Dig. tit. "Criminal Law," §§ 3008, 3009.

23. State *v.* Vianna, 37 La. Ann. 606; State *v.* Hardin, 25 La. Ann. 369; Cox *v.* People, 80 N. Y. 500.

24. *California.*— People *v.* Rodley, 131 Cal. 240, 63 Pac. 351; People *v.* Holmes, 126 Cal. 462, 58 Pac. 917; People *v.* Lopez, 59 Cal. 362.

Georgia.— Howard *v.* State, 115 Ga. 244, 41 S. E. 654.

of facts sworn to by him,[25] or which, although given by the court of its own motion, were substantially like one requested by him;[26] and it applies to error in the admission of testimony which he himself introduced or elicited by cross-examination.[27] So also a party who by words or actions expresses satisfaction with or acquiescence in the judgment may be estopped to question its validity, as where he executes a bond to abide by the judgment,[28] or permits the rendition of judgment by default.[29] Appellant cannot have reviewed exceptions which he deliberately withdrew;[30] and usually, as is elsewhere stated, a failure to object or except to an erroneous ruling of the trial court may be such laches as will prevent a party from having a review of the same.[31]

c. Waiver in Appellate Court. Many cases hold that failure to file the proper papers or to prosecute the case in the appellate court,[32] or to appear by counsel and support the appeal by argument justifies the court in affirming the judgment.[33] Others hold that, although the appellant does not appear or fails to prosecute his appeal, judgment cannot be affirmed as of course, but the record before the court must be examined and, if it is regular, judgment will then be affirmed.[34] As a rule errors assigned but not argued in the brief are taken as waived and will not be reviewed;[35] and it has also been held that a too concise

Missouri.— State *v.* Pohl, 170 Mo. 422, 70 S. W. 695; State *v.* Haines, (1901) 61 S. W. 621; State *v.* Stewart, 90 Mo. 507, 2 S. W. 790.

Montana.— State *v.* Lucey, 24 Mont. 295, 61 Pac. 994; State *v.* McClellan, 23 Mont. 532, 59 Pac. 924, 75 Am. St. Rep. 558.

Nebraska.— Dinsmore *v.* State, 61 Nebr. 418, 85 N. W. 445.

New Mexico.—Territory *v.* Gonzales, (1902) 68 Pac. 925.

Texas.— Harris *v.* State, (Cr. App. 1901) 61 S. W. 124; Tuller *v.* State, 8 Tex. App. 501.

See 15 Cent. Dig. tit. "Criminal Law," § 3009.

Contra under peculiar circumstances.— Watkins *v.* U. S., 1 Indian Terr. 364, 41 S. W. 1044.

25. Bloom *v.* State, 155 Ind. 292, 58 N. E. 81.

26. Howgate *v.* U. S., 7 App. Cas. (D. C.) 217; Harris *v.* State, (Tex. Cr. App. 1901) 61 S. W. 124.

27. Robinson *v.* State, 33 Ark. 180; State *v.* Hamey, 168 Mo. 167, 67 S. W. 620, 57 L. R. A. 846; Leftwich *v.* State, (Tex. Cr. App. 1900) 55 S. W. 571; Mealer *v.* State, 32 Tex. Cr. 102, 22 S. W. 142.

28. State *v.* Sawyer, 43 Minn. 202, 45 N. W. 155.

29. State *v.* Saxauer, 48 Mo. 454.

A plea of guilty waives all objections to the sufficiency of the evidence. Doans *v.* State, 36 Tex. Cr. 468, 37 S. W. 751.

30. Stephens *v.* People, 4 Park. Cr. (N. Y.) 396.

31. **Failure to object or except** see *supra*, XVII, B, 1, 2.

The court will not always imply assent from silence.— Flanagan *v.* State, 19 Ala. 546. See also Finley *v.* State, 61 Ala. 201.

32. Chaney *v.* State, 9 Ark. 129; State *v.* Dolezol, (Iowa 1896) 68 N. W. 917; State *v.* Higens, 82 Iowa 715, 47 N. W. 779; State *v.* Nellis, 69 Iowa 548, 29 N. W. 459; State *v.* Burton, 49 La. Ann. 1598, 22 So. 841; State *v.* Ferguson, 42 La. Ann. 643, 7 So. 670; Wilkins *v.* Camden County Quarter Sess., 58 N. J. L. 555, 34 Atl. 935.

33. State *v.* Schwab, 112 Iowa 666, 84 N. W. 944; State *v.* Goeken, 82 Iowa 716, 47 N. W. 779; State *v.* Peck, 82 Iowa 713, 47 N. W. 771; State *v.* Richards, 82 Iowa 713, 47 N. W. 769; State *v.* Myatt, 10 Nev. 163; McGuire *v.* Massachusetts, 3 Wall. (U. S.) 382, 18 L. ed. 164.

34. People *v.* Morasco, (Cal. 1894) 38 Pac. 423; State *v.* Davidson, 73 Mo. 428; State *v.* Armstrong, 46 Mo. 588; State *v.* Watkins, 25 Mo. App. 21; Barron *v.* People, 1 Barb. (N. Y.) 136.

35. *California.*— People *v.* Monroe, 138 Cal. 97, 70 Pac. 1072.

Florida.— Mitchell *v.* State, 43 Fla. 188, 30 So. 803.

Georgia.— Evans *v.* State, 115 Ga. 229, 41 S. E. 691; Flowers *v.* State, 114 Ga. 115, 39 S. E. 880; Bennett *v.* State, 102 Ga. 656, 29 S. E. 918.

Hawaii.— Provisional Government *v.* Machado, 9 Hawaii 221.

Illinois.— Call *v.* People, 201 Ill. 499, 66 N. E. 243; Collins *v.* People, 194 Ill. 506, 62 N. E. 902.

Indiana.— Lankford *v.* State, 144 Ind. 428, 43 N. E. 444; Norton *v.* State, 106 Ind. 163, 6 N. E. 126; Bybee *v.* State, 94 Ind. 443, 48 Am. Rep. 175; Richie *v.* State, 58 Ind. 355.

Iowa.— State *v.* Schwab, 112 Iowa 666, 84 N. W. 944.

Maine.— State *v.* Cady, 82 Me. 426, 19 Atl. 908.

Massachusetts.—Com. *v.* Nelson, 180 Mass. 83, 61 N. E. 802; Com. *v.* Noble. 165 Mass. 13, 42 N. E. 328; Com. *v.* Phillips, 162 Mass. 504, 39 N. E. 109.

New Jersey.— State *v.* Barker, 68 N. J. L. 19, 52 Atl. 284.

North Carolina.— State *v.* Bost, 125 N. C. 707, 34 S. E. 650.

Ohio.— Wilder *v.* State, 25 Ohio St. 555.

Utah.— State *v.* Campbell, 25 Utah 342, 71 Pac. 529.

or crude discussion of the error in the brief may justify the court in regarding the assignment discussed as waived.[36]

3. PRESUMPTIONS — a. In General. Nothing can be presumed to contradict the record on appeal, or to supply matters which the law does not require to be of record.[37] But as a general rule it will be presumed that statutory requirements regulating judicial proceedings were complied with and that the court and all its officials have properly and legally performed their duty.[38] Defendant alleging exceptions must show error affirmatively in the record, and in the absence of such showing none will be presumed.[39]

b. As to Particular Facts or Proceedings — (I) *IN GENERAL.* The rule as to the presumption of the regularity of judicial proceedings has been applied to the complaint and warrant, and the preliminary examination,[40] to the selection, sum-

Vermont.— State *v.* Schoolcraft, 72 Vt. 223, 47 Atl. 786.

See 15 Cent. Dig. tit. "Criminal Law," § 3012.

36. Thomas *v.* State, 36 Fla. 109, 18 So. 331.

37. Duncan *v.* State, 88 Ala. 31, 7 So. 104; Stubbs *v.* State, 49 Miss. 716; Laura *v.* State, 26 Miss. 174; Rainey *v.* State, 19 Tex. App. 479; McNeese *v.* State, 19 Tex. App. 48.

What must appear of record see *supra*, XVII, D.

Waiver of motion.— The appellate court will presume a motion waived where the record shows no decision or refusal to decide thereon. State *v.* Ross, 21 Iowa 467; Isaacs *v.* State, 48 Miss. 234.

38. *California.*— People *v.* Holmes, 118 Cal. 444, 50 Pac. 675.

Florida.— Jones *v.* State, (1902) 32 So. 793; Gass *v.* State, (1902) 32 So. 109.

Indiana.— State *v.* Patton, 159 Ind. 248, 64 N. E. 850; Ford *v.* State, 112 Ind. 373, 14 N. E. 241; Johns *v.* State, 104 Ind. 557, 4 N. E. 153; Beard *v.* State, 57 Ind. 8.

Iowa.— State *v.* Bone, 114 Iowa 537, 87 N. W. 507; State *v.* Braniff, 76 Iowa 291, 41 N. W. 21; State *v.* Kraner, 74 Iowa 760, 38 N. W. 382; Sharp *v.* State, 2 Iowa 454.

Kentucky.— Ison *v.* Com., 66 S. W. 184, 23 Ky. L. Rep. 1805; Vaugh *v.* Com., 22 S. W. 371, 15 Ky. L. Rep. 256.

Missouri.— State *v.* Walker, 167 Mo. 366, 67 S. W. 228; State *v.* Wear, 145 Mo. 162, 46 S. W. 1099.

Nebraska.— Smith *v.* State, 4 Nebr. 277.

New Mexico.— Territory *v.* Webb, 2 N. M. 147.

North Carolina.— State *v.* Seaborn, 15 N. C. 305.

Pennsylvania.— Com. *v.* Jadwin, 2 L. T. N. S. 13.

Tennessee.— Bennett *v.* State, 2 Yerg. 472.

Texas.— Jack *v.* State, 26 Tex. 1; Oates *v.* State, (Cr. App. 1895) 30 S. W. 554.

West Virginia.— State *v.* Lowe, 21 W. Va. 782, 45 Am. Rep. 570.

See 15 Cent. Dig. tit. "Criminal Law," § 3014.

Presumption that court based ruling on evidence pertinent to issue.— State *v.* Smith, 74 Iowa 580, 38 N. W. 492.

39. *Alabama.*— Cummins *v.* State, 58 Ala. 387.

California.— People *v.* Huff, 72 Cal. 117, 13 Pac. 168; People *v.* Lewis, 64 Cal. 401, 1 Pac. 490; People *v.* Richmond, 29 Cal. 414.

Florida.— Bryant *v.* State, 34 Fla. 291, 16 So. 177.

Georgia.— Dasher *v.* State, 113 Ga. 3, 38 S. E. 348.

Illinois.— Johnson *v.* People, 197 Ill. 48, 64 N. E. 286.

Indiana.— Veatch *v.* State, 60 Ind. 291; Carrick *v.* State, 18 Ind. 409.

Iowa.— State *v.* Shelledy, 8 Iowa 477.

Kansas.— State *v.* English, 34 Kan. 629, 9 Pac. 761.

Michigan.— People *v.* McDowell, 63 Mich. 229, 30 N. W. 68.

Minnesota.— State *v.* Brown, 12 Minn. 538.

Mississippi.— McQuillen *v.* State, 8 Sm. & M. 587.

Nebraska.— Coil *v.* State, 62 Nebr. 15, 86 N. W. 925.

Nevada.— State *v.* Stanley, 4 Nev. 71.

North Carolina.— State *v.* Wilson, 121 N. C. 650, 28 S. E. 416; State *v.* Seaborn, 15 N. C. 305.

Oregon.— O'Kelly *v.* Territory, 1 Oreg. 51.

Pennsylvania.— Taylor *v.* Com., 44 Pa. St. 131.

Texas.— Micken *v.* State, (Cr. App. 1895) 30 S. W. 222.

West Virginia.—State *v.* Henry, 51 W. Va. 283, 41 S. E. 439.

See 15 Cent. Dig. tit. "Criminal Law," § 3015.

40. People *v.* Williams, 84 Cal. 616, 24 Pac. 145; People *v.* Caldwell, 107 Mich. 374, 65 N. W. 213; State *v.* La Croix, 8 S. D. 369, 66 N. W. 944.

Illustrations.— Thus it will be presumed, where the record is silent, that an information was not filed until a preliminary examination was had or waived (State *v.* Mansfield, 19 Mont. 483, 48 Pac. 898; State *v.* La Croix, 8 S. D. 369, 66 N. W. 944); that it was filed subsequent to the commitment (People *v.* McCurdy, 68 Cal. 576, 10 Pac. 207); that the commitment was by a duly qualified magistrate (People *v.* Jackson, 138 Cal. 462, 71 Pac. 566; People *v.* Williams, 84 Cal. 616, 24 Pac. 145); that the complaint was properly signed by the complainant (Taylor *v.* State, (Tex. Cr. App. 1903) 72 S. W. 181); that the warrant was issued by the clerk under the direction of the court (Grimshaw *v.* State, 98 Wis. 612,

moning, swearing, and organization of the grand jury,[41] to their action in finding the indictment,[42] to the submission of the indictment to the grand jury,[43] to its return and presentment in court,[44] to the propriety of an indictment as the proper mode of accusation,[45] to the indorsement of the names of the witnesses,[46] to rulings on a demurrer or motion to quash,[47] to service of the indictment and list of jurors on defendant,[48] to the propriety of a separate or a joint trial of persons jointly indicted,[49] and to the appointment of counsel.[50]

(II) *ARRAIGNMENT AND PLEAS.* It has been held that statements in the record that defendant appeared in person or by counsel and participated in the

74 N. W. 375); and that the evidence authorized the issuance of the warrant where the record fails to show the evidence (People *v.* Caldwell, 107 Mich. 374, 65 N. W. 213. See also People *v.* Whipple, 108 Mich. 587, 66 N. W. 490).

Warrant, complaint, and preliminary examination see *supra*, X, B, C, D.

41. *Alabama.*— Hall *v.* State, 134 Ala. 90, 32 So. 750.

Hawaii.— Oriemon *v.* Territory, 13 Hawaii 413.

Illinois.— Williams *v.* People, 54 Ill. 422.

Indiana.— Powers *v.* State, 87 Ind. 144; Coverdale *v.* State, 60 Ind. 306; Bell *v.* State, 42 Ind. 335.

Iowa.— State *v.* Gibbs, 39 Iowa 318.

Louisiana.— State *v.* Tazwell, 30 La. Ann. 884.

Massachusetts.— Jeffries *v.* Com., 12 Allen 145.

Mississippi.— Chase *v.* State, 46 Miss. 683.

North Carolina.— State *v.* Perry, 122 N. C. 1018, 29 S. E. 384.

Ohio.— State *v.* Thomas, 61 Ohio St. 444, 56 N. E. 276, 48 L. R. A. 459; Williams *v.* State, Wright 42.

Pennsylvania.— Com. *v.* Smith, 4 Pa. Super. Ct. 1.

Tennessee.— Zachary *v.* State, 7 Baxt. 1; Galvin *v.* State, 6 Coldw. 283.

See 15 Cent. Dig. tit. "Criminal Law," § 3017.

Where the court summoned a special grand jury under a statute empowering it to do so on a certain contingency, the presumption is that the contingency happened, where the record is silent and no showing is made to the contrary. Battle *v.* State, 54 Ala. 93; Freel *v.* State, 21 Ark. 212; State *v.* Overstreet, 128 Mo. 470, 31 S. W. 35.

42. State *v.* Lassley, 7 Port. (Ala.) 526; Lanekton *v.* U. S., 18 App. Cas. (D. C.) 348; Price *v.* Com., 21 Gratt. (Va.) 846.

Presumed that indictment is based on legal and sufficient evidence. People *v.* Glen, 173 N. Y. 395, 66 N. E. 112.

On a plea of former jeopardy defendant must establish that the former trial was on a valid indictment. This will not be presumed for the purpose of overruling a subsequent conviction, from which an appeal is taken. State *v.* Wilson, 39 Mo. App. 187.

43. Bedford *v.* State, 2 Swan (Tenn.) 72.

44. *Indiana.*— Heath *v.* State, 101 Ind. 512; Willey *v.* State, 46 Ind. 363.

Louisiana.— State *v.* Mason, 32 La. Ann. 1018.

Mississippi.— Greeson *v.* State, 5 How. 33.

New Jersey.—Engeman *v.* State, 54 N. J. L. 247, 23 Atl. 676.

New York.—Brotherton *v.* People, 75 N. Y. 159.

North Carolina.— State *v.* Bordeaux, 93 N. C. 560.

See 15 Cent. Dig. tit. "Criminal Law," § 3017.

What the record must show as to finding and presentment of the indictment see *supra*, XVII, D, 1, a, (IX).

45. Where one can be tried for a misdemeanor by indictment only when an order to that effect is made, it will be presumed, where the record is silent, that the order was made. Ritchie *v.* Territory, 9 Okla. 454, 60 Pac. 97.

46. The indorsement of the name of a witness on the copy of the information in the transcript raises the presumption that the original information was indorsed at the proper time. Berneker *v.* State, 40 Nebr. 810, 59 N. W. 372.

47. Where a demurrer and motion to quash are overruled without findings as to the facts on which they are based, it will be presumed that the court found against the facts alleged in the demurrer and motion (State *v.* Humason, 5 Wash. 499, 32 Pac. 111); and if the record does not contain the demurrer it will be presumed that it was addressed to the whole indictment, so that overruling it is not error where one of the counts in the indictment is good (Cheatham *v.* State, 59 Ala. 40).

Where it is doubtful from the record whether a bill of particulars or the indictment was demurred to, it will be presumed to have been the former, where an amended bill of particulars was filed, demurrer to it overruled, and a trial and conviction had, for the reason that it is absurd to suppose that a trial could be had if the indictment had been overruled on demurrer. Jules *v.* State, 85 Md. 305, 36 Atl. 1027.

48. Clarke *v.* State, 78 Ala. 474, 56 Am. Rep. 45; Rash *v.* State, 61 Ala. 89. See also U. S. *v.* Plumer, 27 Fed. Cas No. 16,058, 3 Cliff. 28.

49. Where two are indicted and the record shows that only one was tried, it may be presumed that a separate trial was ordered. Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767. So too the discretion of the trial court in refusing a severance will be presumed to have been properly exercised. State *v.* Watkins, 106 La. 380, 31 So. 10.

50. The appointment of a prosecuting attorney *pro hac vice* will be presumed regular

proceedings at some stage subsequent to the arraignment justify a presumption that he was formally arraigned.[51] On the other hand, however, it has been held that an arraignment and plea will not be presumed from recitals in the record that defendant appeared and that a jury was selected, impaneled, and sworn.[52] Where the record shows no action taken on defendant's plea of former jeopardy,[53] or where it shows no verdict on a plea of former acquittal, and the bill of exceptions does not show that defendant asked the court to instruct the jury thereon or that this was refused,[54] it will be presumed that the plea was waived. But where defendant withdrew a plea of guilty properly made, in order to move to dismiss the indictment, which motion was overruled, it will be presumed that the plea was withdrawn solely for the purpose of the motion and that it was reinstated, although the record shows no formal renewal.[55] If the record shows that no counsel appeared for accused, but fails to show that he requested one, it will be presumed that he did not, and that he waived his right to counsel.[56]

(III) *Organization and Jurisdiction of Court, Venue, Adjournments, and Continuances.* The legality and validity of the organization of the trial court will be presumed,[57] and all presumptions will be made in favor of the jurisdiction of the court over the person of defendant, where the record shows no objection to jurisdiction.[58] If the record is silent as to where the court was held, it will be presumed that it was held at the place designated by the statute,[59] and it will be presumed that it was held for the proper county.[60] Presumptions of

and warranted by the facts, where the record is silent. Wilson *v.* People, 3 Colo. 325; State *v.* Fontenot, 48 La. Ann. 283, 19 So. 113. And the appellate court will presume that the attorney assigned the prisoner was an attorney of the court duly licensed. State *v.* Kentuck, 8 La. Ann. 308.

51. Paris *v.* State, 36 Ala. 232; Sohn *v.* State, 18 Ind. 389; State *v.* McCombs, 13 Iowa 426.

52. Crain *v.* U. S., 162 U. S. 625, 16 S. Ct. 952, 40 L. ed. 1097. And see State *v.* Wood, (Mo. App. 1903) 71 S. W. 724.

A proper arraignment and plea may be presumed and a conviction sustained from recitals in the record that defendant fraudulently and wilfully stood mute and that thereupon he was tried (Ellenwood *v.* Com., 10 Metc. (Mass.) 222), that he was "asked by the court whether he [was] guilty or not guilty of the offence charged upon him" (Com. *v.* Harvey, 103 Mass. 451), or that he "personally appeared in open court and was duly arraigned" (State *v.* Abrams, 11 Oreg. 169, 8 Pac. 327; State *v.* Lee Ping Bow, 10 Oreg. 27).

Plea of guilty.— Under a statute requiring the judge on a plea of guilty to be satisfied that the plea was knowingly and fairly made, it will be presumed, where the record shows a private examination of the accused by the judge before sentence, that he was satisfied that the plea was thus made. People *v.* Ellsworth, 68 Mich. 496, 36 N. W. 236.

It may be presumed that the court refused to accept a plea in abatement not verified or proved as provided by statute. Roby *v.* State, 96 Wis. 667, 71 N. W. 1046.

53. Johnson *v.* State, 26 Tex. App. 631, 10 S. W. 235.

54. State *v.* Childers, 32 Oreg. 119, 49 Pac. 801.

55. People *v.* Bradner, 107 N. Y. 1, 13 N. E. 87.

56. State *v.* Raney, 63 N. J. L. 363, 43 Atl. 677.

57. *California.*—People *v.* Barbour, 9 Cal. 230.

Georgia.— Ring *v.* State, 96 Ga. 295, 22 S. E. 526.

Illinois.— People *v.* Woodside, 72 Ill. 407.

Indiana.— Morgan *v.* State, 12 Ind. 448; Porter *v.* State, 2 Ind. 435.

Mississippi.— Guice *v.* State, 60 Miss. 714.

Nebraska.— Clough *v.* State, 7 Nebr. 320.

West Virginia.— Boice *v.* State, 1 W. Va. 329.

See 15 Cent. Dig. tit. "Criminal Law," § 3020.

Appointment of special judge.— It will be presumed that the appointment of a special judge is legal (Montgomery County *v.* Courtney, 105 Ind. 311, 4 N. E. 896; Shircliff *v.* State, 96 Ind. 369), and that the contingency authorizing, or a good cause for, his appointment had arisen (Schwartz *v.* State, (Tex. Cr. App. 1897) 40 S. W. 976; State *v.* Newman, 49 W. Va. 724, 39 S. E. 655), although the record does not show who was appointed or by what authority he acted (State *v.* Lowe, 21 W. Va. 782, 45 Am. Rep. 570), and is silent as to other facts.

58. State *v.* Baty, 166 Mo. 561, 66 S. W. 428; People *v.* Bradner, 107 N. Y. 1, 13 N. E. 87; State *v.* Easterlin, 61 S. C. 71, 39 S. E. 250; Thurman *v.* State, (Tex. Cr. App. 1897) 40 S. W. 795.

What record must show as to jurisdictional facts see *supra*, XVII, D, 1, a, (III)-(V).

59. West *v.* State, 22 N. J. L. 212.

60. Where the record shows that the court was held in a certain county and the jurors were chosen from that county, it will be presumed that the court was held for that

regularity will also be indulged with respect to venue,[61] change of venue,[62] adjournments,[63] and continuances or refusals thereof.[64]

(IV) *Conduct of Trial in General.* Where the record shows that defendant was present when the trial commenced, and that the proceedings were consecutive and continuous and without an adjournment, and that he was also present at the rendition of the verdict, it will be presumed, where the record is silent as to his absence, that he was present continuously during the intermediate days of the trial.[65] The ruling of the trial court on objections to remarks or conduct of

county, although not so alleged in the record. Melton *v.* State, 3 Humphr. (Tenn.) 389.

61. Where the evidence is not brought up, it will be presumed that the commission of the offense was proved in the county where the indictment was found. Thetstone *v.* State, 32 Ark. 179. See also People *v.* Tipton, 73 Cal. 405, 14 Pac. 894.

Venue and proof thereof see *supra*, VII, A; XII, A, 1, h; XII, I, 2, d.

62. Where it appears that the crime was committed and the accused indicted in one county and the trial occurred in another, it will be presumed that all steps required for a change of venue were properly taken.

Arkansas.—Price *v.* State, (1903) 71 S. W. 948.

Indiana.— Doty *v.* State, 6 Blackf. 529.

Kentucky.— McHargess *v.* Com., 23 S. W. 349, 15 Ky. L. Rep. 323.

Missouri.— State *v.* Callaway, 154 Mo. 91, 55 S. W. 444.

Virginia.— Joyce *v.* Com., 78 Va. 287.

See 15 Cent. Dig. tit. "Criminal Law," § 3021.

It will be presumed that the indictment was properly transmitted to the court to which the venue is changed. State *v.* Shelledy, 8 Iowa 477.

If the record shows a motion for a change, but no ruling thereon, it may be presumed that the motion was waived. State *v.* Whalen, 54 Iowa 753, 6 N. W. 552.

63. Hughes *v.* State, 117 Ala. 25, 23 So. 677; Sylvester *v.* State, 72 Ala. 201; State *v.* Weaver, 104 N. C. 758, 10 S. E. 486. An adjournment from day to day, and even a continuance over the term against the objection of the appellant, will be presumed proper, although the record shows no cause for the adjournment, if it is silent as to the grounds of objection. Vanderkarr *v.* State, 51 Ind. 91; State *v.* Miller, 53 Iowa 84, 154, 209, 4 N. W. 838, 900, 1083; State *v.* Nugent, 71 Mo. 136. On the other hand it may be presumed that the court remained in session from the time the jury retired until the verdict was rendered, where the record shows no adjournment. State *v.* McDonald, (S. D. 1902) 91 N. W. 447.

Adjournments appearing of record see *supra*, XVII, D, 1, a, (IV).

64. Grady *v.* People, 125 Ill. 122, 16 N. E. 654; State *v.* Howell, 117 Mo. 307, 23 S. W. 263; State *v.* Stevenson, 93 Mo. 91, 5 S. W. 806; Cornwell *v.* State, Mart. & Y. (Tenn.) 147; Hathaway *v.* State, (Tex. Cr. App. 1902) 70 S. W. 88.

A motion to postpone unsupported by an affidavit will be presumed to have been properly denied. Morris *v.* State, 104 Ind. 457, 4 N. E. 148.

Absence of defendant.— Where the record showed that the case was continued, but failed to show that the accused was present at the time of such continuance, there is no presumption that the court acted correctly Shelton *v.* Com., 89 Va. 450, 16 S. E. 355.

65. *Alabama.*— Banks *v.* State, 72 Ala. 522.

California.— People *v.* Rader, 136 Cal. 253, 68 Pac. 707.

Florida.— McCoggle *v.* State, 41 Fla. 525, 26 So. 734.

Illinois.— Sewell *v.* People, 189 Ill. 174, 59 N. E. 583; Schirmer *v.* People, 33 Ill. 275.

Indiana.— Campbell *v.* State, 148 Ind. 527, 47 N. E. 221.

Iowa.— State *v.* Wood, 17 Iowa 18; Harriman *v.* State, 2 Greene 270.

Louisiana.— State *v.* Starr, 52 La. Ann. 610, 26 So. 998; State *v.* Nickleson, 45 La. Ann. 1172, 14 So. 134.

Massachusetts.— Jeffries *v.* Com., 12 Allen 145.

Michigan.— Grimm *v.* People, 14 Mich. 300.

Minnesota.— State *v.* Ryan, 13 Minn. 370.

Missouri.— State *v.* Yerger, 86 Mo. 33; State *v.* Schoenwald, 31 Mo. 147; State *v.* Adams, 80 Mo. App. 293.

Nebraska.— Bolln *v.* State, 51 Nebr. 581, 71 N. W. 444; Dodge *v.* People, 4 Nebr. 220.

New Mexico.— Territory *v.* Yarberry, 2 N. M. 391.

New York.— Stephens *v.* People, 4 Park. Cr. 396.

North Carolina.— State *v.* Langford, 44 N. C. 436.

Oregon.— State *v.* Cartwright, 10 Oreg. 193.

Pennsylvania.— Hazlett *v.* Com., 1 Pittsb. 169.

Tennessee.— Griffin *v.* State, 109 Tenn. 17, 70 S. W. 61.

Washington.— State *v.* Costello, 29 Wash. 366, 69 Pac. 1099; Leschi *v.* Territory, 1 Wash. Terr. 13.

Wyoming.— Trumble *v.* Territory, 3 Wyo. 280, 21 Pac. 1081, 6 L. R. A. 384.

Compare Day *v.* Territory, 2 Okla. 409, 37 Pac. 806.

See 15 Cent. Dig. tit. "Criminal Law," § 3027. And see *supra*, XIV, B, 3; XVII, D, 1, a, (XVI).

The same presumption will be drawn where it appears that the accused was present when the jury was impaneled and the

counsel are presumed to have been correct where the record shows that no hearing was had thereon, and that no evidence of their objectionable character was offered,[66] or where it does not appear what the objectionable remark was.[67]

(v) *Matters Relating to Petit Jury*—(A) *In General.* The fact that the record shows a trial by jury raises a presumption, in the absence of anything to the contrary, that the jurors were properly drawn and summoned,[68] that the jurors selected were qualified,[69] that the foreman was duly appointed,[70] and that the jury was composed of the requisite number of persons,[71] that the jurors discharged were properly discharged,[72] and generally that the court acted properly and legally in all of its rulings relating to the selection and impaneling of the jurors.[73] If the record does not purport to set out the exact terms of the oath which was administered to the jury, but recites that they were duly sworn, it will be presumed that the proper form of oath was employed,[74] but if the

trial was completed in one day (Burney *v.* State, 32 Fla. 253, 13 So. 406; Padfield *v.* People, 146 Ill. 660, 35 N. E. 469; Schirmer *v.* People, 33 Ill. 275; State *v.* Starr, 52 La. Ann. 610, 26 So. 998; State *v.* White, 52 La. Ann. 206, 26 So. 849; State *v.* Clement, 42 La. Ann. 583, 7 So. 685; State *v.* Peterson, 41 La. Ann. 85, 6 So. 527; Lawson *v.* Territory, 8 Okla. 1, 56 Pac. 698), and where the record shows his presence in court on the day the verdict was rendered (State *v.* Bickel, 7 Mo. App. 572; Folden *v.* State, 13 Nebr. 328, 14 N. W. 412). The presence of defendant at the beginning of each day of the trial affords the presumption that he was there during the whole day. State *v.* Miller, 23 W. Va. 801. See also Williams *v.* Com., 93 Va. 769, 25 S. E. 659.

66. State *v.* Doyle, 107 Mo. 36, 17 S. W. 571.

67. Baker *v.* State, 30 Fla. 41, 11 So. 492. If the objectionable statement and the circumstance under which it was made are not in the record, it may be presumed that the remark was proper under the circumstances. Nicholls *v.* State, 68 Wis. 416, 32 N. W. 543, 60 Am. Rep. 870. And where the utterance of objectionable statements is denied by the prosecuting attorney the ruling of the court on the weight of the evidence of such utterance will be presumed correct. State *v.* Woodard, 84 Iowa 172, 50 N. W. 885; State *v.* Maynes, 61 Iowa 119, 15 N. W. 864.

68. *Alabama.*— Hughes *v.* State, 117 Ala. 25, 23 So. 677; State *v.* Williams, 3 Stew. 454.

Colorado.— Giano *v.* People, 30 Colo. 20, 69 Pac. 504.

Florida.— Oliver *v.* State, 38 Fla. 46, 20 So. 803.

Illinois.— Peri *v.* People, 65 Ill. 17.

Texas.— Sprague *v.* State, (Cr. App. 1898) 44 S. W. 837.

Virginia.—Lawrence *v.* Com., 30 Gratt. 845.

See 15 Cent. Dig. tit. "Criminal Law," § 3023.

69. *Arkansas.*—Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885.

Indiana.— French *v.* State, 12 Ind. 670, 74 Am. Dec. 229.

Kansas.— State *v.* Taylor, 36 Kan. 329, 13 Pac. 550.

Missouri.— State *v.* Howard, 118 Mo. 127, 24 S. W. 41.

Tennessee.— Cartwright *v.* State, 12 Lea 620; Isham *v.* State, 1 Sneed 111.

Washington.— State *v.* Vance, 29 Wash. 435, 70 Pac. 34.

See 15 Cent. Dig. tit. "Criminal Law," § 3023.

70. Easterling *v.* State, 35 Miss. 210.

71. Turns *v.* Com., 6 Metc. (Mass.) 224; Hunt *v.* State, 61 Miss. 577.

72. Thomas *v.* Leonard, 5 Ill. 556.

73. Ryan *v.* State, 100 Ala. 105, 14 So. 766; Leslie *v.* Com., 42 S. W. 1095, 19 Ky. L. Rep. 1201; State *v.* Smith, 26 La. Ann. 62; State *v.* Gallagher, 26 La. Ann. 46; Page *v.* Com., 27 Gratt. (Va.) 954.

Waiver of objections.— Objections to the competency of the array or to the competency of individual jurors not promptly called to the attention of the court, where the appellant could have ascertained the grounds of the objection by due diligence, will be presumed to have been waived. Patterson *v.* State, 70 Ind. 341; Castanedo *v.* State, 7 Tex. App. 582.

74. *Alabama.*— Atkins *v.* State, 60 Ala. 45; Battle *v.* State, 54 Ala. 93; Blair *v.* State, 52 Ala. 343; McCuller *v.* State, 49 Ala. 39; McNeil *v.* State, 47 Ala. 498; Lockett *v.* State, 47 Ala. 42.

Arkansas.— Wells *v.* State, (1891) 16 S. W. 577.

Colorado.— Minick *v.* People, 8 Colo. 440, 9 Pac. 4.

Florida.— Palmquist *v.* State, 30 Fla. 73, 11 So. 521; Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; Potsdamer *v.* State, 17 Fla. 895; State *v.* Pearce, 14 Fla. 153. See also Lovett *v.* State, 29 Fla. 356, 11 So. 172.

Georgia.— Bird *v.* State, 53 Ga. 602.

Mississippi.— Edwards *v.* State, 47 Miss. 581; Woodsides *v.* State, 2 How. 655.

Missouri.— State *v.* Schoenwald, 31 Mo. 147.

Nebraska.— Smith *v.* State, 4 Nebr. 277.

North Carolina.— State *v.* Christmas, 20 N. C. 410.

Ohio.— Boose *v.* State, 10 Ohio St. 575, See also Wareham *v.* State, 25 Ohio St. 610.

record gives the form employed, and it is not the legal form, the conviction must be reversed.[75]

(B) *Waiver of Jury.* The rule applicable in civil cases that every presumption will be made against the waiver of a jury trial[76] applies with greater force to criminal trials involving corporal punishment.[77] If the record states that the case was tried, without stating whether by jury or otherwise, it will be presumed that the trial was by jury, where defendant was entitled to one.[78]

(C) *Custody and Discharge of Jury.* The presence of the jury in court may be presumed from the fact that a jury trial was had, although the record fails to show their presence on certain days;[79] and where the record shows that the jury were placed in charge of an officer, it will be presumed that this was regularly and legally done,[80] and that the officer was properly sworn, where the record states that he was a sworn officer.[81] All presumptions are in favor of the legality of the action of the court in discharging a jury without defendant's consent, for inability to agree or for any other cause,[82] and where the record is silent as to whether defendant consented to a discharge, it has been held that it may be presumed that he did consent.[83]

(VI) *Questions Relating to Evidence.* It will generally be presumed that the trial court properly exercised its discretion in admitting or excluding evidence,[84] and where the record shows no objection to evidence, it will be presumed

Oklahoma.— Brink *v.* Territory, 3 Okla. 588, 41 Pac. 614.

Pennsylvania.— Cathcart *v.* Com., 37 Pa. St. 108; Beale *v.* Com., 25 Pa. St. 11.

Tennessee.— Fitzhugh *v.* State, 13 Lea 258; McClure *v.* State, 1 Yerg. 206.

Texas.— Arthur *v.* State, 3 Tex. 403; Clark *v.* State, 18 Tex. App. 467; Stinson *v.* State, 5 Tex. App. 31; Mills *v.* State, 4 Tex. App. 263; Harris *v.* State, 2 Tex. App. 102; Johnson *v.* State, 1 Tex. App. 519.

Virginia.— Crump *v.* Com., (1895) 23 S. E. 760.

See 15 Cent. Dig. tit. "Criminal Law," § 3024.

A recital that the jury were "impaneled" is insufficient to show that it was properly sworn; nor is this defect cured by a recital in the bill of exceptions that the oath was properly administered. Zapf *v.* State, 35 Fla. 210, 17 So. 225.

75. Murphy *v.* State, 54 Ala. 178; Davis *v.* State, 54 Ala. 88; Gardner *v.* State, 48 Ala. 263; Smith *v.* State, 47 Ala. 540; Johnson *v.* State, 47 Ala. 9; Anderson *v.* State, 34 Ark. 257; Bivens *v.* State, 11 Ark. 455; Bray *v.* State, 41 Tex. 560; Holland *v.* State, 14 Tex. App. 182; Chambliss *v.* State, 2 Tex. App. 396; Smith *v.* State, 1 Tex. App. 516.

76. See Appeal and Error, 3 Cyc. 298.

77. Evans *v.* State, 23 Ohio Cir. Ct. 103.

Although the bill of exceptions may state that a jury was waived, the fact will not be presumed where the record shows a verdict of guilty, the discharge of the jury, and objections to the instructions to the jury and to the verdict of the jury. State *v.* Ingraham, 96 Iowa 278, 65 N. W. 152.

78. Beale *v.* Com., 25 Pa. St. 11. But a statement that defendant submitted the case to the court and that the court heard the evidence and found him guilty raises a presumption that the trial was without a jury. Morgan *v.* People, 136 Ill. 161, 26 N. E. 651.

79. Beale *v.* Com., 25 Pa. St. 11. See also State *v.* Parsons, 7 Nev. 57.

80. Dias *v.* State, 7 Blackf. (Ind.) 20, 39 Am. Dec. 448.

81. Holmes *v.* People, 10 Ill. 478; State *v.* Nelson, 132 Mo. 184, 33 S. W. 809; Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046; Lancaster *v.* State, 91 Tenn. 267, 18 S. W. 777.

The separation of the jury from time to time will be presumed to have been with the consent of the prisoner, where the record shows nothing to the contrary. Pate *v.* People, 8 Ill. 644; State *v.* Brown, 75 Mo. 317.

82. Vanderkarr *v.* State, 51 Ind. 91; Price *v.* State, 36 Miss. 531, 72 Am. Dec. 195; State *v.* Dunn, 80 Mo. 681; State *v.* Jeffors, 64 Mo. 376.

83. People *v.* Curtis, 76 Cal. 57, 17 Pac. 941; Lancton *v.* State, 14 Ga. 426.

84. *Alabama.*— Jernigan *v.* State, 81 Ala. 58, 1 So. 72. And see Floyd *v.* State, 82 Ala. 16, 2 So. 683, presumption of proof of *corpus delicti* before proof of confession.

Arkansas.— Pleasant *v.* State, 15 Ark. 624.

California.— People *v.* Reilly, 106 Cal. 648, 40 Pac. 13 (admission of deposition taken on preliminary examination); People *v.* Marseiles, 70 Cal. 98, 11 Pac. 503 (exclusion of witness as not competent to testify as to defendant's reputation).

Iowa.— State *v.* Strong, 6 Iowa 72.

Missouri.— State *v.* Richardson, 117 Mo. 586, 23 S. W. 769.

North Carolina.— State *v.* Wilkerson, 103 N. C. 337, 9 S. E. 415.

Oregon.— State *v.* Childers, 32 Oreg. 119, 49 Pac. 801.

Texas.— Chambers *v.* State, (Cr. App. 1901) 65 S. W. 192; Lienpo *v.* State, 28 Tex. App. 179, 12 S. W. 588.

Vermont.— State *v.* Goodrich, 19 Vt. 116, 47 Am. Dec. 676.

West Virginia.—State *v.* Hatfield, 48 W. Va. 561, 37 S. E. 626.

that no objectionable evidence was received.[85] It will also be presumed that the court properly exercised its discretion in permitting[86] or refusing to permit[87] introduction of evidence out of its regular order. A witness who testified as an expert is presumed to have been competent only where the record shows that he qualified to the satisfaction of the court;[88] but the presumption is in favor of the competency of youthful witnesses, as it depends upon their conduct and appearance, which are peculiarly within the knowledge of the trial court and cannot appear of record.[89] After verdict, if the evidence or no material part of it is in the bill of exceptions, it will be presumed to have been sufficient as to each and every material and essential fact relevant under the charge and necessary to support the verdict.[90]

(VII) *Instructions and Refusals to Instruct.* In the absence from the record of the instructions,[91] or of any exceptions to them as given, it will be presumed that the jury was properly instructed.[92] If the evidence is not in the

United States.— Clune *v.* U. S., 159 U. S. 590, 16 S. Ct. 125, 40 L. ed. 269.

See 15 Cent. Dig. tit. "Criminal Law," § 3029.

It will be presumed that a writing admitted in evidence was read to the jury as required by statute, where nothing appears to the contrary. State *v.* Patch, 21 Mont. 534, 55 Pac. 108.

Where a diagram was placed before the jury, it will not be presumed that they undertook to decipher words that the court directed to be erased. Stiles *v.* State, 113 Ga. 700, 39 S. E. 295.

Admission of confession.—Johnson *v.* Com., 2 Ky. L. Rep. 67; Hightower *v.* State, 58 Miss. 636; Wilson *v.* State, 32 Tex. 112.

Proper foundation for impeaching evidence.— State *v.* Brown, 28 Oreg. 147, 41 Pac. 1042.

That testimony was given ore tenus.— Beale *v.* Com., 25 Pa. St. 11.

85. Brown *v.* People, 29 Mich. 232.

86. Levells *v.* State, 32 Ark. 585.

87. State *v.* Ruhl, 8 Iowa 447.

88. Gardner *v.* State, 96 Ala. 12, 11 So. 402; Polk *v.* State, 36 Ark. 117.

89. Blackwell *v.* State, 11 Ind. 196.

90. *Colorado.*— Short *v.* People, 27 Colo. 175, 60 Pac. 350.

Connecticut.— State *v.* Wolfarth, 42 Conn. 155.

Indiana.— Woodworth *v.* State, 145 Ind. 276, 43 N. E. 933.

Louisiana.— State *v.* Angelo, 32 La. Ann. 407.

Massachusetts.— Benson *v.* Com., 158 Mass. 164, 33 N. E. 384; Com. *v.* Smith, 11 Allen 243.

Michigan.— People *v.* Durfee, 62 Mich. 487, 29 N. W. 109.

Minnesota.— State *v.* Shettleworth, 18 Minn. 208.

Montana.— State *v.* Shepphard, 23 Mont. 323, 58 Pac. 868.

Oregon.— State *v.* Colestock, 41 Oreg. 9, 67 Pac. 418; State *v.* Childers, 32 Oreg. 119, 49 Pac. 801.

Rhode Island.— Kenney *v.* State, 5 R. I. 385.

Texas.— State *v.* Pine, 30 Tex. 399.

Virginia.— *In re* Earhart, 9 Leigh 671; Lithgow *v.* Com., 2 Va. Cas. 297.

United States.— McCarty *v.* U. S., 101 Fed. 113, 41 C. C. A. 242; U. S. *v.* Koch, 21 Fed. 873.

See 15 Cent. Dig. tit. "Criminal Law," § 3031.

If the record shows no evidence of the venue, it may be presumed that it was proved, in the absence of objection or exception. People *v.* Marks, 72 Cal. 46, 13 Pac. 149; Hays *v.* Com., 14 S. W. 833, 12 Ky. L. Rep. 611; State *v.* Tucker, 84 Mo. 23; Brantly *v.* State, 42 Tex. Cr. 293, 59 S. W. 892.

Where an alleged forged instrument is indispensable on the trial, it will not be presumed that it was in evidence. Strickland *v.* State, (Tex. App. 1890) 13 S. W. 865.

Corroboration of a prosecuting witness, if necessary, will be presumed where nothing appears to the contrary. State *v.* Owens, 22 Minn. 238.

91. *California.*— People *v.* Molina, 126 Cal. 505, 59 Pac. 34.

Georgia.— Fordham *v.* State, 112 Ga. 228, 37 S. E. 391.

Idaho.— State *v.* Watkins, 7 Ida. 35, 59 Pac. 1106.

Illinois.— Sullivan *v.* People, 156 Ill. 94, 40 N. E. 288.

Indiana.— Bealer *v.* State, 150 Ind. 390, 50 N. E. 302.

Massachusetts.—Com. *v.* Kneeland, 20 Pick. 206.

New York.— People *v.* Bishop, 69 Hun 105, 23 N. Y. Suppl. 243.

North Carolina.— State *v.* Ridge, 125 N. C. 655, 34 S. E. 439; State *v.* Dickerson, 98 N. C. 708, 3 S. E. 687.

Tennessee.— State *v.* Robinson, 106 Tenn. 184, 61 S. W. 60; Williams *v.* State, 3 Heisk. 376.

Texas.— Rogers *v.* State, 43 Tex. 406; Carey *v.* State, (Cr. App. 1899) 60 S. W. 550; Carr *v.* State, 5 Tex. App. 153; Newton *v.* State, 3 Tex. App. 245.

See 15 Cent. Dig. tit. "Criminal Law," § 3032.

Necessity of instructions appearing in the record see *supra*, XVII, D, 1, a, (XVII).

92. *Illinois.*— Hickam *v.* People, 137 Ill. 75, 27 N. E. 88.

record, it will be presumed that it warranted the instructions given by the court,[93] and that instructions refused were not applicable to the evidence.[94] Where an instruction is susceptible of two constructions, it will be presumed that the trial court intended it to be construed against the party asking it.[95] It will not be presumed that the jury understood an instruction differently from the way it would be understood by persons not jurors;[96] nor will it be presumed that words in an instruction were used in other than their ordinary sense.[97] It will be presumed that instructions which were refused were not in writing, and that they were refused for that reason, where the record fails to show that they were in writing.[98]

(VIII) *VERDICT, JUDGMENT, AND SENTENCE.* Every presumption will be made in favor of the regularity and validity of the verdict, where the record is silent as to any objection made;[99] and the recital in the record of a judgment or of the passing of the sentence raises a presumption which is conclusive, if not

Louisiana.— State *v.* Dudoussat, 47 La. Ann. 977, 17 So. 685.

Massachusetts.— Com. *v.* Glover, 111 Mass. 395.

Michigan.— People *v.* Skutt, 96 Mich. 449, 56 N. W. 11.

Missouri.— State *v.* Clark, 147 Mo. 20, 47 S. W. 886.

Ohio.— Bolen *v.* State, 26 Ohio St. 371.

South Carolina.— State *v.* Sheppard, 54 S. C. 178, 32 S. E. 146.

United States.— Blake *v.* U. S., 71 Fed. 286, 18 C. C. A. 117.

See 15 Cent. Dig. tit. "Criminal Law," § 3032.

The recapitulation of the testimony by the court will not be presumed to have been in a manner unfavorable to defendant, where no exception was taken at the time. State *v.* Shoemaker, 101 N. C. 690, 8 S. E. 332.

Further instructions given on the request of the jury will be presumed to cover the inquiries submitted by them. Fordham *v.* State, 112 Ga. 228, 37 S. E. 391.

A refusal to give an improper charge creates no presumption that a proper charge was not given. Buchanan *v.* State, 100 Ga. 75, 25 S. E. 843.

In Texas, in the absence of a bill of exceptions, it will be presumed, under the statute, that the charge was signed by the judge. Jackson *v.* State, (Cr. App. 1901) 62 S. W. 914.

93. *Indiana.*—Ferris *v.* State, 156 Ind. 224, 59 N. E. 475.

Iowa.— State *v.* Viers, 82 Iowa 397, 48 N. W. 732.

Kentucky.— Boggs *v.* Com., 5 S. W. 307, 9 Ky. L. Rep. 342. See also Greer *v.* Com., 111 Ky. 93, 63 S. W. 443, 23 Ky. L. Rep. 489.

Missouri.— State *v.* Brown, 75 Mo. 317.

Nebraska.— Martin *v.* State, (1903) 93 N. W. 161.

New Mexico.— Territory *v.* Perea, 1 N. M. 627 [*overruling* Leonardo *v.* Territory, 1 N. M. 291].

Texas.— Jernigan *v.* State, (Cr. App. (1901) 63 S. W. 560; Loftin *v.* State, (Cr. App. 1900) 55 S. W. 493; Burrows *v.* State, (Cr. App. 1899) 55 S. W. 54; Campbell *v.* State, (Cr. App. 1894) 24 S. W. 645.

See 15 Cent. Dig. tit. "Criminal Law," § 3032. And see *supra*, XVII, D, 7, g, (II).

94. Ferris *v.* State, 156 Ind. 224, 59 N. E. 475; State *v.* McEwen, 151 Ind. 485, 51 N. E. 1053.

95. Smith *v.* State, 88 Ala. 23, 7 So. 103.

96. People *v.* Welch, 49 Cal. 174. And see Davis *v.* State, 25 Ohio St. 369.

97. White *v.* State, 153 Ind. 689, 54 N. E. 763.

98. Harrison *v.* State, 79 Ala. 29; Green *v.* State, 66 Ala. 40, 41 Am. Rep. 744.

Where the bill shows a request for the instructions in writing and the giving of such instructions, with an exception to the giving of oral instructions, it will be presumed that the request was properly made before argument, as required by statute. Herron *v.* State, 17 Ind. App. 161, 46 N. E. 540.

99. *California.*— People *v.* Rogers, 71 Cal. 565, 12 Pac. 679.

Illinois.— Sullivan *v.* People, 156 Ill. 94, 40 N. E. 288.

South Carolina.— State *v.* Fuller, 1 Bay 245, 1 Am. Dec. 610.

Texas.— Chambers *v.* State, (Cr. App. 1901) 65 S. W. 192; Mills *v.* State, 4 Tex. App. 263.

Wisconsin.— See also Seiler *v.* State, 112 Wis. 293, 87 N. W. 1072.

See 15 Cent. Dig. tit. "Criminal Law," § 3034.

Illustrations.— It will be presumed that a general verdict of guilty to an indictment charging two distinct offenses either applies to both, or if to one only that sentence was passed accordingly (People *v.* Shotwell, 27 Cal. 394; State *v.* Merwin, 34 Conn. 113. See also State *v.* Hall, 108 N. C. 776, 13 S. E. 189. But *compare* State *v.* McCauless, 31 N. C. 375); that a verdict was delivered in open court, publicly and in defendant's presence, if his presence was necessary (State *v.* Schmail, 25 Minn. 370); and that the verdict was amended by the direction of the court and with the jury's consent, where it was originally vague and indistinct (State *v.* Steptoe, 1 Mo. App. 19).

clearly rebutted,[1] that the court complied with all the requirements of the statute in passing sentence.[2] Where judgment is rendered on a plea of guilty, it will be presumed that the sentence imposed thereunder was for the crime to which defendant pleaded guilty;[3] and where defendant was tried on two counts and one is bad, it is presumed that a general verdict and sentence is applicable to the good one.[4]

(IX) *NEW TRIAL AND ARREST OF JUDGMENT.* Where the grounds for granting a new trial are not shown, it may be presumed that sufficient grounds were presented,[5] and it may be presumed that the court acted properly in granting or denying a motion for a new trial or in arrest of judgment.[6] An abandonment of a motion for a new trial will be presumed when the record shows that the court proceeded to pronounce sentence without showing what disposition, if any, was made of such motion.[7]

(X) *PROCEEDINGS FOR REVIEW.* As a general proposition, it may be said that a compliance with all statutory conditions necessary to the perfecting of an appeal must appear in the record and cannot be supplied by presumption of law based simply on an intention or attempt to appeal.[8] All reasonable inferences, however, from facts admitted or apparent of record will be drawn to support the validity of the appeal.[9]

If the verdict as entered is so uncertain as to be fatally defective and void, a subsequent entry, stating it with certainty, will not be presumed to be an amendment, nor will the incorrect entry be presumed to be a clerical error. The verdict may be set aside, or, if it is found that the error was a clerical one, the record may be sent back for correction. Brannigan *v.* People, 3 Utah 488, 24 Pac. 767.

1. See APPEAL AND ERROR, 3 Cyc. 320.

2. *Alabama.*— Boynton *v.* State, 77 Ala. 29.

Arkansas.— Brown *v.* State, 13 Ark. 96.

California.— People *v.* Barton, 88 Cal. 176, 25 Pac. 1117; *In re* Brown, 32 Cal. 48.

Iowa.— State *v.* Hopkins, 67 Iowa 285, 25 N. W. 244.

Massachusetts.— Doherty *v.* Com., 109 Mass. 359.

Texas.— King *v.* State, 32 Tex. Cr. 463, 24 S. W. 514.

West Virginia.—State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

See 15 Cent. Dig. tit. "Criminal Law," § 3035.

Illustrations.— Thus it will be presumed, where the record is silent, that the judgment was properly signed by the judge (State *v.* Hunt, 137 Ind. 537, 37 N. E. 409); that defendant was asked if he had anything to say why sentence should not be pronounced (Gillespie *v.* People, 176 Ill. 238, 52 N. E. 250; Lillard *v.* State, 151 Ind. 322, 50 N. E. 383; State *v.* Coleman, 27 La. Ann. 691; State *v.* Hugel, 27 La. Ann. 375; State *v.* Fritz, 27 La. Ann. 360; Edwards *v.* State, 47 Miss. 581; Territory *v.* Webb, 2 N. M. 147; People *v.* McGeery, 6 Park. Cr. (N. Y.) 653); that a verdict of guilty with a sentence of a maximum punishment is based on a finding that the accused had been previously convicted of another crime (People *v.* Eppinger, 109 Cal. 294, 41 Pac. 1037); that the accused had been informed that a verdict of guilty had been found against him as required by a statute (Bond *v.* State, 23 Ohio St. 349); that he waived the statutory period allowed him between conviction and judgment (Jones *v.* Territory, 4 Okla. 45, 43 Pac. 1072); and that a judgment was pronounced on the second of two verdicts which recommended the prisoner to mercy rather than on the first (State *v.* Dawkins, 32 S. C. 17, 10 S. E. 772).

3. Green *v.* Com., 12 Allen (Mass.) 155.

4. Josslyn *v.* Com., 6 Metc. (Mass.) 236. See also Mertz *v.* People, 81 Ill. App. 576.

5. See APPEAL AND ERROR, 3 Cyc. 318.

6. Cook *v.* U. S., 1 Greene (Iowa) 56; Gamble *v.* State, (Tex. Cr. App. 1899) 50 S. W. 458.

Proper exercise of discretion presumed.— People *v.* Rushing, 130 Cal. 449, 62 Pac. 742, 80 Am. St. Rep. 141; Cummins *v.* Com., 5 Ky. L. Rep. 200; Sanders *v.* State, (Tex. Cr. App. 1901) 64 S. W. 260. But *compare* Baines *v.* State, 42 Tex. Cr. 510, 61 S. W. 119, 312; State *v.* Perrigo, 67 Vt. 406, 31 Atl. 844.

If it appears that a motion in arrest and for a new trial were filed and disposed of on the same day, it may be presumed that the motion for a new trial was filed and disposed of first. State *v.* Griffie, 118 Mo. 188, 23 S. W. 878 [*following* Farmers' Bank *v.* Bayliss, 41 Mo. 274].

Time for making.— If the statute limits the time within which a new trial must be applied for, except under certain circumstances and for good cause, and the record shows that the motion was made after the time limited, without objection, it will be presumed that good cause existed for moving after the statutory period had expired. Hart *v.* State, 21 Tex. App. 163, 17 S. W. 421.

7. Blackburn *v.* State, 25 Ohio St. 554.

8. State *v.* Johnson, 52 S. C. 505, 30 S. E. 592; Fairchild *v.* State, 23 Tex. 176. See APPEAL AND ERROR, 3 Cyc. 266.

What must appear of record see *supra*, XVII, D, 1, b.

9. Thus where the abstract papers contain all the evidence, there is a presumption that the evidence is on the record of the trial

4. Discretion of Lower Court — a. In General. In the absence of a clear abuse of discretion to the prejudice of the appellant, matters purely within the discretion of the trial court are not reviewable.[10]

b. Indictment and Pleas. In applying the rule just stated the action of the trial court in passing upon the sufficiency of a complaint with respect to the description of the offense,[11] in allowing or disallowing amendments to the complaint[12] or to the indictment,[13] in refusing to quash an indictment,[14] in granting or refusing to grant a bill of particulars,[15] in allowing or refusing to allow a request to withdraw a plea of not guilty and file a special plea,[16] and in permitting the withdrawal of a plea of guilty,[17] being matters wholly within the discretion of the court, are not reviewable unless clearly erroneous and prejudicial to defendant.

c. Proceedings Before Trial — (1) *In General.* Similarly the refusal to allow a change of venue,[18] especially where the evidence for and against the neces-

court (State *v.* Tucker, 68 Iowa 50, 25 N. W. 924), and where the record does not show a settlement of the bill of exceptions it may be presumed from the fact that the trial judge signed it (State *v.* Campbell, 20 Nev. 122, 17 Pac. 620). That a notice of appeal was properly given will be inferred from a clause of the judgment directing that the accused be kept in the county jail for a certain period, or, unless otherwise directed by the court, he shall be sent to the penitentiary. Mullins *v.* State, 37 Tex. 337. Refusal of the trial judge to certify that the bill of exceptions contained all the evidence is presumptively correct where the appellant fails to controvert the assertion of the court. Sampson *v.* People, 188 Ill. 592, 59 N. E. 427.

Presumption that bill of exceptions presented within proper time.— Childers *v.* State, (Tex. App. 1890) 13 S. W. 650; Tomlin *v.* State, 25 Tex. App. 676, 8 S. W. 931. See also Stout *v.* State, 90 Ind. 1.

10. *Florida.*— Denham *v.* State, 22 Fla. 664.

Kansas.— State *v.* Morton, 59 Kan. 338, 52 Pac. 890.

Louisiana.— State *v.* Watkins, 21 La. Ann. 290; State *v.* Cazeau, 8 La. Ann. 109.

Massachusetts.— Com. *v.* Sacket, 22 Pick. 394; Feneley *v.* Mahoney, 21 Pick. 212.

Missouri.— State *v.* Lanahan, 144 Mo. 31, 45 S. W. 1090; State *v.* Fenly, 18 Mo. 445; State *v.* Floyd, 15 Mo. 349.

New York.— People *v.* Baker, 3 Hill 159.

Oklahoma.— Perkins *v.* Territory, 10 Okla. 506, 63 Pac. 860.

Texas.— White *v.* State, 10 Tex. App. 381.

See 15 Cent. Dig. tit. "Criminal Law," § 3038; and Appeal and Error, 3 Cyc. 325.

Excusing grand jurors.—Williams *v.* State, 69 Ga. 11.

Impaneling special grand jury.— State *v.* Overstreet, 128 Mo. 470, 31 S. W. 35.

11. Com. *v.* Gorman, 16 Gray (Mass.) 601; State *v.* Davis, 52 Vt. 376.

12. State *v.* Taylor, 118 N. C. 1262, 24 S. E. 526.

13. Rocco *v.* State, 37 Miss. 357.

14. *Alabama.*— State *v.* Jones, 5 Ala. 666.

Indiana.— Glover *v.* State, 109 Ind. 391, 10 N. E. 282.

Maine.— State *v.* Hurley, 54 Me. 562; State *v.* Maher, 49 Me. 569; State *v.* Soule, 20 Me. 19.

Massachusetts.— Com. *v.* Eastman, 1 Cush. 189, 48 Am. Dec. 596.

Michigan.— People *v.* Reigel, 120 Mich. 78, 78 N. W. 1017.

Missouri.— State *v.* Lucas, 147 Mo. 70, 47 S. W. 1067; State *v.* Fanning, 38 Mo. 362; State *v.* Burgess, 24 Mo. 381, 69 Am. Dec. 433; State *v.* Conrad, 21 Mo. 271.

North Carolina.— State *v.* De Graff, 113 N. C. 688, 18 S. E. 507.

Pennsylvania.— Com. *v.* Sheppard, 20 Pa. Super. Ct. 417.

South Carolina.— State *v.* Shirer, 20 S. C. 392.

Wisconsin.— State *v.* Fee, 19 Wis. 562.

United States.— U. S. *v.* Hamilton, 109 U. S. 63, 3 S. Ct. 9, 27 L. ed. 857; Endleman *v.* U. S., 86 Fed. 456, 30 C. C. A. 186.

See 15 Cent. Dig. tit. "Criminal Law," § 3042.

Discretion not arbitrary.— State *v.* McNally, 55 Md. 559.

Where by local practice a motion to quash is regarded as a demurrer, the action of the court is the subject of review. Jefferson *v.* State, 46 Miss. 270.

15. *Colorado.*— Howard *v.* People, 27 Colo. 396, 61 Pac. 595.

Kansas.— State *v.* Lindgrove, 1 Kan. App. 51, 41 Pac. 688.

Michigan.— People *v.* McKinney, 10 Mich. 54.

Pennsylvania.— Com. *v.* Zuern, 16 Pa. Super. Ct. 588.

Rhode Island.— State *v.* Hill, 13 R. I. 314.

See 15 Cent. Dig. tit. "Criminal Law," § 3041.

16. *Alabama.*— Davis *v.* State, 131 Ala. 10, 31 So. 569.

California.— People *v.* Lee, 17 Cal. 76.

Illinois.— Phillips *v.* People, 55 Ill. 429.

Maryland.— Cooper *v.* State, 64 Md. 40, 20 Atl. 986.

Massachusetts.— Com. *v.* Blake, 12 Allen 188. See also Com. *v.* Gould, 12 Gray 171.

See 15 Cent. Dig. tit. "Criminal Law," § 3043.

17. Monahan *v.* State, 135 Ind. 216, 34 N. E. 967; Pattee *v.* State, 109 Ind. 545, 10 N. E. 421; Conover *v.* State, 86 Ind. 99; State *v.* Delahoussaye, 37 La. Ann. 551.

18. *California.*—People *v.* Elliott, 80 Cal. 296, 22 Pac. 207; People *v.* Perdue, 49 Cal. 425. See also People *v.* Lee, 5 Cal. 353.

sity for granting the change is substantially conflicting,[19] the refusal of the trial court to discharge the accused for delay in bringing him to trial,[20] the refusal of a motion for a severance where two are jointly indicted,[21] the calling of a case out

Florida.— Squires *v.* State, 42 Fla. 251, 27 So. 864; Adams *v.* State, 28 Fla. 511, 10 So. 106.

Georgia.— White *v.* State, 100 Ga. 659, 28 S. E. 423.

Idaho.— State *v.* Gilbert, (1902) 69 Pac. 62; State *v.* St. Clair, 6 Ida. 109, 53 Pac. 1.

Illinois.— Price *v.* People, 131 Ill. 223, 23 N. E. 639; Myers *v.* People, 26 Ill. 173. See also Hickam *v.* People, 137 Ill. 75, 27 N. E. 88.

Indiana.— Jones *v.* State, 152 Ind. 318, 53 N. E. 222; Ransbottom *v.* State, 144 Ind. 250, 43 N. E. 218; Walker *v.* State, 136 Ind. 663, 36 N. E. 356; Fahnestock *v.* State, 23 Ind. 231.

Iowa.— State *v.* Miner, 107 Iowa 656, 78 N. W. 679; State *v.* Woodward, 84 Iowa 172, 50 N. W. 885; State *v.* Billings, 77 Iowa 417, 42 N. W. 456; State *v.* Perigo, 70 Iowa 657, 28 N. W. 452; State *v.* Foley, 65 Iowa 51, 21 N. W. 162.

Kansas.— Emporia *v.* Volmer, 12 Kan. 622.

Kentucky.— Barnes *v.* Com., 110 Ky. 348, 61 S. W. 733, 22 Ky. L. Rep. 1802; Crockett *v.* Com., 100 Ky. 382, 38 S. W. 674, 18 Ky. L. Rep. 835; Hicks *v.* Com., 3 Ky. L. Rep. 87.

Louisiana.— State *v.* Powell, 109 La. 727, 33 So. 748; State *v.* Brittin, 50 La. Ann. 261, 23 So. 301; State *v.* Dent, 41 La. Ann. 1082, 7 So. 694; State *v.* Daniel, 31 La. Ann. 91.

Minnesota.— State *v.* Stokely, 16 Minn. 282.

Mississippi.—Bishop *v.* State, 62 Miss. 289.

Missouri.— State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743; State *v.* Clevenger, 156 Mo. 190, 56 S. W. 1078; State *v.* Thompson, 141 Mo. 408, 42 S. W. 949; State *v.* Loe, 98 Mo. 609, 12 S. W. 254; State *v.* Kring, 11 Mo. App. 92.

Nebraska.— Goldsberry *v.* State, (1902) 92 N. W. 906; Welsh *v.* State, 60 Nebr. 101, 82 N. W. 368; Olive *v.* State, 11 Nebr. 1, 7 N. W. 444.

New Mexico.— Territory *v.* Kinney, 3 N. M. 97, 2 Pac. 357.

Ohio.— Hotelling *v.* State, 2 Ohio Cir. Dec. 366.

Oklahoma.— Cutler *v.* Territory, 8 Okla. 101, 56 Pac. 861.

Oregon.— State *v.* Pomeroy, 30 Oreg. 16, 46 Pac. 797.

Pennsylvania.— Com. *v.* Cleary, 148 Pa. St. 26, 23 Atl. 1110; Com. *v.* Allen, 135 Pa. St. 483, 19 Atl. 957.

Tennessee.— King *v.* State, 91 Tenn. 617, 20 S. W. 169; Poe *v.* State, 10 Lea 673. See also Moses *v.* State, 11 Humphr. 232.

Texas.— Mondragon *v.* State, 33 Tex. 480; Gray *v.* State, 43 Tex. Cr. 300, 65 S. W. 375; Cannon *v.* State, 41 Tex. Cr. 467, 56 S. W. 351; Nite *v.* State, 41 Tex. Cr. 340, 54 S. W. 763; Baw *v.* State, 33 Tex. Cr. 24, 24 S. W. 293.

Utah.— State *v.* Carrington, 15 Utah 480, 50 Pac. 526.

Virginia.— Wright *v.* Com., 33 Gratt. 880.

Washington.— Edwards *v.* State, 2 Wash. 291, 26 Pac. 258.

See 15 Cent. Dig. tit. "Criminal Law," § 3044.

This discretion is judicial, not a mere personal whim or caprice, and if it is exercised in contravention of legal rules the judgment may be reversed. Price *v.* People, 131 Ill. 223, 23 N. E. 639; State *v.* Canada, 48 Iowa 448; State *v.* Mooney, 10 Iowa 506; Walker *v.* State, 42 Tex. 360; Dupree *v.* State, 2 Tex. App. 613.

In Alabama it is provided by statute that the refusal of an application for a change of venue may after final judgment be reviewed and revised on appeal. Horn *v.* State, 98 Ala. 23, 13 So. 329; Seams *v.* State, 84 Ala. 410, 4 So. 521. Prior to the enactment of this statute, it had been decided that the action of the trial court was not subject to revision by the appellate court. Posey *v.* State, 73 Ala. 490; Evans *v.* State, 62 Ala. 6; Kelly *v.* State, 52 Ala. 361 [*overruling Ex p.* Chase, 43 Ala. 303]; State *v.* Brookshire, 2 Ala. 303.

In North Carolina it is said that the action of the lower court is not ordinarily reviewable, but that perhaps it might be in an extreme case. State *v.* Johnson, 104 N. C. 780, 10 S. E. 257. See also State *v.* Smarr, 121 N. C. 669, 28 S. E. 549; State *v.* Hall, 73 N. C. 134; State *v.* Hill, 72 N. C. 345.

19. *Alabama.*— Horn *v.* State, 98 Ala. 23, 13 So. 329.

Indiana.— Conrad *v.* State, 144 Ind. 290, 43 N. E. 221; Reinhold *v.* State, 130 Ind. 467, 30 N. E. 306.

Iowa.— State *v.* Beck, 73 Iowa 616, 35 N. W. 684.

Kansas.— State *v.* Rogers, 54 Kan. 683, 39 Pac. 219; State *v.* Rhea, 25 Kan. 576.

Kentucky.— Stafford *v.* Com., 18 S. W. 11, 13 Ky. L. Rep. 665; Hasson *v.* Com., 11 S. W. 286, 10 Ky. L. Rep. 1054.

Missouri.— State *v.* Wilson, 85 Mo. 134; State *v.* Taylor, 64 Mo. 137.

Texas.— Tooney *v.* State, 8 Tex. App. 452; Grissom *v.* State, 8 Tex. App. 386; Johnson *v.* State, 4 Tex. App. 268.

Wisconsin.— Perrin *v.* State, 81 Wis. 135, 50 N. W. 516.

See 15 Cent. Dig. tit. "Criminal Law," § 3044.

20. Brown *v.* State, 85 Ga. 713, 11 S. E. 831. But this rule does not apply where it appears by the record that the trial of the prisoner was unreasonably delayed (State *v.* Nugent, 71 Mo. 136), or that it was delayed longer than is permissible under a statute, and no good cause is shown for such delay (People *v.* Henry, 77 Cal. 445, 19 Pac. 830).

21. *Illinois.*— Gillespie *v.* People, 176 Ill. 238, 52 N. E. 250.

Mississippi.— Wall *v.* State, 51 Miss. 396, 24 Am. Rep. 640.

its order,[22] and the ruling of the court upon an application for an order to summon witnesses at the state's expense[23] have been held subject to review only where it clearly appears that the discretion of the trial court was abused.

(II) *Continuances* — (A) *In General.* Unless, from the facts and circumstances of the case, it is clearly apparent that there has been an abuse of discretion operating to the prejudice of defendant, the rule in most jurisdictions is that as an application for a continuance is addressed to the sound discretion of the trial court, its action will not be reviewed and revised by an appellate court.[24] In other

New Jersey.— State *v.* Baum, 64 N. J. L. 410, 45 Atl. 806.

Tennessee.— Watson *v.* State, 16 Lea 604.

Texas.— Rucker *v.* State, 7 Tex. App. 549.

See 15 Cent. Dig. tit. "Criminal Law," § 3050.

Not reviewable.— Com. *v.* McCluskey, 123 Mass. 401; State *v.* Moore, 120 N. C. 570, 26 S. E. 697; State *v.* Hall, 108 N. C. 776, 13 S. E. 189; State *v.* Oxendine, 107 N. C. 783, 12 S. E. 573.

22. State *v.* Cole, 38 La. Ann. 843.

23. In the absence of a statute giving defendant an absolute right to summon witnesses at the state's expense, the granting of an order is under the various statutes discretionary with the court, and this discretion will not be reviewed where it does not appear that the circumstances as shown by defendant called for its exercise in his favor. State *v.* Benge, 61 Iowa 658, 17 N. W. 100; State *v.* Elswood, 15 Wash. 453, 46 Pac. 727; Goldsby *v.* U. S., 160 U. S. 70, 16 S. Ct. 216, 40 L. ed. 343.

24. *Alabama.*— Kilgore *v.* State 124 Ala. 24, 27 So. 4; Cunningham *v.* State, 117 Ala. 59, 23 So. 693.

Arkansas.— Edmonds *v.* State, 34 Ark. 720.

Florida.— Jones *v.* State, (1902) 32 So. 793; Hall *v.* State, 35 Fla. 534, 17 So. 638.

Georgia.— Cochran *v.* State, 113 Ga. 726, 39 S. E. 332; Rutledge *v.* State, 108 Ga. 69, 33 S. E. 812; McDaniel *v.* State, 103 Ga. 268, 30 S. E. 29; Delk *v.* State, 99 Ga. 667, 26 S. E. 752; Roberts *v.* State, 14 Ga. 6.

Idaho.— State *v.* Rice, 7 Ida. 762, 66 Pac. 87; State *v.* Gorden, 5 Ida. 297, 48 Pac. 1061.

Illinois.— Hoyt *v.* People, 140 Ill. 588, 30 N. E. 315, 16 L. R. A. 239; Wroy *v.* People, 78 Ill. 212. *Compare* Holmes *v.* People, 10 Ill. 478, decided before enactment of statute providing for review.

Indiana.— Morris *v.* State, 104 Ind. 457, 4 N. E. 148; Detro *v.* State, 4 Ind. 200; Fuller *v.* State, 1 Blackf. 63.

Iowa.— State *v.* Maher, 74 Iowa 77, 37 N. W. 2; State *v.* Rorabacher, 19 Iowa 154; State *v.* McComb, 18 Iowa 43; State *v.* Cox, 10 Iowa 351.

Kentucky.— Smith *v.* Com., 42 S. W. 1138, 19 Ky. L. Rep. 1073.

Louisiana.— State *v.* Mathis, 106 La. 263, 30 So. 834; State *v.* Keiner, 52 La. Ann. 1476, 27 So. 961; State *v.* Johnson, 47 La. Ann. 1225, 17 So. 789; State *v.* Finn, 31 La. Ann. 408.

Michigan.—People *v.* Marrs, 125 Mich. 376, 84 N. W. 284.

Mississippi.— Stewart *v.* State, 50 Miss. 587; McDaniel *v.* State, 8 Sm. & M. 401, 47 Am. Dec. 93.

Missouri.— State *v.* Williams, 170 Mo. 204, 70 S. W. 476; State *v.* Webster, 152 Mo. 87, 53 S. W. 423; State *v.* Riney, 137 Mo. 102, 38 S. W. 718; State *v.* Steen, 115 Mo. 474, 22 S. W. 461; Green *v.* State, 13 Mo. 382.

Montana.— Territory *v.* Perkins, 2 Mont. 467.

Nebraska.— Kerr *v.* State, 63 Nebr. 115, 88 N. W. 240; Fanton *v.* State, 50 Nebr. 351, 69 N. W. 953, 36 L. R. A. 158.

Nevada.— State *v.* Rosemurgey, 9 Nev. 308.

New Mexico.— Territory *v.* McFarlane, 7 N. M. 421, 37 Pac. 1111.

New York.— People *v.* Vermilyea, 7 Cow. 369. See also People *v.* Jackson, 111 N. Y. 362, 19 N. E. 54. *Compare* Webster *v.* People, 92 N. Y. 422; People *v.* Colt, 3 Hill 432.

Ohio.— Holt *v.* State, 11 Ohio St. 691. See also Johnson *v.* State, 42 Ohio St. 207.

Oregon.— State *v.* Wong Gee, 35 Oreg. 276, 57 Pac. 914; State *v.* O'Neil, 13 Oreg. 183, 9 Pac. 284.

Pennsylvania.— Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228; Com. *v.* Scouton, 20 Pa. Super. Ct. 503.

Tennessee.— Brown *v.* State, 85 Tenn. 439, 2 S. W. 895; Bellew *v.* State, 5 Humphr. 567. See also King *v.* State, 91 Tenn. 617, 20 S. W. 169.

Texas.— Turner *v.* State, 20 Tex. App. 56; Woodard *v.* State, 9 Tex. App. 412; Cantee *v.* State, 1 Tex. App. 402.

Virginia.— Hite *v.* Com., 96 Va. 489, 31 S. E. 895; Munford *v.* Com., 2 Va. Cas. 6.

Washington.— Thompson *v.* Territory, 1 Wash. Terr. 547.

West Virginia.— State *v.* Madison, 49 W. Va. 96, 38 S. E. 492; State *v.* Emblem, 46 W. Va. 326, 33 S. E. 223; State *v.* Lane, 44 W. Va. 730, 29 S. E. 1020; State *v.* Maier, 36 W. Va. 757, 15 S. E. 991; State *v.* Betsall, 11 W. Va. 703.

See 15 Cent. Dig. tit. "Criminal Law," § 3045; and Appeal and Error, 3 Cyc. 334.

Absence of witnesses.— The general rule is applicable when the motion for a continuance is based on the absence of a material witness.

Alabama.— Huskey *v.* State, 129 Ala. 94, 29 So. 838; Walker *v.* State, 91 Ala. 76, 9 So. 87.

Georgia.— Stovall *v.* State, 106 Ga. 443, 32 S. E. 586; Varnadoe *v.* State, 67 Ga. 768.

Kentucky.— Ross *v.* Com., (1900) 59 S. W. 28; Kendall *v.* Com., 19 S. W. 173, 14 Ky. L. Rep. 53.

jurisdictions, however, the courts have gone to the extent of declaring that it is wholly within the discretion of the judge presiding in the trial court to grant or refuse a continuance, and that his action is not open to exception or revision.[25]

(B) *Facts Considered as Guiding the Discretion.* According to some authorities the appellate court in determining whether the discretion of the trial court has been properly exercised in refusing a continuance may take into consideration the evidence and proceedings at the trial, and if from the record it appears that defendant suffered no injury it will determine that the discretion was not abused.[26] It has been held, however, that the appellate court is confined strictly to the affidavits offered on the motion for a continuance.[27]

d. Conduct of Trial — (I) *In General.* Great discretion is vested in the trial court as regards the conduct of the trial and the regulation of matters incident thereto.[28] Accordingly it has been held that the appointment of counsel for

Louisiana.—State *v.* Nicholson, 14 La. Ann. 785; State *v.* Charlot, 8 Rob. 529.

Missouri.— State *v.* Kindred, 148 Mo. 270, 49 S. W. 845; State *v.* Cochran, 147 Mo. 504, 49 S. W. 558.

Nebraska.— Burrell *v.* State, 25 Nebr. 581, 41 N. W. 399.

Pennsylvania.— Com. *v.* Craig, 19 Pa. Super. Ct. 81.

Texas.— Hughes *v.* State, (Cr. App. 1900) 60 S. W. 562; Clay *v.* State, 40 Tex. Cr. 556, 51 S. W. 212; Johnson *v.* State, (Cr. App. 1899) 50 S. W. 1018; Areola *v.* State, 40 Tex. Cr. 51, 48 S. W. 195; Foreman *v.* State, 33 Tex. Cr. 272, 26 S. W. 212.

Virginia.— Early *v.* Com., 86 Va. 921, 11 S. E. 795.

See 15 Cent. Dig. tit. "Criminal Law," § 3046.

Lack of preparation.— Where a continuance is asked for because of lack of time to prepare for the trial the general rule applies.

Connecticut.— State *v.* Lee, 69 Conn. 186, 37 Atl. 75.

Florida.— Jenkins *v.* State, 31 Fla. 196, 12 So. 677.

Georgia.— Moody *v.* State, 54 Ga. 660.

Iowa.— State *v.* Stegner, 72 Iowa 13, 33 N. W. 340.

Louisiana.—State *v.* Crawford, 41 La. Ann. 589, 6 So. 471; State *v.* Johnson, 36 La. Ann. 852.

See 15 Cent. Dig. tit. "Criminal Law," § 3048.

25. Com. *v.* Drake, 124 Mass. 21; Com. *v.* Donovan, 99 Mass. 425, 96 Am. Dec. 765; State *v.* Pankey, 104 N. C. 840, 10 S. E. 315; State *v.* Scott, 80 N. C. 356; State *v.* Duncan, 28 N. C. 98; State *v.* Lindsey, 78 N. C. 499 (in which it is queried whether, if the discretion of the judge were plainly abused, an appeal would not lie); State *v.* Lucker, 40 S. C. 549, 18 S. E. 797; State *v.* Way, 38 S. C. 333, 17 S. E. 39; State *v.* Wyse, 33 S. C. 582, 12 S. E. 556.

26. Owens *v.* Com., 1 Ky. L. Rep. 124; Jones *v.* State, 60 Miss. 117; Territory *v.* Kinney, 3 N. M. 97, 2 Pac. 357; Delaney *v.* State, 7 Baxt. (Tenn.) 28.

False affidavits.— Although a sufficient case has been made on the affidavits for a continuance, the appellate court will not reverse the action of the lower court because the continuance was refused, when on the trial it appears that the reasons given for asking the continuance were false and fabricated for the purpose of delay. Taylor *v.* State, 11 Lea (Tenn.) 708; Porter *v.* State, 3 Lea (Tenn.) 496.

In Texas it is provided by statute that on a motion for a new trial the application for a continuance is to be reconsidered in the light of the evidence that has been adduced upon the trial, and if, when viewed in this light, it appears that the testimony sought is material, and that the facts stated in the application are probably true, a new trial must be granted, and if refused the action of the lower court will be reversed by the appellate court. Attaway *v.* State, 31 Tex. Cr. 475, 20 S. W. 925; Weathersby *v.* State, 29 Tex. App. 278, 15 S. W. 823; Browning *v.* State, 26 Tex. App. 432, 9 S. W. 770; Rice *v.* State, 22 Tex. App. 654, 3 S. W. 791; Miller *v.* State, 18 Tex. App. 232; Matthews *v.* State, 17 Tex. App. 472; Aiken *v.* State, 10 Tex. App. 610; Sheckles *v.* State, 9 Tex. App. 326; Dowdy *v.* State, 9 Tex. App. 292; Clampitt *v.* State, 9 Tex. App. 27; Reynolds *v.* State, 8 Tex. App. 493; White *v.* State, 6 Tex. App. 476.

27. Cutler *v.* State, 42 Ind. 244.

28. *Arkansas.*— Green *v.* State, (1903) 71 S. W. 665.

New York.— People *v.* Finnegan, 1 Park. Cr. 147.

North Carolina.— State *v.* Laxton, 78 N. C. 564.

Texas.— Hubotter *v.* State, 32 Tex. 479; Jones *v.* State, 8 Tex. App. 648.

Virginia.— Jones *v.* Com., 87 Va. 63, 12 S. E. 226.

Illustrations.— The court has discretion to forbid the publication of the testimony (State *v.* Galloway, 5 Coldw. (Tenn.) 326, 98 Am. Dec. 404), to direct that a witness be taken in custody on a charge of perjury (Linsday *v.* People, 67 Barb. (N. Y.) 548), and to transfer the case from one division of the court to another (People *v.* Owens, 132 Cal. 469, 64 Pac. 770). Where a statute authorizes an adjournment, if for sufficient cause the judge is unable to attend, the reason for the adjournment is not reviewable. Smith *v.* State, 4 Nebr. 277.

defendant[29] or for the prosecution,[30] the appointment of a stenographer,[31] the compelling or refusal to compel the prosecution to elect as between counts,[32] the action of the trial court as to the scope and character of the arguments of counsel,[33] including the time[34] and the order[35] of the arguments and the discharge of the jury because of a failure to agree or for any other valid reason[36] have been held to be matters so far within the discretion of the trial court as not to be subject of review. But it seems that the action of the trial court in putting or keeping defendant in irons is reviewable.[37]

(11) *Selecting and Impaneling Jurors.* A decision of the trial court as to a question of law involved in the formation of the jury is of course generally reviewable by the appellate court, but its determination of the facts as to the qualification, selection, and impaneling of jurors is within its sound discretion and not reviewable unless manifestly erroneous.[38]

29. Burton *v.* State, 75 Ind. 477; Pennington *v.* State, 13 Tex. App. 44.

30. State *v.* Sweeney, 93 Mo. 38, 5 S. W. 614; State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

31. State *v.* Pagels, 92 Mo. 300, 4 S. W. 931; Preuit *v.* People, 5 Nebr. 377.

32. *District of Columbia.*— U. S. *v.* McBride, 7 Mackey 371.

Indiana.— Beaty *v.* State, 82 Ind. 228; Lamphier *v.* State, 70 Ind. 317.

Missouri.— State *v.* Daubert, 42 Mo. 242; State *v.* Gray, 37 Mo. 463.

New York.— People *v.* Reavey, 38 Hun 418.

Tennessee.—Womack *v.* State, 7 Coldw. 508.

See 15 Cent. Dig. tit. "Criminal Law," § 3058.

33. *Arkansas.*— Ford *v.* State, 34 Ark. 649.

Georgia.— Cobb *v.* State, 27 Ga. 648.

Indiana.— Combs *v.* State, 75 Ind. 215.

Iowa.— State *v.* McPherson, 114 Iowa 492, 87 N. W. 421.

Louisiana.— State *v.* Chevis, 48 La. Ann. 575, 19 So. 557.

Michigan.— People *v.* Winslow, 39 Mich. 505.

Missouri.— State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330.

New York.— People *v.* Hallen, 164 N. Y. 565, 58 N. E. 1090.

North Carolina.— State *v.* Caveness, 78 N. C. 484.

Pennsylvania.— Com. *v.* McMahon, 14 Pa. Co. Ct. 621.

Tennessee.— Kizer *v.* State, 12 Lea 564.

Texas.— Fretwell *v.* State, 43 Tex. Cr. 501, 67 S. W. 1021.

Washington.— State *v.* Costello, 29 Wash. 366, 69 Pac. 1099.

West Virginia.— State *v.* Allen, 45 W. Va. 65, 30 S. E. 209.

See 15 Cent. Dig. tit. "Criminal Law," § 3059.

Additional argument upon return of jury.— The refusal of the judge to permit counsel to state new points to the jury when they return to court for fresh instructions will not be reviewed. State *v.* Maxent, 10 La. Ann. 743.

Permitting law-books to be read to the jury is largely discretionary with the court, and unless a clear abuse of discretion is shown will not authorize a reversal. Edmonds *v.* State, 34 Ark. 720; Willis *v.* State, (Tex. Cr. App. 1900) 55 S. W. 495; Williams *v.* State, (Tex. Cr. App. 1899) 53 S. W. 859; Hines *v.* State, 3 Tex. App. 483; Dempsey *v.* State, 3 Tex. App. 429, 30 Am. Rep. 148.

34. People *v.* Owens, 132 Cal. 469, 64 Pac. 770; Cromer *v.* State, 21 Ind. App. 502, 52 N. E. 239; Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228.

35. State *v.* Waltham, 48 Mo. 55; State *v.* Keene, 100 N. C. 509, 6 S. E. 91.

36. *Colorado.*— *In re* Allison, 13 Colo. 525, 22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790.

Georgia.— Avery *v.* State, 26 Ga. 233.

Idaho.— State *v.* Jorgenson, 3 Ida. 620, 32 Pac. 1129.

Maryland.— Hoffman *v.* State, 20 Md. 425.

New York.— People *v.* Green, 13 Wend. 55.

Oregon.— State *v.* Reinhart, 26 Oreg. 466, 38 Pac. 822.

South Carolina.— State *v.* Stephenson, 54 S. C. 234, 32 S. E. 305.

Tennessee.—State *v.* Brooks, 3 Humphr. 70.

Texas.— Clark *v.* State, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; Ray *v.* State, 4 Tex. App. 450.

Washington.— State *v.* Costello, 29 Wash. 366, 69 Pac. 1099.

See 15 Cent. Dig. tit. "Criminal Law," § 3060.

Review of discretion if improperly exercised.— See Dobbins *v.* State, 14 Ohio St. 493; Wright *v.* Com., 75 Va. 914.

37. People *v.* Harrington, 42 Cal. 165, 10 Am. Rep. 296; State *v.* Kring, 64 Mo. 591. *Contra*, Faire *v.* State, 58 Ala. 74.

It will be presumed, where the record is silent as to a valid excuse for keeping him in irons, that the court acted within its discretion in refusing to order him to be unfettered. Territory *v.* Kelly, 2 N. M. 292.

38. *Arkansas.*— Maclin *v.* State, 44 Ark. 115.

California.— People *v.* Flannelly, 128 Cal. 83, 60 Pac. 670; People *v.* Hickman, 113 Cal. 80, 45 Pac. 175; People *v.* Wong Ark, 96 Cal. 125, 30 Pac. 1115; People *v.* Bemmerly, 87 Cal. 117, 25 Pac. 266; People *v.* Kunz, 73 Cal. 313, 14 Pac. 836; People *v.* Colsom, 49 Cal. 679.

Colorado.—Nicholson *v.* People, (Sup. 1903)

e. Reception of Evidence — (i) *In General.* The discretion of the court is very broad in determining questions relating to the reception of evidence and is not reviewable unless such discretion has been plainly abused.[39]

(ii) *Competency of Witnesses.* Rulings of the trial court upon the competency of witnesses are largely in its discretion. Thus the question whether a witness is qualified as an expert will not be reviewed unless it is very clear that the discretion of the court has been exceeded.[40] The same rule applies where the

71 Pac. 377; Babcock *v.* People, 13 Colo. 515, 22 Pac. 817; Stratton *v.* People, 5 Colo. 276; Jones *v.* People, 2 Colo. 351; Solander *v.* People, 2 Colo. 48.

Connecticut.— State *v.* Lee, 69 Conn. 186, 37 Atl. 75.

District of Columbia.— Horton *v.* U. S., 15 App. Cas. 310.

Florida.— Mims *v.* State, 42 Fla. 199, 27 So. 865; Shiver *v.* State, 41 Fla. 630, 27 So. 36; Edwards *v.* State, 39 Fla. 753, 23 So. 537.

Georgia.— Hackett *v.* State, 108 Ga. 40, 33 S. E. 842; Carter *v.* State, 106 Ga. 372, 32 S. E. 345, 71 Am. St. Rep. 262; Hinkle *v.* State, 94 Ga. 595, 21 S. E. 595; Wilson *v.* State, 69 Ga. 224; Costly *v.* State, 19 Ga. 614.

Idaho.— Territory *v.* Evans, 2 Ida. (Hasb.) 651, 23 Pac. 232, 7 L. R. A. 646; U. S. *v.* Langford, 2 Ida. (Hash.) 561, 21 Pac. 409.

Illinois.— Coughlin *v.* People, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57.

Indiana.— Lewis *v.* State, 137 Ind. 344, 36 N. E. 1110.

Iowa.— State *v.* Buxton, 89 Iowa 573, 57 N. W. 417.

Kansas.— State *v.* Lowe, 56 Kan. 594, 44 Pac. 20; State *v.* Sorter, 52 Kan. 531, 34 Pac. 1036.

Kentucky.— Curtis *v.* Com., 110 Ky. 845, 62 S. W. 886, 23 Ky. L. Rep. 267; Forman *v.* Com., 86 Ky. 605, 6 S. W. 579, 9 Ky. L. Rep. 759; Rutherford *v.* Com., 13 Bush 608; Terrell *v.* Com., 13 Bush 246; Gilbert *v.* Com., 51 S. W. 590, 21 Ky. L. Rep. 415.

Louisiana.— State *v.* Anderson, 52 La. Ann. 101, 26 So. 781; State *v.* Harris, 51 La. Ann. 1194, 25 So. 984; State *v.* Thomas, 41 La. Ann. 1088, 6 So. 803; State *v.* Lewis, 41 La. Ann. 590, 6 So. 536; State *v.* Eloi, 34 La. Ann. 1195.

Maine.— State *v.* Garing, 74 Me. 152.

Maryland.— Garlitz *v.* State, 71 Md. 293, 18 Atl. 39, 4 L. R. A. 601.

Massachusetts.— Com. *v.* Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235.

Minnesota.— State *v.* Feldman, 80 Minn. 314, 83 N. W. 182; State *v.* Durnam, 73 Minn. 150, 75 N. W. 1127; State *v.* Mims, 26 Minn. 183, 2 N. W. 494, 683.

Missouri.— State *v.* Bauerle, 145 Mo. 1, 46 S. W. 609; State *v.* Ihrig, 106 Mo. 267, 17 S. W. 300; State *v.* Williamson, 106 Mo. 162, 17 S. W. 172; State *v.* Chatham Nat. Bank, 80 Mo. 626.

Nebraska.— Rhea *v.* State, 63 Nebr. 461, 88 N. W. 789; Coil *v.* State, 62 Nebr. 15, 86 N. W. 925; Dinsmore *v.* State, 61 Nebr. 418, 85 N. W. 445; Ward *v.* State, 58 Nebr. 719, 79 N. W. 725; Dodge *v.* People, 4 Nebr. 220.

Nevada.— State *v.* Larkin, 11 Nev. 314.

New Hampshire.— State *v.* Jones, 50 N. H. 369, 9 Am. Rep. 242.

New Jersey.— Patterson *v.* State, 48 N. J. L. 381, 4 Atl. 449.

New York.—People *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616; People *v.* McQuade, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273 [*reversing* 1 N. Y. Suppl. 155]; Thomas *v.* People, 67 N. Y. 218.

North Carolina.— State *v.* Maultsby, 130 N. C. 664, 41 S. E. 97; State *v.* Kinsauls, 126 N. C. 1095, 36 S. E. 31; State *v.* Potts, 100 N. C. 457, 6 S. E. 657. See also State *v.* Fuller, 114 N. C. 885, 19 S. E. 797.

North Dakota.— State *v.* Ekanger, 8 N. D. 559, 80 N. W. 482.

Oklahoma.— Malignon *v.* Territory, 8 Okla. 439, 58 Pac. 505.

Oregon.— State *v.* Morse, 35 Oreg. 462, 57 Pac. 631; State *v.* Brown, 28 Oreg. 147, 41 Pac. 1042; State *v.* Saunders, 14 Oreg. 300, 12 Pac. 441.

Pennsylvania.— Com. *v.* Heidler, 191 Pa. St. 375, 43 Atl. 211; Com. *v.* Church, 17 Pa. Super. Ct. 39.

South Carolina.— State *v.* Haines, 36 S. C. 504, 15 S. E. 555.

South Dakota.— State *v.* Church, 6 S. D. 89, 60 N. W. 143; State *v.* Chapman, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432.

Tennessee.— Sartin *v.* State, 7 Lea 679.

Texas.—Allen *v.* State, (Cr. App. 1902) 70 S. W. 85; Ramsey *v.* State, (Cr. App. 1901) 63 S. W. 875; Riddles *v.* State, (Cr. App. 1898) 46 S. W. 1058; West *v.* State, (Cr. App. 1893) 24 S. W. 31; Mason *v.* State, 15 Tex. App. 534.

Utah.— People *v.* Hopt, 4 Utah 247, 9 Pac. 407.

Virginia.— Montague *v.* Com., 10 Gratt. 767.

Washington.— White *v.* Territory, 3 Wash. Terr. 397, 19 Pac. 37.

Wisconsin.— Oshoga *v.* State, 3 Pinn. 56, 3 Chandl. 57.

United States.— *Ex p.* Spies, 123 U. S. 131, 8 S. Ct. 21, 31 L. ed. 80.

See 15 Cent. Dig. tit. "Criminal Law," § 3056; and Appeal and Error, 3 Cyc. 331.

39. Cline *v.* State, 51 Ark. 140, 10 S. W. 225; State *v.* Doherty, 72 Vt. 381, 48 Atl. 658, 82 Am. St. Rep. 951: Moore *v.* U. S., 150 U. S. 57, 14 S. Ct. 26, 37 L. ed. 996. And see Appeal and Error, 3 Cyc. 336.

Striking out evidence.— The allowance or refusal of a motion to strike out testimony which has been admitted without objection is in the discretion of the court, which cannot be reviewed on appeal unless accused was prevented from taking seasonable objection. De Forest *v.* U. S., 11 App. Cas. (D. C.) 458.

40. *Arkansas.*— Green *v.* State, 64 Ark. 523, 43 S. W. 973.

objection to the witness is based upon his extreme youth,[41] or upon his lack of intelligence arising from any cause.[42]

(III) *Order of Proof.* The order in which evidence shall be admitted is discretionary with the trial court,[43] and the admission of legal evidence at any stage of the proceedings is not reviewable.[44] The state[45] as well as defendant[46] may, after its evidence is closed, with the court's permission, introduce evidence which it has omitted. On the other hand the court's refusal to reopen the case will not be reviewed unless it appears that its discretion was exercised improperly and unfairly.[47]

(IV) *Examination of Witnesses.* The exercise of the discretion of the trial court as to the extent and mode of conducting the examination of witnesses,[48] as to whether a witness who has been examined shall be recalled for further examination,[49] as to whether or not leading questions shall be asked a wit-

California.— People *v.* Goldsworthy, 130 Cal. 600, 62 Pac. 1074.

District of Columbia.— Horton *v.* U. S., 15 App. Cas. 310.

Missouri.— State *v.* David, 131 Mo. 380, 33 S. W. 28.

New York.— People *v.* Flechter, 44 N. Y. App. Div. 199, 60 N. Y. Suppl. 777, 14 N. Y. Cr. 328.

North Carolina.—State *v.* Hinson, 103 N. C. 374, 9 S. E. 552.

See 15 Cent. Dig. tit. "Criminal Law," § 3062.

Non-expert witnesses.—Rulings that non-expert witnesses have had sufficient observation to enable them properly to testify on a question of sanity will not be reviewed. People *v.* McCarthy, 115 Cal. 255, 46 Pac. 1073; People *v.* Levy, 71 Cal. 618, 12 Pac. 791; Hite *v.* Com., 20 S. W. 217, 14 Ky. L. Rep. 308.

41. State *v.* Prather, 136 Mo. 20, 37 S. W. 805; State *v.* Baum, 64 N. J. L. 410, 45 Atl. 806; State *v.* Finger, 131 N. C. 781, 42 S. E. 820; Johnson *v.* State, 1 Tex. App. 609.

42. *Indiana.*—Batterson *v.* State, 63 Ind. 531.

Minnesota.— State *v.* Levy, 23 Minn. 104, 23 Am. Rep. 678.

Missouri.— State *v.* Scanlan, 58 Mo. 204.

North Carolina.— State *v.* Edwards, 79 N. C. 648.

Oklahoma.— Milligan *v.* Territory, 2 Okla. 164, 37 Pac. 1059.

Texas.— Ake *v.* State, 6 Tex. App. 398, 32 Am. Rep. 586.

United States.— Wheeler *v.* U. S., 159 U. S. 523, 16 S. Ct. 93, 40 L. ed. 244.

See 15 Cent. Dig. tit. "Criminal Law," § 3062.

43. *California.*— People *v.* Goldsworthy, 130 Cal. 600, 62 Pac. 1074; People *v.* Gordon, 103 Cal. 568, 37 Pac. 534.

Florida.— Roberson *v.* State, 40 Fla. 509, 24 So. 474.

Georgia.— Williams *v.* State, 60 Ga. 367, 27 Am. Rep. 412.

Illinois.— Argo *v.* People, 78 Ill. App. 246.

Indiana.— Pratt *v.* State, 7 Ind. 625.

Kentucky.— Jackson *v.* Com., 64 S. W. 729, 23 Ky. L. Rep. 1114; Walker *v.* Com., 7 Ky. L. Rep. 46.

Louisiana.— State *v.* Jones, 51 La. Ann. 103, 24 So. 594.

Maryland.— Legore *v.* State, 87 Md. 735, 41 Atl. 60.

Michigan.— People *v.* Saunders, 25 Mich. 119.

Missouri.— State *v.* Shroyer, 104 Mo. 441, 16 S. W. 286, 24 Am. St. Rep. 344; State *v.* Hatfield, 72 Mo. 518.

Nebraska.— Baer *v.* State, 59 Nebr. 655, 81 N. W. 856; Basye *v.* State, 45 Nebr. 261, 63 N. W. 811.

Nevada.— State *v.* Harrington, 9 Nev. 91.

New Jersey.—Donnelly *v.* State, 26 N. J. L. 601.

New York.— Wilke *v.* People, 53 N. Y. 525; Augsbury *v.* People, 1 N. Y. Cr. 299; Stephens *v.* People, 4 Park. Cr. 396.

North Carolina.— State *v.* Dixon, 78 N. C. 558.

Ohio.— Webb *v.* State, 29 Ohio St. 351.

Rhode Island.— State *v.* Ballou, 20 R. I. 607, 40 Atl. 861.

Tennessee.— Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046.

Texas.— Caviness *v.* State, 42 Tex. Cr. 420, 60 S. W. 555; Dement *v.* State, 39 Tex. Cr. 271, 45 S. W. 917; Lister *v.* State, 3 Tex. App. 17.

Vermont.— State *v.* Magoon, 50 Vt. 333.

West Virginia.— State *v.* Williams, 49 W. Va. 220, 38 S. E. 495.

United States.— Stockslager *v.* U. S., 116 Fed. 590, 54 C. C. A. 46.

See 15 Cent. Dig. tit. "Criminal Law," § 3063; and Appeal and Error, 3 Cyc. 337.

44. John *v.* State, 16 Ga. 200; State *v.* Murphy, 118 Mo. 7, 25 S. W. 95.

45. Granison *v.* State, 117 Ala. 22, 23 So. 146; Cargill *v.* Com., 93 Ky. 578, 20 S. W. 782, 14 Ky. L. Rep. 517; Territory *v.* O'Donnell, 4 N. M. 66, 12 Pac. 743; State *v.* Nelson, 13 Wash. 523, 43 Pac. 637.

46. People *v.* Ross, 65 Cal. 104, 3 Pac. 491.

47. State *v.* Shroyer, 104 Mo. 441, 16 S. W. 286, 24 Am. St. Rep. 344; Hart *v.* U. S., 84 Fed. 799, 28 C. C. A. 612.

48. Wade *v.* State, 50 Ala. 164; Donnelly *v.* State, 26 N. J. L. 601 [*affirming* 26 N. J. L. 463]; State *v.* Fox, 25 N. J. L. 566.

49. *Arkansas.*— Wallace *v.* State, 28 Ark. 531.

California.— People *v.* McNamara, 94 Cal. 509, 29 Pac. 953; People *v.* Moan, 65 Cal. 532, 4 Pac. 545; People *v.* Keith, 50 Cal. 137.

ness,[50] and as to the restriction or enlargement of the scope of the cross-examination of a witness so far as it relates to his credibility,[51] unless abused, will not be reviewed.

(v) *Exclusion of Witnesses.* Excluding other witnesses from the court-room during the examination of a witness,[52] or, after witnesses have been excluded, permitting one who has remained to testify,[53] are matters within the discretion of the court and will not be reviewed unless the discretion is clearly abused and defendant's substantial rights are prejudiced.

(vi) *Preliminary Proof as to Confessions.* The preliminary question of the admissibility of confessions is one for the determination of the trial court, and unless it be made clearly apparent that manifest error has been committed by such court in its determination, its decision should be sustained by the appellate court.[54]

Kentucky.— Rhodes *v.* Com., 10 Ky. L. Rep. 722.

Maryland.— Brown *v.* State, 72 Md. 468, 20 Atl. 186.

Missouri.— State *v.* Hamilton, 55 Mo. 520.

North Carolina.— State *v.* Weaver, 35 N. C. 491.

See 15 Cent. Dig. tit. "Criminal Law," § 3064; and Appeal and Error, 3 Cyc. 339.

The refusal to allow a witness to be recalled for the purpose of laying a predicate to impeach him is within the discretion of the trial court. Bell *v.* State, 74 Ala. 420; Garza *v.* State, 3 Tex. App. 286.

50. *Alabama.*— Hinds *v.* State, 55 Ala. 145.

California.— People *v.* Fong Ah Sing, 70 Cal. 8, 11 Pac. 323.

Florida.— Myers *v.* State, 43 Fla. 500, 31 So. 275.

Indiana.— App *v.* State, 90 Ind. 73.

Iowa.— State *v.* Bodekee, 34 Iowa 520.

Kansas.— State *v.* McAnulty, 26 Kan. 533.

Minnesota.— State *v.* Staley, 14 Minn. 105.

Missouri.— State *v.* Whalen, 149 Mo. 286, 49 S. W. 989; State *v.* Napper, 141 Mo. 401, 42 S. W. 957; State *v.* Hughes, 24 Mo. 147.

Oregon.— State *v.* Ogden, 39 Oreg. 195, 65 Pac. 449.

Texas.— Lafferty *v.* State, (Cr. App. 1893) 24 S. W. 507.

Wisconsin.— Baker *v.* State, 69 Wis. 32, 33 N. W. 52.

See 15 Cent. Dig. tit. "Criminal Law," § 3064; and Appeal and Error, 3 Cyc. 338.

51. *Alabama.*— Linnehan *v.* State, 115 Ala. 471, 22 So. 662.

District of Columbia.— Horton *v.* U. S., 15 App. Cas. 310.

Iowa.— State *v.* Ross, 21 Iowa 467.

Kansas.— State *v.* Pfefferle, 36 Kan. 90, 12 Pac. 406.

Massachusetts.— Com. *v.* Robinson, 1 Gray 555; Com. *v.* Savory, 10 Cush. 535; Com. *v.* Hills, 10 Cush. 530; Com. *v.* Shaw, 4 Cush. 593.

Michigan.— People *v.* McArron, 121 Mich. 1, 79 N. W. 944.

New Jersey.— Disque *v.* State, 49 N. J. L. 249, 8 Atl. 281; West *v.* State, 22 N. J. L. 212.

New York.— La Beau *v.* People, 33 How. Pr. 66, 6 Park. Cr. 371.

Oregon.— State *v.* McGrath, 35 Oreg. 109, 57 Pac. 321.

South Carolina.— State *v.* May, 33 S. C. 39, 11 S. E. 440.

West Virginia.— State *v.* Hatfield, 48 W. Va. 561, 37 S. E. 626.

United States.— Putnam *v.* U. S., 162 U. S. 687, 16 S. Ct. 923, 40 L. ed. 1118.

See 15 Cent. Dig. tit. "Criminal Law," § 3064; and Appeal and Error, 3 Cyc. 338.

Cross-examination.— It is discretionary with the court to permit a witness to be cross-examined as to indictments and criminal charges against him (Wallace *v.* State, 41 Fla. 547, 26 So. 713; Brookin *v.* State, 26 Tex. App. 121, 9 S. W. 735), and to refuse to permit him to be cross-examined as to matters not touched upon in his direct examination (McBride *v.* U. S., 101 Fed. 821, 42 C. C. A. 38).

The overbearing and indecorous manner in which a question is put to the accused when he testifies will not be reviewed unless prejudice be clearly shown. Arnold *v.* People, 75 N. Y. 603.

52. Barnes *v.* State, 88 Ala. 204, 7 So. 38, 16 Am. St. Rep. 48; McGuff *v.* State, 88 Ala. 147, 7 So. 35, 16 Am. St. Rep. 25; Nelson *v.* State, 2 Swan (Tenn.) 237; State *v.* Morgan, 35 W. Va. 260, 13 S. E. 385. See also State *v.* Manuel, 64 N. C. 601 (separation during an adjournment); Kennedy *v.* State, 19 Tex. App. 618 (permitting counsel to confer with witnesses under the rule).

53. *Alabama.*— Huskey *v.* State, 129 Ala. 94, 29 So. 838; Wilson *v.* State, 52 Ala. 299.

Kentucky.— Carlton *v.* Com., 18 S. W. 535, 13 Ky. L. Rep. 946.

Louisiana.— State *v.* Harrison, 38 La. Ann. 501.

Texas.— Caviness *v.* State, (Cr. App. 1901) 60 S. W. 555; Combs *v.* State, (Cr. App. 1899) 49 S. W. 585; Dement *v.* State, 39 Tex. Cr. 271, 45 S. W. 917; George *v.* State, 17 Tex. App. 513; Shields *v.* State, 8 Tex. App. 427.

Virginia.— Jackson *v.* Com., 96 Va. 107, 30 S. E. 452.

54. *Alabama.*— Bonner *v.* State, 55 Ala. 242.

Colorado.— Fincher *v.* People, 26 Colo. 169, 56 Pac. 902.

Iowa.— State *v.* Storms, 113 Iowa 385, 85 N. W. 610, 86 Am. St. Rep. 380.

Louisiana.— State *v.* Porteau, 52 La. Ann. 476, 26 So. 993; State *v.* Bartley, 34 La. Ann. 147; State *v.* Avery, 31 La. Ann. 181.

f. Motion For a New Trial. The action of the trial court upon a motion for a new trial will not generally be reviewed unless it clearly appears that its discretionary powers were abused,[55] or unless the motion for a new trial was made upon assignments of error in law where the discretionary power of the court is not involved.[56] Accordingly the refusal of a new trial, asked for because of newly discovered evidence,[57] the refusal of a new trial, based upon the alleged

Maine.— State *v.* Grover, 96 Me. 363, 52 Atl. 757.

Minnesota.— State *v.* Holden, 42 Minn. 350, 44 N. W. 123.

Missouri.— State *v.* Hopkirk, 84 Mo. 278.

North Carolina.— State *v.* Efler, 85 N. C. 585; State *v.* Vann, 82 N. C. 631.

Pennsylvania.— Fife *v.* Com., 29 Pa. St. 429.

South Carolina.— State *v.* Cannon, 49 S. C. 550, 27 S. E. 526.

See 15 Cent. Dig. tit. "Criminal Law," § 3066.

What constitutes fear or hope is a matter of law which may be reviewed. Whether such fear or hope existed in the particular case is a question of fact which cannot be reviewed. State *v.* Burgwyn, 87 N. C. 572; State *v.* Davis, 63 N. C. 578.

Decision final when evidence conflicting.— State *v.* Day, 55 Vt. 510. See also Fincher *v.* People, 26 Colo. 169, 56 Pac. 902.

The extent of the preliminary proof on the voluntary character of the confession is discretionary. Hardy *v.* U. S., 3 App. Cas. (D. C.) 35. And where the record contains no facts showing the confession was not free, and the evidence satisfactorily shows the guilt of the prisoner, judgment will not be reversed because of a failure to require preliminary proof that the confession was voluntary. Mitchell *v.* State, 79 Ga. 730, 5 S. E. 130.

55. *Alabama.*—Hampton *v.* State, 133 Ala. 180, 32 So. 230; Smith *v.* State, 133 Ala. 145, 31 So. 806; Durrett *v.* State, 133 Ala. 119, 32 So. 234; Sanders *v.* State, 131 Ala. 1, 31 So. 564; Harden *v.* State, 109 Ala. 50, 19 So. 494.

Arizona.— Anderson *v.* Territory, (1899) 56 Pac. 717.

District of Columbia.— U. S. *v.* Wood, 1 MacArthur 241.

Georgia.— Winn *v.* State, 116 Ga. 514, 42 S. E. 749; Sheppard *v.* State, 115 Ga. 823, 42 S. E. 250; Johnson *v.* State, 97 Ga. 217, 22 S. E. 385; Smith *v.* State, 91 Ga. 188, 17 S. E. 68.

Illinois.— Johnson *v.* People, 22 Ill. 314; Martin *v.* People, 13 Ill. 341; Pate *v.* People, 8 Ill. 644.

Iowa.— State *v.* Soper, 118 Iowa 1, 91 N. W. 774; State *v.* Hutchinson, 95 Iowa 566, 64 N. W. 610; State *v.* Gadbois, 89 Iowa 25, 56 N. W. 272.

Kentucky.— Curtis *v.* Com., 110 Ky. 845, 62 S. W. 886, 23 Ky. L. Rep. 267; Strutton *v.* Com., 62 S. W. 875, 23 Ky. L. Rep. 307; Welsh *v.* Com., 60 S. W. 185, 948, 1118, 63 S. W. 984, 64 S. W. 262, 23 Ky. L. Rep. 151; Spillman *v.* Com., 48 S. W. 978, 20 Ky. L. Rep. 1125; Horner *v.* Com., 41 S. W. 561, 19 Ky. L. Rep. 710; Smith *v.* Com., 37 S. W. 586, 18 Ky. L. Rep. 652.

Louisiana.— State *v.* Broussard, 108 La. 600, 32 So. 361; State *v.* Miller, 107 La. 796, 32 So. 191; State *v.* Benjamin, 105 La. 501, 29 So. 969; State *v.* Davis, 48 La. Ann. 727, 19 So. 670; State *v.* Beck, 41 La. Ann. 584, 6 So. 431.

Massachusetts.— Com. *v.* Morrison, 134 Mass. 189.

Michigan.— People *v.* Francis, 52 Mich. 575, 18 N. W. 364.

Nevada.— State *v.* Salge, 2 Nev. 321.

New Mexico.— U. S. *v.* Biena, 8 N. M. 99, 42 Pac. 70; U. S. *v.* Chaves, 6 N. M. 180, 27 Pac. 489.

New York.— People *v.* D'Argencour, 95 N. Y. 624 [*affirming* 32 Hun 178].

North Carolina.— State *v.* Gee, 92 N. C. 756; State *v.* Douglass, 63 N. C. 500.

Ohio.— Lee *v.* State, 32 Ohio St. 113.

Oklahoma.— Hodge *v.* Territory, 12 Okla. 108, 69 Pac. 1077.

Oregon.— State *v.* Childers, 32 Oreg. 119, 49 Pac. 801; State *v.* Huntley, 25 Oreg. 349, 35 Pac. 1065.

Pennsylvania.— Com. *v.* Eisenhower, 181 Pa. St. 470, 37 Atl. 521, 59 Am. St. Rep. 670; Gray *v.* Com., 101 Pa. St. 380, 47 Am. Rep. 733.

Texas.— Hughes *v.* State, (Cr. App. 1900) 60 S. W. 562; Holloway *v.* State, (Cr. App. 1900) 59 S. W. 883; Smith *v.* State, 15 Tex. App. 139.

Washington.— State *v.* Buhmann, 16 Wash. 700, 47 Pac. 961.

Wisconsin.— State *v.* Lamont, 2 Wis. 437.

United States.— Addington *v.* U. S., 165 U. S. 184, 17 S. Ct. 288, 41 L. ed. 679; Wheeler *v.* U. S., 159 U. S. 523, 16 S. Ct. 93, 40 L. ed. 244; McClellan *v.* Pyeatt, 50 Fed. 686, 1 C. C. A. 613.

See 15 Cent. Dig. tit. "Criminal Law," § 3067; and APPEAL AND ERROR, 3 Cyc. 343.

Contra.— State *v.* George, 8 Rob. (La.) 535; Com. *v.* Tobin, 125 Mass. 203, 28 Am. Rep. 220; O'Meara *v.* State, 17 Ohio St. 515.

The finding of the court on disputed questions of fact on the motion is usually conclusive. State *v.* Madigan, 66 Minn. 10, 68 N. W. 179; State *v.* Floyd, 61 Minn. 467, 63 N. W. 1096. *Contra*, Ryan *v.* State, 97 Tenn. 206, 36 S. W. 930.

56. State *v.* Bass, 11 La. Ann. 478; State *v.* Schnepel, 23 Mont. 523, 59 Pac. 927.

57. *Arkansas.*— Shepherd *v.* State, 34 Ark. 659; Coker *v.* State, 20 Ark. 53.

California.— People *v.* Clarke, 130 Cal. 642, 63 Pac. 138; People *v.* Rushing, 130 Cal. 449, 62 Pac. 742, 80 Am. St. Rep. 141; People *v.* Ah Noon, 116 Cal. 656, 48 Pac. 799; People *v.* Sutton, 73 Cal. 243, 15 Pac. 86.

disqualification of certain jurors, especially when the evidence as to such disqualification is conflicting,[58] and the granting or refusal of a new trial for the misconduct of jurors,[59] especially when the evidence as to such misconduct is conflicting,[60] being matters within the discretion of the trial court, are usually not reviewable in the absence of clear abuse of discretion.

g. Sentence and Punishment. Where by statute[61] the amount of a fine, the

Illinois.— Wilson *v.* People, 26 Ill. 434.

Indiana.— Smith *v.* State, 143 Ind. 685, 42 N. E. 913; Todd *v.* State, 25 Ind. 212.

Iowa.— Warren *v.* State, 1 Greene 106.

Kentucky.— Clark *v.* Com., 32 S. W. 131, 17 Ky. L. Rep. 540; Gambill *v.* Com., 23 S. W. 960, 15 Ky. L. Rep. 477; Smith *v.* Com., 17 S. W. 868, 13 Ky. L. Rep. 612.

Louisiana.— State *v.* Callian, 109 La. 346, 33 So. 363; State *v.* Ware, 43 La. Ann. 400, 8 So. 878; State *v.* Long, 4 La. Ann. 441; State *v.* Hunt, 4 La. Ann. 438.

Michigan.— People *v.* Nunn, 120 Mich. 530, 79 N. W. 800.

North Carolina.— State *v.* Morris, 109 N. C. 820, 13 S. E. 877.

South Carolina.— State *v.* Jones, 49 S. C. 330, 26 S. E. 652; State *v.* Nance, 25 S. C. 168.

Tennessee.— Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046.

Texas.— Sullivan *v.* State, (Cr. App. 1900) 55 S. W. 48; Burns *v.* State, 12 Tex. App. 269.

Washington.— State *v.* Webb, 20 Wash. 500, 55 Pac. 935.

See 15 Cent. Dig. tit. "Criminal Law," § 3069.

Conclusive findings.— The court's findings on the question of diligence in procuring evidence (State *v.* Guiton, 51 La. Ann. 155, 24 So. 784; State *v.* Jones, 46 La. Ann. 545, 15 So. 402; Poage *v.* State, 43 Tex. 454) and on the materiality and cumulative character of the evidence (Smith *v.* State, 81 Ga. 479, 8 S. E. 187; Bronson *v.* State, 2 Tex. App. 46) are conclusive.

58. *Georgia.*— Bowdoin *v.* State, 113 Ga. 1150, 39 S. E. 478; Roberts *v.* State, 110 Ga. 253, 34 S. E. 203; Allen *v.* State, 102 Ga. 619, 29 S. E. 470; Vann *v.* State, 83 Ga. 44, 9 S. E. 945; Brinkley *v.* State, 58 Ga. 296.

Indiana.— Moynihan *v.* State, 70 Ind. 126, 36 Am. Rep. 178; Holloway *v.* State, 53 Ind. 554; Clem *v.* State, 33 Ind. 418.

Iowa.— State *v.* Soper, 118 Iowa 1, 91 N. W. 774.

Kentucky.— Comely *v.* Com., 17 B. Mon. 403; Cornelius *v.* Com., 15 B. Mon. 539.

Mississippi.— Sam *v.* State, 31 Miss. 480.

Missouri.— State *v.* Howell, 117 Mo. 307, 23 S. W. 263; State *v.* Dusenberry, 112 Mo. 277, 20 S. W. 461.

Nebraska.— Murphey *v.* State, 43 Nebr. 34, 61 N. W. 491; Lamb *v.* State, 41 Nebr. 356, 59 N. W. 895.

North Carolina.— State *v.* Lambert, 93 N. C. 618; State *v.* Davis, 80 N. C. 412.

Pennsylvania.— McClain *v.* Com., 110 Pa. St. 263, 1 Atl. 45.

Texas.— Mikel *v.* State, 43 Tex. Cr. 615, 68 S. W. 512.

See 15 Cent. Dig. tit. "Criminal Law," § 3070.

The rejection of the affidavits of jurors as to the existence of an extraneous influence is not discretionary, but is reviewable on writ of error. Mattox *v.* U. S., 146 U. S. 140, 13 S. Ct. 50, 36 L. ed. 917.

59. *Alabama.*— Brister *v.* State, 26 Ala. 107.

Arkansas.— Wright *v.* State, 35 Ark. 639.

California.— People *v.* Rushing, 130 Cal. 449, 62 Pac. 742, 80 Am. St. Rep. 141; People *v.* Sullivan, 129 Cal. 557, 62 Pac. 101; People *v.* Kramer, 117 Cal. 647, 49 Pac. 842.

Indiana.— Bloom *v.* State, 155 Ind. 292, 58 N. E. 81; Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 157.

Iowa.— State *v.* Soper, 118 Iowa 1, 91 N. W. 774; State *v.* Hunt, 112 Iowa 509, 84 N. W. 525.

Louisiana.— State *v.* Brunetto, 13 La. Ann. 45.

Massachusetts.— Com. *v.* White, 148 Mass. 429, 19 N. E. 222.

Missouri.— State *v.* Cushenberry, 157 Mo. 168, 56 S. W. 737.

Nebraska.— Carleton *v.* State, 43 Nebr. 373, 61 N. W. 699.

New York.— People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188; People *v.* Johnson, 110 N. Y. 134, 17 N. E. 684.

North Carolina.— State *v.* Fuller, 114 N. C. 885, 19 S. E. 797; State *v.* Barber, 89 N. C. 523.

Oregon.— State *v.* Magers, 36 Oreg. 38, 58 Pac. 892.

South Carolina.— State *v.* Sullivan, 43 S. C. 205, 21 S. E. 4.

South Dakota.— State *v.* McDonald, (1902) 91 N. W. 447.

United States.— U. S. *v.* Gillies, 25 Fed. Cas. No. 15,206, Pet. C. C. 159.

See 15 Cent. Dig. tit. "Criminal Law," § 3071.

Misconduct of bailiff.—Messenger *v.* State, 152 Ind. 227, 52 N. E. 147; Doles *v.* State, 97 Ind. 555.

Misconduct of judge as to jury.— People *v.* Rushing, 130 Cal. 449, 62 Pac. 742, 80 Am. St. Rep. 141.

60. *California.*— People *v.* Dye, 62 Cal. 523.

Idaho.— People *v.* Biles, 2 Ida. (Hasb.) 114, 6 Pac. 120.

Nevada.— State *v.* St. Clair, 16 Nev. 207.

New York.— People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846.

Oklahoma.— Gatliff *v.* Territory, 2 Okla. 523, 37 Pac. 809.

61. **Where the statute provides both fine and imprisonment as punishment,** it has been held that the trial judge is without dis-

period of imprisonment, or a choice between fine or imprisonment is in the court's discretion within certain limits its exercise of the discretion will not be reviewed if the statutory limits are not exceeded, unless under all the circumstances manifest abuse is apparent.[62] Assigning a new day for the execution of a sentence before imposed is a matter of discretion with the lower court and is not appealable.[63] An appellate court will not interfere with regard to the punishment assessed by a jury unless there has been an evident abuse of power.[64]

5. Questions of Fact and Findings Thereon — a. Power to Review Evidence — (i) *In General.* It is difficult to formulate a general rule stating the extent to which appellate courts will pass upon the weight and sufficiency of evidence and reverse because of an insufficiency of evidence, but the general rule[65] seems to be

cretion to omit either, but that nevertheless if one of the penalties is omitted the error will not afford ground of reversal if the punishment imposed is authorized by the statute. Dillon *v.* State, 38 Ohio St. 586.

62. *Georgia.*— Baldwin *v.* State, 75 Ga. 482; Whitten *v.* State, 47 Ga. 297; Farris *v.* State, 35 Ga. 241.

Kentucky.— Duke *v.* Com., 6 Ky. L. Rep. 597.

Michigan.— People *v.* Kelly, 99 Mich. 82, 57 N. W. 1090.

Minnesota.— State *v.* Barrett, 40 Minn. 65, 41 N. W. 459; State *v.* Herrick, 12 Minn. 132.

Missouri.— State *v.* Davidson, 44 Mo. App. 513.

Nebraska.— Wright *v.* State, 45 Nebr. 44, 63 N. W. 147; Weinecke *v.* State, 34 Nebr. 14, 51 N. W. 307; Morrison *v.* State, 13 Nebr. 527, 14 N. W. 475.

New York.— People *v.* Williams, 58 Hun 278, 12 N. Y. Suppl. 249.

North Carolina.— State *v.* Miller, 94 N. C. 902.

Tennessee.— Tarrant *v.* State, 4 Lea 483.

Texas.— March *v.* State, 35 Tex. 115.

See 15 Cent. Dig. tit. "Criminal Law," § 3073.

The finding of the federal court that there is no penitentiary suitable for the confinement of convicts in the district where the court is held is not reviewable. *Ex p.* Karstendick, 93 U. S. 396, 23 L. ed. 889.

63. State *v.* Levelle, 36 S. C. 600, 15 S. E. 380.

64. State *v.* Bean, 21 Mo. 269; Johnson *v.* State, 5 Tex. App. 423; Davis *v.* State, 4 Tex. App. 456; McWhirt's Case, 3 Gratt. (Va.) 594, 46 Am. Dec. 196.

65. *Alabama.*— Phleming *v.* State, Minor 42.

California.— People *v.* Cummings, 123 Cal. 269, 55 Pac. 898; People *v.* Hough, 120 Cal. 538, 52 Pac. 846, 65 Am. St. Rep. 201; People *v.* Knutte, 111 Cal. 453, 44 Pac. 166; People *v.* Doane, 77 Cal. 560, 20 Pac. 84.

Colorado.— Rowe *v.* People, 26 Colo. 542, 59 Pac. 57.

Georgia.— Burgess *v.* State, 113 Ga. 749, 39 S. E. 294; Carroll *v.* State, 113 Ga. 720, 39 S. E. 285; Walker *v.* State, 97 Ga. 213, 22 S. E. 528; Allen *v.* State, 91 Ga. 189, 16 S. E. 980; Francis *v.* State, 86 Ga. 123, 12 S. E. 266.

Indiana.— McCaughey *v.* State, 156 Ind. 41, 59 N. E. 169; Vancleave *v.* State, 150 Ind. 273, 49 N. E. 1060; Schnuer *v.* State, 18 Ind. App. 226, 47 N. E. 843.

Kansas.— State *v.* Brubaker, 56 Kan. 90, 42 Pac. 353; State *v.* Hunter, 50 Kan. 302, 32 Pac. 37; Cherokee *v.* Fox, 34 Kan. 16, 7 Pac. 625.

Kentucky.— Richie *v.* Com., 70 S. W. 629, 24 Ky. L. Rep. 1077; Hinkle *v.* Com., 66 S. W. 816, 23 Ky. L. Rep. 1988; Ison *v.* Com., 66 S. W. 184, 23 Ky. L. Rep. 1805; Nelson *v.* Com., 62 S. W. 1018, 23 Ky. L. Rep. 320; Justice *v.* Com., 46 S. W. 499, 20 Ky. L. Rep. 386.

Louisiana.— State *v.* Prade, 50 La. Ann. 914, 24 So. 642; State *v.* Donald, 44 La. Ann. 158, 10 So. 600; State *v.* McFarlain, 42 La. Ann 803, 8 So. 600; State *v.* Beck, 41 La. Ann. 584, 6 So. 431. See also State *v.* Colomb, 108 La. 253, 32 So. 351; State *v.* Bildstein, 44 La. Ann. 778, 11 So. 37.

Maine.— State *v.* Peterson, 70 Me. 216.

Massachusetts.— Com. *v.* Cronan, 155 Mass. 393, 29 N. E. 639; Com. *v.* Fitchburg R. Co., 10 Allen 189; Com. *v.* Gillon, 2 Allen 505.

Michigan.— People *v.* Henssler, 48 Mich. 49, 11 N. W. 804.

Missouri.— State *v.* Woodward, 171 Mo. 593, 71 S. W. 1015; State *v.* Prendible, 165 Mo. 329, 65 S. W. 559; State *v.* Goforth, 136 Mo. 111, 37 S. W. 801; State *v.* Alfrey, 124 Mo. 393, 27 S. W. 1097.

New Mexico.—Territory *v.* Gonzales, (1902) 68 Pac. 925 (when the discretion of the court has been abused and has resulted in injustice, then the appellate court will interfere); Territory *v.* Romero, 2 N. M. 474; U. S. *v.* Lewis, 2 N. M. 459.

North Carolina.—State *v.* Storkey, 63 N. C. 7. See also State *v.* Rose, 129 N. C. 575, 40 S. E. 83.

Oklahoma.— Filson *v.* Territory, 11 Okla. 351, 67 Pac. 473; Boggs *v.* U. S., 10 Okla. 424, 63 Pac. 969, 65 Pac. 927.

South Carolina.— State *v.* Bates, 62 S. C. 377, 40 S. E. 772; State *v.* Marchbanks, 61 S. C. 17, 39 S. E. 187; State *v.* Chiles, 44 S. C. 338, 22 S. E. 339.

Utah.— State *v.* Endsley, 19 Utah 478, 57 Pac. 430.

Washington.— State *v.* Coates, 22 Wash. 601, 61 Pac. 726; State *v.* Murphy, 15 Wash. 98, 45 Pac. 729; State *v.* Kroenert, 13 Wash. 644, 43 Pac. 876.

that where there is material evidence tending to prove defendant's guilt before the jury, and the trial court refuses to set their verdict aside, an appellate court will not reverse the action of both the trial court and the jury; that it will examine the record to see whether there is evidence proper to go the jury, and upon which a verdict of guilt might reasonably be founded, and, being satisfied on that point, will refuse to interfere, whatever may be its own opinion of the weight or preponderance of the evidence. If, however, the verdict of the jury is altogether unsupported by any evidence whatever,[66] or if it is against the evidence and every

West Virginia.— State *v.* Henry, 51 W. Va. 283, 41 S. E. 439; State *v.* Bowyer, 43 W. Va. 180, 27 S. E. 301.

Wisconsin.— Williams *v.* State, 61 Wis. 281, 21 N. W. 56.

Wyoming.— Cornish *v.* Territory, 3 Wyo. 95, 3 Pac. 793.

United States.— Humes *v.* U. S., 170 U. S. 210, 18 S. Ct. 602, 42 L. ed. 1011; Miles *v.* U. S., 103 U. S. 304, 26 L. ed. 481.

See 15 Cent. Dig. tit. "Criminal Law," §§ 3068, 3074, 3075.

In Arkansas the appellate court has never adopted the rule of refusing a new trial in all or any cases, where there has been any evidence whatever, however weak, to support the verdict — what is called a scintilla of evidence. Oliver *v.* State, 34 Ark. 632.

In Iowa the rule seems to be that the appellate court will set aside a conviction which is clearly contrary to the weight of evidence, and that in determining this question greater latitude is permitted in criminal than in civil cases. State *v.* Tomlinson, 11 Iowa 401. The appellate court will not, however, order a new trial because the evidence supporting the conviction is not strong. State *v.* Kirkpatrick, 72 Iowa 500, 34 N. W. 301.

In Nebraska, if the finding of a jury is attacked as not sustained by sufficient evidence, it will not be disturbed by the appellate court unless manifestly wrong. Ward *v.* State, 58 Nebr. 719, 79 N. W. 725; Monroe *v.* State, 10 Nebr. 448, 17 N. W. 285.

In New York, under Code Cr. Proc. § 528, providing that "when the judgment is of death, the court of appeals may order a new trial if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial," etc., it has been decided that it is not the province of the court of appeals to review or determine controverted questions of fact arising upon conflicting evidence, but that the jury is the ultimate tribunal in such a case, and that with its decision the court may not interfere unless it reaches the conclusion that justice has not been done. People *v.* Decker, 157 N. Y. 186, 51 N. E. 1018; People *v.* Constantino, 153 N. Y. 24, 47 N. E. 37; People *v.* Taylor, 138 N. Y. 398, 34 N. E. 275; People *v.* Cignarale, 110 N. Y. 23, 17 N. E. 135. Under Code Cr. Proc. § 527, giving the appellate division of the supreme court the power to order a new trial for like cause without being limited to capital cases, it has been decided that it is not enough to justify interference with the verdict that the court on the case before it can see that the evidence made the case a conflicting and very doubtful one, demanding the solution of a verdict to settle the doubt or conflict, but it must be quite apparent that the conflict has been settled by a verdict against the substantial and preponderating weight of evidence. People *v.* McInerney, 5 N. Y. Cr. 47.

In Tennessee it is said that the rule that the appellate court will not grant a new trial upon the facts, unless the jury shall appear to have been guilty of great rashness, does not apply to criminal cases. In such cases the appellate court will grant a new trial if convinced that the verdict was not warranted by the evidence. Stuart *v.* State, 1 Baxt. 178; Dains *v.* State, 2 Humphr. 439. In criminal cases the appellate court will criticize and weigh the evidence, and if in their judgment it preponderates against the verdict will grant a new trial. Cochran *v.* State, 7 Humphr. 544; Copeland *v.* State, 7 Humphr. 478.

In Texas it seems that the appellate court will examine the evidence to ascertain if it is sufficient to sustain the verdict, always having in mind that the trial court is generally in a much better condition to determine whether defendant ought to have a new trial than the appellate court. McMillan *v.* State, (Cr. App. 1902) 71 S. W. 279; Penn *v.* State, (Cr. App. 1902) 68 S. W. 170; Johnson *v.* State, (Cr. App. 1902) 66 S. W. 552; Chapman *v.* State, 3 Tex. App. 67.

In Virginia it is the well settled rule of the appellate court in granting new trials, when asked for on the sole ground that the verdict is contrary to the evidence, to grant them very cautiously, and only when the verdict is manifestly wrong, great weight being due to a verdict rendered by a jury and approved by a judge before whom the witnesses gave their evidence. Lewis *v.* Com., 81 Va. 416.

Verdict produced by improper influences.— In several cases it has been said that the appellate court will not reverse the finding of the jury unless the verdict is so clearly and manifestly against the weight of evidence as to suggest the presumption that it was produced by influences other than a proper consideration of the testimony, such as passion, prejudice, or partiality. State *v.* Kaplan, 72 Conn. 635, 45 Atl. 1018; Harrison *v.* State, 39 Fla. 514, 22 So. 747; Doyle *v.* State, 39 Fla. 155, 22 So. 272, 63 Am. St. Rep. 159; Robinson *v.* State, 24 Fla. 358, 5 So. 6; State *v.* Glahn, 97 Mo. 679, 11 S. W. 260.

66. *Arkansas.*— Oliver *v.* State, 34 Ark. 632.

California.— People *v.* Williams, 133 Cal.

proper inference which is reasonably deducible therefrom,[67] the judgment will be reversed by the appellate court.

(11) *Conflicting Evidence.* It is not ordinarily the province of the appellate court to determine the credibility of conflicting evidence.[68] The presumption is in favor of the verdict, and the appellate court will not interfere when the evidence is conflicting if there be material evidence tending to support the verdict,[69] although it may differ from the jury as to the preponderance of the evidence.[70] It has been said, however, that in all cases, even those of conflict, an appellate court will direct a new trial when upon inspection of the evidence the

165, 65 Pac. 323; People *v.* Kuches, 120 Cal. 566, 52 Pac. 1002.

Connecticut.— State *v.* Lyon, 12 Conn. 487.

Florida.— Williams *v.* State, 20 Fla. 391.

Georgia.— Thomas *v.* State, 114 Ga. 543, 40 S. E. 735; Mackey *v.* State, 112 Ga. 682, 37 S. E. 858.

Indiana.— Long *v.* State, 56 Ind. 117.

Kentucky.— Brown *v.* Com., 69 S. W. 1098, 24 Ky. L. Rep. 727; Abbott *v.* Com., 47 S. W. 576, 20 Ky. L. Rep. 727.

Missouri.— State *v.* Dreher, 137 Mo. 11, 38 S. W. 567; State *v.* Alfrey, 124 Mo. 393, 27 S. W. 1097; State *v.* Howell, 100 Mo. 628, 14 S. W. 4.

Oklahoma.— Kennon *v.* Territory, 5 Okla. 685, 50 Pac. 172.

South Carolina.— State *v.* Shaw, 64 S. C. 566, 43 S. E. 14, 92 Am. St. Rep. 817, 60 L. R. A. 801; State *v.* Foote, 58 S. C. 218, 36 S. E. 551.

Utah.— State *v.* Endsley, 19 Utah 478, 57 Pac. 430.

Washington.— State *v.* O'Hara, 17 Wash. 525, 50 Pac. 477, 933.

See 15 Cent. Dig. tit. "Criminal Law," §§ 3074, 3075.

67. State *v.* Reinheimer, 109 Iowa 624, 80 N. W. 669.

68. State *v.* Hert, 89 Mo. 590, 1 S. W. 830.

69. *Arizona.*—Anderson *v.* Territory, (1899) 56 Pac. 717; Hackett *v.* Territory, (1898) 52 Pac. 358.

California.— People *v.* Brown, 130 Cal. 591, 62 Pac. 1072; People *v.* Emerson, 130 Cal. 562, 62 Pac. 1069; People *v.* Soap, 127 Cal. 408, 59 Pac. 771; People *v.* Chun Hong, 86 Cal. 329, 24 Pac. 1021.

Colorado.— Giano *v.* People, 30 Colo. 20, 69 Pac. 504.

Connecticut.— State *v.* Laudano, 74 Conn. 638, 51 Atl. 860.

Florida.— Teal *v.* State, 43 Fla. 580, 31 So. 282; Magill *v.* State, 42 Fla. 197, 28 So. 56; Browning *v.* State, 41 Fla. 271, 26 So. 639.

Georgia.— Patton *v.* State, 117 Ga. 230, 43 S. E. 533; Thomas *v.* State, 115 Ga. 235, 41 S. E. 578; Carroll *v.* State, 113 Ga. 720, 39 S. E. 285; Connally *v.* State, 112 Ga. 196, 37 S. E. 379; Ledbetter *v.* State, 97 Ga. 190, 23 S. E. 823; Sutherland *v.* State, 86 Ga. 515, 12 S. E. 926.

Idaho.— State *v.* Rathbone, (1901) 67 Pac. 186.

Illinois.— Hiner *v.* People, 34 Ill. 297.

Indiana.— Rosenbarger *v.* State, 154 Ind. 425, 56 N. E. 914; Blume *v.* State, 154 Ind. 343, 56 N. E. 771; Smith *v.* State, 154 Ind. 107, 56 N. E. 19; Robb *v.* State, 144 Ind. 569, 43 N. E. 642.

Iowa.— State *v.* Baughman, 111 Iowa 71, 82 N. W. 452; State *v.* Lauderbeck, 96 Iowa 258, 65 N. W. 158.

Kansas.— State *v.* Barr, 54 Kan. 230, 38 Pac. 289; State *v.* Kyne, 10 Kan. App. 277, 62 Pac. 728; State *v.* Fox, (App. 1900) 62 Pac. 727.

Kentucky.— Scott *v.* Com., 70 S. W. 281, 24 Ky. L. Rep. 889; Smith *v.* Com., 26 S. W. 1100, 16 Ky. L. Rep. 169.

Minnesota.— State *v.* Herrick, 12 Minn. 132.

Missouri.— State *v.* McCullough, 171 Mo. 571, 71 S. W. 1002; State *v.* Blitz, 171 Mo. 530, 71 S. W. 1027; State *v.* Nettles, 153 Mo. 464, 55 S. W. 70; State *v.* Devan, 148 Mo. 487, 50 S. W. 98; State *v.* Taylor, 93 Mo. App. 327, 67 S. W. 672.

Montana.— State *v.* Ford, 26 Mont. 1, 66 Pac. 293; State *v.* Hurst, 23 Mont. 484, 59 Pac. 911.

Nebraska.— Parker *v.* State, (1903) 93 N. W. 1037; Everson *v.* State, (1903) 93 N. W. 394; Russell *v.* State, (1902) 92 N. W. 751; Musfelt *v.* State, 64 Nebr. 445, 90 N. W. 237; Dutcher *v.* State, 16 Nebr. 30, 19 N. W. 612.

New Mexico.— Territory *v.* Pino, 9 N. M. 598, 58 Pac. 393; Territory *v.* Webb, 2 N. M. 147.

New York.— People *v.* Moran, 161 N. Y. 657, 57 N. E. 1120; People *v.* Place, 157 N. Y. 584, 52 N. E. 576; People *v.* Zounek, 20 N. Y. Suppl. 755; People *v.* McInerney, 5 N. Y. Cr. 47.

North Dakota.— State *v.* Montgomery, 9 N. D. 405, 83 N. W. 873.

Oregon.— State *v.* Foot You, 24 Oreg. 61, 32 Pac. 1031, 33 Pac. 537.

Texas.— King *v.* State, (Cr. App. 1901) 64 S. W. 245; Jackson *v.* State, (Cr. App. 1900) 58 S. W. 1007; Montgomery *v.* State, (Cr. App. 1893) 23 S. W. 693.

Washington.— State *v.* Maldonado, 21 Wash. 653, 59 Pac. 489.

See 15 Cent. Dig. tit. "Criminal Law," § 3076.

70. *Arkansas.*— Oliver *v.* State, 34 Ark. 632.

California.— People *v.* Ah Jake, 91 Cal. 98, 27 Pac. 595.

Georgia.— Young *v.* State, 82 Ga. 752, 9 S. E. 1108.

Illinois.— Eastman *v.* People, 93 Ill. 112.

Iowa.— State *v.* Clark, 78 Iowa 492, 43 N. W. 273.

verdict is so clearly and palpably against the weight of it as to shock the sense of justice.[71]

(III) *Circumstantial and Conflicting Evidence.* The fact that the evidence is circumstantial and conflicting does not alone empower the appellate court to weigh it or determine its sufficiency, if it reasonably tends to prove the guilt of the accused and fairly warrants a conviction.[72]

b. Credibility of Witnesses. The credibility of witnesses being exclusively for the jury, the appellate court will affirm where the sole question is, were the witnesses credible, and the evidence is directly conflicting.[73]

c. Particular Elements of Crime. The question whether any particular fact indispensable to the crime charged has been proved is for the jury, and the general rules under which the appellate court acts in examining evidence may be applied to each essential ingredient of the crime. Thus the appellate court will not weigh the evidence, where it is conflicting, to ascertain if the venue,[74] the intent,[75] or the sanity of the accused[76] has been proved. But where on examina-

See 15 Cent. Dig. tit. "Criminal Law," § 3075.

71. Oliver *v.* State, 34 Ark. 632.

72. *Arkansas.*— Richardson *v.* State, (1892) 19 S. W. 502.

Georgia.— Smith *v.* State, 63 Ga. 90.

Illinois.— Swigar *v.* People, 109 Ill. 272.

Indiana.— Weaver *v.* State, 154 Ind. 1, 55 N. E. 858; Taylor *v.* State, 130 Ind. 66, 29 N. E. 415.

Iowa.— State *v.* Rainsbarger, 74 Iowa 196, 37 N. W. 153.

Kentucky.— Cole *v.* Com., 33 S. W. 193, 17 Ky. L. Rep. 1112.

Missouri.— State *v.* Musick, 71 Mo. 401; Plattsburg *v.* Trimble, 46 Mo. App. 459.

New York.— People *v.* Place, 157 N. Y. 584, 52 N. E. 576.

Texas.— Morris *v.* State, (Cr. App. 1897) 39 S. W. 934; Carson *v.* State, 34 Tex. Cr. 342, 30 S. W. 799.

Virginia.— McCune *v.* Com., 2 Rob. 771; Com. *v.* Bennet, 2 Va. Cas. 235.

See 15 Cent. Dig. tit. "Criminal Law," § 3080.

A conviction on circumstantial evidence will always be sustained unless it is opposed by a decided preponderance of evidence or is based on no evidence. Browning *v.* State, 33 Miss. 47.

73. *Arkansas.*—Pleasant *v.* State, 15 Ark. 624.

Connecticut.— State *v.* Kaplan, 72 Conn. 635, 45 Atl. 1018.

Georgia.— May *v.* State, 94 Ga. 76, 20 S. E. 251; Bohannon *v.* State, 89 Ga. 445, 15 S. E. 496; Whitten *v.* State, 47 Ga. 297. See also Patton *v.* State, 117 Ga. 230, 43 S. E. 533.

Hawaii.— Reg. *v.* Ah Lee, 5 Hawaii 547.

Indiana.— Hire *v.* State, 144 Ind. 359, 43 N. E. 312.

Iowa.— State *v.* Falconer, 70 Iowa 416, 30 N. W. 655.

Kansas.— State *v.* Plum, 49 Kan. 679, 31 Pac. 308.

Kentucky.— Spencer *v.* Com., 6 Ky. L. Rep. 222.

Louisiana.— State *v.* Caulfield, 23 La. Ann. 148.

Mississippi.— Terry *v.* State, (1893) 12 So. 544; Riggs *v.* State, 30 Miss. 635.

Missouri.— State *v.* Bauerle, 145 Mo. 1, 46 S. W. 609; State *v.* Shanks, 98 Mo. App. 138, 71 S. W. 1065; State *v.* Nolle, 96 Mo. App. 524, 70 S. W. 504.

Montana.— State *v.* Howell, 26 Mont. 3, 66 Pac. 291.

New York.— People *v.* Place, 157 N. Y. 584, 52 N. E. 576.

Ohio.— Whitcomb *v.* State, 14 Ohio 282.

Tennessee.— Jones *v.* State, 3 Heisk. 445.

Texas.— Crawford *v.* State, (Cr. App. 1895) 33 S. W. 350; Lane *v.* State, 6 Tex. App. 164.

See 15 Cent. Dig. tit. "Criminal Law," § 3077.

74. *California.*— People *v.* Magallones, 15 Cal. 426.

Iowa.— State *v.* Hopkins, 94 Iowa 86, 62 N. W. 656.

Louisiana.— State *v.* McAdams, 106 La. 720, 31 So. 187; State *v.* Thornton, 49 La. Ann. 1007, 22 So. 315.

Pennsylvania.—Com. *v.* Budnis, 197 Pa. St. 542, 47 Atl. 748.

South Carolina.— State *v.* Vari, 35 S. C. 175, 14 S. E. 392; State *v.* Penny, 19 S. C. 218.

Texas.— Bowling *v.* State, 13 Tex. App. 338.

See 15 Cent. Dig. tit. "Criminal Law," § 3078.

75. Braxton *v.* State, 157 Ind. 213, 61 N. E. 195; Lay *v.* State, 12 Ind. App. 362, 39 N. E. 768; State *v.* Sheldon, 8 Rob. (La.) 540; French *v.* Foley, 11 Fed. 801.

76. *California.*— People *v.* Larrabee, 115 Cal. 158, 46 Pac. 922.

Indiana.— Henning *v.* State, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756.

New York.— People *v.* Taylor, 138 N. Y. 398, 34 N. E. 275; People *v.* Schuyler, 106 N. Y. 298, 12 N. E. 783.

Oregon.— State *v.* Hansen, 25 Oreg. 391, 35 Pac. 976, 36 Pac. 296.

Pennsylvania.— Com. *v.* Fritch, 9 Pa. Co. Ct. 164.

Texas.— Wade *v.* State, 43 Tex. Cr. 207, 63 S. W. 878.

tion of the evidence there is a total lack of proof as to the intent[77] or of some other element of the crime,[78] or it appears that the jury disregarded the defense, which was almost conclusively established by the evidence,[79] judgment will be reversed.

d. Successive Convictions. That there have been two or more verdicts of conviction, showing that several juries have considered the evidence of guilt sufficient, will have much weight with the appellate court in sustaining the judgment.[80]

e. Where Jury Trial Was Waived. Where by consent of the parties a jury is waived and the evidence submitted to the trial judge, his findings are equivalent to the verdict of a jury, and the rules as to review are the same as though there had been a jury.[81]

f. Approval of the Trial Judge. The fact that the trial judge was satisfied with the verdict, and that he refused to set it aside or order a new trial, will be considered by the appellate court.[82]

6. HARMLESS ERROR — a. In General. As a general proposition appellant or plaintiff in error, to obtain a reversal, must show not only that error occurred, but that he was substantially prejudiced thereby.[1] Technical and nominal errors

See 15 Cent. Dig. tit. "Criminal Law," § 3078.

77. Manuel *v.* People, 48 Barb. (N. Y.) 548; State *v.* Hammond, 35 Wis. 315.

78. Whitehead *v.* State, 20 Fla. 841; Amsden *v.* State, 52 Ind. 454.

79. Holmes *v.* State, 20 Tex. App. 110.

Conflicting evidence as to defense.— If the evidence as to self-defense (State *v.* Newman, 49 W. Va. 724, 39 S. E. 655) or as to an alibi (State *v.* Watson, 102 Iowa 651, 72 N. W. 283) is conflicting, the appellate court will not review it.

80. Waller *v.* State, 104 Ga. 505, 30 S. E. 835; State *v.* Cross, 12 Iowa 66, 79 Am. Dec. 519; State *v.* Clawson, 32 Mo. App. 93; Firby *v.* State, 3 Baxt. (Tenn.) 358.

The presumption of the correctness of the last verdict is not conclusive, and a new trial may be granted for insufficiency of evidence (Grayson *v.* Com., 7 Gratt. (Va.) 613), but only in an extremely clear case (State *v.* Myers, 12 Wash. 77, 40 Pac. 626).

81. *Alabama.*— Feibelman *v.* State, 130 Ala. 122, 30 So. 384; Wright *v.* State, 129 Ala. 123, 29 So. 864; Du Bose *v.* State, 126 Ala. 81, 28 So. 656; Boyd *v.* State, 88 Ala. 169, 7 So. 268, 16 Am. St. Rep. 31; Knowles *v.* State, 80 Ala. 9; Wren *v.* State, 70 Ala. 1; Cawthorn *v.* State, 63 Ala. 157.

Iowa.— State *v.* Boynton, 75 Iowa 753, 38 N. W. 505.

Kansas.— Oswego *v.* Belt, 16 Kan. 480.

Kentucky.— Klyman *v.* Com., (1895) 30 S. W. 658; Engle *v.* Com., 7 Ky. L. Rep. 830.

Massachusetts.— Com. *v.* Gill, 14 Gray 400.

Texas.— Bell *v.* State, 18 Tex. App. 53, 51 Am. Rep. 293.

See 15 Cent. Dig. tit. "Criminal Law," § 3082.

Review when verdict based on an agreed statement of facts.— Olathe *v.* Adams, 15 Kan. 391; State *v.* Sullivan, 14 Kan. 170; Davidson *v.* State, 77 Md. 388, 26 Atl. 415; State *v.* Smith, 75 N. C. 141; Sewell *v.* State, 15 Tex. App. 56.

82. *Georgia.*— Herndon *v.* State, 110 Ga. 313, 35 S. E. 154; Day *v.* State, 110 Ga. 254, 34 S. E. 207; Jones *v.* State, 106 Ga. 365, 34 S. E. 174; Travis *v.* State, 97 Ga. 359, 23 S. E. 830; Dutton *v.* State, 92 Ga. 14, 18 S. E. 545; Surles *v.* State, 89 Ga. 167, 15 S. E. 38; Carnes *v.* State, 28 Ga. 192.

Missouri.— State *v.* Rufus, 149 Mo. 406, 51 S. W. 80.

South Carolina.— State *v.* Hooper, 2 Bailey 37.

Tennessee.— Anderson *v.* State, 6 Lea 602.

Texas.— Bright *v.* State, 10 Tex. App. 68.

See 15 Cent. Dig. tit. "Criminal Law," § 3084.

New trial when judge disapproves.— State *v.* Anderson, 2 Bailey (S. C.) 565.

Reversal when action of trial judge plainly erroneous.— People *v.* Acosta, 10 Cal. 195.

Where upon conflicting evidence the accused has been convicted, and the judge has on motion refused to set the conviction aside no presumption of prejudice exists. Ridout *v.* State, 6 Tex. App. 249. Where one is convicted on conflicting evidence, and the court refuses a new trial on the ground that the verdict is contrary to the evidence, the appellate court, in considering error based on the overruling of a motion for a new trial, will consider only the evidence of the commonwealth, and if that is sufficient to sustain the verdict no reversal will be had. State *v.* Thompson, 21 W. Va. 741.

1. *Alabama.*— Salm *v.* State, 89 Ala. 56, 8 So. 66; Hughes *v.* State, 35 Ala. 351.

Arizona.— Territory *v.* Hargrave, 1 Ariz. 95, 25 Pac. 475.

Arkansas.— Hampton *v.* State, 67 Ark. 266, 54 S. W. 746.

California.— People *v.* Molina, 126 Cal. 505, 59 Pac. 34; People *v.* Eppinger, 109 Cal. 294, 41 Pac. 1037.

Georgia.— Hussey *v.* State, 69 Ga. 54.

Idaho.—State *v.* Rice, 7 Ida. 762, 66 Pac. 87.

Illinois.— Davis *v.* People, 114 Ill. 86, 29 N. E. 192; Nicholson *v.* People, 29 Ill. App. 57.

Indiana.— Hollingsworth *v.* State, 111 Ind. 289, 12 N. E. 490.

therefore and mere irregularities not substantially prejudicing the accused may be disregarded on review by the appellate court;[2] and defendant cannot complain of an error committed by the trial court in his favor.[3] An appellate court will not

Iowa.—Hintermeister *v.* State, 1 Iowa 101.
Kentucky.— Wright *v.* Com., 72 S. W. 340, 24 Ky. L. Rep. 1838; Whiteneck *v.* Com., 55 S. W. 916, 56 S. W. 3, 21 Ky. L. Rep. 1625; Sloan *v.* Com., 23 S. W. 676, 15 Ky. L. Rep. 437; Austin *v.* Com., 4 Ky. L. Rep. 29.
Louisiana.— State *v.* Mansfield, 52 La. Ann. 1355, 27 So. 887; State *v.* Kennon, 45 La. Ann. 1192, 14 So. 187; State *v.* Brown, 16 La. Ann. 384.
Maine.— State *v.* Bennett, 75 Me. 590.
Massachusetts.—Com. *v.* Graves, 112 Mass. 282.
Michigan.— People *v.* Niles, 44 Mich. 606, 7 N. W. 192.
Mississippi.— Josephine *v.* State, 39 Miss. 613.
Missouri.— State *v.* Matthews, 88 Mo. 121; State *v.* Forrester, 63 Mo. App. 530; State *v.* Williams, 11 Mo. App. 600.
New Jersey.—State *v.* Fox, 25 N. J. L. 566.
New York.— People *v.* Youngs, 151 N. Y. 210, 45 N. E. 460; People *v.* Myers, 2 Hun 6; People *v.* Walters, 18 Abb. Pr. 147.
North Carolina.— State *v.* Cowan, 29 N. C. 239.
Ohio.— Scovern *v.* State, 6 Ohio St. 288; May *v.* State, 14 Ohio 461, 45 Am. Dec. 548.
United States.— Milby *v.* U. S., 120 Fed. 1, 57 C. C. A. 21; Jackson *v.* U. S., 102 Fed. 473, 42 C. C. A. 452; U. S. *v.* Mathoit, 26 Fed. Cas. No. 15,740, 1 Sawy. 142.
See 15 Cent. Dig. tit. "Criminal Law," § 3085.

Ruling proper on other grounds.—A ruling which, although based on grounds that are erroneous, was proper on other grounds will not justify a reversal. State *v.* Weaver, 58 S. C. 106, 36 S. E. 499.

Probability of prejudice.—An error will reverse if it is probable that accused was prejudiced thereby, or that a different verdict would have been returned if the error had not been committed, it not being necessary that it should appear that the error necessarily prejudiced his substantial rights. Lowry *v.* Com., 63 S. W. 977, 23 Ky. L. Rep. 1240.

Rule inapplicable to capital cases.—Mitchell *v.* State, 60 Ala. 26. *Compare* Davis *v.* People, 114 Ill. 86, 29 N. E. 192.

2. *Alabama.*— Sanders *v.* State, 131 Ala. 1, 31 So. 564.
California.— People *v.* Maroney, 109 Cal. 277, 41 Pac. 1097.
Hawaii.— Reg. *v.* Haumea, 8 Hawaii 280; Rex *v.* Wo Sow, 7 Hawaii 734.
Idaho.— State *v.* Rice, 7 Ida. 762, 66 Pac. 87.
Illinois.— Collins *v.* People, 194 Ill. 506, 62 N. E. 902.
Kansas.— State *v.* Smiley, 65 Kan. 240, 69 Pac. 199; Millar *v.* State, 2 Kan. 174.
Kentucky.— Nicely *v.* Com., 58 S. W. 995, 22 Ky. L. Rep. 900.
Louisiana.— State *v.* Charles, 108 La. 230, 32 So. 354; State *v.* Starr, 52 La. Ann. 610, 26 So. 998; State *v.* Turner, 25 La. Ann. 573.
Minnesota.— State *v.* Graffmuller, 26 Minn. 6, 46 N. W. 445.
Montana.— State *v.* Sloan, 22 Mont. 293, 56 Pac. 364.
New Mexico.— Leonardo *v.* Territory, 1 N. M. 291.
Oklahoma.— Hodge *v.* Territory, 12 Okla. 108, 69 Pac. 1077; Boggs *v.* U. S., 10 Okla. 424, 63 Pac. 969, 65 Pac. 927.
Tennessee.— Wilson *v.* State, 109 Tenn. 167, 70 S. W. 57; Lancaster *v.* State, 2 Lea 575; Isham *v.* State, 1 Sneed 111.
Texas.— Morgan *v.* State, 43 Tex. Cr. 543, 67 S. W. 420; Nelson *v.* State, (Cr. App. 1902) 66 S. W. 775; McDaniel *v.* State, (Cr. App. 1902) 66 S. W. 549; Robbins *v.* State, (Cr. App. 1892) 20 S. W. 359.
See 15 Cent. Dig. tit. "Criminal Law," § 3086.

This is the rule by statute in some states.—*Indiana.*—Vandyne *v.* State, 130 Ind. 26, 29 N. E. 392; Hunter *v.* State, 102 Ind. 428, 1 N. E. 361; Baebner *v.* State, 25 Ind. App. 597, 58 N. E. 741; Rosenstein *v.* State, 9 Ind. App. 290, 36 N. E. 652.
Iowa.— State *v.* Kuhn, 117 Iowa 216, 90 N. W. 733; State *v.* Raw, 81 Iowa 138, 46 N. W. 872; State *v.* Guisenhause, 20 Iowa 227.
New Jersey.— State *v.* Baum, 64 N. J. L. 410, 45 Atl. 806.
New York.— People *v.* Miller, 169 N. Y. 339, 62 N. E. 418, 88 Am. St. Rep. 546; People *v.* Hallen, 164 N. Y. 565, 58 N. E. 1090; People *v.* Decker, 157 N. Y. 186, 51 N. E. 1018; People *v.* Martell, 138 N. Y. 595, 33 N. E. 838; People *v.* Shinburne, 27 N. Y. App. Div. 424, 50 N. Y. Suppl. 51.
Wisconsin.— Lanphere *v.* State, 114 Wis. 193, 89 N. W. 128; Cornell *v.* State, 104 Wis. 527, 80 N. W. 745.
See 15 Cent. Dig. tit. "Criminal Law," § 3086.

Admission of confession.— Under the New York statute (Code Cr. Proc. § 542), where the elements of a crime are proved independently of the confession of the accused, the error of the court in admitting his confession may be disregarded. People *v.* Meyer, 162 N. Y. 357, 56 N. E. 758, 14 N. Y. Cr. 487.

3. *California.*— People *v.* Donaldson, 70 Cal. 116, 11 Pac. 681.
Florida.— McCoy *v.* State, 40 Fla. 494, 24 So. 485.
Georgia.— Wheeler *v.* State, 112 Ga. 43, 37 S. E. 126; Simms *v.* State, 60 Ga. 145.
Iowa.— State *v.* Cunningham, 111 Iowa 233, 82 N. W. 775.
Missouri.— State *v.* Schieller, 130 Mo. 510, 32 S. W. 976.
Nebraska.— Marion *v.* State, 20 Nebr. 233, 29 N. W. 911, 57 Am. Rep. 825.
Tennessee.— De Berry *v.* State, 99 Tenn. 207, 42 S. W. 31.

disturb a judgment in a criminal case after a verdict of acquittal, although an erroneous instruction was given by the trial court,[4] or competent evidence for the state improperly rejected.[5]

b. Presumptions as to Prejudice. The fact of error has been held in some cases to raise a presumption that the accused was injured,[6] but this presumption is rebuttable by clear proof to the contrary appearing on the record,[7] and in some cases it does not exist. Where it does not appear that alleged error in preliminary proceedings affected any substantial right of the accused it will not be presumed prejudicial,[8] but a ruling of the court depriving defendant of any fundamental and substantial right during the trial will be presumed to have been prejudicial.[9] In a felony case the absence of the accused during the taking of the testimony,[10] or on the submission of the case to the jury,[11] or at other important steps during the trial raises a presumption of prejudice.[12] A presumption of prejudice also arises from error in the admission of irrelevant or illegal evidence over objection,[13]

Vermont.— State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

Washington.— State *v.* Douette, 31 Wash. 6, 71 Pac. 556.

Wisconsin.— Ryan *v.* State, 83 Wis. 486, 53 N. W. 836.

See 15 Cent. Dig. tit. "Criminal Law," §§ 3088, 3089.

4. State *v.* Baker, 19 Mo. 683.

5. State *v.* Johnson, 8 Blackf. (Ind.) 533.

Where the state fails to offer sufficient proof to justify a conviction, the appellate court will not, at the request of the state, reverse the cause for errors committed at the trial which would have necessitated a reversal but for such failure of proof. People *v.* Weiss-Chapman Drug Co., 5 Colo. App. 153, 38 Pac. 334.

6. People *v.* Murphy, 47 Cal. 103; People *v.* Williams, 18 Cal. 187; Hawkins *v.* State, 28 Fla. 363, 9 So. 652; State *v.* Gut, 13 Minn. 341; Boyd *v.* State, 16 Lea (Tenn.) 149; Quarles *v.* State, 1 Sneed (Tenn.) 407. And see *supra*, XVII, G, 6, a.

7. Dave *v.* State, 22 Ala. 23; People *v.* Richards, 136 Cal. 127, 68 Pac. 477; People *v.* Murphy, 47 Cal. 103; Kirby *v.* People, 123 Ill. 436, 15 N. E. 33; Com. *v.* Keenan, 140 Mass. 481, 5 N. E. 477.

8. *Arkansas.*— Atkins *v.* State, 16 Ark. 568.

Indiana.— Stephenson *v.* State, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 261.

Iowa.— Sharp *v.* State, 2 Iowa 454.

Kansas,— State *v.* Snodgrass, 52 Kan. 174, 34 Pac. 750.

Nebraska.— Hoover *v.* State, 48 Nebr. 184, 66 N. W. 1117.

See 15 Cent. Dig. tit. "Criminal Law," § 3091.

Illustration of prejudicial error.— The discharge of a competent juror without the consent of the accused (Phillips *v.* State, 68 Ala. 469), the furnishing him with an incorrect and imperfect list of jurors (Stewart *v.* State, 13 Ark. 720), or the neglect of some statutory requirement in impaneling (State *v.* Holme, 54 Mo. 153) or summoning (Hicks *v.* State, 5 Tex. App. 488) the jury, being subversive of his substantial rights, may raise a presumption of prejudice sufficient for a reversal.

9. Austin *v.* Com., 4 Ky. L. Rep. 29, deprivation of jury trial. See also Hawkins *v.* State, 32 Fla. 248, 13 So. 353, 37 Am. St. Rep. 92, holding that it would be presumed that the jury read the word "Guilty," inadvertently written by the judge on the margin of an instruction given them and taken to their room, and that it influenced them to convict.

Submission of the issues on the pleas of former conviction and not guilty to the jury at the same time raises a presumption of prejudice. Foster *v.* State, 39 Ala. 229.

Time of pronouncing judgment.— Where a statute provides that if the court remains in session judgment must be pronounced at least three days after verdict, an earlier imposition creates a presumption of prejudice which may cause the case to be remanded for a new judgment unless the record clearly rebuts the presumption. State *v.* Watrous, 13 Iowa 489.

10. Rutherford *v.* Com., 78 Ky. 639.

11. Allen *v.* Com., 86 Ky. 642, 6 S. W. 645, 9 Ky. L. Rep. 784; Brewer *v.* Com., 8 S. W. 339, 10 Ky. L. Rep. 122.

12. Presence of accused see *supra*, XIV, B, 3.

13. *Alabama.*— Vaughan *v.* State, 83 Ala. 55, 3 So. 530; Williams *v.* State, 83 Ala. 16, 3 So. 616; Diggs *v.* State, 49 Ala. 311.

Arkansas.— Elder *v.* State, 69 Ark. 648, 65 S. W. 938, 86 Am. St. Rep. 220; Stone *v.* State, 56 Ark. 345, 19 S. W. 968. And see White *v.* State, 70 Ark. 24, 65 S. W. 937.

California.— People *v.* Wallace, 89 Cal. 158, 26 Pac. 650.

Iowa.— State *v.* Reidel, 26 Iowa 430.

Kentucky.— Scott *v.* Com., 94 Ky. 511, 23 S. W. 219, 15 Ky. L. Rep. 251, 42 Am. St. Rep. 371.

Massachusetts.— Com. *v.* Kimball, 24 Pick. 366.

Michigan.— People *v.* Millard, 53 Mich. 63, 18 N. W. 562.

Mississippi.— Hughes *v.* State, 58 Miss. 355; Lynes *v.* State, 36 Miss. 617; Turney *v.* State, 8 Sm. & M. 104, 47 Am. Dec. 74.

New Jersey.— Ryan *v.* State, 60 N. J. L. 552, 38 Atl. 672.

New York.— People *v.* Smith, 172 N. Y. 210, 64 N. E. 814; Stokes *v.* People, 53 N. Y.

from error in the exclusion of proper evidence offered by defendant,[14] from error in the instructions given,[15] or in refusing instructions requested,[16] and by the weight of authority, at least in felony cases, from the improper separation of the jury pending the trial, without the consent of the accused.[17]

164, 13 Am. Rep. 492; People *v.* Gonzales, 35 N. Y. 49. See also People *v.* Maine, 166 N. Y. 50, 59 N. E. 696; People *v.* Smith, 162 N. Y. 520, 56 N. E. 1001; People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730.

Oregon.— State *v.* Gallo, 18 Oreg. 423, 23 Pac. 264; State *v.* Ching Ling, 16 Oreg. 419, 18 Pac. 844.

Texas.— Hester *v.* State, 15 Tex. App. 567; Tyson *v.* State, 14 Tex. App. 388; Preston *v.* State, 4 Tex. App. 186.

Virginia.— Payne *v.* Com., 31 Gratt. 855; Rand *v.* Com., 9 Gratt. 738.

Washington.— State *v.* Thompson, 14 Wash. 285, 44 Pac. 533.

West Virginia.— State *v.* Hull, 45 W. Va. 767, 32 S. E. 240. And see State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813.

See 15 Cent. Dig. tit. "Criminal Law," § 3094.

Reversal notwithstanding competent evidence.—Jackson *v.* State, 56 Miss. 311; Draper *v.* State, 22 Tex. 400.

Striking out the improper evidence does not necessarily cure the error. Bedford *v.* State, 36 Nebr. 702, 55 N. W. 263; People *v.* Zimmerman, 1 N. Y. St. 468.

Answers not shown in record.— If the record does not show what answer was made to questions objected to, it will not be assumed that the answers were prejudicial. Jhons *v.* People, 25 Mich. 499. See *supra*, XVII, D, 7, f.

14. *California.*— People *v.* Miller, 135 Cal. 69, 67 Pac. 12; People *v.* Williams, 18 Cal. 187.

Kentucky.— Cornelius *v.* Com., 15 B. Mon. 539.

Louisiana.— State *v.* Platte, 34 La. Ann. 1061.

Maine.— State *v.* Walker, 77 Me. 488, 1 Atl. 357.

Missouri.— State *v.* Kinder, 96 Mo. 548, 10 S. W. 77; State *v.* McGrath, 73 Mo. 181.

New York.— People *v.* Corey, 148 N. Y. 476, 42 N. E. 1066; People *v.* Wood, 126 N. Y. 249, 27 N. E. 362.

Pennsylvania.— Com. *v.* McGowan, 2 Pars. Eq. Cas. 341.

Compare, however, State *v.* Butterfield, 73 Iowa 86, 34 N. W. 750; Hargroves *v.* State, (Tex. Cr. App. 1894) 24 S. W. 905.

See 15 Cent. Dig. tit. "Criminal Law," § 3095.

15. *California.*— People *v.* Marshall, 112 Cal. 422, 44 Pac. 718; People *v.* Smith, 105 Cal. 676, 39 Pac. 38.

Colorado.— Farnum *v.* U. S., 1 Colo. 309.

Connecticut.— State *v.* Gannon, 75 Conn. 206, 52 Atl. 727.

Florida.— Lane *v.* State, (1902) 32 So. 896; Wood *v.* State, 31 Fla. 221, 12 So. 539.

Iowa.— State *v.* Johnson, 69 Iowa 623, 29 N. W. 754; State *v.* Rice, 56 Iowa 431, 9 N. W. 343.

Kentucky.— Barnett *v.* Com., 84 Ky. 449, 1 S. W. 722, 8 Ky. L. Rep. 448.

Mississippi.— Josephine *v.* State, 39 Miss. 613.

Nebraska.— Curry *v.* State, 4 Nebr. 545.

New York.— People *v.* Gonzales, 35 N. Y. 49; People *v.* Chartoff, 72 N. Y. App. Div. 555, 75 N. Y. Suppl. 1088.

Tennessee.— Troxdale *v.* State, 9 Humphr. 411.

See 15 Cent. Dig. tit. "Criminal Law," § 3096.

Where one of two inconsistent charges is erroneous, it is said that it will be presumed that the jury followed the erroneous charge. U. S. *v.* Green, 6 Mackey (D. C.) 562; State *v.* Ferguson, 9 Nev. 106; People *v.* Berlin, 10 Utah 39, 36 Pac. 199 [*reversing* 9 Utah 383, 35 Pac. 498]. This presumption may be rebutted by showing clearly that the error was corrected and cured by instructions for the accused. People *v.* Lapique, (Cal. 1901) 67 Pac. 14; Hawthorne *v.* State, 58 Miss. 778.

Alluding to details of other cases is bad practice, but it will be presumed that the jury were not misled thereby. Pointer *v.* U. S., 151 U. S. 396, 14 S. Ct. 410, 38 L. ed. 208.

Where an instruction appears twice in the record, the form in one case being correct and in the other erroneous, it will be presumed that the former was given. People *v.* Gibson, 106 Cal. 458, 39 Pac. 864.

In Texas it is provided by statute that the appellate court must set aside a conviction where an erroneous charge was duly excepted to without considering whether such charge was prejudicial or not. Boren *v.* State, 32 Tex. Cr. 637, 25 S. W. 775; Reed *v.* State, 29 Tex. App. 449, 16 S. W. 99; Habel *v.* State, 28 Tex. App. 588, 13 S. W. 1001; Paulin *v.* State, 21 Tex. App. 436, 1 S. W. 453.

16. Owens *v.* State, 35 Tex. Cr. 345, 33 S. W. 875; Niland *v.* State, 19 Tex. App. 166; Harrison *v.* State, 10 Tex. App. 93.

17. *Arkansas.*— Maclin *v.* State, 44 Ark. 115.

Florida.— Gamble *v.* State, (1902) 33 So. 471; Tervin *v.* State, 37 Fla. 396, 20 So. 551.

Georgia.— Jones *v.* State, 68 Ga. 760; Monroe *v.* State, 5 Ga. 85.

Kansas.— Madden *v.* State, 1 Kan. 340.

Mississippi.— Durr *v.* State, 53 Miss. 425; Woods *v.* State, 43 Miss. 364. And see Green *v.* State, 59 Miss. 501.

Missouri.— State *v.* Murray, 91 Mo. 95, 3 S. W. 397.

New Mexico.— U. S. *v.* Swan, 7 N. M. 306, 34 Pac. 533.

Tennessee.— McLain *v.* State, 10 Yerg. 241, 31 Am. Dec. 573.

Texas.— Robinson *v.* State, 30 Tex. App. 459, 17 S. W. 1082; Defriend *v.* State, 22 Tex. App. 570, 2 S. W. 641.

c. Proceedings Before Trial—(1) *In General.* Errors committed before the indictment, and errors generally in proceedings preliminary to the trial, especially where defendant cannot be prejudiced thereby on his trial, are harmless and cannot affect his conviction.[18] This rule has been applied to: Defects in the indictment or information;[19] error in allowing amendments which consist in the insertion of unnecessary and immaterial matter in affidavits or in the pleadings;[20] error in overruling a demurrer to a pleading which was withdrawn;[21] error in overruling a motion to quash,[22] or a motion to strike out irrelevant matter from an indictment or information;[23] error in quashing a count in an indictment or information;[24] error in refusing to grant a change of venue,[25] or irregularities in the manner of changing the venue;[26] error in refusing to grant separate trials to joint defendants.[27] This rule as to errors before the trial has also been applied to

Wisconsin.— Keenan *v.* State, 8 Wis. 132.

United States.— Mattox *v.* U. S., 146 U. S. 140, 13 S. Ct. 50, 36 L. ed. 917.

See 15 Cent. Dig. tit. "Criminal Law," § 3098. And see *supra*, XIV, J, 3; XV, A, 2, l, (IV), (E).

18. Blemer *v.* People, 76 Ill. 265. And see cases cited *infra*, note 19 *et seq.*

It is not error affecting the trial that defendant was illegally or forcibly brought within the jurisdiction of the court. The court will not inquire into the manner of his capture, but will leave him to his remedy against the officer who acted illegally. People *v.* Eberspacher, 79 Hun (N. Y.) 410, 29 N. Y. Suppl. 796. And *compare* Wright *v.* Com., 2 Rob. (Va.) 800.

No preliminary examination.— If defendant in misdemeanor is not entitled to a preliminary examination under certain circumstances he is not prejudiced, where, being prosecuted for a felony which includes a misdemeanor, he is convicted of a misdemeanor without having had a preliminary examination. State *v.* Watson, 30 Kan. 281, 1 Pac. 770.

19. *Arkansas.*— Scott *v.* State, 42 Ark. 73.

California.— People *v.* Dick, 37 Cal. 277.

Indiana.— Parks *v.* State, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190; Heath *v.* State, 101 Ind. 512. And see Hauk *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; Myers *v.* State, 92 Ind. 390.

Kansas.— State *v.* Bussey, 58 Kan. 679, 50 Pac. 891.

Kentucky.— Jane *v.* Com., 3 Metc. 18. And see Com. *v.* Kelcher, 3 Metc. 484.

Maryland.— Wedge *v.* State, 12 Md. 232.

Mississippi.—See Cannon *v.* State, 75 Miss. 364, 22 So. 827.

Missouri.— State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330; State *v.* Edwards, 60 Mo. 490.

Nebraska.— Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744.

New Jersey.—State *v.* Robinson, 35 N. J. L. 71.

New York.— People *v.* Gumaer, 80 Hun 78, 30 N. Y. Suppl. 17; Real *v.* People, 55 Barb. 551, 579, 8 Abb. Pr. N. S. 314. See also Phelps *v.* People, 72 N. Y. 365; People *v.* Slattery, 7 N. Y. App. Div. 535, 40 N. Y. Suppl. 243.

Pennsylvania.— Perdue *v.* Com., 96 Pa. St. 311; Com. *v.* Newcomer, 49 Pa. St. 478.

Texas.— Kennedy *v.* State, 9 Tex. App. 399.

See 15 Cent. Dig. tit. "Criminal Law," § 3101.

20. Stefani *v.* State, 124 Ind. 3, 24 N. E. 254; Braithwaite *v.* State, 28 Nebr. 832, 45 N. W. 247; State *v.* Drury, 13 R. I. 540.

A technical error in striking out one of the counts of the indictment, as an amendment to it, is harmless, as the court in any case could have accomplished the same result by the entry of a *nolle prosequi*. Salm *v.* State, 89 Ala. 56, 8 So. 66.

21. Rocco *v.* State, 37 Miss. 357.

Error in overruling a demurrer to an indictment is not prejudicial where a *nolle prosequi* is subsequently entered. Oakley *v.* State, 135 Ala. 29, 33 So. 693.

22. *Florida.*— Bueno *v.* State, 40 Fla. 160, 23 So. 862.

Kentucky.—Hawkins *v.* Com., 70 S. W. 640, 24 Ky. L. Rep. 1034.

Massachusetts.— Com. *v.* Andrews, 132 Mass. 263.

Missouri.— State *v.* Spence, 87 Mo. App. 577.

New Jersey.— State *v.* Jackson, 65 N. J. L. 62, 46 Atl. 767.

South Dakota.— See State *v.* Isaacson, 8 S. D. 69, 65 N. W. 430.

Texas.— Vincent *v.* State, (Cr. App. 1900) 55 S. W. 819.

United States.— MacDonald *v.* U. S., 63 Fed. 426, 12 C. C. A. 339.

See 15 Cent. Dig. tit. "Criminal Law," § 3103.

23. Fahnestock *v.* State, 23 Ind. 231.

24. State *v.* Leapfoot, 19 Mo. 375.

The quashing of bad counts in an indictment, being in the discretion of the court, if error at all, is harmless. State *v.* Woodward, 21 Mo. 265.

25. State *v.* Hamil, 96 Iowa 728, 65 N. W. 395; State *v.* Reno, 41 Kan. 674, 21 Pac. 803; Wren *v.* Com., 1 S. W. 712, 8 Ky. L. Rep. 418.

26. State *v.* Harper, 28 La. Ann. 35; State *v.* Burgess, 78 Mo. 234.

An omission from the record, which is sent to the court to which the change is made, of the recognizance of a witness is harmless, where the witness appears at the trial and no injury is otherwise shown. Wolfforth *v.* State, 31 Tex. Cr. 387, 20 S. W. 741.

27. The refusal of a severance, where several are jointly indicted, is harmless error

error in rejecting a defective plea;[28] irregularities in the arraignment;[29] and irregularities in drawing, summoning, or impaneling the grand jury.[30] And while the failure to join issue by plea or demurrer is prejudicial error which will justify a reversal,[31] if there are two defective pleas, and issue is taken on one, a failure to require the state to demur or reply to the other is harmless error.[32]

(11) *Refusing Continuance.* The refusal of a continuance, although erroneous, is harmless where by circumstances arising during the trial the necessity for the continuance is obviated.[33] So the court's action in refusing to delay the proceedings a short time because of the non-arrival of a witness is harmless error, where the time during which he was expected to arrive expires before the jury was charged and he did not arrive,[34] particularly where no injury is shown because of the refusal of delay.[35] Again an error in denying a continuance is harmless where defendant's guilt is so fully established by the evidence that the

where the court by proper instructions limits the evidence to the defendants to which it is applicable, although the cases of the respective defendants are antagonistic (State *v.* Finley, 118 N. C. 1161, 24 S. E. 495) or where the case against one defendant is dismissed and he is used as a witness against the other (Dawson *v.* State, 34 Tex. Cr. 263, 30 S. W. 224). See also Shaw *v.* State, 39 Tex. Cr. 161, 45 S. W. 597.

28. Hughes *v.* State, 35 Ala. 351; Baker *v.* State, 80 Wis. 416, 50 N. W. 518.

If the plea of autrefois convict, when submitted to the jury, would not have availed defendant because the offense of which he had been convicted was not identical with that for which he was on trial, the action of the court in overruling it without submitting it to the jury was harmless error. Prine *v.* State, 41 Tex. 300.

The court's action in overruling a plea because it was not in accordance with the facts, when sustained by the record, although irregular, is harmless. Lester *v.* State, 91 Wis. 249, 64 N. W. 850.

The overruling of a voluntary and unnecessary plea in writing before arraignment, at which the accused was personally present, if error, is harmless. State *v.* Meekins, 41 La. Ann. 543, 6 So. 822.

29. Territory *v.* Hargrave, 1 Ariz. 95, 25 Pac. 475; Whitehead *v.* Com., 19 Gratt. (Va.) 640; State *v.* Boyce, 24 Wash. 514, 64 Pac. 719.

30. Boles *v.* State, 58 Ark. 35, 22 S. W. 887; Ford *v.* State, (Fla. 1902) 33 So. 301; Montgomery *v.* State, 3 Kan. 263; Cox *v.* People, 80 N. Y. 500.

31. Graeter *v.* State, 54 Ind. 159; State *v.* Douglass, 20 W. Va. 770.

32. Henry *v.* State, 33 Ala. 389.

33. Thus where the grounds for the continuance is the absence of witnesses, proof by other witnesses of the facts proposed to be proved by the absent witnesses renders the refusal of a continuance harmless.

Arkansas.— Carpenter *v.* State, 62 Ark. 286, 36 S. W. 900.

Georgia.— Cook *v.* State, 26 Ga. 593.

Indiana.— Marks *v.* State, 101 Ind. 353.

Kentucky.— Nelson *v.* Com., 94 Ky. 594, 23 S. W. 348, 350, 15 Ky. L. Rep. 255; Hall *v.* Com., 94 Ky. 322, 22 S. W. 333, 15 Ky. L Rep. 102; Young *v.* Com., (1895) 29 S. W. 900; Trabune *v.* Com., 17 S. W. 186, 13 Ky. L. Rep. 319; Smith *v.* Com., 4 S. W. 798, 9 Ky. L. Rep. 215.

Louisiana.— State *v.* Lejeune, 52 La. Ann. 463, 26 So. 992.

Michigan.— People *v.* Burwell, 106 Mich. 27, 65 N. W. 986.

Mississippi.— Jones *v.* State, 60 Miss. 117.

Missouri.— State *v.* Cavanaugh, 76 Mo. 53; State *v.* Scheonwald, 31 Mo. 147.

Texas.— Kyle *v.* State, (Cr. App. 1899) 53 S. W. 846; Bush *v.* State, 40 Tex. Cr. 539, 51 S. W. 238; Bolton *v.* State, (Cr. App. 1898) 43 S. W. 1010; Gonzales *v.* State, 30 Tex. App. 203, 16 S. W. 978; Tucker *v.* State, 23 Tex. App. 512, 5 S. W. 180.

See 15 Cent. Dig. tit. "Criminal Law," § 3111.

Refusing a continuance to enable accused to prepare for trial is harmless error where under the peculiar circumstances he has sufficient time to prepare. Price *v.* People, 131 Ill. 223, 23 N. E. 639; State *v.* Weems, 96 Iowa 426, 65 N. W. 387; Lue *v.* Com., (Ky. 1891) 15 S. W. 664.

Error in vacating a continuance and setting the case for trial was harmless, where accused's counsel was present and stated that accused was ready for trial and had been all the time. Sampson *v.* People, 188 Ill. 592, 59 N. E. 427.

Illness of counsel.— It was not error to refuse a continuance on the ground that one of defendant's attorneys was not well, where he fully discharged his duty to defendant. Hayden *v.* Com., 45 S. W. 886, 20 Ky. L. Rep. 274.

34. State *v.* Raven, 115 Mo. 419, 22 S. W. 376.

35. Loakman *v.* State, 32 Tex. Cr. 561, 25 S. W. 20.

Requiring counsel to proceed with the examination of persons summoned as jurors, before he is required to announce whether or not he was ready for trial, if error, is harmless, where defendant is not actually prejudiced on the trial. State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743.

The refusal of time to permit accused and his counsel to consult is harmless error, where

court can see that the jury would not have found differently if the absent witness had been present and testified as claimed.[36]

(III) *Drawing and Summoning Jury.* Formal errors or irregularities in the proceedings of drawing and summoning the jury are harmless, unless it affirmatively appears from the record that defendant was prejudiced thereby on his trial.[37]

(IV) *Impaneling Jury* — (A) *In General.* Formal errors or irregularities in impaneling the jurors, even in a capital case,[38] are harmless, unless it affirmatively appears on the record that defendant was injured thereby,[39] but as defendant has a substantial right to a fair and impartial jury, error in accepting, over

under the circumstances of the case he actually had time to consult. Feinberg *v.* People, 174 Ill. 609, 51 N. E. 798.

36. *Arkansas.*— Moore *v.* State, 50 Ark. 25, 6 S. W. 17.

Georgia.— Hodges *v.* State, 95 Ga. 497, 20 S. E. 272; Jim *v.* State, 15 Ga. 535.

Illinois.— Corbin *v.* People, 131 Ill. 615, 23 N. E. 613.

Kentucky.— Prewitt *v.* Com., 5 Ky. L. Rep. 861.

Mississippi.—Hemingway *v.* State, 68 Miss. 371, 8 So. 317.

Missouri.— State *v.* Worrell, 25 Mo. 205.

Texas.— Wright *v.* State, (Cr. App. 1898) 45 S. W. 723; May *v.* State, (Cr. App. 1892) 20 S. W. 396. And see McCarty *v.* State, 4 Tex. App. 461.

See 15 Cent. Dig. tit. "Criminal Law," § 3112.

37. *California.*— People *v.* Iams, 57 Cal. 115.

Indiana.— Wood *v.* State, 92 Ind. 269.

Kansas.— Montgomery *v.* State, 3 Kan. 263.

Louisiana.— State *v.* Egan, 37 La. Ann. 368; State *v.* Guidry, 28 La. Ann. 630.

Minnesota.— State *v.* Gut, 13 Minn. 341.

Mississippi.— Steele *v.* State, 76 Miss. 387, 24 So. 910.

Missouri.— State *v.* Clark, 147 Mo. 20, 47 S. W. 886.

New York.— Cox *v.* People, 80 N. Y. 500; Ferris *v.* People, 31 How. Pr. 140; People *v.* Druse, 5 N. Y. Cr. 10.

Ohio.— McHugh *v.* State, 42 Ohio St. 154.

Oklahoma.— Queenan *v.* Territory, 11 Okla. 261, 71 Pac. 218, 61 L. R. A. 324 [*affirmed* in 190 U. S. 548, 23 S. Ct. 762, 47 L. ed. 1175].

Pennsylvania.— Com. *v.* Cleary, 148 Pa. St. 26, 23 Atl. 1110; Com. *v.* Immell, 6 Binn. 403.

Texas.— Bargna *v.* State, (Cr. App. 1902) 68 S. W. 997; Mitchell *v.* State, 36 Tex. Cr. 278, 33 S. W. 367, 36 S. W. 456; Franklin *v.* State, 34 Tex. Cr. 625, 31 S. W. 643. And see Williams *v.* State, 29 Tex. App. 89, 14 S. W. 388.

Wisconsin.— See Hughes *v.* State, 109 Wis. 397, 85 N. W. 333.

See 15 Cent. Dig. tit. "Criminal Law," § 3114.

Where a statutory requirement is not plainly mandatory, a slight divergence therefrom is a mere irregularity and presumptively harmless. Siebert *v.* People, 143 Ill. 571, 32 N. E. 431; State *v.* Rockwell, 82 Iowa 429, 48 N. W. 721; State *v.* Smarr, 121 N. C. 669, 28 S. E. 549. *Contra,* McGuire *v.* People, 2 Park. Cr. (N. Y.) 148; Bach *v.* State, 38 Onio St. 664.

38. O'Connor *v.* State, 9 Fla. 215.

39. *Alabama.*— Sellers *v.* State, 52 Ala. 368.

California.— People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269.

Georgia.— Wilson *v.* State, 69 Ga. 224.

Kentucky.— Rush *v.* Com., 47 S. W. 586, 20 Ky. L. Rep. 775.

Louisiana.— State *v.* Claire, 41 La. Ann. 1067, 6 So. 806.

Michigan.— People *v.* Craig, 48 Mich. 502, 12 N. W. 675.

Missouri.— State *v.* Taylor, 171 Mo. 465, 71 S. W. 1005; State *v.* Ludwig, 70 Mo. 412.

Oklahoma.— Huntley *v.* Territory, 7 Okla. 60, 54 Pac. 314.

South Carolina.— State *v.* Jones, 29 S. C. 201, 7 S. E. 296.

Tennessee.— Henry *v.* State, 4 Humphr. 270.

Texas.— Lenert *v.* State, (Cr. App. 1901) 63 S. W. 563; Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153; McKinney *v.* State, 8 Tex. App. 626; Hollis *v.* State, 8 Tex. App. 620; Grissom *v.* State, 8 Tex. App. 386.

Washington.—State *v.* Royse, 24 Wash. 440, 64 Pac. 742.

West Virginia.— State *v.* Henderson, 29 W. Va. 147, 1 S. E. 225.

See 15 Cent. Dig. tit. "Criminal Law," § 3115.

In excusing jurors, the court's discretion should be carefully exercised. If, however, its action is not such as to violate the nature and security of the jury trial, or to deprive the accused of any substantial right, any error it may commit is harmless. State *v.* Ostrander, 18 Iowa 435. Thus error in ruling on defendant's challenges is harmless, where the juror is subsequently peremptorily challenged and does not serve. State *v.* Winter, 72 Iowa 627, 34 N. W. 475. See also People *v.* Freeman, 92 Cal. 359, 28 Pac. 261. So error, if any, in refusing defendant's counsel the right to further examine a juror is harmless, where from his answers it is already apparent that he is incompetent. Longley *v.* Com., 99 Va. 807, 37 S. E. 339.

Where a juror who has been challenged is impaneled and sworn by mistake, it is harmless error for the court to refuse to stand him aside, where it does not appear that he had

objection, a juror who confesses to prejudice is not harmless, although upon all the evidence the verdict appears fair and just.[40]

(B) *Sustaining Challenge.* Erroneously sustaining challenges for the prosecution is harmless where the accused has not exhausted his peremptory challenges before a qualified jury was obtained, and it does not appear that a juror obnoxious to him is in the box.[41]

(C) *Overruling Challenge.* The overruling of defendant's challenge to a juror for cause is harmless error, if his peremptory challenges were not then or afterward exhausted, although he was thereby forced, over objection, to accept an obnoxious juror.[42] Although error in overruling a good challenge for cause is not cured by a peremptory challenge which exhausts all defendant's peremptory

any bias or prejudice or that he had formed an opinion. Munson *v.* State, 34 Tex. Cr. 498, 31 S. W. 387.

Swearing jury.— Informalities or irregularities in administering the oath to the jurors or in the language used are harmless. State *v.* McComb, 18 Iowa 43; Baxter *v.* State, 15 Lea (Tenn.) 657; Hartigan *v.* Territory, 1 Wash. Terr. 447.

40. Hughes *v.* State, (Tex. Cr. App. 1900) 60 S. W. 562; Washburn *v.* State, 31 Tex. Cr. 352, 20 S. W. 715.

A failure to warn defendant of his right to challenge any particular juror before he is sworn, as required by statute, is harmless error, where he is represented by counsel and is fully aware of his rights (People *v.* Ellsworth, 92 Cal. 594, 28 Pac. 604; People *v.* O'Brien, 88 Cal. 483, 26 Pac. 362; People *v.* Mortier, 58 Cal. 262), and particularly where he has the benefit of all his peremptory challenges (People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161).

41. *District of Columbia.*—Horton *v.* U. S., 15 App. Cas. 310.

Idaho.— State *v.* McGraw, 6 Ida. 635, 59 Pac. 178.

Louisiana.— State *v.* Aarons, 43 La. Ann. 406, 9 So. 114; State *v.* Farrer, 35 La. Ann. 315.

Michigan.— People *v.* Fowler, 104 Mich. 449, 62 N. W. 572.

North Carolina.— State *v.* Arthur, 13 N. C. 217.

Oregon.— State *v.* Ching Ling, 16 Oreg. 419, 18 Pac. 844.

Tennessee.— Jenkins *v.* State, 99 Tenn. 569, 42 S. W. 263.

See 15 Cent. Dig. tit. "Criminal Law," § 3116.

Contra.— State *v.* Hammond, 14 S. D. 545, 86 N. W. 627.

42. *Arizona.*— Chartz *v.* Territory, (1893) 32 Pac. 166.

Arkansas.— Caldwell *v.* State, 69 Ark. 322, 63 S. W. 59; Benton *v.* State, 30 Ark. 328.

California.— People *v.* Winthrop, 118 Cal. 85, 50 Pac. 390.

Colorado.— Van Houton *v.* People, 22 Colo. 53, 43 Pac. 137.

Connecticut.— State *v.* Smith, 49 Conn. 376.

District of Columbia.— U. S. *v.* Neverson, 1 Mackey 152.

Georgia.— Wilson *v.* State, 69 Ga. 224.

Illinois.— Gott *v.* People, 187 Ill. 249, 58 N. E. 293; Gillespie *v.* People, 176 Ill. 238, 52 N. E. 250.

Indiana.— Shields *v.* State, 149 Ind. 395, 49 N. E. 351; Voght *v.* State, 145 Ind. 12, 43 N. E. 1049.

Iowa.— State *v.* George, 62 Iowa 682, 18 N. W. 298; State *v.* Elliott, 45 Iowa 486.

Kansas.— Morton *v.* State, 1 Kan. 468.

Kentucky.— Gilbert *v.* Com., 51 S. W. 590, 21 Ky. L. Rep. 415.

Louisiana.— State *v.* Harris, 107 La. 196, 31 So. 646; State *v.* Fourchy, 51 La. Ann. 228, 25 So. 109; State *v.* Marceaux, 50 La. Ann. 1137, 24 So. 611; State *v.* Nicholls, 50 La. Ann. 699, 23 So. 980.

Michigan.— People *v.* Aplin, 86 Mich. 393, 49 N. W. 148.

Minnesota.— State *v.* Lawlor, 28 Minn. 216, 9 N. W. 698.

Mississippi.— Klyce *v.* State, 79 Miss. 652, 31 So. 339; Fletcher *v.* State, 60 Miss. 675.

Nebraska.— Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744.

Nevada.— State *v.* Hartley, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33.

New York.— People *v.* Larubia, 140 N. Y. 87, 35 N. E. 412; People *v.* McQuade, 48 Hun 620, 1 N. Y. Suppl. 155.

North Carolina.— State *v.* Kinsauls, 126 N. C. 1095, 36 S. E. 31; State *v.* Pritchett, 106 N. C. 667, 11 S. E. 357.

North Dakota.— Territory *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003.

Ohio.— Erwin *v.* State, 29 Ohio St. 186, 23 Am. Rep. 733; Mimms *v.* State, 16 Ohio St. 221.

South Carolina.— State *v.* Weaver, 58 S. C. 106, 36 S. E. 499; State *v.* McQuaige, 5 Rich. 429.

Tennessee.— Madden *v.* State, (Sup. 1901) 67 S. W. 74; Preswood *v.* State, 3 Heisk. 468; McGowan *v.* State, 9 Yerg. 184.

Texas.— Burrell *v.* State, 18 Tex. 713; Taylor *v.* State, (Cr. App. 1903) 72 S. W. 396; Taylor *v.* State, (Cr. App. 1900) 56 S. W. 753; Cannon *v.* State, 41 Tex. Cr. 467, 56 S. W. 351; Keaton *v.* State, 40 Tex. Cr. 139, 49 S. W. 90.

Utah.— People *v.* Thiede, 11 Utah 241, 39 Pac. 837.

Washington.— State *v.* Stentz, 30 Wash. 134, 70 Pac. 241; State *v.* Moody, 7 Wash. 395, 35 Pac. 132.

United States.— *Ex p.* Spies, 123 U. S. 131, 8 S. Ct. 21, 22, 31 L. ed. 80; Hopt *v.* Utah, 120 U. S. 430, 7 S. Ct. 614, 30 L. ed. 708.

challenges,[43] an error in accepting an incompetent juror is harmless, where defendant has still several peremptory challenges, and either challenges peremptorily or is silent.[44]

d. Conduct of Trial in General. The regulation of the proceedings during the trial being largely in the court's discretion,[45] irregularities occurring therein but not affecting the merits, if erroneous, are generally harmless, unless injury to the accused clearly appears.[46] This rule has been applied under particular circumstances to failure of the court to assign counsel for defendant;[47] to proceedings in the absence of defendant;[48] to omission to swear defendant's wit-

See 15 Cent. Dig. tit. "Criminal Law," § 3117.

43. State *v.* McCoy, 109 La. 682, 33 So. 730; Theisen *v.* Johns, 72 Mich. 285, 40 N. W. 727; Thurman *v.* State, 27 Nebr. 628, 43 N. W. 404; Renfro *v.* State, 42 Tex. Cr. 393, 56 S. W. 1013.

A refusal to sustain a proper challenge for cause, which compels the accused subsequently to exhaust his peremptory challenges, is prejudicial error. State *v.* Stentz, 30 Wash. 134, 70 Pac. 241.

44. *Mississippi.*— Moriarity *v.* State, 62 Miss. 654.

Nebraska.— Blenkiron *v.* State, 40 Nebr. 11, 58 N. W. 587.

New York.— People *v.* Lammerts, 164 N. Y. 137, 58 N. E. 22.

Tennessee.— Carroll *v.* State, 3 Humphr. 315.

Texas.— Johnson *v.* State, 27 Tex. 758; Sawyer *v.* State, 39 Tex. Cr. 557, 47 S. W. 650; Dancy *v.* State, (Cr. App. 1898) 46 S. W. 247.

Wisconsin.— Carthaus *v.* State, 78 Wis. 560, 47 N. W. 629.

See 15 Cent. Dig. tit. "Criminal Law," § 3117.

The fact that defendant has exhausted his peremptory challenges, and hence cannot challenge peremptorily, does not alone raise a presumption that an error in overruling a challenge for cause is prejudicial. Villereal *v.* State, (Tex. Cr. App. 1901) 61 S. W. 715; Goodson *v.* State, (Tex. Cr. App. 1893) 22 S. W. 20.

Whether the order in which peremptory challenges were made, under the direction of the court, was that contemplated by statute, is immaterial, if it appears that defendant accepted the jury before his peremptory challenges were exhausted. State *v.* Reddington, 7 S. D. 368, 64 N. W. 170. See also State *v.* Bailey, 32 Kan. 83, 3 Pac. 769.

45. **Discretion of court** see *supra*, XVII, G, 4, d.

46. Wilson *v.* State, 109 Tenn. 167, 70 S. W. 57.

Illustrations.— To illustrate and support the rule stated in the text, it may be said that refusal to permit defendant to be present at a consultation between his witness and his counsel (State *v.* Weems, 96 Iowa 426, 65 N. W. 387), refusal of the judge to retire the jury while taking evidence as to the foundation for the admission of dying declarations (State *v.* Johnson, 41 La. Ann. 1076, 6 So. 802), permitting a witness to testify whose correct address is not given in the list of witnesses served (Horton *v.* U. S., 15 App. Cas. (D. C.) 310), permitting evidence to be introduced out of order (Ortiz *v.* State, 30 Fla. 256, 11 So. 611), conducting the examination as to the admissibility of a confession in the presence of the jury (Anderson *v.* State, 72 Ga. 98), and receiving, complimenting, and discharging a grand jury during the trial (Phillips *v.* State, 6 Tex. App. 44) are harmless errors.

An offer by counsel on both sides to furnish food for the jury, while improper, is harmless. Thomas *v.* State, 61 Miss. 60.

Applause by the audience in the court-room, promptly repressed and rebuked, is usually harmless. Weathersby *v.* State, 29 Tex. App. 278, 15 S. W. 823. See *supra*, XIV, J, 4, c; XV, A, 2, l, (IV), (N).

Failure of the court to appoint an interpreter because the language used by some of the witnesses was not understood by the accused is not prejudicial error, where his counsel understood it and the jurors all understood it, and where no request was made for a translator. Rex *v.* Long, 2 Quebec K. B. 328.

47. The fact that defendant is permitted to try his case without counsel is harmless error, where the record does not show that he requested counsel to be assigned or asked a continuance for absence of counsel. State *v.* Doyle, 36 La. Ann. 91. Nor will a conviction be reversed solely because he was abandoned by counsel shortly before the trial, and was unable to employ other counsel. Steinhauser *v.* State, (Tex. Cr. App. 1898) 48 S. W. 506.

Assignment of counsel see *supra*, XIV, B, 5, c.

48. Although as a general rule the accused is absolutely entitled to be present in the court-room during the trial in all cases of felony, and proceeding in his absence, when there is no valid waiver of his right, is ordinarily reversible error (see *supra*, XIV, B, 3), some cases have held that his absence during the closing argument (State *v.* Grate, 68 Mo. 22; State *v.* Pierce, 123 N. C. 745, 31 S. E. 847), during the taking of a view by the jury (Rutherford *v.* Com., 78 Ky. 639, 1 Ky. L. Rep. 410), while instructions are being given (Meece *v.* Com., 78 Ky. 586, 1 Ky. L. Rep. 337), when the jury is discharged because they cannot agree (Yarbrough *v.* Com., 89 Ky. 151, 12 S. W. 143, 11 Ky. L. Rep. 351, 25 Am. St. Rep. 524), or during the argument of a motion for a new trial (Morris

nesses;[49] to irregularities and informalities in the oath administered to a witness for the prosecution;[50] to suspension of the trial;[51] to failure to read the indictment to the jury,[52] even where it is required by the statute;[53] to the reading of evidence to the jury by the prosecution before its introduction;[54] to failure of the prosecution to read to the jury written evidence which was admitted without objection;[55] to remarks of the judge;[56] to limitation of the time for argument by defendant's counsel;[57] and to improper remarks by the prosecuting attorney, where the evidence in any event establishes defendant's guilt,[58] or where the remarks relate to immaterial or conceded matters, or nothing necessarily prejudicial appears in

v. State, 43 Tex. Cr. 289, 65 S. W. 531) is harmless error, unless it affirmatively appears that he was actually injured.

As to presumption of prejudice, however, see *supra*, XVII, G, 6, h.

Temporary and occasional absences of the accused from court, it not appearing that any of his rights were prejudiced, is harmless. Hite *v.* Com., 20 S. W. 217, 14 Ky. L. Rep. 308.

49. Rankin *v.* Com., 82 Ky. 424. See also Ogden *v.* State, (Tex. Cr. App. 1900) 58 S. W. 1018.

50. State *v.* Mazon, 90 N. C. 676.

51. The temporary suspension of a trial to dispose of a motion in another trial (People *v.* Lafuente, 6 Cal. 202), or to finish another trial which had been interrupted by reason of the absence of a witness (Miller *v.* State, 32 Tex. Cr. 266, 22 S. W. 880), if error, is harmless. See *supra*, XIII, A.

52. Penn *v.* State, 62 Miss. 450.

53. Ussery *v.* Territory, (Ariz. 1894) 36 Pac. 35, holding also that the statute is not jurisdictional, and that the reading is waived by plea and failure to make objections.

54. O'Brien *v.* Com., 89 Ky. 354, 12 S. W. 471, 11 Ky. L. Rep. 534, holding that error in permitting the prosecuting attorney to read in his opening to the jury a writing which he means to offer as evidence is harmless where the writing is afterward received in evidence.

55. State *v.* Parker, 16 Nev. 79.

56. The remarks of the judge, so far as they are in accordance with the evidence, or with facts stated in the record, although improper and perhaps error, are harmless.

Alabama.— Walker *v.* State, 85 Ala. 7, 4 So. 686, 7 Am. St. Rep. 17.

California.— People *v.* Elliott, 80 Cal. 296, 22 Pac. 207.

Iowa.— State *v.* Weems, 96 Iowa 426, 65 N. W. 387; State *v.* George, 62 Iowa 682, 18 N. W. 298.

Louisiana.— State *v.* Wright, 41 La. Ann. 605, 6 So. 137.

Missouri.— State *v.* Whitworth, 126 Mo. 573, 29 S. W. 595.

Pennsylvania.— Com. *v.* Washington, 202 Pa. St. 148, 51 Atl. 759.

Tennessee.— Hoard *v.* State, 15 Lea 318.

Washington.— State *v.* Boyce, 24 Wash. 514, 64 Pac. 719.

See 15 Cent. Dig. tit. "Criminal Law," § 3125.

Comments by the court on the materiality of evidence are harmless, unless it appears that defendant was actually prejudiced. Stayton *v.* State, 32 Tex. Cr. 33, 22 S. W. 38.

Remarks of judge see *supra*, XIV, B, 9; XV, A, 2, e, (I).

57. Williams *v.* Com., 82 Ky. 640; Kizer *v.* State, 12 Lea (Tenn.) 564. See *supra*, XIV, E, 1.

58. *Arkansas.*— Wells *v.* State, (1891) 16 S. W. 577.

California.— People *v.* Mayes, 113 Cal. 618, 45 Pac. 860.

Georgia.— Hoxie *v.* State, 114 Ga. 19, 39 S. E. 944.

Idaho.— State *v.* Rice, 7 Ida. 762, 66 Pac. 87.

Illinois.— Duffin *v.* People, 107 Ill. 113, 47 Am. Rep. 431.

Indiana.— Heyl *v.* State, 109 Ind. 589, 10 N. E. 916; Boyle *v.* State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218.

Iowa.— State *v.* Weston, 98 Iowa 125, 67 N. W. 84; State *v.* Ean, 90 Iowa 534, 58 N. W. 898.

Kentucky.— Hourigan *v.* Com., 94 Ky. 520, 23 S. W. 355, 15 Ky. L. Rep. 265; Gilbert *v.* Com., 51 S. W. 590, 21 Ky. L. Rep. 415; Hayden *v.* Com., 45 S. W. 886, 20 Ky. L. Rep. 274; Ray *v.* Com., 43 S. W. 221, 19 Ky. L. Rep. 1217; Handly *v.* Com., 24 S. W. 609, 15 Ky. L. Rep. 736.

Louisiana.— State *v.* Mack, 45 La. Ann. 1155, 14 So. 141.

Michigan.— People *v.* Luders, 126 Mich. 440, 85 N. W. 1081; People *v.* Ringsted, 90 Mich. 371, 51 N. W. 519.

Minnesota.— State *v.* Ahern, 54 Minn. 195, 55 N. W. 959.

Mississippi.— Brown *v.* State, 81 Miss. 143, 33 So. 170.

Missouri.— State *v.* Phillips, 160 Mo. 503, 60 S. W. 1050; State *v.* Leabo, 89 Mo. 247, 1 S. W. 288; State *v.* Banks, 10 Mo. App. 111.

North Carolina.—State *v.* Craine, 120 N. C. 601, 27 S. E. 72.

Texas.— Hawkins *v.* State, (Cr. App. 1903) 71 S. W. 756; Walker *v.* State, 28 Tex. App. 503, 13 S. W. 860; Hudson *v.* State, 28 Tex. App. 323, 13 S. W. 388; House *v.* State, 19 Tex. App. 227; Bass *v.* State, 16 Tex. App. 62.

Washington.—State *v.* Moody, 7 Wash. 395, 35 Pac. 132.

West Virginia.—State *v.* Mooney, 49 W. Va. 712, 39 S. E. 657; State *v.* Shawn, 40 W. Va. 1, 20 S. E. 873.

See 15 Cent. Dig. tit. "Criminal Law," § 3127.

them.[59] If a question of law is left to the jury and they decide it properly the error is harmless.[60]

e. Rulings on Evidence — (1) *In General.* The rule that non-prejudicial error will not justify the reversal of a judgment of conviction is applicable to rulings as to evidence.[61] Thus allowing the asking of leading questions[62] or of improper or illegal questions and permitting them to be answered where the answers were favorable to accused,[63] overruling objections to improper questions which when put were not answered[64] or refusing to compel the prosecution to call and examine

59. *Alabama.*— Lide *v.* State, 133 Ala. 43, 31 So. 953.

California.— People *v.* Rodley, 131 Cal. 240, 63 Pac. 351; People *v.* Patterson, 124 Cal. 102, 56 Pac. 882; People *v.* Phelan, 123 Cal. 551, 56 Pac. 424.

Iowa.— State *v.* Potts, 83 Iowa 317, 49 N. W. 845. *Compare* State *v.* Roscum, 119 Iowa 330, 93 N. W. 295.

Kentucky.— Yontz *v.* Com., 66 S. W. 383, 23 Ky. L. Rep. 1868.

Louisiana.— State *v.* Briscoe, 30 La. Ann. 433.

Oregon.— State *v.* Morse, 35 Oreg. 462, 57 Pac. 631.

South Dakota.— State *v.* Williams, 11 S. D. 64, 75 N. W. 815.

Texas.— Driver *v.* State, (Cr. App. 1901) 65 S. W. 528.

Wisconsin.— Hoffman *v.* State, 97 Wis. 571, 73 N. W. 51.

See 15 Cent. Dig. tit. "Criminal Law," § 3127. And see *supra*, XIV, E.

Cure of error by instruction and reprimand. — People *v.* Schmitt, 106 Cal. 48, 39 Pac. 204; State *v.* Ford, 42 La. Ann. 255, 7 So. 696; People *v.* Smith, 106 Mich. 431, 64 N. W. 200; People *v.* Priori, 164 N. Y. 459, 58 N. E. 668. See also *supra*, XIV, E, 6.

Verdict inflicting lowest penalty as showing that remarks were harmless.— Warren *v.* Com., 99 Ky. 370, 35 S. W. 1028, 18 Ky. L. Rep. 141.

60. State *v.* Lewis, 10 Kan. 157; Com. *v.* Brown, 121 Mass. 69; State *v.* Jackson, 13 N. C. 563.

But it has been held reversible error to submit to a jury the question of guilt under a count which was unsupported by any evidence, although defendant was convicted on another count. Botsch *v.* State, 43 Nebr. 501, 61 N. W. 730.

61. State *v.* Hill, 39 La. Ann. 927, 3 So. 117. See also Lowe *v.* State, (Fla. 1902) 32 So. 956.

62. State *v.* Fooks, 29 Kan. 425; Webb *v.* State, (Tex. Cr. App. 1901) 60 S. W. 961; Roberson *v.* State, (Tex. Cr. App. 1899) 49 S. W. 398.

63. *Alabama.*— Sanders *v.* State, (1902) 32 So. 654; Thompson *v.* State, 100 Ala. 70, 14 So. 878.

California.— People *v.* Sullivan, 129 Cal. 557, 62 Pac. 101; People *v.* Chin Hane, 108 Cal. 597, 41 Pac. 697.

Florida.— Myers *v.* State, 43 Fla. 500, 31 So. 275.

Georgia.— Whaley *v.* State, 11 Ga. 123.

Illinois.— McMahon *v.* People, 189 Ill. 222, 59 N. E. 584.

Indiana.— Shears *v.* State, 147 Ind. 51, 46 N. E. 331.

Iowa.— State *v.* Desmond, 109 Iowa 72, 80 N. W. 214; State *v.* Farrell, 82 Iowa 553, 48 N. W. 940.

Kentucky.— Clark *v.* Com., 32 S. W. 131, 17 Ky. L. Rep. 540.

Massachusetts.— Com. *v.* Oakes, 151 Mass. 59, 23 N. E. 660.

Michigan.— People *v.* McArron, 121 Mich. 1, 79 N. W. 944; People *v.* Brown, 53 Mich. 531, 19 N. W. 172.

Missouri.— State *v.* Fisher, 162 Mo. 169, 62 S. W. 690.

Nebraska.— Nightingale *v.* State, 62 Nebr. 371, 87 N. W. 158.

New Jersey.— State *v.* Barker, 68 N. J. L. 19, 52 Atl. 284.

New York.— McGuire *v.* People, 48 How. Pr. 517; People *v.* Ogle, 4 N. Y. Cr. 349.

South Carolina.— State *v.* Merriman, 34 S. C. 16, 12 S. E. 619.

Texas.—McComas *v.* State, (Cr. App. 1903) 72 S. W. 189; Kelly *v.* State, (Cr. App. 1903) 71 S. W. 756; Bargna *v.* State, (Cr. App. 1902) 68 S. W. 997; Lancaster *v.* State, 36 Tex. Cr. 16, 35 S. W. 165; Green *v.* State, (App. 1889) 12 S. W. 872.

Wisconsin.— Miller *v.* State, 106 Wis. 156, 81 N. W. 1020.

See 15 Cent. Dig. tit. "Criminal Law," § 3130.

64. *Arizona.*— Qualey *v.* Territory, (1902) 68 Pac. 546.

California.— People *v.* Vann, 129 Cal. 118, 61 Pac. 776; People *v.* Patterson, 124 Cal. 102, 56 Pac. 882; People *v.* Dennis, 39 Cal. 625.

Florida.— Myers *v.* State, 43 Fla. 500, 31 So. 275.

Georgia.— Cochran *v.* State, 113 Ga. 726, 39 S. E. 332.

Indiana.— McClary *v.* State, 75 Ind. 260.

Kentucky.— Taylor *v.* Com., 59 S. W. 33, 22 Ky. L. Rep. 929.

Louisiana.— State *v.* Riley, 42 La. Ann. 995, 8 So. 469.

Maryland.— Zimmerman *v.* State, 56 Md. 536.

Michigan.—People *v.* Pyckett, 99 Mich. 613, 58 N. W. 621.

Missouri.—State *v.* Furgerson, 162 Mo. 668, 63 S. W. 101.

New York.— Shay *v.* People, 4 Park. Cr. 353.

South Carolina.— State *v.* Taylor, 57 S. C. 483, 35 S. E. 729, 76 Am. St. Rep. 575.

Texas.— Cannon *v.* State, (Cr. App. 1900) 56 S. W. 351; Merritt *v.* State, 40 Tex. Cr.

witnesses present in court [65] is usually considered as harmless error. So the misconduct of a witness in answering a question after it had been ruled out,[66] in breaking out excitedly in an accusation concerning the crime for which defendant is charged,[67] or in volunteering irrelevant evidence [68] is harmless where the court at once ordered the objectionable matter to be stricken out and instructed the jury to disregard the improper language of the witness. Again the character and limits of cross-examination are almost entirely in the discretion of the court, so that if nothing entirely irrelevant is elicited, a cross-examination relevant to the credibility of the witness is harmless.[69] So far as the cross-examination of the accused brings out only that which is favorable to him,[70] or if on all the evidence it appears that his answers could not have affected the verdict,[71] it is harmless.

(II) *Admission of Evidence* — (A) *In General.* The admission of evidence which is not material, over objection, is usually harmless error, unless it appears affirmatively that its admission actually injured defendant.[72] This is particularly

359, 50 S. W. 384; Williams *v.* State, 30 Tex. App. 354, 17 S. W. 408.

Vermont.— State *v.* Fitzgerald, 72 Vt. 142, 47 Atl. 403; State *v.* Burpee, 65 Vt. 1, 25 Atl. 964, 36 Am. St. Rep. 775, 19 L. R. A. 145.

This rule applies where the court directs the witness not to answer (State *v.* Beal, 94 Iowa 39, 62 N. W. 657; State *v.* McIntire, 89 Iowa 139, 56 N. W. 419; Howard *v.* State, 37 Tex. Cr. 494, 36 S. W. 475, 66 Am. St. Rep. 812; Alexander *v.* State, 21 Tex. App. 406, 17 S. W. 139, 57 Am. Rep. 617), or informs him that he has a right to refuse to answer, which right he exercises (Smith *v.* State, 64 Md. 25, 20 Atl. 1026, 54 Am. Rep. 752).

An offer by the prosecuting witness to prove his own good character is harmless, where it is rejected by the court. State *v.* Grant, 144 Mo. 56, 45 S. W. 1102.

Error in questions laying the foundation for evidence will not be considered where the evidence itself is not introduced. People *v.* Brown, 130 Cal. 591, 62 Pac. 1072.

65. State *v.* Williams, 30 La. Ann. 842.

The error, if any, is cured where defendant calls and examines the witnesses himself. People *v.* Resh, 107 Mich. 251, 65 N. W. 99; Eason *v.* State, 6 Baxt. (Tenn.) 431.

If defendant desires to use a witness who has testified for the state, he must be subpœnaed or the court asked to direct him to appear, or his non-appearance will not justify a reversal of a conviction. Simons *v.* People, 150 Ill. 66, 36 N. E. 1019.

66. State *v.* Butterfield, 75 Mo. 297.

67. Com. *v.* Gilbert, 165 Mass. 45, 42 N. E. 336.

68. State *v.* Watson, 81 Iowa 380, 46 N. W. 868; People *v.* Mead, 50 Mich. 228, 15 N. W. 95.

Defendant should move promptly to strike out the improper evidence volunteered, and if he does not do this he must prove that it was prejudicial (People *v.* Howard, 73 Mich. 10, 40 N. W. 789), which may very readily be done where the other evidence of guilt is slight (Harrison *v.* State, 16 Tex. App. 325).

69. *California.*—People *v.* Bishop, 134 Cal. 682, 66 Pac. 976.

Indiana.— Baehner *v.* State, 25 Ind. App. 597, 58 N. E. 741.

Iowa.— State *v.* Neimeyer, 66 Iowa 634, 24 N. W. 247.

Michigan.— People *v.* Gale, 50 Mich. 237, 15 N. W. 99.

Nebraska.— See Davis *v.* State, 51 Nebr. 301, 70 N. W. 984.

North Carolina.— See State *v.* Sidden, 104 N. C. 845, 10 S. E. 262.

See 15 Cent. Dig. tit. "Criminal Law," § 3133.

70. People *v.* Goodwin, 132 Cal. 368, 64 Pac. 561; People *v.* Carleton, (Cal. 1884) 4 Pac. 763; U. S. *v.* Neverson, 1 Mackey (D. C.) 152; State *v.* Avery, 113 Mo. 475, 21 S. W. 193.

71. State *v.* Bartlett, 55 Me. 200; State *v.* Beaucleigh, 92 Mo. 490, 4 S. W. 666.

Cross-examination on immaterial matters, although perhaps erroneous, is seldom prejudicial. People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269; State *v.* Lewis, 118 Mo. 79, 23 S. W. 1082; Davis *v.* State, 23 Tex. App. 210, 4 S. W. 590.

The misconduct of the prosecuting attorney in attempting on the cross-examination of the accused after adverse rulings to elicit an admission from him that he was guilty of another crime by asking the same question in different forms and making improper remarks thereon is harmless, although highly improper and to be summarily prevented by the court, where the other evidence was sufficient to warrant a conviction. Schroeder *v.* People, 196 Ill. 211, 63 N. E. 678.

72. *Alabama.*—Thompson *v.* State, 122 Ala. 12, 26 So. 141; Terry *v.* State, 118 Ala. 79, 23 So. 776; Gaston *v.* State, 117 Ala. 162, 23 So. 682; Pellum *v.* State, 89 Ala. 28, 8 So. 83.

Arkansas.— Ragland *v.* State, (1902) 70 S. W. 1039; Wallace *v.* State, 28 Ark. 531.

California.— People *v.* Johnson, 131 Cal. 511, 63 Pac. 842; People *v.* Matthews, (1899) 58 Pac. 371; People *v.* Hawes, 98 Cal. 648, 33 Pac. 791; People *v.* Lemperle, 94 Cal. 45, 29 Pac. 709; People *v.* Nelson, 85 Cal. 421, 24 Pac. 1006; People *v.* Davis, 47 Cal. 93; People *v.* Plummer, 12 Cal. 256.

true where there is sufficient competent evidence to sustain a conviction irrespective of that erroneously admitted.[73]

(B) *Error Cured*—(1) IN GENERAL. Error, if any, in admitting illegal, irrelevant, or improper testimony is usually harmless, where the fact which is intended to be proved thereby is fully shown by other evidence or is admitted.[74]

Colorado.— Barr *v.* People, 30 Colo. 522, 71 Pac. 392; Murphy *v.* People, 9 Colo. 435, 13 Pac. 528.

Florida.— Wallace *v.* State, 41 Fla. 547, 26 So. 713.

Georgia.— Kitchens *v.* State, 116 Ga. 847, 45 S. E. 256; Hall *v.* State, 110 Ga. 314, 35 S. E. 153; Mayes *v.* State, 108 Ga. 787, 33 S. E. 811; Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814.

Idaho.— State *v.* Anthony, 6 Ida. 383, 55 Pac. 884.

Illinois.— Wallace *v.* People, 159 Ill. 446, 42 N. E. 771; Watt *v.* People, 126 Ill. 9, 18 N. E. 340, 1 L. R. A. 403.

Indiana.— Keesier *v.* State, 154 Ind. 242, 56 N. E. 232; Dean *v.* State, 130 Ind. 237, 29 N. E. 911.

Iowa.—State *v.* Glucose Sugar Refining Co., 117 Iowa 524, 91 N. W. 794; State *v.* Shunka, 116 Iowa 206, 89 N. W. 977; State *v.* McIntosh, 109 Iowa 209, 80 N. W. 349; State *v.* Marshall, 105 Iowa 38, 74 N. W. 763; State *v.* Pugsley, 75 Iowa 742, 38 N. W. 498.

Kansas.— State *v.* Romain, 44 Kan. 719, 25 Pac. 225; State *v.* Johnson, 8 Kan. App. 269, 55 Pac. 506; State *v.* Bane, 1 Kan. App. 537, 42 Pac. 376.

Kentucky.— Nelson *v.* Com., 94 Ky. 594, 23 S. W. 348, 350, 15 Ky. L. Rep. 255; Nicely *v.* Com., 58 S. W. 995, 22 Ky. L. Rep. 900; Webb *v.* Com., 12 S. W. 769, 11 Ky. L. Rep. 642; Pearce *v.* Com., 8 S. W. 893, 10 Ky. L. Rep. 178.

Michigan.— People *v.* Mead, 50 Mich. 228, 15 N. W. 95; Strang *v.* People, 24 Mich. 1.

Minnesota.— State *v.* McCartey, 17 Minn. 76.

Mississippi.— Browning *v.* State, 33 Miss. 47.

Missouri.— State *v.* McLain, 159 Mo. 340, 60 S. W. 736; State *v.* Howard, 102 Mo. 142, 14 S. W. 937; State *v.* Jennings, 18 Mo. 435.

Montana.— Territory *v.* Clayton, 8 Mont. 1, 19 Pac. 293.

New York.— People *v.* Coombs, 158 N. Y. 532, 53 N. E. 527; People *v.* Gonzalez, 35 N. Y. 49; People *v.* Blase, 57 N. Y. App. Div. 585, 68 N. Y. Suppl. 472; People *v.* Miller, 79 N. Y. Suppl. 1122; People *v.* Brandt, 14 N. Y. St. 419; People *v.* Meyers, 5 N. Y. Cr. 120; Stephens *v.* People, 4 Park. Cr. 396.

North Dakota.—State *v.* McGahey, 3 N. D. 293, 55 N. W. 753.

Ohio.— Searles *v.* State, 6 Ohio Cir. Ct. 331.

Pennsylvania.— Com. *v.* Biddle, 200 Pa. St. 640, 50 Atl. 262.

South Carolina.— State *v.* Martin, 47 S. C. 67, 25 S. E. 113.

Tennessee.— Turner *v.* State, 89 Tenn. 547, 15 S. W. 838.

Texas.— Merritt *v.* State, 40 Tex. Cr. 359, 50 S. W. 384; Shaw *v.* State, 39 Tex. Cr. 161, 45 S. W. 597; McGrath *v.* State, 35 Tex. Cr. 413, 34 S. W. 127, 941; Sargent *v.* State, 35 Tex. Cr. 325, 33 S. W. 364; Logan *v.* State, 17 Tex. App. 50; Bigby *v.* State, 5 Tex. App. 101.

Vermont.— State *v.* Taylor, 70 Vt. 1, 39 Atl. 447, 67 Am. St. Rep. 648, 42 L. R. A. 673; State *v.* Babcock, 51 Vt. 570.

Virginia.— Com. *v.* Brown, 90 Va. 671, 19 S. E. 447.

West Virginia.— State *v.* Yates, 21 W. Va. 761.

See 15 Cent. Dig. tit. "Criminal Law," § 3137.

73. *Georgia.*— Haupt *v.* State, 108 Ga. 60, 33 S. E. 829.

Kansas.— State *v.* Tegder, 6 Kan. App. 762, 50 Pac. 985.

New York.— People *v.* Blase, 57 N. Y. App. Div. 585, 68 N. Y. Suppl. 472.

Texas.— Kilpatrick *v.* State, 39 Tex. Cr. 10, 44 S. W. 830.

Canada.— Reg. *v.* Mailloux, 16 N. Brunsw. 493.

See 15 Cent. Dig. tit. "Criminal Law," § 3137.

Error in informing an accomplice who testifies against defendant that his evidence cannot be used against himself is harmless. People *v.* Rodundo, 44 Cal. 538.

74. *Alabama.*— Wright *v.* State, 129 Ala. 123, 29 So. 864; Fuller *v.* State, 117 Ala. 36, 23 So. 688.

California.— People *v.* Chrisman, 135 Cal. 282, 67 Pac. 136; People *v.* Shaw, 111 Cal. 171, 43 Pac. 593. And see People *v.* Piggott, 126 Cal. 509, 59 Pac. 31.

Colorado.— Jones *v.* People, 23 Colo. 276, 47 Pac. 275.

Florida.— Boykin *v.* State, 40 Fla. 484, 24 So. 141. And see Wallace *v.* State, 41 Fla. 547, 26 So. 713.

Georgia.— Dockins *v.* State, (1899) 34 S. E. 846. And see Lovett *v.* State, 60 Ga. 257.

Illinois.— Halloway *v.* People, 181 Ill. 544, 54 N. E. 1030. See also Meul *v.* People, 198 Ill. 258, 64 N. E. 1106.

Iowa.— State *v.* Beebe, 115 Iowa 128, 88 N. W. 358; State *v.* Reilly, 104 Iowa 13, 73 N. W. 356; State *v.* Goode, 68 Iowa 593, 27 N. W. 772. And see State *v.* Hossack, 116 Iowa 194, 89 N. W. 1077.

Kansas.— State *v.* Patterson, 52 Kan. 335, 34 Pac. 784; State *v.* Schmidt, 34 Kan. 399, 8 Pac. 867.

Kentucky.— Wigginton *v.* Com., 92 Ky. 282, 17 S. W. 634, 13 Ky. L. Rep. 641; Cope *v.* Com., 47 S. W. 436, 20 Ky. L. Rep. 721; Clem *v.* State, 13 S. W. 102, 11 Ky. L. Rep. 780.

Louisiana.—State *v.* Primeaux, 104 La. 365,

Thus the erroneous admission of secondary evidence is cured by the subsequent introduction of the document.[75] The erroneous admission of evidence over objection is harmless where the accused subsequently during the trial admits the facts brought out.[76] So the admission of evidence, for which a foundation is

29 So. 110; State *v.* Robinson, 52 La. Ann. 541, 27 So. 129.

Michigan.— People *v.* Gregory, 130 Mich. 522, 90 N. W. 414; People *v.* Schoonmaker, 119 Mich. 242, 77 N. W. 934; People *v.* Crawford, 48 Mich. 498, 12 N. W. 673.

Minnesota.— State *v.* Bourne, 86 Minn. 426, 90 N. W. 1105; State *v.* Minot, 79 Minn. 118, 81 N. W. 753.

Mississippi.— Campbell *v.* State, 81 Miss. 417, 33 So. 224; Lipscomb *v.* State, 76 Miss. 223, 25 So. 158; Garrard *v.* State, 50 Miss. 147.

Missouri.— State *v.* Gregory, 170 Mo. 598, 71 S. W. 170; State *v.* Gatlin, 170 Mo. 354, 70 S. W. 885; State *v.* Moore, 156 Mo. 204, 56 S. W. 883; State *v.* Stephens, 70 Mo. App. 554. And see State *v.* Smith, 114 Mo. 406, 21 S. W. 827; State *v.* Pratt, 98 Mo. 482, 11 S. W. 977; State *v.* Owen, 78 Mo. 367.

Nevada.— State *v.* Buster, 23 Nev. 346, 47 Pac. 194.

New Jersey.— Malynak *v.* State, 61 N. J. L. 562, 40 Atl. 572.

New York.— People *v.* Hallen, 164 N. Y. 565, 58 N. E. 1090; People *v.* Otto, 101 N. Y. 690, 5 N. E. 788, 4 N. Y. Cr. 149; People *v.* Gonzalez, 35 N. Y. 49; People *v.* Meyers, 5 N. Y. Cr. 120.

Oregon.— State *v.* Sally, 41 Oreg. 366, 70 Pac. 396; State *v.* Welch, 32 Oreg. 33, 54 Pac. 213.

South Carolina.— State *v.* Sims, 16 S. C. 486.

Tennessee.— Turner *v.* State, 89 Tenn. 547, 15 S. W. 838.

Texas.— Bargna *v.* State, (Cr. App. 1902) 68 S. W. 997; Matkins *v.* State, (Cr. App. 1901) 62 S. W. 911; Crockett *v.* State, 40 Tex. Cr. 173, 49 S. W. 392; Batson *v.* State, 36 Tex. Cr. 606, 38 S. W. 48. And see Gann *v.* State, (Cr. App. 1900) 59 S. W. 896.

Virginia.— Com. *v.* Brown, 90 Va. 671, 19 S. E. 447.

Washington.—State *v.* Coella, 8 Wash. 512, 36 Pac. 474; State *v.* Munson, 7 Wash. 239, 34 Pac. 932.

Wyoming.— Cornish *v.* Territory, 3 Wyo. 95, 3 Pac. 793.

See 15 Cent. Dig. tit. "Criminal Law," § 3138.

75. *Iowa.*— State *v.* Moothart, 109 Iowa 130, 80 N. W. 301; State *v.* Tennebom, 92 Iowa 551, 61 N. W. 193; State *v.* King, 81 Iowa 587, 47 N. W. 775.

Louisiana.— State *v.* Cazeau, 8 La. Ann. 109.

Massachusetts.— Com. *v.* Cooper, 130 Mass. 285.

Michigan.— People *v.* Pope, 108 Mich. 361, 66 N. W. 213.

New York.— People *v.* Otto, 101 N. Y. 690, 5 N. E. 788, 4 N. Y. Cr. 149.

Washington.— State *v.* Roller, 30 Wash. 692, 71 Pac. 718.

See 15 Cent. Dig. tit. "Criminal Law," § 3138.

76. *Arkansas.*—Williams *v.* State, 66 Ark. 264, 50 S. W. 517.

California.— People *v.* Harlan, 133 Cal. 16, 65 Pac. 9; People *v.* Lee Dick Lung, 129 Cal. 491, 62 Pac. 71; People *v.* Whiteman, 114 Cal. 338, 46 Pac. 99; People *v.* Ketchum, 73 Cal. 635, 15 Pac. 353; People *v.* Daniels, 70 Cal. 521, 11 Pac. 655.

Colorado.— Short *v.* People, 27 Colo. 175, 60 Pac. 350.

Connecticut.— State *v.* Rathbun, 74 Conn. 524, 51 Atl. 540.

Florida.— Caldwell *v.* State, 43 Fla. 545, 30 So. 814; Wallace *v.* State, 41 Fla. 547, 26 So. 713.

Georgia.— Mayes *v.* State, 108 Ga. 787, 33 S. E. 811; Milam *v.* State, 108 Ga. 29, 33 S. E. 818.

Kansas.— State *v.* Furney, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262.

Kentucky.— Webb *v.* Com., 35 S. W. 1038, 18 Ky. L. Rep. 220.

Louisiana.— State *v.* Walsh, 44 La. Ann. 1122, 11 So. 811.

Missouri.— State *v.* Cunningham, 154 Mo. 161, 55 S. W. 282; State *v.* Whitworth, 126 Mo. 573, 29 S. W. 595.

New York.— People *v.* McKane, 143 N. Y. 455, 38 N. E. 950; People *v.* Elmore, 3 N. Y. Cr. 264.

Oregon.— State *v.* Hatcher, 29 Oreg. 309, 44 Pac. 584.

Rhode Island.— State *v.* Collins, (1902) 52 Atl. 990.

South Carolina.— State *v.* Corley, 43 S. C. 127, 20 S. E. 989.

Texas.— Solomon *v.* State, (Cr. App. 1901) 65 S. W. 915; Roller *v.* State, (Cr. App. 1898) 44 S. W. 496; Carlisle *v.* State, 37 Tex. Cr. 108, 38 S. W. 991; Street *v.* State, (Cr. App. 1896) 37 S. W. 328; Johnson *v.* State, (Cr. App. 1894) 26 S. W. 504.

Wisconsin.—Jenness *v.* State, 103 Wis. 553, 79 N. W. 759; Butler *v.* State, 102 Wis. 364, 78 N. W. 590.

United States.— Motes *v.* U. S., 178 U. S. 458, 20 S. Ct. 993, 44 L. ed. 1150.

An error in admitting parol evidence of the contents of notes, without accounting for the originals, is cured by the facts that the accused in his statement admits the existence and contents of the notes. McElveen *v.* State, 97 Ga. 217, 22 S. E. 402.

A statement by the accused while under arrest, although inadmissible as a confession, may be received to identify him where he admits he was the doer of the act alleged to be criminal. State *v.* Howard, 102 Mo. 142, 14 S. W. 937.

The proof of an incompetent fact by a witness of the accused is equivalent to its admission by him. People *v.* Clarke, 130 Cal. 642, 63 Pac. 138.

required to be laid, prior to laying the same, is harmless, where the proper foundation is subsequently shown.[77]

(2) By Withdrawing or Striking Out. Error in the admission of incompetent testimony according to the majority of the cases may be cured by the action of the court striking it out and directing the jury to disregard it.[78] Many cases hold, however, that error in the admission of improper evidence is not cured by directing the jury to disregard it, unless it positively appears that no injury was done to defendant thereby.[79]

Admission or confession of a co-defendant. — The reception in evidence of an admission by one of several defendants jointly tried is harmless error where its application is restricted to defendant who uttered it. Crosby *v.* People, 137 Ill. 325, 27 N. E. 49. And see State *v.* Munchrath, 78 Iowa 268, 43 N. W. 211.

77. Dennis *v.* State, 118 Ala. 72, 23 So. 1002; Floyd *v.* State, 82 Ala. 16, 2 So. 683; Edwards *v.* State, 49 Ala. 334; Johnson *v.* State, 29 Ala. 62, 65 Am. Dec. 383; Lawson *v.* State, 20 Ala. 65, 56 Am. Dec. 182; People *v.* Grimes, 132 Cal. 30, 64 Pac. 101; People *v.* Squires, 99 Cal. 327, 33 Pac. 1092; People *v.* Bennett, 65 Cal. 267, 3 Pac. 868; People *v.* Van Tassel, 26 N. Y. App. Div. 445, 50 N. Y. Suppl. 53.

Illustrations.— Error in admitting the declarations of an alleged conspirator without prior proof of a conspiracy (State *v.* Cain, 20 W. Va. 679), in receiving a paper in evidence without proof of its genuineness (State *v.* Douglass, 7 Iowa 413), in permitting a witness to give an opinion that a writing is forged without qualifying him as an expert (Com. *v.* Hall, 164 Mass. 152, 41 N. E. 133), or in receiving evidence of a conversation between a witness and a third person without showing that defendant was present (State *v.* Pepo, 23 Mont. 473, 59 Pac. 721) is cured by subsequently supplying the preliminary proof omitted.

78. *Alabama.*— Smith *v.* State, 107 Ala. 139, 18 So. 306.

Arkansas.— Hanlon *v.* State, 51 Ark. 186, 10 S. W. 265.

California.— People *v.* Prather, 133 Cal. 436, 66 Pac. 589, 863; People *v.* French, (1885) 7 Pac. 822; People *v.* Bealoba, 17 Cal. 389.

Georgia.— Christian *v.* State, 86 Ga. 430, 12 S. E. 645.

Illinois.— Lathrop *v.* People, 197 Ill. 169, 64 N. E. 385; Bolen *v.* People, 184 Ill. 338, 56 N. E. 408; Simons *v.* People, 150 Ill. 66, 36 N. E. 1019; Lyons *v.* People, 137 Ill. 602, 27 N. E. 677.

Indiana.— Joy *v.* State, 14 Ind. 139.

Iowa.— State *v.* Hughes, 106 Iowa 125, 76 N. W. 520, 68 Am. St. Rep. 288; State *v.* Chingren, 105 Iowa 169, 74 N. W. 946; State *v.* Helm, 97 Iowa 378, 66 N. W. 751.

Kansas.— State *v.* Emmons, 45 Kan. 397, 26 Pac. 679; State *v.* Hodges, 45 Kan. 389, 26 Pac. 676; State *v.* Gould, 40 Kan. 258, 19 Pac. 739.

Kentucky.— Tully *v.* Com., 13 Bush 142; Montgomery *v.* Com., 30 S. W. 602, 17 Ky. L. Rep. 94; Pearce *v.* Com., 8 S. W. 893, 10 Ky. L. Rep. 178.

Massachusetts.— Com. *v.* Cody, 165 Mass. 133, 42 N. E. 575; Com. *v.* Ham, 150 Mass. 122, 22 N. E. 704.

Michigan.— People *v.* Gregory, 130 Mich. 522, 90 N. W. 414.

Missouri.—State *v.* McGinnis, 158 Mo. 105, 59 S. W. 83.

Montana.— U. S. *v.* Upham, 2 Mont. 170.

Nebraska.— McCormick *v.* State, (1902) 92 N. W. 606; Reed *v.* State, (1902) 92 N. W. 321.

New York.— People *v.* Schooley, 149 N. Y. 99, 43 N. E. 536; People *v.* McCarthy, 110 N. Y. 309, 18 N. E. 128; Murphy *v.* People, 63 N. Y. 590; People *v.* McLaughlin, 2 N. Y. App. Div. 419, 37 N. Y. Suppl. 1005; People *v.* Kennedy, 22 N. Y. Suppl. 267.

North Carolina.— State *v.* Downs, 118 N. C. 1242, 24 S. E. 531; State *v.* Crane, 110 N. C. 530, 15 S. E. 231; State *v.* Eller, 104 N. C. 853, 10 S. E. 313.

Ohio.— Mimms *v.* State, 16 Ohio St. 221.

Oregon.— State *v.* McDaniel, 39 Oreg. 161, 65 Pac. 520.

Rhode Island.— State *v.* Mace, 6 R. I. 85.

South Carolina.— State *v.* Taylor, 56 S. C. 360, 34 S. E. 939; State *v.* Atkinson, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877, 41 S. C. 551, 19 S. E. 691; State *v.* James, 34 S. C. 49, 12 S. E. 657.

Tennessee.— Green *v.* State, 97 Tenn. 50, 36 S. W. 700.

Texas.— Smith *v.* State, (Cr. App. 1902) 70 S. W. 84; Cleland *v.* State, (Cr. App. 1901) 65 S. W. 189; Robinson *v.* State, (Cr. App. 1901) 63 S. W. 869; Trotter *v.* State, 37 Tex. Cr. 468, 36 S. W. 278; Jones *v.* State, 33 Tex. Cr. 7, 23 S. W. 793.

Virginia.— O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121.

Washington.— State *v.* Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888.

See 15 Cent. Dig. tit. "Criminal Law," § 3141.

79. *California.*— People *v.* Wallace, 89 Cal. 158, 26 Pac. 650.

Mississippi.— Chism *v.* State, 70 Miss. 742, 12 So. 852.

Missouri.— State *v.* Kuehner, 93 Mo. 193, 6 S. W. 118.

South Dakota.— State *v.* De Masters, (1902) 90 N. W. 852.

Texas.— Faulkner *v.* State, 43 Tex. Cr. 311, 65 S. W. 1093; Hatcher *v.* State, 43 Tex. Cr. 237, 65 S. W. 97.

Vermont.— State *v.* Meader, 54 Vt. 126, 651; State *v.* Hopkins, 50 Vt. 316.

(3) By Verdict. Error in the admission of evidence may be cured by a verdict of conviction which by its nature shows that it was not produced by the evidence admitted.[80] If it appears from competent evidence that the accused was guilty, the imposition of the minimum penalty cures the admission of incompetent testimony.[81]

(c) *Refusal to Strike Out.* The denial of a motion to strike out evidence which was wholly immaterial,[82] which was cumulative and practically conceded,[83] or which was so uncertain in its character as not to be prejudicial[84] is harmless.

(iii) *Exclusion of Evidence*—(a) *In General.* The exclusion of evidence, whether it is or is not competent, is harmless, where it reasonably appears that its admission would not have affected the verdict.[85] So if the evidence excluded

United States.— Boyd *v.* U. S., 142 U. S. 450, 12 S. Ct. 292, 35 L. ed. 1077.

See 15 Cent. Dig. tit. "Criminal Law," § 3141.

Error in admitting the confessions or declarations of the accused or of his accomplices which are incompetent is not cured by a subsequent direction to disregard them. People *v.* Oldham, 111 Cal. 648, 44 Pac. 312; Com. *v.* Taylor, 5 Cush. (Mass.) 605; State *v.* Aiken, 41 Oreg. 294, 69 Pac. 683; Shephard *v.* State, 88 Wis. 185, 59 N. W. 449.

This rule should be strictly applied where incompetent evidence is the only incriminating proof (Hornbeck *v.* State, 35 Ohio St. 277, 35 Am. Rep. 608) or where its character is such as to inflame and excite the sympathies of the jury against the accused (State *v.* Kuehner, 93 Mo. 193, 6 S. W. 118; State *v.* Fredericks, 85 Mo. 145; People *v.* Zimmerman, 4 N. Y. Cr. 272).

80. *Iowa.*— State *v.* Craig, 78 Iowa 637, 43 N. W. 462; State *v.* Middleham, 62 Iowa 150, 17 N. W. 446.

Kentucky.— Parks *v.* Com., 5 S. W. 49, 9 Ky. L. Rep. 275.

Massachusetts.— Com. *v.* Billings, 167 Mass. 283, 45 N. E. 910; Com. *v.* Meserve, 154 Mass. 64, 27 N. E. 997; Com. *v.* Lincoln, 9 Gray 288.

Mississippi.— Hill *v.* State, 64 Miss. 431, 1 So. 494.

Missouri.— State *v.* Sprague, 149 Mo. 409, 50 S. W. 901.

North Carolina.— State *v.* Stanton, 118 N. C. 1182, 24 S. E. 536.

Ohio.— Manson *v.* State, 24 Ohio St. 590.

South Carolina.—State *v.* Stuckey, 56 S. C. 576, 35 S. E. 263; State *v.* Bodie, 33 S. C. 117, 11 S. E. 624.

Tennessee.— Givens *v.* State, 103 Tenn. 648, 55 S. W. 1107.

See 15 Cent. Dig. tit. "Criminal Law," § 3143.

81. Davis *v.* State, 111 Ga. 829, 35 S. E. 655; Wilkerson *v.* State, (Tex. Cr. App. 1899) 57 S. W. 956; King *v.* State, 42 Tex. Cr. 108, 57 S. W. 840; Turner *v.* State, (Tex. Cr. App. 1900) 55 S. W. 53; Carico *v.* State, (Tex. Cr. App. 1899) 49 S. W. 371; Lettz *v.* State, (Tex. Cr. App. 1893) 21 S. W. 371. But *compare* Campbell *v.* State, (Tex. Cr. App. 1897) 40 S. W. 282.

The improper admission of proof of a former conviction, under a statute imposing the maximum penalty on the second conviction, is harmless, where the jury assessed the minimum punishment. State *v.* Waters, 144 Mo. 341, 46 S. W. 173. See also Morrison *v.* Com., 56 S. W. 516, 21 Ky. L. Rep. 1814.

82. McKee *v.* People, 36 N. Y. 113, 3 Abb. Pr. N. S. (N. Y.) 216, 34 How. Pr. (N. Y.) 230. *Compare* People *v.* McLean, 84 Cal. 480, 24 Pac. 32.

83. Perrin *v.* State, 81 Wis. 135, 50 N. W. 516.

84. People *v.* Ward, 77 Cal. 113, 19 Pac. 373.

85. *California.*—People *v.* Barthleman, 120 Cal. 7, 52 Pac. 112; People *v.* Keith, 50 Cal. 137.

Connecticut.— State *v.* Gannon, 75 Conn. 206, 52 Atl. 727.

Georgia.— Hood *v.* State, 93 Ga. 168, 18 S. E. 553; Beck *v.* State, 57 Ga. 351.

Illinois.— Gallagher *v.* People, 29 Ill. App. 401.

Iowa.— State *v.* Kowolski, 96 Iowa 346, 65 N. W. 306; State *v.* Pugsley, 75 Iowa 742, 38 N. W. 498.

Kansas.— Wise *v.* State, 2 Kan. 419, 85 Am. Dec. 595.

Kentucky.— Chrystal *v.* Com., 9 Bush 669; Jackson *v.* Com., 14 S. W. 677, 12 Ky. L. Rep. 575. *Compare* Cornelius *v.* Com., 15 B. Mon. 539; Ingram *v.* Com., 71 S. W. 908, 24 Ky. L. Rep. 1531.

Louisiana.— State *v.* Baum, 51 La. Ann. 1112, 26 So. 67; State *v.* Spillman, 43 La. Ann. 1001, 10 So. 198.

Massachusetts.— Com. *v.* Nott, 135 Mass. 269; Com. *v.* Sumner, 124 Mass. 321.

North Carolina.— State *v.* Rash, 34 N. C. 382, 55 Am. Dec. 420.

Pennsylvania.— Com. *v.* Irwin, 2 Pa. L. J. 329.

Tennessee.— McGuire *v.* State, 3 Heisk. 104.

Texas.— Levine *v.* State, 35 Tex. Cr. 647, 34 S. W. 969; De Alberts *v.* State, 34 Tex. Cr. 508, 31 S. W. 391; Self *v.* State, 28 Tex. App. 398, 13 S. W. 602; Luttrell *v.* State, 14 Tex. App. 147.

See 15 Cent. Dig. tit. "Criminal Law," § 3145.

Thus where a non-expert witness can give only his opinion of the sanity of defendant in connection with his testimony of the particular conduct which forms a basis of this opinion, it is harmless to refuse to receive

would have been injurious to defendant its exclusion, although it may have been competent, is harmless error.[86]

(B) *Error Cured* — (1) By Other Evidence. The exclusion of evidence to prove particular facts is harmless if the facts sought to be proved are subsequently proved by other evidence, and it is apparent that the evidence excluded could not have changed the result.[87]

(2) By Subsequent Admission. The exclusion of any particular evidence is harmless if the same evidence is subsequently admitted, either on behalf of the party first offering it or on behalf of the adverse party.[88]

his opinion where he testifies to no acts which would form the basis for it. State *v.* Williamson, 106 Mo. 162, 17 S. W. 172.

To authorize a reversal because of the exclusion of evidence, it must appear that the excluded evidence was important and beneficial to defendant upon the whole case. Champ *v.* Com., 2 Metc. (Ky.) 17, 74 Am. Dec. 388.

86. Marks *v.* State, 87 Ala. 99, 6 So. 377.

87. *California.*— People *v.* Silva, 121 Cal. 668, 54 Pac. 146; People *v.* Lynch, 101 Cal. 229, 35 Pac. 860; People *v.* Scott, 93 Cal. 516, 29 Pac. 123.

Colorado.— Torris *v.* People, 19 Colo. 438, 36 Pac. 153; Power *v.* People, 17 Colo. 178, 28 Pac. 1121.

Georgia.— Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814.

Indiana.— Wagner *v.* State, 116 Ind. 181, 18 N. E. 833.

Iowa.— State *v.* Gray, 116 Iowa 231, 89 N. W. 987; State *v.* McPherson, 114 Iowa 492, 87 N. W. 421; State *v.* Hockett, 70 Iowa 442, 30 N. W. 742. And see State *v.* Phillips, 119 Iowa 652, 89 N. W. 1092.

Kansas.— State *v.* McCarty, 54 Kan. 52, 36 Pac. 338. *Contra*, State *v.* Eastman, 62 Kan. 353, 63 Pac. 597.

Kentucky.— Bryan *v.* Com., 33 S. W. 95, 17 Ky. L. Rep. 965; Walkup *v.* Com., 20 S. W. 221, 14 Ky. L. Rep. 337. And see Herron *v.* Com., 64 S. W. 432, 23 Ky. L. Rep. 782. *Contra*, Young *v.* Com., 42 S. W. 1141, 19 Ky. L. Rep. 929.

Louisiana.— State *v.* Martin, 47 La. Ann. 1540, 18 So. 508.

Massachusetts.—Com. *v.* Brewer, 164 Mass. 577, 42 N. E. 92.

Michigan.— People *v.* Reilly, 53 Mich. 260, 18 N. W. 849. And see People *v.* Hilliard, 119 Mich. 24, 77 N. W. 306.

Mississippi.— Lipscomb *v.* State, 75 Miss. 559, 23 So. 210, 230.

Missouri.— State *v.* Smith, 164 Mo. 567, 65 S. W. 270; State *v.* Griffie, 118 Mo. 188, 23 S. W. 878; State *v.* Green, 37 Mo. 466; State *v.* McGuire, 16 Mo. App. 558.

Nebraska.— See Kelly *v.* State, 51 Nebr. 572, 71 N. W. 299.

New York.— People *v.* Clark, 102 N. Y. 735, 8 N. E. 38; People *v.* Garrahan, 19 N. Y. App. Div. 347, 46 N. Y. Suppl. 497; People *v.* Brooks, 15 N. Y. Suppl. 362.

Oregon.— Jackson *v.* Scharff, 1 Oreg. 246.

Pennsylvania.— Com. *v.* Irwin, 2 Pa. L. J. 329. And see Com. *v.* Bezek, 168 Pa. St. 603, 32 Atl. 109.

South Carolina.— State *v.* Taylor, 57 S. C. 483, 35 S. E. 729, 76 Am. St. Rep. 575; State *v.* Petsch, 43 S. C. 132, 20 S. E. 993.

Texas.— Rodriquez *v.* State, (Cr. App. 1902) 68 S. W. 993; Duke *v.* State, 35 Tex. Cr. 283, 33 S. W. 349; Wyers *v.* State, 22 Tex. App. 258, 2 S. W. 722; Levy *v.* State, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. Rep. 826. And see Burns *v.* State, (Cr. App. 1901) 66 S. W. 303; Lamb *v.* State, (Cr. App. 1900) 56 S. W. 51.

Wisconsin.— Perrin *v.* State, 81 Wis. 135, 50 N. W. 516.

See 15 Cent. Dig. tit. "Criminal Law," § 3146.

Contra.— State *v.* Shafer, 22 Mont. 17, 55 Pac. 526; State *v.* Goff, 117 N. C. 755, 23 S. E. 355; State *v.* Murray, 63 N. C. 31.

An exception is recognized where, in excluding evidence, the court gives the jury to understand necessarily that in its opinion the purpose for which the evidence was introduced was wholly immaterial. The subsequent admission of evidence of the same facts does not cure the error, as the effect of the latter evidence is nullified by the earlier ruling. State *v.* Marco, 32 Oreg. 175, 50 Pac. 799. See also People *v.* Wood, 126 N. Y. 249, 27 N. E. 362.

88. *Alabama.*—Walker *v.* State, 91 Ala. 76, 9 So. 87; Cleveland *v.* State, 86 Ala. 1, 5 So. 426; Jackson *v.* State, 83 Ala. 76, 3 So. 847.

Arkansas.— Blair *v.* State, 69 Ark. 558, 64 S. W. 948.

California.— People *v.* Harlan, 133 Cal. 16, 65 Pac. 9; People *v.* Woody, 48 Cal. 80.

Florida.— Baker *v.* State, 30 Fla. 41, 11 So. 492.

Indiana.— Ard *v.* State, 114 Ind. 542, 16 N. E. 504.

Iowa.— State *v.* Heacock, 106 Iowa 191, 76 N. W. 654; State *v.* Nelson, 58 Iowa 208, 12 N. W. 253.

Louisiana.— State *v.* Collens, 37 La. Ann. 607.

Massachusetts.—Com. *v.* Brewer, 164 Mass. 577, 42 N. E. 92.

Michigan.— People *v.* McArron, 121 Mich. 1, 79 N. W. 944.

Missouri.— State *v.* Smith, 114 Mo. 406, 21 S. W. 827.

Montana.— State *v.* Biggerstaff, 17 Mont. 510, 43 Pac. 709.

Nebraska.— Coil *v.* State, 62 Nebr. 15, 86 N. W. 925.

New Jersey.—Clifford *v.* State, 60 N. J. L. 287, 37 Atl. 1101.

(3) By Further Examination of Witness. An erroneous exclusion of evidence is cured by the subsequent admission of the same testimony by the same witness,[89] or by a statement by the witness that he was not able to testify as expected.[90] The exclusion of proper testimony on the cross-examination of the state's witness is cured where he is subsequently recalled and reëxamined as to the same matters.[91]

(4) By Withdrawal of Objection. Error in excluding a question on objection is cured by the withdrawal of the objection before the close of the testimony,[92] although the party producing the witness does not then examine him.[93]

(5) By Verdict. Error in the exclusion of evidence is cured by a verdict which by its nature shows that it would not have been different if the excluded evidence had been admitted.[94] And generally the imposition of the mini-

New York.— People *v.* Priori, 164 N. Y. 459, 58 N. E. 668; Barringer *v.* People, 14 N. Y. 593; People *v.* Stack, 41 N. Y. App. Div. 548, 58 N. Y. Suppl. 691; Stephens *v.* People, 4 Park. Cr. 396.

North Carolina.— State *v.* Freeman, 100 N. C. 429, 5 S. E. 921.

Ohio.— Gandolfo *v.* State, 11 Ohio St. 114.

South Carolina.— State *v.* Sullivan, 43 S. C. 205, 21 S. E. 4.

South Dakota.— State *v.* Hughes, 8 S. D. 338, 66 N. W. 1076.

See 15 Cent. Dig. tit. "Criminal Law," § 3147.

The rule of the text is to be taken with some qualifications. Thus defendant cannot be deprived of the right to prove his good character by a subsequent admission that the witness whose testimony was received would have testified that his reputation was good. People *v.* Bahr, 74 N. Y. App. Div. 117, 77 N. Y. Suppl. 443. Under the same principle that defendant is entitled to the *viva voce* examination of a witness, an error in excluding competent evidence is not cured by submitting a written recital of it to the jury. Lovett *v.* State, 80 Ga. 255, 4 S. E. 912. See also as to the improper exclusion of evidence that the deceased person in a homicide was of a quarrelsome reputation State *v.* Ellis, 30 Wash. 396, 70 Pac. 963. As to evidence excluded and afterward offered by adverse party see Alvord *v.* State, 33 Ga. 303, 81 Am. Dec. 209; State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113.

The refusal of the court to compel the state to place eye-witnesses of the crime on the stand is cured by the action of defendant in examining them on his own behalf. State *v.* Rolla, 21 Mont. 582, 55 Pac. 523.

Where competent and material evidence is offered and erroneously rejected, the error is not cured by an intimation that if subsequently offered during the trial it might have been admitted. Edgington *v.* U. S., 164 U. S. 361, 17 S. Ct. 72, 41 L. ed. 467. *Contra*, Monson *v.* State, (Tex. Cr. App. 1901) 63 S. W. 647.

89. *California.*—People *v.* Gilmore, (1898) 53 Pac. 806; People *v.* Kramer, 117 Cal. 647, 49 Pac. 842; People *v.* Fong Ah Sing, 70 Cal. 8, 11 Pac. 323; People *v.* Parton, 49 Cal. 632.

Illinois.—Goon Bow *v.* People, 160 Ill. 438, 43 N. E. 593.

Indiana.— Lillard *v.* State, 151 Ind. 322, 50 N. E. 383.

Louisiana.— State *v.* Martin, 47 La. Ann. 1540, 18 So. 508.

Massachusetts.—Com. *v.* Nelson, 180 Mass. 83, 61 N. E. 802.

Mississippi.— McCullough *v.* State, (1900) 28 So. 946.

New York.— People *v.* Brooks, 131 N. Y. 321, 30 N. E. 189 [*affirming* 15 N. Y. Suppl. 362]; McCann *v.* People, 3 Park. Cr. 272. See also People *v.* Panyko, 171 N. Y. 669, 64 N. E. 1124.

South Carolina.— State *v.* Chaffin, 56 S. C. 431, 33 S. E. 454.

See 15 Cent. Dig. tit. "Criminal Law," § 3148.

90. Ridgely *v.* State, 75 Md. 510, 23 Atl. 1099.

91. *Dakota.*— Territory *v.* Collins, 6 Dak. 234, 50 N. W. 122.

Georgia.— Hinkle *v.* State, 94 Ga. 595, 21 S. E. 595.

Kentucky.— Butler *v.* Com., (1886) 2 S. W. 228.

Michigan.— Burden *v.* People, 26 Mich. 162; Dillin *v.* People, 8 Mich. 357.

Missouri.— State *v.* Murphy, 118 Mo. 7, 25 S. W. 95.

South Dakota.— State *v.* Smith, 8 S. D. 547, 67 N. W. 619.

Wisconsin.— Zoldoske *v.* State, 82 Wis. 580, 52 N. W. 778.

See 15 Cent. Dig. tit. "Criminal Law," § 3148.

92. Com. *v.* Hamilton, 15 Gray (Mass.) 480; Coats *v.* People, 4 Park. Cr. (N. Y.) 662.

Error in striking out evidence is cured by a withdrawal of the motion and an instruction to the jury that the evidence stricken out remains in the case. State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733.

93. Pitts *v.* State, (Tex. Cr. App. 1895) 30 S. W. 359.

Striking out an answer is harmless, where it is subsequently given without objection. People *v.* Plyer, 126 Cal. 379, 58 Pac. 904.

94. Thus the exclusion of evidence which might have reduced the offense from murder to manslaughter is harmless where defendant is convicted of manslaughter. People *v.* Wyman, 15 Cal. 70; Territory *v.* Gay, 2 Dak. 125, 2 N. W. 477; Hill *v.* State, 64 Miss. 431, 1 So. 494.

mum penalty cures the exclusion of evidence offered solely to mitigate the offense.[95]

f. Instructions — (I) *In General.* A slight error in an instruction, which clearly did not and could not have prejudiced defendant, is harmless.[96] Such is the case where the evidence of defendant's guilt was conclusive, and on the whole case it appears that the conviction cannot reasonably be supposed to have been the result of the instruction.[97] Instructions may be harmless because no prejudice appears, and therefore no ground for reversal, although erroneous as being

When the verdict indicates that the jury found as true the facts which such evidence would have tended to prove, error in the exclusion of evidence is harmless. Merritt *v.* State, 40 Tex. Cr. 359, 50 S. W. 384.

95. Crampton *v.* State, 37 Ark. 108; State *v.* Graham, 51 Iowa 72, 50 N. W. 285; Lyle *v.* State, 21 Tex. App. 153, 17 S. W. 425.

96. *Alabama.*— Towns *v.* State, 111 Ala. 1, 20 So. 598.

Arkansas.—Williams *v.* State, 70 Ark. 393, 68 S. W. 241; Wilkins *v.* State, 68 Ark. 441, 60 S. W. 30.

California.— People *v.* Smith, 59 Cal. 601; People *v.* Donahue, 45 Cal. 321.

Colorado.— Short *v.* People, 27 Colo. 175, 60 Pac. 350.

Georgia.— Hoxie *v.* State, 114 Ga. 19, 39 S. E. 944; Studstill *v.* State, 105 Ga. 832, 31 S. E. 542; Seyden *v.* State, 78 Ga. 105.

Illinois.— Bressler *v.* People, 117 Ill. 422, 8 N. E. 62; Panton *v.* People, 114 Ill. 505, 2 N. E. 411.

Indiana.— Henning *v.* State, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756; Brown *v.* State, 105 Ind. 385, 5 N. E. 900; Stout *v.* State, 90 Ind. 1.

Iowa.— State *v.* Hamann, 113 Iowa 367, 85 N. W. 614.

Kansas.— State *v.* Asbell, 57 Kan. 398, 46 Pac. 770.

Kentucky.— Taylor *v.* Com., 65 S. W. 450, 23 Ky. L. Rep. 1466; Sprague *v.* Com., 58 S. W. 430, 22 Ky. L. Rep. 519; Crittenden *v.* Com., 3 Ky. L. Rep. 56; Bailey *v.* Com., 2 Ky. L. Rep. 436.

Louisiana.— State *v.* Chase, 37 La. Ann. 165.

Minnesota.— State *v.* Shippey, 10 Minn. 223, 88 Am. Dec. 70.

Mississippi.— Thomas *v.* State, 61 Miss. 60; Harris *v.* State, 47 Miss. 318.

Missouri.— State *v.* Terry, 172 Mo. 213, 72 S. W. 513; State *v.* Rosenberg, 162 Mo. 358, 62 S. W. 435, 982; State *v.* Miller, 159 Mo. 113, 60 S. W. 67.

Nebraska.— McArthur *v.* State, 60 Nebr. 390, 83 N. W. 196; Whitney *v.* State, 53 Nebr. 287, 73 N. W. 696; Ferguson *v.* State, 52 Nebr. 432, 72 N. W. 590, 66 Am. St. Rep. 512; Davis *v.* State, 51 Nebr. 301, 70 N. W. 984.

Nevada.— State *v.* Donovan, 10 Nev. 36.

New Jersey.— State *v.* Wells, 1 N. J. L. 486, 1 Am. Dec. 211.

New York.— People *v.* Bransby, 32 N. Y. 525; People *v.* Formosa, 61 Hun 272, 16 N. Y. Suppl. 753; People *v.* Wiley, 3 Hill 194.

North Dakota.— State *v.* Murphy, 9 N. D. 175, 82 N. W. 738.

Ohio.— Berry *v.* State, 31 Ohio St. 219, 27 Am. Rep. 506; Stephens *v.* State, 14 Ohio 386.

Oregon.— State *v.* Deal, 41 Oreg. 437, 70 Pac. 532; State *v.* Birchard, 35 Oreg. 484, 59 Pac. 468.

Pennsylvania.— Com. *v.* Bubnis, 197 Pa. St. 542, 47 Atl. 748; Diehl *v.* Lee, (1887) 9 Atl. 865.

South Carolina.— State *v.* Ross, 58 S. C. 444, 36 S. E. 659; State *v.* Taylor, 56 S. C. 360, 34 S. E. 939; State *v.* Murrell, 33 S. C. 83, 11 S. E. 682.

Tennessee.— Harris *v.* State, 7 Lea 538.

Texas.— Ross *v.* State, (Cr. App. 1902) 70 S. W. 543; Lewis *v.* State, (Cr. App. 1900) 59 S. W. 886; Stevens *v.* State, 42 Tex. Cr. 154, 59 S. W. 545; Williams *v.* State, 41 Tex. Cr. 365, 54 S. W. 759.

Virginia.— Porterfield *v.* Com., 91 Va. 801, 22 S. E. 352; Muscoe *v.* Com., 87 Va. 460, 12 S. E. 790.

Washington.— State *v.* Brooks, 4 Wash. 328, 30 Pac. 147.

Wisconsin.— Loew *v.* State, 60 Wis. 559, 19 N. W. 437; Hogan *v.* State, 36 Wis. 226.

See 15 Cent. Dig. tit. "Criminal Law," § 3154.

97. *California.*—People *v.* Fenwick, 45 Cal. 287.

Florida.— Wooten *v.* State, 24 Fla. 335, 5 So. 39, 1 L. R. A. 819.

Georgia.— Farlinger *v.* State, 110 Ga. 313, 35 S. E. 152; Echols *v.* State, 109 Ga. 508, 34 S. E. 1038; Toler *v.* State, 108 Ga. 771, 33 S. E. 630; Pascal *v.* State, 77 Ga. 596, 3 S. E. 2.

Illinois.— Meul *v.* People, 198 Ill. 258, 64 N. E. 1106; Young *v.* People, 193 Ill. 236, 61 N. E. 1104.

Iowa.— State *v.* Goode, 68 Iowa 593, 27 N. W. 772.

Kentucky.— Wilson *v.* Com., 60 S. W. 400, 22 Ky. L. Rep. 1251.

Nevada.— State *v.* Slingerland, 19 Nev. 135, 7 Pac. 280.

Texas.—Coleman *v.* State, (Cr. App. 1900) 59 S. W. 268.

Washington.—State *v.* Witherow, 15 Wash. 562, 46 Pac. 1035.

Wyoming.— Edelhoff *v.* State, 5 Wyo. 19, 36 Pac. 627.

An instruction, although erroneous, is not reversible error unless it misled or confused the jury to the prejudice of defendant. Barclay *v.* U. S., 11 Okla. 503, 69 Pac. 798.

upon the weight of the evidence,[98] or because they assume facts to have been proved of which there is no evidence,[99] or of which there is evidence.[1] Instructions which, although erroneous, are more favorable to the accused than they should be and which could not have injured him are harmless.[2] The giving of oral instructions contrary to a statute is not reversible error if the instructions are proper and do not injure the accused.[3]

(II) *Contradictory Instructions.* Contradictory instructions are prejudicial where they are liable to mislead the jury, as for example where it is

An instruction on circumstantial evidence is harmless where the case is made out by direct evidence. Pace *v.* State, 41 Tex. Cr. 203, 51 S. W. 953, 53 S. W. 689.

98. Jones *v.* State, 113 Ala. 95, 21 So. 229; Dixon *v.* State, 46 Nebr. 298, 64 N. W. 961; State *v.* Neville, 51 N. C. 423.

99. Wilkins *v.* State, 68 Ark. 441, 60 S. W. 30; Braxton *v.* State, 157 Ind. 213, 61 N. E. 195; State *v.* Hopper, 71 Mo. 425. See *supra*, XIV, F, 4, a, (XIV).

1. An instruction which assumes facts to be proven is harmless where the facts so assumed are admitted or conclusively proved, and because of the conclusive character of the evidence of guilt no prejudice appears.

Arkansas.— Wilkins *v.* State, 68 Ark. 441, 60 S. W. 30; Cline *v.* State, 51 Ark. 140, 10 S. W. 225.

California.— People *v.* Lapique, 136 Cal. 503, 69 Pac. 226; People *v.* Barthleman, 120 Cal. 7, 52 Pac. 112. *Compare* People *v.* Jackson, 138 Cal. 462, 71 Pac. 566.

Indiana.— Smith *v.* State, 28 Ind. 321.

Kentucky.— Brewer *v.* Com., 12 S. W. 672, 11 Ky. L. Rep. 601.

Mississippi.— Wesley *v.* State, 37 Miss. 327, 75 Am. Dec. 62.

Nebraska.— Hill *v.* State, 42 Nebr. 503, 60 N. W. 916.

West Virginia.— State *v.* Douglass, 28 W. Va. 297.

See 15 Cent. Dig. tit. "Criminal Law," § 3156. And see *supra*, XIV, F, 4, a, (XIV).

2. *Alabama.*— McCormack *v.* State, 133 Ala. 202, 32 So. 268; Henson *v.* State, 120 Ala. 316, 25 So. 23.

California.— People *v.* Wong Ah Foo, 69 Cal. 180, 10 Pac. 375.

Connecticut.— State *v.* Cook, 75 Conn. 267, 53 Atl. 589.

Florida.— Olds *v.* State, (1902) 33 So. 296; Marshall *v.* State, 32 Fla. 462, 14 So. 92.

Georgia.— Hoxie *v.* State, 114 Ga. 19, 39 S. E. 944; Chapman *v.* State, 112 Ga. 56, 37 S. E. 102; Perry *v.* State, 110 Ga. 234, 36 S. E. 781; Joiner *v.* State, 105 Ga. 646, 31 S. E. 556.

Idaho.— State *v.* Alcorn, 7 Ida. 599, 64 Pac. 1014.

Illinois.— Crowell *v.* People, 190 Ill. 508, 60 N. E. 872; Moore *v.* People, 190 Ill. 331, 60 N. E. 535.

Indiana.— Stewart *v.* State, 111 Ind. 554, 13 N. E. 59.

Iowa.— State *v.* Henderson, 84 Iowa 161, 50 N. W. 758.

Kentucky.— Philpot *v.* Com., 69 S. W. 959, 24 Ky. L. Rep. 757; Bailey *v.* Com., 58 S. W. 425, 22 Ky. L. Rep. 512.

Louisiana.— State *v.* Trivas, 32 La. Ann. 1086, 36 Am. Rep. 293.

Maryland.— Hechter *v.* State, 94 Md. 429, 50 Atl. 1041, 56 L. R. A. 457.

Minnesota.— State *v.* Grear, 29 Minn. 221, 13 N. W. 140.

Missouri.— State *v.* Ashcraft, 170 Mo. 409, 70 S. W. 898; State *v.* Hyland, 144 Mo. 302, 46 S. W. 195; State *v.* Donnelly, 130 Mo. 642, 32 S. W. 1124; State *v.* Bruder, 35 Mo. App. 475.

Nevada.— State *v.* Raymond, 11 Nev. 98.

New York.— People *v.* Noonan, 14 N. Y. Suppl. 519.

North Carolina.— State *v.* Hunt, 128 N. C. 584, 38 S. E. 473.

North Dakota.— State *v.* Montgomery, 9 N. D. 405, 83 N. W. 873.

Oregon.— State *v.* Sally, 41 Oreg. 366, 70 Pac. 396; State *v.* Porter, 32 Oreg. 135, 49 Pac. 964.

Pennsylvania.— Com. *v.* Wireback, 190 Pa. St. 138, 42 Atl. 542, 70 Am. St. Rep. 625.

South Carolina.— State *v.* Moorman, 27 S. C. 22, 3 S. E. 621; State *v.* Slack, 1 Bailey 330.

Tennessee.— Hannum *v.* State, 90 Tenn. 647, 18 S. W. 269.

Texas.— Winfield *v.* State, (Cr. App. 1903) 72 S. W. 182; Boren *v.* State, 32 Tex. Cr. 637, 25 S. W. 775; Loggins *v.* State, 32 Tex. Cr. 364, 24 S. W. 512.

Wyoming.— Ross *v.* State, 8 Wyo. 351, 57 Pac. 924.

See 15 Cent. Dig. tit. "Criminal Law," § 3160.

Illustrations.— An instruction which requires the state to prove more than the law requires (State *v.* Chingren, 105 Iowa 169, 74 N. W. 946; State *v.* Grant, 86 Iowa 216, 53 N. W. 120; Hopkins *v.* Com., 3 Bush (Ky.) 480; State *v.* O'Gorman, 68 Mo. 179; Tuttle *v.* State, 41 Tex. Cr. 96, 51 S. W. 911; Blunt *v.* State, 9 Tex. App. 234) or which authorizes a conviction of a lower grade of crime than that charged in the indictment (Hodges *v.* State, 95 Ga. 497, 20 S. E. 272; State *v.* Buchler, 103 Mo. 203, 15 S. W. 331; State *v.* Alston, 113 N. C. 666, 18 S. E. 692; Eredia *v.* State, (Tex. Cr. App. 1901) 65 S. W. 188; Hawthorne *v.* State, 28 Tex. App. 212, 12 S. W. 603; Johnson *v.* State, 5 Tex. App. 423) is harmless.

3. People *v.* Cox, 76 Cal. 281, 18 Pac. 332; Austin *v.* Com., 4 Ky. L. Rep. 29; Com. *v.* Barry, 11 Allen (Mass.) 263; Leonardo *v.* Territory, 1 N. M. 291.

probable that the jury may have adopted the erroneous rule,[4] even though the evidence justifies a conviction.[5] But slight inconsistencies or contradictions in a charge which is otherwise correct are usually harmless.[6] Defendant cannot complain that charges given at his own request are contradictory.[7]

(III) *Abstract Instructions.* An abstract instruction which correctly states the law and which does not mislead the jury or prejudice the accused, if error, is harmless.[8] As the instruction has no application to any evidence in the case it is not presumed to be prejudicial.[9] If, however, an instruction is misleading it is reversible, although correct as an abstract proposition.[10]

(IV) *As to Punishment.* An erroneous instruction as to the punishment is harmless where the jury have no power to fix the punishment,[11] where they disregard the instruction and assess the lowest penalty under the statute,[12] where

4. *California.*— People *v.* Higgins, (1886) 12 Pac. 301; People *v.* Campbell, 30 Cal. 312.

Connecticut.— State *v.* Yanz, 74 Conn. 177, 50 Atl. 37, 92 Am. St. Rep. 205.

Iowa.— State *v.* Hartzell, 58 Iowa 520, 12 N. W. 557.

Missouri.— State *v.* Simms, 68 Mo. 305.

Montana.— State *v.* Rolla, 21 Mont. 582, 55 Pac. 523.

See 15 Cent. Dig. tit. "Criminal Law," § 3157.

5. People *v.* Valencia, 43 Cal. 552.

6. *California.*— People *v.* De Graaff, 127 Cal. 676, 60 Pac. 429.

Indiana.— Musser *v.* State, 157 Ind. 423, 61 N. E. 1.

Louisiana.— State *v.* Moffatt, 20 Mont. 371, 51 Pac. 823.

Michigan.— People *v.* Dudley, (1902) 90 N. W. 1058.

New York.— People *v.* Fletcher, 44 N. Y. App. Div. 199, 60 N. Y. Suppl. 777, 14 N. Y. Cr. 328.

Utah.— State *v.* Williamson, 22 Utah 248, 62 Pac. 1022, 83 Am. St. Rep. 780.

See 15 Cent. Dig. tit. "Criminal Law," § 3157.

Contradictions between the charges for the prosecution and for the accused are harmless where the former are correct and the latter favorable to accused. Carroll *v.* People, 136 Ill. 456, 27 N. E. 18.

7. State *v.* Branton, 33 Oreg. 533, 56 Pac. 267. See *supra*, XIV, G, 24, e.

8. *Alabama.*— Bonner *v.* State, 97 Ala. 47, 12 So. 408.

Arkansas.— Hellems *v.* State, 22 Ark. 207.

California.— People *v.* Brown, 130 Cal. 591, 62 Pac. 1072; People *v.* Flannelly, 128 Cal. 83, 60 Pac. 670.

Connecticut.— State *v.* Kallaher, 70 Conn. 398, 39 Atl. 606, 66 Am. St. Rep. 116.

Georgia.— Arnheiter *v.* State, 115 Ga. 572, 41 S. E. 989, 58 L. R. A. 392; Knight *v.* State, 114 Ga. 48, 39 S. E. 928, 88 Am. St. Rep. 17; Robinson *v.* State, 82 Ga. 535, 9 S. E. 528.

Illinois.— Moore *v.* People, 190 Ill. 331, 60 N. E. 535; Pate *v.* People, 8 Ill. 644; Moore *v.* People, 92 Ill. App. 137.

Kansas.— State *v.* Keys, 53 Kan. 674, 37 Pac. 167.

Kentucky.— Justice *v.* Com., 46 S. W. 499, 20 Ky. L. Rep. 386.

Louisiana.— State *v.* Turner, 35 La. Ann. 1103; State *v.* Johnson, 33 La. Ann. 889.

Maine.— State *v.* Clair, 84 Me. 248, 24 Atl. 843.

Minnesota.— State *v.* Shippey, 10 Minn. 223, 88 Am. Dec. 70.

Missouri.— State *v.* King, 111 Mo. 576, 20 S. W. 299; State *v.* Snell, 78 Mo. 240.

North Carolina.— State *v.* Bost, 125 N. C. 707, 34 S. E. 650.

Oklahoma.— Hodge *v.* Territory, 12 Okla. 108, 69 Pac. 1077.

South Carolina.— State *v.* Wallace, 44 S. C. 357, 22 S. E. 411.

Tennessee.— Rexford *v.* Pulley, 4 Baxt. 364.

Texas.— McKinney *v.* State, 8 Tex. App. 626.

See 15 Cent. Dig. tit. "Criminal Law," § 3159.

9. *Arkansas.*— McFalls *v.* State, 66 Ark. 16, 48 S. W. 492.

California.— People *v.* Mathever, 132 Cal. 326, 64 Pac. 481; People *v.* Dole, (1898) 51 Pac. 945; People *v.* Tucker, 117 Cal. 229, 49 Pac. 134; People *v.* Walsh, 43 Cal. 447; People *v.* March, 6 Cal. 543.

Indiana.— Shields *v.* State, 149 Ind. 395, 49 N. E. 351.

Mississippi.— Rodgers *v.* State, (1897) 21 So. 130.

New York.— Shorter *v.* People, 2 N. Y. 193, 51 Am. Dec. 286.

Ohio.— Stewart *v.* State, 1 Ohio St. 66.

Tennessee.— Wilson *v.* State, 3 Heisk. 278; Steinwehr *v.* State, 5 Sneed 586.

Texas.— Frazier *v.* State, (Cr. App. 1901) 64 S. W. 934; Benson *v.* State, (Cr. App. 1898) 44 S. W. 168; Tucker *v.* State, (Cr. App. 1897) 43 S. W. 106.

Washington.— Yelm Jim *v.* Territory, 1 Wash. Terr. 63.

See 15 Cent. Dig. tit. "Criminal Law," § 3159.

10. Coughlin *v.* People, 18 Ill. 266, 68 Am. Dec. 541; Lowry *v.* Com., 63 S. W. 977, 23 Ky. L. Rep. 1240; Allen *v.* U. S., 150 U. S. 551, 14 S. Ct. 196, 37 L. ed. 1179.

11. Davis *v.* State, 152 Ind. 145, 52 N. E. 754; Topeka *v.* Raynor, 8 Kan. App. 279, 55 Pac. 509.

12. Ballentine *v.* State, 48 Ark. 45, 2 S. W. 340; State *v.* Gann, 72 Mo. 374; Morton *v.* State, 91 Tenn. 437, 19 S. W. 225.

the court reduces the punishment to the minimum,[13] or where the jury do not act on the instructions but leave it to the court to fix the punishment, and the court imposes the proper penalty.[14]

(v) *Cure of Error*—(a) *By Subsequent Instructions.* An erroneous instruction on a material point is not cured by a subsequent correct instruction on that point if the jury are left in doubt thereby which of the two is correct,[15] but an instruction not fully stating the law may be cured by a subsequent instruction which completes it.[16]

(b) *By Verdict.* An erroneous instruction is harmless where defendant is acquitted of the crime to which it is applicable.[17] If he is acquitted of a lower degree of crime and convicted of a higher, error in instructing as to the former is harmless,[18] and error in instructions as to a higher degree of the crime is harmless where he is convicted of the lower degree.[19]

An instruction that the jury may assess a greater punishment than is allowed by law is harmless when they assess the minimum. State *v.* Burr, 81 Mo. 108.

An instruction as to the punishment which is more favorable to the accused than he has a right to expect, if error, is generally harmless. Stewart *v.* State, 111 Ind. 554, 13 N. E. 59; Logsden *v.* Com., 5 S. W. 393, 9 Ky. L. Rep. 431; Creech *v.* Com., 5 Ky. L. Rep. 860.

In Texas, where the code requires that the law applicable to the penalty shall be charged, any error in charging the jury as to the penalty, although favorable to the accused, is reversible error, which is not cured by the assessment of the legal penalty. Hargrove *v.* State, (Cr. App. 1895) 30 S. W. 801; Gardenshire *v.* State, 18 Tex. App. 565; Cohen *v.* State, 11 Tex. App. 337; Myers *v.* State, 9 Tex. App. 157; Bouldin *v.* State, 8 Tex. App. 624; Jones *v.* State, 7 Tex. App. 338; Allen *v.* State, 1 Tex. App. 514. But it has been held that the error may be cured by the imposition of the minimum penalty by the jury. Parker *v.* State, 43 Tex. Cr. 526, 67 S. W. 121; Zion *v.* State, (Cr. App. 1901) 61 S. W. 306; Stevens *v.* State, (Cr. App. 1897) 43 S. W. 102; Green *v.* State, 32 Tex. Cr. 298, 22 S. W. 1094; Champ *v.* State, 32 Tex. Cr. 87, 22 S. W. 678. But see Davis *v.* State, 6 Tex. App. 133.

13. State *v.* Harl, 137 Mo. 252, 38 S. W. 919; State *v.* Tull, 119 Mo. 421, 24 S. W. 1010.

14. State *v.* Wheeler, 108 Mo. 658, 18 S. W. 924.

15. Ballard *v.* State, 19 Nebr. 609, 28 N. W. 271.

16. Williams *v.* State, 113 Ga. 704, 39 S. E. 294; Wait *v.* Com., 69 S. W. 697, 24 Ky. L. Rep. 604; Butler *v.* State, 102 Wis. 364, 78 N. W. 590.

Curing errors by subsequent instructions see *supra,* XIV, G, 28, b.

17. *California.*— People *v.* Wallace, 101 Cal. 281, 35 Pac. 862.

Kentucky.— Com. *v.* Montedonico, 4 Ky. L. Rep. 993.

Missouri.— State *v.* Pitts, 156 Mo. 247, 56 S. W. 887; State *v.* Dunn, 80 Mo. 681.

Tennessee.— Parham *v.* State, 10 Lea 498.

Texas.— Polin *v.* State, (Cr. App. 1901) 65 S. W. 183; Rosson *v.* State, 37 Tex. Cr. 87, 38 S. W. 788; Tigerina *v.* State, 35 Tex. Cr. 302, 33 S. W. 353.

See 15 Cent. Dig. tit. "Criminal Law," § 3161.

An omission to charge on the intent is harmless, where, although the accused was indicted for assault with intent to kill, he was convicted of assault with a deadly weapon. State *v.* Lavery, 35 Oreg. 402, 58 Pac. 107.

18. *California.*— People *v.* Riley, 65 Cal. 107, 3 Pac. 413.

Georgia.— McTyier *v.* State, 91 Ga. 254, 18 S. E. 140.

Illinois.— Quinn *v.* People, 123 Ill. 333, 15 N. E. 46.

Indiana.— Hart *v.* State, 149 Ind. 585, 49 N. E. 580.

Kansas.— State *v.* Potter, 15 Kan. 302; State *v.* Dickson, 6 Kan. 209.

Missouri.— State *v.* Glahn, 97 Mo. 679, 11 S. W. 260.

Tennessee.— Tarvers *v.* State, 90 Tenn. 485, 16 S. W. 1041.

See 15 Cent. Dig. tit. "Criminal Law," § 3161.

19. *California.*— People *v.* Boling, 83 Cal. 380, 23 Pac. 421.

Colorado.— Mackey *v.* People, 2 Colo. 13.

Florida.— Mitchell *v.* State, 43 Fla. 584, 31 So. 242.

Georgia.— Crawford *v.* State, 92 Ga. 481, 17 S. E. 906.

Indiana.— Long *v.* State, 95 Ind. 481; Rollins *v.* State, 62 Ind. 46.

Iowa.— State *v.* Winter, 72 Iowa 627, 34 N. W. 475.

Kentucky.— Henderson *v.* Com., 7 Ky. L. Rep. 745.

Missouri.— State *v.* Gates, 130 Mo. 351, 32 S. W. 971; State *v.* Stockwell, 106 Mo. 36, 16 S. W. 888; State *v.* Wilson, 98 Mo. 440, 11 S. W. 985; State *v.* Kelly, 85 Mo. 143.

Nebraska.— Williams *v.* State, 60 Nebr. 526, 83 N. W. 681.

North Carolina.— State *v.* Hairston, 121 N. C. 579, 28 S. E. 492.

South Carolina.— State *v.* Richardson, 47 S. C. 18, 24 S. E. 1028.

Texas.— McCarty *v.* State, (Cr. App. 1900) 58 S. W. 77; Rutledge *v.* State, Cr. App. 1895) 33 S. W. 347; Blackwell *v.* State, 33 Tex. Cr. 278, 26 S. W. 397, 32 S. W. 128;

(VI) *Failure or Refusal to Instruct* — (A) *In General.* Error in failing or refusing to give an instruction is harmless and no ground for reversal, where defendant was not prejudiced thereby.[20] Refusal or omission to instruct on any particular point or on any particular rule of law is harmless if from the evidence or from the verdict rendered upon it it is clear that the accused was not prejudiced.[21] A refusal to give instructions which are tendered as a whole is harmless, unless each of them was correct and proper.[22]

(B) *Cure of Error by Verdict or Determination.* A refusal to instruct on request is harmless where the jury find a state of facts to which the instruction would not have been applicable,[23] or from which it appears that the accused could not have been prejudiced by the refusal.[24] Where defendant is convicted

Stephenson *v.* State, (Cr. App. 1894) 24 S. W. 645.

Virginia.— Whitlock *v.* Com., 89 Va. 337, 15 S. E. 893.

Contra, Mitchell *v.* State, 60 Ala. 26.

See 15 Cent. Dig. tit. "Criminal Law," § 3161.

A charge on malice in a prosecution for murder is harmless where the accused is convicted of manslaughter. Colvin *v.* Com., 60 S. W. 701, 22 Ky. L. Rep. 1407; State *v.* Stuckey, 56 S. C. 576, 35 S. E. 263; Flynn *v.* State, 97 Wis. 44, 72 N. W. 373. See also Homicide.

Where one is indicted as accessary and as principal in the second degree, an instruction as to accessaries is harmless error where defendant is convicted as a principal. Williams *v.* State, 69 Ga. 11.

Error as to the effect a recommendation to mercy would have on the sentence is harmless, where the verdict was returned with such recommendation. State *v.* Haddon, 49 S. C. 308, 27 S. E. 194.

20. Errors assigned as to refusal of instructions will not be considered if it appears that the jury were otherwise properly instructed. Mabry *v.* State, 71 Miss. 716, 14 So. 267. And generally where it appears from the evidence that defendant had a fair trial a refusal to instruct will be harmless unless prejudice is actually shown.

California.—People *v.* Hubert, 119 Cal. 216, 51 Pac. 329, 63 Am. St. Rep. 72.

Illinois.— Lyman *v.* People, 198 Ill. 544, 64 N. E. 974.

Iowa.— State *v.* Helvin, 65 Iowa 289, 21 N. W. 645.

Kansas.— Campbell *v.* State, 3 Kan. 488.

Kentucky.— Phelps *v.* Com., 32 S. W. 470, 17 Ky. L. Rep. 706; Poston *v.* Com., 6 Ky. L. Rep. 221.

Maine.— State *v.* Mayberry, 48 Me. 218.

South Carolina.— State *v.* Stuckey, 56 S. C. 576, 35 S. E. 263.

Texas.— Brown *v.* State, (Cr. App. 1898) 43 S. W. 986.

United States.— Rieger *v.* U. S., 107 Fed. 916, 47 C. C. A. 61.

See 15 Cent. Dig. tit. "Criminal Law," § 3164.

Under a statute providing that a conviction must not be reversed because of error if the court is satisfied no injury resulted therefrom, the court must be satisfied, in order to hold that the refusal of an instruction is harmless, that the verdict would not have been different had it been given. Dennis *v.* State, 118 Ala. 72, 23 So. 1002.

Necessity for requests for instructions see *supra*, XIV, H, 1.

21. *Illinois.*— Sykes *v.* People, 127 Ill. 117, 19 N. E. 705, 2 L. R. A. 461.

Iowa.— State *v.* Tweedy, 11 Iowa 350.

Mississippi.— Fleming *v.* State, 60 Miss. 434.

Missouri.— State *v.* Kolb, 48 Mo. App. 269.

Nebraska.— Pjarrou *v.* State, 47 Nebr. 294, 66 N. W. 422.

Tennessee.— Ford *v.* State, 101 Tenn. 454, 47 S. W. 703.

Texas.— Gentry *v.* State, (Cr. App. 1892) 20 S. W. 551; Massengale *v.* State, 24 Tex. App. 181, 6 S. W. 35.

Vermont.— State *v.* Hanlon, 62 Vt. 334, 19 Atl. 773.

Washington.— State *v.* Douette, 31 Wash. 6, 71 Pac. 556.

See 15 Cent. Dig. tit. "Criminal Law," §§ 3164, 3165.

Illustrations.— A refusal to instruct on reasonable doubt, or on the credibility of witnesses, is harmless where on the evidence there can be no possible doubt of defendant's guilt. McGuire *v.* State, 37 Miss. 369; State *v.* Cunningham, 130 Mo. 507, 32 S. W. 970. Where a fuller charge than that which was given could not have done defendant any good a refusal to give it is harmless. Armstrong *v.* State, 2 Lea (Tenn.) 190; Cox *v.* State, 41 Tex. 1. And where the evidence abundantly establishes the guilt of the accused, a refusal to instruct on the presumption of innocence is harmless. State *v.* Kennedy, 154 Mo. 268, 55 S. W. 293. See also Lyman *v.* People, 198 Ill. 544, 64 N. E. 974.

Failure to charge on the purpose of evidence.— Cox *v.* Com., 69 S. W. 799, 24 Ky. L. Rep. 680.

Particular points on which instructions are required see, generally, *supra*, XIV, G.

22. Horn *v.* State, 98 Ala. 23, 13 So. 329; Davis *v.* State, 51 Nebr. 301, 70 N. W. 984.

23. Baker *v.* State, 58 Ark. 513, 25 S. W. 603; State *v.* Hall, 97 Iowa 400, 66 N. W. 725; Clark *v.* State, 27 Tex. App. 405, 11 S. W. 374.

24. People *v.* Leong Yune Gun, 77 Cal. 636, 20 Pac. 27; People *v.* Frindel, 58 Hun (N. Y.)

of a lower grade of the offense, refusal of instructions as to the higher grade is harmless.[25]

(VII) *Modification of Requested Instructions.* The action of the court in modifying a requested instruction so as to make it correctly state the law is harmless, as no error results to the accused thereby.[26]

(VIII) *Signing and Filing.* A failure to file instructions given,[27] or for the judge to sign them, as required by statute,[28] is harmless, unless it clearly appears that the statute is mandatory.[29]

g. Conduct and Deliberations of Jury. Slight irregularities on the part of jurors or of the court in dealing with them,[30] such as communications of jurors with outsiders,[31] the action of the officer in communicating with the jury and their listening to what he has to say,[32] the separation of the jury, with or without the consent of the court,[33] or the use of intoxicating liquors by the jury during the trial[34] may constitute harmless error only, where it appears from the circumstances that the accused was not in fact prejudiced. But the presence in the jury room and the reading by the jury of documentary evidence unfavorable to the accused is usually prejudicial error, unless by a timely instruction they are told to exclude everything they have read from their consideration.[35]

h. Verdict, Judgment, and Sentence — (I) *Verdict.* Irregularities in the

482, 12 N. Y. Suppl. 498; Habel *v.* State, 28 Tex. App. 588, 13 S. W. 1001.

25. *California.*— People *v.* Nichol, 34 Cal. 211.

Georgia.— Gant *v.* State, 115 Ga. 205, 41 S. E. 698.

Iowa.— State *v.* Castello, 62 Iowa 404, 17 N. W. 605.

Minnesota.— State *v.* Brown, 12 Minn. 538.

Missouri.— State *v.* Grote, 109 Mo. 345, 19 S. W. 93.

New York.— Myer *v.* People, 8 Hun 528.

North Carolina.— State *v.* McCourry, 128 N. C. 594, 38 S. E. 883.

South Carolina.— State *v.* Smith, (1900) 37 S. E. 133; State *v.* Richardson, 47 S. C. 18, 24 S. E. 1028.

Wisconsin.— Jaekson *v.* State, 91 Wis. 253, 64 N. W. 838.

See 15 Cent. Dig. tit. "Criminal Law," § 3166.

It is harmless error to refuse to charge on a less crime than that alleged in the indictment, where the accused is convicted of the less crime. Morton *v.* State, (Tex. Cr. App. 1902) 70 S. W. 93; Johnson *v.* State, (Tex. Cr. App. 1896) 35 S. W. 387.

26. People *v.* Barthleman, 120 Cal. 7, 52 Pac. 112; Sample *v.* State, 104 Ind. 289, 4 N. E. 40; Tracey *v.* State, 46 Nebr. 361, 64 N. W. 1069; McCoy *v.* State, 27 Tex. App. 415, 11 S. W. 454.

Modification of requested instructions see *supra*, XIV, H, 3, e.

27. People *v.* Robinson, 17 Cal. 363; People *v.* Connor, 17 Cal. 354.

28. State *v.* Stanley, 48 Iowa 221.

29. Granger *v.* State, 11 Tex. App. 454; Hill *v.* State, 4 Tex. App. 559.

30. *California.*— People *v.* Bush, 68 Cal. 623, 10 Pac. 169.

Iowa.— State *v.* Baughman, 111 Iowa 71, 82 N. W. 452; State *v.* Craig, 78 Iowa 637, 43 N. W. 462.

Kansas.— State *v.* Peterson, 38 Kan. 204, 16 Pac. 263; State *v.* Dickson, 6 Kan. 209.

Louisiana.— State *v.* Johnson, 41 La. Ann. 1076, 6 So. 802.

New Jersey.— Titus *v.* State, 49 N. J. L. 36, 7 Atl. 621.

New York.— People *v.* Druse, 5 N. Y. Cr. 10.

Texas.— Camp *v.* State, (Cr. App. 1900) 57 S. W. 96; Willis *v.* State, 24 Tex. App. 586, 6 S. W. 857.

See 15 Cent. Dig. tit. "Criminal Law," § 3170 *et seq.* And see *supra*, XIV, J, 4.

31. Hilton *v.* Com., 16 S. W. 826, 13 Ky. L. Rep. 158; Cartwright *v.* State, 12 Lea (Tenn.) 620; Doyle *v.* U. S., 10 Fed. 269, 11 Biss. 100.

32. State *v.* Wart, 51 Iowa 587, 2 N. W. 405.

33. *Illinois.*— Wilhelm *v.* People, 72 Ill. 468 [*distinguishing* Lewis *v.* People, 44 Ill. 452; McIntyre *v.* People, 38 Ill. 514].

Indiana.— Masterson *v.* State, 144 Ind. 240, 43 N. E. 138.

Louisiana.— State *v.* Veillon, 105 La. 411, 29 So. 883.

Missouri.— State *v.* Murray, 126 Mo. 611, 29 S. W. 700; State *v.* Payton, 90 Mo. 220, 2 S. W. 394.

Nebraska.— Caw *v.* People, 3 Nebr. 357.

West Virginia.— State *v.* Cotts, 49 W. Va. 615, 39 S. E. 605, 55 L. R. A. 176.

See 15 Cent. Dig. tit. "Criminal Law," § 3174.

Contra.— State *v.* Cotts, 49 W. Va. 615, 39 S. E. 605, 55 L. R. A. 176.

34. People *v.* Sansome, 98 Cal. 235, 33 Pac. 202; People *v.* Deegan, 88 Cal. 602, 26 Pac. 500; State *v.* Corcoran, 7 Ida. 220, 61 Pac. 1034; State *v.* Reed, 3 Ida. 754, 35 Pac. 706. See also *supra*, XIV, J, 4, b; XV, A, 2, l, (IV), (G).

35. Phillips *v.* State, 62 Ark. 119, 34 S. W. 539; State *v.* Bradley, 6 La. Ann. 554. And see *supra*, XIV, J, 5.

Where a statute permits the jury to take with them the pleadings and all papers and evidence, permitting them to take the indict-

reception[36] or in the language[37] of the verdict may be harmless where it appears that the verdict is justified by the evidence and the instructions.

(II) *JUDGMENT.* Delay in rendering judgment[38] or the rendition of a judgment upon a verdict which was irregularly rendered[39] is not necessarily reversible error. And while a judgment which imposes an illegal or excessive punishment will be reversed,[40] an exercise of the discretion, either of the court or of the jury in fixing the punishment, is harmless where it does not exceed the statutory limits.[41]

(III) *SENTENCE.* Slight errors in and departures from the statutory mode of pronouncing sentence are usually harmless if the accused be thereby deprived of no substantial right.[42] So the suspension of sentence being usually made on the application of the accused, and, if erroneous at all, being favorable to him, is harmless.[43]

(IV) *ERROR FAVORABLE TO DEFENDANT.* An error by the court or in the exercise of discretion by court or jury in fixing the punishment which is favorable to the accused,[44] or by which he receives no greater punishment than if it

ment on which is indorsed a prior jury's verdict of conviction is harmless. Cargill *v.* Com., 93 Ky. 578, 20 S. W. 782, 14 Ky. L. Rep. 517; Herrold *v.* Com., 8 S. W. 194, 10 Ky. L. Rep. 70; Com. *v.* Wingate, 6 Gray (Mass.) 485.

36. *California.*—People *v.* Nichols, 62 Cal. 518.

Iowa.— State *v.* Vaughan, 29 Iowa 286.

Kansas.— State *v.* McAnulty, 26 Kan. 533.

Kentucky.— Rainey *v.* Com., 40 S. W. 682, 19 Ky. L. Rep. 390.

Pennsylvania.— Com. *v.* Morrison, 193 Pa. St. 613, 44 Atl. 913.

Tennessee.— State *v.* Farrow, 8 Baxt. 571.

See 15 Cent. Dig. tit. "Criminal Law," § 3179 *et seq.*

37. An indefinite verdict of guilty on two counts for dissimilar crimes is cured by a sentence imposing the minimum punishment which could be rendered under the statute. Vives *v.* U. S., 92 Fed. 355, 34 C. C. A. 403. So a failure of the jury to pass upon a plea of former acquittal, in the absence of any proof to support it (Robinson *v.* State, 23 Tex. App. 315, 4 S. W. 904), or the jury's finding of the value of property stolen to be below its real value, being favorable to the accused (Gettinger *v.* State, 13 Nebr. 308, 14 N. W. 403), is harmless.

38. State *v.* Ray, 50 Iowa 520.

39. O'Bryan *v.* State, 48 Ark. 42, 2 S. W. 339, where the verdict was justified by the evidence, and the court immediately on discovering the irregularity caused it to be corrected.

An error in describing the offense of which defendant is adjudged guilty is harmless if the record otherwise furnishes him complete protection against another prosecution for the same offense. People *v.* Terrill, 133 Cal. 120, 65 Pac. 303.

40. State *v.* Thorne, 81 N. C. 555; White *v.* Com., 3 Brewst. (Pa.) 30.

41. McCulley *v.* State, 62 Ind. 428; People *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616. See also Irving *v.* People, 28 How. Pr. (N. Y.) 205.

The assessment of punishment in a verdict, reached by dividing the total number of years' punishment by twelve, does not affect the finding of guilt, and when prejudicial is cured by reducing the term of the assessed punishment to the lowest term provided by statute. Williams *v.* State, 66 Ark. 264, 50 S. W. 517.

The imposition of a penalty less than the maximum that might be inflicted under either of several counts of an indictment will not be set aside if any of the counts is found sufficient on appeal. Jewett *v.* U. S., 100 Fed. 832, 41 C. C. A. 88.

42. People *v.* Murback, 64 Cal. 369, 30 Pac. 608; State *v.* Stevens, 47 Iowa 276.

A defendant whose guilt is clearly established after trial cannot complain that his co-defendant who pleaded guilty received a shorter sentence than he did. Jones *v.* State, 14 Tex. App. 85.

The failure to ask him if he has anything to say why sentence should not be pronounced is harmless unless it appears that he is actually injured. Lillard *v.* State, 151 Ind. 322, 50 N. E. 383; State *v.* Bradley, 30 La. Ann. 326; Hildebrand *v.* People, 1 Hun (N. Y.) 19, 3 Thomps. & C. (N. Y.) 82.

43. Holly *v.* Com., 36 S. W. 532, 18 Ky. L. Rep. 441; Bird *v.* Cincinnati, 9 Ohio Dec. (Reprint) 301, 12 Cinc. L. Bul. 101; Pointer *v.* U. S., 151 U. S. 396, 14 S. Ct. 410, 38 L. ed. 208.

44. *Alabama.*— Ooton *v.* State, 5 Ala. 463; Covy *v.* State, 4 Port. 186.

Arkansas.— Bishop *v.* State, (1890) 14 S. W. 88.

Illinois.— McQuoid *v.* People, 8 Ill. 76.

Indiana.— Colip *v.* State, 153 Ind. 584, 55 N. E. 739, 74 Am. St. Rep. 322; Miller *v.* State, 149 Ind. 67, 49 N. E. 894, 40 L. R. A. 109; Nichols *v.* State, 127 Ind. 406, 26 N. E. 839; Hoskins *v.* State, 27 Ind. 470.

Kentucky.— Orme *v.* Com., 55 S. W. 195, 21 Ky. L. Rep. 1412.

Michigan.— People *v.* Rouse, 72 Mich. 59, 40 N. W. 57.

Montana.— State *v.* Towner, 26 Mont. 339, 67 Pac. 1004.

New York.— People *v.* Trainor, 57 N. Y. App. Div. 422, 68 N. Y. Suppl. 263, 15 N. Y. Cr. 333; People *v.* Bauer, 37 Hun 407.

had not been committed,[45] is harmless. Defendant, although subject to two distinct and independent penalties for the same crime, cannot allege as error that only one was imposed in the sentence.[46]

i. Proceedings After Judgment — (i) *In General.* Errors in proceedings after judgment cannot be reviewed in the absence of a statute permitting it.[47]

(ii) *Motion For New Trial or in Arrest of Judgment.* The refusal of the court to consider defendant's motion for a new trial, when made in time,[48] or to hear relevant evidence on the motion,[49] is reversible error, irrespective of the opinion of the appellate court as to the sufficiency of the ground for the motion. It is harmless error to deny a new trial for mere irregularities occurring on the trial[50] and not affecting any substantial right of the accused.[51] Irregularities and slight errors by the court in the proceedings on a motion for a new trial may be disregarded.[52]

H. Determination and Disposition of Appeal — **1. In General.** The appellate court will ordinarily decide and dispose of the case according to the

Ohio.— Brennan *v.* State, 11 Ohio Cir. Dec. 316.

Tennessee.— Wattingham *v.* State, 5 Sneed 64.

See 15 Cent. Dig. tit. "Criminal Law," § 3188.

45. Roberts *v.* State, 25 Ind. App. 366, 58 N. E. 203; Simmons *v.* U. S., Morr. (Iowa) 490; Herrold *v.* Com., 8 S. W. 194, 10 Ky. L. Rep. 70.

46. Dodge *v.* State, 24 N. J. L. 455; Kane *v.* People, 8 Wend. (N. Y.) 203.

Appellant cannot complain that he was convicted of a crime of a lower degree than that for which he was indicted, where the conviction was as favorable to him as the evidence would warrant. Strickland *v.* State, 98 Ga. 84, 25 S. E. 908; Allen *v.* Com., 12 S. W. 582, 11 Ky. L. Rep. 555; Tollett *v.* State, (Tex. Cr. App. 1900) 55 S. W. 335; Ross *v.* State (Tex. Cr. App. 1898) 45 S. W. 808.

The action of the jury in recommending defendant to the mercy of the court is harmless. Wall *v.* State, 69 Ga. 766.

The action of the judge in offering to mitigate the sentence, which offer was rejected by the accused, cannot be urged as error. Murphy *v.* State, 97 Ind. 579.

The imposition of a smaller fine than the minimum under the statute is not available to the accused as error. Harmison *v.* Lewistown, 153 Ill. 313, 38 N. E. 628, 46 Am. St. Rep. 893; Harrod *v.* Dinsmore, 127 Ind. 338, 26 N. E. 1072; State *v.* Evans, 23 La. Ann. 525.

47. Woodsides *v.* State, 2 How. (Miss.) 655; Roesel *v.* State, 62 N. J. L. 368, 41 Atl. 833. See also Humphreys *v.* State, (Tex. Cr. App. 1897) 39 S. W. 679.

Denial of application for leave to prove exceptions is harmless error where the court allowed the question excepted to but excluded the exception from the bill of exceptions. People *v.* Scott, 91 Cal. 563, 27 Pac. 930.

Error in requiring counsel for accused to point out specifically errors in the charge is harmless, where he afterward obtains from the court bills embodying his exceptions to the charge. Tucker *v.* State, 23 Tex. App. 512, 5 S. W. 180.

Refusal of time to prepare exceptions unless it appears that the accused was actually injured thereby is harmless error. Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153; Rosborough *v.* State, 21 Tex. App. 672, 1 S. W. 459.

Refusal of the court to certify that oral instructions were given is harmless, where they are made a part of the record by bill of exceptions. People *v.* Clark, 106 Cal. 32, 39 Pac. 53.

Refusal of the court to settle a bill of exceptions is harmless error where the ruling excepted to is not, under the statute, subject to review. State *v.* Crutchley, 19 Nev. 368, 12 Pac. 113.

On an appeal from an order requiring a prosecutor to pay costs errors on the trial cannot be reviewed. State *v.* Whitley, 123 N. C. 728, 31 S. E. 392.

48. Collier *v.* Com., 110 Ky. 516, 62 S. W. 4, 22 K. L. Rep. 1929.

49. State *v.* Hyland, 36 La. Ann. 87.

50. Jones *v.* State, 94 Ga. 73, 20 S. E. 249; People *v.* Baker, 27 N. Y. App. Div. 597, 50 N. Y. Suppl. 771; Mendiola *v.* State, 18 Tex. App. 462; State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224.

51. Huffman *v.* State, 21 Ind. App. 449, 52 N. E. 713, 69 Am. St. Rep. 368; Swang *v.* State, 2 Coldw. (Tenn.) 212, 88 Am. Dec. 593.

52. People *v.* Azoff, 105 Cal. 632, 39 Pac. 59; Cook *v.* State, 108 Ga. 770, 33 S. E. 632.

On motion for a new trial the amendment by the court of a controverting affidavit (Garcia *v.* State, (Tex. Cr. App. 1901) 63 S. W. 309), permitting irrelevant affidavits to be read (Chestnut *v.* State, 112 Ga. 366, 37 S. E. 384), passing remarks on the sufficiency of the evidence by the court (Alderman *v.* State, (Tex. Cr. App. 1893) 22 S. W. 1093 [*following* Rains *v.* State, 7 Tex. App. 588]), or permitting the jury to be examined as to whether or not they followed the charge of the court, and asking them on what they based their verdict of mitigating circumstances (Hannum *v.* State, 90 Tenn. 647, 18 S. W. 269) is harmless.

laws existing at the time of its own decision.[53] Where, pending an appeal, the appellant discovers new evidence, he may, it has been held, apply to the appellate court for leave to move in the trial court for a new trial on the new evidence.[54] So the appellate court may order that judgment be arrested, if it finds that defendant's objections to the sufficiency of the indictment were improperly overruled.[55] The validity of the opinion is not affected by the fact that it and the judgment are filed while the appellate court is not in session.[56]

2. AFFIRMANCE — a. On Questions Certified. Under a statute which authorizes an appellate court to render judgment in accordance with the opinion of the presiding judge, a simple affirmance is sufficient.[57]

b. Appeal Not Sufficiently Presented. As it is not the duty of the appellate court to hunt for errors, as a general rule where the appellant fails by bill of exceptions, assignment of error, or other record, and a proper brief, to properly present the appeal to the court, judgment may be affirmed.[58] If no brief be filed, and the appellate court is unable to discover error in the record, the judgment will be affirmed.[59] The same rule applies where there is no bill of exceptions.[60]

53. Keller *v.* State, 12 Md. 322, 71 Am. Dec. 596; Simpson *v.* State, 56 Miss. 297. And see APPEAL AND ERROR, 3 Cyc. 407.

54. If his affidavit shows a *prima facie* case the appeal may be suspended and the case remanded (State *v.* Sullivan, 41 S. C. 506, 19 S. E. 722; State *v.* Turner, (S. C. 1893) 17 S. E. 752; State *v.* Young, 35 S. C. 590, 14 S. E. 66), but if the appellate court is satisfied that the newly discovered evidence is cumulative (State *v.* Turner, 39 S. C. 414, 17 S. E. 888), or that it would not probably influence the result on a new trial (State *v.* Rhodes, 44 S. C. 325, 21 S. E. 807, 22 S. E. 306; State *v.* Ezzard, 41 S. C. 522, 19 S. E. 854), it may deny leave to move for a new trial.

55. Com. *v.* Collins, 2 Cush. (Mass.) 556. But judgment will not be arrested on the ground that the appellate court has no jurisdiction because the court below required defendant to give a recognizance not required by the law as a condition of an appeal, where the appellant complied with the requirement and had all the benefits and advantages of the appellate court. Com. *v.* Lynch, 14 Gray (Mass.) 383. It has been held, however, in the absence of statute, that motions in arrest of judgment and sentence cannot be filed in the appellate court, as such motions are exclusively for the trial court, and that the only jurisdiction which the appellate court has of such motions is where an appeal is taken from them. State *v.* Hodgson, 66 Vt. 134, 28 Atl. 1089.

56. State *v.* Levelle, 36 S. C. 600, 15 S. E. 380.

57. If, however, the judgment is reversed, all questions certified and determined should be specifically answered. U. S. *v.* Reese, 92 U. S. 214, 23 L. ed. 563.

58. *Alabama.*— Hunter *v.* State, 48 Ala. 272.

Florida.— Horn *v.* State, 40 Fla. 472, 24 So. 147.

Georgia.— Griffin *v.* State, 116 Ga. 562, 42 S. E. 752.

Iowa.— State *v.* Addison, (1895) 65 N. W. 309.

Kansas.— State *v.* Dorsey, 37 Kan. 226, 15 Pac. 240.

Kentucky.— Neely *v.* Com., 5 S. W. 310, 9 Ky. L. Rep. 381.

Louisiana.— State *v.* Joseph, 104 La. 560, 29 So. 278; State *v.* Jackson, 51 La. Ann. 693, 25 So. 399; State *v.* Williams, 37 La. Ann. 311; State *v.* Anderson, 35 La. Ann. 991; State *v.* Potter, 33 La. Ann. 795.

Missouri.— State *v.* Mansfield, 106 Mo. 110, 17 S. W. 290; State *v.* Sullivan, 19 Mo. App. 44.

North Carolina.— State *v.* Page, 116 N. C. 1016, 21 S. E. 401; State *v.* Whitmire, 112 N. C. 895, 17 S. E. 527; State *v.* Henry, 104 N. C. 914, 10 S. E. 488.

Tennessee.— Saffrans *v.* State, 2 Lea 149.

Texas.— Angel *v.* State, (Cr. App. 1896) 34 S. W. 945; Hall *v.* State, 33 Tex. Cr. 537, 28 S. W. 200; Rix *v.* State, (Cr. App. 1894) 28 S. W. 198; Jaimes *v.* State, (Cr. App. 1893) 24 S. W. 421; Clements *v.* State, (Cr. App. 1892) 20 S. W. 766.

Utah.— People *v.* Pettit, 5 Utah 241, 14 Pac. 337.

See 15 Cent. Dig. tit. "Criminal Law," §§ 3204, 3205.

59. *Alabama.*— Williams *v.* State, 98 Ala. 22, 12 So. 808.

California.— People *v.* Short, (1895) 41 Pac. 862; People *v.* Moran, (1892) 31 Pac. 853.

Illinois.— Burklow *v.* People, 89 Ill. 123.

Iowa.— State *v.* Tharp, 80 Iowa 770, 45 N. W. 757.

Louisiana.— State *v.* Johns, 49 La. Ann. 1250, 22 So. 328.

Missouri.— State *v.* Meyer, 13 Mo. App. 596.

Montana.— State *v.* Dakin, 15 Mont. 556, 39 Pac. 848; Territory *v.* Mooney, 8 Mont. 151, 19 Pac. 595.

See 15 Cent. Dig. tit. "Criminal Law," § 3204 *et seq.*

60. Cannon *v.* State, 13 Mo. 421; People *v.* Jugigo, 123 N. Y. 630, 25 N. E. 317; Close *v.* State, 30 Tex. 631; Duncan *v.* State, (Tex. Cr. App. 1894) 26 S. W. 212; Mendosa *v.* State, (Tex. Cr. App. 1894) 26 S. W. 61;

c. Frivolous Appeals or Appeals For Delay. If it is evident that the appeal was taken solely for delay, and particularly if the exceptions are frivolous, judgment will be affirmed.[61]

d. On the Merits. If the evidence appears amply sufficient to justify the conviction, and the instructions apparently state the law correctly, and there is nothing in the record which shows that the accused has been deprived of any substantial right, judgment must be affirmed.[62]

e. Where Reversal Would Prove Useless. Where, because appellant's imprisonment had expired before the appellate court had an opportunity to consider the appeal, a reversal would be of no benefit to him judgment may be affirmed.[63]

f. Affirmance in Part. The appellate court may reverse a judgment of a lower court as to part and affirm as to part, where the legal part is severable from that which is illegal.[64] So a judgment upon a joint indictment and trial may be reversed as to one and affirmed as to the other defendants.[65]

g. Equal Division of Court. Where the appellate judges are equally divided in opinion, the ruling or judgment of the court below stands affirmed.[66] A decision thus made is as final as though by a unanimous court and cannot be changed on a second appeal.[67]

h. Modification or Correction of Judgment and Sentence — (i) *In General.* In the absence of a statute permitting this to be done the appellate court has no power to amend or correct the judgment.[68] According to the modern practice,

Franks *v.* State, (Tex. Cr. App. 1894) 25 S. W. 784.

61. State *v.* Sinegal, 45 La. Ann. 287, 12 So. 351; State *v.* One Arm Jim, 20 Nev. 70, 15 Pac. 397; People *v.* Wood, 123 N. Y. 632, 25 N. E. 292.

62. *Iowa.*— State *v.* Johns, 70 Iowa 761, 30 N. W. 486; State *v.* Dumond, 57 Iowa 333, 10 N. W. 679.

Kansas.— State *v.* Schreiber, 41 Kan. 307, 21 Pac. 263.

Missouri.— State *v.* Camp, 130 Mo. 464, 32 S. W. 970.

Montana.— State *v.* Pugh, 16 Mont. 343, 40 Pac. 861.

Nebraska.— Redfield *v.* State, 39 Nebr. 192, 57 N. W. 986.

New York.— People *v.* Miller, 21 N. Y. Suppl. 388.

See 15 Cent. Dig. tit. "Criminal Law," § 3305.

Constitutionality of statute.— If on appeal it is apparent that the indictment was insufficient under the statute which defines and provides for punishing a crime, the appellate court will affirm the action of the lower court in quashing the indictment without inquiring into the constitutionality of the statute, although that point was raised in the court below. State *v.* Wright, 159 Ind. 394, 65 N. E. 190.

63. State *v.* Garrety, (Iowa 1902) 90 N. W. 76.

64. Taff *v.* State, 39 Conn. 82; State *v.* Kennedy, 88 Mo. 341; Syracuse, etc., Plank-Road *v.* People, 66 Barb. (N. Y.) 25; Montgomery *v.* State, 7 Ohio St. 107; Lougee *v.* State, 11 Ohio 68.

This rule is usually applied to errors in fixing the punishment. Thus, where the verdict erroneously added a fine to imprisonment, it was held that the verdict would be sustained as to the imprisonment and reversed as to the fine by directing the trial court to strike it out. Kennedy *v.* State, 62 Ind. 136.

65. Fletcher *v.* People, 52 Ill. 395; State *v.* Stair, 87 Mo. 268, 56 Am. Rep. 449; Moore *v.* State, 4 Tex. App. 127; Jones *v.* Com., 31 Gratt. (Va.) 836.

Where a severance is refused and both defendants are found guilty, but the record shows no evidence as to one, the judgment will be reversed as to him and affirmed as to his co-defendant. Wall *v.* State, 51 Miss. 396, 24 Am. Rep. 640. *Contra*, Isaacs *v.* State, 48 Miss. 234, where it was held that a joint judgment against several was not separable.

66. Hobby *v.* State, (Ga. 1901) 39 S. E. 949; Davis *v.* State, 110 Ga. 291, 34 S. E. 1015; Aiken *v.* State, 73 Ga. 812; Styles *v.* State, 28 Ga. 388; State *v.* Perkins, 53 N. H. 435; Walton *v.* State, 1 Ohio Dec. (Reprint) 32, 1 West. L. J. 256. See also Appeal and Error, 3 Cyc. 405, 406.

In England, where there is a division in the appellate court on a question of law, it is usual to direct a rehearing before the fifteen judges; but where the division is on the facts only, a majority of one opinion will determine the judgment of the court. Reg. *v.* Burrell, 9 Cox C. C. 368, L. & C. 354, 33 L. J. M. C. 54, 9 L. T. Rep. N. S. 426, 12 Wkly. Rep. 149.

67. Chahoon *v.* Com., 21 Gratt. (Va.) 822.

68. Fellinger *v.* People, 15 Abb. Pr. (N. Y.) 128, 24 How. Pr. (N. Y.) 341; Woodford *v.* State, 1 Ohio St. 427; Howell *v.* State, 1 Oreg. 241.

The appellate court has no power to correct a sentence which the law does not authorize and to impose the proper sentence, or to remand the case to the lower court for that purpose. It can only reverse the judgment for the error.

Arkansas.— Simpson *v.* State, 56 Ark. 8, 19 S. W. 99.

however, and under recent statutes, the appellate court may reform and correct defects in the judgment appealed from and affirm it as thus corrected.[69]

(II) *Reduction or Mitigation of Punishment*—(A) *In General.* The appellate court in affirming a conviction may modify the punishment imposed by the trial court by mitigating, reducing, or otherwise changing it so far as it exceeds the limits prescribed by the statute.[70] This rule applies to a fine[71] or a

Maryland.— McDonald *v.* State, 45 Md. 90; Watkins *v.* State, 14 Md. 412.

Massachusetts.— Christian *v.* Com., 5 Metc. 530; Shepherd *v.* Com., 2 Metc. 419.

Michigan.—Wilson *v.* People, 24 Mich. 410; Elliott *v.* People, 13 Mich. 365.

Mississippi.— Wharton *v.* State, 41 Miss. 680.

New York.— Ratzky *v.* People, 29 N. Y. 124.

Oregon.— Howell *v.* State, 1 Oreg. 241.

England.— Reg. *v.* Silversides, 3 Q. B. 406, 2 G. & D. 617, 6 Jur. 805, 11 L. J. M. C. 82, 43 E. C. L. 794; Rex *v.* Bourne, 7 A. & E. 58, 34 E. C. L. 55; Rex *v.* Ellis, 5 B. & C. 395, 5 L. J. M. C. O. S. 1, 11 E. C. L. 512; Holt *v.* Reg., 2 D. & L. 774, 9 Jur. 538, 14 L. J. Q. B. 98. But see Reg. *v.* Willis, L. R. 1 C. C. 363, 12 Cox C. C. 192, 41 L. J. M. C. 102, 26 L. T. Rep. N. S. 485, 20 Wkly. Rep. 632; Reg. *v.* Horn, 15 Cox C. C. 205, 47 J. P. 344, 48 L. T. Rep. N. S. 272.

Where the court fixes no term of imprisonment in its sentence there is no judgment which the appellate court can reverse, and it will remand the prisoner to the lower court to pronounce such sentence and judgment as is required by law. Wharton *v.* State, 41 Miss. 680.

69. *Alabama.*— Campbell *v.* State, 16 Ala. 144.

Louisiana.— State *v.* Gomer, 6 La. Ann. 311; State *v.* Turner, 6 La. Ann. 309.

Minnesota.— Mims *v.* State, 26 Minn. 494, 5 N. W. 369.

New Jersey.— Bindernagle *v.* State, 61 N. J. L. 259, 38 Atl. 973, 39 Atl. 360, 41 Atl. 109.

New York.— People *v.* Shaver, 55 N. Y. Suppl. 729.

Tennessee.— Griffin *v.* State, 109 Tenn. 17, 70 S. W. 61; State *v.* Steele, 3 Heisk. 135.

Texas.— Bullard *v.* State, (Cr. App. 1899) 50 S. W. 348 (construing Code Cr. Proc. art. 904); Reyna *v.* State, 26 Tex. App. 666, 14 S. W. 455; Lanham *v.* State, 7 Tex. App. 126.

Virginia.— Sledd *v.* Com., 19 Gratt. 813.

See 15 Cent. Dig. tit. "Criminal Law," § 3199.

A direction that the convict shall be put to labor as provided by the statute may be inserted by an amendment in the appellate court. Murphy *v.* State, 38 Ark. 514.

In New York by Cr. Code, § 543, the appellate court may correct a judgment and the sentence imposed by setting the latter aside and passing a new sentence. People *v.* Griffin, 27 Hun 595.

Under the Texas statute allowing the appellate court to reform and correct judgments in criminal cases, a judgment will be reformed so as to conform to the allegations of the indictment and to the findings in the verdict. Turner *v.* State, (Cr. App. 1901) 68 S. W. 511; Thomas *v.* State, 31 Tex. Cr. 82, 19 S. W. 901. A judgment finding defendant guilty of two crimes will be reformed so as to make it for one only, where the evidence does not sustain a conviction of the other. Swartz *v.* State, (App. 1892) 18 S. W. 415.

70. *Georgia.*— Hathcock *v.* State, 88 Ga. 91, 13 S. E. 959.

Michigan.— People *v.* Seller, 58 Mich. 327, 25 N. W. 304. But see Elliott *v.* People, 13 Mich. 365.

Mississippi.— Haynes *v.* State, (1898) 22 So. 871.

New York.— People *v.* Baldwin, 4 N. Y. Suppl. 608.

Pennsylvania.— Daniels *v.* Com., 7 Pa. St. 371; Drew *v.* Com., 1 Whart. 279.

Tennessee.— Griffin *v.* State, 109 Tenn. 17, 70 S. W. 61. But see McDougal *v.* State, 5 Baxt. 660. And *compare* Kelly *v.* State, 7 Baxt. (Tenn.) 323.

Texas.— Prince *v.* State, 44 Tex. 480; Thomas *v.* State, 31 Tex. Cr. 82, 19 S. W. 901; Reyna *v.* State, 26 Tex. App. 666, 14 S. W. 455; Hill *v.* State, 10 Tex. App. 673; Rivers *v.* State, 10 Tex. App. 177.

United States.— U. S. *v.* Wynn, 11 Fed. 57; Bates *v.* U. S., 10 Fed. 92, 10 Biss. 70.

See 15 Cent. Dig. tit. "Criminal Law," § 3195; and Appeal and Error, 3 Cyc. 424.

Contra.— State *v.* Child, 42 Kan. 611, 22 Pac. 721.

A right of accused.— The accused has an absolute right to be sentenced according to law, and where he has been deprived of this right by a higher sentence than is warranted by the testimony the appellate court must reduce it. Anderson *v.* State, 26 Nebr. 387, 41 N. W. 951.

No remand necessary.— This may be done without remanding the case. People *v.* Fick, 89 Cal. 144, 26 Pac. 759.

Sentence by appellate court.— Simpson *v.* State, 56 Ark. 8, 19 S. W. 99.

Under a statute permitting the appellate court to correct a sentence, whether it is short of or exceeds that established by law, it has no authority to correct a verdict in which the jury fixes the penalty and the judge imposes sentence for a greater penalty, although not in excess of the legal limits. Nemo *v.* Com., 2 Gratt. (Va.) 558.

71. State *v.* Shaw, 23 Iowa 316. And see *In re* Feeley, 12 Cush. (Mass.) 598, holding that the appellate court cannot impose a fine and imprisonment for an offense which the lower court can punish only by fine or imprisonment.

sentence to a term of imprisonment[72] in excess of that permitted by statute; to a fine rendered against defendants jointly;[73] to a sentence on a general verdict of guilty where one of several counts is unsustained by any evidence;[74] and to a premature sentence.[75]

(B) *Discretion of Court.* Under a statute giving the appellate court power to modify the penalty and reduce the punishment imposed by the court below, the appellate court must have some facts upon which to base its action.[76]

(III) *Increasing Punishment.* In a few cases it has been held that where by clerical mistake or otherwise the punishment inflicted by the sentence imposed falls short of that which is proper under the verdict and judgment entered, the appellate court may reform the sentence and direct the additional punishment to be imposed.[77]

(IV) *Fixing Date of Execution.* It seems that the appellate court on affirming the judgment in a capital case may if necessary appoint the day of execution.[78]

i. Affirmance Without Statement. The action of the trial court it seems may be affirmed without any statement of the reasons for the affirmance.[79]

j. Time to Move For Affirmance. The prosecution must promptly move for an affirmance claimed on the ground of failure to prosecute.[80]

k. Effect of Affirmance. After affirmance questions as to the sufficiency of the indictment and the jurisdiction of the trial court are *res adjudicata* and will not be considered on a subsequent appeal.[81]

72. *Alabama.*— Johnson *v.* State, 94 Ala. 35, 10 So. 667; Morrisette *v.* State, 77 Ala. 71; Miller *v.* State, 77 Ala. 41; Burch *v.* State, 55 Ala. 136.

Arkansas.— Simpson *v.* State, 56 Ark. 8, 19 S. W. 99; Brown *v.* State, 34 Ark. 232.

Pennsylvania.— Johnson *v.* Com., 24 Pa. St. 386.

South Dakota.— State *v.* Taylor, 7 S. D. 533, 64 N. W. 548.

Wisconsin.— Hogan *v.* State, 30 Wis. 428, 11 Am. Rep. 575.

See 15 Cent. Dig. tit. "Criminal Law," § 3196.

Contra.— *Ex p.* Page, 49 Mo. 291.

73. McLeod *v.* State, 35 Ala. 395.

74. State *v.* Bugbee, 22 Vt. 32.

Where accused is sentenced to two consecutive terms on two counts, the first of which is found insufficient on appeal, the judgment on the other will stand, and imprisonment thereunder shall commence at the beginning of the term under the first count. Blitz *v.* U. S., 153 U. S. 308, 14 S. Ct. 924, 38 L. ed. 725.

75. Cordova *v.* State, 6 Tex. App. 445.

76. State *v.* Baughman, 20 Iowa 497. If in its opinion there are mitigating circumstances the court may in its discretion reduce the punishment as excessive. State *v.* Moody, 50 Iowa 443; State *v.* Doering, 48 Iowa 650; State *v.* Thompson, 46 Iowa 699; State *v.* Hayden, 45 Iowa 11.

The record must clearly show that the punishment was excessive. State *v.* Wilmoth, 63 Iowa 380, 19 N. W. 249; State *v.* Wart, 51 Iowa 587, 2 N. W. 405. It will not reduce the penalty unless the record contains all the evidence. State *v.* Joaquin, 43 Iowa 131; State *v.* Harris, 36 Iowa 268.

77. Sword *v.* State, 5 Humphr. (Tenn.) 102; McDonald *v.* State, 14 Tex. App. 504. But see Territory *v.* Griego, 8 N. M. 133, 42 Pac. 81, holding that where the court sentenced a convicted murderer to the penitentiary for a term of years, when under the statute he should have been sentenced to death, the appellate court had no power to direct the trial court to enter a different judgment, although the accused was not thereby entitled to his discharge for such error.

Fine.— The same rule has been applied to a sentence imposing a fine. Robinson *v.* State, 24 Tex. App. 4, 5 S. W. 509.

78. Russell *v.* State, 33 Ala. 366; People *v.* Ferris, 32 How. Pr. (N. Y.) 411; Schwab *v.* Berggren, 143 U. S. 442, 12 S. Ct. 525, 36 L. ed. 218. See also People *v.* Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197. But see State *v.* Oscar, 13 La. Ann. 297.

79. Particularly is this true where no argument or statement of such reasons could illustrate any principle of law. Simons *v.* State, 52 Ga. 587.

80. It has been held that a motion at a term subsequent to that at which the appeal was taken is too late. Chaney *v.* State, 9 Ark. 129.

81. Smith *v.* Foster, 85 Iowa 705, 50 N. W. 220.

The reformed judgment is *res adjudicata* as to all questions arising on the record previous to the judgment and sentence. McDonald *v.* State, 80 Wis. 407, 50 N. W. 185.

On certiorari only such errors are considered as were ground for allowing the writ, and these must appear by the return. If the judgment returned is affirmed the stay arising from the issuance of the writ postpones its enforcement only from the time of suing out the writ to the return of the order of affirmance. The statute allowing certio-

l. Damages on Affirmance. A statute which provides that in criminal actions, where a judgment for a fine is suspended and subsequently is affirmed, damages shall be awarded against defendant is constitutional,[82] and under it the appellant is liable to damages where his appeal is dismissed.[83]

m. Resentence on Affirmance. The appellate court on an affirmance may properly pronounce the same sentence which has been pronounced in the court below.[84]

3. Reversal — a. In General. It may be laid down as a general rule that on a writ of error or appeal by defendant the appellate court will reverse a judgment on a verdict of guilty whenever it is made to appear that there has been an error prejudicial to him,[85] but not otherwise.[86] Judgment may be reversed where the public prosecuting officer or attorney-general admits error,[87] fails to controvert the claim of the appellant,[88] or to file a brief,[89] unless a statute expressly provides that reversal can only be had on an argument satisfying the appellate court that the judgment should be reversed.[90] On a writ of error by the state, however, the default of defendant in error will not entitle the prosecution to a reversal as a matter of course, but the court must decide the case as though he had appeared and argued it.[91] The fact that an agreement has been made whereby the case before the appellate court is to be a test case, and the parties in other cases are to abide the decision in it, does not invalidate the conviction or justify a reversal.[92]

b. Disagreement of Court as to Grounds For Reversal. If a majority of the court do not agree that error is shown judgment must be affirmed, but it is not necessary that they shall agree upon the same ground for reversal. Where the majority agree that the judgment is erroneous upon a point which may be assigned as error it will be reversed, although the majority may not agree as to the particular grounds upon which their decision is based.[93]

c. Sentence in Appellate Court. The common-law rule preventing any action by the appellate court on reversal, except to discharge the prisoner,[94] has been modified in many states by statutes which substantially confer upon appellate courts power to render such judgment on reversal as should have been given in the trial court.[95] Although the appellate court may have no express power to

rari contemplates no new judgment, and the judgment below stands as the sole judgment, the stay not affecting it otherwise than extending the time of its enforcement. People *v.* Hobson, 48 Mich. 27, 11 N. W. 771.

82. Wellington *v.* State, 52 Ark. 447, 13 S. W. 134.

83. Evans *v.* Com., 3 Bush (Ky.) 161.

84. Moett *v.* People, 85 N. Y. 373.

85. See Appeal and Error, 3 Cyc. 441.

86. *Georgia.*—Groves *v.* State, 116 Ga. 607, 42 S. E. 1014.

Kentucky.— Arnold *v.* Com., 55 S. W. 894, 21 Ky. L. Rep. 1566.

Louisiana.— State *v.* Kennedy, 11 La. Ann. 479.

Missouri.— State *v.* Shackelford, 148 Mo. 493, 50 S. W. 105.

Texas. — O'Bar *v.* State, 32 Tex. 465; Pierce *v.* State, 14 Tex. App. 365.

Harmless error see *supra*, XVII, G, 6.

Doubt as to fact.— Where the only contention of defendant is that the record does not disclose the fact of his presence at the trial, the appellate court, having a doubt as to this, should not reverse but should endeavor by proper proceedings to ascertain the actual fact. State *v.* White, 52 La. Ann. 206, 26 So. 849.

On certiorari to bring up the record of a justice his decision will not be reversed unless the return shows error. People *v.* Etter, 72 Mich. 175, 40 N. W. 241.

87. State *v.* Bailey, 85 Iowa 713, 50 N. W. 561; State *v.* Goddard, 146 Mo. 177, 48 S. W. 82; State *v.* Lee, 91 N. C. 570; State *v.* Valentine, 29 N. C. 141.

88. State *v.* Hogan, 85 Iowa 712, 50 N. W. 880, claim that the verdict was against the evidence.

Moot questions will not be considered by the appellate court, where the state admits that, if the accused is guilty of any crime it is not the crime charged, and it is apparent that he will not be again tried upon the same charge. People *v.* Lewis, 127 Cal. 207, 59 Pac. 830.

89. Ireland *v.* People, 1 Colo. App. 126, 27 Pac. 872; Lorenz *v.* State, 53 Nebr. 463, 73 N. W. 935. See also *supra*, XVII, E, 2.

90. People *v.* Bradner, 44 Hun (N. Y.) 233.

91. People *v.* Tarbox, 30 How. Pr. (N. Y.) 318.

92. State *v.* Munzenmaier, 24 Iowa 87.

93. Browning *v.* State, 33 Miss. 47, in which case one judge voted for reversal because the evidence was not sufficient, and the other voted for reversal because of the conduct of the jury.

94. See *supra*, XVII, H, 2, h, (I).

95. *Alabama.*— Washington *v.* State, 125 Ala. 40, 28 So. 78.

sentence to death, yet its repetition of the former sentence is merely an irregularity which will not vitiate the proceedings.[96]

d. Directing Judgment in Lower Court. By statute in many of the states, although not at common law, the appellate courts have power on reversal to remand the case with directions to the court below to render and enter such judgment as may be just and proper under the circumstances.[97] If the appellate court sees clearly that the facts in evidence are insufficient to constitute the offense charged, it should direct the entry of a *nolle prosequi*.[98]

e. Holding or Discharging Defendant on Reversal — (i) *In General.* Where a conviction is reversed, the appellate court may refuse to hold defendant or commit him to answer to another indictment then pending, particularly where there is no proof that he intends to abscond.[99] The accused ought to be discharged on reversal in every case where the evidence in the trial court was insufficient to establish the offense.[1] But where the judgment is reversed because the indict-

Massachusetts.— Jacquins *v.* Com., 9 Cush. 279.

Mississippi.— Anthony *v.* State, 13 Sm. & M. 263; Oliver *v.* State, 5 How. 14.

Pennsylvania.— Beale *v.* Com., 25 Pa. St. 11.

Tennessee.— State *v.* Shaw, 8 Humphr. 32.

Virginia.— Hall *v.* Com., 6 Leigh 615, 29 Am. Dec. 236; Murry *v.* Com., 5 Leigh 720; Brooks *v.* Com., 4 Leigh 669.

West Virginia.— State *v.* Gould, 26 W. Va. 258.

See 15 Cent. Dig. tit. "Criminal Law," § 3220.

The federal circuit court of appeals may on reversal impose such sentence as the law prescribes, or direct the court below to take such proceedings as the justice of the case requires. Whitworth *v.* U. S., 114 Fed. 302, 52 C. C. A. 374. See also Ballew *v.* U. S., 160 U. S. 187, 16 S. Ct. 263, 40 L. ed. 388.

The rule of the text must be qualified where the court below has a discretion, in assessing the punishment, to choose between a fine and imprisonment, and between imprisonment in the jail or in the penitentiary, but is without discretion to assess a fine where it sentences accused to the penitentiary, and errs in adding a fine to imprisonment in the penitentiary. Under such circumstances the case must be remanded. State *v.* Mooney, 27 W. Va. 546.

The judgment in the lower court and that in the appellate court do not constitute two judgments against the accused, where the judgment in the appellate court is expressly stated to be in lieu of that in the lower court. It was so held where on a writ of error the accused was retried on the record in the appellate court, and it was said that the appellate court could either render final judgment or remand the case for further proceedings. Higgins *v.* People, 69 Ill. 11.

96. *In re* Ferris, 35 N. Y. 262.

97. *Arkansas.*— Eastling *v.* State, 69 Ark. 189, 62 S. W. 584.

Illinois.— Baxter *v.* People, 8 Ill. 368.

Kentucky.— Smith *v.* Com., 67 S. W. 32, 23 Ky. L. Rep. 2271.

New York.— Ratzky *v.* People, 29 N. Y. 124.

Oregon.— State *v.* Marple, 15 Oreg. 205, 14 Pac. 521.

Texas.— Schutze *v.* State, 30 Tex. 508.

Washington.— Foster *v.* Woolery, (1893) 32 Pac. 1083; Way *v.* Woolery, 6 Wash. 157, 32 Pac. 1082.

United States.— Ballew *v.* U. S., 160 U. S. 187, 16 S. Ct. 263, 40 L. ed. 388. But *compare In re* Friedrich, 51 Fed. 747.

See 15 Cent. Dig. tit. "Criminal Law," § 3222.

Refusal of lower court to hear motion.— Where a judgment is reversed because the court below erroneously refused to hear a motion, the appellate court may not consider the merits of the case, but may remand the cause, with directions to the court below to hear the motion. Luther *v.* State, 27 Ind. 47.

Refusal to hear evidence as to invalidity of indictment.— The same course will be followed by the appellate court, where the trial court refused to hear evidence to prove that a word had been inserted in an indictment after the discharge of the grand jury. State *v.* Vest, 21 W. Va. 796.

Direction to quash indictment or count.— Where on appeal an indictment is found fatally defective, and the conviction is reversed for that reason, the case may be remanded with a direction to the trial court to quash the indictment. Dunklin *v.* State, 134 Ala. 195, 32 So. 666. Or the court may direct a defective count to be quashed. *In re* Scott, 14 Gratt. (Va.) 687.

On an appeal from an intermediate court whose decision is reversed the case may be remanded with directions to dismiss the appeal. St. Louis *v.* Kneper, 11 Mo. App. 587.

98. People *v.* Chappell, 27 Mich. 486; People *v.* Gaige, 23 Mich. 93.

99. People *v.* Cox, 67 N. Y. App. Div. 344, 73 N. Y. Suppl. 774; Shepherd *v.* People, 24 How. Pr. (N. Y.) 388.

Where the accused has been acquitted by reason of a variance between the indictment and the proof, the appellate court will not, on a motion by the prosecution, order him to be held for his appearance at a new trial because the prosecution alleges a clerical mistake in the proceedings for which he is not responsible. State *v.* Jones, 11 N. J. L. 289.

1. *Alabama.*— Allen *v.* State, 40 Ala. 334, 91 Am. Dec. 477.

ment or information was technically defective,[2] because a juror was substituted without the consent of the prisoner,[3] because, although the indictment is good, the verdict is unwarranted and illegal,[4] or where judgment is simply arrested on an appeal,[5] the prisoner may be remanded in order that a new indictment may be presented or for such other proceedings in the lower court as may be proper under the circumstances.[6]

(II) *Remanding For New Sentence.* Where there is no reversible error except that, in sentencing, the lower court has exceeded its power or imposed a sentence which is vague and indefinite, the appellate court on a reversal will not order a new trial, but will remand the case to the trial court for the imposition of a proper judgment and sentence.[7] A statute which requires the appellate court to render judgment and award such sentence as the law requires does not necessarily require it to pass sentence on reversal, but it may remand the case for sentence.[8] Failure to ask the accused before sentence for felony if he had anything to say why sentence should not be pronounced does not justify a new trial, but the case should be remanded for a proper sentence.[9]

f. New Trials — (I) *In General.* On reversal for an erroneous ruling affecting some substantial right of the accused, or because of a verdict which is unau-

Illinois.— Miller *v.* People, 90 Ill. 409.
Iowa.— State *v.* Clouser, 72 Iowa 302, 33 N. W. 686.
Massachusetts.— Com. *v.* Ordway, 12 Cush. 270.
Missouri.— State *v.* Brinkman, 40 Mo. App. 284; State *v.* Fuchs, 17 Mo. App. 458; State *v.* Dieckhoff, 1 Mo. App. 83.
New Mexico.— U. S. *v.* Lewis, 2 N. M. 459.
England.— Holt *v.* Reg., 2 D. & L. 774, 9 Jur. 538, 14 L. J. Q. B. 98.
See 15 Cent. Dig. tit. "Criminal Law," §§ 3221, 3229.

Discharge where right to prosecute is barred by limitation.— People *v.* Burt, 51 Mich. 199, 16 N. W. 378.

Where defendant has been in prison on a void judgment and cannot be tried again, the appellate court will discharge him. Dunbar *v.* Territory, (Ariz. 1897) 50 Pac. 30.

2. Peter *v.* State, 3 How. (Miss.) 433; *In re* Nicholls, 5 N. J. L. 539; Landrum *v.* State, 37 Tex. Cr. 666, 40 S. W. 737; Pittman *v.* State, 14 Tex. App. 576.

3. State *v.* Williams, 3 Stew. (Ala.) 454.

4. State *v.* Hendricks, 38 La. Ann. 682.

5. State *v.* Cook, 20 La. Ann. 130; Jones *v.* State, 11 Sm. & M. (Miss.) 315; Calvin *v.* State, 25 Tex. 789. See also State *v.* McCoy, 14 N. H. 364.

6. The accused, being in the penitentiary by virtue of his sentence, was remitted on reversal to the custody of the jailer of the proper county. State *v.* Barnes, 59 Mo. 154. But on the other hand where the court reversed a sentence of imprisonment in the penitentiary on the ground that it was illegal, deeming that the accused had been sufficiently punished, it would not remit the record for a new sentence, but discharged the accused. Clellans *v.* Com., 8 Pa. St. 223.

7. *Alabama.*— Herrington *v.* State, 87 Ala. 1, 5 So. 831; De Bardelaben *v.* State, 50 Ala. 179. But *compare* Zaner *v.* State, 90 Ala. 651, 8 So. 698.
Arkansas.— Baker *v.* State, 4 Ark. 56.
California.— People *v.* Riley, 48 Cal. 549.
Dakota.— Territory *v.* Conrad, 1 Dak. 363, 46 N. W. 605.
Florida.— Wallace *v.* State, 41 Fla. 547, 26 So. 713; Roberts *v.* State, 30 Fla. 82, 11 So. 536.
Idaho.— Territory *v.* Guthrie, 2 Ida. (Hasb.) 432, 17 Pac. 39.
Illinois.— Henderson *v.* People, 165 Ill. 607, 46 N. E. 711; Wallace *v.* People, 159 Ill. 446, 42 N. E. 771.
Louisiana.— State *v.* Nicholson, 14 La. Ann. 785.
Mississippi.— Wharton *v.* State, 41 Miss. 680; Kelly *v.* State, 3 Sm. & M. 518.
Missouri.— State *v.* Gordon, 153 Mo. 576, 55 S. W. 76.
Nebraska.— Griffen *v.* State, 46 Nebr. 282, 64 N. W. 966.
New York.— Harris *v.* People, 59 N. Y. 599; Fitzgerrold *v.* People, 37 N. Y. 685; McKee *v.* People, 32 N. Y. 239; Syracuse, etc., Plank Road Co. *v.* People, 66 Barb. 25; Hussy *v.* People, 47 Barb. 503; Walters *v.* People, 19 Abb. Pr. 212.
North Carolina.— State *v.* Crowell, 116 N. C. 1052, 21 S. E. 502; State *v.* Lawrence, 81 N. C. 522; State *v.* Upchurch, 31 N. C. 454.
Ohio.— Picket *v.* State, 22 Ohio St. 405; Williams *v.* State, 18 Ohio St. 46.
Pennsylvania.— Com. *v.* Peach, 170 Pa. St. 173, 32 Atl. 582; Beale *v.* Com., 25 Pa. St. 11; Com. *v.* Barge, 11 Pa. Super. Ct. 164.
South Carolina.— State *v.* Baker, 58 S. C. 111, 36 S. E. 501.
Washington.— Watson *v.* State, 2 Wash. 504, 27 Pac. 226.
Wisconsin.— Lacy *v.* State, 15 Wis. 13; Peglow *v.* State, 12 Wis. 534; Benedict *v.* State, 12 Wis. 313.
United States.— Haynes *v.* U. S., 101 Fed. 817, 42 C. C. A. 34.

8. Routt *v.* State, 61 Ark. 594, 34 S. W. 262; State *v.* Bilansky, 3 Minn. 246; People *v.* Bork, 96 N. Y. 188.

9. *Florida.*— Keech *v.* State, 15 Fla. 591.
Kansas.— State *v.* Jennings, 24 Kan. 642.

thorized by the law or the evidence, by reason of which it is apparent that he has not had a legal and impartial trial, a new trial will be ordered.[10] The appellate court will not remand for a new trial a cause in which the trial court on a motion for a new trial decided that the verdict was not sustained by the evidence and imposed a light sentence, for to do this would infringe upon the province of the lower court which possesses a discretion to determine whether the evidence is legally sufficient to sustain a verdict.[11]

(II) *Grounds For New Trial and Request.* Whether the appellate court will on a reversal remand the case, with a direction to the court below to render such judgment as may be just and proper, or will order a new trial of the accused, depends upon the character of the error discovered. If the accused has been deprived of some substantial legal right in the trial court, or if he has not had, without his fault, a full, impartial, and legal trial, it is the duty of the appellate court to direct a new trial.[12] Under a statute conferring power on the appellate court to grant a new trial if proper, a new trial may be granted, although not asked for by the appellant.[13]

Michigan.— People *v.* Palmer, 105 Mich. 568, 63 N. W. 656.

Nebraska.— Dodge *v.* People, 4 Nebr. 220.

Pennsylvania.— McCue *v.* Com., 78 Pa. St. 185, 21 Am. Rep. 7.

South Carolina.— State *v.* Jefcoat, 20 S. C. 383; State *v.* Trezevant, 20 S. C. 363, 47 Am. Rep. 840.

Wyoming.— Kinsler *v.* Territory, 1 Wyo. 112.

See 15 Cent. Dig. tit. "Criminal Law," § 3224.

In New York, however, it has been held that the omission to ask this question before judgment deprives the accused of a substantial legal right and justifies a reversal with a new trial. Messner *v.* People, 45 N. Y. 1.

10. *Kentucky.*— Com. *v.* Tanner, 5 Bush 316.

Michigan.— Pond *v.* People, 8 Mich. 150.

Montana.— State *v.* Herron, 12 Mont. 300, 30 Pac. 140.

Ohio.— *In re* Kazer, 5 Ohio 544.

Tennessee.— Murphy *v.* State, 7 Coldw. 516.

Virginia.— Benton *v.* Com., 91 Va. 782, 21 S. E. 495.

Wisconsin.— *In re* Keenan, 7 Wis. 695.

On reversal the court may order a new trial, although defendant has not moved for it and denies the court's power to grant it. State *v.* Rover, 10 Nev. 388, 21 Am. Rep. 745.

Statutory provisions.—In many states statutes exist which not only provide that the appellate court may not only reverse, affirm, or modify, but also provide that if proper it may grant a new trial. People *v.* Lee Yune Chong, 94 Cal. 379, 29 Pac. 776; Ray *v.* State, Greene (Iowa) 316, 48 Am. Dec. 379; State *v.* Rover, 13 Nev. 17; O'Brien *v.* People, 36 N. Y. 276, 2 Transcr. App. (N. Y.) 5, 3 Abb. Pr. N. S. (N. Y.) 368; McKee *v.* People, 36 N. Y. 113, 1 Transcr. App. (N. Y.) 1, 3 Abb. Pr. N. S. (N. Y.) 216, 34 How. Pr. (N. Y.) 230; People *v.* Williams, 29 Hun (N. Y.) 520; People *v.* Nileman, 8 N. Y. St. 300. In Massachusetts by statute, on a motion made simultaneously with the argument and also on the exceptions, the court may grant a new trial. Com. *v.* Peck, 1 Metc. 428. Under the New York statute the court of appeals cannot reverse a capital sentence unless it appears that substantial error was committed, or that justice demands and requires a new trial. People *v.* Filippelli, 173 N. Y. 509, 66 N. E. 402. As to the power of the court of appeals to grant new trials where no exceptions were taken, but where justice requires it, see People *v.* Cignarale, 110 N. Y. 23, 17 N. E. 135; McKee *v.* People, 36 N. Y. 113, 1 Transcr. App. (N. Y.) 1, 3 Abb. Pr. N. S. (N. Y.) 216, 34 How. Pr. (N. Y.) 230.

New trial after quashing one count.— The appellate court may in addition to reversing the judgment direct that a defective count in an indictment shall be quashed, and remand the case for trial on those counts which are not defective. *In re* Scott, 14 Gratt. (Va.) 687.

11. State *v.* Symes, 17 Wash. 596, 50 Pac. 487.

12. Trulock *v.* State, 1 Iowa 515; State *v.* Gunter, 30 La. Ann. 536; State *v.* Shafer, 22 Mont. 17, 55 Pac. 526.

Illustrations.— On reversal because the accused was not arraigned (Graeter *v.* State, 54 Ind. 159), or because the crime was not proved by sufficient evidence (People *v.* Gordon, 39 Mich. 508; McCann *v.* People, 6 Park. Cr. (N. Y.) 629; State *v.* Rogers, 93 N. C. 523; Garland *v.* State, 2 Swan (Tenn.) 18), or where without fault of the accused a portion of the evidence or of the appeal papers has been lost or destroyed (State *v.* Bess, 31 La. Ann. 191; State *v.* Reed, 67 Mo. 36; State *v.* Huggins, 126 N. C. 1055, 35 S. E. 606), or where the evidence appears wholly insufficient to sustain the verdict (State *v.* Foster, 21 W. Va. 767), a new trial should be granted.

Appellate court cannot grant a new trial for newly discovered evidence. State *v.* Gooch, 94 N. C. 987; State *v.* Starnes, 94 N. C. 973.

13. People *v.* Lee Yune Chong, 94 Cal. 379, 29 Pac. 776; People *v.* Olwell, 28 Cal. 456; State *v.* Rover, 13 Nev. 17.

g. Remanding For Amendment. Where an appeal was needlessly brought after the overruling of a demurrer to an information, the error in which might have been corrected by the prosecuting attorney at once, on the objection being made in the trial court, the appellate court may refuse to consider the case on its merits, but may reverse *pro forma* and remand in order that the prosecuting attorney may amend the information.[14]

h. Effect of Reversal. The effect of a general and unqualified reversal on the prior proceedings is to nullify them completely and to leave the case as though judgment and sentence had never been rendered.[15] Its effect on the subsequent disposition of the case depends upon the power and authority of the court to determine whether a new trial shall be awarded, whether the case shall be remanded to have a proper sentence rendered according to law, or whether the accused shall be discharged absolutely.[16] It has been held that a reversal *ipso facto* operates to discharge the accused.[17] But a reversal of a conviction under two or more counts for error committed under one of them is operative only as to the count under which the error was committed and the verdict may stand as to the others.[18]

i. Vacating Stay. A stay of execution granted pending appeal, on a certificate of reasonable doubt, may be vacated on reversal.[19] After the remittitur a stay becomes inoperative and judgment may then be executed.[20] The appellate court has no power after a reversal to grant a further stay on the ground of defendant's ill-health, where the statute provides in substance that sentence shall be executed as soon as possible.[21]

j. Setting Aside Reversal. A reversal will not be set aside merely because the prisoner without the knowledge of the appellate court has escaped pending appeal.[22]

4. Mandate and Proceedings After Remand — a. Mandate or Other Remanding Order. In order to reinvest the lower court with jurisdiction after judgment on appeal, there should be some order from the appellate court directing it to proceed thereon.[23] The remittitur on a reversal need not expressly set aside the verdict

14. State *v.* Austin, 72 Vt. 46, 47 Atl. 102.

15. Watkins *v.* State, 14 Md. 412; *Ex p.* Roberts, 9 Nev. 44, 16 Am. Rep. 1.

A reversal solely on the ground that the judgment was illegally rendered leaves the verdict and all precedent proceedings in full force and effect. State *v.* McClain, 156 Mo. 99, 56 S. W. 731.

Where a judgment against a principal was reversed on appeal, a judgment against an accessary after the fact must also be reversed, without examining the testimony against him. Ray *v.* State, 13 Nebr. 55, 13 N. W. 2.

Effect of a reversal of an order setting aside a stay granted on motion for a change of venue on the trial which took place during such stay see People *v.* McLaughlin, 150 N. Y. 365, 44 N. E. 1017.

16. See *supra*, XVII, H, 3, d–f.

17. Keller *v.* State, 12 Md. 322, 71 Am. Dec. 596; Cochrane *v.* State, 6 Md. 400.

18. Ballew *v.* U. S., 160 U. S. 187, 16 S. Ct. 263, 40 L. ed. 388. A reversal of a conviction under a count for burglary and remanding the case for further proceedings does not impair the implied acquittal of a charge of larceny contained in another count in the same indictment. Bell *v.* State, 48 Ala. 684, 17 Am. Rep. 40; State *v.* Guettler, 34 Kan. 582, 9 Pac. 200. But where a crime is but one transaction, a reversal affects the whole case, although the crime is charged in different degrees in different counts of the same information. George *v.* State, 59 Nebr. 163, 80 N. W. 486.

19. Com. *v.* Hayes, 170 Mass. 16, 48 N. E. 779.

20. State *v.* Prater, 27 S. C. 599, 4 S. E. 562.

21. Com. *v.* Hayes, 170 Mass. 16, 48 N. E. 779.

22. Leftwich *v.* Com., 20 Gratt. (Va.) 716.

23. The appellate court has jurisdiction of the case until a mandate, procedendo, or remittitur is issued. State *v.* Faulds, 17 Mont. 140, 42 Pac. 285; State *v.* Wyse, 33 S. C. 582, 12 S. E. 556. But see People *v.* Dick, 39 Cal. 102, in which a mandate was held unnecessary to reinvest the lower court with jurisdiction. And *compare* Downs *v.* State, 19 Md. 571, holding that if there are no proceedings in the lower court for this writ to operate upon the mandate need not be issued.

Effect on jurisdiction of appellate court.— On the filing of the mandate from the appellate court in the lower court, the former loses all jurisdiction of the case, and the lower court resumes jurisdiction so far as it may be necessary to conduct subsequent proceedings in conformity with the opinion of the appellate court. *Ex p.* Jones, 41 Cal. 209; People *v.* Dick, 39 Cal. 102; People *v.* Walters, 1 Ida. 274; Harris *v.* State, 2 Tex.

and judgment,[24] or in a capital case, on a dismissal of the appeal, assign a new day for the execution.[25] In the absence of statute providing for a delay in issuing the mandate it may be issued immediately on an affirmance.[26] The indictment ought to be remitted to the term of the lower court then in session.[27] An omission to file a mandate or remittitur in the lower court is a mere irregularity that may be waived.[28] An appellant who moves for a stay of the mandate, with leave to move for a new trial because of new evidence, must make out a *prima facie* case.[29]

b. Pleading Over on Overruling Demurrer. It has been held to be discretionary with the appellate court, after it has affirmed the overruling of a demurrer to an indictment, to permit the respondent to plead over and remand the case to the lower court for trial.[30]

c. Sending Down Record. Where on certiorari the record is removed to a superior court for review it is necessary to remit it for the execution of the sentence.[31]

d. Proceedings in Lower Court — (I) *In General.* It is the duty of the lower court to comply strictly with the directions of the appellate court, and to follow its rulings as laid down in the opinion.[32]

(II) *Amending or Vacating Judgment.* After affirmance the lower court

App. 134. But where after affirmance a motion is made in the lower court and an appeal taken therefrom, the latter revives the jurisdiction of the appellate court so far as relates to the matter involved in the second appeal. State *v.* Way, 40 S. C. 294, 18 S. E. 676.

24. State *v.* Stephens, 13 S. C. 285.

A mandate which advises the lower court of the reversal and directs it to proceed in the case in the manner required by law and in harmony with the opinion of the appellate court amounts to a direction to retry the accused, when the opinion was substantially that he was entitled to a new trial on account of error. State *v.* Clouser, 72 Iowa 302, 33 N. W. 686. It is not necessary that the mandate should direct the court below to grant a new trial to give it jurisdiction. Harmon *v.* Territory, 9 Okla. 313, 60 Pac. 115.

25. State *v.* Levelle, 38 S. C. 216, 16 S. E. 717, 17 S. E. 30.

26. Nelson *v.* Com., 94 Ky. 594, 23 S. W. 348, 350, 15 Ky. L. Rep. 255.

27. But in the absence of such an express direction it may go to the next term of that court. Com. *v.* Robinson, 1 Gray (Mass.) 555. The fact that a mandate of reversal is filed with the lower court ten days prior to the term next succeeding the reversal is not reversible error, although unauthorized by the court, where defendant received notice that the case would be called for trial at the next term and he had a reasonable time to prepare his defense. Powers *v.* Com., 70 S. W. 644, 1050, 24 Ky. L. Rep. 1007, 1186.

28. As where defendant asked for and obtained a change of venue out of the lower court. Perteet *v.* People, 70 Ill. 171; Brucker *v.* State, 19 Wis. 539. See Jones *v.* State, 67 Ga. 240, as to loss of remittitur.

If the remittitur is filed it need not be copied in the record of the lower court. Adams *v.* State, 1 Swan (Tenn.) 466.

A transcription on the minute-book of the lower court of a judgment of reversal of the appellate court is sufficient to give the lower court jurisdiction to retry the case. Reed *v.* Com., 98 Va. 817, 36 S. E. 399.

29. State *v.* Jacobs, 28 S. C. 608, 6 S. E. 577.

It is too late in a criminal case after a reversal, and a mandate, with the day for the execution reassigned, to move to recall the mandate for the purpose of a rehearing. State *v.* Merriman, 35 S. C. 607, 14 S. E. 394.

30. State *v.* Wilkins, 17 Vt. 151. But see People *v.* Taylor, 3 Den. (N. Y.) 91, holding that the appellate court has no discretion in this matter, and that where a judgment sustaining defendant's demurrer was reversed, the appellate court must proceed to final judgment and pass sentence thereon.

31. Duffy *v.* Britton, 48 N. J. L. 371, 7 Atl. 679. But see People *v.* Ferris, 32 How. Pr. (N. Y.) 411, holding that a statute which provides that a record removed for review shall be remitted to the court from whence it was removed does not apply to a record removed to an intermediate appellate court and thence to a final appellate court.

32. *Arkansas.*— State *v.* Harrison, 21 Ark. 197.

Louisiana.— State *v.* Byrd, 31 La. Ann. 419.

Missouri.— State *v.* Newkirk, 49 Mo. 472.

New York.— People *v.* Ferris, 32 How. Pr. 411.

Virginia.— Marshall's Case, 5 Gratt. 693.

Compare State *v.* Whitener, 93 N. C. 590, where the lower court, discovering that the appellate court had overlooked a statute in holding that no offense was charged, submitted the matter to the jury.

See 15 Cent. Dig. tit. "Criminal Law," § 3232.

Change of venue.— The accused may insist on his application for a change of venue

has no jurisdiction to vacate the judgment which is then a judgment of the appellate court.[33]

(III) *NEW TRIAL.* Inasmuch as the judgment on appeal is an adjudication only as to matters actually ruled upon in the appellate court,[34] a defendant convicted of one crime on an indictment for another, on a new trial after reversal, can be tried for the offense charged in the original indictment.[35] The accused may on the new trial plead former jeopardy, although a certiorari intended to secure his release on such ground has been denied him.[36] New evidence may be introduced by either party on a new trial after reversal, whether the reversal was on a question of fact or on a ruling of law or both.[37] On the other hand after the affirmance of a capital sentence and the filing of the remittitur, the trial court has no power to entertain a motion for a new trial on newly discovered evidence, without leave of the appellate court.[38]

(IV) *SENTENCE AFTER REMAND.* The power of the court after remand to

which was erroneously denied on his trial. Barrows *v.* People, 11 Ill. 121.

Count equally divided.— Where on questions reserved to the appellate court before judgment the judges of the appellate court are equally divided, no further proceedings can properly be taken in the court below, and on this account the prosecution is practically ended. People *v.* Braman, 30 Mich. 460.

Forfeiture of bail.— Under a statute which provides that on affirmance the original judgment shall be carried into effect, a mandate stating that the judgment has been affirmed and directing the court to execute it does not justify the forfeiture of defendant's bail on his non-appearance. State *v.* McEnturff, 98 Iowa 415, 67 N. W. 272.

Nolle prosequi.— It is proper for the lower court on motion of the prosecuting attorney to permit a *nolle prosequi* or to dismiss the case sent to it on a reversal, because the evidence was insufficient to justify the verdict, if the state has no other or further evidence to offer on a new trial. Lewis *v.* State, 101 Ga. 532, 28 S. E. 970; State *v.* Seymour, 7 Ida. 548, 63 Pac. 1036.

Restitution of fine.— The appellate court, on the reversal of a judgment imposing a fine, will order it to be refunded in the lower court and will remand the cause for that purpose if the money be under the control of the lower court. Old *v.* Com., 18 Gratt. (Va.) 915.

33. State *v.* Boyce, 25 Wash. 422, 65 Pac. 763.

As long as the appellate court retains jurisdiction it may correct errors so as to make the judgment rendered by it conform to the judgment intended, and may do this either on proper application or of its own motion. State *v.* Fullmore, 47 S. C. 34, 24 S. E. 1026. See also APPEAL AND ERROR, 3 Cyc. 472. Even after the filing of the remittitur, a judgment of reversal may be vacated and the case restored to the docket of the appellate court on proof that the transcript from the lower court, which had been the basis of the reversal, entirely misrepresented the real record. Lovett *v.* State, 29 Fla. 384, 11 So. 176, 16 L. R. A. 313. And see People *v.* Hill, 73 Hun (N. Y.) 473, 26 N. Y. Suppl. 331. *Contra,* Brown *v.* State, 29 Fla. 494, 11 So. 181.

34. State *v.* Perry, 122 N. C. 1018, 29 S. E. 384.

35. State *v.* Groves, 121 N. C. 563, 28 S. E. 262; Hurley *v.* State, 4 Ohio Cir. Ct. 425.

Defendant acquitted upon one count of an indictment and convicted upon another may be retried as to the whole case. State *v.* Stanton, 23 N. C. 424; State *v.* Cross Roads Com'rs, 3 Hill (S. C.) 239.

In New York one convicted of a less crime than that charged cannot on a reversal have the issue in his new trial restricted to the less crime, where to do so may raise a question of the jurisdiction of the court. People *v.* Palmer, 8 N. Y. St. 499.

Where the judgment quashing a demurrer to an indictment is reversed, defendant may be tried on the same indictment (State *v.* Bacon, 77 Miss. 366, 27 So. 563), and generally a reversal does not prevent a trial upon the same indictment unless the indictment was on appeal adjudged insufficient. State *v.* Hughes, 2 Ala. 102, 36 Am. Dec. 411.

36. State *v.* Twiggs, 90 N. C. 685.

If defendant stand mute on his new trial the court may order a jury to determine whether he stands mute obstinately, and if it be found that he does, the court may enter a plea for him without his consent. Sutcliffe *v.* State, 18 Ohio 469, 51 Am. Dec. 459, holding also that a reversal, while it annuls the judgment and verdict at the first trial, does not reach the prisoner's plea, and that his plea of not guilty, interposed on the first trial, may stand on the second trial, although he then pleads a former conviction.

37. State *v.* Newkirk, 49 Mo. 472.

38. The jurisdiction which the lower court obtains by the filing of the remittitur is only for the purpose of carrying out the final judgment of the appellate court. State *v.* Turner, 39 S. C. 420, 17 S. E. 885.

Where leave was granted, it was held that the lower court must hear the testimony offered, decide the motion on its merits, and certify the result to the appellate court. State *v.* Way, 43 S. C. 410, 21 S. E. 313.

fix a new day of execution, where the day originally fixed has expired pending the appeal, is unquestioned.[39]

I. Liability on Appeal-Bond or Recognizance, and Deposits For Costs[40]

1. Appeal-Bond or Recognizance — a. Validity. Appeal-bonds and recognizances with respect to their validity and the liability thereon are governed by the principles of law applicable to bonds and recognizances generally.[41] The stay of execution in a criminal case is a sufficient consideration for an appeal-bond.[42] Such insufficiency in an appeal-bond or recognizance as renders it vague and unintelligible, or omission from it of material matters required by statute, will invalidate it.[43] A recognizance in a criminal case binding defendant to appear is sufficient if it states the cause of its taking, names the court before whom he is bound to appear, and the authority of the court taking it.[44] Where, however, the court has no authority to grant an appeal an appeal-bond is invalid.[45]

b. Extent of Liability. The extent of the liability on an appeal-bond depends of course upon the terms of the bond.[46] The parties to a bond for costs, in a prosecution begun before a justice, are liable for costs in both the proceedings before the justice and in a trial *de novo* on appeal, although the accused is acquitted in the latter.[47] The parties on a bond to pay a fine and costs are not liable where the verdict of guilty did not assess any fine.[48]

c. Condition to Prosecute Appeal. A condition to prosecute an appeal and to pay such fine as shall be adjudged against the accused is broken where he prosecutes his appeal, but fails to pay his fine;[49] and a condition to prosecute an appeal to effect is broken by a failure to prosecute within the year allowed by statute.[50]

d. Discharge of Sureties. An appearance and trial does not satisfy a bond conditioned that defendant shall prosecute his appeal and pay such fine and costs as shall be adjudged against him. His failure to pay his fine renders the sureties liable.[51] The sureties are not liable so long as the principal is ready to pay his fine and costs.[52] If the sureties undertake that the principal shall appear at the term next to be held and abide the judgment thereof, their liability is limited to such judgment as may be rendered at that term and session, and if the term is adjourned without any proceedings in the case they are discharged.[53]

39. People *v.* Clark, 7 N. Y. 385; People *v.* Ferris, 32 How. Pr. (N. Y.) 411; Nicholas *v.* Com., 91 Va. 813, 22 S. E. 507. *Compare* Hanrahan *v.* People, 95 Ill. 165.

If the case is remanded expressly for a resentence, the lower court may and it is its duty to resentence, even though part of a void sentence was executed. U. S. *v.* Harman, 68 Fed. 472.

Where, pending an appeal in a felony, the court entered a stay of execution, it may resentence and set another day for execution, although the time for which a stay has been granted has passed. *In re* Cross, 146 U. S. 271, 13 S. Ct. 109, 36 L. ed. 969. See also Walters *v.* People, 19 Abb. Pr. (N. Y.) 212; People *v.* Lyons, 2 N. Y. Suppl. 604, 6 N. Y. Cr. 133.

40. Necessity and sufficiency of security see *supra*, XVII, C, 4.

41. See Bonds, 5 Cyc. 721; Recognizances.

42. Everly *v.* State, 10 Ind. App. 15, 37 N. E. 556.

Consideration of appeal-bonds see Appeal and Error, 2 Cyc. 924.

43. See Appeal and Error, 2 Cyc. 919.

44. Com. *v.* Green, 138 Mass. 200.

45. Mexico *v.* Geiger, 53 Mo. App. 440. See also Appeal and Error, 2 Cyc. 928.

46. A bond conditioned to pay a judgment which may be rendered upon the dismissal or trial of an appeal would not include a judgment entered on a plea of guilty, as in such case there is no trial. Stephens *v.* People, 15 Ill. 131.

47. *Ex p.* Perrin, 41 Ark. 194; Taylor *v.* State, 39 Ark. 291.

48. Fuqua *v.* People, 10 Colo. App. 62, 48 Pac. 1053.

49. Johnson *v.* State, 32 Tex. Cr. 353, 22 S. W. 406.

50. Everly *v.* State, 10 Ind. App. 15, 37 N. E. 556.

51. Johnson *v.* State, 32 Tex. Cr. 353, 22 S. W. 406.

52. Humphries *v.* State, (Tex. Cr. App. 1902) 69 S. W. 527.

53. State *v.* Becker, 80 Wis. 313, 50 N. W. 178. The dismissal of an appeal because of insufficiency of the bond and remanding appellant to jail until the fine is paid discharges the sureties. Phipps *v.* State, 25 Tex. App. 660, 8 S. W. 929; Childers *v.* State, 25 Tex. App. 658, 8 S. W. 928. The sureties are not discharged, however, where the accused is under sentence to pay a fine and in default of payment to go to jail, by surrendering the accused, the undertaking or bond being to pay the judgment, if affirmed. Lead *v.* Klatt, (S. D. 1902) 91 N. W. 582.

Appellate court ceasing to exist.— Where parties execute a bond conditioned to abide

e. Proceedings to Enforce — (I) *In General.* At common law the remedy on an appeal-bond is by action[54] and the remedy on a recognizance is by forfeiture.[55] Forfeiture of a recognizance at common law creates an absolute debt of record in the nature of a judgment. On this, both in England and in the United States, in the absence of statute, and often under statutes, before execution can issue a scire facias must be issued or an action of debt may be brought, as upon a judgment.[56] In some of the states, by statute, summary remedies are provided for enforcing the liability on appeal-bonds or recognizances.[57]

(II) *Pleading.* A complaint or declaration in an action on a recognizance or appeal-bond should properly set forth the legal effect of the obligation, or show that it was and is actually on file, and if it does not it may be demurred to. If it is alleged that it was on file it may be inferred that it was duly returned and entered. The jurisdiction of the court to take the recognizance ought to be alleged.[58] If defendant on a scire facias defends on the ground that the court is without jurisdiction because the record fails to show that the bond was given he must do so by a plea, upon which the state can take issue and offer evidence, and not by a motion to dismiss.[59]

(III) *Evidence.* The record showing a recognizance ordinarily cannot be contradicted.[60] Where the bond has been lost, parol evidence is received to show the time mentioned in the bond to which an adjournment was taken, as the docket entry of this does not control the recitals in the bond.[61]

(IV) *Conclusiveness of Appeal.* It has been held that the surety, in an action brought against him on an appeal-bond, may show that the judgment imposing the fine for which he is sued was void.[62]

(V) *Review.* Either party to an action on a recognizance in a criminal prosecution may have the decision reviewed on exceptions,[63] but it cannot be objected for the first time on appeal that the recognizance was not filed by the clerk of the court.[64]

(VI) *Jurisdiction.* Where a statute provides that the appellate court may render judgment against the appellant and his sureties in a recognizance given on an appeal, the criminal court to which such appeal is taken may do so, although such court has no civil jurisdiction, and inasmuch as the surety has had his day in court according to the procedure prescribed by statute he cannot complain that he

and perform the judgment of an appellate court, and thereon obtain a stay, and the appellate court subsequently by limitation of law ceases to exist before the cause is reached and argued and all the papers are transferred to another court, it will be presumed that the bond was executed in contemplation of the expiration of the appellate court, and a statute which provides for the transfer of causes on such event will be regarded as binding on the parties to the same effect as though it were incorporated in the bond, and the sureties will not be discharged by the appellate court ceasing to exist. Johnson *v.* State, 66 Kan. 111, 71 Pac. 267.

54. See Appeal and Error, 2 Cyc. 965; Bonds, 5 Cyc. 811.

55. See Recognizances.

56. State *v.* Dowd, 43 N. H. 454; State *v.* Kinne, 39 N. H. 129. See also Robinson *v.* Gordon, 85 Ga. 559, 11 S. E. 844; Robinson *v.* State, 34 Tex. Cr. 131, 29 S. W. 788.

57. Ullery *v.* Ft. Smith, 35 Ark. 214; Robinson *v.* Gordon, 85 Ga. 559, 11 S. E. 844; Payne *v.* Com., 14 Ky. L. Rep. 302. See also Appeal and Error, 2 Cyc. 961.

Setting aside judgment by default on appeal-bond.— Humphries *v.* State, (Tex. Cr. App. 1902) 69 S. W. 527.

58. Com. *v.* Green, 138 Mass. 200. See, generally, Bonds; Recognizances.

In Texas service of the citation on the surety is necessary (Wooldridge *v.* Griffith, 59 Tex. 290), although the citation need not state the offense for which defendant was committed (Robinson *v.* State, 34 Tex. Cr. 131, 29 S. W. 788), nor the date of the giving of the bond (Robinson *v.* State, 34 Tex. Cr. 131, 29 S. W. 788).

59. State *v.* Bell, 58 Miss. 345.

60. Owen *v.* State, 55 Vt. 47.

61. State *v.* Burdick, 84 Iowa 626, 51 N. W. 67.

The signatures to an appeal-bond, taken and attested by a justice, are presumptively genuine. State *v.* Boisseau, 1 Rob. (La.) 388.

62. People *v.* Carroll, 44 Mich. 371, 6 N. W. 871. But see Payne *v.* Com., 14 Ky. L. Rep. 302; Stevens *v.* Kansas City, 146 Mo. 460, 48 S. W. 658.

63. Treasurer *v.* Merrill, 14 Vt. 557.

64. People *v.* Robb, 98 Mich. 397, 57 N. W. 257.

has been deprived of his property without due process of law in violation of the constitution.[65]

2. DEPOSITS FOR COSTS. A defendant who on an appeal deposits the amount of the costs is entitled to the return thereof on his acquittal after a trial *de novo* in the appellate court.[66]

XVIII. SUCCESSIVE OFFENSES AND HABITUAL CRIMINALS.

A. Power to Punish — 1. IN GENERAL. Statutes under which more severe punishment may be inflicted upon the accused where the crime of which he is convicted is a second or subsequent offense, being highly penal, should not be extended in their application to cases which do not by the strictest construction come under their provisions.[67] Such statutes are not unconstitutional or objectionable upon the ground that they are *ex post facto* laws,[68] that they inflict a double punishment for the same offense,[69] that they inflict cruel or unusual punishment,[70] that they put the accused twice in jeopardy for the same offense,[71] or that they impose a penalty on crimes committed outside the jurisdiction.[72]

2. WHAT ARE SUCCESSIVE OR SECOND OFFENSES. The terms of the statutes employed in describing the prior offense vary greatly.[73] A statute which pro-

65. Stevens *v.* Kansas City, 146 Mo. 460, 48 S. W. 658.

66. District of Columbia *v.* Lyon, 7 Mackey (D. C.) 222.

67. They are intended to prevent the repetition of crimes by the same persons by increasing the penalty upon habitual offenders. *Ex p.* Seymour, 14 Pick. (Mass.) 40. And see People *v.* Douglass, 87 Cal. 281, 25 Pac. 417; People *v.* Raymond, 96 N. Y. 38 [*affirming* 32 Hun 123].

68. *California.*— *Ex p.* Gutierrez, 45 Cal. 429.

Kentucky.— Herndon *v.* Com., 105 Ky. 197, 48 S. W. 989, 20 Ky. L. Rep. 1114, 88 Am. St. Rep. 303; White *v.* Com., 50 S. W. 678, 20 Ky. L. Rep. 1942; Whorton *v.* Com., 7 Ky. L. Rep. 826; Taylor *v.* Com., 3 Ky. L. Rep. 783.

Massachusetts.— Sturtevant *v.* Com., 158 Mass. 598, 33 N. E. 648; Com. *v.* Graves, 155 Mass. 163, 29 N. E. 579; Com. *v.* Getchell, 16 Pick. 452; Com. *v.* Phillips, 11 Pick. 28: *In re* Ross, 2 Pick. 165.

New York.— People *v.* Raymond, 96 N. Y. 38.

Ohio.—Blackburn *v.* State, 50 Ohio St. 428, 36 N. E. 18.

Virginia.— Rand *v.* Com., 9 Gratt. 738.

See 15 Cent. Dig. tit. "Criminal Law," § 3253 *et seq.*

69. *California.*— People *v.* Stanley, 47 Cal. 113, 17 Am. Rep. 401.

Illinois.— Kelly *v.* People, 115 Ill. 583, 4 N. E. 644, 56 Am. Rep. 184.

Kentucky.— Chenowith *v.* Com., 12 S. W. 585, 11 Ky. L. Rep. 561.

Maryland.— Maguire *v.* State, 47 Md. 485.

Massachusetts.—Com. *v.* Hughes, 133 Mass. 496; Hopkins *v.* Com., 3 Metc. 460; Plumbly *v.* Com., 2 Metc. 413; Ross' Case, 2 Pick. 165.

Minnesota.—State *v.* Benson, 28 Minn. 424, 10 N. W. 471.

Missouri.— State *v.* Austin, 113 Mo. 538, 21 S. W. 31.

New York.— Johnson *v.* People, 55 N. Y. 512; People *v.* Bosworth, 64 Hun 72, 19 N. Y. Suppl. 114; People *v.* McCarthy, 45 How. Pr. 97.

Virginia.— Rand *v.* Com., 9 Gratt. 738.

Wisconsin.— Ingalls *v.* State, 48 Wis. 647, 4 N. W. 785.

See 15 Cent. Dig. tit. "Criminal Law," § 3253 *et seq.* See also *infra*, XIX, B, 4.

70. State *v.* Stanley, 47 Cal. 113, 17 Am. Rep. 401; McDonald *v.* Com., 173 Mass. 322, 53 N. E. 874, 73 Am. St. Rep. 293; State *v.* Hodgson, 66 Vt. 134, 28 Atl. 1089; McDonald *v.* Massachusetts, 180 U. S. 311, 21 S. Ct. 389, 45 L. ed. 542; Moore *v.* Missouri, 159 U. S. 673, 16 S. Ct. 179, 40 L. ed. 301 [*affirming* 121 Mo. 514, 26 S. W. 345, 42 Am. St. Rep. 542]. And see People v. Morris, 80 Mich. 634, 45 N. W. 591, 8 L. R. A. 685. See also *infra*, XIX, E, 2, b, (III).

71. Moore *v.* Missouri, 159 U. S. 673, 16 S. Ct. 179, 40 L. ed. 301; Leeper *v.* Texas, 139 U. S. 462, 11 S. Ct. 577, 35 L. ed. 225; Pace *v.* Alabama, 106 U. S. 583, 1 S. Ct. 637, 27 L. ed. 207.

72. McDonald *v.* Com., 173 Mass. 322, 53 N. E. 874, 73 Am. St. Rep. 293.

73. In Kentucky to authorize increased punishment on a third conviction of felony it need not be shown that the penalty should have been increased on the second conviction. Brown *v.* Com., 61 S. W. 4, 22 Ky. L. Rep. 1582.

In Massachusetts the statute under certain circumstances imposes an additional punishment on one convicted of a crime punishable by hard labor for a "term of years." The additional punishment will not be inflicted on a third conviction where the offense is punishable only by imprisonment for a year, although defendant was twice before convicted and sentenced for a term of years. *Ex p.* White, 14 Pick. 90. But see *Ex p.* Stevens, 14 Pick. 94, where the additional punishment was imposed on a conviction of a second offense punishable by imprisonment "for more than one year."

Punishment on a subsequent conviction cannot be increased because of a prior sen-

vides increased penalties for subsequent offenses specifically named does not require that the second offense shall be a repetition of the identical crime of which the offender was convicted, but refers to any one of those specifically mentioned.[74] An offense is no less a "similar offense" to one previously committed by reason of the fact that the penalties for the two differ.[75]

3. Former Conviction Must Precede Commission of Crime Charged. The statutes increasing the punishment on account of a former conviction do not apply unless the offense for which the defendant is on trial shall have been committed after the conviction as well as after the commission of the first.[76]

4. After Pardon For First Offense. It has been held that the fact that the accused was pardoned does not exempt him from the increased punishment on a subsequent conviction.[77]

5. Invalidity of Prior Conviction. That the prior conviction was erroneous will not prevent the operation of the statute as to a subsequent conviction, unless the court in which the prior conviction was held had no jurisdiction.[78]

B. Prosecutions — 1. Allegation of Former Conviction. Inasmuch as the fact of a former conviction is a part of the offense, to the extent of aggravating it and increasing the punishment, it must be alleged in the information or indictment.[79] The entire record of the former trial and conviction need not be set

tence, unless the prior offense was felony in itself, and was not made so in the particular case by an earlier conviction. Stover *v.* Com., 92 Va. 780, 22 S. E. 874.

Time of convictions.— Where the statute in referring to the conviction specifies no time, convictions at one and the same term of the same court for distinct crimes are two convictions within the meaning of the statute, as much as though they are at different terms or in different courts. Com. *v.* Phillips, 11 Pick. (Mass.) 28.

First offense in other jurisdiction.— A statute which imposes an increased penalty on a second conviction has been held not to apply where the first conviction was in another state. People *v.* Cæsar, 1 Park. Cr. (N. Y.) 645.

74. Kelly *v.* People, 115 Ill. 583, 4 N. E. 644, 56 Am. Rep. 184. See also People *v.* Raymond, 96 N. Y. 38.

75. Com. *v.* Marchand, 155 Mass. 8, 29 N. E. 578.

Murder and assault with intent to kill are not offenses of the "same nature," under a statute increasing the punishment for a second offense of the same nature as a prior offense. Long *v.* State, 36 Tex. 6.

76. Brown *v.* Com., 100 Ky. 127, 37 S. W. 496, 18 Ky. L. Rep. 630; Brown *v.* Com., 61 S. W. 4, 22 Ky. L. Rep. 1582; People *v.* Butler, 3 Cow. (N. Y.) 347; Long *v.* State, 36 Tex. 6; Rand *v.* Com., 9 Gratt. (Va.) 738; Com. *v.* Welsh, 2 Va. Cas. 57. *Contra*, State *v.* Dale, 110 Iowa 215, 81 N. W. 453.

77. Williams *v.* People, 196 Ill. 173, 63 N. E. 681; Herndon *v.* Com., 105 Ky. 197, 48 S. W. 989, 20 Ky. L. Rep. 1114, 88 Am. St. Rep. 303; Mount *v.* Com., 2 Duv. (Ky.) 93; Stewart *v.* Com., 2 Ky. L. Rep. 386; State *v.* Manicke, 139 Mo. 545, 41 S. W. 223 (by statute); People *v.* Price, 53 Hun (N. Y.) 185, 6 N. Y. Suppl. 833. *Contra*, State *v.* Martin, 59 Ohio St. 212, 52 N. E. 188, 69 Am. St. Rep. 762, 43 L. R. A. 94; Edwards *v.* Com., 78 Va. 39, 49 Am. Rep. 377.

A discharge from a state prison in consequence of a pardon is a discharge "in due course of law," rendering the convict liable to an additional sentence if recommitted. Evans *v.* Com., 3 Metc. (Mass.) 453.

78. Kelly *v.* People, 115 Ill. 583, 4 N. E. 644, 56 Am. Rep. 184; Wilde *v.* Com., 2 Metc. (Mass.) 408; People *v.* Adams, 95 Mich. 541, 55 N. W. 461. And *compare* Latney *v.* U. S., 18 App. Cas. (D. C.) 265.

On an allegation of three prior convictions a sentence of additional punishment is valid if two only of them were valid, where only two convictions are necessary under the statute. Newton *v.* Com., 8 Metc. (Mass.) 535. It has been held that the validity of the former sentence cannot be questioned on a third conviction, but a judgment of additional punishment will be reversed where prior judgments on which additional punishment was based have also been reversed. Hopkins *v.* Com., 3 Metc. (Mass.) 460.

A judgment on a confession is a conviction within the statute imposing a heavier penalty upon a conviction of a second offense. People *v.* Adams, 95 Mich. 541, 55 N. W. 461.

79. *Indiana.*—Evans *v.* State, 150 Ind. 651, 50 N. E. 820.

Massachusetts.— Com. *v.* Harrington, 130 Mass. 35; Tuttle *v.* Com., 2 Gray 505.

New York.— People *v.* Sickles, 156 N. Y. 541, 51 N. E. 288 [*affirming* 26 N. Y. App. Div. 470, 50 N. Y. Suppl. 377]; People *v.* Price, 119 N. Y. 650, 23 N. E. 1149 [*affirming* 2 N. Y. Suppl. 414]; Wood *v.* People, 53 N. Y. 511; Gibson *v.* People, 5 Hun 542; People *v.* Youngs, 1 Cai. 37.

North Dakota.— State *v.* Markuson, 7 N. D. 155, 73 N. W. 82.

Wyoming.— Bandy *v.* Hehn, 10 Wyo. 167, 67 Pac. 979.

Canada.— L'Association Pharmaceutique de Quebec *v.* Livernois, 9 Quebec Q. B. 243.

See 15 Cent. Dig. tit. "Criminal Law," § 3260 *et seq.*

Compare People *v.* Carlton, 57 Cal. 559.

forth;[80] and it is only necessary that the facts required shall be alleged with sufficient clearness to enable the court to determine whether or not the statute applies.[81]

2. BURDEN AND SUFFICIENCY OF PROOF. The burden of proof is on the state to prove the prior conviction like any other material fact.[82] The identity of the accused with the person previously convicted must be proved.[83] The evidence of defendant's identity must relate to his identity while in custody under the prior sentence.[84]

3. EVIDENCE ADMISSIBLE. A distinct crime cannot be proven to aggravate the statutory penalty unless charged in the indictment.[85] The certificate of the warden of the penitentiary is proper evidence to show the discharge of the prisoner,[86] and the judgment in the prior proceedings is the best evidence of his conviction.[87]

4. PLEAS AND THEIR EFFECT. A plea of guilty of the crime charged, where the indictment charges a prior conviction, confesses the previous conviction.[88] A plea of not guilty generally puts the fact of prior conviction in issue, where it is alleged in the indictment as well as the commission of the subsequent crime.[89]

Contra.— State *v.* Hudson, 32 La. Ann. 1052.

Because of the necessity of alleging the prior conviction the statute does not apply to increase the penalty in a sentence imposed under the second count of an indictment, where the accused was convicted on both the first and second counts. Tuttle *v.* Com., 2 Gray (Mass.) 505.

80. Plumbly *v.* Com., 2 Metc. (Mass.) 413. But the commission of a crime, its date, its nature, and the fact and date of conviction and sentence should be set forth. People *v.* Carlton, 57 Cal. 559; Maguire *v.* State, 47 Md. 485; State *v.* Carr, 146 Mo. 1, 47 S. W. 790.

81. Wilde *v.* Com., 2 Metc. (Mass.) 408.

82. Rector *v.* Com., 4 Ky. L. Rep. 323; Johnson *v.* People, 55 N. Y. 512; State *v.* Haynes, 35 Vt. 570; Bandy *v.* Hehn, 10 Wyo. 167, 67 Pac. 979.

An admission by the accused that he had been previously convicted of felony has been held not sufficient proof of that fact, where the statute requires the jury to find it from the record and other competent evidence. Rector *v.* Com., 4 Ky. L. Rep. 323. See also Oliver *v.* Com., 67 S. W. 983, 24 Ky. L. Rep. 84. But see People *v.* Thomas, 110 Cal. 41, 42 Pac. 456; People *v.* Meyer, 73 Cal. 548, 15 Pac. 95; *Ex p.* Young Ah Gow, 73 Cal. 438; People *v.* Carlton, 57 Cal. 559. See also People *v.* King, 64 Cal. 338, 30 Pac. 1028; Miller *v.* State, (Tex. Cr. App. 1898) 44 S. W. 162.

Proof of discharge.— Where a statute provides for increasing the punishment of a subsequent crime, after a conviction and a discharge from prison by reason of the expiration of imprisonment or pardon, it is necessary to prove the discharge as well as the conviction. The expiration of the imprisonment or a pardon cannot be presumed from mere lapse of time. Wood *v.* People, 53 N. Y. 511 [*overruling* Johnston *v.* People, 65 Barb. (N. Y.) 342].

83. Hines *v.* State, 26 Ga. 614; Com. *v.* Briggs, 7 Pick. (Mass.) 177; People *v.* Price, 2 N. Y. Suppl. 414, 6 N. Y. Cr. 141; Reg. *v.* Leng, 1 F. & F. 77.

Defendant's admission of his identity may be sufficient. Kane *v.* Com., 109 Pa. St. 541.

Identity of name is some evidence of identity of person, but whether it should constitute conclusive evidence depends on other circumstances. State *v.* Lashus, 79 Me. 504, 11 Atl. 180. In most cases, however, identity of name is not sufficient, and should be supplemented by other proof. Reg. *v.* Levy, 8 Cox C. C. 73; Reg. *v.* Crofts, 9 C. & P. 219, 38 E. C. L. 137; Reg. *v.* Leng, 1 F. & F. 77.

This is a question of fact for the jury on the second trial. Hines *v.* State, 26 Ga. 614; State *v.* Lashus, 79 Me. 504, 11 Atl. 180; State *v.* Haynes, 35 Vt. 565; State *v.* Freeman, 27 Vt. 523.

84. Reg. *v.* Leng, 1 F. & F. 77.

85. Ingram *v.* State, 39 Ala. 247, 84 Am. Dec. 782.

86. State *v.* Austin, 113 Mo. 538, 21 S. W. 31.

87. State *v.* Brown, 115 Mo. 409, 22 S. W. 367; Bullard *v.* State, 40 Tex. Cr. 270, 50 S. W. 348.

The original complaint, with the plea of guilty indorsed thereon, and a statement that accused was fined, is competent evidence of the former conviction. State *v.* Cox, 69 N. H. 246, 41 Atl. 862.

The record of the earlier conviction is inadmissible without the production of the indictment. Cross *v.* State, 78 Ala. 430.

88. People *v.* Delany, 49 Cal. 394.

89. People *v.* Gutierrez, 74 Cal. 81, 15 Pac. 444; *Ex p.* Young Ah Gow, 73 Cal. 438, 15 Pac. 76; People *v.* Lewis, 64 Cal. 401, 1 Pac. 490; People *v.* Carlton, 57 Cal. 559; Hines *v.* State, 26 Ga. 614. *Contra,* Thomas *v.* Com., 22 Gratt. (Va.) 912.

A plea of not guilty, with a confession of a former conviction, justifies a general verdict that defendant is guilty as charged in the indictment, and it is not necessary for the jury to find specially as to the prior conviction. People *v.* Brooks, 65 Cal. 295, 300, 4 Pac. 7, 11. See also People *v.* Appleton, (Cal. 1898) 52 Pac. 582, as to admission of former conviction.

If the accused refuses to plead to an allega-

5. Order of Trying the Issues. In the United States, by statute[90] or as a rule of practice, it is customary to determine the issue of prior conviction after the general verdict and by a second jury.[91] If, however, the statute expressly provides that the proof of a prior conviction should be made "upon trial," such proof must be made before verdict.[92]

6. Verdict. The jury ought to find specifically on the issue of prior conviction, when submitted to them under a plea of not guilty;[93] and a verdict of "guilty as charged" will be treated as an acquittal of the charge of a prior conviction.[94]

7. Sentence or Judgment. The judgment, if it recite the conviction of the subsequent crime, need not recite the former conviction.[95] The additional punishment must be included in the sentence passed on the accused for the subsequent offense and cannot be awarded against him in separate proceedings, where the indictment charges the former conviction.[96] On sentence the accused should

tion of former conviction the court may enter a plea for him. People *v.* Youngs, 1 Cai. (N. Y.) 37.

90. In the absence of a statute prescribing when the proof of a former conviction may be made, it may be proved upon the trial and before the conviction of the second offense. This does not deprive accused of the presumption of innocence (People *v.* Sickles, 156 N. Y. 541, 51 N. E. 288), nor permit him to give evidence of his efforts at reformation since the former conviction (People *v.* Thompson, 33 N. Y. App. Div. 177, 53 N. Y. Suppl. 497, 13 N. Y. Cr. 273).

91. Com. *v.* Morrow, 9 Phila. (Pa.) 583; State *v.* Freeman, 27 Vt. 523.

In England if the indictment charges a prior conviction the issue first tried is the subsequent offense charged, and if defendant be found guilty the issue, if any, of a prior conviction is tried. Reg. *v.* Hilton, Bell C. C. 20, 8 Cox C. C. 87, 5 Jur. N. S. 47, 28 L. J. M. C. 28, 7 Wkly. Rep. 59; Reg. *v.* Woodfield, 16 Cox C. C. 314; Reg. *v.* Levy, 8 Cox C. C. 73. The prisoner if he plead not guilty should first be arraigned upon the whole indictment, and the jury sworn and charged as to the subsequent crime, reading to them only that portion of the indictment which relates thereto. On conviction of the subsequent crime, but without reswearing the jury, the allegation of the prior conviction may be read to them and they be charged to inquire on that issue. Reg. *v.* Martin, L. R. 1 C. C. 214, 11 Cox C. C. 343, 39 L. J. M. C. 31, 21 L. T. Rep. N. S. 469, 18 Wkly. Rep. 72; Reg. *v.* Shuttleworth, 3 C. & K. 375, 5 Cox C. C. 369, 2 Den. C. C. 351, 15 Jur. 1066, 21 L. J. M. C. 36, T. & M. 626; Reg. *v.* Key, 3 C. & K. 371, 2 Den. C. C. 347, 15 Jur. 1065, 21 L. J. M. C. 35, T. & M. 623.

92. State *v.* Spaulding, 61 Vt. 505, 17 Atl. 844.

Under Va. Code (1887), §§ 4179–4182, the superintendent of the penitentiary may, where a person has been sentenced to like punishment before, and the record shows that he was not sentenced for an increased term, file an information requiring the convict to say whether he is the person formerly convicted and sentenced, and if he remains silent, or joins issue on his identity, a jury of bystanders are summoned to try the issue, and the court may thereupon sentence him to increased punishment This statute is constitutional. King *v.* Lynn, 90 Va. 345, 18 S. E. 439.

93. People *v.* Eppinger, 109 Cal. 294, 41 Pac. 1037; Rector *v.* Com., 80 Ky. 468, 4 Ky. L. Rep. 323; Sweeney *v.* Com., 39 S. W. 22, 18 Ky. L. Rep. 1020; Thomas *v.* Com., 22 Gratt. (Va.) 912.

A verdict of guilty on both counts is proper where one count charges petit larceny and the other its commission after a conviction of a like offense. Stroup *v.* Com., 1 Rob. (Va.) 754.

General verdict.— If the court instructs the jury that if they find defendant has been previously convicted they may assess the additional punishment, a general verdict is not only proper but the only verdict which they can render; and their finding defendant guilty as charged and affixing the additional punishment is a finding of a former conviction. Herndon *v.* Com., 105 Ky. 197, 48 S. W. 989, 20 Ky. L. Rep. 1114; Oliver *v.* Com., 67 S. W. 983, 24 Ky. L. Rep. 84; Combs *v.* Com., 20 S. W. 268, 14 Ky. L. Rep. 245. *Compare* Chenowith *v.* Com., (Ky. 1889) 12 S. W. 585.

94. People *v.* Eppinger, 109 Cal. 294, 41 Pac. 1037.

95. *Ex p.* Williams, 89 Cal. 421, 26 Pac. 887. See also People *v.* Kelley, 120 Cal. 271, 52 Pac. 587.

A statement in the judgment-roll that defendant confesses the prior conviction is sufficient in the absence of a specific requirement as to how the "answer" of defendant admitting the subsequent conviction shall be framed, under Cal. Pen. Code, § 1158. People *v.* McNeill, 118 Cal. 388, 50 Pac. 538.

96. Plumbly *v.* Com., 2 Metc. (Mass.) 413. But see Bump *v.* Com., 8 Metc. (Mass.) 533, holding that if it is not discovered that the accused is an ex-convict until he is received in the state prison, an information may be filed and the additional punishment awarded thereon, although it is still with the former sentence but one punishment for one offense. And see Com. *v.* Keniston, 5 Pick. (Mass.) 420, holding that where after the conviction the prosecuting officer has to file an informa-

be informed that the indictment charges him with a prior conviction of crime, and then the usual question, if he has anything to say why judgment should not be pronounced, must be put.[97]

8. MEASURE OF PUNISHMENT. Where the statute provides that on a third conviction of felony the convict may be convicted of being an habitual criminal and be imprisoned for life, the court should sentence him to imprisonment for life where the jury find that he has been previously twice convicted, and convict him of a subsequent felony.[98]

XIX. PUNISHMENT AND PREVENTION OF CRIME.[99]

A. In General — 1. PUNISHMENT DEFINED. Punishment is pain, suffering, loss, confinement, or other penalty inflicted on a person for a crime or offense by the authority to which the offender is subject; a penalty imposed in the enforcement or application of law.[1]

2. CONFORMITY OF PUNISHMENT TO SENTENCE. The punishment actually endured must conform strictly in character and duration to that designated in the sentence. Thus one sentenced to hard labor for the county cannot be punished with imprisonment in jail,[2] and he should be discharged on habeas corpus.[3]

3. FEDERAL PRISONERS IN STATE PENITENTIARY. Under the act of congress which provides that criminals sentenced to a state prison by a federal court shall be subject to the discipline and treatment received by convicts sentenced by a state court, federal prisoners may be subjected to hard labor as part of the imprisonment, where a state statute provides that this shall be part of the punishment of prisoners in the penitentiary.[4]

tion to secure the additional punishment, it must be filed before the term of the convict's imprisonment has expired, and in reckoning the term it is presumed to commence with the day of his commitment.

Where one was convicted of several larcenies, it was not required by the Massachusetts statute that the court should adjudge him to be a common and notorious thief. Rice *v.* Com., 12 Metc. (Mass.) 246. But see Haggett *v.* Com., 3 Metc. (Mass.) 457.

97. People *v.* Wheatley, 88 Cal. 114, 26 Pac. 95.

98. Blackburn *v.* State, 50 Ohio St. 428, 36 N. E. 18. See also Boggs *v.* Com., 5 S. W. 307, 9 Ky. L. Rep. 343; People *v.* Raymond, 96 N. Y. 38, where it is held that if the character of the subsequent crime is such that on a first conviction the accused might have been, in the discretion of the court, punished by imprisonment for life, the life penalty is not discretionary on a second conviction but imperative under the statute providing for increased punishment on conviction of a second offense.

A judgment is not invalidated by the fact that the punishment imposed is only for the crime charged as a first offense, although the indictment charges a prior conviction and punishment, and a statute permits an additional punishment on these facts being shown. Phillips *v.* Com., 3 Metc. (Mass.) 588.

Under a statute punishing one on a third conviction as an habitual criminal defendant cannot be sentenced to a longer term of imprisonment than that prescribed by the statute (Shepherd *v.* Com., 2 Metc. (Mass.) 419); and it is not necessary that an interval of liberty should intervene between the first and second term under a statute punishing one on a third conviction as an habitual criminal (Com. *v.* Richardson, 175 Mass. 202, 55 N. E. 988).

99. **Judgment and sentence** see *supra*, XVI.

1. Century Dict. [*cited* in Gunning *v.* People, 86 Ill. App. 174, where it was held that removal from office is a punishment].

Punishment is not restricted to the deprivation of life, liberty, or property, but embraces the deprivation or suspension of any right, civil or political, previously enjoyed. Cummings *v.* Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356.

Deprivation of the right to hold office is in some jurisdictions a part of the punishment for crime. Com. *v.* Jones, 10 Bush (Ky.) 725; Barker *v.* People, 20 Johns. (N. Y.) 457.

Punishments and their consequences distinguished.— Punishment *per se* has been distinguished from the mere effect or consequence of punishment as being only that which the court is authorized to impose in pronouncing its judgment, it being held that constitutional or statutory provisions that persons convicted of certain crimes shall thereafter be disqualified to hold office or shall lose their right of suffrage do not make such deprivations a part of the punishment. State *v.* Jones, 82 N. C. 685. *Compare* Com. *v.* Jones, 10 Bush (Ky.) 725.

2. *Ex p.* Pearson, 59 Ala. 654.

3. Kirby *v.* State, 62 Ala. 51.

4. *Ex p.* Geary, 10 Fed. Cas. No. 5,293, 2 Biss. 485.

B. Constitutional and Statutory Provisions[5] — **1. Uniformity of Penalty.** The punishment for the same offense must be uniform for all persons in the same class.[6] Statutes imposing punishments for felony must operate uniformly upon the inhabitants of the state enacting them.[7]

2. Construing Statutes. If a statute creating or increasing a penalty is capable of two constructions, it should be construed so as to operate in favor of life and liberty.[8] And statutes imposing punishment must be construed together.[9] If the statute repeals the common law in so far as the punishment of an offense is concerned, the fact that the indictment does not conclude against the form of the statute does not prevent the statutory punishment being inflicted.[10]

3. Imprisonment For Fine, Forfeiture, or Costs. Imprisonment for non-payment of a fine is elsewhere treated.[11] Since a provision for forfeiture of a specific sum is equivalent to imposition of a fine for that amount, a statutory provision that one convicted shall "forfeit" a specific amount authorizes imposition of a fine and the imprisonment of the accused until it is paid.[12] A statutory provision permitting the imprisonment of a convict at hard labor to satisfy costs incurred by the state does not infringe the constitutional provision which provides that no person shall be imprisoned for debt.[13]

5. **Ex post facto laws** see Constitutional Law, 8 Cyc. 1027.

Involuntary servitude as a punishment see Constitutional Law, 8 Cyc. 878.

6. State *v.* Goodwill, 33 W. Va. 179, 10 S. E. 285, 25 Am. St. Rep. 863, 6 L. R. A. 621. See Constitutional Law, 8 Cyc. 1055, 1076.

Place of punishment.— A statute which provides that a local criminal court may sentence a prisoner to a house of correction, where elsewhere he must be imprisoned in jail, is not a special or local act relating to the punishment of crime prohibited by the constitution, as it does not change the punishment or degree of any crime, but only provides a place where punishment may be inflicted. *Ex p.* Williams, 87 Cal. 78, 24 Pac. 602, 25 Pac. 248. See also *In re* Ambrosewf, 109 Cal. 264, 41 Pac. 1101.

Confinement of minors in reform school.— Nor is an act unconstitutional which provides for the detention of minors in a reform school during their minority, by reason of which they may be detained longer than the term of imprisonment provided for their offenses. *Ex p.* Nichols, 110 Cal. 651, 43 Pac. 9.

Municipal ordinances.— A statute which is general in its provision is not unconstitutional, as violating a provision requiring uniformity of penalties, because in some cities, which by their charter have power to punish the same offense, a lighter penalty is inflicted by a municipal ordinance. Johnson *v.* People, 6 Colo. App. 163, 40 Pac. 576.

7. *In re* Jilz, 3 Mo. App. 243.

Degrees of punishment.— A statute is not necessarily invalid because different degrees of punishment may be imposed under it by different courts for the same offense, where the degree of punishment is discretionary with the court within the statutory limits. *In re* Mulholland, 97 Cal. 527, 32 Pac. 568.

8. Com. *v.* Martin, 17 Mass. 359; Scrinegrour *v.* State, 2 Pinn. (Wis.) 112, 1 Chandl. (Wis.) 48.

9. State *v.* Scholl, 130 Mo. 396, 32 S. W. 968. The court may in its sentence of imprisonment declare for what period the accused shall be kept at hard labor and for what period without labor, although the statute under which the prosecution is had does not specify hard labor, if by general statute the court is authorized in sentencing to imprisonment to declare for what period the prisoner shall be kept at hard labor. *Ex p.* Clark, 50 Ohio St. 649, 35 N. E. 576.

A general statute fixing the minimum of imprisonment is not repugnant to the special statute fixing the maximum punishment for the particular offense without providing for a minimum, and under both statutes construed together imprisonment may be imposed for any term between the maximum and the minimum punishment. State *v.* Scholl, 130 Mo. 396, 32 S. W. 968.

A statute defining a misdemeanor may fix a minimum punishment, where another statute declares that every offense which is a misdemeanor is punishable for a maximum term named therein. State *v.* Mulkey, 6 Ida. 617, 59 Pac. 17.

10. U. S. *v.* Norris, 27 Fed. Cas. No. 15,899, 1 Cranch C. C. 411. See Indictments and Informations.

11. **Imprisonment on non-payment of fine** see *infra*, XIX, C, 9.

12. *Ex p.* Alexander, 39 Mo. App. 108. See also Com. *v.* Avery, 14 Bush (Ky.) 625, 29 Am. Rep. 429; State *v.* Mumford, 73 Mo. 647, 39 Am. Rep. 532; State *v.* Sellner, 17 Mo. App. 39.

13. Bailey *v.* State, 87 Ala. 44, 6 So. 398 (also holding that a local law authorizing convicts thus sentenced to be employed in working on the public roads does not change the rule); Bradley *v.* State, 69 Ala. 318. See Constitutional Law, 8 Cyc. 879, 1092.

Where a defendant is sentenced for a specified term "and until he shall pay the costs," the payment of the costs is a part of the punishment, and the continued imprisonment after the expiration of the term is of the

4. Punishment Proportioned to Offense. A constitutional provision that all penalties shall be proportioned to the nature of the offense is not violated by a statute which provides for increased penalties upon second and subsequent convictions of certain felonies,[14] nor by a statute requiring minors to be imprisoned for the maximum term, unless sooner released by the managers of a reformatory, although adult offenders may receive in the discretion of the jury a shorter term.[15] A statute which increases the punishment for an assault, where it is accompanied by an intent to do great bodily harm, is not unconstitutional because it does not define an assault of this character.[16]

5. Indefinite Imprisonment. A constitutional provision forbidding indefinite imprisonment is not violated by a sentence to pay a fine, with a provision that the accused remain in the custody of the sheriff until the fine is paid, for the punishment is the fine, and the committing to custody is only a means of its enforcement.[17]

6. Indeterminate Sentences. In some jurisdictions there are statutes providing for indeterminate sentences, by which a maximum and minimum term of imprisonment is fixed, with the proviso that upon certain contingencies the accused may be released before the expiration of the maximum term.[18] Such sentences are not void as being uncertain in their duration,[19] nor are the statutes authorizing such sentences unconstitutional.[20]

7. Repealing Statutes — a. In General. Where after a crime is committed the statute which it offends is repealed, and the repealing statute contains no saving clause as to crimes committed before its passage, all proceedings are arrested and the accused cannot be sentenced or punished under the statute.[21] But repeals

same character as that before. Riley *v.* State, 16 Conn. 47.

14. Kelley *v.* People, 115 Ill. 583, 4 N. E. 644, 56 Am. Rep. 184. See also *supra*, XVIII, A, 1.

15. People *v.* Illinois State Reformatory, 148 Ill. 413, 36 N. E. 76, 23 L. R. A. 139; Miller *v.* State, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109.

16. People *v.* Troy, 96 Mich. 530, 56 N. W. 102.

17. *Ex p.* Peacock, 25 Fla. 478, 6 So. 473; *Ex p.* Bryant, 24 Fla. 278, 4 So. 854, 12 Am. St. Rep. 200.

Definiteness of sentence see *supra*, XVI, D, 5.

18. People *v.* Murphy, 185 Ill. 623, 57 N. E. 820; Johnson *v.* People, 173 Ill. 131, 50 N. E. 321; Hicks *v.* State, 150 Ind. 293, 50 N. E. 27; Skelton *v.* State, 149 Ind. 641, 49 N. E. 901; Murphy *v.* Com., 172 Mass. 264, 52 N. E. 505, 70 Am. St. Rep. 266, 43 L. R. A. 154.

Construction of statute.— The purpose of the system of indeterminate sentences and parol is the improvement of the condition of convicts in the penitentiary, and its operation should not be restricted by a strict construction of the statutes. People *v.* Murphy, 185 Ill. 623, 57 N. E. 820.

To what offenses applicable.— The Illinois statute which refers to "crimes punishable by imprisonment in the penitentiary" is held to embrace not only crimes which must, but also those which may, be so punished, and for which an alternative punishment by way of fine is allowed (People *v.* Murphy, 185 Ill. 623, 57 N. E. 820 [in effect *overruling* Towne *v.* People, 89 Ill. App. 258]), but in Indiana a similar statute has been held applicable only to crimes which must be so punished (Hicks *v.* State, 150 Ind. 293, 50 N. E. 27).

The Indiana law does not repeal the prior statute allowing the court or jury in certain cases to punish either by imprisonment in the county jail or in the state prison, but applies only to cases where imprisonment in the county jail is inadequate. Caiger *v.* State, 155 Ind. 646, 58 N. E. 1036.

19. Murphy *v.* Com., 172 Mass. 264, 52 N. E. 505, 70 Am. St. Rep. 266, 43 L. R. A. 154.

20. Bloom *v.* State, 155 Ind. 292, 58 N. E. 81; Wilson *v.* State, 150 Ind. 697, 49 N. E. 904; Vancleave *v.* State, 150 Ind. 273, 49 N. E. 1060; Miller *v.* State, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109.

Constitutionality of indeterminate sentence laws see Constitutional Law, 8 Cyc. 1030.

21. *Connecticut.*—State *v.* Grady, 34 Conn. 118; State *v.* Daley, 29 Conn. 272.

Massachusetts.— Com. *v.* McDonough, 13 Allen 581; Flaherty *v.* Thomas, 12 Allen 428.

Texas.— Wall *v.* State, 18 Tex. 682, 70 Am. Dec. 302.

Vermont.— State *v.* Meader, 62 Vt. 458, 20 Atl. 730.

Wisconsin.— State *v.* Campbell, 44 Wis. 529.

See 15 Cent. Dig. tit. "Criminal Law," § 3279.

Effect of repealing statutes on punishments see *supra*, II, C, 3, d, (II); XVI, C, 4. And see Constitutional Law, 8 Cyc. 1035.

Where a statute regulating the punishment of a crime provides no penalty, the court cannot impose one under the former act which is repealed. State *v.* Gaunt, 13 Oreg. 115, 9 Pac. 55.

of criminal statutes by implication are not favored, and where there is a difference only and not an inconsistency between the two statutes, the repealing force of the latter will extend only so far as is absolutely necessary.[22] So where there are repugnant sections in a criminal code the rule is as to a repeal by implication that the sections transcribed in the court from later statutes amend those transcribed from earlier statutes, so far as is necessary to make them consistent.[23] And, where it is expressly provided that a statute prescribing the punishment shall operate to repeal all inconsistent statutes, its effect is not extended more than is necessary.[24]

b. Statutes Existing When Crime Was Committed. As a general rule the punishment of a crime must be assessed according to the statute which is in operation at the date of its commission.[25] And where one has been convicted before the passage of a statute affirming a common-law offense, the common-law punishment may be imposed after the passage of the act.[26] If the punishment is diminished by statute the statute in force at the date of the commission of the crime is to that extent repealed, and punishment must be imposed under the new statute.[27] But it has been held that a statute which increases the punishment and contains no saving clause as to a crime committed before it takes effect does not apply to an offense committed before its enactment, and the accused cannot be punished under either the old or the new statute.[28]

c. Effect of Saving Clause in Repealing Statute. A general saving clause in, or referring to, a repealing statute, continues the earlier statute in force as to crimes committed prior to the repeal, and the accused on conviction may be punished under the statute as it existed at the time of the commission of the crime notwithstanding its repeal.[29] Where a statute provides that no new law shall repeal or in any way affect the former one as to any offense committed against the former law, except that the proceedings thereafter shall conform to the new

22. *Alabama.*—Herrington *v.* State, 87 Ala. 1, 5 So. 831.

Connecticut.— State *v.* Grady, 34 Conn. 118.

Illinois.— Featherstone *v.* People, 194 Ill. 325, 62 N. E. 684.

Indiana.— Zeilinski *v.* State, 150 Ind. 700, 50 N. E. 304.

Louisiana.— State *v.* Lewis, 3 La. Ann. 398.

Massachusetts.—Murphy *v.* Com., 172 Mass. 264, 52 N. E. 505, 70 Am. St. Rep. 266, 43 L. R. A. 154; Hopkins *v.* Com., 3 Metc. 460.

Tennessee.—Durham *v.* State, 89 Tenn. 723, 18 S. W. 74.

Texas.— *Ex p.* Creel, 29 Tex. App. 439, 16 S. W. 256.

Where the punishment under both acts is precisely the same, it has been held immaterial whether the accused is punished under the act in existence when the crime was committed, or under the statute which has superseded it before the trial, inasmuch as he is not deprived of any of his rights thereby. Mingie *v.* People, 54 Ill. 274.

23. Zaner *v.* State, 90 Ala. 651, 8 So. 698.

24. Carter *v.* Burt, 12 Allen (Mass.) 424; Dolan *v.* Thomas, 12 Allen (Mass.) 421.

Repeal of statutes see *supra*, II, D, 3.

25. Jordan *v.* State, 38 Ga. 585; Gibson *v.* State, 35 Ga. 224; Griuad *v.* State, 34 Ga. 270.

The federal statute providing that offenses committed at places ceded to the government, the punishment of which is not provided for by the federal statute, shall be subject to the penalties provided for by the law of the state in which the place is situated, applies only to the state statutes in existence at the time of its passage. U. S. *v.* Paul, 6 Pet. (U. S.) 141, 8 L. ed. 348; U. S. *v.* Barnaby, 51 Fed. 20.

26. Beard *v.* State, 74 Md. 130, 21 Atl. 700.

27. Clarke *v.* State, 23 Miss. 261; State *v.* Cooler, 30 S. C. 105, 8 S. E. 692, 3 L. R. A. 181; State *v.* Williams, 2 Rich. (S. C.) 418, 45 Am. Dec. 741.

28. Com. *v.* McDonough, 13 Allen (Mass.) 581; Flaherty *v.* Thomas, 12 Allen (Mass.) 428.

29. Aaron *v.* State, 40 Ala. 307; *In re* Davis, 6 Ida. 766, 59 Pac. 544; Vincent *v.* California, 149 U. S. 648, 13 S. Ct. 960, 37 L. ed. 884 [*approving* People *v.* Vincent, 95 Cal. 425, 30 Pac. 581]; McNulty *v.* California, 149 U. S. 645, 13 S. Ct. 959, 37 L. ed. 882 [*approving* People *v.* McNulty, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61]. See also CONSTITUTIONAL LAW, 8 Cyc. 1035.

Construction of statute.— A statute providing that the repeal of any statute shall not have the effect to release or extinguish "any penalty, forfeiture or liability" incurred under such statute, unless the repealing act shall so expressly provide, covers a prosecution under a statute which authorizes imprisonment as well as where the punishment is pecuniary. U. S. *v.* Mathews, 23 Fed. 74.

Under a statute which provides that a mitigated penalty is to be imposed by a judgment pronounced after the new statute goes

statute, the jury on conviction may fix the penalty under the law in force when the crime occurred.[30]

d. Repeal After Sentence and Before Execution. Where, after a prisoner is sentenced to death, the law under which he was convicted and sentenced is repealed and the punishment mitigated, he cannot be resentenced to capital punishment thereafter but must be discharged.[31]

e. Right of Accused to Elect Between Original and Repealing Statutes. In some of the states the accused has a right to elect between the punishment prescribed by the statute in existence at the date of the commission of the crime and a subsequent statute amending or repealing it by changing the punishment.[32] If the prisoner fails to elect it has been held that he may be punished according to the law in force at the date of the crime,[33] although elsewhere it is held that if the subsequent punishment ameliorates the prior punishment, and he fails to exercise his right to elect, he should be punished under the repealing statute.[34]

C. Extent of Punishment[35] — **1. At Common Law.** The punishments inflicted for crimes at common law are death, imprisonment, fine, pillory, tumbrel, and the stocks.[36] To these was added the punishment by whipping, which at common law was usually inflicted only on persons of inferior conditions who might be guilty of petit larceny and other small offenses.[37] Punishment by transportation in England was wholly the creature of statutory regulations.[38] Fines were considered the lowest species of punishment, and, although at first they were the only penalties to which the rich were liable, when judges were at most merely collectors of the royal revenue, yet later they were enforced only in cases to which they were particularly appropriate, the court keeping in view the provisions of magna charta and of the bill of rights that excessive fines ought not to be demanded.[39] In the United States criminal offenses, the punishment of which is not provided by statute, are punishable as at common law, usually by fine or imprisonment or both, in the discretion of the court, according to the precedents of the common law.[40]

2. Legislative Power to Prescribe Punishment. Congress and the state legisla-

into effect, a judgment pronounced before it takes effect cannot be reversed so the mitigated penalty may be applied. Jones *v.* Com., 104 Ky. 468, 47 S. W. 328, 20 Ky. L. Rep. 651.

30. Johnson *v.* People, 173 Ill. 131, 50 N. E. 321. See also State *v.* Crawford, 11 Kan. 32; State *v.* Boyle, 10 Kan. 113.

The law in force when a trial is begun remains, under such a statute, the law until it is ended, and the punishment is not affected by a new law going into effect during the trial (Myers *v.* State, 8 Tex. App. 321; Simms *v.* State, 8 Tex. App. 230), or while an appeal is pending (Walker *v.* State, 7 Tex. App. 245, 32 Am. Rep. 595).

31. Aaron *v.* State, 40 Ala. 307, holding also that the repeal is a "legal reason against the execution of the sentence" within the meaning of a statute.

32. Clarke *v.* State, 23 Miss. 261; State *v.* Abbott, 8 W. Va. 741. Under a statute conferring this privilege the accused should properly consent to the trial under the subsequent statute before the jury is sworn and impaneled, although he may exercise the privilege any time before the verdict is received and recorded. State *v.* Abbott, 8 W. Va. 741.

Construction of Texas statute.— Maul *v.* State, 25 Tex. 166; Cockrum *v.* State, 24 Tex. 394; Martin *v.* State, 24 Tex. 61; Herber *v.* State, 7 Tex. 69; Allen *v.* State, 7 Tex. App. 298.

33. Clarke *v.* State, 23 Miss. 261.

34. McInturf *v.* State, 20 Tex. App. 335; Perez *v.* State, 8 Tex. App. 610; Veal *v.* State, 8 Tex. App. 474.

35. **Judgment and sentence** see *supra*, XVI.

36. See 1 Chitty Cr. L. 779 *et seq.*

Imprisonment for life or during the king's pleasure was inflicted as punishment at common law (Waller's Case, Cro. Car. 372; Davis' Case, Dyer 188*b*; 3 Inst. 142), although in one case in the United States the contrary has been held (State *v.* Danforth, 3 Conn. 112).

Where an invalid punishment is provided for a statutory offense, the punishment may be assessed as at common law. State *v.* Corbett, 61 Ark. 226, 32 S. W. 686.

37. 1 Chitty Cr. L. 796.

38. 1 Chitty Cr. L. 789, 792.

39. 1 Chitty Cr. L. 557, 809.

40. State *v.* Wilson, 2 Root (Conn.) 62; U. S. *v.* Marshall, 6 Mackey (D. C.) 34; Smith *v.* People, 25 Ill. 17, 76 Am. Dec. 780.

The court may pass sentence according to the statutes, although the indictment is drawn as at common law, such statutes not being rules of pleading but merely affecting the conduct of the trial and instructions to be

tures have in general complete power, subject to constitutional restrictions,[41] to provide punishments for crimes and offenses committed subsequent to the enactment of the statutes defining them.[42] The legislature may increase the punishment applicable to a certain class of offenses,[43] and it may impose more than one penalty for the same offense, providing it does not put the accused twice in jeopardy of life or limb.[44]

3. Obligation of Court to Follow Statute. Where a statute provides a specific punishment for a particular statutory crime, the courts must follow the statute closely, and a departure from the statute assessing punishment in excess of the statutory limitation is illegal.[45] If a statute directs a fine and imprisonment punishment may be by both,[46] but if it directs fine or imprisonment punishment by both is illegal;[47] and where a statute provides for imprisonment and fine, or imprisonment without fine, a fine without imprisonment is illegal.[48] If a statute fixes the maximum and minimum of a fine but leaves it to the discretion of the court to fix the precise sum, the imposition of a fine less than the minimum is not less illegal than one in excess of the maximum.[49]

4. Discretion of Court. The statutes frequently leave the extent of the punishment to the discretion of the court within certain limits, and the exercise of such discretion will not be interfered with unless it is clearly abused.[50] Where the court has a discretion as to the character or amount of punishment, it may be guided in the exercise of its discretion by the fact that the accused has

given the jury. Kennedy *v.* People, 39 N. Y. 245; U. S. *v.* Dixon, 25 Fed. Cas. No. 14,968, 1 Cranch C. C. 414; U. S. *v.* King, 26 Fed. Cas. No. 15,534, 1 Cranch C. C. 444.

41. Constitutionality of statutes see *supra*, XIX, B.

42. U. S. *v.* Cross, 1 MacArthur (D. C.) 149; Thomas *v.* People, 113 Ill. 531.

43. Bork *v.* People, 91 N. Y. 5.

44. Com. *v.* Gilbert, 6 J. J. Marsh. (Ky.) 184.

Former jeopardy see *supra*, IX.

45. *Florida.*— *Ex p.* Martini, 23 Fla. 343, 2 So. 689.

Louisiana.— Homer *v.* Blackburn, 27 La. Ann. 544; State *v.* Nolan, 8 Rob. 513.

Michigan.— Donnoly *v.* People, 38 Mich. 756; Brownbridge *v.* People, 38 Mich. 751.

Mississippi.— Stark *v.* State, 81 Miss. 397, 33 So. 175.

Missouri.— State *v.* Jones, 86 Mo. 623.

New York.— Renwick *v.* Morris, 7 Hill 575.

Oregon.— Howell *v.* State, 1 Oreg. 241.

Pennsylvania.— Beale *v.* Com., 25 Pa. St. 11.

South Carolina.— State *v.* Hord, 8 S. C. 84.

Wisconsin.— Haney *v.* State, 5 Wis. 529.

United States.— Whitworth *v.* U. S., 114 Fed. 302, 52 C. C. A. 214; *In re* Christian, 82 Fed. 199.

See 15 Cent. Dig. tit. "Criminal Law," §§ 3287, 3288.

Illustrations.—If the statute prescribes imprisonment in the penitentiary, imprisonment in the county jail is illegal (De Bardelaben *v.* State, 50 Ala. 179), and a sentence that defendant stand committed until his fine and costs are paid is illegal, unless expressly authorized by statute (Brown *v.* State, 11 Ohio 276).

Conflicting, excessive, and erroneous assessment of punishment see *supra*, XVI, D, 6, 7, 8.

Solitary confinement.— Where the prisoner, in a separate proceeding on an information, is sentenced to additional punishment, it need not include solitary confinement, although the original punishment imposed included it. Bump *v.* Com., 8 Metc. (Mass.) 533. That the court may so sentence to solitary confinement on an information see Com. *v.* Bryant, 2 Va. Cas. 465. Where a statutory provision has abolished solitary confinement, "excepting for prison discipline," a court has no power to impose a sentence involving solitary confinement, as prison discipline is to be enforced solely by the warden and within the prison, and not by the court. State *v.* Haynes, 74 Me. 161.

46. Com. *v.* Shade, 1 Woodw. (Pa.) 44; Kittrell *v.* State, 104 Tenn. 522, 58 S. W. 120; State *v.* Dunlap, 25 Wash. 292, 65 Pac. 544; U. S. *v.* Vickery, 28 Fed. Cas. No. 16,619.

In Canada it seems the court is not bound to inflict both, but may choose between fine and imprisonment. Reg. *v.* Robidoux, 2 Can. Cr. Cas. 19; Brabant *v.* Robidoux, 7 Quebec Q. B. 527.

47. Com. *v.* Griffin, 105 Mass. 185; State *v.* Crowell, 116 N. C. 1052, 21 S. E. 502; State *v.* Walters, 97 N. C. 489, 2 S. E. 539, 2 Am. St. Rep. 310; State *v.* Browne, 20 R. I. 302, 38 Atl. 978.

In Michigan a contrary rule is expressly provided by statute. People *v.* Minter, 59 Mich. 557, 26 N. W. 701.

48. Johnson *v.* State, 18 Tex. App. 7.

49. Graham *v.* State, 1 Ark. 171.

50. Greenville *v.* Kemmis, 58 S. C. 427, 36 S. E. 727, 50 L. R. A. 725; State *v.* Sheppard, 54 S. C. 178, 32 S. E. 146.

An objection that the period of imprisonment must be for one or more whole years, where the court has power to imprison "for any number of years," is of no effect where

been previously convicted of similar offenses.[51] It may also consider in reducing the term of imprisonment the time that the convict has been in custody awaiting trial.[52] If the evidence was barely sufficient to support the verdict the court is justified in imposing a low degree of punishment.[53]

5. Power to Commit to Particular Prisons. The power to designate the place in which the accused shall suffer imprisonment depends in most cases on constitutional and statutory provisions.[54] If the statute gives the court a discretion to choose between punishment by imprisonment in the penitentiary or the county jail a sentence to the penitentiary is proper.[55] Under a statute authorizing imprisonment for the non-payment of a fine, if the primary punishment includes a term of imprisonment in the state prison, the convict may be required to serve out his fine in the same institution and need not be transferred to a county jail for this purpose,[56] but in other cases imprisonment for the non-payment of fines must be in the county jail.[57]

6. Imprisonment at Hard Labor. Punishment by imprisonment at hard labor is illegal, unless authorized by statute,[58] although it has been held that under a statute providing only for imprisonment, the court may sentence to a prison where hard labor is imposed as a part of the discipline.[59]

the sentence was for a year or a fractional part thereof. Allen *v.* People, 77 Ill. 484.

Discretion to impose a sentence short of death on a verdict of guilty of murder in the first degree, where the jury finds mitigating circumstances, is not abused by imposing a punishment of death, although the jury finds such circumstances. Lancaster *v.* State, 91 Tenn. 267, 18 S. W. 777.

A sentence for the maximum term on a plea of guilty, defendant being a man of previous good character, who while intoxicated was induced by others to commit a burglary, has been held too severe (Charles *v.* State, 27 Nebr. 881, 44 N. W. 39); but the court refused to disturb a sentence of one year less than the maximum, where it appeared that it was not the first offense (State *v.* Burton, 27 Wash. 528, 67 Pac. 1097).

Matter in mitigation or aggravation see *supra,* XVI, D, 2, b.

Reduction of a penalty by statute where judgment is confessed.— Sneed *v.* Com., 6 Dana (Ky.) 338.

Review of discretionary sentence and punishment see *supra,* XVII, G, 4, g.

51. Giles *v.* State, 66 Ga. 344; Mims *v.* State, 26 Minn. 498, 5 N. W. 374; State *v.* Wilson, 121 N. C. 650, 28 S. E. 416; State *v.* Wise, 32 Oreg. 280, 50 Pac. 800.

52. People *v.* State Prison, 66 N. Y. 342.

53. State *v.* Madden, 35 Iowa 511.

54. *Ex p.* Williams, 87 Cal. 78, 24 Pac. 602, 25 Pac. 248; *Ex p.* Flood, 64 Cal. 251, 30 Pac. 437; Shepherd *v.* Com., 2 Metc. (Mass.) 419; State *v.* McNeill, 75 N. C. 15.

House of correction.— Lane *v.* Com., 161 Mass. 120, 36 N. E. 755; Stevens *v.* Com., 4 Metc. (Mass.) 360; *In re* Silverthorn, 73 Mich. 644, 41 N. W. 834; Elliott *v.* People, 13 Mich. 365.

Judgment and sentence see *supra,* XVI, D, 5, e.

55. State *v.* Welch, 29 S. C. 4, 6 S. E. 894.

Jails and workhouses in New Jersey are by statute treated as entirely distinct in their origin, object, and government. The authority which a justice of the peace has to commit to the workhouse will not authorize him to commit to the county jail. State *v.* Ellis, 26 N. J. L. 219. Punishment by imprisonment in the county jail is illegal and void, where the statute provides as punishment for disorderly persons incarceration in the workhouse. Fairbanks *v.* Sheridan, 43 N. J. L. 484.

56. People *v.* Sage, 13 N. Y. App. Div. 135, 43 N. Y. Suppl. 372, 12 N. Y. Cr. 200.

57. Eggart *v.* State, 40 Fla. 527, 25 So. 144; Bueno *v.* State, 40 Fla. 160, 23 So. 862.

A statute authorizing the imprisonment of federal prisoners for the non-payment of fines does not in the absence of express provision confer authority to imprison in the state's prison. *In re* Greenwald, 77 Fed. 590.

58. *Louisiana.*— State *v.* Myhand, 12 La. Ann. 504.

New York.— Niles *v.* People, 4 Am. L. J. N. S. 507.

South Carolina.— State *v.* Williams, 40 S. C. 373, 19 S. E. 5.

Tennessee.— Durham *v.* State, 89 Tenn. 723, 18 S. W. 74.

United States.— Haynes *v.* U. S., 101 Fed. 817, 42 C. C. A. 34.

See 15 Cent. Dig. tit. "Criminal Law," § 3284.

The addition of the words "hard labor" to a sentence of imprisonment, when not authorized by statute, does not render the entire sentence void (U. S. *v.* Pridgeon, 153 U. S. 48, 14 S. Ct. 746, 38 L. ed. 631; Jackson *v.* U. S., 102 Fed. 473, 42 C. C. A. 452), but the accused is entitled to have it corrected as to the unauthorized part (Daniels *v.* Com., 7 Pa. St. 371; Jackson *v.* U. S., 102 Fed. 473, 42 C. C. A. 452), although notwithstanding such correction hard labor may be required as a part of the prison discipline (Gardes *v.* U. S., 87 Fed. 172, 30 C. C. A. 596).

59. *Ex p.* Karstendick, 93 U. S. 396, 23 L. ed. 889.

Judgment and sentence see *supra,* XVI, D, 5, h.

7. Employment of Convicts on Public Works. The punishment of a convict by compelling him to labor on public works under county authorities is authorized by the constitutions of some states.[60] Rural and urban highways are public works within the meaning of statutes and constitutions providing for the employment of convicts on public works.[61] One sentenced to labor upon the public works, under contract, may be imprisoned at night to prevent his escape.[62]

8. On Failure of Jury to Assess Punishment. In Missouri it is provided by statute that if the jury assess a punishment below the limit prescribed by law for the offense of which defendant is convicted, the court shall pronounce sentence and render judgment according to the lowest limit which the law prescribes.[63]

9. Imprisonment in Default of Payment of Fine. Imprisonment in default of payment of fine is illegal, unless the court is expressly authorized by the legislature to impose it.[64] Statutes which expressly permit imprisonment for non-payment of a fine usually limit the term of such imprisonment, providing that the imprisonment shall be in proportion to the amount of the fine.[65] Where this is the case defendant may avoid imprisonment for non-payment and secure his discharge by paying the fine or the remainder thereof, deducting the amount for which his imprisonment is an equivalent.[66] If there be no limitation placed upon the duration of the imprisonment to enforce the fine, it seems that the convict may be confined for an unlimited time in default of the payment of the fine.[67]

10. Misdemeanors. Misdemeanors, the punishment of which is not specifically prescribed by statute, are punishable by fine and imprisonment in the county jail within reasonable limits in the discretion of the court[68] or jury.[69] Punishment by imprisonment in the state's prison on a conviction of misdemeanor is generally illegal.[70]

11. Attempts. At common law an attempt to commit a misdemeanor was punishable by fine and imprisonment or both.[71] Where a statute provides for punishment for an attempt to commit a misdemeanor, it is proper to impose the same term of imprisonment as by statute is designated for the complete offense.[72] In many of the states the statutes provide that an attempt to commit a crime

Sentence by federal court see *supra*, XIX, A, 3.

60. State *v.* Weathers, 98 N. C. 685, 4 S. E. 512. Where the statute permits the convict to be hired out, the court cannot direct that he be hired out, but may authorize the county commissioners to do so. State *v.* Johnson, 94 N. C. 863. Where a statute provides that under certain circumstances convicts may be compelled to labor on public works until the expiration of the sentence of imprisonment, a sentence requiring the convict to be kept in jail, where such circumstances are shown, is error, and the judgment to that extent will be reversed. Johnson *v.* State, (Miss. 1900) 26 So. 967; Reabold *v.* State, 73 Miss. 236, 18 So. 929.

61. Lark *v.* State, 55 Ga. 435; State *v.* Weathers, 98 N. C. 685, 4 S. E. 512.

62. Brady *v.* Joiner, 101 Ga. 190, 28 S. E. 679.

63. State *v.* Sears, 86 Mo. 169; State *v.* McQuaig, 22 Mo. 319.

64. *Ex p.* Rosenheim, 83 Cal. 388, 23 Pac. 372; *Ex p.* Wadleigh, 82 Cal. 518, 23 Pac. 190; Roop *v.* State, 58 N. J. L. 487, 34 Atl. 885.

65. **Sentence to imprisonment for non-payment of fine** see *supra*, XVI, D, 5, f.

Place of imprisonment see *supra*, XIX, C, 5.

Imprisonment for non-payment of fine is not a part of a term of imprisonment or labor which is given in addition to the fine, and therefore a provision that the convict shall be credited with a certain sum on his fine for each day's imprisonment or labor and that in no event shall he be required to work out his fine for more than a year has no application to a term of imprisonment imposed with his fine. *Ex p.* Dockery, 38 Tex. Cr. 293, 42 S. W. 599.

66. *Ex p.* Casey, 85 Cal. 36, 24 Pac. 599.

67. Hathcock *v.* State, 88 Ga. 91, 13 S. E. 959. See also Brock *v.* State, 22 Ga. 98.

68. Atchison *v.* State, 13 Lea (Tenn.) 275; *Ex p.* Garrison, 36 W. Va. 686, 15 S. E. 417. See Matter of Hallenbeck, 65 How. Pr. (N. Y.) 401.

The imposition of the costs of prosecution in addition to a fine is not excessive punishment in the case of a misdemeanor. Phillips *v.* State, 95 Ga. 478, 20 S. E. 270.

69. Cornelison *v.* Com., 84 Ky. 583, 2 S. W. 235, 8 Ky. L. Rep. 793.

70. *Ex p.* Ah Cha, 40 Cal. 426; U. S. *v.* Marshall, 6 Mackey (D. C.) 34.

71. Com. *v.* Jones, 22 Pittsb. Leg. J. (Pa.) 55.

72. Com. *v.* Jones, 22 Pittsb. Leg. J. (Pa.) 55. In some states this is the rule by statute. See Brownlow *v.* State, 112 Ga. 405, 37 S. E. 733.

may be punished by the imposition of imprisonment for one-half or not to exceed one-half the term for which the perpetrator of the completed crime would be punishable.[73] A statute providing that the punishment for an attempt to commit a crime shall be one-half the penalty for a conviction of the crime is too uncertain and indefinite to be enforced in cases where, for the commission of the crime, imprisonment for life is the only penalty.[74]

12. Accessaries and Accomplices. At common law the punishment of accessaries before the fact was generally the same as that of principals.[75] But the punishment of an accessary after the fact was in most cases less than the punishment of the principal, and in many cases it was trivial.[76] In most cases by statute it is now provided that accessaries and accomplices shall receive the same punishment as the principal.[77]

13. Age as Affecting Punishment. Under a statute which distinguishes the punishment of criminals according to their age, the age at the date of the commission of the crime and not at the date of the conviction is to be considered.[78]

14. Double Punishment. The constitutional principle that no one shall be twice put in jeopardy for the same offense is broad enough to mean that no one can be twice lawfully punished for the same offense. The one follows from the other, and the constitutional provisions are designed to protect the accused from a double punishment as much as to protect him from two trials.[79] Hence where two judgments are by mistake entered against the accused on one verdict and he serves the full term imposed in one, he cannot be reimprisoned on the other.[80] A judgment for a fine and imprisonment is not void as a double punishment because it provides that the fine and costs may be enforced by a civil judgment;[81] and the imposition of a fine for betting in a criminal prosecution, and a civil action to recover the amount received by the accused on such bet, do not constitute a double punishment for the same offense.[82] The same is true of imprisonment for failure to pay a fine,[83] of a resentence after serving part of a legal

73. See McLaughlin's Case, 107 Mass. 225; O'Neil *v.* People, 15 Mich. 275; Mackay *v.* People, 1 Park. Cr. (N. Y.) 459. A statute providing that an attempt to commit an offense punishable with imprisonment in the penitentiary for a term of not less than two years shall be punished by imprisonment for one year applies, although if the accused was convicted of the complete offense he might, on the recommendation of the jury to the mercy of the court, be sentenced, as for a misdemeanor, to a lower degree of punishment. Miller *v.* State, 58 Ga. 200.

Under a statute providing for punishment of attempts to commit certain crimes therein specified, attempts to commit other crimes not included have been held not to be punishable, under the rule that where a statute fails to affix a penalty to an offense none can be inflicted. Hill *v.* State, 53 Ga. 125.

74. People *v.* Burns, 138 Cal. 159, 69 Pac. 16, 70 Pac. 1087. But where the crime itself if consummated is punishable by a definite term of years, imprisonment for one half of that term for an attempt is legal, although the actual commission of the crime is also punishable in the discretion of the court (People *v.* Gardner, 98 Cal. 127, 32 Pac. 880), or on the recommendation of the jury by imprisonment for life (*In re* De Camp, 15 Utah 158, 49 Pac. 823).

75. 1 Chitty Cr. L. 267.

76. 1 Chitty Cr. L. 267.

77. Anderson *v.* State, 63 Ga. 675; State *v.* Hunter, 43 La. Ann. 157, 8 So. 624; Nuthill *v.* State, 11 Humphr. (Tenn.) 247.

Under the Kentucky statute the accessary is not liable to the same punishment. Bland *v.* Com., 10 Bush 622.

78. Monoughan *v.* People, 24 Ill. 340.

79. *Ex p.* Lange, 18 Wall. (U. S.) 163, 21 L. ed. 872. A statute which provides for imprisonment in the state prison for a term not exceeding five years, or in the county jail not exceeding six months, or by both (People *v.* Perini, 94 Cal. 573, 29 Pac. 1027), or which provides that where the accused is convicted of embezzling public moneys a fine equal to double the amount of the money embezzled may be imposed in addition to imprisonment is not unconstitutional as inflicting a double punishment or awarding the injured party double damages (Everson *v.* State, (Nebr. 1902) 92 N. W. 137).

Successive terms of imprisonment see *supra*, XVI, D, 5, d.

80. Davis *v.* Catron, 22 Wash. 183, 60 Pac. 131.

81. State *v.* Marion, 14 Mont. 458, 36 Pac. 1044.

82. Com. *v.* Avery, 14 Bush (Ky.) 625, 29 Am. Rep. 429.

83. Inasmuch as imprisonment for a failure to pay a fine is no part of the punishment, but rather the means of enforcing the punishment, an illegal imprisonment for a failure to pay a fine does not render a second imprisonment under a valid sentence illegal,

sentence,[84] and of a provision that the prison officials may discipline the inmates of the prisons, and provision for the punishment of crimes committed therein.[85]

D. Cumulative Punishments — 1. In General. By common law cumulative fines and terms of imprisonment, if definite and certain, are valid where the accused is convicted of separate and distinct crimes in different indictments or in different counts of the same indictment.[86] And where a convict is serving a term of imprisonment under a prior sentence at the time of a second conviction, sentence may be pronounced to begin at the expiration of the term he is serving.[87] In some jurisdictions, however, it is held that cumulative sentences cannot be imposed except where they are expressly authorized by statute.[88] A term of imprisonment to begin in the future, after the determination of a prior term, is not necessarily illegal in itself or invalid because it is vague or uncertain. It may be uncertain when it is imposed, but it will be made certain by the event, for, if the prior imprisonment is shortened by a reversal or a pardon, the sentence of subsequent punishment then takes effect in the same mode as if the prior term had expired by the natural lapse of time.[89]

2. Statutory Provisions. There are now in many jurisdictions statutes expressly allowing cumulative sentences in certain cases.[90] The operation of these statutes

as being a double punishment. State *v.* Schierhoff, 103 Mo. 47, 15 S. W. 151.

84. A reversal and a remand for the purpose of having the proper punishment imposed, after the accused has served a portion of an erroneous punishment, is not the infliction of a double punishment, although by a resentence he is actually confined for a longer period than the term for which he was originally sentenced. Com. *v.* Murphy, 174 Mass. 369, 54 N. E. 860, 75 Am. St. Rep. 353, 48 L. R. A. 393 [*affirmed* in Murphy *v.* Massachusetts, 177 U. S. 155, 20 S. Ct. 639, 44 L. ed. 711]. So a convict who appeals and is during the appeal confined in prison may be sentenced to a new term of imprisonment on his conviction after a new trial, and the court need not consider the fact of his prior imprisonment. People *v.* Brush, 128 N. Y. 529, 28 N. E. 533. See also Trezza *v.* Brush, 142 U. S. 160, 12 S. Ct. 158, 35 L. ed. 974.

85. People *v.* Huntley, 112 Mich. 569, 71 N. W. 178.

86. 1 Chitty Cr. L. 718. And see the following cases:

Colorado.— Parker *v.* People, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803.

Connecticut.— State *v.* Smith, 5 Day 175, 5 Am. Dec. 132.

District of Columbia.— *In re* Fry, 3 Mackey 135.

Kansas.— State *v.* Carlyle, 33 Kan. 716, 7 Pac. 623.

Louisiana.— State *v.* Robinson, 40 La. Ann. 730, 5 So. 20.

Massachusetts.— Kite *v.* Com., 11 Metc. 581.

Minnesota.— Mims *v.* State, 26 Minn. 498, 5 N. W. 374.

Nebraska.— *In re* Walsh, 37 Nebr. 454, 55 N. W. 1075.

North Carolina.— State *v.* Hamby, 126 N. C. 1066, 35 S. E. 614.

Utah.— *In re* Wilson, 11 Utah 114, 39 Pac. 498.

Virginia.— Com. *v.* Leath, 1 Va. Cas. 151.

United States.— Howard *v.* U. S., 75 Fed. 986, 21 C. C. A. 586, 34 L. R. A. 509; *In re* Esmond, 42 Fed. 827. See also *In re* Mills, 135 U. S. 263, 10 S. Ct. 762, 34 L. ed. 107; *Ex p.* Henry, 123 U. S. 372, 8 S. Ct. 142, 31 L. ed. 174.

England.— Castro *v.* Reg., 6 App. Cas. 229, 14 Cox C. C. 546, 45 J. P. 452, 50 L. J. Q. B. 497, 44 L. T. Rep. N. S. 350, 29 Wkly. Rep. 669; Rex *v.* Wilkes, 4 Burr. 2527.

See 15 Cent. Dig. tit. "Criminal Law," § 3299. See also *supra*, XVI, C, 13, a.

87. Russel *v.* Com., 7 Serg. & R. (Pa.) 489; U. S. *v.* Farrell, 25 Fed. Cas. No. 15,074, 5 Cranch C. C. 311.

Successive terms of imprisonment see *supra*, XVI, D, 5, d.

88. *California.*— *Ex p.* Morton, 132 Cal. 346, 64 Pac. 469.

Indiana.— Kennedy *v.* Howard, 74 Ind. 87.

Kentucky.— James *v.* Ward, 2 Metc. 271.

Missouri.— *Ex p.* Meyers, 44 Mo. 279.

Texas.— Prince *v.* State, 44 Tex. 480.

89. Kite *v.* Com., 11 Metc. (Mass.) 581; Shumaker *v.* State, 10 Tex. App. 117. See also *In re* Packer, 18 Colo. 525, 33 Pac. 578. *Contra*, *In re* Lamphere, 61 Mich. 105, 27 N. W. 882. The court, however, should not, in imposing sentence of imprisonment to begin in the future, fix the day on which each successive term of imprisonment shall begin, but should direct that each term should begin at the expiration of the previous one, for the reason that the prior term may be shortened by good behavior, by executive clemency, or by a reversal of the judgment. *In re* Walsh, 37 Nebr. 454, 55 N. W. 1075.

Where the law is declared unconstitutional under which the first conviction is had, a second sentence, to begin at the expiration of the first, is void for uncertainty. *Ex p.* Jordan, 5 Ohio S. & C. Pl. Dec. 397.

90. *California.*— *Ex p.* Morton, 132 Cal. 346, 64 Pac. 469; *Ex p.* Kirby, 76 Cal. 514, 18 Pac. 655.

Kentucky.— Evans *v.* Com., 12 S. W. 768, 11 Ky. L. Rep. 573.

Missouri.— *Ex p.* Durhin, 102 Mo. 100, 14 S. W. 821; *In re* Williamson, 67 Mo. 174; *Ex p.* Turner, 45 Mo. 331.

is generally confined to cases where the several convictions are obtained before judgment is pronounced on either.[91]

3. Punishment of Crime Committed During First Imprisonment. Where a prisoner during an unexpired term of imprisonment commits a crime, he may be punished therefor and sentenced to a term of imprisonment to commence on the expiration of his present term.[92] If he commits a capital offense, he may be executed before the term of imprisonment which he is serving has expired.[93]

E. Cruel and Unusual Punishments and Excessive Fines — 1. Constitutional Provisions. The provision of the federal constitution[94] prohibiting "cruel and unusual punishments" and the levying of excessive fines is confined in its operation to the legislature and the judiciary of the United States,[95] and does not apply to legislation by the state. The constitutions of most states, however, also provide that cruel and unusual punishment shall not be inflicted.[96]

2. What Constitutes Cruel and Unusual Punishment — a. In General. What shall in any particular case constitute a cruel and unusual punishment under the constitutional provisions depends upon the facts and circumstances of the punishment itself, and upon the nature of the act which is to be punished.[97] The prohibition of the constitution would unquestionably apply to punishments which amount to physical torture, or to such as would by their character shock the minds of persons possessed of the ordinary feelings of humanity.[98]

New York.— People *v.* Liscomb, 60 N. Y. 559, 19 Am. Rep. 211.

Texas.— Stewart *v.* State, 37 Tex. Cr. 135, 38 S. W. 1143; Smith *v.* State, 34 Tex. Cr. 123, 29 S. W. 774; *Ex p.* Moseley, 30 Tex. App. 338, 17 S. W. 418. The Texas statute authorizing cumulative punishments applies to misdemeanors as well as felonies (Stewart *v.* State, 37 Tex. Cr. 135, 38 S. W. 1143; *Ex p.* Cox, 29 Tex. App. 84, 14 S. W. 396), but only to cases where the punishment is by imprisonment and not by fine (*Ex p.* Banks, 41 Tex. Cr. 201, 53 S. W. 688).

United States.— *In re* Esmond, 42 Fed. 827.

See 15 Cent. Dig. tit. "Criminal Law," § 3299 *et seq.*

91. See *Ex p.* Morton, 132 Cal. 346, 68 Pac. 469; *Ex p.* Bryan, 76 Mo. 253; *Ex p.* Kayser, 47 Mo. 253; *In re* Esmond, 42 Fed. 827. In Missouri the different convictions must be at the same term and both obtained before sentence on either is pronounced. *Ex p.* Meyers, 44 Mo. 279. The Texas statute applies to cases where the convictions are on separate indictments and at different terms of the court. *Ex p.* Moseley, 30 Tex. App. 338, 17 S. W. 418.

92. *Ex p.* Brunding, 47 Mo. 255, where the prisoner escaped and committed a crime while at large.

93. Thomas *v.* People, 67 N. Y. 218.

94. U. S. Const. Amendm. arts. 8, 14.

95. *Massachusetts.*— McDonald *v.* Com., 173 Mass. 322, 53 N. E. 874, 73 Am. St. Rep. 293; Com. *v.* Murphy, 165 Mass. 66, 42 N. E. 504, 52 Am. St. Rep. 496, 30 L. R. A. 734; Com. *v.* Hitchings, 5 Gray 482.

New York.— Barker *v.* People, 3 Cow. 686, 15 Am. Dec. 322.

Pennsylvania.— James *v.* Com., 12 Serg. & R. 220.

Vermont.— State *v.* Hodgson, 66 Vt. 134, 28 Atl. 1089.

Virginia.— Southern Express Co. *v.* Com., 92 Va. 59, 22 S. E. 809, 41 L. R. A. 436.

United States.— Pervear *v.* Com., 5 Wall. 475, 18 L. ed. 608.

See 15 Cent. Dig. tit. "Criminal Law," § 3304.

96. 1 Stimson St. L. 31.

Banishment from the state by transportation as a punishment for crime is expressly forbidden in several of the states. State *v.* Baker, 58 S. C. 111, 36 S. E. 501. And see 1 Stimson St. L. 31.

97. Blydenburgh *v.* Miles, 39 Conn. 484; State *v.* Stubblefield, 157 Mo. 360, 58 S. W. 337.

The court cannot consider what the governor might do in the exercise of the pardoning power to mitigate the punishment. *Ex p.* Tuichner, 69 Iowa 393, 28 N. W. 655.

The severity of the punishment does not alone constitute cruelty. Cummins *v.* People, 42 Mich. 142, 3 N. W. 305; 1 Bishop New Cr. L. § 947.

98. *Arkansas.*— Thomas *v.* Kinkead, 55 Ark. 502, 18 S. W. 854, 29 Am. St. Rep. 68, 15 L. R. A. 558.

Indiana.— Hobbs *v.* State, 133 Ind. 404, 32 N. E. 1019, 18 L. R. A. 774.

Missouri.— State *v.* Williams, 77 Mo. 310.

New Mexico.— Territory *v.* Ketchum, 10 N. M. 718, 65 Pac. 168, 55 L. R. A. 90; Garcia *v.* Territory, 1 N. M. 415.

South Dakota.— State *v.* Becker, 3 S. D. 29, 51 N. W. 1018.

United States.— Wilkerson *v.* Utah, 99 U. S. 130, 25 L. ed. 345.

See 15 Cent. Dig. tit. "Criminal Law," § 3306 *et seq.*

The ancient punishments prevalent in England, such as drawing and quartering, burning at the stake, mutilation of limbs, death by slow starvation in prison, and the like, would probably be regarded as cruel and unusual by every court called upon to decide this question. See State *v.* Williams, 77 Mo. 310; Wilkerson *v.* Utah, 99 U. S. 130, 25 L. ed. 345.

b. Particular Sentences — (1) *In General.* The character of punishments imposed by the statute, which have been held not to infringe constitutional provisions prohibiting cruel and unusual punishment, differs widely in the several states.[19]

The discretion of the legislature will not be interfered with by the court except in extreme cases. McDonald *v.* Com., 173 Mass. 322, 53 N. E. 874, 73 Am. St. Rep. 293; People *v.* Huntley, 112 Mich. 569, 71 N. W. 178; State *v.* Becker, 3 S. D. 29, 51 N. W. 1018; Aldridge *v.* Com., 2 Va. Cas. 447.

99. Not cruel and unusual.— The following punishments have been held not to be cruel and unusual.

California.— Imprisonment in the state prison for two years or a fine of five thousand dollars or both, for assault with a deadly weapon. *Ex p.* Mitchell, 70 Cal. 1, 11 Pac. 488. An additional term of imprisonment in jail for non-payment of a fine of one thousand dollars, one day for each dollar. *In re* Collins, (1890) 23 Pac. 374; *In re* Rosenheim, 83 Cal. 388, 23 Pac. 372. Twenty years for robbery at night in the house of the persons robbed. People *v.* Clark, 106 Cal. 32, 39 Pac. 53.

Colorado.—A fine not to exceed five hundred dollars, with imprisonment not to exceed eighteen months, or both, for an infraction of the liquor law. Cardillo *v.* People, 26 Colo. 355, 58 Pac. 678.

Georgia.— Twelve months in the chaingang for breaking in and stealing oats from a barn. Mitchell *v.* State, 100 Ga. 91, 26 S. E. 501. Ten years in the penitentiary for assault with intent to kill. Fogarty *v.* State, 80 Ga. 450, 5 S. E. 782.

Indiana.— See Shields *v.* State, 149 Ind. 395, 49 N. E. 351; Hobbs *v.* State, 133 Ind. 404, 32 N. E. 1019, 18 L. R. A. 774 ("White-Cap Act"); McLaughlin *v.* State, 45 Ind. 338 (abatement of a nuisance).

Iowa.— Imprisonment not to exceed five years, or a fine of five hundred dollars and imprisonment for one year, for obstructing the highway. State *v.* Teeters, 97 Iowa 458, 66 N. W. 754. Five years at hard labor in the penitentiary for receiving a deposit while an officer of an insolvent bank. State *v.* Boomer, 103 Iowa 106, 72 N. W. 424.

Kansas.— Hard labor for a term not exceeding seven years, for larceny from a railroad company. *In re* Tutt, 55 Kan. 705, 41 Pac. 957.

Kentucky.— Disfranchisement as punishment for gambling. Harper *v.* Com., 93 Ky. 290, 19 S. W. 737, 14 Ky. L. Rep. 163.

Massachusetts.— The habitual criminal act providing for a punishment for twenty-five years on a second conviction of felony. Sturtevant *v.* Com., 158 Mass. 598, 33 N. E. 648.

Michigan.— Five years' imprisonment for receiving stolen property. People *v.* Smith, 94 Mich. 644, 54 N. W. 487.

Minnesota.— Six years and six months' imprisonment for asking a bribe, while a member of a city council. State *v.* Durnam, 73 Minn. 150, 75 N. W. 1127. Committing minor to confinement during minority. State *v.* Phillips, 73 Minn. 77, 75 N. W. 1029.

Missouri.— Two years in the penitentiary for selling a paper devoted mainly to scandals, etc. (State *v.* Van Wye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627), or for obtaining three dollars by means of a fraudulent device and false pretenses (State *v.* Williams, 77 Mo. 310 [*affirming* 12 Mo. App. 415]).

New Jersey.—A fine of one hundred dollars or imprisonment not to exceed five years or both, as a penalty for violating the provisions of a law regulating the cultivation of oysters. State *v.* Corson, 67 N. J. L. 178, 50 Atl. 780.

New York.— Disfranchisement for dueling. Barker *v.* People, 20 Johns. 457. The imposition of a penalty under a special act for an offense also punishable under a general act. *In re* Bayard, 25 Hun 546, 63 How. Pr. 73 [*reversing* 61 How. Pr. 294].

North Carolina.— Two years in jail, with work on the public roads, for carrying concealed weapons (State *v.* Hamby, 126 N. C. 1066, 35 S. E. 614), or for an unjustifiable assault and robbery (State *v.* Apple, 121 N. C. 584, 28 S. E. 469). Providing for the collection of fines by hiring out the convict, where he is a free person of color. State *v.* Manuel, 20 N. C. 144. Twelve months in jail and three hundred dollars and costs for assault and battery with a deadly weapon. State *v.* Reid, 106 N. C. 714, 11 S. C. 315.

Ohio.— Imprisonment at hard labor in the penitentiary of any tramp who threatens to injure the person of another. State *v.* Hogan, 63 Ohio St. 202, 58 N. E. 572, 81 Am. St. Rep. 626, 52 L. R. A. 863.

Oklahoma.— Fifty years' imprisonment for manslaughter in the first degree. Jones *v.* Territory, 4 Okla. 45, 43 Pac. 1072.

Rhode Island.— Fine of two hundred and fifty dollars with imprisonment for thirty days, for peddling without a state and local license. State *v.* Foster, 22 R. I. 163, 46 Atl. 833, 50 L. R. A. 339.

Tennessee.— Disqualification to hold office for gambling. State *v.* Smith, 2 Yerg. 272. Fine and imprisonment for a long term for traveling about in disguise, under the statute designed to repress the "Ku Klux." Ligan *v.* State, 3 Heisk. 159.

Texas.— Five years for stealing a horse. Lillard *v.* State, 17 Tex. App. 114.

Vermont.— A fine of three hundred dollars or three years' imprisonment for a second conviction of illegally furnishing intoxicating liquors. State *v.* Hodgson, 66 Vt. 134, 28 Atl. 1089.

Wisconsin.—A failure to fix the maximum punishment for the wilful conversion of floating logs, which is made larceny, does not make a punishment cruel or unusual. State *v.* Fackler, 91 Wis. 418, 64 N. W. 1029.

Wyoming.— Imprisonment at the rate of one dollar per day for failure to pay a fine

(II) *CAPITAL PUNISHMENT.* The power of the legislature to provide capital punishment for crime is not limited by a constitutional provision forbidding cruel and usual punishments;[1] nor does such a provision prevent the legislature from changing the method of capital punishment.[2]

(III) *INCREASED PUNISHMENT ON SECOND CONVICTION.* A statute imposing a heavier penalty on a person convicted of felony, where he has been before convicted of certain specified crimes, or providing a severer punishment for a subsequent offense than for a first offense, is not unconstitutional as being a cruel and unusual punishment.[3]

(IV) *INDETERMINATE SENTENCE.* A sentence under the indeterminate sentence law, by which the length of the sentence to a reformatory shall depend upon the action of the board of said reformatory, does not inflict a cruel and unusual punishment under the constitution.[4]

(V) *WHIPPING.* Whipping has been held not to be a cruel and unusual punishment within the meaning of a state bill of rights[5] or of the provision of the federal constitution.[6]

3. EXCESSIVE FINES — a. In General. What in any instance shall constitute an excessive fine in violation of a constitutional provision depends upon the character of the crime and to a certain extent upon the ability of the defendant to pay;[7]

of one thousand dollars. *In re* McDonald, 4 Wyo. 150, 33 Pac. 18.

The following have been held cruel and unusual punishments within the constitutional provisions: The forfeiture of the tax paid for a liquor license, with inability to continue in the liquor business or become a surety on any bond for one year, as a punishment for violation of a law in regard to the sale of liquors. People *v.* Smith, 94 Mich. 644, 54 N. W. 487. Five years' imprisonment, and at the end thereof to give security in the sum of five hundred dollars to keep the peace for five years, as a punishment for assault and battery. State *v.* Driver, 78 N. C. 423.

1. Territory *v.* Ketchum, 10 N. M. 718, 65 Pac. 169, 55 L. R. A. 90.

Crime not formerly capital.— The legislature may impose capital punishment for the commission of a crime which was formerly not capital, for the fact that capital punishment was never inflicted upon a certain class of convicted criminals does not render it cruel and unusual. State *v.* Stubblefield, 157 Mo. 360, 58 S. W. 337; Territory *v.* Ketchum, 10 N. M. 718, 65 Pac. 169, 55 L. R. A. 90.

To punish an attempted train robbery by death is not in contravention of the constitutional provision, in view of the methods usually employed. Territory *v.* Ketchum, 10 N. M. 718, 65 Pac. 169, 55 L. R. A. 90.

2. People *v.* Durston, 119 N. Y. 569, 24 N. E. 6, 7 N. Y. Cr. 457, 16 Am. St. Rep. 859, 7 L. R. A. 715 [*affirmed* in 136 U. S. 436, 10 S. Ct. 930, 34 L. ed. 519]. And see People *v.* Kemmler, 119 N. Y. 580, 24 N. E. 9.

Electrocution.— A statute providing that the punishment of death shall be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death does not conflict with the constitutional provision that no cruel or unusual punishment shall be inflicted. Storti *v.* Com., 178 Mass. 549, 60 N. E. 210, 52 L. R. A. 520; People *v.* Durston, 119 N. Y. 569, 24 N. E. 6, 7 N. Y. Cr. 457, 16 Am. St. Rep. 859, 7 L. R. A. 715 [*affirmed* in 136 U. S. 436, 10 S. Ct. 930, 34 L. ed. 519].

3. See *supra*, XVIII, A, 1.

4. Miller *v.* State, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109.

5. Foote *v.* State, 59 Md. 264; Com. *v.* Wyatt, 6 Rand. (Va.) 694. *Compare* Ely *v.* Thompson, 3 A. K. Marsh. (Ky.) 70.

6. Garcia *v.* Territory, 1 N. M. 415.

7. See 4 Bl. Comm. 379.

Not excessive.— *Connecticut.*— One hundred dollars for permitting any substance injurious to fish to flow in any waters of a state, to be recovered for every day that the act is violated. Blydenburgh *v.* Miles, 39 Conn. 484.

Georgia.— Double the amount of the mortgage, where the mortgagor sells or disposes of the mortgaged property with intent to defraud the mortgagee. Conley *v.* State, 85 Ga. 348, 11 S. E. 659. See also Hathcock *v.* State, 88 Ga. 91, 13 S. E. 959.

Illinois.— Two hundred dollars and four months in the county jail, imposed on a receiver who permitted property to be carried away for the purpose of defrauding the estate in his hands, and its creditors. Oster *v.* People, 94 Ill. App. 288.

Indiana.—Fifteen dollars for each day that the officer of a certain class of corporations fails to make out a financial statement of their condition. State *v.* Cox, 88 Ind. 254.

Iowa.—Fines of twenty-five, fifty, and one hundred dollars for first, second, and third violations of the liquor law. Martin *v.* Blattner, 68 Iowa 286, 25 N. W. 131, 27 N. W. 244.

Kentucky.— Five hundred dollars imposed on a railroad company for failing to give certain signals at a highway crossing. Louisville, etc., R. Co. *v.* Com., 104 Ky. 35, 46 S. W. 207, 20 Ky. L. Rep. 371. Fifteen hundred dollars for an outrageous battery on a defenseless woman. Chandler *v.* Com., 1 Bush 41.

Maine.— Five hundred dollars for each lob-

and a fine which in one case would constitute a slight punishment because easily paid might in another be excessive because its payment would be ruin to the convict.

b. Imprisonment in Default of Payment. The imposition of a term of imprisonment upon failure to pay a fine is not a cruel and unusual punishment, although by reason of the amount of numerous fines in the aggregate the imprisonment will require several years of work.[8]

c. Maximum Not Fixed by Statute. The failure of a statute to fix a maximum fine does not render it unconstitutional under a provision forbidding excessive fines.[9] The rule was the same in England, although the English bill of rights forbids exces-

ster caught which is less than a certain length, although the fine imposed is greatly in excess of the value of the property. State *v.* Lubee, 93 Me. 418, 45 Atl. 520. See also State *v.* Craig, 80 Me. 85, 13 Atl. 129.

Massachusetts.—Ten dollars with costs and imprisonment not to exceed thirty days, for an unlawful sale of liquor. Com. *v.* Hitchings, 5 Gray 482.

Michigan.— Two hundred dollars and costs, with a maximum imprisonment of six months for the first offense, and five hundred dollars with imprisonment in the state prison for two years for every subsequent offense, in selling liquors unlawfully. People *v.* Whitney, 105 Mich. 622, 63 N. W. 765. Five hundred dollars and imprisonment for one year for a druggist selling liquor as a beverage. Luton *v.* Newaygo Cir. Judge, 69 Mich. 610, 37 N. W. 701.

Minnesota.— Twice the amount embezzled. Mims *v.* State, 26 Minn. 494, 5 N. W. 369. One hundred dollars with costs and ninety days in jail, for unlawfully killing deer. State *v.* Rodman, 58 Minn. 393, 59 N. W. 1098. Five hundred dollars and one year in the state prison imposed on a public officer for misappropriating sixty-two dollars and fifty cents of the public money. State *v.* Borgstrom, 69 Minn. 508, 72 N. W. 799, 975.

Missouri.— One hundred dollars for every day that an electric street-car is operated in the winter without a screen for the protection of the motorman. State *v.* Whitaker, 160 Mo. 59, 60 S. W. 1068. Three hundred dollars, with three hundred and sixty-five days' imprisonment for a violation of the local option act. *Ex p.* Swann, 96 Mo. 44, 9 S. W. 10.

New Jersey.— One hundred dollars for running a stage without a license. Belmar *v.* Barkalow, 67 N. J. L. 504. 52 Atl. 157.

North Carolina.— Requiring the prosecuting witness in proceedings on a peace warrant to pay the costs, and to be imprisoned for failure to pay them. State *v.* Cannady, 78 N. C. 539.

Rhode Island.— Twenty dollars for each of eighteen birds defendant unlawfully had in his possession. Stone's Petition, 21 R. I. 14, 41 Atl. 658.

South Carolina.— Two hundred dollars and ninety days' imprisonment for violation of the dispensary act. *Ex p.* Keeler, 45 S. C. 537, 23 S. E. 865, 55 Am. St. Rep. 785, 31 L. R. A. 678.

South Dakota.— Five hundred dollars, with six months' imprisonment for the first offense of keeping and maintaining a common nuisance. State *v.* Becker, 3 S. D. 29, 51 N. W. 1018.

Tennessee.— The constitution prohibits the laying of any fine to exceed fifty dollars, unless it shall be assessed by the jury, and the court can assess a fine in excess of fifty dollars only where the statute fixes a specific fine for a particular offense, and he ascertains the fine from the statute and not as a matter of his discretion. Madden *v.* State, (Sup. 1901) 67 S. W. 74. See also State *v.* Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941.

Vermont.— Twenty dollars fine for each of three hundred and seven offenses against the state liquor law. State *v.* Intoxicating Liquor, 58 Vt. 140, 2 Atl. 586.

Virginia.— A thousand dollars for assault and battery on a young woman. Doyle *v.* Com., 100 Va. 808, 40 S. E. 925.

Wisconsin.—Seventy-five dollars with three months' imprisonment or both for unlawfully killing game. State *v.* De Lano, 80 Wis. 259, 49 N. W. 808.

Wyoming.— Five hundred dollars for contempt of court in attempting to bribe a witness, with six months in jail, and until the fine and costs are paid. Fisher *v.* McDaniel. 9 Wyo. 457, 64 Pac. 1056, 87 Am. St. Rep. 971. Three months in jail and one thousand dollars fine, and to stand committed until the fine be paid, for criminal libel. *In re* McDonald, 4 Wyo. 150, 33 Pac. 18.

See 15 Cent. Dig. tit. "Criminal Law," § 3309.

The personal liabilities imposed on public officers for the non-performance of official duties are not fines within the meaning of the constitutional provision. Porter *v.* Thomson, 22 Iowa 391.

8. *Ex p.* Brady, 70 Ark. 376, 68 S. W. 34. And see other cases in the note preceding.

9. Frese *v.* State, 23 Fla. 267, 2 So. 1; *In re* Yell, 107 Mich. 228, 65 N. W. 97; Martin *v.* Johnson, 11 Tex. Civ. App. 628, 33 S. W. 306; Southern Express Co. *v.* Com., 92 Va. 59, 22 S. E. 809, 41 L. R. A. 436.

Recovery of penalty in civil action.— A statute which provides that a husband who has fraudulently married a seduced female with intent to avoid civil or criminal liability shall be liable to an action which may be brought by the wife on abandonment or non-support within two years is not open to the objection that it is a cruel and unusual punishment, because it does not limit the maximum which may be recovered. Latshaw *v.* State, 156 Ind. 194, 59 N. E. 471.

sive fines, and the amount of each fine varied according to the character of the crime, the quality and financial condition of the parties, and many other circumstances.[10]

F. Term and Place of Punishment — 1. Computation of Time — a. When Term Begins — (I) *In General.* The general rule is that the term of imprisonment for which the convict is sentenced begins with the first day of actual incarceration in the prison to which his sentence has consigned him.[11] The time therefore which a defendant has spent in jail awaiting trial[12] or the time which he spends after conviction and before sentence awaiting a decision on his plea in bar to another indictment,[13] forms no part of the term for which he is sentenced.

(II) *Terms Under Cumulative Punishments.* Where the accused is sentenced to imprisonment for successive terms, and the first sentence is reversed or is shortened by a pardon, the second term begins to run from the time of the reversal of the first or from the pardon of the convict.[14]

b. Time Served Pending Review. The accused is not of right entitled to be credited on his term of imprisonment with the time during which he was on bail pending an appeal[15] or which he has spent in the penitentiary pending the appeal.[16]

10. 4 Bl. Comm. 379. The English statutes seldom fixed the exact amount of the fine, but left it to the will of the king, which meant the discretion of the judges, guided by constitutional requirements. 1 Chitty Cr. L. 809.

11. *Colorado.*—Bradford *v.* People, 22 Colo. 157, 43 Pac. 1013.

District of Columbia.— Price *v.* U. S., 14 App. Cas. 391.

Iowa.— Miller *v.* Evans, 115 Iowa 101, 88 N. W. 198, 91 Am. St. Rep. 143, 56 L. R. A. 101.

New York.— People *v.* State Prison, 66 N. Y. 342; People *v.* McEwen, 62 How. Pr. 226.

South Carolina.— *Ex p.* Duckett, 15 S. C. 210, 40 Am. Rep. 694.

The time spent in jail after sentence and prior to confinement in the prison to which the accused is sentenced cannot therefore be counted as a part of his term of imprisonment. People *v.* McEwen, 62 How. Pr. (N. Y.) 226. It has also been held, however (Scottsboro *v.* Johnston, 120 Ala. 397, 25 So. 809; Miller *v.* State, 15 Fla. 575; *Ex p.* Meyers, 44 Mo. 279), and in some states is expressly provided by statute (*In re* Fuller, 34 Nebr. 581, 52 N. W. 577; Sartain *v.* State, 10 Tex. App. 651, 38 Am. Rep. 649) that the term of imprisonment shall date from the time of the sentence.

A marshal cannot delay the operation of a sentence by failing to deliver the prisoner at the prison to which he is sentenced, and it will also be presumed that the prisoner would have earned the deduction of time allowed for good behavior. *In re* Jennings, 118 Fed. 479.

Where defendant is sentenced to a county penitentiary, the time after sentence spent in another county jail must be credited as a part of the term (People *v.* Lincoln, 25 Hun (N. Y.) 306, 62 How. Pr. (N. Y.) 412), but the time spent in a county jail cannot be credited on a sentence to imprisonment in a state prison (People *v.* State Prison, 66 N. Y. 342).

12. Ryan *v.* State, 100 Ala. 105, 14 So. 766.

13. Hall *v.* Patterson, 45 Fed. 352.

Discretion of court.— Defendant has no absolute right to have it considered as such, although the court may in its discretion consider this in fixing the length of his imprisonment. People *v.* State Prison, 66 N. Y. 342.

14. *Massachusetts.*—Kite *v.* Com., 11 Metc. 581.

Missouri.— *Ex p.* Jackson, 96 Mo. 116, 8 S. W. 800.

Nevada.— *Ex p.* Roberts, 9 Nev. 44, 16 Am. Rep. 1.

Pennsylvania.— Brown *v.* Com., 4 Rawle 259, 26 Am. Dec. 130.

England.— Gregory *v.* Reg., 15 Q. B. 957, 5 Cox C. C. 247, 15 Jur. 79, 19 L. J. Q. B. 366, 69 E. C. L. 957.

See 15 Cent. Dig. tit. "Criminal Law," § 3313 *et seq.*

First term void.— Where terms of imprisonment are successive and the first sentence is adjudged void, it has been held that the prisoner is entitled to an immediate discharge, as the second sentence has been either served or is void for uncertainty. *Ex p.* Roberts, 9 Nev. 44, 16 Am. Rep. 1; *Ex p.* Jordan, Ohio Prob. 9.

If the prisoner escapes during the first term the second does not expire when it would have expired had he remained in prison, as the time during which he has been at liberty must be served in addition to the time he was actually in prison. *In re* Dolan, 101 Mass. 219. Where a prisoner sentenced for two consecutive terms escapes and is convicted of an escape, his sentence for it under the statute does not commence to run until he has served out his consecutive terms. *Ex p.* Irwin, 88 Cal. 169, 25 Pac. 1118.

15. *Ex p.* Jones, 41 Cal. 209; Bradford *v.* People, 22 Colo. 157, 43 Pac. 1013; Com. *v.* Spencer, 9 Kulp (Pa.) 159; *Ex p.* Branch, 37 Tex. Cr. 318, 39 S. W. 932.

16. Harris *v.* People, 138 Ill. 63, 27 N. E. 706; Clemons *v.* State, 92 Tenn. 282, 21 S. W. 525; State *v.* Grottkau, 73 Wis. 589, 41 N. W. 80, 1063, 9 Am. St. Rep. 816; *In re* Morse, 117 Fed. 763.

In Iowa it is provided by statute that if a defendant, imprisoned during the pendency of an appeal, is again convicted on a new

The term of his imprisonment begins when the judgment is affirmed,[17] when the remittitur is filed in the lower court,[18] or if the appeal is dismissed when the mandate is filed in the appellate court.[19]

c. Time Covered by Conditional Pardon or Parol. A convict is not entitled to be credited on the term for which he is sentenced with the time during which he has been at large because of a void reprieve, particularly where his sentence expressly requires the punishment to begin at his reception in custody.[20]

d. Time During Which Convict Is at Liberty. A prisoner who escapes after conviction but before his term is served may on his recapture be compelled to serve out his term of imprisonment without regard to the time he has been at large.[21] He cannot be credited with the time during which he has been at liberty on the term of imprisonment for which he was sentenced.[22]

e. Term Not to Expire During Winter. In some states it is enacted by statute that a term of imprisonment shall be so limited that it shall not expire during the winter months.[23]

2. When Terms Are Concurrent. In the absence of a statute, if it be not stated in either of two or more sentences imposed at the same time, that the imprisonment under any one of them shall take effect at the expiration of the others, the periods of time named will run concurrently and the punishments be executed simultaneously.[24] The fact that the terms of imprisonment are to be successive must be clearly and expressly stated.[25]

trial, the period of his former imprisonment shall be deducted from the period of imprisonment fixed on the last verdict. Travis *v.* State, 109 Iowa 602, 80 N. W. 680; State *v.* Hopkins, 67 Iowa 285, 25 N. W. 244.

In Washington by statute one convicted of a felony who is unable to furnish bail pending appeal may have the time that he was incarcerated in jail deducted from his term of imprisonment, where the judgment is affirmed and apparently where the appeal is dismissed for want of prosecution. *In re* Bojar, 7 Wash. 355, 35 Pac. 71.

17. State *v.* Grottkau, 73 Wis. 589, 41 N. W. 80, 1063, 9 Am. St. Rep. 816.

If the execution of the sentence is suspended by proceedings in error, it seems that the term is to be computed from the time when defendant is actually incarcerated after the appeal has been decided. *In re* Morse, 117 Fed. 763.

18. Wiggins *v.* Tyson, 114 Ga. 64, 39 S. E. 865.

19. *Ex p.* Carey, (Tex. Cr. App. 1901) 64 S. W. 241.

20. Neal *v.* State, 104 Ga. 509, 30 S. E. 858, 69 Am. St. Rep. 175, 42 L. R. A. 190.

Under a statute which provides that in computing the term of the prisoner's confinement the time between a conditional pardon and a subsequent arrest shall be taken to be a part thereof, the accused cannot, on breach of the condition of pardon, be imprisoned under his first sentence after the date when it would have expired had he not been pardoned. *In re* West, 111 Mass. 443.

21. *California.*— *Ex p.* Vance, 90 Cal. 208, 27 Pac. 209, 13 L. R. A. 574.

Delaware.— McCoy *v.* New Castle County, 9 Houst. 433, 9 Atl. 416.

Georgia.— Neal *v.* State, 104 Ga. 509, 30 S. E. 858, 60 Am. St. Rep. 175, 42 L. R. A. 190.

Indiana.— *Ex p.* Clifford, 29 Ind. 106.

Kansas.— Hollon *v.* Hopkins, 21 Kan. 638.

New Jersey.— *In re* Edwards, 43 N. J. L. 555, 39 Am. Rep. 610.

Texas.— *Ex p.* Wyatt, 29 Tex. App. 398, 16 S. W. 301.

Virginia.— Cleek *v.* Com., 21 Gratt. 777.

See 15 Cent. Dig. tit. "Criminal Law," § 3314.

22. *In re* Edwards, 43 N. J. L. 555, 39 Am. Rep. 610.

Where the accused is released on habeas corpus and the proceedings are subsequently reversed, he is not entitled to credit for the time during which he was at liberty. State *v.* McClellan, 87 Tenn. 52, 9 S. W. 233.

23. It has been held that such a statute is merely directory, and that a sentence failing to observe its provisions is not void (Miller *v.* Finkle, 1 Park. Cr. (N. Y.) 374), particularly where the provision is that the expiration of the term must occur during the summer "whenever practicable" (Mims *v.* State, 26 Minn. 494, 5 N. W. 369).

A failure to observe the statute is at most only ground for a resentence. Com. *v.* Peach, 170 Pa. St. 173, 32 Atl. 582.

In Pennsylvania this statute applies to prisoners sentenced to the penitentiary and not to imprisonment in a county prison. Com. *v.* Peach, 170 Pa. St. 173, 32 Atl. 582.

24. *District of Columbia.*— *In re* Jackson, 3 MacArthur 24.

Indiana.— Miller *v.* Allen, 11 Ind. 389.

Kentucky.— James *v.* Ward, 2 Metc. 271.

Maine.— *In re* Breton, 93 Me. 39, 44 Atl. 125, 74 Am. St. Rep. 335.

Nevada.— *Ex p.* Gafford, 25 Nev. 101, 57 Pac. 484, 83 Am. St. Rep. 568.

England.— Reg. *v.* King, [1897] 1 Q. B. 214, 18 Cox C. C. 447, 61 J. P. 329, 66 L. J. Q. B. 87, 75 L. T. Rep. N. S. 392.

See 15 Cent. Dig. tit. "Criminal Law," § 3315 *et seq.*

25. *In re* Breton, 93 Me. 39, 44 Atl. 125, 74 Am. St. Rep. 335.

3. DISCHARGE UNDER EXCESSIVE SENTENCE. As a general rule a prisoner erroneously sentenced in excess of the power of the court to impose punishment is not entitled to an absolute discharge, unless he has already served the maximum term for which he could legally be imprisoned.[26]

4. DELAY IN PRONOUNCING OR ENFORCING SENTENCE. If the court improperly delays sentencing the accused without his fault, and he in the meantime remains in imprisonment, he is entitled to his discharge where his imprisonment is equivalent to the term he would have received if he had been promptly sentenced.[27] An unreasonable delay after sentence on the part of the officer having a convict in custody in delivering him at the prison to which he is sentenced entitles the prisoner to be discharged from the custody of such officer and into that provided by the sentence, but not to an absolute discharge,[28] unless the authorities have failed to provide a place of imprisonment in accordance with the terms of the sentence.[29]

5. PLACE OF IMPRISONMENT — a. In General. In England at common law the court of king's bench may commit the convict to any legal jail within the kingdom.[30] In the United States the places to which convicts may be committed to serve out their terms depend largely upon the local statutes.[31] In the absence of a statutory provision designating a particular place where the accused shall be imprisoned a federal district court may designate any place, either jail or penitentiary, within its jurisdiction.[32] Under the statute[33] which provides that under certain circumstances a federal court may sentence to imprisonment in a state penitentiary, it is no objection to the validity of the sentence that the state has not formally authorized the use of its penitentiary for such purpose, if it suffers the convict to be detained by its officers in the state jurisdiction.[34] In the different states the place of imprisonment is generally regulated by statutes.[35] A

Where the accused was sentenced for three terms of five years each, "not to run concurrently," on three separate indictments, and the sentence does not state upon which indictment each term is to be served, the sentences will run concurrently, as the additional words are invalid because vague. U. S. *v.* Patterson, 29 Fed. 775.

26. People *v.* Parkhurst, 50 Mich. 389, 15 N. W. 522.

The term of punishment is not void in toto, but is valid so far as the court had power to inflict imprisonment. *In re* Paschal, 56 Kan. 123, 42 Pac. 373.

27. State *v.* Snyder, 98 Mo. 555, 12 S. W. 369.

28. White *v.* State, 134 Ala. 197, 32 So. 320; O'Neill *v.* State, 134 Ala. 189, 32 So. 667.

29. *Ex p.* Goucher, 103 Ala. 305, 15 So. 601; *Ex p.* Stewart, 98 Ala. 66, 13 So. 660; *Ex p.* Crews, 78 Ala. 457; Kirby *v.* State, 62 Ala. 51.

30. At the county assize the convict may be imprisoned anywhere in the county, or within the town or city within the county, where the offense was committed. 1 Chitty Cr. L. 800.

31. If the crime committed be a felony, and the statute is silent, imprisonment will usually be in the state's prison. See the statutes of the several states. And see *supra*, XIX, A, 3; XIX, C, 5.

But where the statute is silent as to the place, and the crime is punishable only by a short term, the court will construe it to be a misdemeanor, punishable by imprisonment in the county jail, rather than as a felony, punishable by imprisonment in the state's prison. Horner *v.* State, 1 Oreg. 267.

32. *Ex p.* Geary, 10 Fed. Cas. No. 5,293, 2 Biss. 485.

33. U. S. Rev. St. (1878) § 5541 [U. S. Comp. St. (1901) p. 3721].

A federal court has no jurisdiction to sentence a convict to imprisonment in a state penitentiary, except where the imprisonment is for more than one year or at hard labor. *In re* Bonner, 151 U. S. 242, 14 S. Ct. 323, 38 L. ed. 149; *In re* Mills, 135 U. S. 263, 10 S. Ct. 762, 34 L. ed. 107; *Ex p.* Karstendick, 93 U. S. 396, 23 L. ed. 889; Haynes *v.* U. S., 101 Fed. 817, 42 C. C. A. 34; *Ex p.* Friday, 43 Fed. 916; U. S. *v.* Cobb, 43 Fed. 570; *In re* De Puy, 7 Fed. Cas. No. 3,814, 3 Ben. 307.

The attorney-general may designate a penitentiary outside the state for the confinement of federal criminals convicted in a state in which there is no suitable prison available. *Ex p.* Karstendick, 93 U. S. 396, 23 L. ed. 889.

34. *Ex p.* Karstendick, 93 U. S. 396, 23 L. ed. 889; *Ex p.* Geary, 10 Fed. Cas. No. 5,293, 2 Biss. 485.

35. See the following cases:

Alabama.— Washington *v.* State, 63 Ala. 189.

District of Columbia.— U. S. *v.* Marshall, 6 Mackey 34.

Maryland.— Bond *v.* State, 78 Md. 523, 28 Atl. 407.

Michigan.— *In re* Cox, 129 Mich. 635, 89 N. W. 440.

North Carolina.— State *v.* Norwood, 93 N. C. 578.

Ohio.— Kimbleaweez *v.* State, 51 Ohio St. 228, 36 N. E. 1072.

Pennsylvania.— Com. *v.* Zelt, 138 Pa. St. 615, 21 Atl. 7, 11 L. R. A. 602.

statute which provides one place of imprisonment for a certain class of crimes does not prevent the legislature from providing another place for the same class of convicts.[36]

b. Reformatory. In some of the states the word "penitentiary" is used interchangeably for state prison;[37] but a state reformatory differs radically from a penitentiary in that its purpose, although involving confinement as a punishment, is the reformation of those who by reason of their immature age may presumably be reformed.[38]

c. On Change of Venue. Where the venue of the trial has been changed, and the accused is convicted, the court in which he is tried may, in the absence of an express statute, sentence him to imprisonment in either the jail of the county in which the crime was committed or in that of the county where he was tried.[39]

d. Outside of County or State. A sentence to a state prison located in another state, when authorized by statute and by a contract[40] between the states concerned, does not deprive the convict of the equal protection of the laws of the state, nor place him beyond the reach of its pardoning power.[41]

e. Punishment in Territorial Courts. A territorial court is a "court of the

See 15 Cent. Dig. tit. "Criminal Law," § 3321.

A statute which provides that a crime shall be felony, punishable by imprisonment, will be held by implication to mean imprisonment in the state prison, particularly where the constitution provides that felony shall mean a crime punishable by death or imprisonment in the state prison. *In re* Pratt, 19 Colo. 138, 34 Pac. 680.

36. Brown *v.* People, 75 N. Y. 437.

37. Henderson *v.* People, 165 Ill. 607, 46 N. E. 711.

38. People *v.* Illinois State Reformatory, 148 Ill. 413, 36 N. E. 76, 23 L. R. A. 139. And see Cunningham *v.* People, 195 Ill. 550, 63 N. E. 517; Henderson *v.* People, 165 Ill. 607, 46 N. E. 711; State *v.* Hewes, 60 Kan. 765, 57 Pac. 959.

One who has served a term in a state reformatory may be resentenced to it on a subsequent conviction, where he is still under age, and not to a penitentiary, although the statute provides that no one shall be sent to a reformatory who has been sentenced to a penitentiary in any state or country. Henderson *v.* People, 165 Ill. 607, 46 N. E. 711.

A statute authorizing the transfer of incorrigible inmates of a reformatory to a penitentiary, by a resolution of its board of managers, is unconstitutional, in that it attempts to confer judicial power upon the managers and also deprives the convict of his liberty without due process of law, the imprisonment in the penitentiary involving consequences which do not attach by reason of his sentence to the reformatory. *In re* Dumford, 7 Kan. App. 89, 53 Pac. 92.

Age of the accused.— The prisoner, if desirous of having the jury determine whether he shall be sentenced to the reformatory or to the penitentiary, must introduce proof that he is not of adult age. Gutierez *v.* State, (Tex. Cr. App. 1898) 47 S. W. 372. The age of the accused at his conviction determines whether he shall be sent to the reformatory or to the penitentiary. Cunningham *v.* People, 195 Ill. 550, 63 N. E. 517.

A defendant is not "convicted" on the entry of a plea of guilty but only when judgment is rendered thereon, and if at the time of such judgment he is over the age at which under the statute persons "convicted" of certain offenses may be committed to the reformatory, he should be sentenced to the penitentiary. State *v.* Townley, 147 Mo. 205, 48 S. W. 833.

Where the legislature fails to provide a reformatory in accordance with a constitutional provision for such punishment of convicts under a certain age, the court may sentence convicts of that age to the penitentiary. Willard *v.* Com., 96 Ky. 148, 28 S. W. 151, 16 Ky. L. Rep. 343.

In Michigan the governor may commute the sentence of a female imprisoned in the state prison to imprisonment in the house of correction, and in so doing need not shorten the term of imprisonment. Rich *v.* Chamberlain, 107 Mich. 381, 65 N. W. 235, 104 Mich. 436, 62 N. W. 584, 27 L. R. A. 573.

39. Davies *v.* State, 72 Wis. 54, 38 N. W. 722.

40. A statute authorizing a territory to contract with any other state or territory to provide for the confinement of its prisoners is not unconstitutional because it authorizes imprisonment elsewhere than in the state where the crime is committed. Kingen *v.* Kelley, 3 Wyo. 566, 28 Pac. 36, 15 L. R. A. 177.

In the absence of an express statute, the court should merely commit the accused to the county jail, and if there is no jail in the county in which it is sitting, it is the duty of the sheriff to see that the prisoner is confined in the nearest sufficient jail. Dyer *v.* People, 84 Ill. 624; Keedy *v.* People, 84 Ill. 569; Mullinix *v.* People, 76 Ill. 211. See also Davies *v.* State, 72 Wis. 54, 38 N. W. 722.

In North Carolina the court cannot sentence convicts to work on public roads outside of their respective counties. State *v.* Austin, 121 N. C. 620, 28 S. E. 361.

41. McKinney *v.* State, 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710; Kingen *v.* Kelley, 3

United States" within a statute which provides that persons convicted by any "court of the United States" may, where there is no court in the territory, be confined in some convenient state or territory to be designated by the secretary of the interior.[42]

f. Change in Place of Imprisonment. Where, after defendant's imprisonment has begun, the location of the state prison is changed, he may be transferred to a newly located state prison by an order of the court.[43] Again a statute which requires any court on habeas corpus for the release of a prisoner confined under a sentence erroneous as to time and place to sentence him to the proper place of imprisonment or for the correct time confers power to correct a sentence passed previous to its enactment.[44]

G. Execution of Sentence of Death — 1. STATUTORY PROVISIONS. The time, place, and manner of executing the death penalty is almost wholly regulated by statutes in the various states.[45]

2. TIME OF EXECUTION. At common law the sentence of death was generally silent as to the precise day of execution.[46] The time for the execution of a death sentence is no material part of the judgment.[47] A statutory provision prescribing a period within which or after which execution may be had must be strictly observed.[48]

3. PLACE OF EXECUTION. The place of execution must be the county in which

Wyo. 566, 28 Pac. 36, 15 L. R. A. 177. See also *In re* Terrill, 66 Kan. 315, 71 Pac. 589.

42. *In re* Osterhaus, 18 Fed. Cas. No. 10,609.

Where congress has provided for imprisonment in penitentiaries erected by its authority in the territories, persons convicted in the territorial courts must be sent to such penitentiaries, and the territorial legislature cannot provide a different place of confinement. Territory *v.* Nelson, 2 Wyo. 346.

43. Kingen *v.* Kelley, 3 Wyo. 566, 28 Pac. 36, 15 L. R. A. 177; Reddill's Case, 1 Whart. (Pa.) 445. See also Pember's Case, 1 Whart. (Pa.) 439. Similarly where a federal convict is sentenced to a certain state jail, his imprisonment in the jail at another place to which it has been removed by the authority of the state legislature since his sentence is legal (*In re* Hartwell, 11 Fed. Cas. No. 6,173, 1 Lowell 536), and persons subsequently convicted may be sentenced to the newly located prison (*Ex p.* Brooks, 29 Fed. 83).

The removal of a federal prisoner on account of ill health or because of improper treatment where he is confined can be authorized only by the attorney-general. U. S. *v.* Greenwald, 64 Fed. 6.

44. Such a statute is not unconstitutional as being *ex post facto* or retrospective, nor does it confer new original jurisdiction on the court. *Ex p.* Bethurum, 66 Mo. 545.

45. See the following cases:

California.— People *v.* Vincent, 95 Cal. 425, 30 Pac. 581; People *v.* McNulty, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61.

Massachusetts.— Storti's Case, 178 Mass. 549, 60 N. E. 210, 52 L. R. A. 520.

Minnesota.— State *v.* Holong, 38 Minn. 368, 37 N. W. 587.

New York.— People *v.* Kemmler, 119 N. Y. 580, 24 N. E. 9; People *v.* Durston, 119 N. Y. 569, 24 N. E. 6, 7 N. Y. Cr. 457, 16 Am. St. Rep. 859, 7 L. R. A. 715; Ratzky *v.* People, 29 N. Y. 124; Lowenberg *v.* People, 27 N. Y. 336, 26 How. Pr. 202.

United States.— Holden *v.* Minnesota, 137 U. S. 483, 11 S. Ct. 143, 34 L. ed. 734; *In re* Kemmler, 136 U. S. 436, 10 S. Ct. 930, 34 L. ed. 519; Wilkerson *v.* Utah, 99 U. S. 130, 25 L. ed. 345.

46. Holden *v.* Minnesota, 137 U. S. 483, 11 S. Ct. 143, 34 L. ed. 734 [*distinguishing In re* Medley, 134 U. S. 160, 10 S. Ct. 384, 33 L. ed. 835]; Atkinson *v.* Reg., 3 Bro. P. C. 517, 1 Eng. Reprint 1471; Rex *v.* Rogers, 3 Burr. 1809; Rex *v.* Doyle, 1 Leach C. C. (4th ed.) 67.

47. Hence if on account of an appeal pending the time for the execution of a capital sentence has passed, it is the duty of the sheriff to execute the same under the original warrant or mandate in his hands, without undue delay, where the appeal is affirmed. McDowell *v.* Couch, 6 La. Ann. 365; Com. *v.* Hill, 185 Pa. St. 385, 39 Atl. 1055.

As to the date of the execution see *supra*, XVI, F.

As to fixing new date for execution see *supra*, XVI, F, 4, d.

Where execution is respited until a particular day, the sheriff must execute it on the day, unless a further respite is ordered, or judgment has been reversed in the meantime. People *v.* Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197.

48. If the statute requires that punishment of death shall be inflicted after a certain number of days have elapsed after conviction, the time cannot be shortened even by the consent of the prisoner. Koerner *v.* State, 96 Ind. 243. If the statute requires the day of execution to be not more than twenty-five days from the time sentence is pronounced it is error to fix it at more than that time. Wallace *v.* People, 159 Ill. 446, 42 N. E. 771.

If the accused is entitled to a certain number of days in which to appeal from an order fixing the day of execution, it is error to fix the date for execution within that period (People *v.* Durrant, 119 Cal. 54, 50 Pac. 1070) or to fix the execution within the time allowed for preparing and settling a bill of exceptions in preparation for an application

the accused is tried, and the rule is not changed by the fact that there has been a change of venue from the county where the crime was committed,[49] or that the accused has been confined for safe-keeping in a different county.[50]

4. Mode of Execution. The usual mode of inflicting capital punishment at common law was by hanging.[51] In the case of treason and certain other very atrocious crimes other means of execution, such as beheading, burning, drawing and quartering, were at one time in use.[52] In the United States the mode of execution is generally regulated by statute.[53]

5. Custody Pending Execution. The prisoner awaiting execution is in the custody of the sheriff who is to execute the sentence.[54]

H. Restitution. At common law there could be no restitution of stolen property on an indictment, the only remedy being an appeal of larceny or robbery.[55] By an early statute, however, a writ of restitution was provided for, to be awarded by the justices on a conviction of robbery or larceny.[56] This writ was to be awarded as soon as the conviction was had,[57] but as a matter of practice was rarely if ever employed, the custom being for the judge summarily to order the goods to be brought into court and restored to the owner.[58] Aside from the goods belonging to the prosecutor in the larceny, the justice in England had no power, either at common law or by statute, to dispose of chattels in the possession of a convicted thief.[59] In some of the United States there are statutes providing that upon the conviction of the offender property which has been stolen[60] or fraudulently obtained[61] shall be restored to the owner.[62] In Rhode Island it is provided by

for a certificate of probable cause (People *v.* Durrant, 119 Cal. 201, 51 Pac. 185).

49. *Ex p.* Fleming, 60 Miss. 910; State *v.* Twiggs, 60 N. C. 142.

50. *Ex p.* Fleming, 60 Miss. 910.

51. And it was a felony for the officer in charge of the execution to substitute any other mode without legal order or authority to do so. 4 Bl. Comm. 404; 1 Chitty Cr. L. 787; 2 Hale P. C. 411. See also Lowenberg *v.* People, 27 N. Y. 336, 26 How. Pr. (N. Y.) 202.

In England even the king could not legally change the sentence so as to increase the punishment (2 Hawkins P. C. c. 51, § 5; 3 Inst. 311), yet as he might pardon and remit the whole punishment, so he might in mitigation, where the punishment was for high treason, remit the cruel and barbarous parts of it (1 Chitty Cr. L. 787).

52. 4 Bl. Comm. 376; 2 Hale P. C. 412.

53. See *supra*, note 45.

Execution by shooting may be ordered under a statute making the mode of execution discretionary with the court. Wilkerson *v.* Utah, 99 U. S. 130, 25 L. ed. 345.

The legislature may prescribe that a sentence of death shall be executed before sunrise and within the walls of the jail, or within some other inclosure higher than the gallows, so as to exclude the view of persons outside. It may also prescribe the number and character of those who may witness the execution, and may enact that newspaper reporters shall be excluded. These regulations when applied to offenses previously committed are not *ex post facto*. Holden *v.* Minnesota, 137 U. S. 483, 11 S. Ct. 143, 34 L. ed. 734 [*distinguishing In re* Medley, 134 U. S. 160, 10 S. Ct. 384, 33 L. ed. 835].

54. He need not be kept in prison in the county where the crime was committed (Jackson *v.* People, 18 Ill. 269, and if the jail of the county where he is tried is insecure, he may be committed for safe-keeping to the jail of another county (Revel *v.* State, 26 Ga. 275).

In Massachusetts a statute providing that persons convicted of a capital offense shall be sentenced to hard labor in the state prison until the execution does not conflict with a statute which requires the death penalty to be inflicted in the county where the accused is convicted. The sheriff of the latter county may, on receiving the governor's warrant, receive the convict from the state prison and transfer him to the jail of the county where his execution is to take place. Opinion of Justices, 11 Cush. 604.

55. 4 Bl. Comm. 362; 1 Hale P. C. 542.

56. 21 Hen. VIII, c. 11.

57. 1 Chitty Cr. L. 820.

58. 4 Bl. Comm. 363; 1 Chitty Cr. L. 820.

A later statute covering the same subject was 7 & 8 Geo. IV, c. 29, § 57. The court held, in construing this statute, that it had no power to order the restitution of a bank of England note which had been paid and canceled, intimating that the prosecutrix might have a civil action against the bank. Rex *v.* Stanton, 7 C. & P. 431, 32 E. C. L. 692.

59. Reg. *v.* Pierce, Bell C. C. 235, 8 Cox C. C. 344; Reg. *v.* London Corp., E. B. & E. 509, 4 Jur. N. S. 1078, 27 L. J. M. C. 231, 96 E. C. L. 509.

60. Com. *v.* Boudrie, 4 Gray (Mass.) 418; Huntzinger *v.* Com., 97 Pa. St. 336.

61. Huntzinger *v.* Com., 97 Pa. St. 336, holding also that to support a judgment of restitution, the indictment must show that the money or other thing was actually received by defendant.

62. **Where the goods of two different persons are stolen,** and so mixed by the thief that they are not distinguishable, the person

statute that on a conviction of larceny the person whose property is stolen may recover double damages therefor from the person convicted.[63]

I. Prevention of Crime — 1. Intervention of Officers or Private Persons. A private individual seeing another person actually perpetrating or about to perpetrate a felony may interfere, employing such force as is necessary to prevent the commission of the felony.[64] If the felony be homicide, or any other forcible felony, such as rape, burglary, or robbery, the person interfering may take life, if necessary, to prevent it.[65] It is the duty of a justice of the peace or peace officer to actively endeavor to suppress all riot and disorder and prevent breaches of the peace.[66]

2. Security For Good Behavior.[67] At common law the judge may, in cases of conviction of gross misdemeanors, require the convict to give security for his future good behavior.[68] In some of the states the power of requiring security for good behavior, in addition to the infliction of a punishment, is conferred upon the courts by statute.[69] A bond, when required, should be a general bond for good behavior, and not a special recognizance against the doing of a specific act not in itself a gross misdemeanor.[70]

CRIMINAL LAW AMENDMENT ACT. An act passed in 1871, (34 & 35 Vict. c. 32,) to prevent and punish any violence, threats, or molestation, on the part either of master or workmen, in the various relations arising between them.[1]

CRIMINAL LAW CONSOLIDATED ACTS. The statutes 24 & 25 Vict. cc. 94–100, passed in 1861, for the consolidation of the criminal law of England and Ireland.[2]

CRIMINAL LAWYER. One skilled in the practice of criminal law.[3]

CRIMINAL LETTERS. In Scotch law, a process used as the commencement of a criminal proceeding, in the nature of a summons issued by the lord advocate or his deputy.[4]

CRIMINAL LIBEL. See Libel and Slander.

CRIMINALLY. As defined by statute, feloniously.[5] (See, generally, Criminal Law.)

who first prosecutes the thief to conviction is entitled to a full restitution, although there may not remain enough to satisfy the claim of the other. Penny's Case, 1 City Hall Rec. (N. Y.) 113.

If the statute provides that "the stolen property" shall be restored, the court is confined to the articles stolen, and cannot make restitution out of other property or out of proceeds of a sale of the stolen property. Com. *v.* Boudrie, 4 Gray (Mass.) 418.

63. See Doughty *v.* De Amoreel, 22 R. I. 158, 46 Atl. 838; Barker *v.* Almy, 20 R. I. 367, 39 Atl. 185.

64. *Alabama.*— Storey *v.* State, 71 Ala. 329; Dill *v.* State, 25 Ala. 15.

Michigan.— Pond *v.* People, 8 Mich. 150.

New York.—Ruloff *v.* People, 45 N. Y. 213; Phillips *v.* Trull, 11 Johns. 486.

North Carolina.— State *v.* Rutherford, 8 N. C. 457, 9 Am. Dec. 658.

Pennsylvania.—Respublica *v.* Montgomery, 1 Yeates 419.

Vermont.— Spalding *v.* Preston, 21 Vt. 9, 50 Am. Dec. 68.

See 15 Cent. Dig. tit. "Criminal Law," § 3336.

65. See Homicide.

66. Patterson *v.* State, 91 Ala. 58, 8 So. 756; Respublica *v.* Montgomery, 1 Yeates (Pa.) 419.

67. Security to keep the peace see Breach of the Peace, 5 Cyc. 1028.

68. Territory *v.* Nugent, 1 Mart. (La.) 102, 5 Am. Dec. 702; Bamber *v.* Com., 10 Pa. St. 339; Estes *v.* State, 2 Humphr. (Tenn.) 496; State *v.* Gillilan, (W. Va. 1901) 38 S. E. 516, 51 W. Va. 278, 41 S. E. 131, 57 L. R. A. 426. Security will not be required on acquittal for passing counterfeit money, although it appeared in the evidence that the accused had uttered counterfeit money. U. S. *v.* Venable, 28 Fed. Cas. No. 16,616, 1 Cranch C. C. 417.

69. State *v.* Chandler, 31 Kan. 201, 1 Pac. 787.

Statute is constitutional.— State *v.* Woodard, 7 Kan. App. 421, 53 Pac. 278 [*affirmed* in State *v.* Miller, (Sup. 1899) 56 Pac. 1132]; State *v.* Webb, 7 Kan. App. 423, 53 Pac. 276.

A defendant who pleads guilty is "convicted" within the meaning of the statute. State *v.* Woodard, 7 Kan. App. 421, 53 Pac. 278 [*affirmed* in State *v.* Miller, (Sup. 1899) 56 Pac. 1132].

70. Estes *v.* State, 2 Humphr. (Tenn.) 496; State *v.* Gillilan, (W. Va. 1901) 38 S. E. 516.

1. Black L. Dict. [*citing* 4 Stephen Comm. 241].

2. Black L. Dict. [*citing* 4 Stephen Comm. 297].

3. English L. Dict.

4. It resembles a criminal information at common law. Black L. Dict.

5. Mich. Comp. Laws (1897), § 11792.

CRIMINALLY INCURRED LIABILITY. A liability incurred in the perpetration of a crime.[6]

CRIMINAL NEGLIGENCE. See NEGLIGENCE.

CRIMINAL NEWS. Information of wicked and immoral acts of recent occurrence or discovery.[7]

CRIMINAL PRISONER. Any person charged with or convicted of a crime.[8]

CRIMINAL PROCEDURE. See CRIMINAL LAW.

CRIMINAL PROCEEDING. An action instituted and prosecuted by the state or sovereign power in its own name against a person who is accused of a crime to punish him therefor.[9] (See, generally, CRIMINAL LAW.)

CRIMINAL PROCESS. Process issued to compel a person to answer for a crime or misdemeanor, where punishment of some kind or other must be the consequence of conviction.[10]

CRIMINAL PROSECUTION. A prosecution in a court of justice, in the name of the government, against one or more individuals accused of a crime;[11] a prosecution against a person who is accused and who is to be tried by a petit jury.[12] (See, generally, CRIMINAL LAW.)

CRIMINAL SIDE. The criminal jurisdiction of a court having both civil and criminal jurisdiction.[13]

CRIMINA MORTE EXTINGUUNTUR. A maxim meaning "Crimes are extinguished by death."[14]

CRIMINATE. To exhibit evidence of the commission of a criminal offense.[15] (See, generally, CRIMINAL LAW; WITNESSES.)

CRIMINATION. The act of criminating, in any sense of the word; ACCUSATION, *q. v.*; CHARGE,[16] *q. v.* (See, generally, CRIMINAL LAW; WITNESSES.)

CRIMP. One who decoys and plunders sailors under cover of harboring them.[17] (See, generally, SEAMEN; SHIPPING.)

CRINOLINE CLOTH. Cloth made of cotton and hair.[18]

CRISP. Brittle or friable; in a condition to break with a short sharp fracture.[19]

CRITICISM. A discussion, or, as applicable in libel cases, a censure of the conduct or character or utterances of the person criticised.[20] (Criticism: In General, see LIBEL AND SLANDER. Infringement of Copyright, see COPYRIGHT.)

CR'M. A contraction of Crastinum, in old pleadings.[21]

CR'O. A contraction of CRASTINO,[22] *q. v.*

CROFT. A close adjacent to a dwelling house.[23] (See CLOSE.)

CROPPER. See CROPS.

6. Kuehn *v.* Paroni, 20 Nev. 203, 206, 19 Pac. 273.

7. State *v.* McKee, 73 Conn. 18, 26, 46 Atl. 409, 84 Am. St. Rep. 124, 49 L. R. A. 542, defining the term as used in Conn. Pub. Acts (1885), p. 433, § 2.

8. 28 & 29 Vict. c. 126, § 4; Osborne *v.* Milman, 17 Q. B. D. 514, 519, where Denman, J., in construing this act, said: "I do not think that any person imprisoned by any Court can be held to be a convicted 'criminal prisoner' within the meaning of § 4 of the Prisons Act."

9. Abbott L. Dict.; Century Dict. [*quoted* in *In re* Leslie, 9 Am. Bankr. Rep. 561, 566].

10. Ward *v.* Lewis, 1 Stew. (Ala.) 26, 27.

11. 1 Chitty Cr. L. [*quoted* in Harger *v.* Thomas, 44 Pa. St. 128, 130, 84 Am. Dec. 422].

Distinguished from "action."—"A criminal prosecution, although instituted by an individual, is not in any sense an action between the person instituting it and the prisoner. It is not an action at all." Harger *v.* Thomas, 44 Pa. St. 128, 130, 84 Am. Dec. 422.

12. Counselman *v.* Hitchcock, 142 U. S. 547, 586, 12 S. Ct. 195, 35 L. ed. 1110.

13. English L. Dict.

14. Black L. Dict.

15. Bouvier L. Dict.

16. Century Dict.

17. Wharton L. Lex.

18. Arthur *v.* Butterfield, 125 U. S. 70, 77, 8 S. Ct. 714, 31 L. ed. 643.

19. Webster Dict. [*quoted* in Atlantic Dynamite Co. *v.* Climax Powder Mfg. Co., 72 Fed. 925, 934].

20. Belknap *v.* Ball, 83 Mich. 583, 588, 47 N. W. 674, 21 Am. St. Rep. 622, 11 L. R. A. 72.

21. Burrill L. Dict.

22. Burrill L. Dict. [*citing* Fleta lib. 2, c. 32, § 2].

23. Atkins *v.* Drake, 1 McClel. & Y. 213, 243, where the court said: "In the northern parts of England, it is well known that every house has what is called a 'croft.' In any village in Yorkshire, it is a common mode of expression to say, 'I am going into the croft.'" And see Goodright *v.* Pears, 11 East 58, 59.

Enclosed for pasture or arable, or any particular use. Jacob L. Dict.

CROPS

By S. Blair Fisher

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Validity as Against Creditors, see FRAUDULENT CONVEYANCES.

I. DEFINITION.

A crop is some product of the soil gathered during a single year.[1] Crops

1. Goodrich *v.* Stevens, 5 Lans. (N. Y.) 230, 231. Another definition is: "Every thing produced from the earth by annual planting,

which are obtained by the labor and cultivation of man are termed *fructus industriales*.[2] Those which are produced by the powers of nature alone are denominated *fructus naturales*.[3]

II. OWNERSHIP.[4]

A. In General. The ownership of realty carries with it as an incident thereto the *prima facie* presumption of the ownership of both the natural products of the land, such as grass and trees, and the emblements, or annually sown crops.[5] The owner of land, however, may, in parting with the use of it to another, make such conditions and reservations in relation to the land itself or the products growing from it as he chooses instead of parting with the full right.[6]

cultivation and labor." Craddock *v.* Riddlesbarger, 2 Dana (Ky.) 205, 206.

Synonymous with "emblements."— See Sparrow *v.* Pond, 49 Minn. 412, 52 N. W. 36, 32 Am. St. Rep. 571, 16 L. R. A. 103.

A crop is a "growing crop" from the time the seed is deposited in the ground, for at that time the seed loses the qualities of a chattel and becomes a part of the freehold and passes with a sale of it. Wilkinson *v.* Ketler, 69 Ala. 435.

An outstanding crop is a crop in the field not gathered or housed, without regard to its state. It is an outstanding crop from the day it commences to grow until it is finally gathered from the ground on which it is planted and taken away. Sullins *v.* State, 53 Ala. 474.

2. Smock *v.* Smock, 37 Mo. App. 56. See also Hamilton *v.* State, 94 Ga. 770, 21 S. E. 995.

Other definitions are: "The products of annual planting." Reed *v.* Johnson, 14 Ill. 257, 259.

"Those products of the earth which are annual, and are raised by yearly manurance and labor, and essentially owe their annual existence to the cultivation by man." Sparrow *v.* Pond, 49 Minn. 412, 417, 52 N. W. 36, 32 Am. St. Rep. 571, 16 L. R. A. 103.

Illustrations.— Growing periodical crops (Vulicevich *v.* Skinner, 77 Cal. 239, 19 Pac. 424; Davis *v.* McFarlane, 37 Cal. 634, 99 Am. Dec. 340; Parham *v.* Tompson, 2 J. J. Marsh. (Ky.) 159; Garth *v.* Caldwell, 72 Mo. 622; Swafford *v.* Spratt, 93 Mo. App. 631, 67 S. W. 701; Glass *v.* Blazer, 91 Mo. App. 564; Holt *v.* Holt, 57 Mo. App. 272; Smock *v.* Smock, 37 Mo. App. 56; Walton *v.* Jordan, 65 N. C. 170; Phillips *v.* Keysaw, 7 Okla. 674, 56 Pac. 695; Pattison's Appeal, 61 Pa. St. 294, 100 Am. Dec. 637; Evans *v.* Roberts, 5 B. & C. 829, 8 D. & R. 611, 4 L. J. K. B. O. S. 313, 11 E. C. L. 700), such as corn, cotton, wheat, rye, potatoes (McKenzie *v.* Lampley, 31 Ala. 526; Howe *v.* Batchelder, 49 N. H. 204; Edwards *v.* Thompson, 85 Tenn. 720, 4 S. W. 913, 4 Am. St. Rep. 807; Kimball *v.* Sattley, 55 Vt. 285, 45 Am. Rep. 614; Jones *v.* Flint, 10 A. & E. 753, 9 L. J. Q. B. 252, 2 P. & D. 594, 37 E. C. L. 396), fruit (State *v.* Fowler, 88 Md. 601, 42 Atl. 201, 71 Am. St. Rep. 452, 42 L. R. A. 849; Purner *v.* Piercy, 40 Md. 212, 17 Am. Rep. 591; Smock *v.* Smock, 37 Mo. App. 56), hops (Sparrow *v.* Pond, 49 Minn. 412, 52 N. W. 36, 32 Am. St. Rep. 571, 16 L. R. A. 103; Smock *v.* Smock, 37 Mo. App. 56; Frank *v.* Harrington, 36 Barb. (N. Y.) 415; Lewis *v.* McNatt, 65 N. C. 63; Latham *v.* Atwood, Cro. Car. 515. And see Webster *v.* Zielly, 52 Barb. (N. Y.) 482), garden vegetables, and the like (Sparrow *v.* Pond, 49 Minn. 412, 52 N. W. 36, 32 Am. St. Rep. 571, 16 L. R. A. 103; Green *v.* Armstrong, 1 Den. (N. Y.) 550) are *fructus industriales*. Crude turpentine which has formed on the body of the tree is also *fructus industriales*. Lewis *v.* McNatt, 65 N. C. 63.

3. Smock *v.* Smock, 37 Mo. App. 56. See also Hamilton *v.* State, 94 Ga. 770, 21 S. E. 995.

Illustrations.— The fruit of trees, perennial bushes, and grasses growing from perennial roots are *fructus naturales*. Sparrow *v.* Pond, 49 Minn. 412, 52 N. W. 36, 32 Am. St. Rep. 571, 16 L. R. A. 103; Bank of Lansingburgh *v.* Crary, 1 Barb. (N. Y.) 542; Green *v.* Armstrong, 1 Den. (N. Y.) 550; Kimball *v.* Sattley, 55 Vt. 285, 45 Am. Rep. 614; Jones *v.* Flint, 10 A. & E. 753, 9 L. J. Q. B. 252, 2 P. & D. 594, 37 E. C. L. 396.

4. Ownership as between: Devisee and personal representative see WILLS. Execution debtor and purchaser at execution sale see EXECUTIONS. Landlord and tenant see LANDLORD AND TENANT. Life-tenant and remainder-man see ESTATES. Mortgagor and purchaser at foreclosure sale see MORTGAGES. Personal representative and heir see EXECUTORS AND ADMINISTRATORS. Plaintiff and defendant in ejectment see EJECTMENT. Tenants in common see TENANCY IN COMMON.

5. Ellestad *v.* Northwestern Elevator Co., 6 N. D. 88, 69 N. W. 44.

Such presumption is not conclusive. It may be rebutted by competent evidence in the given case that the natural products or the annual crops do in fact belong to another than the owner. Ellestad *v.* Northwestern Elevator Co., 6 N. D. 88, 69 N. W. 44.

6. *Arkansas.*— Ponder *v.* Rhea, 32 Ark. 435.

California.— Howell *v.* Foster, 65 Cal. 169, 3 Pac. 647.

New Hampshire.— Moulton *v.* Robinson, 27 N. H. 550.

New York.— Andrew *v.* Newcomb, 32 N. Y. 417.

B. Crops Raised by Fraudulent Grantee. A fraudulent grantee of a farm has, as against the creditors of his grantor, title to the crops that he raises on the farm while the conveyance is unimpeached, unless it be shown that he manages the farm and raises the crops for the benefit of the grantor.[7]

C. Crops Raised by Trespasser. Where a mere intruder upon land plants crops thereon, such crops, so long as they remain unsevered, are the property of the owner of the land.[8] But one who sows, cultivates, and harvests a crop upon the land of another is entitled to the crop as against the owner of the land, whether he came to the possession of the land lawfully or not, provided he remains in possession till the crop is harvested.[9]

D. Crops Raised Under Parol License. One who enters upon the lands of another and puts in crops under a parol license and a parol agreement that he shall have the crops raised by him is entitled to the crops.[10]

E. Sale or Conveyance of Land — 1. In General. According to the great weight of authority crops so far partake of the nature of realty that in the absence of reservation or exception they pass by a sale or conveyance of the land

North Dakota.— Angell *v.* Egger, 6 N. D. 391, 71 N. W. 547.

Oregon.— Fox *v.* McKinney, 9 Oreg. 493.

South Dakota.— Consolidated Land, etc., Co. *v.* Hawley, 7 S. D. 229, 63 N. W. 904.

Vermont.— Bellows *v.* Wells, 36 Vt. 599; Edson *v.* Colburn, 28 Vt. 631, 67 Am. Dec. 730; Smith *v.* Atkins, 18 Vt. 461.

Forfeiture of land.— Where plaintiff and defendant enter into a contract whereby the former agrees to work for the latter for a certain term for which services defendant agrees to pay him a certain price per month, and to give him the use of an acre of land upon which to plant crops, plaintiff by leaving defendant's service without just cause forfeits all right to the use of the land, and defendant is entitled to the crop. Butler *v.* Rice, 17 Hun (N. Y.) 406.

7. Hartman *v.* Weiland, 36 Minn. 223, 30 N. W. 815 [*citing* Sanders *v.* Chandler, 26 Minn. 273, 3 N. W. 351]. See, generally, FRAUDULENT CONVEYANCES.

8. *Alabama.*—Carlisle *v.* Killebrew, 89 Ala. 329, 6 So. 756, 6 L. R. A. 617.

Illinois.— Crotty *v.* Collins, 13 Ill. 567. See also McGinniss *v.* Fernandes, 135 Ill. 69, 26 N. E. 109, 25 Am. St. Rep. 347.

Indiana.— Rowell *v.* Klein, 44 Ind. 290, 15 Am. Rep. 235.

Iowa.— Schmidt *v.* Williams, 72 Iowa 317, 33 N. W. 693.

Kansas.— Freeman *v.* McLennan, 26 Kan. 151.

Kentucky.— Huston *v.* Skaggs, 7 Ky. L. Rep. 592.

Missouri.— Jenkins *v.* McCoy, 50 Mo. 348; Baker *v.* McInturff, 49 Mo. App. 505; Oyster *v.* Oyster, 32 Mo. App. 270; Salmon *v.* Fewell, 17 Mo. App. 118.

Oklahoma.— Phillips *v.* Keysaw, 7 Okla. 674, 56 Pac. 695.

Texas.— See Walker *v.* Simkins, 2 Tex. App. Civ. Cas. § 69.

See 15 Cent. Dig. tit. "Crops," § 5.

A mere possessor of public land who has planted a crop thereon cannot maintain trespass against a purchaser who enters and removes such crop. Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374. See also Rasor *v.* Qualls, 4 Blackf. (Ind.) 286, 30 Am. Dec. 658.

9. *California.*— Johnston *v.* Fish, 105 Cal. 420, 38 Pac. 979, 45 Am. St. Rep. 53; Groome *v.* Almstead, 101 Cal. 425, 35 Pac. 1021 [*following* Page *v.* Fowler, 39 Cal. 412, 2 Am. Rep. 462]; Huerstal *v.* Muir, 64 Cal. 450, 2 Pac. 33; Martin *v.* Thompson, 62 Cal. 618.

Georgia.— Dollar *v.* Roddenbery, 97 Ga. 148, 25 S. E. 410.

Minnesota.— Lindsay *v.* Winona, etc., R. Co., 29 Minn. 411, 13 N. W. 191, 43 Am. Rep. 228.

Missouri.— Adams *v.* Leip, 71 Mo. 597; Jenkins *v.* McCoy, 50 Mo. 348; Harris *v.* Turner, 46 Mo. 438; Morgner *v.* Briggs, 46 Mo. 65; Boyer *v.* Williams, 5 Mo. 335, 32 Am. Dec. 324; Edwards *v.* Eveler, 84 Mo. App. 405; McAllister *v.* Lawler, 32 Mo. App. 91.

New York.— Stockwell *v.* Phelps, 34 N. Y. 363, 90 Am. Dec. 710.

North Carolina.— Hinton *v.* Walston, 115 N. C. 7, 20 S. E. 164; Faulcon *v.* Johnston, 102 N. C. 264, 9 S. E. 394, 11 Am. St. Rep. 737; Ray *v.* Gardner, 82 N. C. 454; Brothers *v.* Hurdle, 32 N. C. 490, 51 Am. Dec. 400.

Oklahoma.— Phillips *v.* Keysaw, 7 Okla. 674, 56 Pac. 695.

Washington.— Churchill *v.* Ackerman, 22 Wash. 227, 60 Pac. 406.

See 15 Cent. Dig. tit. "Crops," § 5.

10. Harris *v.* Frink, 49 N. Y. 24, 10 Am. Rep. 318, holding that where under a parol contract for the sale of land the vendee, with the consent of the vendor, in pursuance of the terms of the contract, enters into possession and puts in crops, the invalidity of the contract to sell and convey does not affect the vendee's title to the crops, and if the vendor refuses to perform and ejects the vendee, the title of the latter to the crops is not thereby divested. In such case the crops as between the parties are not a part of the realty but chattels.

as appurtenant thereto,[11] whether unripe or matured,[12] so long as there has not been a severance, actual or constructive, of such crops from the land.[13] It has,

11. *Alabama.*—Wilkinson *v.* Ketler, 69 Ala. 435; Thweat *v.* Stamps, 67 Ala. 96.

Arkansas.— Brock *v.* Smith, 14 Ark. 431; Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374; Gibbons *v.* Dillingham, 10 Ark. 9, 50 Am. Dec. 233. See Hensley *v.* Brodie, 16 Ark. 511.

California.— Fiske *v.* Soule, 87 Cal. 313, 25 Pac. 430. See also Marr *v.* Rhodes, 131 Cal. 267, 63 Pac. 364.

Connecticut.— Maples *v.* Millon, 31 Conn. 598.

Delaware.— Gan *v.* Cordrey, (1902) 53 Atl. 334.

Georgia.— Bagley *v.* Columbus Southern R. Co., 98 Ga. 626, 25 S. E. 638, 58 Am. St. Rep. 325, 34 L. R. A. 286; Frost *v.* Render, 65 Ga. 15; Ferguson *v.* Hardy, 59 Ga. 758; Pitts *v.* Hendrix, 6 Ga. 452.

Illinois.— Talbot *v.* Hill, 68 Ill. 106; Creel *v.* Kirkham, 47 Ill. 344; Powell *v.* Rich, 41 Ill. 466; Smith *v.* Price, 39 Ill. 28, 89 Am. Dec. 284; Reed *v.* Johnson, 14 Ill. 257; Damery *v.* Ferguson, 48 Ill. App. 224; Harmon *v.* Fisher, 9 Ill. App. 22.

Indiana.— Heavilon *v.* Heavilon, 29 Ind. 509; Turner *v.* Cool, 23 Ind. 56, 85 Am. Dec. 449.

Iowa.— Price *v.* Brayton, 19 Iowa 309.

Kansas.— Polley *v.* Johnson, 52 Kan. 478, 35 Pac. 8, 23 L. R. A. 258; Smith *v.* Leighton, 28 Kan. 544, 17 Pac. 52, 5 Am. St. Rep. 778; Garanflo *v.* Cooley, 33 Kan. 137, 5 Pac. 766; Chapman *v.* Veach, 32 Kan. 167, 4 Pac. 100; Smith *v.* Hague, 25 Kan. 246.

Kentucky.— Bourne *v.* Bourne, 92 Ky. 211, 17 S. W. 443, 13 Ky. L. Rep. 545; Huston *v.* Staggs, 7 Ky. L. Rep. 592.

Louisiana.— Baird *v.* Brown, 28 La. Ann. 842; Bludworth *v.* Lambeth, 9 Rob. 256.

Michigan.— Dayton *v.* Dakin, 103 Mich. 65, 61 N. W. 349; Coman *v.* Thompson, 47 Mich. 22, 10 N. W. 62, 41 Am. Rep. 706; Ruggles *v.* Centreville First Nat. Bank, 43 Mich. 192, 5 N. W. 357; Tripp *v.* Hasceig, 20 Mich. 254, 4 Am. Rep. 388.

Minnesota.— Mitchell *v.* Tschida, 71 Minn. 133, 73 N. W. 625; Erickson *v.* Paterson, 47 Minn. 525, 50 N. W. 699.

Missouri.— Reed *v.* Swan, 133 Mo. 100, 34 S. W. 483; McIlvaine *v.* Harris, 20 Mo. 457, 64 Am. Dec. 196.

New Hampshire.— Kittredge *v.* Woods, 3 N. H. 503, 14 Am. Dec. 393.

New Jersey.— Bloom *v.* Welsh, 27 N. J. L. 177; Terhune *v.* Elberson, 3 N. J. L. 297.

New York.— Batterman *v.* Albright, 122 N. Y. 484, 25 N. E. 856, 19 Am. St. Rep. 510, 11 L. R. A. 800; Harris *v.* Frink, 49 N. Y. 24, 10 Am. Rep. 318; Wintermute *v.* Light, 46 Barb. 278; Beach *v.* Barons, 13 Barb. 305; Hadley *v.* Barton, 47 How. Pr. 481; Foote *v.* Colvin, 3 Johns. 216, 3 Am. Dec. 478. See also Otis *v.* Thompson, Lalor 131.

Ohio.— Herron *v.* Herron, 47 Ohio St. 544, 25 N. E. 420, 21 Am. St. Rep. 854, 9 L. R. A. 667; Baker *v.* Jordan, 3 Ohio St. 438. But crops do not pass by judicial or partition sales. Houts *v.* Showalter, 10 Ohio St. 124; Cassilly *v.* Rhodes, 12 Ohio 88.

Oklahoma.— Phillips *v.* Keysaw, 7 Okla. 674, 56 Pac. 695.

Pennsylvania.— Hershey *v.* Metzgar, 90 Pa. St. 217; Backenstoss *v.* Stahler, 33 Pa. St. 251, 75 Am. Dec. 592; Bear *v.* Bitzer, 16 Pa. St. 175, 55 Am. Dec. 490; Burnside *v.* Weightman, 9 Watts 46; Wilkins *v.* Vashbinder, 7 Watts 378; Pennsylvania Bank *v.* Wise, 3 Watts 394.

South Carolina.— Hancock *v.* Caskey, 8 S. C. 282.

Tennessee.— Shofner *v.* Shofner, 5 Sneed 95; Pickens *v.* Reed, 1 Swan 80.

Texas.— Willis *v.* Moore, 59 Tex. 628, 40 Am. Rep. 284.

Virginia.— Crews *v.* Pendleton, 1 Leigh 297, 19 Am. Dec. 750.

West Virginia.— Kerr *v.* Hill, 27 W. Va. 576; Engle *v.* Engle, 3 W. Va. 246.

Wisconsin.— Wescott *v.* Delano, 20 Wis. 514.

England.— Brantom *v.* Griffiths, 1 C. P. D. 349, 45 L. J. C. P. 588, 34 L. T. Rep. N. S. 871, 24 Wkly. Rep. 762.

See 15 Cent. Dig. tit. "Crops," § 2.

Rule not altered by statute of frauds and perjuries.— The rule of the common law that growing crops pass by a conveyance of the land is held not to have been altered by the statute against fraud and perjuries. Backenstoss *v.* Stahler, 33 Pa. St. 251, 75 Am. Dec. 592 [*citing* Evans *v.* Roberts, 5 B. & C. 829, 8 D. & R. 611, 4 L. J. K. B. O. S. 313, 11 E. C. L. 700; Dunn *v.* Ferguson, Hayes 540; Sainsbury *v.* Matthews, 4 M. & W. 343].

Passes as part of dower estate.— A crop of wheat growing upon land at the time it was set off and confirmed to the widow as dower will pass with the land and be considered a part of her dower estate unless expressly reserved. Ralston *v.* Ralston, 3 Greene (Iowa) 533.

12. Damery *v.* Ferguson, 48 Ill. App. 224; Tripp *v.* Hasceig, 20 Mich. 254, 4 Am. Rep. 388. But see Powell *v.* Rich, 41 Ill. 466.

13. *Illinois.*— Talbot *v.* Hill, 68 Ill. 106; Damery *v.* Ferguson, 48 Ill. App. 224.

Michigan.— Tripp *v.* Hasceig, 20 Mich. 254, 4 Am. Rep. 388.

Nebraska.— Yeazel *v.* White, 40 Nebr. 432, 58 N. W. 1020, 24 L. R. A. 449.

Oklahoma.— Phillips *v.* Keysaw, 7 Okla. 674, 56 Pac. 695.

Pennsylvania.— Hershey *v.* Metzger, 90 Pa. St. 217.

See 15 Cent. Dig. tit. "Crops," § 2.

Grain set apart as landlord's portion.—The conveyance of land will not pass grain raised thereon which has been set apart as the landlord's portion, in the absence of a contract to that effect, this being a delivery to the landlord. Moffett *v.* Armstrong, 40 Iowa 484.

however, been held that annual crops do not necessarily pass with the title of the land, and that, although the presumption is that while growing they pass, such presumption may be rebutted,[14] even by parol evidence.[15]

2. **Reservation of Crops.** In a conveyance of land in fee or for years, growing crops may be considered by the parties as personal property and so separated in contemplation of law by an agreement reserving them as not to pass by the deed or lease.[16]

III. CROPPERS.

A. Definition. A cropper is one who having no interest in the land works it in consideration of receiving a portion of the crop for his labor.[17]

B. Existence of Relation. The intention of the parties as expressed in the language they have used, interpreted in the light of the surrounding circumstances, controls in determining whether or not a given contract constitutes the cultivator a cropper.[18] If the language used imports a present demise of any character by which any interest in the land passes to the occupier, or by which he obtains the right of exclusive possession, the contract becomes one of lease, and

14. Walton *v.* Jordan, 65 N. C. 170.

Presumption very slight.—In Flynt *v.* Conrade, 61 N. C. 190, 93 Am. Dec. 588, it was held that a growing crop differs only from a personal chattel in the circumstance of not being severed from the land, and that the presumption that it passes with the land is very slight.

15. Walton *v.* Jordan, 65 N. C. 170; Flynt *v.* Conrade, 61 N. C. 190, 93 Am. Dec. 588, in which it was held that the presumption may be rebutted by the acts and declarations of the parties.

16. Hendrickson *v.* Ivins, 1 N. J. Eq. 562; Herron *v.* Herron, 47 Ohio St. 544, 25 N. E. 420, 21 Am. St. Rep. 854, 9 L. R. A. 667; Jones *v.* Timmons, 21 Ohio St. 596; Houts *v.* Showalter, 10 Ohio St. 124; Youmans *v.* Caldwell, 4 Ohio St. 71; Baker *v.* Jordan, 3 Ohio St. 438.

As to necessity of writing on sale of crops see Frauds, Statute of.

Stipulations providing for ownership of crops by landlord until rent is paid see Andrew *v.* Newcomb, 32 N. Y. 417; McCombs *v.* Becker, 3 Hun (N. Y.) 342; Van Hoozer *v.* Cory, 34 Barb. (N. Y.) 9.

The reservation of growing crops gives the right to enter and cut and carry away the same, and if they are wrongfully taken by the vendee trover will lie to recover the same. Backenstoss *v.* Stahler, 33 Pa. St. 251, 75 Am. Dec. 592.

Where one sells his crop by parol and afterward conveys the land such conveyance will not carry the title to the crop. Austin *v.* Sawyer, 9 Cow. (N. Y.) 39.

17. Romero *v.* Dalton, (Ariz. 1886) 11 Pac. 863, 864. See also McElmurray *v.* Turner, 86 Ga. 215, 12 S. E. 359.

Other definitions are: "A laborer receiving pay in a share of the crop." Harrison *v.* Ricks, 71 N. C. 7, 11.

"One hired to work land and to be compensated by a share of the produce." Steel *v.* Frick, 56 Pa. St. 172, 175. See also Adams *v.* McKesson, 53 Pa. St. 81, 91 Am. Dec. 183; Fry *v.* Jones, 2 Rawle (Pa.) 11.

"A person hired by the landowner to cultivate the land, receiving for his compensation a portion of the crops raised." Wood *v.* Garrison, 62 S. W. 728, 729, 23 Ky. L. Rep. 295.

"One who raises a crop upon land of another under a contract to raise the crop for a particular part of it." Burgie *v.* Davis, 34 Ark. 179.

A cropper's contract is "one in which one agrees to work the land of another for a share of the crop, without obtaining any interest in the land or ownership in the crop before division." Gray *v.* Robinson, (Ariz. 1893) 33 Pac. 712, 713.

"The difference between a tenant and a cropper is clear. A tenant has an estate in the land for the term, and consequently he has a right of property in the crops. If he pays a share of the crop for rent, it is he that divides off to the landlord his share, and until such division the right of property and the possession in the whole, is his. . . A cropper has no estate in the land; that remains in the landlord. Consequently although he has, in some sense, the possession of the crop, it is only the possession of a servant, and is in law that of the landlord. The landlord must divide off to the cropper his share." Harrison *v.* Ricks, 71 N. C. 7, 10. And see Appling *v.* Odom, 46 Ga. 583, 584, where it is said: "There is an obvious distinction between a cropper and a tenant. One has a possession of the premises, exclusive of the landlord; the other has not. The one has a right for a fixed time; the other has only a right to go on the land to plant, work and gather the crop. The possession of the land is with the owner as against the cropper. This is not so of the tenant." See also Denton *v.* Strickland, 48 N. C. 61; Brazier *v.* Ansley, 33 N. C. 12, 51 Am. Dec. 408; McNeely *v.* Hart, 32 N. C. 63, 51 Am. Dec. 377.

18. *Arizona.*— Gray *v.* Robinson, (1893) 33 Pac. 712.

California.— Walls *v.* Preston, 25 Cal. 59.

Illinois.— Dixon *v.* Niccolls, 39 Ill. 372, 89 Am. Dec. 312.

the relation of landlord and tenant is created.[19] If on the other hand there be no language in the contract importing a conveyance of any interest in the land, but by the express terms of the contract the general possession of the land is reserved by the owner, the occupant becomes a mere cropper.[20]

C. Rights and Liabilities — 1. In General. A cropper's contract gives the cropper no legal possession of the premises further than as an employee; the legal possession is in the employer,[21] who alone can maintain trespass.[22] Before the division of the crop the whole is the property of the landlord and the cropper has no legal title to any part thereof[23] which can be subjected to the payment of his debts[24] or which he can assign or convey to a third person.[25] When, however, their respective rights in the crop have been adjusted and the cropper's part specifically set aside to him the title thereto is in him,[26] and he may mortgage or dispose of the same as he will.[27]

Massachusetts.— Warner *v.* Abbey, 112 Mass. 355.

Missouri.— Johnson *v.* Hoffman, 53 Mo. 504; Moser *v.* Lower, 48 Mo. App. 85.

New Hampshire.— Moulton *v.* Robinson, 27 N. H. 550.

See 15 Cent. Dig. tit. "Crops," § 6.

19. Gray *v.* Robinson, (Ariz. 1893) 33 Pac. 712. See, generally, Landlord and Tenant.

20. *Alabama.*— Brown *v.* Coats, 56 Ala. 439; Smith *v.* Rice, 56 Ala. 417; Williams *v.* Nolen, 34 Ala. 167; Smyth *v.* Tankersley, 20 Ala. 212, 56 Am. Dec. 193; Thompson *v.* Mawhinney, 17 Ala. 362, 52 Am. Dec. 176.

Arizona.— Gray *v.* Robinson, (1893) 33 Pac. 712; Romero *v.* Dalton, (1886) 11 Pac. 863.

Arkansas.— Hammock *v.* Creekmore, 48 Ark. 264, 3 S. W. 180; Burgie *v.* Davis, 34 Ark. 179.

California.—Wentworth *v.* Miller, 53 Cal. 9.

Illinois.— Alwood *v.* Ruckman, 21 Ill. 200.

New Jersey.— State *v.* Jewell, 34 N. J. L. 259; Guest *v.* Opdyke, 31 N. J. L. 552.

New York.— Putnam *v.* Wise, 1 Hill 234, 37 Am. Dec. 309.

North Carolina.— Haywood *v.* Rogers, 73 N. C. 320; Hudgins *v.* Wood, 72 N. C. 256.

Pennsylvania.— McCormick *v.* Skiles, 163 Pa. St. 590, 30 Atl. 195; Adams *v.* McKesson, 53 Pa. St. 81, 91 Am. Dec. 183; Fry *v.* Jones, 2 Rawle 11.

Vermont.— Warner *v.* Hoisington, 42 Vt. 94; Esdon *v.* Colburn, 28 Vt. 631, 67 Am. Dec. 730.

See 15 Cent. Dig. tit. "Crops," § 7.

21. Steel *v.* Frick, 56 Pa. St. 172; Adams *v.* McKesson, 53 Pa. St. 81, 91 Am. Dec. 183; Fry *v.* Jones, 2 Rawle (Pa.) 11.

A cropper has no interest except that arising out of the contract of the owner of the land to pay him his portion of the crop or of its value as wages. Hudgins *v.* Wood, 72 N. C. 256.

22. Adams *v.* McKesson, 53 Pa. St. 81, 91 Am. Dec. 183.

23. *Arizona.*— Gray *v.* Robinson, (1893) 33 Pac. 712.

Arkansas.— Hammock *v.* Creekmore, 48 Ark. 264, 3 S. W. 180.

Georgia.— See McElmurray *v.* Turner, 86 Ga. 215, 12 S. E. 359.

Kentucky.— Wood *v.* Garrison, 62 S. W. 728, 23 Ky. L. Rep. 295.

North Carolina.— Harrison *v.* Ricks, 71 N. C. 7; Brazier *v.* Ansley, 33 N. C. 12, 51 Am. Dec. 408; McNeely *v.* Hart, 32 N. C. 63, 51 Am. Dec. 337; Hare *v.* Pearson, 26 N. C. 76; State *v.* Jones, 19 N. C. 544.

South Carolina.— Roger *v.* Collier, 2 Bailey 581, 23 Am. Dec. 153.

Virginia.— Parrish *v.* Com., 81 Va. 1.

See 15 Cent. Dig. tit. "Crops," § 7.

Taking by cropper without consent of owner.— Where a landowner contracts with one to crop his land and to give him part of the crop after paying all advances, and the crop has not been divided, such cropper is not a tenant, but a mere employee, and the ownership of the entire crop is in the landowner, and if the cropper forcibly or against the consent of the landowner takes the crop from the possession of the latter, such taking is larceny, robbery, or other offense, according to the circumstances of the case. Parrish *v.* Com., 81 Va. 1.

24. Brazier *v.* Ansley, 33 N. C. 12, 51 Am. Dec. 408.

25. McNeely *v.* Hart, 32 N. C. 63, 51 Am. Dec. 377; State *v.* Jones, 19 N. C. 544.

26. Hughes *v.* Stewart, 74 Ga. 827.

Sufficient division of grain to render it subject to attachment.— Under a cropping contract by the terms of which the entire crop of grain raised was to belong to the owner of the land until division should be made, and one half of the crop was to be segregated on the ground to be given to the cropper at the conclusion of the threshing and sacking of the crop, where it appeared that all of the crop excepting one stack had been threshed and sacked, and one half thereof delivered by the cropper to the order of the owner of the land, and the remaining half remained in the field, such remaining half of the threshed and sacked crop is to be deemed the property of the cropper, and is subject to attachment by his creditor. Crocker *v.* Cunningham, 122 Cal. 547, 55 Pac. 404.

27. Parks *v.* Webb, 48 Ark. 293, 3 S. W. 521 [*citing* Meadow *v.* Wise, 41 Ark. 285; Jarratt *v.* McDaniel, 32 Ark. 598].

2. Abandonment of Contract by Cropper. If the cropper abandons the contract before completion, he cannot recover for a partial performance, and his interest becomes vested in the landlord, divested of any lien which may have attached to it for agricultural advances while it was the property of the cropper.[28]

IV. Actions For Injuries to Crops.

A. Venue. An action to recover damages against one unlawfully entering upon land and destroying growing crops thereon may be brought in the county in which defendant resides or may be summoned.[29]

B. Parties.[30] The owner of the crop and not the owner of the land is entitled to recover for damages done to such crop.[31] All joint owners of a crop injured are proper parties to an action for damages for such injury.[32]

V. Offenses in Relation to Crops.

A. In General. The statutes of a number of states expressly prohibit, and provide for the punishment of, certain offenses against growing crops, as for instance the removal thereof without satisfying the claims of the lessor or giving notice of such removal;[33] and the severance from the soil and removal of the growing crops of another.[34]

B. Indictment or Information. An indictment under a statute prohibiting certain offenses with respect to growing crops must in charging the alleged offense follow the language of the statute or use other equivalent words.[35] Under a statute making it a misdemeanor for any person who shall unlawfully go on the

28. Thigpen *v.* Leigh, 93 N. C. 47.

If a cropper fails to begin the labor contracted to be done by him, or having begun without good cause fails to continue it, the landlord may maintain forcible detainer and dispossess him. Wood *v.* Garrison, 62 S. W. 728, 23 Ky. L. Rep. 295.

Breach of contract by owner.— The remedy of the cropper against the owner of the land for breach of the contract in refusing to permit him to perform is to recover the value of the contract at the time of the breach, which may be more or less than the value of the labor performed. Cull *v.* San Francisco, etc., Land Co., 124 Cal. 591, 57 Pac. 456.

29. Duncan *v.* Yordy, 27 Kan. 348. See, generally, Venue.

30. See, generally, Parties.

31. Telephone Tel. Co. *v.* Forke, 2 Tex. App. Civ. Cas. § 365, in which it was held that the tenant and not the landlord owned the crops and was entitled to the damage done thereto, if any. See also Larkin *v.* Taylor, 5 Kan. 433, holding that the lessee of land in possession under a contract to give a part of the crops for rent may maintain an action for trespass upon his lands and crops without making the owner of the land a party. And see Duncan *v.* Yordy, 27 Kan. 348; Caldwell *v.* Custard, 7 Kan. 303, which cases hold that one who is in the actual and peaceable possession of real estate may be entitled to recover for injuries to his growing crops, although not the owner of the premises and not entitled to the right of possession thereof.

32. Hayes *v.* Crist, 4 Kan. 350; Texas, etc., R. Co. *v.* Gill, 2 Tex. App. Civ. Cas. § 175.

One joint owner cannot alone maintain a suit for damages to his crops without joining therein the other joint owners of such property. Those refusing to join in the action as plaintiffs should be made parties defendant. Texas, etc., R. Co. *v.* Gill, 2 Tex. App. Civ. Cas. § 175; Houston, etc., R. Co. *v.* Hollingsworth, 2 Tex. App. Civ. Cas. § 173.

33. State *v.* Powell, 94 N. C. 920; State *v.* Walker, 87 N. C. 541.

The offense of removing crops without payment or giving notice of such removal, although it may have been committed secretly or at night, is a simple misdemeanor, and is not punishable by imprisonment in the penitentiary. State *v.* Powell, 94 N. C. 920.

34. Sullins *v.* State, 53 Ala. 474; State *v.* Scott, 68 Ind. 267; Johnson *v.* State, 68 Ind. 43; Arbuckle *v.* State, 32 Ind. 34; State *v.* Sheppard, 33 La. Ann. 1216.

35. Johnson *v.* State, 68 Ind. 43.

A mere informality will not vitiate the indictment. State *v.* Walker, 87 N. C. 541.

In an indictment for removing a crop without satisfying the lessor's claims for rent, etc., it is sufficient to aver in the words of the statute that the act was done "wilfully" and "unlawfully," leaving it to defendant to show in excuse if he can that such removal was made in good faith and for the preservation of the crops. State *v.* Walker, 87 N. C. 541. And an averment in an indictment for removing a crop "without having given any notice of such intended removal" is equivalent to the averment that the removal was made without giving the five days' notice required by the statute. State *v.* Powell, 94 N. C. 920; State *v.* Walker, 87 N. C. 541.

lands of another and unlawfully pull off and carry away any fruit, etc., which is the property of another the unlawfully going is an essential ingredient in the offense, and must be averred in the affidavit and information charging such offense.[36]

CROP-TIME. That portion of the year which is occupied in making and gathering the crop — the period of time which would intervene between the time, when the crop no longer required working: in popular phrase, when "the crop is laid by."[1]

CROSS. As an adjective, in the inverse order; COUNTER, *q. v.*; made by the opposite party.[2] As a noun, a mark, instead of his name, made by a person who cannot write, or is disabled from writing.[3] As a preposition, over, from side to side.[4] As a verb, to pass from side to side;[5] to pass or move over.[6] In ordinary and popular phrase the word is used indifferently to express the passing from side to side of a given object whether the passage is effected by moving directly upon the object crossed, or by passing over it at an elevation;[7] also to intersect;[8] to cut into or between.[9] (Cross: Appeal, see APPEAL AND ERROR. Bill, see EQUITY. Complaint, see PLEADING. Demand, see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM. Error, see APPEAL AND ERROR. Examination, see CRIMINAL LAW; DEPOSITIONS; EVIDENCE; WITNESSES. Libel, see ADMIRALTY. Remainder, see ESTATES. Replevin, see REPLEVIN. Signature by, see SIGNATURES. Vein, see MINES AND MINERALS.)

36. State *v.* Scott, 68 Ind. 267 [*citing* Arbuckle *v.* State, 32 Ind. 34].

Description of land.— An indictment under a statute which makes it a misdemeanor for one to go unlawfully upon the lands of another, and pull from the stalk and carry away growing corn, need not describe the land upon which the trespass was committed further than to give the name of the owner. It must, however, allege that the corn was growing on the stalk or that it was green. Johnson *v.* State, 68 Ind. 43.

In Louisiana an indictment for severing from the soil of another any produce, etc., is defective if it charges merely that produce severed from the soil was a part of a crop "produced" by such other person. It should allege that the crop was "owned," etc. State *v.* Sheppard, 33 La. Ann. 1216.

1. Martin *v.* Chapman, 6 Port. (Ala.) 344, 351, where it is said: "And the time when the crop had matured, and it was necessary to commence gathering it, is that portion of the year which is not considered crop time."

2. Anderson L. Dict.

3. Anderson L. Dict. And see, generally, SIGNATURES.

4. People *v.* New York Cent. R. Co., 25 Barb. (N. Y.) 199, 202.

5. As to cross a road or a river, which may be done by passing upon a bridge elevated above the level of the road or river passed. People *v.* New York Cent. R. Co., 25 Barb. (N. Y.) 199, 202; Century Dict. [*quoted* in Atchison, etc., R. Co. *v.* Kansas City, etc., R. Co., (Kan. 1902) 70 Pac. 939, 940].

"**The terms 'crossing' and 'overtaking' are not mutually exclusive.** A vessel may be crossing another's course, and at the same time overtaking her, in a certain sense; or she may be overtaking another in a general or popular sense, or in reference to certain aspects, and clearly not be an overtaking vessel in the sense of the rules of navigation." The Aurania, 29 Fed. 98, 104.

6. People *v.* New York Cent. R. Co., 25 Barb. (N. Y.) 199, 202. And see Wheeler *v.* Rochester, etc., R. Co., 12 Barb. (N. Y.) 227, 232, where the court said: "Crossing does not necessarily and inevitably mean passing over, though that is its most usual signification."

7. Thus, a bridge is said to cross a river; and a man is said to have crossed a river who has passed over it upon a bridge which does not come in contact with the river. People *v.* New York Cent. R. Co., 25 Barb. (N. Y.) 199, 202. And see People *v.* New York Cent. R. Co., 13 N. Y. 78, 80, where it is said: "The railroad, in the present case, certainly crossed the public road, though upon a bridge at an elevation of fifteen feet. The traveler crosses the river upon a bridge or in a boat. He crosses the Niagara below the falls upon a suspension bridge some two hundred feet above the river."

"**Crossing of roads, or other interference therewith**" as used in a statute relative to railways see Tanner *v.* South Wales R. Co., 5 E. & B. 618, 627, 1 Jur. N. S. 1215, 25 L. J. Q. B. 7, 85 E. C. L. 618.

"**Crossing the lake**" as used in a statute in reference to payment of tolls to a bridge company see Cayuga Bridge Co. *v.* Stout, 7 Cow. (N. Y.) 33, 34. And see Sprague *v.* Birdsall, 2 Cow. (N. Y.) 419, 420.

8. As to lay a body across another, as to cross a word in writing. People *v.* New York Cent. R. Co., 25 Barb. (N. Y.) 199, 202.

9. State *v.* New Haven, etc., Co., 45 Conn. 331, 344.

CROSS ACTION. An action by a defendant in an action, against the plaintiff in the same action, upon the same contract, or for the same tort.[10] (Cross Action: In General, see PLEADING; RECOUPMENT, SET-OFF, AND COUNTER-CLAIM. Abatement of, see ABATEMENT AND REVIVAL. In Divorce Proceedings, see DIVORCE. In Ejectment, see EJECTMENT. In Proceedings to Enforce Contracts, see SPECIFIC PERFORMANCE. In Replevin, see REPLEVIN. On Foreclosure of Mortgage, see MORTGAGES. To Cancel Instrument, see CANCELLATION OF INSTRUMENTS. To Reform Instrument, see REFORMATION OF INSTRUMENTS.)

CROSS APPEAL. See APPEAL AND ERROR.

CROSS BILL. See EQUITY.

CROSS-COMPLAINT. See PLEADING.

CROSS DEMAND. See RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

CROSSED CHECK. A check crossed with two lines, between which are either the name of a bank or the words "and company," in full or abbreviated.[11] (See, generally, COMMERCIAL PAPER.)

CROSS ERROR. See APPEAL AND ERROR.

CROSS-EXAMINATION.[12] In practice, the examination of a witness by the party opposed to the party who has first examined him, in order to test the truth of such first or direct examination, which is also called examination in chief.[13] (Cross-Examination: Of Witness, see CRIMINAL LAW; DEPOSITIONS; EVIDENCE; WITNESSES.)

CROSSING. As applied to the intersection of a common highway and a railroad and as used in statutes, the entire structure, including the approaches, although a part of the structure may be outside the lines of the railroad's lands or the place where the roads actually cross each other.[14] (See, generally, RAILROADS; STREET RAILROADS.)

CROSS LIBEL. See ADMIRALTY.

CROSS-PETITION. See PLEADING.

CROSS REMAINDER. See ESTATES.

CROSS REPLEVIN. See REPLEVIN.

CROSS RULES. Rules where each of the opposite litigants obtained a rule *nisi*, as the plaintiff to increase the damages, and the defendant to enter a nonsuit.[15]

CROSS-TIE. A sleeper, connecting and supporting the parallel rails of a railroad.[16]

CROSS VEIN. See MINES AND MINERALS.

CROWN. The sovereign; the royal power; also, that which concerns or pertains to the ruling power — the king or queen.[17] The term is also commonly

"Crossing the bar," etc.— Under a statute containing the words: "Crossing the bar between Hog island and Loud's island, thence to the first mentioned bound," "crossing the bar, etc., means passing clear across the entire width of the bar on the line of low water, and when the western edge or limit of the bar on the line of low water is reached, then a straight line from that point 'to the first mentioned bound.'" Bremen *v.* Bristol, 66 Me. 354, 356.

10. Bouvier L. Dict. And see Francis *v.* Baker, 10 A. & E. 642, 644, 37 E. C. L. 342, where Williams, J., said: "Many matters may now be shown or pleaded as a defence, which were formerly considered only the subjects of a cross action."

11. In the former case, the banker on whom it is drawn must not pay the money for the check to any other than the banker named; in the latter case, he must not pay it to any other than a banker. Black L. Dict. [*citing* 2 Stephen Comm. 118 note *c*].

12. The character X is sometimes used to indicate "cross-examination." Anderson L. Dict.

13. Burrill L. Dict.

14. Roxbury *v.* Central Vermont R. Co., 60 Vt. 121, 138, 14 Atl. 92. See also Moberly *v.* Kansas City, etc., R. Co., 17 Mo. App. 518, 538 [*citing* Farley *v.* Chicago, etc., R. Co., 42 Iowa 234].

15. Wharton L. Lex.

16. Standard Dict. [*cited* in Howser *v.* Cumberland, etc., R. Co., 80 Md. 146, 154, 30 Atl. 906, 45 Am. St. Rep. 332, 27 L. R. A. 154, where it is said: "Its figure and dimensions are familiar, and its flat surfaces and weight illustrate how readily it can be loaded so as to form an almost compact body of wood, if reasonable care be exercised in placing them on the flat bottom of the car, and proper lateral support be given them]."

17. Anderson L. Dict. And see U. S. *v.* Lee, 106 U. S. 196, 251, 1 S. Ct. 240, 27 L. ed. 171; Atty.-Gen. *v.* Hallett, 3 D. & L. 685,

made use of to designate an ornamental badge of regal power worn on the head by sovereign princes.[18]

CROWN CASES. In English law, criminal prosecutions.[19]

CROWN DEBTOR. Any person having money belonging to the Crown.[20]

CROWN DEBTS. Debts which a prerogative entitles the crown to claim priority for before all other creditors.[21]

CROWNER. In old Scotch law, a coroner.[22] (See, generally, CORONERS.)

CROWN LANDS. The demesne lands of the crown, which it is now usual for the sovereign to surrender at the commencement of his reign for its whole duration, in consideration of the CIVIL LIST (*q. v.*) settled upon him.[23]

CROWN LAW. Criminal law in England is so termed, the crown being always the prosecutor in criminal proceedings.[24]

CROWN OFFICE. A department belonging to the court of queen's bench, commonly called the crown side of the court, which takes cognizance of all criminal causes, from high treason down to the most trivial misdemeanor or breach of the peace.[25]

CROWN OFFICE IN CHANCERY. One of the offices of the high court of chancery now transferred to the high court of justice.[26]

CROWN PAPER. A paper containing the list of criminal cases which await the hearing or decision of the court.[27]

CROWN SIDE. The criminal department of the court of queen's bench; the civil department or branch being called the "plea side."[28]

CROWN SOLICITOR. In England, the solicitor to the treasury acts, in state prosecutions, as solicitor for the crown in preparing the prosecution. In Ireland there are officers called "crown solicitors" attached to each circuit, whose duty it is to get up every case for the crown in criminal prosecutions.[29] (See PROSECUTING ATTORNEYS.)

CROY. Marsh land.[30]

CRUCE SIGNATI. In old English law, signed or marked with the cross.[31]

CRUCIATUS LEGIBUS INVISI. A maxim meaning "Physical tortures are refused or denied in the laws."[32]

CRUCIBLE.[33] A chemist's melting pot, made of earth;[34] a pot for melting metals.[35]

694, 15 L. J. Exch. 246, 15 M. & W. 97; Doe *v.* Roe, 8 M. & W. 579, 582.

18. Wharton L. Lex.

19. Cyclopedic L. Dict. And see State *v.* Williams, 9 Houst. (Del.) 508, 527, 18 Atl. 949, where it is said: "There is now, in England, a 'court for crown cases reserved,' as it is called, which entertains cases certified to it by the trial court, and for proper cause affirms or quashes convictions."

20. Wharton L. Lex.

21. Wharton L. Lex.

22. Burrill L. Dict.

23. Wharton L. Lex.

24. Burrill L. Dict. [*citing* 4 Bl. Comm. 2].

25. Burrill L. Dict. [*citing* 4 Bl. Comm. 265; 4 Stephen Comm. 326].

26. Sweet L. Dict.

27. Brown L. Dict.

28. Black L. Dict. [*citing* 4 Bl. Comm. 265].

29. Black L. Dict.

30. Wharton L. Lex. [*citing* Blount Lex.].

31. Pilgrims to the holy land (or crusaders); so called because they wore the sign of the cross upon their garments. Burrill L. Dict. [*citing* Bracton, fol. 20].

32. Adams Gloss. [*citing* 2 Best Ev. § 555; Lofft Max.].

33. **Distinguished from "instrument" or "tool."**—Under a statute providing that any person who shall make or mend or have in his possession any die, stamp, or other instrument or tool for the purpose of forging or counterfeiting shall be punished, etc., the court said: "A crucible is in common use with citizens, as well as artists, and is an article on open sale, and is bought and used by gold and silver smiths, who make beads and spoons, unlike the stamp and other appropriate tools for counterfeiting; which are wholly or mainly for that purpose, and which therefore cannot be readily obtained, and for honest purposes are not wanted, and, when possessed, afford greater evidence of a bad intent. We think, therefore, that if 'instrument' and 'tool' may be considered as generic terms, 'crucible' is not one of their family; that in a statute highly penal, to call it a 'tool' or 'instrument' for counterfeiting would be a construction too latitudinarian." State *v.* Bowman, 6 Vt. 594, 597.

34. Johnson Folio Dict. [*quoted* in State *v.* Bowman, 6 Vt. 594, 596] where it is said: "So called because they were formerly marked with a cross."

35. Johnson Small Dict. [*quoted* in State *v.* Bowman, 6 Vt. 594, 596].

CRUCIS JUDICIUM. In old European law, the trial or judgment of the cross; one of the modes of trial by which crimes were formerly attempted to be discovered or purged.[36]

CRUDE. In its natural state; not cooked or prepared by fire or heat; undressed; not altered, refined or prepared for use by any artificial process; raw.[37]

CRUDE TARTAR. Argols.[38] (See CREAM OF TARTAR.)

CRUEL. Disposed to give pain to others in body or mind; willing or pleased to torment, vex, or afflict; inhuman, destitute of pity, compassion, or kindness; fierce; ferocious; savage; barbarous; hardhearted; applied to persons, or their dispositions, exerted in tormenting, vexing, or afflicting.[39]

CRUEL AND UNUSUAL PUNISHMENT. See CRIMINAL LAW.

CRUEL TREATMENT. Any act intended to torment, vex, or afflict, or which actually afflicts or torments without necessity; or any act of inhumanity, wrong, oppression, or injustice.[40] (Cruel Treatment: As Ground For Divorce, see DIVORCE.)

CRUELTY. Every willful act, omission or neglect, whereby unjustifiable physical pain, suffering, or death is caused or permitted;[41] the infliction of great pain or misery without necessity;[42] either actual violence endangering life or limb or health, or conduct creating a reasonable apprehension of such violence.[43] (Cruelty: As Ground of Divorce, see DIVORCE. Death Caused by, see HOMICIDE. To Animal, see ANIMALS. To Apprentice, see APPRENTICES. To Child, see INFANTS; PARENT AND CHILD. To Convict, see CONVICTS.)

CRUISE. A voyage for a given purpose; a cruising voyage, or voyage to make captures *jure belli*.[44] (See CREW; and, generally, SEAMEN; SHIPPING.)

CRUIVE. A box or enclosure, made with spars, like a hen-crib, generally placed in a dam or dike that runs across a river, for the purpose of confining the fish that enter into it.[45] (See, generally, FISH AND GAME.)

36. Burrill L. Dict. [*citing* Spelman Gloss.].

37. Webster Dict. [*quoted* in Recknagel *v.* Murphy, 102 U. S. 197, 200, 26 L. ed. 130].

As applied to saw logs, the word means their natural state or condition, after being severed from the remainder of the trunk and other portions of the tree. It means that they have not been polished or dressed, altered, refined, or prepared for use by artificial process. Bucki *v.* McKinnon, 37 Fla. 391, 395, 20 So. 540, where the court said: "We think it a matter of which we might take judicial knowledge, that all saw logs are round and crude."

38. Recknagel *v.* Murphy, 102 U. S. 197, 200, 26 L. ed. 130, where the court said: "Argols and crude tartar are synonyms. The phrases are used convertibly by those who deal in the article."

39. Webster Dict. [*quoted* in Territory *v.* Pridemore, 4 N. M. 137, 138, 13 Pac. 96].

40. Myrick *v.* Myrick, 67 Ga. 771, 778.

"Cruel treatment does not always consist of actual violence. There are words of false accusation, that inflict deeper anguish than physical injuries to the person — more enduring and lacerating to the wounded spirit of a gentle woman, than actual violence to the person, though severe." Farnham *v.* Farnham, 73 Ill. 497, 500.

41. Ga. Pen. Code, § 705 [*quoted* in Griffith *v.* State, 116 Ga. 835, 837, 43 S. E. 251]; Minn. St. (1894) § 6542.

42. Judge *v.* State, 58 Ala. 402, 403.

The word "cruelty" "clearly includes both the wilfulness and cruel temper of mind with which the act was done, and the pain inflicted by the act. If the act were merely accidental, or did not give pain, it would not be cruel, in the ordinary sense of the word as applied to such an act." Com. *v.* McClellan, 101 Mass. 34, 35.

43. Williams *v.* Williams, 23 Fla. 324, 326, 2 So. 768.

44. The Brutus, 4 Fed. Cas. No. 2,060, 2 Gall. 526. And see Brown *v.* Jones, 4 Fed. Cas. No. 2,017, 2 Gall. 477; Douglass *v.* Eyre, 7 Fed. Cas. No. 4,032, Gilp. 147; Magee *v.* Moss, 16 Fed. Cas. No. 8,944, Gilp. 219.

"A cruise imports a return voyage to the country or port of the domicile of the ship, unless that construction be repelled by the context." The Brutus, 4 Fed. Cas. No. 2,060, 2 Gall. 526.

"The boundaries of a cruise, like those of a voyage, may be defined by local limits, or by artificial time, or by both combined." The Brutus, 4 Fed. Cas. No. 2,060, 2 Gall. 526.

45. Jamieson Dict. [*quoted* in Hodgson *v.* Little, 16 C. B. N. S. 198, 206, 10 Jur. N. S. 953, 33 L. J. M. C. 229, 11 L. T. Rep. N. S. 136, 12 Wkly. Rep. 1103, 111 E. C. L. 198, where Willes, J., in considering the words "crib," "cruive," "inscales," said: "At least the word 'box' is strictly applicable to the fish-lock in question, and indeed to the greater part of these contrivances, in which the fish is enticed into an enclosed place where he is 'cribbed' and confined in a cruive or grufte by hecks and inscales"].

CRUX. In old English law, a cross; the cross; the badge of the old crusaders; and of the Templars and of the Hospitallers.[46]

CRY. To make oral and public proclamation of, to notify or advertise by outcry, especially things lost or found, goods to be sold, etc., public advertisement by outcry, proclamation, as by hawkers of their wares.[47]

CRY DE PAIS. In old English law, the cry of the country; the hue and cry after offenders, as raised by the country, (i. e. the inhabitants) in the absence of the constable to whom that duty properly belonged.[48]

CRYER. An auctioneer;[49] one who calls out aloud; one who publishes or proclaims.[50]

CT. See CENT.

CUBIC YARD. Twenty-seven cubic feet.[51]

CUCKING-STOOL. A chair on which females for certain offenses were fastened and ducked in a pond;[52] an engine, invented for the punishment of scolding and unquiet women.[53] (See, generally, COMMON SCOLD.)

CUI ANTE DIVORTIUM. Literally, to whom before divorce. A writ for a woman divorced from her husband to recover her lands and tenements which she had in fee simple or in tail, or for life, from him to whom her husband alienated them during the marriage, when she could not gainsay it.[54]

CUI BONO.[55] For whose goods; for whose use or benefit.[56]

CUICUNQUE ALIQUIS QUID CONCEDIT CONCEDERE VIDETUR ET ID SINE QUO RES IPSA ESSE NON POTUIT. A maxim meaning "Whoever grants a thing is supposed also tacitly to grant that without which the grant itself would be of no effect."[57]

CUI IN VITA. In old English practice, a writ of entry which lay for a woman against him to whom her husband aliened her lands or tenements in his lifetime.[58]

CUI JURISDICTIO DATA EST, EA QUOQUE CONCESSA ESSE VIDENTUR, SINE QUIBUS JURISDICTIO EXPLICARI NON POTEST. A maxim meaning "To whomsoever a jurisdiction is given, those things also are supposed to be granted, without which the jurisdiction cannot be exercised."[59]

46. Burrill L. Dict. [*citing* Fleta, lib. 2, c. 50, §§ 16, 18].

47. Webster Dict. [*quoted* in Rochester *v.* Close, 35 Hun (N. Y.) 208, 211].

48. Burrill L. Dict. [*citing* 2 Hale P. C. 100].

49. Burrill L. Dict. And see Carr *v.* Gooch, 1 Wash. (Va.) 260, 262, where it is said: "The appellee was employed by all the executors to perform the duties of a cryer, in the selling of a tract of land."

50. Burrill L. Dict.

51. Corcoran *v.* Chess, 131 Pa. St. 356, 359, 18 Atl. 876.

52. Wharton L. Lex.

The chair was sometimes in the form of a close stool, which contributed to increase the degradation. It was also called a goging-stool, a close stool. Wharton L. Lex.

53. Termes de la Ley [*quoted* in James *v.* Com., 12 Serg. & R. (Pa.) 220, 230].

"The punishment of the ducking or cucking-stool, is from the cuckoo, '*qui odiose jurgat et rixatur,*' as Lord Coke has it, in 3 Inst. 219; or, as Jacob has it, in his dictionary, the gogen-stool, and by some thought to be corrupted from the choke-stool; and the instrument is called in Stat. 51 Hen. III, a trebucket, a pitfall, and in law, as Lord Coke says, signifies a stool that falls into a pit of water." James *v.* Com., 12 Serg. & R. (Pa.) 220, 227.

54. Wharton L. Lex.

55. Cui bono is ever of great weight in all agreements. Mitchell *v.* Reynolds, 10 Mod. 130, 135.

56. Sometimes translated — for what good, for what useful purpose. Burrill L. Dict.

57. Broom Leg. Max.

Applied or explained in the following cases:

Massachusetts.— Babcock *v.* Western R. Corp., 9 Metc. 553, 556, 43 Am. Dec. 411.

New Jersey.— Hayden *v.* Dutcher, 31 N. J. Eq. 217, 219.

New York.— Seymour *v.* Canandaigua, etc., R. Co., 25 Barb. 284, 310 [*quoting* Broom Leg. Max.].

Vermont.— Stevens *v.* Pillsbury, 57 Vt. 205, 211, 52 Am. Rep. 121.

England.— Rowbotham *v.* Wilson, 8 E. & B. 123, 149, 3 Jur. N. S. 1297, 27 L. J. Q. B. 61, 5 Wkly. Rep. 820, 92 E. C. L. 123; Lord *v.* Sydney, 33 L. T. Rep. N. S. 1, 12 Moore P. C. 473, 499, 7 Wkly. Rep. 267, 14 Eng. Reprint 991.

Canada.— Edinburgh L. Assur. Co. *v.* Barnhart, 17 U. C. C. P. 63, 84.

58. So called from the words of the writ, *cui ipsa in vita sua contradicere non potuit,* &c.; (whom she in his lifetime, could not gainsay, &c.). Burrill L. Dict.

"In a cui in vita brought by a wife, the writ is *cui ipsa in vitâ suâ contradicere non,* &c." Bold *v.* Molineux, 1 Dyer 14*b*, 15*b*.

59. Burrill L. Dict. [*citing* Dig. Just. 2, I, 2; 1 Wooddesson Lect. Introd. lxxi].

CUI JUS EST DONANDI, EIDEM ET VENDENDI ET CONCEDENDI JUS EST. A maxim meaning "He who has a right to give has also a right to sell and to grant." [60]

CUILIBET IN SUA ARTE PERITO EST CREDENDUM. A maxim meaning "Credence should be given to one skilled in his peculiar profession." [61]

CUILIBET LICET JURI PRO SE INTRODUCTO RENUNCIARE. A maxim meaning "Any one may waive or renounce the benefit of a principle or rule of law that exists only for his protection." [62]

CUI LICET QUOD MAJUS NON DEBET QUOD MINUS EST NON LICERE. A maxim meaning "He who has authority to do the more important act shall not be debarred from doing that of less importance." [63]

CUI PATER EST POPULUS NON HABET ILLE PATREM. A maxim meaning "He to whom the people is father has not a father." [64]

CUI PLUS LICET QUAM PAR EST PLUS VULT QUAM LICET. A maxim meaning "He to whom more is granted than is just wants more than is granted." [65]

CUIQUE IN SUA ARTE CREDENDUM EST. A maxim meaning "Every one is to be believed in his own art." [66]

CUJUS EST COMMODUM EJUS DEBET ESSE INCOMMODUM. A maxim meaning "Whose is the advantage, his also should be the disadvantage." [67]

CUJUS EST COMMODUM, EJUS EST ONUS. A maxim meaning "He who has the benefit has also the burden." [68]

CUJUS EST DARE, EJUS EST DISPONERE. A maxim meaning "The giver of a gift has the right to regulate its disposal." [69]

CUJUS EST DIVISIO, ALTERIUS EST ELECTIO. A maxim meaning "Whichever [of two parties] has the division, [of an estate,] the choice [of the shares] is the other's." [70]

CUJUS EST DOMINIUM EJUS EST PERICULUM. A maxim meaning "The risk lies upon the owner of the subject." [71]

CUJUS EST INSTITUERE, EJUS EST ABROGARE. A maxim meaning "Whose right it is to institute, his right it is to abrogate." [72]

CUJUS EST SOLUM EJUS EST USQUE AD CŒLUM. A maxim meaning "He who possesses land possesses also that which is above it." [73]

60. Bouvier L. Dict.

61. Broom Leg. Max.

Applied in People *v.* Thurston, 2 Park. Cr. (N. Y.) 49, 138. And see Vander Donckt *v.* Thellusson, 8 C. B. 812, 825, 19 L. J. C. P. 12, 65 E. C. L. 812; *In re* Sussex Peerage Case, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034; Pollard *v.* Wybourn, 1 Hagg. Eccl. 725, 727.

62. Black L. Dict.

63. Broom Leg. Max. where it is said: "A doctrine founded on common sense, and of very general importance and application, not only with reference to the law of real property, but to that likewise of principal and agent."

64. Black L. Dict. [*citing* Coke Litt. 123].

65. Morgan Leg. Max. [*citing* 2 Inst. 464].

66. Bouvier L. Dict.

Applied in Walker *v.* Protection Ins. Co., 29 Me. 317, 320; Corning *v.* Burden, 15 How. (U. S.) 252, 270, 14 L. ed. 683. And see Dickinson *v.* Barber, 9 Mass. 225, 227, 6 Am. Dec. 58.

67. Wharton L. Lex.

Applied in Hughes *v.* Gordon, 1 Bligh 287, 302. 4 Eng. Reprint 109.

68. Bouvier L. Dict.

Applied in Oliver *v.* Newburyport Ins. Co., 3 Mass. 37, 53, 3 Am. Dec. 77.

69. Stevens' Estate, 83 Cal. 322, 325, 23 Pac. 379, 17 Am. St. Rep. 252 [*citing* Broom Leg. Max.].

Applied in the following cases: *California.*— Stevens' Estate, 83 Cal. 322, 325, 23 Pac. 379, 17 Am. St. Rep. 252 [*citing* Broom Leg. Max.].

Pennsylvania.— Ashurst *v.* Given, 5 Watts & S. 323, 330; Funk's Estate, 27 Wkly. Notes Cas. 473, 476; Ward's Estate, 16 Phila. 259, 260.

Virginia.— Hood *v.* Haden, 82 Va. 588, 595; Patteson *v.* Horsley, 29 Gratt. 263, 269; Harrison *v.* Harrison, 2 Gratt. 1, 17, 44 Am. Dec. 365; Lee *v.* U. S. Bank, 9 Leigh 200, 207; Williamson *v.* Beckham, 8 Leigh 20, 25.

United States.— Fisher *v.* The Sybil, 9 Fed. Cas. No. 4,824, Brunn. Col. Cas. 274.

England.— Salisbury *v.* Gladstone, 17 C. B. N. S. 843, 848, 112 E. C. L. 843; Calvin's Case, 7 Coke 2*a*, 6*a*; Brooke *v.* Garrod, 2 De G. & J. 62, 66, 3 Kay & J. 608, 27 L. J. Ch. 226, 6 Wkly. Rep. 121, 59 Eng. Ch. 50.

70. Black L. Dict. [*citing* Coke Litt. 166*b*].

71. Trayner Leg. Max.

72. Black L. Dict. [*citing* Broom Leg. Max. 878 note].

73. Broom Leg. Max.

CUJUS EST SOLUM, EJUS EST USQUE AD CŒLUM ET AD INFEROS. A maxim meaning "To whomsoever the soil belongs, he owns also to the sky and to the depths."[74]

CUJUS JURIS (I. E., JURISDICTIONIS) EST PRINCIPALE, EJUSDEM JURIS ERIT ACCESSORIUM. A maxim meaning "An accessory matter is subject to the same jurisdiction as its principal."[75]

CUJUS PER ERROREM DATI REPETITIO EST, EJUS CONSULTO DATI DONATIO EST. A maxim meaning "That which, when given through mistake can be recovered back, when given with knowledge of the facts, is a gift."[76]

CUL. An abbreviation of the word CULPABILIS, *q. v.*, guilty.[77]

CUL DE SAC. A way open only at one end;[78] a street or road closed at one end, which only communicates with a public street or road at the other.[79] (See, generally, PRIVATE ROADS; STREETS AND HIGHWAYS.)

CULL. A board full of holes or knots and not considered merchantable.[80] A term also applied to a railroad tie which does not conform to specifications.[81]

CULM.[82] The coal which passes through the screens of the breakers and is then placed in what is known as the culm or refuse heap; refuse coal.[83]

CULPA. An act of neglect, causing damage, but not implying an intent to injure.[84]

Applied or explained in the following cases: *California.*— Lux *v.* Haggin, 69 Cal. 255, 392, 10 Pac. 674.

Connecticut.— Becket *v.* Clark, 40 Conn. 485, 488; Agawam Canal Co. *v.* Edwards, 36 Conn. 476, 497; Baldwin *v.* Breed, 16 Conn. 60, 66; Isham *v.* Morgan, 9 Conn. 374, 377, 23 Am. Dec. 361; Ingraham *v.* Hutchinson, 2 Conn. 584, 598.

Maine.— Chesley *v.* King, 74 Me. 164, 171, 43 Am. Rep. 569; Chase *v.* Silverstone, 62 Me. 175, 183, 16 Am. Rep. 419.

Massachusetts.— Gannon *v.* Hargadon, 10 Allen 106, 109, 87 Am. Dec. 625; Atkins *v.* Bordman, 2 Metc. 457, 567, 37 Am. Dec. 100.

Minnesota.— Stillwater Water Co. *v.* Farmer, (1903) 93 N. W. 907, 909.

Missouri.— Rychlicki *v.* St. Louis, 98 Mo. 497, 511, 11 S. W. 1001, 14 Am. St. Rep. 651, 4 L. R. A. 594 (per Ray, C. J., in dissenting opinion); Benson *v.* Chicago, etc., R. Co., 78 Mo. 504, 512.

New Jersey.— Stevens *v.* Paterson, etc., R. Co., 34 N. J. L. 532, 570, 3 Am. St. Rep. 269; Barnett *v.* Johnson, 15 N. J. Eq. 481, 489.

New York.— Genet *v.* Delaware, etc., Canal Co., 13 Misc. 409, 420, 35 N. Y. Suppl. 147; Mahan *v.* Brown, 13 Wend. 261, 263, 28 Am. Dec. 461.

Ohio.— Winslow *v.* Fuhrman, 25 Ohio St. 639, 651; Frazier *v.* Brown, 12 Ohio St. 294, 304; Winton *v.* Cornish, 5 Ohio 477, 478.

Pennsylvania.— Patterson *v.* Philadelphia, etc., R. Co., 8 Pa. Co. Ct. 186, 188; Galbraith *v.* Oliver, 3 Pittsb. 78, 79.

Vermont.— Stratton *v.* Lyons, 53 Vt. 641, 643.

West Virginia.— Jordan *v.* Benwood, 42 W. Va. 312, 316, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A. 519.

England.— Raine *v.* Alderson, 1 Arn. 329, 333, 4 Bing. N. Cas. 702, 2 Jur. 327, 7 L. J. C. P. 273, 6 Scott 691, 33 E. C. L. 932; Fay *v.* Prentice, 1 C. B. 828, 840, 9 Jur. 877, 14 L. J. C. P. 298, 50 E. C. L. 828; Baten's Case, 9 Coke 53*b*, 54; Electric Tel. Co. *v.* Overseers of Poor, 11 Exch. 181, 189, 1 Jur. N. S. 733, 24 L. J. M. C. 146, 3 Wkly. Rep. 518.

Canada.— Potts *v.* Bovine, 16 Ont. 152, 158 [*citing* Broom Leg. Max.].

74. Black L. Dict. [*citing* Coke Litt. 4*a*].
Applied in Sargent *v.* Adams, 3 Gray (Mass.) 72, 79, 63 Am. Dec. 718; Hoffman *v.* Armstrong, 46 Barb. (N. Y.) 337; Levy *v.* Burgess, 38 N. Y. Super. Ct. 431, 438.

75. Black L. Dict.

76. Bouvier L. Dict.

77. If he be *cul.* of making, writing, and composing, &c. Burrill L. Dict.

78. Adams *v.* Harrington, 114 Ind. 66, 72, 14 N. E. 603. And see Bartlett *v.* Bangor, 67 Me. 460, 467.

79. Perrin *v.* New York Cent. R. Co., 40 Barb. (N. Y.) 65, 70; Holdane *v.* Cold Spring, 23 Barb. (N. Y.) 103, 113. And see Bartlett *v.* Bangor, 67 Me. 460, 467; Hickok *v.* Plattsburgh, 41 Barb. (N. Y.) 130, 136.

80. Sloan *v.* Allegheny Co., 91 Md. 501, 502, 46 Atl. 1003.

81. Chapman *v.* Kansas City, etc., R. Co., 146 Mo. 481, 506, 48 S. W. 646.

82. **"The word culm was doubtless brought to the Pennsylvania coal fields by Welsh miners.** With them the word has been used to describe an inferior grade of coal of but little value, and it readily came into use to define coal not inferior in quality but unmarketable and valueless because of its size. It was the adaptation of a word to a use closely akin to its original meaning. The words 'culm or refuse coal,' as used in the lease, meant refuse coal — that is to say, coal refused by the lessee because it was unsalable." Lance *v.* Lehigh, etc., Coal Co., 163 Pa. St. 84, 98, 29 Atl. 755.

83. Lance *v.* Lehigh, etc., Coal Co., 163 Pa. St. 84, 97, 29 Atl. 755, where it is said: "It is unmarketable coal, and may according to the demands of the market, include at one time what is marketable at another time."

84. Wharton L. Lex.

CULPABILIS. In old English law, guilty.[85]

CULPABLE.[86] Criminal; censurable.[87] (Culpable: Homicide, see HOMICIDE. Neglect, see NEGLIGENCE.)

CULPABLE HOMICIDE. See HOMICIDE.

CULPABLE NEGLIGENCE. See NEGLIGENCE.

CULPA CARET QUI SCIT SED PROHIBERE NON POTEST. A maxim meaning "He is clear of blame who knows, but cannot prevent."[88]

CULPÆ PŒNA PAR ESTO. A maxim meaning "Let the punishment be proportioned to the offense."[89]

CULPA EST IMMISCERE SE REI AD SE NON PERTINENTI. A maxim meaning "It is a fault for any one to meddle in a matter not pertaining to him."[90]

CULPA LATA DOLO ÆQUIPARATUR. A maxim meaning "Gross neglect is equivalent to fraud."[91]

CULPA TENET SUOS AUCTORES.[92] A maxim meaning "A fault binds its own authors."[93]

CULPA VEL PŒNA EX EQUITATE NON INTENDITUR. A maxim meaning "Blame or punishment does not proceed from equity."[94]

CULPRIT. A mild term imputing crime; applied to one accused, but not yet convicted, or to one doubtless guilty, but of an offense not heinous.[95]

CULTIVATE.[96] To improve the product of the earth by manual indus-

"In the civil law, . . . there are three degrees of fault or neglect; *lata culpa*, gross fault or neglect; *levis culpa*, ordinary fault or neglect; *levissima culpa*, slight fault or neglect: and the definitions of these degrees are precisely the same with those in our law." Brand *v.* Schenectady, etc., R. Co., 8 Barb. (N. Y.) 368, 378.

85. Burrill L. Dict. And see U. S. *v.* Gilbert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19, where it is said: "When upon his arraignment the prisoner pleaded not guilty, the clerk immediately enters upon the record 'Not guilty,' or as it stood anciently abbreviated, '*Non cul*' for '*non culpabilis*'; and immediately the reply of the government, supposed to be given *viva voce*, that the prisoner is guilty (and by Blackstone supposed to be indicated by the abbreviation '*cul. prit.*'), though in point of fact such reply is never formally made. When this is done issue is then said to be joined; for Mr. Justice Blackstone informs us that, 'immediately upon issue joined, it is inquired of the prisoner, by what trial he will make his innocence appear,' which the clerk does by the words 'How wilt thou be tried.'" See also *infra*, note 95.

86. Culpable neglect.—In Sykes *v.* Meacham, 103 Mass. 285, 287, it is said: "It is hardly necessary to consider the question whether the phrase 'culpable neglect,' as used in the statute, means anything more than 'gross neglect,' or failure to make 'reasonable inquiry.'"

87. Waltham Bank *v.* Wright, 8 Allen (Mass.) 121, 122, where it is said: "And when the term is applied to the omission by a person to preserve the means of enforcing his own rights, 'censurable' is more nearly an equivalent. As he has merely lost a right of action which he might voluntarily relinquish, and has wronged nobody but himself, 'culpable neglect' would seem to convey the idea of neglect for which he was 'to blame'; that is, the neglect which exists where the loss can fairly be ascribed to his own carelessness, improvidence or folly."

This term is to be distinguished from *dolus*, which means fraud, guile, or deceit. Black L. Dict.

88. Black L. Dict.

89. Burrill L. Dict.

90. Black L. Dict.

91. Bouvier L. Dict.

92. An old and just maxim.— Dickinson's Appeal, 42 Conn. 491, 508, 19 Am. Rep. 553.

93. Wharton L. Lex.

Applied in Dickinson's Appeal, 42 Conn. 491, 508, 19 Am. Rep. 553.

94. Morgan Leg. Max.

95. Abbott L. Dict.

Blackstone believes it an abbreviation of the old forms of arraignment, whereby, on the prisoner's pleading not guilty, the clerk would respond, "*culpabilis, prit*," *i. e.*, he is guilty and the crown is ready. It was (he says) the *viva voce* replication, by the clerk, on behalf of the crown, to the prisoner's plea of *non culpabilis; prit* being a technical word, anciently in use in the formula of joining issue. Black L. Dict. [*citing* 4 Bl. Comm. 339]. But a more plausible explanation is that given by Donaldson, as follows: The clerk asks the prisoner, "Are you guilty, or not guilty?" Prisoner, "Not guilty." Clerk, "*Qu'il paroit*, [may it prove so.] How will you be tried?" Prisoner, "By God and my country." These words being hurried over, came to sound, "Culprit, how will you be tried?" The ordinary derivation is from *culpa*. Wharton L. Lex.

96. A mill-lot upon which a mill is erected may be cultivated or improved land within the letter and spirit of a statute authorizing the laying out of a private way leading from land under "improvement." Lyon *v.* Hamor, 73 Me. 56, 57.

"The terms, 'improved or cultivated land' . . . are to be taken in the popular sense, according to the general understanding of the community, when distinguishing what is

try;[97] to till, or husband the ground — to forward the product of the earth, by general industry.[98]

CULTIVATION. Plowing and preparing land for crops, or the raising of something that grows from the ground, besides grass.[99] (Cultivation: As Element of Adverse Possession, see ADVERSE POSSESSION. See, generally, AGRICULTURE; CROPS.)

CULVERT. A water-way, or water-passage, whether of wood or stone, square or arched;[1] a covered drain under a road, designed for the passage of water;[2] an arched drain to carry water under a road from one side to the other;[3] an arched drain for the passage of water under a road or canal;[4] an arched passage or drain for water beneath a road, canal, or railway.[5]

CUM. As a preposition, with. As an adverb, when, whereas.[6] (See CON.)

CUM ACTIO FUERIT MERE CRIMINALIS, INSTITUI POTERIT AB INITIO CRIMINALITER VEL CIVILITER. A maxim meaning "When an action is merely criminal, it can be instituted from the beginning either criminally or civilly."[7]

CUM ADSUNT TESTIMONIA RERUM, QUID OPUS EST VERBIS? A maxim meaning "When the proofs of facts are present, what need is there of words?"[8]

CUM ALIQUID IMPEDITUR, PROPTER UNUM, EO REMOTO, TOLLITUR IMPEDIMENTUM. A maxim meaning "When any thing is impeded by one single cause, if that be removed, the impediment is removed."[9]

CUM ALIQUIS RENUNCIAVERIT SOCIETATI, SOLVITUR SOCIETAS. A maxim meaning "When any partner renounces the partnership, the partnership is dissolved."[10]

CUMBER. To hinder by obstruction; to hamper in movement.[11]

called wild land, or land in a state of nature, from that which has been cultivated and improved. The terms, to 'improve or cultivate,' may be considered synonymous." Clark *v.* Phelps, 4 Cow. (N. Y.) 190, 203.

97. Voight *v.* Meyer, 42 N. Y. App. Div. 350, 353, 59 N. Y. Suppl. 70; Clark *v.* Phelps, 4 Cow. (N. Y.) 190, 203, where it is said: "When speaking of improved land, it is generally understood to be such as has been reclaimed, is used for the purpose of husbandry, and is cultivated as such, whether the appropriation is for tillage, meadow or pasture."

98. Bailey Dict. [*quoted* in State *v.* Allen, 35 N. C. 36, 37].

Applied under timber-culture act.— Where a statute in relation to timber-culture required a claimant during the second year to cultivate, to crop, or otherwise the five acres broken the first year, the court said: "'To 'cultivate to crop or otherwise' is not 'to plant in timber, seeds, or cuttings,' but to sow or plant in wheat, corn, clover, potatoes, or other annual crop which may be cultivated and harvested or gathered during the year. The word 'otherwise,' so far as it has any signification, must be construed in connection with the preceding words, 'to cultivate,' so as to limit its application to some act or process which involves, primarily, the improvement or amelioration of the soil." U. S. *v.* Shinn, 14 Fed. 447, 452, 8 Sawy. 403.

99. U. S. *v.* Niemeyer, 94 Fed. 147, 150, where it is said: "Cultivation means cultivation. Making a stock farm or stock range of land is not putting it into cultivation. Fitting it for grazing, cutting the trees for the purpose of putting it in condition for grazing purposes, is not putting it in cultivation. That is not what the law contemplates when it says cultivation." And see American Emigrant Co. *v.* Rogers Locomotive Mach. Works, 83 Iowa 612, 615, 50 N. W. 52, where it is said: "But by the cultivation of land is ordinarily understood something more than the gathering of crops which grow spontaneously, or with little care. Land which can be cultivated, . . . is arable land,— that which is adapted to the raising of crops which require annual planting and tillage, as corn, wheat, oats, rye and barley in this country, and which is susceptible of such cultivation in all ordinary seasons."

1. Oursler *v.* Baltimore, etc., R. Co., 60 Md. 358, 367.

2. Gale *v.* Dover, 68 N. H. 403, 44 Atl. 535; Boyd *v.* Derry, 68 N. H. 272, 273, 38 Atl. 1005.

3. Kowalka *v.* St. Joseph, 73 Mich. 322, 325, 41 N. W. 416.

4. Webster Dict. [*quoted* in Kowalka *v.* St. Joseph, 73 Mich. 322, 325, 41 N. W. 416].

5. Worcester Dict. [*quoted* in Carroll County *v.* Bailey, 122 Ind. 46, 51, 23 N. E. 672].

6. Burrill L. Dict.

7. Black L. Dict. [*citing* Bracton 102].

8. Black L. Dict. [*citing* 2 Bulstrode 53].

9. Adams Gloss.

Applied in Paget's Case, 5 Coke 76*b*, 77*a*.

10. Trayner Leg. Max.

11. Century Dict.

"Cumbering" distinguished from "obstructing."— In Grand Rapids *v.* Hughes, 15 Mich. 54, 57, the court said: "Our laws have always made a distinction between cumbering or obstructing a public way, and encroaching upon it. The former term has been applied to impediments to travel and

CUM CONFITENTE SPONTE MITIUS EST AGENDUM. A maxim meaning "One confessing willingly should be dealt with more leniently." [12]

CUM DE LUCRO DUORUM QUÆRITUR, MELIOR EST CAUSA POSSIDENTIS. A maxim meaning "When the question is as to the gain of two persons, the cause of him who is in possession is the better." [13]

CUM DUO INTER SE PUGNANTIA REPERIUNTUR IN TESTAMENTO ULTIMUM RATUM EST. A maxim meaning "When two clauses (or provisions) are found in a will, contradictory of, or inconsistent with, each other, the last is confirmed (sustained)." [14] (See, generally, WILLS.)

CUM DUO JURA CONCURRUNT IN UNA PERSONA ÆQUUM EST AC SI ESSENT IN DUOBUS. [15] A maxim meaning "When two rights meet in one person, it is the same as if they were in two persons." [16]

CUM IN CORPORE DISSENTITUR APPARET NULLAM ESSE ACCEPTIONEM. [17] A maxim meaning "When there is a disagreement in the substance, it appears that there is no acceptance." [18]

CUM LEGITIMÆ NUPTIÆ FACTÆ SUNT, PATREM LIBERI SEQUUNTUR. A maxim meaning "Children born under a legitimate marriage follow the condition of the father." [19]

CUM LICET FUGERE, NE QUÆRE LITEM. A maxim meaning "Enter not into law, if you can avoid it." [20]

CUM ONERE. With the burden or charge; subject to a charge or incumbrance. [21]

CUM PAR DELICTUM EST DUORUM, SEMPER ONERATUR PETITOR ET MELIOR HABETUR POSSESSORIS CAUSA. A maxim meaning "When both parties are in fault the plaintiff must always fail, and the cause of the person in possession be preferred." [22]

CUM PERTINENTIIS. With the appurtenances. [23]

passage placed in the open street, and tending to make its use difficult or dangerous; while the latter has embraced the actual inclosure of a portion of the street by fences or walks, or occupation by buildings. . . . An encroachment upon a street may, in one sense, be said to 'cumber,' but the legislature has never employed the two words as synonymous terms."

12. Black L. Dict.

13. Black L. Dict. [*citing* Digest 50, 17, 126].

14. Trayner Leg. Max.

15. An old maxim in equity.— Pulteney *v.* Darlington, 7 Bro. P. C. 530, 551, 3 Eng. Reprint 344.

16. Black L. Dict.

Applied in Freeman *v.* Caldwell, 10 Watts (Pa.) 9, 10 (where the court said: "It is a trite but invaluable maxim, and of course conclusive evidence of the law, that when different rights or characters exist together, they are to be treated as if they existed separately"); Downing *v.* Kintzing, 2 Serg. & R. (Pa.) 326, 343 (dissenting opinion); Pulteney *v.* Darlington, 7 Bro. P. C. 530, 551, 3 Eng. Reprint 344; Coppin *v.* Coppin, 2 P. Wms. 291, 296; Slater *v.* Slater, 3 Ch. Chamb. (U. C.) 1, 10.

17. A maxim of the civil law.— Gardner *v.* Lane, 12 Allen (Mass.) 39, 44.

18. Bouvier L. Dict.

Applied in Gardner *v.* Lane, 12 Allen (Mass.) 39, 44.

19. Black L. Dict.

20. Taylor L. Gloss.

21. Burrill L. Dict.

A term applied to a purchaser with knowledge of an incumbrance [who] takes the property *cum onere*. Bouvier L. Dict. [*quoted* in Holmes *v.* Danforth, 83 Me. 139, 142, 21 Atl. 845, where it is said: "When the estate conveyed is so described that the parties must have understood that it was subject to a servitude, the grantee takes it *cum onere*"].

22. Wharton L. Lex. [*citing* Broom Leg. Max.].

23. Burrill L. Dict. [*citing* Bracton fol. 73*b*].

These were formal words in conveyances, when written in Latin. "The incident, accessory, appendant and regardant shall, in most cases, pass by the grant of the principal, without the words *cum pertinentiis*, but not *è converso*." Burrill L. Dict. [*citing* Sheppard Touchst. 89].

"When any thing is granted, . . . all the means to attain it, and all the fruit and effects of it, are granted also; and shall pass inclusive, together with the thing, by the grant of the thing itself, without the words *cum pertinentiis*, or any such-like words. . . . The incident, accident, appendant, and regardant, shall in most cases pass by the grant of the principal without the words *cum pertinentiis*, but not *è converso*." Sheppard Touchst. 89 [*quoted* in Cope *v.* Grant, 7 Pa. St. 488, 491]. And see Rowbotham *v.* Wilson, 8 E. & B. 123, 149, 3 Jur. N. S. 1297, 27 L. J. Q. B. 61, 5 Wkly. Rep. 820, 92 E. C. L. 123; Edinburgh L. Assur. Co. *v.* Barnhart, 17 U. C. C. P. 63, 84 [*citing* Sheppard Touchst. 89].

CUM PRINCIPALIS CAUSA NON CONSISTIT, NE EA QUIDEM QUÆ SEQUUNTUR LOCUM HABENT. A maxim meaning "When the main cause is not consistent, for the most part not even the things which follow have a place."[24]

CUM QUOD AGO NON VALET UT AGO, VALEAT QUANTUM VALERE POTEST. A maxim meaning "When that which I do is of no effect as I do it, it shall have as much effect as it can."[25]

CUM TESTAMENTO ANNEXO. With the will annexed.[26] (See EXECUTORS AND ADMINISTRATORS.)

CUMULATIVE.[27] That augments by addition, that is added to something else; in law, that augments as evidence, facts or arguments of the same kind.[28] (Cumulative: Evidence, see CUMULATIVE EVIDENCE. Legacy, see WILLS. Punishment, see CRIMINAL LAW. Remedy, see CUMULATIVE REMEDY. Sentence, see CRIMINAL LAW.)

CUMULATIVE EVIDENCE. Additional evidence of the same kind to the same point;[29] additional evidence to support the same point, and which is of the same character with the evidence already given;[30] additional evidence of the same kind or degree as that previously given;[31] additional evidence offered to establish a fact as to which witnesses have already testified;[32] additional evidence of the same general character to the same fact or point which was the subject of proof before;[33] evidence which is additional to other evidence already

24. Morgan Leg. Max.

25. Burrill L. Dict. [*citing* 4 Kent Comm. 493].

Applied in Baker *v.* Braman, 6 Hill (N. Y.) 47, 48, 40 Am. Dec. 387; Ruggles *v.* Sherman, 14 Johns. (N. Y.) 446, 450; Rigden *v.* Vallier, 3 Atk. 731, 26 Eng. Reprint 1219, 2 Ves. 252, 257, 28 Eng. Reprint 163; Stapilton *v.* Stapilton, 1 Atk. 2, 8, 26 Eng. Reprint 1; Goodtitle *v.* Bailey, Cowp. 597, 600. And see Thorne *v.* Thorne, 1 Vern. Ch. 141; Thompson *v.* Attfeild, 1 Vern. Ch. 40.

Kent says: "It is a principle of law, that if the form of the conveyance be an inadequate mode of giving effect to the intention, according to the letter of the instrument, it is to be construed under the assumption of another character, so as to give it effect. *Cum quod ago non valet ut ago, valeat quantum valere potest.*" 4 Kent Comm. 493.

26. Black L. Dict. [*citing* 2 Bl. Comm. 503, 504].

27. A word derived from the Latin *cumulo*, to heap up, or *cumulus*, a heap. People *v.* New York Super. Ct., 10 Wend. (N. Y.) 285, 294 [*quoted* in Parshall *v.* Klinck, 43 Barb. (N. Y.) 203].

28. Webster Dict. [*quoted* in People *v.* New York Super. Ct., 10 Wend. (N. Y.) 285, 294].

The term signifies that two things are to be added together or taken one after another, instead of one being a repetition or in substitution of the other. Sweet L. Dict. And see Reg. *v.* Eastern Archipelago Co., 18 Eng. L. & Eq. 167, 183, where it is said: "When one thing is cumulative on another, whether it be remedy, penalty, or power, we are speaking commonly of two things which are at least consistent, and might without incongruity be applied at the same time, as indictment and summary proceeding, fine and imprisonment, action for breach of covenant and ejectment for forfeiture. Two ways of doing the same thing where only one of two can, in fact, be used, may make a case of election, but they are hardly cumulative."

29. *Georgia.*— Code Prac. (1895) § 5143.

Iowa.— Able *v.* Frazier, 43 Iowa 175, 177.

Maine.— Glidden *v.* Dunlap, 28 Me. 379, 383.

Massachusetts.— Parker *v.* Hardy, 24 Pick. 246, 248 [*quoted* in Bradish *v.* State, 35 Vt. 452, 456, where it is said: "We have found no definition which appears to us to be so clear, and so accurate"].

New York.— Fleming *v.* Hollenback, 7 Barb. 271, 278.

Vermont.— Bradish *v.* State, 35 Vt. 452, 456.

"Cumulative evidence is said to be 'additional evidence of the same kind or degree as that previously given, and upon the same point, which in substance and effect simply repeats or adds to what has before been testified.'" St. Joseph Folding-bed Co. *v.* Kansas City, etc., R. Co., 148 Mo. 478, 484, 50 S. W. 85.

30. Parshall *v.* Klinck, 43 Barb. (N. Y.) 203, 212; Brisbane *v.* Adams, 1 Sandf. (N. Y.) 195, 198; People *v.* New York Super. Ct., 10 Wend. (N. Y.) 285, 292 (where it is said: "For instance: The defendants in the court below proved by the third teller, that the bill in question was not delivered until after twelve o'clock: all subsequent witnesses who prove the same fact, are cumulative; their testimony is added to, or heaped up upon that of the first witness"); Wynne *v.* Newman, 75 Va. 811, 818.

31. Parshall *v.* Klinck, 43 Barb. (N. Y.) 203, 212.

32. Abbott L. Dict. [*quoted* in Dale *v.* State, 88 Ga. 552, 561, 15 S. E. 287, where it is said: "It does not necessarily include all evidence which tends to establish the same ultimate or principally controverted fact"].

33. Casey *v.* State, 20 Nebr. 138, 158, 29 N. W. 264.

obtained;[34] evidence which goes to prove what has already been established by other evidence;[35] evidence which tends to support the same fact which was before attempted to be proved;[36] evidence which is of the same nature as that previously produced to establish the same fact or facts;[37] evidence which merely multiplies witnesses to any one or more of the facts before investigated, or only adds other circumstances of the same general character;[38] evidence which goes to the fact principally controverted on the former trial, and respecting which the party asking for a new trial produced testimony on the trial of the cause.[39] (Cumulative Evidence: Absence of as Ground For Continuance, see CONTINUANCES IN CIVIL CASES; CONTINUANCES IN CRIMINAL CASES. Admission in Rebuttal, see CRIMINAL LAW; TRIAL. Newly-Discovered as Ground For New Trial, see CRIMINAL LAW; NEW TRIAL.)

CUMULATIVE LEGACIES. See WILLS.

CUMULATIVE PUNISHMENT. See CRIMINAL LAW.

CUMULATIVE REMEDY. A remedy created by statute in addition to one which still remains in force.[40] (See ACTIONS; ELECTION OF REMEDIES.)

CUMULATIVE SENTENCE. See CRIMINAL LAW.

CUMULATIVE VOTING. That [mode] by which the voter concentrates his ballots on one or more candidates, instead of voting for the full number to be elected.[41] (Cumulative Voting: In Election of — Officers of Private Corporations, see CORPORATIONS; Public Officers, see ELECTIONS.)

CUPOLA FURNACE. A furnace used for melting pig iron for the purpose of casting it into useful forms and articles.[42]

34. Ga. Code Prac. (1895) § 5143.

"**Testimony is not merely cumulative** when it tends to prove a distinct fact not testified to at the trial, although other evidence may have been introduced by the moving party tending to support the same ground of claim or defense to which such fact is pertinent." Goldsworthy *v.* Linden, 75 Wis. 24, 34, 43 N. W. 656 [*citing* Wilson *v.* Plank, 41 Wis. 94]. And see Krueger *v.* Merrill, 66 Wis. 28, 31, 27 N. W. 836; Hinton *v.* Cream City R. Co., 65 Wis. 323, 334, 27 N. W. 147; Flinch *v.* Phillips, 41 Wis. 387, 393.

Must relate to evidence bearing on the issue at the trial.— In Guyot *v.* Butts, 4 Wend. (N. Y.) 579, 581 [*quoted* in Wynne *v.* Newman, 75 Va. 811, 817; St. John *v.* Alderson, 32 Gratt. (Va.) 140, 143], the court said: "I find no case in which a very distinct definition is given of cumulative evidence. The courts have sometimes used expressions seeming to warrant the inference that proof which goes to establish the same issue that the evidence on the first trial was introduced to establish, is cumulative. If the evidence newly discovered, as well as that introduced on the trial, had a direct bearing on the issue, it may be cumulative; but we are not to look at the effect to be produced as furnishing a criterion by which all doubts in relation to this kind of evidence are to be settled; the kind and character of the facts make the distinction. It is their resemblance that makes them cumulative. The facts may tend to prove the same proposition, and yet be so dissimilar in kind as to afford no pretence for saying they are cumulative."

35. Bouvier L. Dict. [*quoted* in Shute *v.* Jones, 24 N. Y. Suppl. 637, 638, where it is said: "And so whatever tends to prove the same point to which other evidence is offered is, in law, cumulative"].

36. Chatfield *v.* Lathrop, 6 Pick. (Mass.) 417, 418.

37. People *v.* O'Conner, 37 Misc. (N. Y.) 754, 755, 76 N. Y. Suppl. 511, 512; People *v.* Leighton, 1 N. Y. Cr. 468, 469.

38. Waller *v.* Graves, 20 Conn. 305, 310 [*quoted* in Casey *v.* State, 20 Nebr. 138, 158, 29 N. W. 264] (where it is said: "But that evidence which brings to light some new and independent truth of a different character, although it tend to prove the same proposition or ground of claim before insisted on, is not cumulative within the true meaning of the rule on this subject"); Wilson *v.* Plank, 41 Wis. 94, 99.

39. Grubb *v.* Kalb, 37 Ga. 459, 464.

"**Evidence newly discovered** is said to be cumulative, in its relation to evidence on the trial, when it is of the same kind and character. If it is dissimilar in kind, it is not cumulative, in a legal sense, though it tends to prove the same proposition." Wynne *v.* Newman, 75 Va. 811, 817 [*quoting* Guyot *v.* Butts, 4 Wend. (N. Y.) 579, 581].

40. Bouvier L. Dict. [*quoted* in Chicago, etc., R. Co. *v.* Chicago, 148 Ill. 141, 160, 35 N. E. 881].

41. Cyclopedic L. Dict.

42. Vinton *v.* Hamilton, 104 U. S. 485, 488, 26 L. ed. 807, where it is said: "It constitutes part of the equipment of a foundry. In shape it is generally a hollow cylinder. The iron is melted by substantially the same process as the ore in a blast furnace. The cupola furnace has an iron notch but no cinder notch, because there is generally so little cinder or slag in pig-iron, as to render such an opening unnecessary."

CUR. AD. VULT. The common abbreviation for CURIA ADVISARI VULT,[43] *q. v.*

CURATE. In ecclesiastical law, properly, an incumbent who has the cure of souls, but now generally restricted to signify the spiritual assistant of a rector or vicar in his cure; an officiating temporary minister in the English church, who represents the proper incumbent; being regularly employed either to serve in his absence or as his assistant, as the case may be.[44]

CURATIVE. Having the power or tendency to cure.[45] (Curative: Act,[46] see CONSTITUTIONAL LAW;[47] STATUTES.)

CURATOR. A person who has been legally appointed to take care of the interests of one who, on account of his youth, or defect of his understanding, or for some other cause, is unable to attend to them himself;[48] a term applied to the guardian of the estate of the ward as distinguished from the guardian of his person.[49] In Louisiana, a person appointed to take care of the estate of an absentee.[50] In Scotch law, it is used in the general sense of guardian.[51] (Curator: Of Estate of — Decedent, see EXECUTORS AND ADMINISTRATORS; Imbecile, see INSANE PERSONS; Minor, see GUARDIAN AND WARD; Spendthrift, see SPENDTHRIFTS. To Administer Estate of Absentee, see ABSENTEES.)

CURATOR AD HOC. In the civil law, a guardian for this purpose; a special guardian.[52] (See ABSENTEES; CURATOR; and, generally, GUARDIAN AND WARD.)

CURATOR AD LITEM. Literally, guardian for the suit. In English law, the corresponding phrase is "guardian *ad litem*."[53] (See CURATOR; and, generally, GUARDIAN AND WARD; INFANTS.)

CURATOR BONIS. In the civil law, a guardian or trustee appointed to take care of property in certain cases; as for the benefit of creditors.[54] In Scotch

43. Burrill L. Dict. And see Clement *v.* Chivis, 9 B. & C. 172.

44. Black L. Dict. [*citing* 1 Bl. Comm. 393; 3 Stephen Comm. 88]. And see Mason *v.* Lambert, 12 Q. B. 795, 803, 12 Jur. 1045, 17 L. J. Q. B. 366, 64 E. C. L. 795, where it is said: "In the times of which we are speaking, the term curatus would have had in England, as it still has in Roman Catholic countries, a much wider meaning than that which a 'curate' or 'perpetual curate' now bears in England, such a meaning as our Liturgy still preserves in our Church when it speaks of 'Bishops and Curates.'"

45. Century Dict.

46. Curative statutes relating to acknowledgments see 1 Cyc. 606.

47. Curative act defined see 8 Cyc. 1023.

48. Larned *v.* Renshaw, 37 Mo. 458, 460.

Distinguished from "guardian."—In Larned *v.* Renshaw, 37 Mo. 458, 460, the court said: "The distinction here taken between guardian and curator, we think, is more artificial than real, when applied to the question involved in this case. Undoubtedly there is a line of demarcation existing between them, and they perform separate functions; they may respectively be committed to different persons, though both are frequently joined in the same individual." And see Easley *v.* Bone, 39 Mo. App. 388, 391, where it is said: "We attach no importance to the fact that the order of appointment designates the appointee as 'curator' instead of 'guardian,'—the meaning of the two words, when applied to the care of an estate merely, being the same."

"At common law, the king was considered to have the care of all persons unable to care for themselves. This care was exercised by the Court of Chancery through a guardian appointed by it, whose functions were those of the tutor or curator of the civil law, the former of whom had charge of the maintenance and education of the infant, and the latter the care of his estate." Sproule *v.* Davies, 69 N. Y. App. Div. 502, 503, 75 N. Y. Suppl. 229. And see 1 Bl. Comm. 460, where it is said: "The guardian with us performs the office both of the tutor (a teacher) and curator (a guardian) of the Roman laws; the former of which had the charge of the maintenance and education of the minor, the latter the care of his fortune; or, according to the language of the court of chancery, the tutor was the committee of the person, the curator the committee of the estate. But this office was frequently united in the civil law; as it is always in our law with regard to minors, though as to lunatics and idiots it is commonly kept distinct."

49. Duncan *v.* Crook, 49 Mo. 116, 117.

"The authority of a guardian bears a near resemblance to that of a father, and is plainly derived out of it; the guardian being only a temporary parent. He usually performs the office of both tutor and curator of the Roman law; the former of which had charge of the maintenance and education of the minor, and the latter the care of his fortune." Sensemen's Appeal, 21 Pa. St. 331, 333.

50. Black L. Dict. [*quoting* La. Civ. Code, art. 50].

51. Burrill L. Dict. [*citing* Bell Dict.].

52. Black L. Dict.

53. Black L. Dict.

In Scotland a curator *ad litem* is appointed for minors not under pupilage when they become a pursuer or defender of a process. Monroe *v.* Douglas, 4 Sandf. Ch. (N. Y.) 126, 200.

54. Burrill L. Dict.

law, the term is applied to guardians for minors, lunatics, etc., and seems to be a term of more authority in Scotland than "committee of the estate of a lunatic" in England.[55]

CURATORSHIP. The office of a curator.[56]

CURATRIX. A woman who has been appointed to the office of curator; a female guardian.[57]

CURBY HOCKS. A peculiar form of the hock, considered as rendering the horse more liable to throw out a curb.[58]

CURE. As a noun, a method or course of remedial treatment for disease, whether successful or not.[59] As a verb, to prepare for preservation by drying, salting, etc.[60]

CURED BY VERDICT. An expression which signifies that the court will, after verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleading, was duly proved at the trial.[61] (See, generally, INDICTMENTS AND INFORMATIONS; PLEADING.)

CURE OF SOULS. In English ecclesiastical law, the spiritual charge of a parish, including the ordinary and regular duties of an officiating clergyman.[62]

CURFEW. The ringing of a bell or bells at eight o'clock at night, at which signal the people were required to extinguish all lights in their dwellings, and to put out or rake up their fires, and retire to rest, and all companies to disperse.[63]

CURIA ADVISARI VULT. The court desires to deliberate over the matter; the court reserves its decision, for the present.[64]

CURIA CANCELLARIÆ OFFICINA JUSTITIÆ. A maxim meaning "The court of chancery is the workshop of justice."[65]

CURIA ECCLESIASTICA LOCUM NON HABET SUPER HIS QUÆ JURIA SUNT COMMUNIS. A maxim meaning "An ecclesiastical court has no jurisdiction over

55. Burrill L. Dict.

56. Black L. Dict.

Curatorship differs from tutorship, in this; that the latter is instituted for the protection of property in the first place, and, secondly, of the person; while the former is intended to protect, first, the person, and secondly, the property. Black L. Dict.

57. Black L. Dict. And see Cross *v.* Cross, 4 Gratt. (Va.) 257, 264.

58. Bailey *v.* Forrest, 2 C. & K. 131, 132, 61 E. C. L. 131.

59. Century Dict.

As applied to sick seamen.— In a libel by a seaman upon a claim that he was entitled to be cured at the expense of the ship for injuries and sickness received while in her service, the court, in speaking of the law relative to the cure of sick or injured seamen, said: "The term cure, was probably employed originally in the sense of taking charge or care of the disabled seaman, and not in that of positive healing." The Atlantic, 2 Fed. Cas. No. 620, 1 Abb. Adm. 451, 480 [*quoted* in The City of Alexandria, 17 Fed. 390, 394]. And see Reed *v.* Canfield, 20 Fed. Cas. No. 11,641, 1 Sumn. 195.

60. Century Dict.

Where, in the particular trade of selling and buying bacon and pork sides, the words, "fully cured," were used as descriptive of the classification of articles sold, in a contest in regard thereto, such words are to have the meaning attached to them by experts — that is, persons in the trade. Featherston *v.* Rounsaville, 73 Ga. 617, 619.

Where a sale of "cured meat" was made by a broker to a merchant at Memphis, that term is to be interpreted according to the understanding of the trade at Memphis, and not according to that where the seller resided, if there be any substantial difference between the two. Treadwell *v.* Anglo-American Packing Co., 13 Fed. 22, 24.

61. *Connecticut.*— State *v.* Keena, 63 Conn. 329, 332, 28 Atl. 522, where it is said: "And such intendment must arise not merely from the verdict but from the united effect of the verdict and the issue upon which the verdict was given."

Indiana.— Alford *v.* Baker, 53 Ind. 279, 283; Peck *v.* Martin, 17 Ind. 115, 117.

Maryland.— Merrick *v.* Metropolis Bank, 8 Gill 59, 75.

Montana.— Hershfield *v.* Aiken, 3 Mont. 442, 452.

New Hampshire.— See White *v.* Concord R. Co., 30 N. H. 188, 209; Bedell *v.* Stevens, 28 N. H. 118, 122.

62. Burrill L. Dict.

Sometimes is abbreviated to "cure." Ecclesiastical benefices are either "with cure," as parsonages, vicarages, &c. or "without cure," as prebends, &c. Burrill L. Dict.

The words "the cure of souls," used in the marriage act, N. C. Rev. St. c. 71, does not imply a necessity, that the minister should be the incumbent of a church living, or the pastor of any congregation or congregations in particular. State *v.* Bray, 35 N. C. 289, 291.

63. An institution supposed to have been introduced into England by order of William the Conqueror. Black L. Dict.

64. Anderson L. Dict. And see Thompson *v.* Butler, 2 Lev. 55, 56.

65. Wharton L. Lex. [*citing* 2 Inst. 552].

matters of common law," or "An ecclesiastical court has no power over matters in common law.[66]

CURIA PARLIAMENTI SUIS PROPRIIS LEGIBUS SUBSTITUT. A maxim meaning "The court of parliament is governed by its own peculiar laws."[67]

CURIOSA ET CAPTIOSA INTERPRETATIO IN LEGE REPROBATUR. A maxim meaning "A curious and captious interpretation of the law is to be reproved."[68]

CURRANT. A very small kind of raisin or dried grape imported from the Levant, chiefly from Zante and Cephalonia, and used in cooking.[69]

CURRAT LEX. The law must take its course.[70]

CURRENCY.[71] Anything which is used as a circulating medium and is generally accepted in trade as a representative of values of property;[72] whatever circulates conventionally on its own credit as a medium of exchange, whether it be bank notes, bills of exchange, or government securities;[73] the circulating medium, the aggregate of coin, bills, notes, &c., in circulation;[74] money current by law, or

66. Morgan Leg. Max.; Peloubet Leg. Max.

67. Wharton L. Lex.

68. Bouvier L. Dict.

69. Century Dict.; Webster Int. Dict. [*quoted* in *In re* Wise, 73 Fed. 183, 187].

70. Adams Gloss. And see Robert *v.* Villars, 12 Mod. 217, 218.

71. "Its primary signification is a passing or flowing — something which flows along or passes from hand to hand." Chicago F. & M. Ins. Co. *v.* Keiron, 27 Ill. 501, 507.

72. Chicago F. & M. Ins. Co. *v.* Keiron, 27 Ill. 501, 505.

73. Griswold *v.* Hepburn, 2 Duv. (Ky.) 20, 33, where it is said: "But such currency, merely spontaneous, is not 'money,' which is the legal medium of exchange, and the only true standard of value. And this distinction between money and currency seems to have been understood by the whole convention which proposed the Constitution to the States for their ratification."

The word "currency" when applied to the medium of trade, means equally coin, bank notes, or notes issued by the government. Leonard *v.* State, 115 Ala. 80, 82, 2 So. 564. See also Klauber *v.* Biggerstaff, 47 Wis. 551, 561, 3 N. W. 357, 32 Am. Rep. 773.

Alabama currency.— See Carlisle *v.* Davis, 7 Ala. 42, 44.

Illinois currency.— See Chicago Mar. Bank *v.* Birney, 28 Ill. 90, 92; Chicago F. & M. Ins. Co. *v.* Keiron, 27 Ill. 501, 505; Hulbert *v.* Carver, 40 Barb. (N. Y.) 245, 253. See also Hulbert *v.* Carver, 37 Barb. (N. Y.) 62, 63.

Kentucky currency.— See Lampton *v.* Haggard, 3 T. B. Mon. (Ky.) 149, 150; Chambers *v.* George, 5 Litt. (Ky.) 335 [*quoted* in Jones *v.* Overstreet, 4 T. B. Mon. (Ky.) 547, 550].

Maryland currency.— See Gardner *v.* State, 25 Md. 146, 151, where a statute defining what is currency expressly recognizes "dollars and cents" as the currency of the state.

Massachusetts currency.—See Com. *v.* Griffiths, 126 Mass. 252, 253.

Mississippi currency.—See Mitchell *v.* Hewitt, 13 Sm. & M. (Miss.) 361, 366 [*citing* Wheaton *v.* Morris, 1 Dall. (Pa.) 124, 133, 1 L. ed. 65]. See also Ballard *v.* Wall, 2 La. Ann. 404, 405.

Missouri currency.— See Cockrill *v.* Kirkpatrick, 9 Mo. 697, 701.

New York currency.— See Ehle *v.* Chittenango Bank, 24 N. Y. 548, 549 [*quoted* in Black *v.* Ward, 27 Mich. 191, 196, 15 Am. Rep. 162]; Leiber *v.* Goodrich, 5 Cow. (N. Y.) 186, 187.

Pennsylvania currency.— See Leiber *v.* Goodrich, 5 Cow. (N. Y.) 186, 187. See also Wharton *v.* Morris, 1 Dall. (Pa.) 125, 126, 1 L. ed. 65.

Tennessee currency.—See Hicklin *v.* Tucker, 2 Yerg. (Tenn.) 448, 449.

United States currency.— In State *v.* Gasting, 23 La. Ann. 609, 610, the court said: "National currency is that which is issued under the sanction of a nation. The nation which authorizes the issue of what we term national bank notes is the United States. Considering therefore the title and terms of the act of Feb. 25, 1863, . . . in connection with these familiar definitions, we think it fair to decide that the phrase 'United States Currency' includes the 'national currency' authorized by the United States — declared to be for many important purposes a lawful tender — and designed to circulate as a medium of trade in all parts of our country."

Irish currency.— See Lansdowne *v.* Lansdowne, 2 Bligh 60, 78, 21 Rev. Rep. 43, 4 Eng. Reprint 250 [*quoted* in Black *v.* Ward, 27 Mich. 191, 198, 15 Am. Rep. 162; Gray *v.* Worden, 29 U. C. Q. B. 535, 539], where Lord Redesdale said: "There is no lawful money of Ireland; it is merely conventional. There is neither gold nor silver coin of legal currency — nothing but copper. . . . There is no such thing as Irish money; it is Irish currency." And see Kearney *v.* King, 2 B. & Ald. 301, 303; Sprowle *v.* Legge, 1 B. & C. 16, 8 E. C. L. 8.

Canada currency.— See Black *v.* Ward, 27 Mich. 191, 199, 15 Am. Rep. 162.

Currency of this state.— See Wilburn *v.* Greer, 6 Ark. 255, 258 [*citing* Graham *v.* Adams, 5 Ark. 261]; Chambers *v.* George, 5 Litt. (Ky.) 335, 336.

"Greenback currency."— See Burton *v.* Brooks, 25 Ark. 215 [*quoted* in Black *v.* Ward, 27 Mich. 191, 196, 15 Am. Rep. 162, where it was held that a note payable in "greenback currency" was payable in the currency of the United States].

74. Worcester Dict. [*quoted* in Pilmer *v.*

paper equivalent in value circulating in the business community at par;[75] money — coined money and paper money equally;[76] the money which passes at a fixed value from hand to hand; money which is authorized by law;[77] lawful money;[78] bank bills, or other paper money issued by authority, which pass as and for coin;[79] bank notes or other paper money issued by authority, and which are continually passing as money;[80] current money in the legal sense;[81] bank bills or other paper money which pass as a circulating medium in the business community as, and for, the constitutional coin of the country;[82] coin, bank notes as pass freely in commercial transactions as money, and regarded nearly equivalent to coin;[83] something which circulates as a medium for trade.[84] In a large and perhaps just sense, the term includes not only gold and silver bank bills, but bills of exchange also. It may include all that adjusts exchanges and settles balances in the operations of trade and business.[85] Also a continual passing from hand to hand, and circulation.[86] (Currency: As Medium of Payment, see PAYMENT. Bills and Notes Payable in, see COMMERCIAL PAPER.[87] Counterfeiting, see COUNTERFEITING. Issuance by State, see STATES.)

CURRENT. Running; now passing or present in its progress.[88]

CURRENT ACCOUNT. Every account in which there has not been a balance

Des Moines Branch State Bank, 16 Iowa 321, 329].

75. Phelps *v.* Town, 14 Mich. 373, 378.

76. Klauber *v.* Biggerstaff, 47 Wis. 551, 561, 3 N. W. 357, 32 Am. Rep. 773, where it is said: "But it means money only; and the only practical distinction between paper money and coined money, as currency, is that coined money must generally be received, paper money may generally be specially refused, in payment of debt; but a payment in either is equally made in money — equally good. The confusion in the cases appears to have arisen for want of proper distinction between money which is current and money which is legal tender." See also Swift *v.* Whitney, 20 Ill. 144 [*quoted* in Trowbridge *v.* Seaman, 21 Ill. 100]; Pilmer *v.* Des Moines Branch State Bank, 16 Iowa 321, 329; Whiteman *v.* Childress, 6 Humphr. (Tenn.) 303; Kirkpatrick *v.* McCullough, 3 Humphr. (Tenn.) 171, 39 Am. Dec. 158 [*quoted* in Miller *v.* McKinney, 5 Lea (Tenn.) 93]. And see Farwell *v.* Kennett, 7 Mo. 595, 597.

77. Bouvier L. Dict. [*quoted* in Black *v.* Ward, 27 Mich. 191, 196, 15 Am. Rep. 162; Butler *v.* Paine, 8 Minn. 324].

78. Mitchell *v.* Hewitt, 13 Sm. & M. (Miss.) 361, 366.

79. Springfield M. & F. Ins. Co. *v.* Tincher, 30 Ill. 399, 403 (where it is said: "Current bills, or currency, are of the value of cash, and exclude the idea of depreciated paper money"); Chicago Mar. Bank *v.* Rushmore, 28 Ill. 463, 476; Swift *v.* Whitney, 20 Ill. 144, 146. See also Galena Ins. Co. *v.* Kupfer, 28 Ill. 332, 335, 81 Am. Dec. 284.

80. Wharton L. Lex. [*quoted* in Chicago F. & M. Ins. Co. *v.* Keiron, 27 Ill. 501, 505; Pilmer *v.* Des Moines Branch State Bank, 16 Iowa 321, 328].

81. Fry *v.* Dudley, 20 La. Ann. 368, 372.

82. Osgood *v.* McConnell, 32 Ill. 74, 77; Galena Ins. Co. *v.* Kupfer, 28 Ill. 332, 335, 81 Am. Dec. 284; Pilmer *v.* Des Moines Branch State Bank, 16 Iowa 321, 328.

83. Webster *v.* Pierce, 35 Ill. 158, 164 [*quoting* Springfield M. & F. Ins. Co. *v.* Tincher, 30 Ill. 399].

84. State *v.* Gasting, 23 La. Ann. 609, 610, where it is said: "It conveys at the present time the idea of paper money, of some sort."

85. Griswold *v.* Hepburn, 2 Duv. (Ky.) 20, 37; Juilliard *v.* Greenman, 110 U. S. 421, 455, 4 S. Ct. 122, 28 L. ed. 204, per Field, J., in dissenting opinion, where it is said: "But if we understand by currency the legal money of the country, and that which constitutes a legal tender for debts, and is the standard measure of value, then undoubtedly nothing is included but gold and silver."

The term "currency" in a contract, must be taken to mean current money, unless there be something in the contract itself to require a different interpretation. Dugan *v.* Campbell, 1 Ohio 115, 118.

The term "in currency," means that the designated number of dollars is payable in an equal number of notes which are current in the community as dollars. Trebilcock *v.* Wilson, 12 Wall. (U. S.) 687, 695, 20 L. ed. 460.

86. Carlisle *v.* Davis, 7 Ala. 42, 44.

87. Note payable in currency see 7 Cyc. 1009.

88. Dempsey *v.* McKennell, 2 Tex. Cr. 284, 23 S. W. 525; Cleburne First Nat. Bank *v.* Graham, (Tex. App. 1889) 22 S. W. 1101, 1102; Blue Star Steamship Co. *v.* Keyser, 81 Fed. 507, 509. See also State *v.* Bartley, 39 Nebr. 353, 359, 58 N. W. 172, 23 L. R. A. 67.

"Notes are current when they pass freely in the common transactions of business, either at their par value or at any other value, ascribed to them by common consent; and if they so pass, they are current, whatever may be their value in reference to a specie standard, or whatever may be the manner in which the banks redeem them." Morris *v.* Edwards, 1 Ohio 189, 215, per Burnet, J., in dissenting opinion.

agreed upon and struck between the parties.[89] (See, generally, ACCOUNTS AND ACCOUNTING.[90])

CURRENT BANK-NOTES.[91] Bank-notes which circulate currently as money;[92] such bank-notes as are convertible into gold and silver at par;[93] such bank-notes as are convertible into specie at the counter where they were issued and pass at par in the ordinary transactions of the country.[94] (See BANK-NOTE.)

CURRENT BANK PAPER. Bank paper which passes from hand to hand as money.[95]

CURRENT BILLS. Current bank bills.[96] (See BANK-NOTE.)

CURRENT EXPENSES.[97] Ordinary expenses;[98] expenses incurred within a reasonable time.[99]

CURRENT FUNDS.[1] Current money;[2] par funds, or money circulating without any discount;[3] funds which are current by law as money;[4] money;[5] money, or such funds as circulate as money;[6] cash, or paper money equivalent thereto;[7]

89. Franklin *v.* Camp, 1 N. J. L. 227, 228.

90. Account current defined see 1 Cyc. 363.

91. The terms "bank-notes," "current bank-notes" and "current funds," when used in notes and obligations, import generally, in their signification, such as are convertible into gold and silver at par. Fleming *v.* Nall, 1 Tex. 248 [*quoted* in Williams *v.* Arnis, 30 Tex. 37, 49]. See BANK-NOTE; CURRENT FUNDS.

92. Baker *v.* Jordan, 5 Humphr. (Tenn.) 485 [*quoted* in McDowell *v.* Keller, 4 Coldw. (Tenn.) 258, 264]. And see Moore *v.* Gooch, 6 Heisk. (Tenn.) 104, 106; Coffin *v.* Hill, 1 Heisk. (Tenn.) 385. See also Swetland *v.* Creigh, 15 Ohio 118, 122, where Read, J., in dissenting opinion, said: "'Current bank notes' does not signify a sum of money certain. The terms current and bankable, are well understood. Paper is regarded as current which will circulate in the ordinary transaction of business, and may vary 5, 10, 15 or 20 per cent, according to the folly or good nature of the community."

Current bank-notes of Kentucky.— See Speak *v.* Warner, 5 J. J. Marsh. (Ky.) 68.

Does not include "money."— "A note payable in current bank-notes is a note for money, or it is not: it cannot be money for one thing and not money for another. We are compelled by the weight of authority to say that [it] is not for money." Kirkpatrick *v.* McCullough, 3 Humphr. (Tenn.) 171, 174, 39 Am. Dec. 158.

"The words 'current bank notes of the city of Cincinnati' are as expressive of their own meaning as 'barrels of superfine flour,' or 'bushels of wheat;' they are definite and admit of but one construction. They necessarily include the notes of every bank of the city that were passing freely in the common business of the day, and they exclude notes of every other description." Morris *v.* Edwards, 1 Ohio 189, 215, per Burnet, J., in dissenting opinion.

93. Williams *v.* Arnis, 30 Tex. 37, 49; Fleming *v.* Nall, 1 Tex. 246, 248.

94. Pierson *v.* Wallace, 7 Ark. 282, 293.

95. Pierson *v.* Wallace, 7 Ark. 282, 293.

96. Collins *v.* Lincoln, 11 Vt. 268, 269.

97. "Both the terms 'support' and 'current expenses,' when applied to the common schools . . . , mean continuing regular expenditures for the maintenance of the schools." Sheldon *v.* Purdy, 17 Wash. 135, 140, 49 Pac. 228. See also State *v.* Board of Education, 68 N. J. L. 496, 497, 53 Atl. 236.

The words "county charges and expenses" are synonymous with the phrase "current expenses," as used in a statute. These phrases may include such charges and expenses as are incidental in conducting the business of the county government for the current year. State *v.* Marion County Com'rs, 21 Kan. 419, 433.

98. Taylor *v.* Mayo, 110 U. S. 330, 338, 4 S. Ct. 147, 28 L. ed. 163.

99. Thomas *v.* Peoria, etc., R. Co., 36 Fed. 808, 819.

Current expenses of the year means the expenses of the current year. Babcock *v.* Goodrich, 47 Cal. 488, 510.

1. "The phrase 'current funds,' as employed in commercial transactions, has a fixed, known signification." State *v.* Bartley, 39 Nebr. 353, 358, 58 N. W. 172, 23 L. R. A. 67. And see Galena Ins. Co. *v.* Kupfer, 28 Ill. 332, 335, 81 Am. Dec. 284 [*quoted* in Marc *v.* Kupfer, 34 Ill. 286, 293].

All funds bankable in the state are current funds. Klauber *v.* Biggerstaff, 47 Wis. 551, 557, 3 N. W. 357, 32 Am. Rep. 773; Platt *v.* Sauk County Bank, 17 Wis. 222, 227.

2. Laird *v.* State, 61 Md. 309, 311.

3. Galena Ins. Co. *v.* Kupfer, 28 Ill. 332, 335, 81 Am. Dec. 284; Pilmer *v.* Des Moines Branch State Bank, 16 Iowa 321, 328; State *v.* Bartley, 39 Nebr. 353, 358, 58 N. W. 172, 23 L. R. A. 67.

Payable in current funds at Pittsburg see Wright *v.* Hart, 44 Pa. St. 454.

4. Hatch *v.* Dexter First Nat. Bank, 94 Me. 348, 351, 47 Atl. 908, 80 Am. St. Rep. 401.

5. Haddock *v.* Woods, 46 Iowa 433, 436.

6. American Emigrant Co. *v.* Clark, 47 Iowa 671, 672.

7. Wood *v.* Price, 46 Ill. 435, 437.

"New York current funds . . . [mean] cash, or at least something precisely equivalent to gold or silver." Lacy *v.* Holbrook, 4 Ala. 88, 90.

bills of exchange or checks, promissory notes, gold or silver;[8] such funds only as are current by law.[9]

CURRENT MONEY.[10] Whatever is intended to, and does actually circulate as money;[11] lawful money;[12] every species of coin or currency;[13] constitutional coin;[14] currency of the country.[15]

CURRENT NOTES. Notes considered as cash.[16]

CURRENT PRICE. The market price.[17]

CURRENT RATE OF EXCHANGE. The rate of exchange at which drafts are negotiated.[18]

CURRENT VALUE. The market value.[19]

CURRENT WAGES. Such compensation for personal services as are to be paid periodically, or from time to time, as the services are rendered; as where the services are to be paid for by the hour, day, week, month, or year.[20]

CURRICULUM.[21] The year; of the course of a year; the set of studies for a particular period, appointed by a university.[22]

CURRIT QUATUOR PEDIBUS. It runs upon four feet; or, as sometimes expressed, it runs upon all fours.[23] (See ALL-FOURS.)

CURRIT TEMPUS CONTRA DESIDES ET SUI JURIS CONTEMPTORES. A maxim meaning "Time runs against the slothful, and those who slight their own rights."[24]

8. Bull *v.* Kasson First Nat. Bank, 123 U. S. 105, 112, 8 S. Ct. 62, 31 L. ed. 97.

9. Phœnix Ins. Co. *v.* Allen, 11 Mich. 501, 508, 83 Am. Dec. 756.

10. "Current money of Kentucky."—In McChord *v.* Ford, 3 T. B. Mon. (Ky.) 166, 167, the court said: "The word 'current' preceding the word 'money,' cannot change its meaning, because it is equally applicable to that kind of money made current by act of Congress, which in truth, is the only current money of Kentucky." And see Chambers *v.* George, 5 Litt. (Ky.) 335.

"Divers promissory notes current as money in said Commonwealth" as used in an indictment for larceny see Com. *v.* Ashton, 125 Mass. 384, 386; Com. *v.* Butts, 124 Mass. 449, 452.

11. Coffin *v.* Hill, 1 Heisk. (Tenn.) 385 [*quoted* in Miller *v.* McKinney, 5 Lea (Tenn.) 93, 96].

"During the revolutionary war, when paper money was the only circulating medium of the states, current money meant paper money: after that was abolished and called in, and gold and silver became the currency then current money meant coined money, and not paper." Jones *v.* Overstreet, 4 T. B. Mon. (Ky.) 547, 550.

12. Coco *v.* Calliham, 21 La. Ann. 624, 626; Wharton *v.* Morris, 1 Dall. (Pa.) 125, 133, 1 L. ed. 65 [*quoted* in Black *v.* Ward, 27 Mich. 191, 196, 15 Am. Rep. 162].

Current lawful money.—As defined by statute, current lawful money is such money as is current at the time of entering into the contract. Lee *v.* Biddis, 1 Dall. (U. S.) 175, 1 L. ed. 88 [*quoted* in Morris *v.* Edwards, 1 Ohio 189, 219, per Burnet, J., in dissenting opinion].

13. Hopson *v.* Fountain, 5 Humphr. (Tenn.) 140 [*quoted* in Miller *v.* McKinney, 5 Lea (Tenn.) 93, 96].

14. Bainhridge *v.* Owen, 2 J. J. Marsh. (Ky.) 463 [*quoted* in Cockrill *v.* Kirkpatrick, 9 Mo. 697, 702].

15. Miller *v.* McKinney, 5 Lea (Tenn.) 93, 96.

Current bank money.—See Lackey *v.* Miller, 61 N. C. 26, 27; Hopson *v.* Fountain, 5 Humphr. (Tenn.) 140, 141.

16. Pierson *v.* Wallace, 7 Ark. 282, 293 [*citing* Leiber *v.* Goodrich, 5 Cow. (N. Y.) 187].

Note payable in "current notes of the State of North Carolina" see Warren *v.* Brown, 64 N. C. 381, 382.

17. *In re* Three Thousand One Hundred and Nine Cases Champagne, 23 Fed Cas. No. 14,012, 1 Ben. 241, where it is said: "Every one can see that 'current price' and 'market value' are synonymous words. We have, in common speech, the word 'price-current' in our language. What is a price-current but a statement or a list of current prices, which are the market values of the merchandise stated in the list."

18. Blue Star Steamship Co. *v.* Keyser, 81 Fed. 507, 511.

19. English L. Dict.

As used in a tariff act, current value is the common marketable price of the goods at the place of exportation. Tappan *v.* U. S., 23 Fed. Cas. No. 13,749, 2 Mason 393, 399.

20. Dempsey *v.* McKennell, 2 Tex. Cr. 284, 23 S. W. 525; Cleburne First Nat. Bank *v.* Graham, (Tex. App. 1889) 22 S. W. 1101, 1102; Sydnor *v.* Galveston, 4 Tex. App. Civ. Cas. § 59, 15 S. W. 202.

21. The original meaning is race ground. Iron City Commercial College *v.* Kerr, 3 Brewst. (Pa.) 196, 200.

22. Black L. Dict.

23. Black L. Dict.

A phrase used in arguments to signify the entire and exact application of a case quoted. And see Burgess *v.* Wheate, 1 W. Bl. 123, 145, 1 Eden 177, 28 Eng. Reprint 652, where it is said: "There is no difference between a trust and an equity of redemption; yet it does not follow that they run *quatuor pedibus*."

24. Wharton L. Lex.

CURSED. Malediction, imprecation, execration.[25]

CURSING. Using blasphemous or profane language; swearing.[26] (Cursing: As Nuisance, see DISORDERLY CONDUCT. Blasphemous, see BLASPHEMY. Profane, see PROFANITY.)

CURSUS CURIÆ EST LEX CURIÆ.[27] A maxim meaning "The practice of the Court is the law of the Court."[28]

25. Irwin *v.* Irwin, 2 Okla. 180, 189, 37 Pac. 548, where it is said: "Where used by one towards another it is intended to convey hate and detestation, and as an invocation for harm or injury."

26. Century Dict.

27. "In a court of equity, as in a court of law, the maxim, . . . is frequently recognised and applied." Broom Leg. Max.

28. Broom Leg. Max.

Applied in Silvey *v.* U. S., 7 Ct. Cl. 305, 332, per Loring, J., in dissenting opinion.

"It was a common expression of the late Chief Justice Tindal, that the course of the court is the practice of the court." Per Cresswell, J., in Freeman *v.* Tranah, 12 C. B. 406, 414, 16 Jur. 1141, 21 L. J. C. P. 214, 74 E. C. L. 406.

CURTESY

By Charles Henry Harriman*

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Alien's Right to Curtesy, see ALIENS.

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I. DEFINITION AND NATURE.

Curtesy is the estate[1] to which by common law a man is entitled on the death of his wife, in the lands or tenements of which she was seized in possession in fee

1. **It is a freehold estate in the husband for his natural life cast upon him by operation of law immediately upon the happening of the necessary incidents.**

Connecticut.— Watson *v.* Watson, 13 Conn. 83.

Illinois.— Shortall *v.* Hinckley, 31 Ill. 219.

Mississippi.— Day *v.* Cochran, 24 Miss. 261.

South Carolina.— Withers *v.* Jenkins, 14 S. C. 597.

Tennessee.— Templeton *v.* Twitty, 88 Tenn. 595, 14 S. W. 595.

It is in the nature of a continuation of the wife's inheritance, and is subject to the same encumbrances under which she held it. Watson *v.* Watson, 13 Conn. 83; Templeton *v.* Twitty, 88 Tenn. 595, 14 S. W. 595; Sumner *v.* Partridge, 2 Atk. 47, 26 Eng. Reprint 425. Any circumstances which would have determined her estate if living will determine his. Withers *v.* Jenkins, 14 S. C. 597.

simple or in tail during their coverture, provided they had lawful issue born alive which might have been capable of inheriting the estate.[2]

II. ORIGIN AND TERMINOLOGY.

Both the origin[3] of the estate and the meaning of the term "curtesy" as used to designate the estate are somewhat in doubt.[4] Whatever may have been the origin of the estate or reasons for its introduction into English law, it appears evident that an estate alike in nearly every particular was known to the civil law in the time of Constantine,[5] also to the Normans before they conquered England,[6] and that the estate was not known in England before the conquest.[7] Curtesy was introduced into the United States with and as a part of the common law,[8] but in many states it has been abolished[9] or somewhat modified by statute.[10]

III. CURTESY INITIATE.

A. In General. Immediately upon the birth of lawful issue of the marriage, born alive and capable of inheriting the wife's estates, the husband acquires, unless otherwise provided by statute,[11] a permanent interest in all the estates of inheritance of the wife of which she has been or may become seized during coverture.[12]

B. Vested Estate. Curtesy initiate becomes a vested interest as soon as it attaches to the wife's estates,[13] and cannot be modified or abolished by the legislature of a state;[14] but until it attaches it is a mere right and may be modified or

2. *Arkansas.*— McDaniel *v.* Grace, 15 Ark. 465.

District of Columbia.— Smith *v.* Smith, 21 D. C. 289; De Hart *v.* Dean, 2 MacArthur 6.

Mississippi.— Redus *v.* Hayden, 43 Miss. 614; Ryan *v.* Freeman, 36 Miss. 175.

Nebraska.— Forbes *v.* Sweesy, 8 Nebr. 520, 1 N. W. 571.

New York.— Billings *v.* Baker, 28 Barb. 343.

South Carolina.— Withers *v.* Jenkins, 14 S. C. 597.

Tennessee.— Gillespie *v.* Worford, 2 Coldw. 632.

Virginia.— Breeding *v.* Davis, 77 Va. 639, 46 Am. Rep. 740.

West Virginia.— Winkler *v.* Winkler, 18 W. Va. 455.

Wisconsin.— Westcott *v.* Miller, 42 Wis. 454.

United States.— Barr *v.* Galloway, 2 Fed. Cas. No. 1,037, 1 McLean 476; Stoddard *v.* Gibbs, 23 Fed. Cas. No. 13,468, 1 Sumn. 263.

See also Black L. Dict.; Bouvier L. Dict.; 2 Bl. Comm. 126; Coke Litt. 30*a*: 1 Cruise Dig. 140; 4 Kent Comm. 27; Washburn Real Prop. (6th ed.) § 31[illegible].

3. Origin.—One writer of authority asserts that the estate is of English origin. Coke Litt. 29*a*, § 35. Its origin is ascribed by others to the civil law in the time of Constantine. Wright Ten. 194. But writers of authority generally agree that the estate is not of feudal origin. 2 Bl. Comm. (Cooley ed.) 126, 127; 4 Kent Comm. 28; Wright Ten. 194.

4. Digby Hist. Real Prop. (5th ed.) 174, 176; 2 Pollock & M. Hist. Eng. L. (2d ed.) 414–419. See also Northcut *v.* Whipp, 12 B. Mon. (Ky.) 65; Paine's Case, 8 Coke 34*a*.

5. 11 Corpus Jur. Civ. lx, 1–4.

6. 1 Cruise Dig. 105.

7. Mirror (Seld. Soc.) 14.

8. Withers *v.* Jenkins, 14 S. C. 597; Anderson L. Dict. 301; Washburn Real Prop. (6th ed.) § 316.

9. See *infra*, IX.

10. See *infra*, III, C.

11. See *infra*, III, C.

12. *Alabama.*—Hunter *v.* Whitworth, 9 Ala. 965.

District of Columbia.— National Metropolitan Bank *v.* Hitz, 1 Mackey 111.

New Hampshire.— Foster *v.* Marshall, 22 N. H. 491.

New Jersey.— Nicholls *v.* O'Neill, 10 N. J. Eq. 88.

New York.— Billings *v.* Baker, 28 Barb. 343.

North Carolina.— Williams *v.* Lanier, 44 N. C. 30.

Pennsylvania.— Lancaster County Bank *v.* Stauffer, 10 Pa. St. 398; Gamble's Estate, 1 Pars. Eq. Cas. 485.

Vermont.— Mattocks *v.* Stearns, 9 Vt. 326.

West Virginia.—Wyatt *v.* Smith, 25 W. Va. 813.

England.— 2 Bl. Comm. 127.

See 15 Cent. Dig. tit. "Curtesy," § 15.

13. Plumb *v.* Sawyer, 21 Conn. 351; McNeer *v.* McNeer, 142 Ill. 388, 32 N. E. 681, 19 L. R. A. 256; Rose *v.* Sanderson, 38 Ill. 247.

14. Zeust *v.* Staffan, 16 App. Cas. (D. C.) 141; Clay *v.* Mayr, 144 Mo. 376, 46 S. W. 157; Wyatt *v.* Smith, 25 W. Va. 813: 2 Bl. Comm. 127; Cooley Const. Lim. (7th ed.) 513.

Legislature may exempt curtesy initiate from liability for debts of husband created after passage of act. Hitz *v.* National Met-

destroyed.[15] When vested, curtesy initiate is an estate in the husband for his natural life, separate and distinct from the estate of the wife.[16]

C. Right to as Affected by Married Women's Acts. Curtesy initiate has been much affected by statutory enactments giving to married women greater rights to and control over their property. It has been generally held that the effect of these acts is to abolish curtesy initiate in all property of the wife acquired after their enactment.[17] Curtesy initiate which has become vested cannot be divested by these acts for constitutional reasons.[18]

IV. REQUISITES.

A. In General. At the common law of England and in the United States in the jurisdictions in which the estate by the curtesy is recognized as a common-law estate, except as otherwise provided by statute,[19] and generally in those states in which curtesy is expressly given by statute it is requisite to entitle the husband to curtesy consummate that there be a legal marriage, sufficient seizin of the wife of an estate of inheritance during coverture, birth of issue, born alive capable of inheriting the estate, and death of the wife before that of the husband.[20]

ropolitan Bank, 111 U. S. 722, 4 S. Ct. 613, 28 L. ed. 577.

The court will not disturb the vested marital right of the husband when he is not guilty of any conduct that would give the wife a divorce. Van Duzer *v.* Van Duzer, 6 Paige (N. Y.) 366, 31 Am. Dec. 257.

15. Zenst *v.* Staffan, 16 App. Cas. (D. C.) 141; Monroe *v.* Van Meter, 100 Ill. 347; Phillips *v.* Farley, 66 S. W. 1006, 23 Ky. L. Rep. 2201; Wyatt *v.* Smith, 25 W. Va. 813; Cooley Const. Lim. (6th ed.) 440.

16. Shortall *v.* Hinckley, 31 Ill. 219; Williams *v.* Lanier, 44 N. C. 30; Canby *v.* Porter, 12 Ohio 79; Lancaster County Bank *v.* Stauffer, 10 Pa. St. 398.

17. *Arkansas.*— Neelly *v.* Lancaster, 47 Ark. 175, 1 S. W. 66, 58 Am. Rep. 752.

Delaware.— Moore *v.* Darby, 6 Del. Ch. 193, 18 Atl. 768, 13 L. R. A. 346.

District of Columbia.— Uhler *v.* Adams, 1 App. Cas. 392.

Indiana.— Luntz *v.* Greve, 102 Ind. 173, 26 N. E. 128.

Massachusetts.—Staples *v.* Brown, 13 Allen 64.

Michigan.— Hill *v.* Chambers, 30 Mich. 422; Tong *v.* Marvin, 15 Mich. 60.

Mississippi.— Hill *v.* Nash, 73 Miss. 849, 19 So. 707.

Missouri.— Dyer *v.* Wittler, 14 Mo. App. 52.

New Jersey.— Ross *v.* Adams, 28 N. J. L. 160; Porch *v.* Fries, 18 N. J. Eq. 204.

New York.— Billings *v.* Baker, 28 Barb. 343; Hurd *v.* Cass, 9 Barb. 366; Billings *v.* Baker, 15 How. Pr. 525.

North Carolina.— Walker *v.* Long, 109 N. C. 510, 14 S. E. 299.

Ohio.— Hershizer *v.* Florence, 39 Ohio St. 516.

Virginia.— Welsh *v.* Solenberger, 85 Va. 441, 8 S. E. 91; Alexander *v.* Alexander, 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125; Breeding *v.* Davis, 77 Va. 639, 46 Am. Rep. 740.

See 15 Cent. Dig. tit. "Curtesy," § 15.

Under the Illinois statute the estate of tenancy by the curtesy initiate is not abolished. McNeer *v.* McNeer, 142 Ill. 388, 32 N. E. 681, 19 L. R. A. 256. Nevertheless, the statute makes it contingent, and it does not vest in the husband until the death of the wife. Lucas *v.* Lucas, 103 Ill. 121; Beach *v.* Miller, 51 Ill. 206, 2 Am. Rep. 290; Cole *v.* Van Riper, 44 Ill. 58.

18. See *supra*, III, B.

19. See *infra*, IV, D, 4.

20. *Alabama.*— Hunter *v.* Whitworth, 9 Ala. 965.

Arkansas.— McDaniel *v.* Grace, 15 Ark. 465.

Connecticut.— Todd *v.* Oviatt, 58 Conn. 174, 20 Atl. 440, 7 L. R. A. 693.

Delaware.— Jackson *v.* Collins, 2 Houst. 128; Moore *v.* Darby, 6 Del. Ch. 193, 18 Atl. 768, 13 L. R. A. 346.

District of Columbia.— Rhodes *v.* Robie, 9 App. Cas. 305; Smith *v.* Smith, 21 D. C. 289; De Hart *v.* Dean, 2 MacArthur 60.

Illinois.— McNeer *v.* McNeer, 142 Ill. 388, 32 N. E. 681, 19 L. R. A. 256; Bozarth *v.* Largent, 128 Ill. 95, 21 N. E. 218; Monroe *v.* Van Meter, 100 Ill. 347.

Mississippi.— Stewart *v.* Ross, 50 Miss. 776; Malone *v.* McLaurin, 40 Miss. 161, 90 Am. Dec. 320; Ryan *v.* Freeman, 36 Miss. 175; Day *v.* Cochran, 24 Miss. 261.

Nebraska.— Forbes *v.* Sweesy, 8 Nebr. 520, 1 N. W. 571, issue unnecessary.

New York.— Furguson *v.* Tweedy, 56 Barb. 168; Billings *v.* Baker, 28 Barb. 343; Jackson *v.* Johnson, 5 Cow. 74, 15 Am. Dec. 433.

Rhode Island.— Burgess *v.* Muldoon, 18 R. I. 607, 22 Atl. 298, 24 L. R. A. 798.

South Carolina.— Withers *v.* Jenkins, 14 S. C. 597.

Tennessee.— Templeton *v.* Twit 38 Tenn. 595, 14 S. W. 435; Gillespie *v.* Worford, 2 Coldw. 632; Guion *v.* Anderson, 8 Humphr. 298.

Virginia.— Breeding *v.* Davis, 77 Va. 639,

B. Validity of Marriage. The marriage must be between parties who are legally capable of entering into the contract of marriage, and valid by the positive law.[21]

C. Seizin — 1. Of Wife's Legal Estate — a. Necessity of Actual Seizin — (I) *The General Rule.* It was necessary by the strict rule of the common law that the wife or the husband for the wife be seized in fact during coverture of her legal estates of inheritance,[22] and except where the rule has been abrogated by statute[23] or where it is impossible to acquire actual seizin.[24] The rule, with some limitations to be hereafter adverted to,[25] still obtains in many jurisdictions that the wife or the husband for the wife must have seizin or that which is deemed actual seizin during coverture of her estates upon which entry may be made.[26]

(II) *Limitations of Rule* — (A) *Introductory Statement.* As intimated in

46 Am. Rep. 740; Muse *v.* Friedenwald, 77 Va. 57; Carpenter *v.* Garrett, 75 Va. 129; Porter *v.* Porter, 27 Gratt. 599.

West Virginia.— Guernsey *v.* Lazear, 51 W. Va. 328, 41 S. E. 405; Winkler *v.* Winkler, 18 W. Va. 455.

Wisconsin.— Westcott *v.* Miller, 42 Wis. 454.

United States.— Stoddard *v.* Gibbs, 23 Fed. Cas. No. 13,468, 1 Sumn. 263.

England.— Jones *v.* Davies, 7 H. & N. 507.

See 15 Cent. Dig. tit. "Curtesy," § 5.

21. If the marriage is absolutely void in law, the husband will not be entitled to curtesy even if the other requisites exist. Wells *v.* Thompson, 13 Ala. 793, 48 Am. Dec. 76; 2 Bl. Comm. 127; 2 Crabb Real Prop. 99; 1 Cruise Dig. 107.

If the marriage is voidable under the canon law it is sufficient if it is not avoided during the life of the wife. It cannot be avoided after her death. 1 Cruise Dig. 107; Washburn Real Prop. (6th ed.) § 318.

22. *Delaware.*— Hunter *v.* Lank, 1 Harr. 10.

District of Columbia.— De Hart *v.* Deam, 2 MacArthur 60.

New Jersey.— Hopper *v.* Demarest, 21 N. J. L. 525.

North Carolina.— Nixon *v.* Williams, 95 N. C. 103.

West Virginia.— Fulton *v.* Johnson, 24 W. Va. 95.

Wisconsin.— Westcott *v.* Miller, 42 Wis. 454.

United States.— Mercer *v.* Selden, 1 How. 37, 11 L. ed. 38.

England.— Parker *v.* Carter, 4 Hare 400, 30 Eng. Ch. 400.

Canada.— Wigle *v.* Merrick, 8 U. C. C. P. 307.

See 15 Cent. Dig. tit. "Curtesy," § 6.

23. In North Carolina by express statutory enactment neither actual nor legal seizin is now necessary. Sears *v.* McBride, 70 N. C. 152.

24. E[illegible] *v.* Furnivall, 17 Ch. D. 115, 50 L. J. Ch. 537, 44 L. T. Rep. N. S. 464, 29 Wkly. Rep. 649.

Actual seizin of incorporeal hereditaments is not necessary. Mercer *v.* Selden, 1 How. (U. S.) 37, 11 L. ed. 38; Barr *v.* Galloway, 2 Fed. Cas. No. 1,037, 1 McLean 476; Shelley's Case, 1 Coke 93*b*.

Actual seizin when prevented by force is not necessary. Mercer *v.* Selden, 1 How. (U. S.) 37, 11 L. ed. 38.

25. See *infra*, IV, C, 1, a, (II).

26. *Arkansas.*— Luttrell *v.* Reynolds, 63 Ark. 254, 37 S. W. 1051; Bogy *v.* Roberts, 48 Ark. 17, 2 S. W. 186, 3 Am. St. Rep. 211; McDaniel *v.* Grace, 15 Ark. 465.

District of Columbia.— Rhodes *v.* Robie, 9 App. Cas. 305; Smith *v.* Smith, 21 D. C. 289; De Hart *v.* Dean, 2 MacArthur 60.

Kentucky.— Petty *v.* Malier, 15 B. Mon. 591; Stinebaugh *v.* Wisdom, 13 B. Mon. 467; Welch *v.* Chandler, 13 B. Mon. 420; Neely *v.* Butler, 10 B. Mon. 48; Orr *v.* Hollidays, 9 B. Mon. 59; Vanarsdall *v.* Fauntleroy, 7 B. Mon. 401; Adams *v.* Logan, 6 T. B. Mon. 175.

New Jersey.— Hopper *v.* Demarest, 21 N. J. L. 525.

Virginia.— Muse *v.* Friedenwald, 77 Va. 57; Carpenter *v.* Garrett, 75 Va. 129.

West Virginia.— Fulton *v.* Johnson, 24 W. Va. 95.

United States.— Mercer *v.* Selden, 1 How. 37, 11 L. ed. 38; Green *v.* Liter, 8 Cranch 229, 3 L. ed. 545.

See 15 Cent. Dig. tit. "Curtesy," § 6.

No seizin during coverture.— A woman of full age before marriage by verbal contract sold land and received the purchase-money. The purchaser was put in possession, but no deed made until after she was married and had issue born alive, when a deed in which her husband joined was given the purchaser. It was held that the husband was not tenant by the curtesy. Welch *v.* Chandler, 13 B. Mon. (Ky.) 420.

Seizin as trustee.— The naked seizin of the wife of an estate held as trustee will not suffice to make the husband tenant by the curtesy, although she has the beneficial interest in the reversion. Chew *v.* Southwark, 5 Rawle (Pa.) 160.

Seizin by decree of court.— A decree of the court settling the right of a husband and his wife in the lands of his wife is equivalent to an actual possession by the husband and is sufficient seizin to entitle the husband to

the preceding section the formal strictness of this rule has been somewhat relaxed in England and in many of the United States.[27]

(B) *Where There Is No Adverse Possession.* Thus in most jurisdictions now it is only necessary that the wife be seized in law during coverture of her legal estates of inheritance not adversely held.[28]

(C) *Where Lands Are Wild and Uncultivated.* So it is not necessary for the wife to be actually seized of her wild and uncultivated lands not adversely held except in one jurisdiction.[29] Seizin in law or constructive seizin without entry is sufficient.[30]

(D) *Other Limitations of Rule.* In some states it is sufficient seizin if the wife have a right of entry,[31] and in one state it is held that the rule requiring actual seizin applies only to cases where her title is not complete before entry, as where she takes by descent or devise and not where her title is acquired by virtue of a conveyance which under the statute of uses passes the legal title and seizin without necessity of entry.[32]

b. What Is a Sufficient Actual Seizin — (I) *In General.* It is generally held sufficient seizin in fact of the wife of her legal estates of inheritance if the seizin is cast upon the wife by law,[33] or if one is in possession whose possession in law is deemed the possession of the wife, she having the legal title,[34] or when the wife

curtesy. Ellsworth *v.* Cook, 8 Paige (N. Y.) 643; Seim *v.* O'Grady, 42 W. Va. 77, 24 S. E. 994.

27. *Maine.*— Wass *v.* Bucknam, 38 Me. 356.

Mississippi.—Malone *v.* McLaurin, 40 Miss. 161, 90 Am. Dec. 320.

New York.— Furguson *v.* Tweedy, 56 Barb. 168; Ellsworth *v.* Cook, 8 Paige 643.

Tennessee.— Gillespie *v.* Worford, 2 Coldw. 632.

United States.—Davis *v.* Mason, 1 Pet. 503, 7 L. ed. 239.

England.— De Gray *v.* Richardson, 3 Atk. 469.

28. *Connecticut.*—Todd *v.* Oviatt, 58 Conn. 174, 20 Atl. 440, 7 L. R. A. 693; Kline *v.* Beebe, 6 Conn. 494; Bush *v.* Bradley, 4 Day 298.

Illinois.— Mettler *v.* Miller, 129 Ill. 630, 22 N. E. 529.

Maine.— Wass *v.* Bucknam, 38 Me. 356.

Mississippi.— Redus *v.* Hayden, 43 Miss. 614; Robb *v.* Griffin, 26 Miss. 579; Day *v.* Cochran, 24 Miss. 261.

Missouri.— Stephens *v.* Hume, 25 Mo. 349; Harvey *v.* Wickham, 23 Mo. 112; McKee *v.* Cottle, 6 Mo. App. 416.

Ohio.— Watkins *v.* Thornton, 11 Ohio St. 367; Merritt *v.* Horne, 5 Ohio St. 307, 67 Am. Dec. 298; Mitchell *v.* Ryan, 3 Ohio St. 377; Borland *v.* Marshall, 2 Ohio St. 308, adversely held.

Pennsylvania.— Buchanan *v.* Duncan, 40 Pa. St. 82.

Tennessee.— Guion *v.* Anderson, 8 Humphr. 298; McCorry *v.* King, 3 Humphr. 267, 39 Am. Dec. 165.

See 15 Cent. Dig. tit. "Curtesy," § 6.

Seizin in law of a reversion by the wife gives the husband curtesy in the land. McKee *v.* Cottle, 6 Mo. App. 416.

29. Neely *v.* Butler, 10 B. Mon. (Ky.) 48; Vanarsdall *v.* Fauntleroy, 7 B. Mon. (Ky.) 401.

30. *Alabama.*—Wells *v.* Thompson, 13 Ala. 793, 48 Am. Dec. 76.

Arkansas.— Luttrell *v.* Reynolds, 63 Ark. 254, 37 S. W. 1051; McDaniels *v.* Grace, 15 Ark. 465.

Mississippi.—Malone *v.* McLaurin, 40 Miss. 161, 90 Am. Dec. 320; Day *v.* Cochran, 24 Miss. 261.

New York.— Ferguson *v.* Tweedy, 43 N. Y. 543 [*affirming* 56 Barb. 168]; Jackson *v.* Sellick, 8 Johns. 262.

Tennessee.— Guion *v.* Anderson, 8 Humphr. 298.

Wisconsin.— Westcott *v.* Miller, 42 Wis. 454.

United States.— Mercer *v.* Selden, 1 How. 37, 11 L. ed. 38; Davis *v.* Mason, 1 Pet. 503, 7 L. ed. 239; Green *v.* Liter, 8 Cranch 229, 3 L. ed. 545; Barr *v.* Galloway, 2 Fed. Cas. No. 1,037, 1 McLean 476.

Judicial sale of vacant lands.— By virtue of a decree of confirmation of a judicial sale of vacant and occupied lots or lands, the purchaser has by construction of law such possession as amounts to such seizin in fact as will entitle the husband of such purchaser to curtesy in such lots or lands. Seim *v.* O'Grady, 42 W. Va. 77, 24 S. E. 994.

31. Kline *v.* Beebe, 6 Conn. 494; Merritt *v.* Horn, 5 Ohio St. 307, 67 Am. Dec. 298; Mitchell *v.* Ryan, 3 Ohio St. 377.

32. Adair *v.* Lott, 3 Hill (N. Y.) 182. See also Carr *v.* Anderson, 6 N. Y. App. Div. 6, 39 N. Y. Suppl. 746.

33. Adair *v.* Lott, 3 Hill (N. Y.) 182; Childers *v.* Bumgarner, 73 N. C. 297; Seim *v.* O'Grady, 42 W. Va. 77, 24 S. E. 994.

Where a married woman claims land under letters patent from the crown her husband need not enter upon the land to entitle him to tenancy by the curtesy. Letters patent constitute seizin in fact. Weaver *v.* Burgess, 22 U. C. C. P. 104.

34. *Kentucky.*— Ellis *v.* [illegible] Ky. 620, 23 S. W. 366, 15 Ky. [illegible] 8;

is a cotenant or coparcener, and one of her cotenants or coparceners is in amicable possession of the lands.[35]

(II) *Seizin at Birth of Issue.* Except in one jurisdiction,[36] it is not necessary that the required seizin of the wife of her legal or equitable estates be concurrent with the birth of issue.[37]

2. Of Wife's Equitable Estate. Equity follows the law and gives the husband curtesy in the equitable estates of inheritance of the wife of which she is sufficiently seized in equity during coverture.[38]

D. Birth of Issue — 1. Birth of Issue Alive. It is necessary unless otherwise provided by statute,[39] in all jurisdictions in which curtesy is recognized as a common-law estate or is expressly given by statute, that legitimate issue of the marriage be born alive.[40]

Sweeney *v.* Montgomery, 85 Ky. 55, 2 S. W. 562, 8 Ky. L. Rep. 944; Carr *v.* Givens, 9 Bush 679, 15 Am. Rep. 747; Phillips *v.* Ditto, 2 Duv. 549; Powell *v.* Gossom, 18 B. Mon. 179.

Mississippi.— Day *v.* Cochran, 24 Miss. 261.

New York.— Ferguson *v.* Tweedy, 43 N. Y. 543; Vrooman *v.* Shephard, 14 Barb. 441; Jackson *v.* Johnson, 5 Cow. 74, 15 Am. Dec. 433.

North Carolina.— Nixon *v.* Williams, 95 N. C. 103; Carter *v.* Williams, 43 N. C. 177.

Pennsylvania.— Rankin's Appeal, (1888) 16 Atl. 82.

United States.— Green *v.* Liter, 8 Cranch 229, 3 L. ed. 545.

England.— De Grey *v.* Richardson, 3 Atk. 469, 26 Eng. Reprint 1069.

See 15 Cent. Dig. tit. "Curtesy," § 6.

Estate held for the payment of a debt.—By will land was devised to the testator's daughter in fee, but the will provided that the wife hold the estate until she could raise money to pay a certain debt. It was held that the daughter became seized on the death of the testator so as to make her husband tenant by the curtesy, although the particular estate did not terminate during her life. Robertson *v.* Stevens, 36 N. C. 247. See Carter *v.* Williams, 43 N. C. 177.

Where a husband in right of his wife became a partner with others in the ownership of a cotton factory and mills and in the management of the business, it was held that his wife was sufficiently seized to give him curtesy. Buckley *v.* Buckley, 11 Barb. (N. Y.) 43.

35. Rhodes *v.* Robie, 9 App. Cas. (D. C.) 305; Carr *v.* Givens, 9 Bush (Ky.) 679, 15 Am. Rep. 747; Buckley *v.* Buckley, 11 Barb. (N. Y.) 43; Childers *v.* Bumgarner, 53 N. C. 297.

36. Gentry *v.* Wagstaff, 14 N. C. 270.

37. It is sufficient if the wife or the husband for the wife be sufficiently seized before or after birth or even after the death of issue if seized during coverture.

Alabama.— Hunter *v.* Whitworth, 9 Ala. 965.

Connecticut.—Heath *v.* White, 5 Conn. 228.

Massachusetts.— Comer *v.* Chamberlain, 6 Allen 166.

New York.— Jackson *v.* Johnson, 5 Cow. 74, 15 Am. Dec. 433.

North Carolina.— Childers *v.* Bumgarner, 53 N. C. 297.

Tennessee.— Templeton *v.* Twitty, 88 Tenn. 595, 14 S. W. 435; Guion *v.* Anderson, 8 Humphr. 298.

38. It is necessary that the wife have of her equitable estates what amounts in equity to the seizin required of her legal estates in the same jurisdiction. The receipt of the rents and profits of an estate in the possession of a trustee is held sufficient equitable seizin in those jurisdictions requiring actual seizin.

District of Columbia.— Frey *v.* Allen, 9 App. Cas. 400.

Kentucky.— Sweesy *v.* Montgomery, 85 Ky. 55; Powell *v.* Gossom, 18 B. Mon. 179.

New Jersey.— Cushing *v.* Blake, 30 N. J. Eq. 689.

South Carolina.— Withers *v.* Jenkins, 14 S. C. 597.

Tennessee.— Baker *v.* Heiskell, 1 Coldw. 641.

Conveyance in contemplation of marriage. — Where a woman in contemplation of marriage grants a term of seventy-five years of her realty to a trustee, in trust for her own use during the contemplated marriage, the husband is entitled to curtesy, issue having been born of the marriage. Lowry *v.* Steele, 4 Ohio 170.

39. See *infra*, IV, D, 4.

40. *Alabama.*—Nicrosi *v.* Phillipi, 91 Ala. 299, 8 So. 561; Grimball *v.* Patton, 70 Ala. 626.

Arkansas.— McDaniel *v.* Grace, 15 Ark. 465.

Delaware.— Doe *v.* Roe, 5 Houst. 477.

Kentucky.— Goff *v.* Anderson, 91 Ky. 303, 15 S. W. 866, 12 Ky. L. Rep. 888, 11 L. R. A. 825.

Mississippi.— Ryan *v.* Freeman, 36 Miss. 175.

New York.— Marsellis *v.* Thalhimer, 2 Paige 35, 21 Am. Dec. 66.

North Carolina.— Childers *v.* Bumgarner, 53 N. C. 297.

West Virginia.— Winkler *v.* Winkler, 18 W. Va. 455.

England.— Paine's Case, 8 Coke 34*a*.

See 15 Cent. Dig. tit. "Curtesy," § 12.

2. Birth of Issue During Life of Wife. The lawful issue of the marriage must be born alive during the lifetime of the mother.[41]

3. Birth of Issue Capable of Inheriting. The issue in addition to being born alive must be capable of inheriting the estates of the wife as her heir.[42]

4. Statutory Exception to Rule Requiring Birth of Issue. The birth of issue is made unnecessary by statute in some jurisdictions.[43]

E. Death of Wife — Curtesy Consummate. The husband must survive the wife.[44] On her death the surviving husband, if all other requisites have existed, becomes vested with a freehold estate known as curtesy consummate.[45]

V. PROPERTY OR ESTATES SUBJECT TO CURTESY.

A. Statutory Separate Estate — 1. In General. In all the jurisdictions of the United States in which the estate by the curtesy now exists, and in England, enactments have been passed creating a statutory separate estate for married women.[46] The general effect of these acts is not to abolish curtesy but to give

Where the marriage of parents of a bastard legitimates the issue the husband is entitled to curtesy. Hunter *v.* Whitworth, 9 Ala. 965.

If the issue after birth has life distinct from and independent of the mother, although it die immediately, it is born alive. Doe *v.* Killen, 5 Houst. (Del.) 14.

A distinct effort to breathe made by the issue after birth and while the umbilical cord is yet uncut is proof that the issue was born alive. Goff *v.* Anderson, 91 Ky. 303, 15 S. W. 866, 12 Ky. L. Rep. 888, 11 L. R. A. 825.

Birth of living issue after conveyance by a married woman of land held by her to her sole and separate use entitles her husband to curtesy therein. Comer *v.* Chamberlain, 6 Allen (Mass.) 166.

41. Marsellis *v.* Thalhimer, 2 Paige (N. Y.) 35, 21 Am. Dec. 66; Paine's Case, 8 Coke 34*a*.

That it is alive in ventre sa mere and is delivered by Cæsarean or other operation after the death of the mother is not sufficient. Marsellis *v.* Thalhimer, 2 Paige (N. Y.) 35, 21 Am. Dec. 66; Murdock *v.* Reed, 1 Disn. (Ohio) 274, 12 Ohio Dec. (Reprint) 618; Paine's Case, 8 Coke 34*a*; 1 Coke Litt. 29*b*.

42. *Connecticut.*— Heath *v.* White, 5 Conn. 228.

Delaware.— Doe *v.* Collins, 2 Houst. 128.

Mississippi.—Taylor *v.* Smith, 54 Miss. 50; Ryan *v.* Freeman, 36 Miss. 175.

Vermont.— Bennett *v.* Camp, 54 Vt. 36.

England.— Sumner *v.* Partridge, 2 Atk. 47, 26 Eng. Reprint 425.

See 15 Cent. Dig. tit. "Curtesy," § 12.

It is not necessary that the issue actually inherit. The possibility that it may inherit is sufficient. Day *v.* Cochran, 24 Miss. 261; Sumner *v.* Partridge, 2 Atk. 47, 26 Eng. Reprint 425.

When the issue would take by purchase and not by inheritance the surviving husband is not entitled to curtesy. Janney *v.* Sprigg, 7 Gill (Md.) 197, 48 Am. Dec. 557; Barker *v.* Barker, 2 Sim. 249, 2 Eng. Ch. 249.

43. Forbes *v.* Sweesy, 8 Nebr. 520, 1 N. W. 571; Hershizer *v.* Florence, 39 Ohio St. 516; Denny *v.* McCabe, 35 Ohio St. 576; Murdock *v.* Reed, 1 Disn. (Ohio) 274, 12 Ohio Dec. (Reprint) 618; McMaster *v.* Negley, 152 Pa. St. 303, 25 Atl. 641; Lancaster County Bank *v.* Stauffer, 10 Pa. St. 398; Gamble's Estate, 1 Pars. Eq. Cas. (Pa.) 489; Kingsley *v.* Smith, 14 Wis. 360.

That the wife has an illegitimate child to inherit from her does not preclude the surviving husband from curtesy. Bruner *v.* Briggs, 39 Ohio St. 478.

44. *Connecticut.*—Wheeler *v.* Hotchkiss, 10 Conn. 225.

Kentucky.— Oldham *v.* Henderson, 5 Dana 254.

New Hampshire.— Foster *v.* Marshall, 22 N. H. 491.

New Jersey.— Porch *v.* Fries, 18 N. J. Eq. 204.

New York.— Jackson *v.* Johnson, 5 Cow. 74, 15 Am. Dec. 433.

Virginia.— Breeding *v.* Davis, 77 Va. 639, 46 Am. Rep. 740.

England.— Jones *v.* Davies, 7 H. & N. 507.

45. *Arkansas.*— Hampton *v.* Cook, 64 Ark. 353, 42 S. W. 535, 62 Am. St. Rep. 194.

Connecticut.— Todd *v.* Oviatt, 58 Conn. 174, 20 Atl. 440, 7 L. R. A. 693; Watson *v.* Watson, 13 Conn. 83; Wheeler *v.* Hotchkiss, 10 Conn. 225.

District of Columbia.— Smith *v.* Smith, 21 D. C. 289.

Illinois.— Jackson *v.* Jackson, 144 Ill. 274, 33 N. E. 51, 36 Am. St. Rep. 427; McNeer *v.* McNeer, 142 Ill. 388, 32 N. E. 681, 19 L. R. A. 256; Bozarth *v.* Largent, 128 Ill. 95, 21 N. E. 218; Lucas *v.* Lucas, 103 Ill. 121; Beach *v.* Miller, 51 Ill. 206, 2 Am. Rep. 290.

Kentucky.— Malone *v.* Conn, 95 Ky. 93, 23 S. W. 677, 15 Ky. L. Rep. 421.

Mississippi.—Day *v.* Cochran, 24 Miss. 261.

New Jersey.— Nicholls *v.* O'Neill, 10 N. J. Eq. 88.

Pennsylvania.— Gamble's Estate, 1 Pars. Eq. Cas. 489.

Tennessee.— Templeton *v.* Twitty, 88 Tenn. 595, 14 S. W. 435.

46. Schouler Dom. Rel. 4th ed.) 176, note 3; Schouler Husb. & W. (1882) Appendix; 6 So. L. Rev. 633.

married women the power, absolute in some cases, qualified in others, to deal with their property during coverture in the same manner as if unmarried, and to entitle the husband to curtesy only in such estates of inheritance as the wife possessed at her death undisposed of by will when given power to devise.[47] The vested marital interest of the husband is not affected by these acts.[48]

2. PROPERTY CONVEYED TO WIFE'S SEPARATE USE. The husband will be tenant by the curtesy of the deceased wife's legal estates conveyed to her by deed or devise for her sole and separate use during life, when no provision is made for a successor on her death.[49] When the children of the wife take her legal estate

47. *Arkansas.*— Neelly *v.* Lancaster, 47 Ark. 175, 1 S. W. 66, 58 Am. Rep. 752.

District of Columbia.— Smith *v.* Smith, 21 D. C. 289.

Michigan.— Brown *v.* Clark, 44 Mich. 309, 6 N. W. 679.

Mississippi.— Hill *v.* Nash, 73 Miss. 849, 19 So. 707; Rabb *v.* Griffin, 26 Miss. 579.

Montana.— Allen *v.* Roush, 15 Mont. 446, 39 Pac. 459.

New Jersey.— Johnson *v.* Cummins, 16 N. J. Eq. 97, 84 Am. Dec. 142.

New York.— Hatfield *v.* Sneden, 54 N. Y. 280; Burke *v.* Valentine, 52 Barb. 412; Clarke *v.* Clark, 24 Barb. 581; Hurd *v.* Cass, 9 Barb. 366; Jaycox *v.* Collins, 26 How. Pr. 496; Lansing *v.* Gulick, 26 How. Pr. 250.

North Carolina.—Morris *v.* Morris, 94 N. C. 613; State *v.* Mills, 91 N. C. 581; Jones *v.* Cohen, 82 N. C. 75; Jones *v.* Carter, 73 N. C. 148; Wilson *v.* Arentz, 70 N. C. 670; Long *v.* Graeber, 64 N. C. 431; Houston *v.* Brown, 52 N. C. 161.

Ohio.— Robert *v.* Sliffe, 41 Ohio St. 225.

Pennsylvania.— Rouse *v.* Directors of Poor, 169 Pa. St. 116, 32 Atl. 541.

Tennessee.— Lewis *v.* Glass, 92 Tenn. 147, 20 S. W. 571.

Virginia.—Browne *v.* Bockover, 84 Va. 424, 4 S. E. 745.

West Virginia.— Guernsey *v.* Lazear, 51 W. Va. 328, 41 S. E. 405; Winkler *v.* Winkler, 18 W. Va. 455.

Wisconsin.— Kingsley *v.* Smith, 14 Wis. 350.

See 15 Cent. Dig. tit. "Curtesy," § 3.

An alien husband subsequently becoming a citizen of the state has no curtesy in his wife's lands acquired during her separate residence, and hence a purchaser of a married woman's realty whose husband has always resided in a foreign country cannot recover a part of the purchase-price because the deed tendered him was not signed by the husband, as her deed was valid without his signature. Riel *v.* Press, 70 N. H. 334, 47 Atl. 608.

Former marriage to same man.— The Ohio act of March 1, 1869, providing that if a deceased wife leaves issue by a "former marriage" her surviving husband shall not be entitled to an estate by the curtesy in the interest of such issue in her estate, unless the estate came to the wife through the husband or his ancestors, is applicable, although the "former marriage" was to the same man. Blum *v.* Blum, 60 Ohio St. 41, 53 N. E. 493.

In Vermont the act of 1823 confines the right of the husband to hold the real estate of the wife as tenant by the curtesy to cases where they were seized in her right in fee simple. Haynes *v.* Bourn, 42 Vt. 686. No curtesy in estate held by wife in fee tail was allowable. Giddings *v.* Cox, 31 Vt. 607.

In England the Married Women's Property Act (1882, 45 & 46 Vict. c. 75) has not affected the right of a husband to an estate by the curtesy in the undisposed-of real estate of his wife. Hope *v.* Hope, [1892] 2 Ch. 336.

Equitable separate estate.— Va. Acts (1876–1877), 333, 334, and Va. Acts (1877–1878), 247, 248, amendatory thereof, creating the statutory separate estates of married women, the proviso of which recites that the separate estate created by any gift, grant, devise, or bequest shall be held according to the provisions thereof, and the provisions of the act so far as not in conflict therewith do not affect an equitable separate estate; and the husband's right of curtesy therein is determined by the rules of equity. Jones *v.* Jones, 96 Va. 749, 32 S. E. 463.

Statutory life-estate.— Ala. Code, § 2353, providing that if a married woman having a separate estate die intestate, leaving a husband, he is entitled to the use of the realty during his life, confers on the surviving husband a life-estate in such realty. Thompson *v.* Thompson, 107 Ala. 163, 18 So. 247.

48. *District of Columbia.*— Zeust *v.* Staifan, 16 App. Cas. 141.

Kentucky.— Dillon *v.* Dillon, 69 S. W. 1099, 24 Ky. L. Rep. 781.

Maine.—McLellan *v.* Nelson, 27 Me. 129.

Missouri.— Clay *v.* Mayr, 144 Mo. 376, 46 S. W. 157.

New York.— Smith *v.* Colvin, 17 Barb. 157.

See also cases cited *supra*, note 47.

See 15 Cent. Dig. tit. "Curtesy," § 3.

49. De Hart *v.* Dean, 2 MacArthur (D. C.) 60; Luntz *v.* Greve, 102 Ind. 173, 26 N. E. 128; Rank *v.* Rank, 120 Pa. St. 191, 13 Atl. 827; Freyvogle *v.* Hughes, 56 Pa. St. 228. But see Sayers *v.* Wall, 26 Gratt. (Va.) 354, 21 Am. Rep. 303.

Fee simple estate.— A deed in consideration of natural love and affection, whereby land is "granted, bargained, sold and released," unto the grantee, upon condition that she shall hold and enjoy said lands during her life, and after her death to go to all her children, "to have and to hold all the premises heretofore mentioned unto the said Sarah Chavis, her heirs and assigns, forever," conveys a title in fee simple, and entitles the

conveyed to her sole and separate use by purchase the husband will not have curtesy.[50]

3. Exclusion of Husband by Instrument of Conveyance. The husband will be barred of his right to curtesy in the statutory separate estate of his wife created by an instrument which in express terms excludes him from curtesy, or in which the intention to exclude is so clear as to leave no room for doubt.[51] But he will not be excluded by words of restraint, limitation, proviso, or condition.[52]

B. Wife's Equitable Estate — 1. In General. The husband is tenant by the curtesy of the wife's equitable estates of inheritance as well as of her legal, if the requisites exist which would entitle him to curtesy in the latter, and in some states statutes have been enacted declaratory of this rule.[53] But under a statute providing that the husband shall hold "curtesy in estates of inheritance," it has been held that a surviving husband is not entitled to curtesy in estates of which his wife had a mere equitable estate.[54]

2. Wife's Separate Equitable Estate — a. The General Rule. The general rule applies to the wife's equitable separate estates of inheritance, the rent and profits of which are paid to the wife for her sole and separate use not subject to any control or rights of the husband;[55] but it has been held that a husband is

grantee's husband to a third interest therein, upon the death of the grantee. Chavis *v.* Chavis, 57 S. C. 173, 35 S. E. 507.

50. Hatfield *v.* Sohier, 114 Mass. 48; McCulloch *v.* Valentine, 24 Nebr. 215, 38 N. W. 854; Stovall *v.* Austin, 16 Lea (Tenn.) 700; Beecher *v.* Hicks, 7 Lea (Tenn.) 207; Sumner *v.* Partridge, 2 Atk. 47, 26 Eng. Reprint 425.

Life-estate remainder to legal heirs.— Where a will bequeaths property to a woman for her natural life and then to her legal heirs, the husband of the devisee can take no estate by curtesy, as her estate terminated with her life. Waller *v.* Martin, 106 Tenn. 341, 61 S. W. 73, 82 Am. St. Rep. 882.

Remainder in trust for children.— A husband is not tenant by the curtesy in lands held in trust for the benefit of his wife during her life, and at her death in trust for her issue. Churchill *v.* Reamer, 8 Bush (Ky.) 256.

51. *Illinois.*— Monroe *v.* Van Meter, 100 Ill. 347.

Kentucky.— Rautenbusch *v.* Donaldson, 18 S. W. 536, 13 Ky. L. Rep. 752.

Missouri.— McBreen *v.* McBreen, 154 Mo. 323, 55 S. W. 463, 77 Am. St. Rep. 758.

Tennessee.— Carter *v.* Dale, 3 Lea 710, 31 Am. Rep. 660.

Wisconsin.— Haight *v.* Hall, 74 Wis. 132, 42 N. W. 109, 17 Am. St. Rep. 122, 3 L. R. A. 857.

See 15 Cent. Dig. tit. "Curtesy," § 22.

Lands conveyed in trust to a wife for her children by a former marriage are not subject to the husband's right of curtesy. Norton *v.* McDevit, 122 N. C. 755, 30 S. E. 24.

When the instrument gives the wife power to appoint and she exercises the power the husband is not entitled to curtesy. Pool *v.* Blakeie, 53 Ill. 495.

52. Mullany *v.* Mullany, 4 N. J. Eq. 16, 31 Am. Dec. 238.

A separate use trust, without more, cannot deprive the husband of his curtesy. Rank *v.* Rank, 120 Pa. St. 191, 13 Atl. 827.

The reservation by a wife in her marriage settlement of the rents and profits of her estate to her sole and separate use for life does not amount to the expression of an intent to exclude the husband from curtesy. Tillinghast *v.* Coggeshall, 7 R. I. 383.

53. *Arkansas.*— Ogden *v.* Ogden, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151.

Illinois.— Meacham *v.* Bunting, 156 Ill. 586, 41 N. E. 175, 47 Am. St. Rep. 239, 28 L. R. A. 618.

Maryland.— Rawlings *v.* Adams, 7 Md. 26; Dugan *v.* Gittings, 3 Gill 138, 43 Am. Dec. 306.

Missouri.— Alexander *v.* Warrance, 17 Mo. 228.

New Jersey.— Cushing *v.* Blake, 30 N. J. Eq. 689.

North Carolina.— Hunt *v.* Satterwhite, 85 N. C. 73.

Pennsylvania.— Carson *v.* Fuhs, 131 Pa. St. 256, 18 Atl. 1017; Ege *v.* Medlar, 82 Pa. St. 86; Dubs *v.* Dubs, 31 Pa. St. 149; Pierce *v.* Hakes, 23 Pa. St. 231; Stokes *v.* McKibbin, 13 Pa. St. 267.

Rhode Island.— Ball *v.* Ball, 20 R. I. 520, 40 Atl. 234.

South Carolina.— Withers *v.* Jenkins, 14 S. C. 597.

United States.— Davis *v.* Mason, 1 Pet. 503, 7 L. ed. 239; Robison *v.* Codman, 19 Fed. Cas. No. 11,970, 1 Sumn. 121.

See 15 Cent. Dig. tit. "Curtesy," § 21.

Curtesy in proceeds of sale.— The husband is entitled to curtesy in the proceeds of a sale of her equitable estate for partition. Forbes *v.* Smith, 40 N. C. 369.

There is no curtesy in a mere equitable right which does not amount to an estate. Sentill *v.* Robeson, 55 N. C. 510.

54. Hall *v.* Crabb, 56 Nebr. 392, 76 N. W. 865.

55. *Massachusetts.*— Richardson *v.* Stodder, 100 Mass. 528.

Mississippi.— Taylor *v.* Smith, 54 Miss. 50.

Missouri.— Soltan *v.* Soltan, 93 Mo. 307,

not entitled to curtesy in an equitable separate estate of a wife created by him, although all the common-law requisites for curtesy exist.[56]

b. Exclusion of Husband by Instrument of Conveyance. The husband will not be entitled to curtesy in the wife's equitable separate estate of inheritance when the terms of the instrument creating the estate expressly exclude him from curtesy,[57] or when the intention to exclude is so clearly expressed that there can be no doubt.[58]

C. Equity of Redemption. Curtesy attaches to an equity of redemption held by the wife.[59]

D. Estates in Expectancy, Remainder, or Reversion. The husband cannot be tenant by the curtesy of a remainder or reversion of his wife expectant on an outstanding particular freehold estate, unless the particular estate falls into the inheritance during coverture.[60] Where the wife is heir in fee to real estate subject

6 S. W. 95. Prior to 1875 a direct conveyance by a husband to his wife vested in her a separate equitable estate in which he had curtesy. Miller *v.* Quick, 158 Mo. 495, 59 S. W. 955.

New Jersey.— Cushing *v.* Blake, 29 N. J. Eq. 399.

Pennsylvania.— Dubs *v.* Dubs, 31 Pa. St. 149.

Tennessee.—Frazer *v.* Hightower, 12 Heisk. 94; Baker *v.* Heiskell, 1 Coldw. 64.

See 15 Cent. Dig. tit. "Curtesy," § 21.

Power in trustee to sell.—Where real estate is given to trustees for a married woman her heirs and assigns forever and for her and their sole and separate use and benefit, and the deed provided for a sale by the trustees, the wife or heirs joining in the deed, the proceeds to be paid to the wife for her sole and separate use, and to be disposed of as she might deem proper, her husband who survives her has curtesy in such real estate. Ege *v.* Medlar, 82 Pa. St. 86.

56. Jones *v.* Jones, 96 Va. 749, 32 S. E. 463.

57. McTigue *v.* McTigue, 116 Mo. 138, 22 S. W. 501; Tremmel *v.* Kleiboldt, 6 Mo. App. 549; Rigler *v.* Cloud, 14 Pa. St. 361; Stokes *v.* McKibbin, 13 Pa. St. 267; Cochran *v.* O'Hern, 4 Watts & S. (Pa.) 95, 39 Am. Dec. 60.

58. McCulloch *v.* Valentine, 24 Nebr. 215, 38 N. W. 854; Mullany *v.* Mullany, 4 N. J. Eq. 16, 31 Am. Dec. 238; Withers *v.* Jenkins, 14 S. C. 527.

Where the equitable separate estate is created by the husband, the intention to exclude results from the transaction itself except so far as he may have reserved his marital rights in the instrument creating the separate estate. Jones *v.* Jones, 96 Va. 749, 32 S. E. 463.

A power to appoint, given the wife by the instrument creating her separate equitable estate, if she fails to exercise, is no bar to the husband's right to curtesy. Cushing *v.* Blake, 29 N. J. Eq. 399; Tillinghast *v.* Coggeshall, 7 R. I. 383.

59. Robinson *v.* Lakenan, 28 Mo. App. 135; De Camp *v.* Crane, 19 N. J. Eq. 166; Davis *v.* Mason, 1 Pet. (U. S.) 503, 7 L. ed. 239; 4 Kent Comm. 30. And see *supra*, V, B, 1.

60. *Alabama.*— Baker *v.* Flournoy, 58 Ala. 650; Planters' Bank *v.* Davis, 31 Ala. 626.

Connecticut.—Todd *v.* Oviatt, 58 Conn. 174, 20 Atl. 440, 7 L. R. A. 693.

District of Columbia.— Rhodes *v.* Robie, 9 App. Cas. 305.

Kentucky.— Moore *v.* Calvert, 6 Bush 356; Stewart *v.* Barclay, 2 Bush 550.

Massachusetts.— Webster *v.* Ellsworth, 147 Mass. 602, 18 N. E. 569; Shores *v.* Carley, 8 Allen 425.

Mississippi.— Redus *v.* Hayden, 43 Miss. 614; Malone *v.* McLaurin, 40 Miss. 161, 90 Am. Dec. 320.

Missouri.— Cox *v.* Boyce, 152 Mo. 576, 54 S. W. 467, 75 Am. St. Rep. 483; Martin *v.* Trail, 142 Mo. 85, 43 S. W. 655.

New Hampshire.— Orford *v.* Benton, 36 N. H. 395; Fisk *v.* Eastman, 5 N. H. 240.

New York.— Ferguson *v.* Tweedy, 43 N. Y. 543; Tayloe *v.* Gould, 10 Barb. 388; Matter of Cregier, 1 Barb. Ch. 598, 45 Am. Dec. 416.

North Carolina.— Carter *v.* Williams, 43 N. C. 177.

Pennsylvania.— Keller *v.* Lamb, 10 Kulp 246.

Tennessee.— Waller *v.* Martin, 106 Tenn. 341, 61 S. W. 73, 82 Am. St. Rep. 882.

See 15 Cent. Dig. tit. "Curtesy," § 24.

Particular estate released.—Where the tenant of a particular estate surrenders to the owner of a vested remainder in tail who is a married woman, the latter thereby gains such an estate as will entitle her husband to curtesy even against the next remainder-man. Pierce *v.* Hakes, 23 Pa. St. 231.

The husband is tenant by the curtesy of a reversion of which his wife was seized in law during coverture, although held under a life-estate by the wife's mother. McKee *v.* Cottle, 6 Mo. App. 416.

Under a statute abolishing curtesy and substituting dower the husband of a wife who died vested of a remainder of which the particular tenant was then seized cannot claim his customary estate therein on the death of the particular tenant. Moore *v.* Iles, 16 Ohio Cir. Ct. 591.

Use for life.— A testator provided by his will that his widow should live on the homestead farm during her life and have certain rights and privileges. He afterward gave to

to the dower of her mother, the husband will not have curtesy in such estate if the mother is living at the death of his wife.[61]

E. Determinable Fees — 1. By Limitation. If the wife's estate of inheritance be upon a limitation by the happening of which the estate of the wife is terminable at common law, the husband will not be tenant by the curtesy in such estate if terminated during the life of the wife.[62]

2. By Springing Use or Executory Devise. If the wife's estate of inheritance is limited over by way of a springing use or executory devise by which her original estate is determined before its natural expiration and a new estate substituted in its place, the seizin and estate which the wife had are sufficient to entitle her husband to curtesy.[63]

3. By Failure of Issue. When the wife's estate is subject to be defeated only in the event of her death leaving no issue, the husband is entitled to curtesy in the estate if issue has been born capable of inheriting the estate.[64]

F. Estate Held by Third Person. Where by will a naked power of sale is given to the executor, the husband of the testator's daughter dying after the testator and before a sale by the executors is entitled to curtesy.[65] Curtesy attaches to the estate of the wife held by her guardian or when conveyed to one

each of his two daughters one half of his real estate for the use and benefit of their heirs. It was held that the husband of one of the daughters who died during the lifetime of her mother was entitled to curtesy in one half of the homestead farm. Buchanan *v.* Duncan, 40 Pa. St. 82.

Vested remainder in fee.— The husband is tenant by the curtesy of a vested remainder in fee. Young *v.* Langbein, 7 Hun (N. Y.) 151.

Where the particular life-estate and the immediate reversion unite in a married woman during coverture, her husband is entitled to curtesy therein. Tayloe *v.* Gould, 10 Barb. (N. Y.) 388.

61. Gibbs *v.* Esty, 22 Hun (N. Y.) 266; Graham *v.* Luddington, 19 Hun (N. Y.) 246; Matter of Cregier, 1 Barb. Ch. (N. Y.) 598, 45 Am. Dec. 416; Carter *v.* Williams, 43 N. C. 177; Hitner *v.* Ege, 23 Pa. St. 305; Keller *v.* Lamb, 10 Kulp (Pa.) 246; Upchurch *v.* Anderson, 3 Baxt. (Tenn.) 410; Reed *v.* Reed, 3 Head (Tenn.) 491, 75 Am. Dec. 777.

Quarantine.— The right of quarantine of a widow before dower is assigned will not bar curtesy. Mettler *v.* Miller, 129 Ill. 630, 22 N. E. 529.

In Virginia, under a statute providing that the widow may remain on the premises without being charged with rent until her dower is assigned, where dower is never assigned, but she remains in possession of the property, a husband of a daughter who dies, leaving issue, in the lifetime of her mother, is not entitled to curtesy in such property. Carpenter *v.* Garrett, 75 Va. 129.

62 Harvey *v.* Brisbin, 143 N. Y. 151, 38 N. E. 108; Hatfield *v.* Sneden, 54 N. Y. 280; McMasters *v.* Negley, 152 Pa. St. 303, 25 Atl. 641; Coke Litt. 241 note.

A grant of land to a daughter for life and after her death to the heirs of her body creates a conditional fee in the daughter, and after her death, leaving children, her husband is entitled to hold the land as tenant by the curtesy. Odom *v.* Beverly, 32 S. C. 107, 10 S. E. 835.

Contingent use.— The husband is entitled to curtesy in a contingent use. McDaniel *v.* Grace, 15 Ark. 465.

Curtesy in a fee conditional.—The curtesy of a husband attaches to a fee conditional in the wife. Withers *v.* Jenkins, 14 S. C. 597.

Termination of estate at death.— An infant married woman had an estate in lands determinable in the event of her dying under age and without issue, which event happened after the birth of a child alive. It was held that the husband was entitled to curtesy. Taliaferro *v.* Burwell, 4 Call (Va.) 321.

63. Martin *v.* Renaker, 9 S. W. 419, 10 Ky. L. Rep. 469; Hatfield *v.* Sneden, 54 N. Y. 280; McMasters *v.* Negley, 152 Pa. St. 303, 25 Atl. 641; Crumley *v.* Deake, 8 Baxt. (Tenn.) 361.

64. Webb *v.* Lexington First Colored Baptist Church, 90 Ky. 117, 13 S. W. 362, 11 Ky. L. Rep. 926; Northcut *v.* Whipp, 12 B. Mon. (Ky.) 65; Thornton *v.* Krepps, 37 Pa. St. 391; Hay *v.* Mayer, 8 Watts (Pa.) 203, 34 Am. Dec. 453; Buchannan *v.* Sheffer, 2 Yeates (Pa.) 374; Holden *v.* Wells, 18 R. I. 802, 31 Atl. 265; Coke Litt. 241*a*. Where a testator devises land to his daughter in fee tail, directing that in case she shall die without issue his executors shall sell the land and divide the proceeds among other legatees named in the will, and the daughter dies leaving a husband, he is entitled to curtesy, issue having been born. Hay *v.* Mayer, 8 Watts (Pa.) 203, 34 Am. Dec. 453.

65. Romaine *v.* Hendrickson, 24 N. J. Eq. 231; Dunscomb *v.* Dunscomb, 1 Johns. Ch. (N. Y.) 508, 7 Am. Dec. 504; Rankin's Appeal, (Pa. 1888) 16 Atl. 82. Where a testator directed that his estate remain in the control of his executors for the use of his wife and children, and after the youngest grandchild should arrive at the age of twenty-one years that it be divided, it was held that a daughter of testator who was of age when he died, and who died before the youngest

as her guardian.[66] So it is held in some jurisdictions that curtesy attaches to the separate estate of the wife conveyed to a trustee by her husband for her sole and separate use, and to estates conveyed to her by the husband without the intervention of a trustee.[67] In others it is held that the husband has not curtesy in such estates of the wife.[68]

G. Estate of Wife Leaving Issue by Former Marriage. Where the deceased wife leaves issue by a former marriage, but no issue of the present marriage, the surviving husband is not entitled to curtesy unless the estate came to the wife from him or one of his ancestors.[69] A surviving husband has curtesy in the interest of a child adopted by his deceased wife and her former husband.[70] Where a wife dies leaving children by a deceased husband and another husband and children by him surviving her, such surviving husband will take as tenant by the curtesy so much of the estate left by the wife as is inherited by their children.[71]

H. Estates Less Than Estates of Inheritance. A surviving second husband is entitled to curtesy in his deceased wife's dower which has been assigned or to which she was entitled as a consequence of her former marriage.[72] By statute the husband may be entitled to curtesy in the permanent leasehold estates of his deceased wife.[73] The husband is not entitled to curtesy in an estate held by the wife for her life.[74] A mere possessory right in lands is not an estate which will entitle the husband of the occupant to tenancy by the curtesy.[75]

VI. RIGHTS AND LIABILITIES OF TENANT BY THE CURTESY.

A. Rights in General. The tenant by the curtesy is entitled to exercise the same rights in the reasonable enjoyment of his estate as may be exercised by any tenant for life.[76]

B. Right to Possession. A husband is entitled to the possession of the estates in which he has curtesy,[77] and may sue in his own name for the possession

grandchild arrived at the age of twenty-one years, never had such an estate as to entitle her surviving husband to curtesy. Burke *v.* Valentine, 52 Barb. (N. Y.) 412. A testator devised the whole of his estate to his daughter and to "her heirs and assigns forever," but if she should die without issue his whole estate was to be sold by the executors. The daughter married, and had issue which died during her lifetime. It was held that her husband had curtesy. Buchannan *v.* Sheffer, 2 Yeates (Pa.) 374.

66. Phillipi *v.* Ditto, 2 Duv. (Ky.) 549; Nightingale *v.* Hidden, 7 R. I. 115.

67. *Illinois.*— Meacham *v.* Bunting, 156 Ill. 586, 41 N. E. 175, 47 Am. St. Rep. 239, 28 L. R. A. 618.

Missouri.— Soltan *v.* Soltan, 93 Mo. 307, 6 S. W. 95; Tremmel *v.* Kleiboldt, 75 Mo. 255.

New Hampshire.— Robie *v.* Chapman, 59 N. H. 41.

New Jersey.— Cushing *v.* Blake, 29 N. J. Eq. 399.

New York.— Vanderveer *v.* Vanderveer, 1 N. Y. Suppl. 897.

Tennessee.— Frazer *v.* Hightower, 12 Heisk. 94.

See 15 Cent. Dig. "Curtesy," § 27.

68. Zuest *v.* Staffan, 16 App. Cas. (D. C.) 141, 14 App. Cas. (D. C.) 200 (under statutory provision); Rigler *v.* Cloud, 14 Pa. St. 361; Sayers *v.* Wall, 26 Gratt. (Va.) 354, 21 Am. Rep. 303.

Where land is bought for the wife with personalty settled by the husband on the wife as a gift he will not be entitled to curtesy in such land. Dugger *v.* Dugger, 84 Va. 130, 4 S. E. 171.

69. Carpenter *v.* Davis, 72 Ill. 14; Hathon *v.* Lyon, 2 Mich. 93; Tilden *v.* Barker, 40 Ohio St. 411; Bruner *v.* Briggs, 39 Ohio St. 478; Denny *v.* McCabe, 35 Ohio St. 576.

Trust estate for children.—A husband cannot take as tenant by the curtesy land conveyed to his wife in trust for her children by a former marriage. Norton *v.* McDevit, 122 N. C. 755, 30 S. E. 24.

70. Clark *v.* Harlan, Ohio Prob. 106.

71. Kingsley *v.* Smith, 14 Wis. 360.

72. Neil *v.* Johnson, 11 Ala. 615; Blair *v.* Wilson, 57 Iowa 177, 10 N. W. 327.

73. Murdock *v.* Reed, 1 Disn. (Ohio) 274, 12 Ohio Dec. (Reprint) 618.

74. *Maryland.*— Janney *v.* Sprigg, 7 Gill 197, 48 Am. Dec. 557.

Missouri.— Spencer *v.* O'Neill, 100 Mo. 49, 12 S. W. 1054; Phillips *v.* La Forge, 89 Mo. 72, 1 S. W. 220.

New Jersey.— Adams *v.* Ross, 30 N. J. L. 505, 82 Am. Dec. 237.

North Carolina.— Graves *v.* Trueblood, 96 N. C. 495, 1 S. E. 918.

Tennessee.— Stovall *v.* Austin, 16 Lea 700.

75. Quinn *v.* Ladd, 37 Oreg. 261, 59 Pac. 457; Brown *v.* Watkins, 98 Tenn. 454, 40 S. W. 480. And see McDaniel *v.* Grace, 15 Ark. 465.

76. Armstrong *v.* Wilson, 60 Ill. 226.

77. Jacobs *v.* Rice, 33 Ill. 369; Miller *v.* Early, 64 Mo. 478; Miller *v.* English, 61 Mo.

of them and for damages for their detention.[78] The husband or one claiming under him may defend against one deriving title from the wife and suing for possession.[79]

C. Right to Convey or Encumber. The husband may sell, convey, assign, transfer, and mortgage his interest in his wife's estate to which he is entitled as tenant by curtesy initiate[80] or consummate.[81]

D. Right to Income From Property. The rents and profits derived from the wife's estates subject to the husband's curtesy belong to the husband absolutely.[82]

E. Right to Income From Selling Price of Property. Where estates of the wife to which curtesy has attached are sold under a power or misapplied by the executor, or taken under the power of eminent domain, the husband is entitled either to the income from the purchase-price or a sum equal to the present value of his estate determined by the rules for ascertaining present value of life-estates sanctioned in the particular jurisdiction.[83]

444; Miller *v.* McCune, 61 Mo. 248; Miller *v.* Bledsoe, 61 Mo. 96.

78. Jacobs *v.* Rice, 33 Ill. 369; Wilson *v.* Arentz, 70 N. C. 670.

79. Bransom *v.* Thompson, 81 Ky. 387; Adair *v.* Lott, 3 Hill (N. Y.) 182; Grant *v.* Townsend, 2 Hill (N. Y.) 554.

Tenant cannot be sued.— Where one holds land as tenant by curtesy, those deriving title from his deceased wife cannot sue during his life. Miller *v.* Bledsoe, 61 Mo. 96.

80. Boykin *v.* Rain, 28 Ala. 332, 65 Am. Dec. 349; National Metropolitan Bank *v.* Hitz, 1 Mackey (D. C.) 111; Jacobs *v.* Rice, 33 Ill. 369; Briggs *v.* Titus, 13 R. I. 136.

A dedication to public use of a wife's lands by her husband will not be effectual, even as to his curtesy, unless she join in the conveyance. Marshall *v.* Anderson, 78 Mo. 85.

Necessity for wife joining in deed.— The husband may convey his interest by the curtesy in his wife's estates of inheritance without the wife joining in the deed. Shortall *v.* Hinckley, 31 Ill. 219.

Rents.— Where a statute provides that no realty acquired by a *feme covert* shall be sold by the husband for the term of his natural life, except with the consent of the wife, the husband cannot sell his life-estate in his wife's realty, but may dispose of the rents. Jones *v.* Carter, 73 N. C. 148.

81. Wells *v.* Thompson, 13 Ala. 793, 48 Am. Dec. 76; Deming *v.* Miles, 35 Nebr. 739, 53 N. W. 665, 37 Am. St. Rep. 464; Long *v.* Graeber, 64 N. C. 431.

82. Hart *v.* Chase, 46 Conn. 207; Hatton *v.* Weems, 12 Gill & J. (Md.) 83; Muldowney *v.* Morris, etc., R. Co., 42 Hun (N. Y.) 444; Matthews *v.* Copeland, 79 N. C. 493.

A tenant by curtesy, agreeing to take a gross sum in the proceeds of the sale of realty in lieu of a life-estate therein is entitled to the value of his deceased wife's interest in the realty, with a deduction for the value of the coal therein, where the land was chiefly valuable for the coal and the mines had not been opened, as a life-tenant has no interest in, or right to open and work, unopened mines. Bond *v.* Godsey, 99 Va. 564, 39 S. E. 216.

Rents.— Where statutory dower has not been demanded by or set off to a surviving husband in his deceased wife's land, he cannot hold one third of the rents and profits as against her minor heirs. Bedford *v.* Bedford, 32 Ill. App. 455 [*affirmed* in 136 Ill. 354, 26 N. E. 662].

Royalties.—The husband is entitled as tenant by the curtesy to the royalties accruing on her leased land after the wife's death. Bubb *v.* Bubb, 201 Pa. St. 212, 50 Atl. 759. But *compare* Fairchild *v.* Fairchild, (Pa. 1887) 9 Atl. 255, holding that a demise of all the coal under the surface of a specific piece of land is a sale of the coal and the sums becoming due as royalties are to be regarded as purchase-money of real estate, and not as rents, and the husband of a deceased woman is not entitled to curtesy in such royalties.

83. *Maryland.*— Hoffman *v.* Rice, 38 Md. 284.

Massachusetts.— Houghton *v.* Hapgood, 13 Pick. 154.

Mississippi.— See Martin *v.* Tillman, 70 Miss. 614, 13 So. 251.

New Jersey.—Cronkright *v.* Haulenbeck, 25 N. J. Eq. 513; Jacques *v.* Ennis, 25 N. J. Eq. 402.

New York.— Benedict *v.* Seymour, 11 How. Pr. 176.

Rhode Island.— Ross *v.* North Providence, 10 R. I. 461.

Sale of mortgaged property.— Where the father as tenant by the curtesy and his son as heir at law sell land formerly the property of the deceased wife to satisfy a mortgage thereon executed by the father and mother jointly, equity will not require the curtesy interest to bear the whole burden of the debt, but will discharge the mortgage out of the proceeds of the sale, and then ascertain the present value of the curtesy interest and pay it out of the balance. *In re* Freeman, 116 N. C. 199, 21 S. E. 110.

Timber.— In ascertaining the value of the interest of a tenant by the curtesy in realty the value of the timber on the land should

F. Right to Work Mines. The husband is entitled to work mines already opened, although the surface belong to another.[84]

G. Right to Betterments. The permanent improvements made by the husband as tenant by the curtesy belong to the wife's estate.[85]

H. Liabilities — 1. In General. The tenant by the curtesy is as to the estate under the same liabilities as any other life-tenant.[86]

2. For Waste. The tenant by the curtesy is liable for waste caused by his acts or those of his lessee,[87] and he is bound to keep the premises in repair.[88]

3. For Debts. Curtesy initiate,[89] except where otherwise provided by statute,[90] and the estate consummate are liable for the debts of the tenant and may be reached by execution and sale.[91] The purchaser succeeds to the rights of the

not be deducted where the value of the land is increased by cutting the timber. Bond *v.* Godsey, 99 Va. 564, 39 S. E. 216.

Where a husband is indebted to the estate of his deceased wife, he is not entitled as tenant by the curtesy to receive the interest of a fund arising from the sale of the wife's lands until the indebtedness has been extinguished. *In re* Lewis, 13 Pa. Co. Ct. 191.

84. Rankin's Appeal, (Pa. 1888) 16 Atl. 82.

Where coal land is leased by a wife for the purpose of mining and removing coal, and no mine is actually opened on it until after her death, as to the right of her husband to curtesy in the royalty of such mine, it will be considered as open at the time of the wife's death. Alderson *v.* Alderson, 46 W. Va. 242, 33 S. E. 228.

85. Doak *v.* Wiswell, 38 Me. 569; Runey *v.* Edmands, 15 Mass. 291; Wilkinson *v.* Wilkinson, 1 Head (Tenn.) 305; Marable *v.* Jordan, 5 Humphr. (Tenn.) 417, 42 Am. Dec. 441.

86. Armstrong *v.* Wilson, 60 Ill. 226; Shortall *v.* Hinckley, 31 Ill. 219; Washburn Real Prop. (6th ed.) § 353. Thus it has been held that he must keep down interest on a mortgage. Hanford *v.* Bockee, 20 N. J. Eq. 101.

87. Rose *v.* Hays, 1 Root (Conn.) 244; Armstrong *v.* Wilson, 60 Ill. 226; Learned *v.* Ogden, 80 Miss. 769, 32 So. 278, 92 Am. St. Rep. 621; Porch *v.* Fries, 18 N. J. Eq. 204. Thus a tenant by the curtesy commits wastes by cutting and selling trees for mere profit, and the sale is not binding on the life-tenant (Learned *v.* Ogden, 80 Miss. 769, 32 So. 278, 92 Am. St. Rep. 621), so he has no power to grant another a license to cut and remove timber (McLeod *v.* Dial, 63 Ark. 10, 37 S. W. 306).

A tenant by the curtesy cannot convey the right to a lessee to extract oil from the land, and a lease executed by him purporting to convey such right is void. Barnsdall *v.* Boley, 119 Fed. 191.

A tenant by the curtesy cannot remove from the premises a building of a permanent character which he had erected during the life of his wife and child. McCullough *v.* Irvine, 13 Pa. St. 438.

88. Rose *v.* Hays, 1 Root (Conn.) 244; *In re* Steele, 19 N. J. Eq. 120.

89. *District of Columbia.*— National Metropolitan Bank *v.* Hitz, 1 Mackey 111.

Illinois.— Gay *v.* Gay, 123 Ill. 221, 13 N. E. 813.

Maine.— Beale *v.* Knowles, 45 Me. 479.

Massachusetts.— Roberts *v.* Whiting, 16 Mass. 186.

Mississippi.— Day *v.* Cochran, 24 Miss. 261.

New York.— Van Duzer *v.* Van Duzer, 6 Paige 366, 31 Am. Dec. 257.

Ohio.— Hulick *v.* Higdon, 1 Ohio Cir. Ct. 332.

Pennsylvania.— Burd *v.* Dansdale, 2 Binn. 80.

Vermont.— Hyde *v.* Barney, 17 Vt. 280, 44 Am. Dec. 335.

West Virginia.—Wyatt *v.* Smith, 25 W. Va. 813.

See 15 Cent. Dig. tit. "Curtesy," § 54.

A settlement by the husband of his estate by the curtesy initiate upon the wife will not be valid against his creditors. Wickes *v.* Clarke, 8 Paige (N. Y.) 161.

Proceedings in partition.— A judgment against the tenant by the curtesy initiate binds his estates in the wife's lands which have been ordered to be appraised in proceedings in partition, but which have not been accepted or sold at the date of the recovery of the judgment. Lancaster County Bank *v.* Stauffer, 10 Pa. St. 398.

90. *Arkansas.*— Hampton *v.* Cook, 64 Ark. 353, 42 S. W. 535, 62 Am. St. Rep. 194.

Delaware.— Evans *v.* Lobdale, 6 Houst. 212, 22 Am. St. Rep. 358.

Maryland.— Anderson *v.* Tydings, 8 Md. 427, 63 Am. Dec. 708.

Pennsylvania.— Curry *v.* Bott, 53 Pa. St. 400; Gamble's Estate, 1 Pars. Eq. Cas. 489; Teacle's Estate, 6 Pa. Co. Ct. 553.

Tennessee.— Young *v.* Lea, 3 Sneed 249.

Virginia.— Welsh *v.* Solenberger, 85 Va. 441, 8 S. E. 91.

See 15 Cent. Dig. tit. "Curtesy," § 54.

91. *Arkansas.*— Littell *v.* Jones, 56 Ark. 139, 19 S. W. 497; Stanley *v.* Bonham, 52 Ark. 354, 12 S. W. 706.

Illinois.— Bozarth *v.* Largent, 128 Ill. 95, 21 N. E. 218; Rose *v.* Sanderson, 38 Ill. 247.

Maryland.— Logan *v.* McGill, 8 Md. 461.

Massachusetts.— Roberts *v.* Whiting, 16 Mass. 186.

Mississippi.— Taylor *v.* Smith, 54 Miss. 50.

New Hampshire.— Squire *v.* Mudgett, 61 N. H. 149.

North Carolina.— McCaskill *v.* McCormac, 99 N. C. 548, 6 S. E. 423.

Ohio.— Canby *v.* Porter, 12 Ohio 79.

tenant, and acquires an estate in the property for the life of the husband[92] unless defeated by divorce.[93] The tenant by the curtesy is not able to defeat this right of his creditors by a disclaimer.[94]

VII. RELEASE, BAR, OR FORFEITURE OF RIGHT TO CURTESY.

A. Devise by Wife. When a married woman, in the exercise of a power given her in the instrument creating her separate estates or acting under a power given by statute, executes a will with the husband's assent disposing of all her estates to which curtesy would attach, the husband is barred of his rights of curtesy.[95] In some jurisdictions the statutes affecting the property of married women have been construed to the effect that the wife cannot devise her realty so as to bar curtesy,[96] while in some others the assent of the husband is not required.[97] It is also held that the assent of the husband or failure to renounce a provision in the wife's will will not bar his right to curtesy,[98] but an agreement to accept the same in lieu thereof will.[99]

B. Deed or Mortgage by Wife. Except where the power is given by statute or by conveyance to the wife,[1] she cannot by conveying or mortgaging

Vermont.— Hyde *v.* Barney, 17 Vt. 280, 44 Am. Dec. 335.

Virginia.— Browne *v.* Bockover, 84 Va. 424, 4 S. E. 745.

See 15 Cent. Dig. tit. "Curtesy," § 54.

During lives of children.— The estate by the curtesy is protected by statute from attachment for debts of the husband so long as any children of the marriage are living, except those contracted for support of wife or issue after the vesting of his estate. Sill *v.* White, 62 Conn. 430, 26 Atl. 396, 20 L. R. A. 321.

Interest on mortgage for improvements.— The estate by the curtesy is liable for interest on a mortgage placed on the wife's lands for improvements, the money having been advanced by the husband. Hanford *v.* Bockee, 20 N. J. Eq. 101.

Joint deed of trust.— Where the husband and wife execute a deed of trust on her separate estates of inheritance and she dies leaving the husband surviving, he will have no curtesy rights that can be subjected to the payment of his debts until such deed is satisfied. Campbell *v.* McBee, 92 Va. 68, 22 S. E. 807.

92. National Metropolitan Bank *v.* Hitz, 1 Mackey (D. C.) 111; Schermerhorn *v.* Miller, 2 Cow. (N. Y.) 439; Gamble's Estate, 1 Pars. Eq. Cas. (Pa.) 489. And see Aiken *v.* Suttle, 4 Lea (Tenn.) 103, holding that where the husband has conveyed his interest in the wife's land and she subsequently obtains a divorce, she does not become entitled to the land therefrom as against the grantees of the husband as if the husband had died.

Ejectment by purchaser.— Under a statute exempting from execution during coverture the interest of the husband in any right of the wife in any real estate acquired by her before or after marriage for his sole debt, a purchaser under execution cannot maintain ejectment for such interest after the wife's death. Churchill *v.* Hudson, 34 Fed. 14.

93. Townsend *v.* Griffin, 4 Harr. (Del.) 440.

94. Watson *v.* Watson, 13 Conn. 83; National Metropolitan Bank *v.* Hitz, 1 Mackey (D. C.) 111. But *compare* Shields *v.* Keys, 24 Iowa 298, holding that a husband may in this state, tenancy by the curtesy being abolished, waive and relinquish his rights to dower in land devised by his wife to another so that the title thereto will be unaffected by any right of his creditors.

95. *Kentucky.*— Garner *v.* Wills, 92 Ky. 386, 17 S. W. 1023, 13 Ky. L. Rep. 726.

Massachusetts.—Silsby *v.* Bullock, 10 Allen 94.

Missouri.— Soltan *v.* Soltan, 93 Mo. 307, 6 S. W. 95.

North Carolina.— Tiddy *v.* Graves, 126 N. C. 620, 36 S. E. 127.

Pennsylvania.— McBride's Estate, 81 Pa. St. 303.

Virginia.— Hutchings *v.* Commercial Bank, 91 Va. 628, 20 S. E. 950; Chapman *v.* Price, 83 Va. 892, 13 S. E. 879.

See 15 Cent. Dig. tit. "Curtesy," § 32.

96. Casler *v.* Gray, 159 Mo. 588, 60 S. W. 1032; Cooke's Appeal, 132 Pa. St. 533, 19 Atl. 274; Shippen's Appeal, 80 Pa. St. 391; Clarke's Appeal, 79 Pa. St. 376; Kneedler *v.* Leaver, 6 Pa. Co. Ct. 556; Alderson *v.* Alderson, 46 W. Va. 242, 33 S. E. 228. And see Garner *v.* Wills, 92 Ky. 382, 17 S. W. 1023, 13 Ky. L. Rep. 726, holding that where a married woman disposes of her land by will under a judgment of court conferring upon her the powers of an unmarried woman, the husband is deprived of his right to curtesy, and his creditors have not ground for complaint.

97. Stewart *v.* Ross, 50 Miss. 776; *Ex p.* Watts, 130 N. C. 237, 41 S. E. 289; Chapman *v.* Price, 83 Va. 392, 11 S. E. 879.

98. Beirne *v.* Beirne, 33 W. Va. 663, 11 S. E. 46; Cunningham *v.* Cunningham, 30 W. Va. 599, 5 S. E. 139.

99. Beirne *v.* Beirne, 33 W. Va. 663, 11 S. E. 46.

1. In Arkansas a husband's right of curtesy since the constitution of 1874 is lost

her property bar her husband's right of curtesy without his consent.[2] This is true even with respect to secret antenuptial conveyances by the wife, on the eve of her marriage, of property which her intended husband knew her to own.[3] In order that the husband's consent may be effective to bar the right of curtesy, it must be given in the manner and form required by statute.[4] He may, however, by his acts irrespective of want of consent estop himself from claiming curtesy.[5]

C. Release by Husband. The husband may release his curtesy or statutory dower right in his wife's property,[6] and it has been held that he is deemed to have done so where by an antenuptial contract and in contemplation of marriage he agrees to surrender his right in his wife's property,[7] or where he and his wife agree each to release to the other all interest in any real estate which the other possessed at the time of their marriage.[8] So it has been held that he estops himself from claiming dower rights in property of his wife by leasing the same from her heirs before assignment of his dower rights.[9]

D. Execution of Deed or Lease by Husband. At the early common law a feoffment by the tenant by curtesy forfeited his estate,[10] but now the general

upon the wife's conveyance of her lands. Neelly *v.* Lancaster, 47 Ark. 175, 1 S. W. 66, 58 Am. Rep. 752; Bagley *v.* Fletcher, 44 Ark. 153; Milwee *v.* Milwee, 44 Ark. 112.

Deed to husband annulled.— Where a deed of a woman to her intended husband executed before her marriage is annulled the husband's curtesy in the wife's property will not be affected. Gilmore *v.* Burch, 7 Oreg. 374, 33 Am. Rep. 710.

Lease by wife.— Where a married woman dies before the expiration of a term of years for which she has leased her own estate, the lessee is entitled to remain undisturbed during the term regardless of the husband's estate by the curtesy or any subsequent execution creditor's claim therein. Forbes *v.* Sweesy, 8 Nebr. 520, 1 N. W. 571.

Where land was partitioned among heirs but deeds were not made, and after the death of one of the heirs her share was conveyed to her children, the life-estate of the surviving husband as tenant by the curtesy was not destroyed. Moore *v.* Hemp, 68 S. W. 1, 24 Ky. L. Rep. 121.

2. Huston *v.* Seeley, 27 Iowa 183; Clay *v.* Mayr, 144 Mo. 376, 46 S. W. 157; Johnson *v.* Fritz, 44 Pa. St. 449. Although a deserted wife has obtained from the court of common pleas a certificate in pursuance of the provisions of the act of May 11, 1855, giving her all the powers of a *feme sole* she cannot bar the husband's right to curtesy by a conveyance. Ayetsky *v.* Goery, 2 Brewst. (Pa.) 302.

3. Freeman *v.* Hartman, 45 Ill. 57, 92 Am. Dec. 193; Westerman *v.* Westerman, 3 Ohio Dec. (Reprint) 501, 9 Am. L. Reg. N. S. 690.

4. Houck *v.* Ritter, 76 Pa. St. 280.

5. Johnson *v.* Fritz, 44 Pa. St. 449, holding that where a wife sold and conveyed her land without her husband's joining, but at her death divided the money from the sale equally between her husband and children, the husband is estopped from claiming curtesy.

6. Crum *v.* Sawyer, 132 Ill. 443, 24 N. E. 956; McBreen *v.* McBreen, 154 Mo. 323, 55 S. W. 463, 77 Am. St. Rep. 758 [*overruling* Shaffer *v.* Kugler, 107 Mo. 58, 17 S. W. 698]; Hooks *v.* Lee, 42 N. C. 157; *In re* McBride, 81 Pa. St. 303.

Facts held not to amount to a release. —Where land was divided among heirs in a suit brought for that purpose, but deeds were not made, and after the death of one of the heirs her surviving husband and the other heirs filed a supplemental petition, her infant children being made defendants, in which plaintiff asked that deeds be made in accordance with the division, which was done, the share of the deceased heir being conveyed to her children, that deed must be read in connection with the record in order to determine its effect; and, it appearing that no reference was made in the suit to the husband's curtesy, it must be presumed that there was no intention to relinquish his right, and he therefore still had a life-estate which was subject to his debts. Moore *v.* Hemp, 68 S. W. 1, 24 Ky. L. Rep. 121.

7. Charles *v.* Charles, 8 Gratt. (Va.) 486, 56 Am. Dec. 155.

Contra.— Rochon *v.* Lecatt, 2 Stew. (Ala.) 429. And see Kennedy *v.* Koopmann, 166 Mo. 87, 65 S. W. 1020.

8. Luttrell *v.* Boggs, 168 Ill. 361, 48 N. E. 171. But see Dooley *v.* Baynes, 86 Va. 644, 10 S. E. 974, holding that separation agreements setting apart a portion of the wife's property for her use do not cause a forfeiture of the husband's curtesy.

Failure to execute power.— When by a marriage settlement the husband conveyed property to a trustee for the benefit of the wife with power to dispose of by will or deed, he has curtesy if she does not execute the power. Jones *v.* Brown, 1 Md. Ch. 191.

9. Heisen *v.* Heisen, 145 Ill. 658, 34 N. E. 597, 21 L. R. A. 434.

10. Wells *v.* Thompson, 13 Ala. 793, 48 Am. Dec. 76; French *v.* Rollins, 21 Me. 372; 2 Bl. Comm. 274; Washburn Real Prop. (6th ed.) § 350. But see Quimby *v.* Dill, 40 Me. 528.

effect of a conveyance in fee or lease by the tenant simply conveys or leases his interest in the estate.[11]

E. Joint Conveyance or Mortgage by Spouses. A joint conveyance or mortgage of the wife's estates made by the husband and wife will bar the husband's curtesy in the estates conveyed or mortgaged to the extent of the mortgage, although the conveyance or mortgage be defective as to the wife.[12]

F. Divorce. A divorce *a vinculo* granted in favor of the wife terminates the husband's right to curtesy and restores to the wife all her rights in her property.[13]

11. *Connecticut.*— Rogers *v.* Moore, 11 Conn. 553.

Kentucky.— Meraman *v.* Caldwell, 8 B. Mon. 32, 46 Am. Dec. 537.

Missouri.— Reaume *v.* Chambers, 22 Mo. 36.

New Hampshire.— Flagg *v.* Bean, 25 N. H. 49.

New Jersey.— Porch *v.* Fries, 18 N. J. Eq. 204.

New York.— Jackson *v.* Manlius, 2 Wend. 357.

North Carolina.— Johnson *v.* Bradley, 31 N. C. 362.

Ohio.— Koltenbrock *v.* Cracraft, 36 Ohio St. 584.

Pennsylvania.— Griffin *v.* Fellows, 81* Pa. St. 114; McKee *v.* Pfout, 3 Dall. 486, 1 L. ed. 690.

See 15 Cent. Dig. tit. "Curtesy," § 34.

A husband's conveyance of land in ignorance of his wife's interest therein does not release his dower right. Farrand *v.* Long, 184 Ill. 100, 56 N. E. 313.

A tenant by the curtesy cannot convey or release to the heir the lands of the wife held adversely to both, although the heir be his child. Vrooman *v.* Shepherd, 14 Barb (N. Y.) 441.

Equitable interest passes by assignment.— An estate in remainder was vested in the wife the enjoyment of which was to commence at the death of her mother, the particular tenant. It was held that if she or her issue survive the mother, the husband will have such an equitable tenancy by the curtesy therein as will pass by an assignment of his property, under the insolvent law in the lifetime of the mother. Gardner *v.* Hooper, 3 Gray (Mass.) 398.

Sale after wife's death on application of husband.—Where land of a deceased wife is sold on application of her husband, the guardian of her minor children, and the husband and the children are described in the petition as the owners of the land, the estate by the curtesy passes to the purchaser. Brooks *v.* Summers, 100 Ky. 620, 38 S. W. 1047, 18 Ky. L. Rep. 1026.

12. *Alabama.*— Chambers *v.* Ringstaff, 69 Ala. 140.

Arkansas.— Bagley *v.* Fletcher, 44 Ark. 153; Harrod *v.* Myers, 21 Ark. 592, 76 Am. Dec. 409.

Delaware.— Evans *v.* Lobdale, 6 Houst. 212, 22 Am. St. Rep. 358.

Iowa.— Huston *v.* Seeley, 27 Iowa 183.

Kentucky.— Welch *v.* Chandler, 13 B. Mon. 420.

Massachusetts.—Baker *v.* Baker, 167 Mass. 575, 46 N. E. 391; Hayden *v.* Peirce, 165 Mass. 359, 43 N. E. 119.

Mississippi.—Stewart *v.* Ross, 50 Miss. 776.

New Jersey.— Middleton *v.* Steward, 47 N. J. Eq. 293, 20 Atl. 846.

Ohio.— Newcomb *v.* Smith, Wright 208.

Pennsylvania.— Haines *v.* Ellis, 24 Pa. St. 253.

Tennessee.—Jackson *v.* Hodges, 2 Tenn. Ch. 276.

See 15 Cent. Dig. tit. "Curtesy," § 36.

Death of wife before formal transfer.— An attempt by husband and wife to bar an estate tail of the latter by process provided by statute where the wife died before the transfer of the property was completed, the consideration being nominal, does not bar his estate. Pierce *v.* Hakes, 23 Pa. St. 231.

Mortgage.— Where a husband and wife execute a mortgage on the wife's land to secure a debt of the husband, and afterward the wife died leaving a child, the husband's interest should be first applied to the payment. Shields *v.* Yellman, 100 Ky. 655, 39 S. W. 30, 18 Ky. L. Rep. 1092.

13. *Alabama.*— Boykin *v.* Rain, 28 Ala. 332, 62 Am. Dec. 349.

Connecticut.— Wheeler *v.* Hotchkiss, 10 Conn. 225.

Illinois.— Howey *v.* Goings, 13 Ill. 95, 54 Am. Dec. 427.

Kentucky.— Hawkins *v.* Ragsdale, 80 Ky. 353, 44 Am. Rep. 483; Hays *v.* Sanderson, 7 Bush 489.

Missouri.— Schuster *v.* Schuster, 93 Mo. 438, 6 S. W. 259.

New York.— Van Duzer *v.* Van Duzer, 6 Paige 366, 31 Am. Dec. 257.

Ohio.— Neff *v.* Turkle, 4 Ohio Dec. (Reprint) 314, 1 Clev. L. Rep. 285, 3 Cinc. L. Bul. 788.

Rhode Island.— Burgess *v.* Muldoon, 18 R. I. 607, 29 Atl. 298, 24 L. R. A. 798.

Vermont.— Mattocks *v.* Stearns, 9 Vt. 326.

Virginia.— Cralle *v.* Cralle, 79 Va. 182.

See 15 Cent. Dig. tit. "Curtesy," § 37.

Effect on judgment liens created by husband.— A divorce restoring to the wife her lands, etc., destroys the husband's rights of tenancy by the curtesy, divests judgment liens created by the husband, and annuls sales made under such liens. Townsend *v.* Griffin, 4 Harr. (Del.) 440.

Wife's immediate right of possession.—The Massachusetts statute gives the wife immediate possession of her property and destroys the interest of the husband as tenant by the

A divorce granted in favor of the husband may not terminate his right to curtesy,[14] as for instance where the divorce is granted for a cause which does not render it void *ab initio*.[15] Nevertheless a divorced husband has no curtesy in land of which his former wife, divorced through her own fault, dies seized of an estate of inheritance.[16] A divorce *a mensa et thoro* in favor of the wife is not a bar to curtesy.[17]

G. Misconduct of Husband. A husband's right to curtesy is not forfeited by the commission of treason during the wife's lifetime and after issue born;[18] nor by his adultery;[19] nor by abuse of his wife, unless it is shown that he wilfully neglected or refused to provide for her or deserted her.[20] Wilful desertion[21] or an abandonment of the wife or property will work a forfeiture of the husband's curtesy.[22]

H. Adverse Possession of Land. Where during coverture the lands of the wife were adversely held the husband will not be entitled to curtesy.[23]

I. By Debts of Wife. The real property of a married woman, if there be no personal property, is in some jurisdictions liable for her debts freed from the right of curtesy,[24] but in others it is subject to this right.[25]

VIII. ACTIONS BY OR AGAINST TENANT.[26]

A. In General. The tenant by the curtesy initiate or consummate, except as affected by statute,[27] may bring in his own name an action of ejectment to

curtesy. Moran *v.* Somes, 154 Mass. 200, 28 N. E. 152.

14. Meacham *v.* Bunting, 156 Ill. 586, 41 N. E. 175, 47 Am. St. Rep. 239, 28 L. R. A. 618; Pinneo *v.* Goodspeed, 104 Ill. 184. And see Burgess *v.* Muldoon, 18 R. I. 607, 29 Atl. 298, 24 L. R. A. 798.

15. Meacham *v.* Bunting, 156 Ill. 586, 41 N. E. 175, 47 Am. St. Rep. 239, 28 L. R. A. 618.

16. Doyle *v.* Rolwing, 165 Mo. 231, 65 S. W. 315, 88 Am. St. Rep. 416, 55 L. R. A. 332.

17. Hunter *v.* Whitworth, 9 Ala. 965; Smoot *v.* Lecatt, 1 Stew. 590.

18. Pemberton *v.* Hicks, 1 Binn. (Pa.) 1.

19. Wells *v.* Thompson, 13 Ala. 793, 48 Am. Dec. 76.

20. Coyle's Estate, 1 Lanc. L. Rev. 234.

21. Hart *v.* McGrew, (Pa. 1887) 11 Atl. 617.

Abuse of the husband by the wife is not sufficient ground to justify his desertion of her under the Pennsylvania act of May 4, 1855. Hahn *v.* Bealor, 132 Pa. St. 242, 19 Atl. 74.

22. Hinton *v.* Whittaker, 101 Ind. 344; Thomas *v.* Hughes, 25 S. W. 591, 15 Ky. L. Rep. 792.

What amounts to abandonment.—A tenant by the curtesy of an undivided portion of land for more than forty years who leaves it in the possession of another tenant in common whose occupancy was no ouster does not forfeit his right to curtesy. Witham *v.* Perkins, 2 Me. 400. A husband will not be allowed to assert his right to curtesy after a period of twelve years unexplained, during which time he claimed the lands and received the rents as guardian of his infant child. Owens *v.* Dunn, 85 Tenn. 131, 2 S. W. 29.

23. *Illinois.*— Jacobs *v.* Rice, 33 Ill. 369.

Kansas.— Jenkins *v.* Dewey, 49 Kan. 49, 30 Pac. 114.

New Jersey.— Hopper *v.* Demarest, 21 N. J. L. 525.

New York.— Baker *v.* Oakwood, 49 Hun 416, 3 N. Y. Suppl. 570.

Pennsylvania.— Crow *v.* Kightlinger, 25 Pa. St. 343.

Tennessee.— Stokely *v.* Slayden, 8 Baxt. 307; Weisinger *v.* Murphy, 2 Head 674; Guion *v.* Anderson, 8 Humphr. 298.

But see Hurleman *v.* Hazlett, 55 Iowa 256, 7 N. W. 600; Mitchell *v.* Ryan, 3 Ohio St. 377; Borland *v.* Marshall, 2 Ohio St. 308.

See 15 Cent. Dig. tit. "Curtesy," § 42.

24. Arrowsmith *v.* Arrowsmith, 8 Hun (N. Y.) 606; Whitney *v.* Londonderry, 54 Vt. 41; Bennett *v.* Camp, 54 Vt. 36.

Curtesy is defeated by a sale of the wife's estate under legal process for the wife's debts. Stewart *v.* Ross, 50 Miss. 776.

25. Kemph *v.* Belknap, 15 Ind. App. 77, 43 N. E. 891; Pirmann *v.* Gerhold, Ohio Prob. 142. But see Shaddinger *v.* Fisher, 2 Ohio Cir. Dec. 381.

Curtesy superior to right of judgment creditors.—On the death of the wife leaving husband and children, the husband's estate by the curtesy is superior to the right of her judgment creditors. Hampton *v.* Cook, 64 Ark. 353, 42 S. W. 535, 62 Am. St. Rep. 194.

26. Abatement and revival see 1 Cyc. 70 note 55; 1 Cyc. 97 note 73.

27. See *supra*, III, C.

Tenant under wife's lease.— A tenant by the curtesy may bring summary process for the recovery of the deceased wife's land from a tenant holding under a lease of the wife. Mack *v.* Roch, 13 Daly (N. Y.) 103. But see Forbes *v.* Sweesy, 8 Nebr. 520, 1 N. W. 571.

recover possession of his wife's real property embraced in his estate,[28] an action for trespass,[29] or a bill to perpetuate evidence of his title resting exclusively in the knowledge of certain witnesses;[30] so a tenant by the curtesy of his deceased wife's undivided share in land may sue for partition.[31]

B. Limitations.[32] Where a husband has made no relinquishment of his right to curtesy, he cannot be barred during his wife's lifetime by the statute of limitations;[33] but his failure to assert his right of curtesy for the statutory period of limitation after his wife's death will bar a recovery.[34] Where the ancestor of a married woman dies seized of land, and the husband is afterward evicted, the statute of limitations begins to run immediately against him, since he is tenant by the curtesy initiate by virtue of the wife's seizin by descent cast.[35]

C. Parties.[36] In actions respecting the wife's property the husband, if he has an estate by the curtesy initiate only, should be made a party plaintiff or defendant.[37] His curtesy will not be barred if he ought to be made a party defendant and is not.[38]

D. Evidence.[39] In an action to establish the right to curtesy the burden is on the husband to show that each and all the requisites necessary to give him curtesy have existed.[40] In an action by a husband to enforce his right to curtesy the general reputation in the family as to whether issue was born alive, admissions by the husband against his right, admissions by the wife tending to prove desertion not to be wilful and malicious, conduct of the wife at the time of the alleged desertion and the conduct of the husband about the time of the desertion are admissible.[41]

28. Rochon *v.* Lecatt, 1 Stew. (Ala.) 609; Moore *v.* Ivers, 83 Mo. 29; Spaulding *v.* Cleghorn, 8 N. Y. Suppl. 269; Hall *v.* Hall, 32 Ohio St. 184. At common law the husband had to join with the wife in an action for the possession of her realty brought during her life. Strœbe *v.* Fehl, 22 Wis. 337.

An agreement of separation, while not enforceable in law, having been performed by both parties, may be pleaded as a complete equitable estoppel by her children in a suit by him to recover curtesy in property acquired after separation and with the wife's own means. McBreen *v.* McBreen, 154 Mo. 323, 55 S. W. 463, 77 Am. St. Rep. 758.

Right to enjoy railroad crossing.— A tenant by the curtesy may sue alone for the right to enjoy a railroad crossing appurtenant to land in which he has the right to curtesy. Costello *v.* Grand Trunk R. Co., 70 N. H. 403, 47 Atl. 265.

The writ of right at common law, or as recognized by statute, does not lie in favor of a tenant. Lecatt *v.* Merchants' Ins. Co., 16 Ala. 177, 50 Am. Dec. 159.

29. Clark *v.* Welton, 1 Root (Conn.) 299; Ro Bards *v.* Murphy, 64 Mo. App. 90; Coit *v.* Grey, 25 Hun (N. Y.) 444.

Trespass de bonis.—A tenant by curtesy of a reversion, expectant upon the determination of an estate in dower, cannot maintain trespass *de bonis* for trees or other things severed and removed from the estate by the dowager. Mathews *v.* Bennett, 20 N. H. 21.

30. Hall *v.* Stout, 4 Del. Ch. 269.

31. Tilton *v.* Vail, 53 Hun (N. Y.) 324, 6 N. Y. Suppl. 146, 17 N. Y. Civ. Proc. 194.

32. See, generally, LIMITATIONS OF ACTIONS.

33. Hurleman *v.* Hazlett, 55 Iowa 256, 7 N. W. 600.

34. Thomas *v.* Hughes, 25 S. W. 591, 15 Ky. L. Rep. 792.

35. Childers *v.* Bumgarner, 53 N. C. 297.

36. See, generally, PARTIES.

37. McGlennery *v.* Miller, 90 N. C. 215.

38. Jacques *v.* Ennis, 25 N. J. Eq. 402.

Tenancy by curtesy may be set up by a stranger in bar of a recovery by the heir. Adair *v.* Lott, 3 Hill (N. Y.) 182.

39. See, generally, EVIDENCE.

40. Smoot *v.* Lecatt, 1 Stew. (Ala.) 590; Doe *v.* Killen, 5 Houst. (Del.) 14; Doe *v.* Collins, 2 Houst. (Del.) 128; Orr *v.* Holliday, 9 B. Mon. (Ky.) 59; Thomas *v.* Hughes, 25 S. W. 591, 15 Ky. L. Rep. 792; Gardner *v.* Klutts, 53 N. C. 375, 80 Am. Dec. 381.

Antenuptial agreement to bar the husband of his rights in his wife's property must be shown to have been in existence at the time of the wife's death. Graves *v.* Wakefield, 54 Vt. 313.

Proof of wilful desertion for one year preceding the wife's death throws the burden on the husband to show that it was for reasonable and lawful cause. Bealor *v.* Hahn, 117 Pa. St. 169, 11 Atl. 776. And see Hahn *v.* Bealor, 132 Pa. St. 242, 19 Atl. 74.

41. Doe *v.* Killen, 5 Houst. (Del.) 14; Hahn *v.* Bealor, 132 Pa. St. 242, 19 Atl. 74; Bealor *v.* Hahn, 117 Pa. St. 169, 11 Atl. 776; Hart *v.* McGrew, (Pa. 1887) 11 Atl. 617.

Note against husband.— In ejectment by a husband as tenant by the curtesy of lands conveyed by the wife before her death, without the joinder of the husband, a note against the husband, which was given the wife as consideration for the land, is not admissible

IX. STATUTORY ABOLITION OF CURTESY.

Curtesy has been abolished by statute in some states,[42] but the husband is given in many states in place of curtesy a dower right in his wife's real property,[43] which is of the same quality and character as the dower interest of a wife in the land of her husband.[44]

CURTILAGE.[1] A COURTYARD,[2] *q. v.*; back-side, or piece of ground lying near, and belonging to a dwelling-house;[3] the court-yard or piece of ground within

in evidence on behalf of the grantee. Houck *v.* Ritter, 76 Pa. St. 280.

Order for wife's maintenance.— In an action by a husband to enforce his right to curtesy, an order of the quarter sessions on him for his wife's maintenance is admissible to prove that he had deserted her, and had failed to voluntarily provide for her support. Bealor *v.* Hahn, 117 Pa. St. 169, 11 Atl. 776. Such evidence is strong but not conclusive of desertion. Hahn *v.* Bealor, 132 Pa. St. 242, 19 Atl. 74.

Peaceable possession under claim of title, although for less than twenty years, where there has been no abandonment, is sufficient *prima facie* evidence of an estate of inheritance in the wife to sustain a husband's claim of curtesy. Rochon *v.* Lecatt, 1 Stew. (Ala.) 609; Smoot *v.* Lecatt, 1 Stew. (Ala.) 590.

42. *Ex p.* Watts, 130 N. C. 237, 41 S. E. 289; and, generally, the statutes of the several states.

43. Heisen *v.* Heisen, 145 Ill. 658, 34 N. E. 597, 21 L. R. A. 434 [*overruling* Crum *v.* Sawyer, 132 Ill. 443, 24 N. E. 956].

44. Maclaren *v.* Stone, 18 Ohio Cir. Ct. 854.

1. **"It is a French word,** and signifieth the same as we take it." Coke Litt. 5*b*. "It is in one place called 'the world.'" Edwards *v.* Derrickson, 28 N. J. L. 39, 45.

"A familiar phrase in the law, and has a well defined legal meaning, both in the administration of civil and criminal law." Edwards *v.* Derrickson, 28 N. J. L. 39, 72, dissenting opinion. In People *v.* Taylor, 2 Mich. 250, 251, the court said: "It is perhaps unfortunate that this term, which is found in the English statutes, and which is descriptive of the common arrangement of dwellings, and the yards surrounding them, in England, should have been perpetuated in our statutes. It is not strictly applicable to the common disposition of enclosures and buildings constituting the homestead of the inhabitants of this country, and particularly of farmers."

"This term 'curtilage' is not perhaps as well defined in the treatises on the criminal law as might be expected from its long usage and frequent introduction into statutes. It is often illustrated by the questions raised in trials for burglary." Com. *v.* Barney, 10 Cush. (Mass.) 480, 482.

Not synonymous with "land adjoining."— In Miller *v.* Mann, 55 Vt. 475, 479, the court said: "We do not think the words 'land adjoining' are synonymous with 'messuage' and 'curtilage.'"

"We do not use that expression ["curtilage"] in Scotland." Per Lord Watson in Caledonian R. Co. *v.* Turcan, 67 L. J. P. C. 69, 73.

As to what is contained within a curtilage see the following cases:

Alabama.— Fisher *v.* State, 43 Ala. 17, 20.

Maine.— State *v.* Shaw, 31 Me. 523, 527.

Massachusetts.— Com. *v.* Estabrook, 10 Pick. 293, 295.

Michigan.— Stearns *v.* Vincent, 50 Mich. 209, 219, 15 N. W. 86, 45 Am. Rep. 37; Pitcher *v.* People, 16 Mich. 142, 148; Pond *v.* People, 8 Mich. 150; People *v.* Taylor, 2 Mich. 250, 252.

Missouri.— State *v.* Hecox, 83 Mo. 531, 536 [*quoting* 2 East P. C. 492, and *citing* Armour *v.* State, 3 Humphr. (Tenn.) 379].

New Jersey.— Edwards *v.* Derrickson, 28 N. J. L. 39, 72, dissenting opinion.

New York.— People *v.* Gedney, 10 Hun 151, 154; Cary *v.* Thompson, 1 Daly 35, 38; People *v.* Parker, 4 Johns. 424.

Ohio.— See Ratekin *v.* State, 26 Ohio St. 420.

South Carolina.—State *v.* Sampson, 12 S. C. 567, 569, 32 Am. Rep. 513.

England.— St Martin-in-the-Fields Parish *v.* Bird, [1895] 1 Q. B. 428, 431, 60 J. P. 52, 64 L. J. Q. B. 230, 71 L. T. Rep. N. S. 868, 14 Reports 146, 43 Wkly. Rep. 194 (per Lord Esher, M. R.); Marson *v.* London, etc., R. Co., L. R. 6 Eq. 101, 105, 37 L. J. Ch. 483, 18 L. T. Rep. N. S. 319; Reg. *v.* Gilbert, 1 C. & K. 84, 47 E. C. L. 84; Carden *v.* Tuck, Cro. Eliz. 89. And see Coke Litt. 5*b*; 24 & 25 Vict. c. 96, § 53.

Includes only dry land.— Where a statute speaks of such buildings as are built and stand upon lots and curtilages, the court said: "By buildings built upon curtilages, the legislature could only mean buildings standing on dry land. . . . Nothing could be more foreign to all ideas of a curtilage than a lot of land under tide waters." Coddington *v.* Beebe, 31 N. J. L. 477, 485.

2. Com. *v.* Barney, 10 Cush. (Mass.) 480, 483.

3. People *v.* Taylor, 2 Mich. 250, 252 [*quoting* Jacob L. Dict. and *citing* Chitty Gen. Pr. 175] (where it is said: "The definition given in Shepherd's Touchstone, page 84, Cunningham's Law Directory, and Webster's, Johnson's and Walker's Dictionaries, is substan-

the common enclosure belonging to a dwelling-house;[4] the court-yard in the front or rear of the house, or at its side, or any piece of ground lying near inclosed and used with the house and necessary for the convenient occupation of the house;[5] a yard, court yard, or piece of ground lying near to a dwelling-house and enclosed within the same fence;[6] the yard, or garden or field, which is near to, and used in connection with the dwelling;[7] a little garden, yard, field, or piece of void ground lying near and belonging to the messuage; a little croft, or court or place of easement, to put in cattle for a time, or to lay in wood, coal, or timber, or such other things necessary for household;[8] a field next to and belonging to a messuage, a field being as uncertain in its size as any other portion of land;[9] a piece of ground within the common enclosure belonging to a dwelling-house, and enjoyed with it, for its more convenient occupation;[10] a space of ground within a common enclosure, belonging to a dwelling-house;[11] a space necessary and convenient and habitually used, for the family purposes, the carrying on of domestic employments;[12] the enclosed space immediately surrounding a dwelling-house contained within the same enclosure;[13] the open space situated within a common inclosure belonging to a dwelling-house;[14] the fence or enclosure

tially the same"); Cary *v.* Thompson, 1 Daly (N. Y.) 35, 38 [*quoting* Tomlin L. Dict. and *citing* Bacon Abr. tit. "Grant"]; Pilbrow *v.* St. Leonard, [1895] 1 Q. B. 33, 37, 59 J. P. 68, 64 L. J. M. C. 130, 72 L. T. Rep. N. S. 135, 14 Reports 181, 43 Wkly. Rep. 342 [*quoting* Jacob L. Dict.]. See also Coddington *v.* Beebe, 31 N. J. L. 477, 485, where it is said: "And which word [curtilage] we have corrupted into court-yard."

4. Edwards *v.* Derrickson, 28 N. J. L. 39, 72, dissenting opinion [*citing* Bouvier L. Dict.; Jacob L. Dict.; Sheppard Touchst. 94; Viner Abr. House "E"].

5. People *v.* Gedney, 10 Hun (N. Y.) 151, 154 [*citing* Bacon Abr. tit. "Grant"].

A word descriptive of buildings, etc.— "A curtilage seems to connect itself with buildings or messuages, and means the grounds which properly appertain to them, whether they be enclosed within one hundred feet square in a city, or whether they are enclosed within the court, grounds, or park attached to and appertaining to a country seat, whether the contents be two acres, ten acres, or one hundred acres." Edwards *v.* Derrickson, 28 N. J. L. 39, 45.

6. Burrill L. Dict.; Webster Dict. [*quoted* in State *v.* Hecox, 83 Mo. 531, 536, where it is said: "It is in this sense the word is used in our statute"].

Formerly surrounded by a fence or stone wall.— "In England, the dwellings and outhouses of all kinds, are usually surounded by a fence or stone wall, enclosing a small piece of land embracing the yards and out-buildings near the house, constituting what is called the court. This wall is so constructed as to add greatly to the security of the property within it; but as such precautionary arrangements have not been considered necessary in this country, they have not been adopted." People *v.* Taylor, 2 Mich. 250, 251.

7. Cook *v.* State, 83 Ala. 62, 65, 3 So. 849, 3 Am. St. Rep. 688 [*quoting* Bishop St. Cr. § 278] (where it is said: "'The privy, barn, stable, cow-houses, dairy-houses, if they are parcel of the messuage, though they are not under the same roof, or adjoining or contiguous to it,' are included within the curtilage"); Ivey *v.* State, 61 Ala. 58, 61 (where it is said: "It is not necessary either should be surrounded by an enclosure. It is the propinqnity to the dwelling, and the use in connection with it for family purposes, which the statute regards, and not the fact of its enclosure").

8. Stroud Jud. Dict. [*quoted* in Pilbrow *v.* St. Leonard, [1895] 1 Q. B. 33, 37, 59 J. P. 68, 64 L. J. M. C. 130, 72 L. T. Rep. N. S. 135, 14 Reports 181, 43 Wkly. Rep. 342, where it is said: "This yard is to get rid of something unnecessary for the household, namely, the dust"].

9. Edwards *v.* Derrickson, 28 N. J. L. 39, 45.

Does not depend upon size.— "The question is not so much the size of the curtilage as whether it is, and always has been, considered, treated, and known as one entire parcel, lying together, sold together, surveyed together, occupied together by its different owners, its metes and bounds known to all, and always recognized and treated as connecting itself immediately with a farming establishment, a manufacturing establishment, a pleasure or other establishment." Edwards *v.* Derrickson, 28 N. J. L. 39, 45.

10. Derrickson *v.* Edwards, 29 N. J. L. 468, 474, 80 Am. Dec. 220.

11. Bouvier L. Dict. [*quoted* in People *v.* Taylor, 2 Mich. 250, 252].

12. State *v.* Shaw, 31 Me. 523, 527, where it is said: "It includes the garden, if there be one. It need not be separated from other lands by fence." But see People *v.* Taylor, 2 Mich. 250, 251 [*quoting* Jacob L. Dict. where it is said: "Though it is said to be a yard or garden belonging to a house, it seems to differ from a garden, for we find *cum quando gardino et curtilagio*"].

13. Bouvier L. Dict. [*quoted* in State *v.* Hecox, 83 Mo. 531, 536].

14. State *v.* Sampson, 12 S. C. 567, 569, 32 Am. Rep. 513 [*quoting* Bouvier L. Dict.]. And see State *v.* Hecox, 83 Mo. 531, 536, where it is said: "Tomlin and Jacobs, in their law dictionaries, do not allow the ele-

of a piece of land around a dwelling-house, usually including the buildings occupied in connection therewith.[15] In law, a fence or enclosure of a small piece of land around a dwelling-house, usually including the buildings occupied in connection with the use of the dwelling-house;[16] a piece of ground either inclosed or not, that is commonly used with the dwelling-house.[17] In its most comprehensive and proper legal signification it includes all that space of ground and buildings thereon, which is usually enclosed within the general fence, immediately surrounding a principal messuage, out-buildings and yard, closely adjoining to a dwelling-house, but it may be large enough for cattle to *levant* and *couchant* therein.[18] As used in the statute the term includes the yard or space of ground near to the dwelling-house, contained in the same inclosure, and used in connection with it by the household.[19] The word originally signified the land with the castles and out-houses, enclosed often with high stone walls, and where the old barons sometimes held their court in the open air.[20] (Curtilage: Building Subject to — Arson, see ARSON; Burglary, see BURGLARY. Disorderly Conduct Within, see DISORDERLY CONDUCT. Resisting Aggression Within, see HOMICIDE.)

CURTILES TERRÆ. COURT LANDS,[21] *q. v.*

CURTILLIUM. A CURTILAGE,[22] *q. v.*

CUSPIDOR.[23] A spittoon of a peculiar form.[24]

CUSSORE. A term used in Hindostan for the discount or allowance made in the exchange of rupees.[25]

CUSTA, CUSTAGIUM, or **CUSTANTIA.** Costs.[26] (See, generally, COSTS.)

CUSTODE ADMITTENDO. A writ for the admitting of a guardian.[27] (See, generally, GUARDIAN AND WARD.)

CUSTODE AMOVENDO. A writ for the removing of a guardian.[28] (See, generally, GUARDIAN AND WARD.)

CUSTODES LIBERTATIS ANGLIÆ AUCTORITATE PARLIAMENTI. The style in which writs and all judicial processes were made out during the great revolution, from the execution of King Charles I, till Oliver Cromwell was declared protector.[29]

CUSTODES PACIS. Guardians of the peace.[30]

CUSTODES PLACITORUM CORONÆ. Keepers of the pleas of the crown (criminal actions or proceedings in which the crown was the prosecutor).[31]

CUSTODES PLACITORUM IN PLENU COMITATU. The keepers of pleas in full county court.[32]

ments of enclosure to enter into the definition."

15. Com. *v.* Intoxicating Liquors, 140 Mass. 287, 289, 3 N. E. 4 [*citing* Com. *v.* Barney, 10 Cush. (Mass.) 480, 482].

16. Com. *v.* Barney, 10 Cush. (Mass.) 480, 481, where it is said: "This fence enclosure might be either a separate fence, or might consist partly of a fence and partly of the exterior of buildings so within this enclosure."

17. State *v.* Twitty, 2 N. C. 102.

18. Chitty Gen. Pr. 175 [*quoted* in People *v.* Taylor, 2 Mich. 250, 252, where it is said: "The definitions of Bouvier and Chitty do not strictly agree with the other authors named, yet it may be gathered from them all, that a curtilage is not necessarily one enclosure, but that it may include more than one yard near the dwelling-house. The definition of neither of the authors cited indicate that it is necessarily a yard which embraces the out-buildings, and yet it may be so; and in England it commonly is so, and the space about the house is spoken of as a court"].

19. Washington *v.* State, 82 Ala. 31, 32, 2 So. 356.

20. Coddington *v.* Beebe, 31 N. J. L. 477, 485.

21. Black L. Dict. [*citing* Cowell Int.].

22. Black L. Dict. [*citing* Spelman Gloss.].

23. "The word 'cuspidor' is derived from the Portuguese verb *cuspo*, to spit; *cuspidor*, a spitter." Ingersoll *v.* Turner, 7 Fed. 859.

24. Ingersoll *v.* Turner, 7 Fed. 859, where it is said: "The difference between a spittoon and a cuspidor is one of form, and the form of the cuspidor is not new. The characteristic and valuable feature of both articles is their self-righting quality, arising from their weighted bottoms."

25. Contradistinguished from *batta* which is the sum deducted. Wharton L. Lex. [*citing* Encycl. Lond.]

26. Burrill L. Dict. [*citing* Spelman Gloss.]

27. Jacob L. Dict.

28. Jacob L. Dict.

29. Black L. Dict.

30. Black L. Dict. [*citing* 1 Bl. Comm. 349.]

31. English L. Dict.

32. English L. Dict.

CUSTODIA LEGIS. Custody of the law.[33] (See CUSTODY OF LAW.)

CUSTODIAM LEASE. In English law, a grant from the crown under the exchequer seal, by which the custody of lands, etc., seised in the king's hands, is demised or committed to some person as custodee or lessee thereof.[34]

CUSTODIAN. An officer of the court.[35] (See CUSTODY.)

CUSTODY.[36] Care, keeping;[37] CHARGE,[38] *q. v.*; imprisonment.[39] (Custody: Of Assigned Estate, see ASSIGNMENTS FOR BENEFIT OF CREDITORS. Of Child[40]—In General, see INFANTS; PARENT AND CHILD; Bastard Child,[41] see BASTARDS; Habeas Corpus Proceedings to Determine, see HABEAS CORPUS; On Divorce of Parents, see DIVORCE; Under Guardianship,[42] see GUARDIAN AND WARD. Of Goods Shipped, see CARRIERS; SHIPPING. Of Insane Person, see INSANE PERSONS. Of Jury, see CRIMINAL LAW; TRIAL. Of Person — Arrested, see ARREST; Convicted, see CONVICTS; PRISONS. Of Public Funds, see OFFICERS. Of

33. Wharton L. Lex. See also 6 Cyc. 1040 note 3.

34. Wharton L. Lex.

35. Buckley *v.* Harrison, 10 Misc. (N. Y.) 683, 690, 31 N. Y. Suppl. 999.

A custodian is not a trustee; and the legal title to property is not in him as a trustee. Buckley *v.* Harrison, 10 Misc. (N. Y.) 683, 690, 31 N. Y. Suppl. 999.

Custodian of documents see 9 Cyc. 121 note 61.

Custodian of fees, etc., see 7 Cyc. 226 note 50.

36. As synonymous with "control" or "possession" see Roe *v.* Doe, 32 Ga. 39, 48 [*citing* Ratteree *v.* Nelson, 10 Ga. 439].

Compared with "keeper."— In Cutter *v.* Howe, 122 Mass. 541, 543, the court said: "The former of these words ["keeper"] has been long known to the profession in all parts of the Commonwealth, and has a well understood meaning; the latter ["custody"] is of more recent use, and perhaps is to a considerable extent of local use, and its meaning not so well understood. So far as we can learn from the facts before us, it is, in this case, probably used to denote the responsibility which the officer is under, when he puts a keeper over property."

"Custody and holding."— Where a statute provides that the officer shall execute the order of attachment "upon personal property, capable of manual delivery, by taking it into his custody and holding it," etc., the court said: "The 'custody and holding' required in the case of property capable of manual delivery is actual and real, not ideal or constructive." Adler *v.* Roth, 5 Fed. 895, 897, 2 McCrary 445.

"Safe custody" under a statute in relation to the care of money, etc., see Reg. *v.* Newman, 8 Q. B. D. 706, 46 J. P. 612, 51 L. J. M. C. 87, 46 L. T. Rep. N. S. 394, 30 Wkly. Rep. 550.

"The word custody in English statutes has been construed to embrace the custody of the bail." Levy *v.* Arnsthall, 10 Gratt. (Va.) 641, 648.

37. Burrill L. Dict.

"Custody and tuition."— Where a statute provided that "upon the death of either father or mother, the surviving parent, . . . of a child likely to be born or of any living child under the age of twenty-one years and unmarried, may by deed or last will, duly executed, dispose of the custody and tuition of such child during its minority," etc., the court said: "The language 'custody and tuition,' used by the statute, includes guardianship of the estate as well as of the person, and the provisions referred to were unquestionably intended to embrace both." Matter of Zwickert, 5 Misc. (N. Y.) 272, 273, 26 N. Y. Suppl. 773.

Custody of jury-wheel.— Where a statute provided that "the said jury-wheel, locked as now required by law, shall remain in the custody of the said jury commissioners, and the keys thereof in the custody of the sheriff of said county," the court said: "It is difficult to see what better disposition these commissioners could have made of the wheel than to deposit it in a vault attached to one of the public offices, where it was under the immediate charge of their own sworn officer. It was clearly in their custody within the meaning of the law." Rolland *v.* Com., 82 Pa. St. 306, 320, 22 Am. Rep. 758 [*cited* in Com. *v.* Valsalka, 181 Pa. St. 17, 27, 37 Atl. 405 (where the court, in speaking of the care of the jury-wheel, declared "that the word 'custody' mentioned in the statute does not necessarily imply a constant keeping under lock and key"); Klemmer *v.* Mt. Penn Gravity R. Co., 163 Pa. St. 521, 533, 30 Atl. 274].

38. State *v.* Clark, 86 Me. 194, 195, 29 Atl. 984, where it is said: "The words, 'charge' and 'custody,' are frequently used as synonymous. The lexicographers give them as synonyms."

39. Smith *v.* Com., 59 Pa. St. 320, 324.

"Custody" implies physical force sufficient to restrain the prisoner from going at large. Wilkes *v.* Slaughter, 10 N. C. 211, 216.

"[A person] who is in jail is in custody within the meaning of the statute." Hillian *v.* State, 50 Ark. 523, 527, 8 S. W. 834.

40. Custody of child see 1 Cyc. 147 *et seq.*

41. That right of mother to custody of bastard is superior to other claims see 5 Cyc. 637.

42. Presumption as to custody with reference to a female of less than sixteen years of age see 1 Cyc. 148 note 46.

Taking girl from custody of master see 1 Cyc. 149 note 54.

Records, see Courts; Records. Place of, see Prisons. See also Commit; Commitment; Committed; Committed to Jail; Committitur; Confinement.)

CUSTODY OF LAW. That custody only which an officer has the right to assume over property by virtue of legal process.[43] (Custody of Law: As Affected by — Attachment, see Attachment; Creditors' Suit, see Creditors' Suits; Execution, see Executions; Garnishment, see Garnishment; Injunction, see Injunctions; Mortgage, see Chattel Mortgages. As Affecting — Jurisdiction, see Admiralty; Courts; Receivers' Title and Possession, see Receivers. Deposit in Court, see Deposits in Court. Interference with Property in, see Contempt. Pending Suit, see Admiralty. See also, generally, Attachment;[44] Executions; Garnishment.)

CUSTODY OF PROPERTY. The keeping of property by one who is charged with or assumes responsibility for its safety.[45] (Custody of Property: Attached,[46] see Attachment; Garnishment. In Bankruptcy and Insolvency Proceedings, see Bankruptcy; Insolvency. Levied on, see Attachment; Executions; Garnishment. Mortgaged, see Chattel Mortgages. See also Custody.)

CUSTOM. See Customs and Usages.

CUSTOMARY. As defined by statute, according to usage.[47] (See, generally, Customs and Usages.)

CUSTOMARY COURT-BARON. A Court-Baron (*q. v.*) at which copyholders might transfer their estates, and where other matters relating to their tenures were transacted.[48]

CUSTOMARY DESPATCH. As applied to the unloading of a vessel, the despatch customary at the place of discharge.[49] A term which refers to the general customs of the port, and not to the special usage of the charterer in his business, or to his means of despatching a ship.[50] (See, generally, Shipping.)

43. Gilman *v.* Williams, 7 Wis. 329, 334, 76 Am. Dec. 219.

"When property is lawfully taken, by virtue of legal process, it is in the custody of the law, and not otherwise." Gilman *v.* Williams, 7 Wis. 329, 334, 76 Am. Dec. 219. See also August *v.* Gilmer, 53 W. Va. 65, 44 S. E. 143.

44. That goods attached are in the custody of the law see 4 Cyc. 653.

45. English L. Dict.

"By the term custody of property as contra-distinguished from legal possession, I understand to be meant, that, charge to keep and care for the owner, subject to his order and direction without any interest or right therein adverse to him, which every servant possesses with regard to the goods of his master confided to his mere care, which custody may be terminated or prolonged according to the will and pleasure of the master." People *v.* Burr, 41 How. Pr. (N. Y.) 293, 296.

46. See 4 Cyc. 653.

47. Mont. Code Civ. Proc. (1895) § 3463, subs. 11; N. D. Rev. Codes (1899), § 5129; Okla. St. (1893) § 2684.

"Customary fines, fees, and other dues or payments" as used in the Settled Land Act see *Re* Naylor, 56 L. T. Rep. N. S. 132, 134.

"Customary right" in behalf of the inhabitants of a town, hamlet, or other local district see Post *v.* Pearsall, 22 Wend. (N. Y.) 425, 431.

48. Black L. Dict. [*citing* 3 Bl. Comm. 33].

49. The Spartan, 25 Fed. 44, 48 [*citing* Kearon *v.* Pearson, 7 H. & N. 386, 388, 31 L. J. Exch. 1, 10 Wkly. Rep. 12]. And see Postlethwaite *v.* Freeland, 5 App. Cas. 599, 49 L. J. Exch. 630, 42 L. T. Rep. N. S. 845, 28 Wkly. Rep. 833 [*cited* in Aalholm *v.* A Cargo of Iron Ore, 23 Fed. 620, 622], where it was held that the word "customary" applied to despatch, and meant such despatch as the custom of the port permitted. See also Good *v.* Isaacs, [1892] 2 Q. B. 555, 564, 7 Aspin. 212, 61 L. J. Q. B. 649, 67 L. T. Rep. N. S. 450, 40 Wkly. Rep. 629, where it is said: "I think that 'as customary' in this charterparty relates directly to the discharge and delivery by the ship rather than to the taking delivery by a consignee. 'To be discharged as fast as steamer can deliver, as customary,' means that the discharge and delivery is to be as fast as the custom of the port would allow."

50. *In re* Eleven Hundred Tons of Coal, 12 Fed. 185, 187. And see Lindsay *v.* Cusimano, 10 Fed. 302, 303; Smith *v.* Sixty Thousand Feet of Yellow Pine Lumber, 2 Fed. 396; Adams *v.* Royal Mail Steam-Packet Co., 5 C. B. N. S. 492, 497, 28 L. J. C. P. 33, 7 Wkly. Rep. 9, 94 E. C. L. 492; Lawson *v.* Burness, 1 H. & C. 396, 10 Wkly. Rep. 733; Kearon *v.* Pearson, 7 H. & N. 386, 31 L. J. Exch. 1, 10 Wkly. Rep. 12.

Where a charter-party contained the words, "customary despatch" relative to the discharge of a vessel, the court said: "This enlarges the source of delay, and makes it include all those usages at the port of delivery which the charterers cannot control, such as the working hours," etc. "Here, these words, 'customary dispatch,' meant the usual

CUSTOMARY DESPATCH IN DISCHARGING. As applied to the cargo of a vessel, discharging with speed, haste, expedition, due diligence, according to the lawful, reasonable, well-known customs of the port of discharge.[51] (See, generally, SHIPPING.)

CUSTOMARY ESTATES. Estates which owe their origin and existence to the custom of the manor in which they are held.[52] (See, generally, ESTATES.)

CUSTOMARY FREEHOLD. In English law, a variety of copyhold estate, the evidences of the title to which are to be found upon the court rolls; the entries declaring the holding to be according to the custom of the manor, but it is not said to be at the will of the lord.[53] (See COPYHOLD; and, generally, ESTATES.)

CUSTOMARY MANNER. As applied to shipping, the mode of loading a vessel, whether by a lighter or at the wharf.[54] (See, generally, SHIPPING.)

CUSTOMARY QUICK DESPATCH.[55] As applied to the unloading of a vessel, the usual quick despatch of the port where delivery is to be made, as distinguished from the common or usual despatch employed there;[56] the ordinary quick despatch, as distinguished from the usual discharge.[57] (See, generally, SHIPPING.)

CUSTOMARY RENT. A rent which entitles the occupier to hold, so long as he pays.[58] (See, generally, LANDLORD AND TENANT.)

CUSTOMARY SERVICE. In English law, a service due by custom from one person to another.[59]

CUSTOMARY TENANTS. In English law, such tenants as hold by the custom of the manor, as their special evidence.[60] (See COPYHOLDER.)

dispatch of persons who are ready to receive a cargo, and exclude all customs in accordance with which these charterers might claim the right to decline to receive, simply because it was more advantageous to postpone." Lindsay *v.* Cusimano, 10 Fed. 302, 303. And see Smith *v.* Sixty Thousand Feet of Yellow Pine Lumber, 2 Fed. 396, 399, where it is said: "The expression, 'customary dispatch,' as affecting the time of discharge, seems to me only to limit the master's right to discharge continuously in this, that he cannot claim the right to discharge during hours of a day, or during days, which by the established usage of the trade in the port are not working hours or days." See also Dayton *v.* Parke, 67 Hun (N. Y.) 137, 22 N. Y. Suppl. 613.

51. Lindsay *v.* Cusimano, 12 Fed. 503, 507, where it is said: "It is the same as usual dispatch, not the same as quick dispatch, which latter has been held to exclude certain usages and customs." And see Davis *v.* Wallace, 7 Fed. Cas. No. 3,657, 3 Cliff. 123, 130; Keen *v.* Audenried, 14 Fed. Cas. No. 7,639, 5 Ben. 535, 536; Thacher *v.* Boston Gas-Light Co., 23 Fed. Cas. No. 13,850, 2 Lowell 361, 363.

52. Black L. Dict. [*citing* 2 Bl. Comm. 149].

53. Black L. Dict. And see Lingwood *v.* Gyde, L. R. 2 C. P. 72, 78, 36 L. J. C. P. 10, 16 L. T. Rep. N. S. 229, 15 Wkly. Rep. 311, where Willes, J., speaking of a statute in relation to copyholds, said: "The act incorrectly describes the tenure as being copyhold, whereas, by reason of the holding being by the custom of the manor only, and not at the will of the lord, it is properly customary freehold." See also Portland *v.* Hill, L. R. 2 Eq. 765, 776, 12 Jur. N. S. 286, 35 L. J. Ch. 439, 15 Wkly. Rep. 38, where Sir W. Page Wood, V. C., said: "What is the rule of law with respect to customary freeholds, as they are sometimes called, but more correctly, privileged copyholds, of a higher class, and with higher privileges than ordinary copyholds that are held at the will of the lord; but still copyholds in the sense of being held by copy of court-roll, and not being within the Statute of Wills, and so of a tenure different from freehold tenure?"

54. Lawson *v.* Burness, 1 H. & C. 396, 400, 10 Wkly. Rep. 733 [*cited* in Tapscott *v.* Balfour, L. R. 8 C. P. 46, 53, 1 Aspin. 501, 42 L. J. C. P. 16, 27 L. T. Rep. N. S. 710, 21 Wkly. Rep. 245].

55. "The signification of this language is well settled." Smith *v.* Harrison, 50 Fed. 565, 566.

56. Smith *v.* Harrison, 50 Fed. 565, 566, where it is said: "It requires haste,—the ordinary haste of quick dispatch." And see Lindsay *v.* Cusimano, 10 Fed. 302; Davis *v.* Wallace, 7 Fed. Cas. No. 3,657, 3 Cliff. 123; Keen *v.* Audenried, 14 Fed. Cas. No. 7,639, 5 Ben. 535.

57. Freeman *v.* Wellman, 67 Fed. 796, 797. And see Harrison *v.* Smith, 67 Fed. 354, 356, 11 C. C. A. 656, where it is said: "The agreement was that the vessel should 'be discharged with customary quick dispatch at port of discharge.' The stipulation contemplated haste."

Distinguished from "quick despatch."—"The dispatch stipulated for in the charter largely influences the freight-rate. 'Customary quick dispatch' gives the charterer a lower rate than 'customary dispatch.'" Smith *v.* Harrison, 50 Fed. 565, 566.

58. Vivian *v.* Moat, 16 Ch. D. 730, 733, 50 L. J. Ch. 331, 44 L. T. Rep. N. S. 210, 29 Wkly. Rep. 504.

59. Burrill L. Dict. [*citing* 3 Bl. Comm. 235; 3 Stephen Comm. 509].

60. Burrill L. Dict. [*citing* Termes de la Ley].

CUSTOMER. A person with whom a business house, or a business man, has regular or repeated dealings.[61]

CUSTOMER OF A BANK. A person who sustains habitual or consecutive business relations with a bank.[62] (See CUSTOMER; and, generally, BANKS AND BANKING.)

CUSTOME SERRA PRISE STRICTE. A maxim meaning "Custom must be taken strictly."[63]

CUSTOM-HOUSE. See CUSTOMS DUTIES.

CUSTOM-HOUSE BROKER. See CUSTOMS DUTIES.

CUSTOM OF MERCHANTS. A system of customs or rules relative to bills of exchange, partnership, and other mercantile matters, and which, under the name of the "*lex mercatoria*," or "law-merchant," has been ingrafted into, and made a part of, the common law.[64] (See, generally, COMMERCIAL PAPER; CONSUETUDO MERCATORUM; CUSTOMS AND USAGES.)

CUSTOM OF THE COUNTRY. With reference to good husbandry the term is applied to the approved habits of husbandry in the neighborhood under circumstances of the like nature.[65]

61. Weinhouse *v.* Cronin, 68 Conn. 250, 254, 36 Atl. 45. And see Askew *v.* Silman, 95 Ga. 678, 680, 22 S. E. 573; Mills *v.* Dunham, [1891] 1 Ch. 576, 580, 60 L. J. Ch. 362, 64 L. T. Rep. N. S. 712, 39 Wkly. Rep. 289.

The word may embrace intending as well as actual customers. McLean *v.* Dun, 39 U. C. Q. B. 551, 562.

62. Great Western R. Co. *v.* London, etc., Banking Co., [1900] 2 Q. B. 464, 472, 5 Com. Cas. 282, 69 L. J. Q. B. 741, 82 L. T. Rep. N. S. 746, 48 Wkly. Rep. 662, construing 45 & 46 Vict. c. 61, §§ 81, 82. In Lacave *v.* Credit Lyonnais, [1897] 1 Q. B. 148, 155, 66 L. J. Q. B. 226, 75 L. T. Rep. N. S. 514, it was decided that one Ponce was not a customer, the judge saying that to constitute him one his relations must be much nearer and closer than those of Ponce in that case. Collins, J., said: "The Act means what it says, and that protection is only given for obvious reasons to a bank which does collect for a customer in the real sense, if he is a person who has an account at the bank." In Mathews *v.* Brown, 63 L. J. Q. B. 494, it was held that a stranger coming to a bank to get a check cashed was not a customer within the section, Cave, J., saying that "the word 'customer' . . . involves something of use and habit."

63. Bouvier L. Dict.

64. Black L. Dict. [*citing* 1 Bl. Comm. 75; 1 Stephen Comm. 54]. And see Edie *v.* East India Co., 2 Burr. 1216, 1228, 1 W. Bl. 295, where Wilmot, J., said: "The custom of merchants is part of the law of England: and courts of law must take notice of it, as such;" and Foster, J., said: "The custom of merchants, or law of merchants, is the law of the kingdom; and is part of the common law." In Edie *v.* East India Co., 1 W. Bl. 295, 299, Foster, J., said: "The custom of merchants, so far as the law regards it, is the custom of England; and therefore Lord Coke calls it, very properly, the law-merchant." See also Cramlington *v.* Evans, 1 Show. 4, 5, where Holt, J., said: "I know no distinction between *lex mercatoria*, and *consuetudo mercatorum*."

"The uniform custom of a merchant or manufacturer is presumed to be known to those who are in the habit of dealing with him, and in their dealings are supposed to act with reference to that custom." McAllister *v.* Reab, 4 Wend. (N. Y.) 483, 490. And see Reab *v.* McAllister, 8 Wend. (N. Y.) 109, 118; Wood *v.* Hickok, 2 Wend. (N. Y.) 501, 504.

65. Legh *v.* Hewitt, 4 East 154, 159, 7 Rev. Rep. 445.

As applied to use of a farm.— Where a tenant promised to "use and occupy the premises in a good and husbandlike manner according to the custom of the country where the said premises lie," Lord Ellenborough, C. J., said: "I understand the parties to have meant no more than this, that the tenant should conform to the prevalent usage of the country where the lands lie. From the subject-matter of the contract it is evident that the word custom, as here used, cannot mean a custom in the strict legal signification of the word; for that must be taken with reference to some defined limit or space which is essential to every custom properly so called. . . What shall be considered in farming as a good and husbandlike manner must vary exceedingly according to soil, climate, and situation." Legh *v.* Hewitt, 4 East 154, 159, 7 Rev. Rep. 445.

CUSTOMS AND USAGES

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Particular Rights, Duties, and Liabilities, see ADJOINING LANDOWNERS; BANKS AND BANKING; CARRIERS; FACTORS AND BROKERS; FIXTURES; INNKEEPERS; LANDLORD AND TENANT; LOGGING; MASTER AND SERVANT; MINES AND MINERALS; MUNICIPAL CORPORATIONS; NEGLIGENCE; NUISANCES; PILOTS; RAILROADS; SHERIFFS AND CONSTABLES; SHIPPING; STREET RAILROADS; STREETS AND HIGHWAYS; TOWAGE; TRESPASS; WAREHOUSEMEN; WATERS; and Like Special Titles.
Custom as Defense to Criminal Prosecution, see CRIMINAL LAW.
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Hearsay Evidence in General, see EVIDENCE.
Indian Divorce Customs, see DIVORCE.
Judicial Notice of Custom, see EVIDENCE.
Opinion Evidence in General, see EVIDENCE.

I. DEFINITIONS.

A. Custom. A custom is a law established by long usage and differs from prescription in the fact that prescription is the making of a right while custom is the making of a law.[1]

1. Linn-Regis *v.* Taylor, 3 Lev. 160; 2 Bl. Comm. 263; Lawson Usages and Customs 15.
Other definitions are: "Practice or course of acting." Muggleton *v.* Barnett, 2 H. & N. 653, 667, 4 Jur. N. S. 139, 27 L. J. Exch. 125, 6 Wkly. Rep. 182.
"Local common law." Hammerton *v.* Honey, 24 Wkly. Rep. 603.

B. Usage. A usage in its most extensive meaning includes both custom and prescription; but in its narrower signification it refers to a general habit, mode, or course of procedure.[2]

C. General and Particular Customs. General customs are such as prevail throughout a country, and become the law of that country; particular customs are such as prevail in some county, city, town, parish, or place.[3]

II. NATURE, REQUISITES, AND VALIDITY.

A. General Customs as Part of Common Law — 1. In General. The general customs of England constitute a part of the common law.[4]

2. Customs of Merchants. While the early customs of the common law relate generally to land, the customs of merchants came later to be recognized by

"A law established by long usage." Wilcox *v.* Wood, 9 Wend. (N. Y.) 346, 349.

"The law or rule which is not written." Strother *v.* Lucas, 12 Pet. (U. S.) 410, 445, 9 L. ed. 1137.

"Something that has the effect of local law." Hall *v.* Nottingham, 1 Ex. D. 1, 3, 45 L. J. Exch. 50, 33 L. T. Rep. N. S. 697, 24 Wkly. Rep. 58.

"Something which has the force and effect of law." Hursh *v.* North, 40 Pa. St. 241, 243.

"Unwritten law that has been introduced by use." Cutter *v.* Waddingham, 22 Mo. 206, 283.

"The practice long used and received which has acquired the force of law." Panaud *v.* Jones, 1 Cal. 488, 498.

"A practice which is universal, or almost universal, in the trade in question." Smith *v.* Sixty Thousand Feet of Yellow Pine Lumber, 2 Fed. 396, 399.

"Usage so long established and so well known as to have acquired the force of law." Adams *v.* Pittsburg Ins. Co., 76 Pa. St. 411, 414.

"Unwritten law, established by common consent and uniform practice, from time immemorial." Lindsay *v.* Cusimano, 12 Fed. 504, 506.

"That length of usage which has become law. It is a usage which has acquired the force of law." Walls *v.* Bailey, 49 N. Y. 464, 471, 10 Am. Rep. 407 [*quoted* in Robinson *v.* New York, etc., Steamship Co., 63 N. Y. App. Div. 211, 217, 71 N. Y. Suppl. 424]. See also Nelson *v.* Southern Pac. R. Co., 15 Utah 325, 331, 49 Pac. 644 [*quoting* Anderson L. Dict.].

"Long-established practice, considered as unwritten law, and resting for authority on long consent; usage." Webster Dict. [*quoted* in Nelson *v.* Southern Pac. Co., 15 Utah 325, 330, 49 Pac. 644].

"Such a usage as by common consent and uniform practice has become the law of the place or of the subject matter to which it relates." *In re* Wilkes-Barre Tp., 7 Kulp (Pa.) 529, 531; Bouvier L. Dict. [*quoted* in Nelson *v.* Southern Pac. Co., 15 Utah 325, 331, 49 Pac. 644]. See also Currie *v.* Syndicate, 104 Ill. App. 165, 169.

"Something which has, by its universality and antiquity, acquired the force and effect of law, in a particular place or country, in respect to the subject-matter to which it relates." Morningstar *v.* Cunningham, 110 Ind. 328, 334, 11 N. E. 593, 59 Am. Rep. 211.

"Customs result from a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent." La. Rev. Civ. Code (1900), art. 3.

2. Lowry *v.* Read, 3 Brewst. (Pa.) 452.

Other definitions are: "That which is generally practiced in affairs of the same nature with that which forms the subject of the contract." La. Rev. Civ. Code (1900), art. 1966.

"A method of dealing, adopted in a particular place or by those engaged in a particular vocation or trade, which acquires legal force, because people make contracts with reference to it." Currie *v.* Syndicate, 104 Ill. App. 165, 169.

Distinguished from "custom."—"We must not confound custom with usage; usage is no more than a fact, custom is a law; there may be usage without custom, but there can be no custom without usage to accompany or precede it: usage consists in the repetition of acts, and custom arises out of this repetition." Esriche Dict. Jurisprudence [*quoted* in Cutter *v.* Waddingham, 22 Mo. 206, 284]. See also Lowry *v.* Read, 3 Brewst. (Pa.) 452, 456, where it is said: "A usage differs from a custom, in that it does not require that it should be immemorial to establish it." And see Currie *v.* Syndicate, 104 Ill. App. 165, 169.

3. Bodfish *v.* Fox, 23 Me. 90, 94, 39 Am. Dec. 611; Lawson Usages and Customs 15.

4. Lawson Usages and Customs 16. See also Common Law, 8 Cyc. 366.

As a custom is local law it cannot be got rid of except by statute. Hammerton *v.* Honey, 24 Wkly. Rep. 603.

By the use of the word "laws," in a treaty, is included custom and usage, when once settled, although recent. Strother *v.* Lucas, 12 Pet. (U. S.) 410, 9 L. ed. 1137.

Every custom supposes an act of parliament or a law made in former times by an equivalent power, although it was not actually called a parliament. Harland *v.* Cooke, Freem. 319.

the English courts. By these are meant those rules relative to bills of exchange, partnership, and other commercial transactions which convenience had suggested and experience had adopted and made general. Those customs which were seen to be universally and notoriously prevalent among merchants and which had been found by experience to be of public benefit were soon adopted by the law merchant, and became a part of the general law of England.[5] So far as the usages of merchants have been judicially ascertained and established, so far as they have become the acknowledged law of the land, they have ceased to deserve the name of custom, just as much as any other common-law rule which had its foundation in the customs of the country. It is a part of that common law, and is therefore not within the scope of this article.[6]

B. Particular Customs of England. The particular customs of the English law are of little practical interest to the American lawyer. They are the remains of a multitude of local customs prevailing, some in one part, some in another, over the whole country, while it was divided into separate dominions.[7]

5. Magill *v.* Brown, Brightly (Pa.) 346; Cookendorfer *v.* Preston, 4 How. (U. S.) 317, 11 L. ed. 992; Beason *v.* Chapman, 8 C. B. 967 note *a*, 65 E. C. L. 967; Brandao *v.* Barnett, 3 C. B. 519, 54 E. C. L. 519, 12 Cl. & F. 787, 8 Eng. Reprint 1622; Lickbarrow *v.* Mason, 1 H. Bl. 357, 6 East 21, 2 T. R. 63, 1 Rev. Rep. 425; Hussey *v.* Jacob, Ld. Raym. 87; Stone *v.* Rawlinson, Willes 559.

6. "People talk of the custom of merchants. This word 'custom' is apt to mislead our ideas. The custom of merchants, so far as the law regards it, is the custom of England; and therefore Lord Coke calls it, very properly, the law-merchant. We should not confound general customs with special local customs." Per Foster, J., in Edie *v.* East India Co., 2 Burr. 1216, 1 W. Bl. 295, 299.

7. Browne Usages and Customs 8.

Instances of these customs are the custom of gavelkind in Kent, by which amongst other things all the sons, and not the eldest only, succeeded to their father's inheritance; the custom of borough English, prevailing in other counties, by which the youngest son inherited the estate in preference to all his elder brothers; the customs of other boroughs, which entitled a widow to all her husband's lands for her dower, instead of the one third to which she was entitled by the general law; and the customs of manors. Portland *v.* Hill, L. R. 2 Eq. 765, 12 Jur. N. S. 286, 35 L. J. Ch. 439, 15 Wkly. Rep. 38; Brahant *v.* Wilson, L. R. 1 Q. B. 44, 6 B. & S. 979, 12 Jur. N. S. 24, 35 L. J. Q. B. 49, 13 L. T. Rep. N. S. 319, 14 Wkly. Rep. 28, 118 E. C. L. 979; Reg. *v.* Hale, 9 A. & E. 339, 1 P. & D. 293, 36 E. C. L. 191; Sheppard *v.* Hall, 3 B. & Ad. 433, 1 L. J. K. B. 152, 23 E. C. L. 195; Willcock *v.* Windsor, 3 B. & Ad. 43, 23 E. C. L. 29; Richardson *v.* Capes, 2 B. & C. 841, 4 D. & R. 512, 2 L. J. K. B. O. S. 182, 9 E. C. L. 363; Richardson *v.* Walker, 2 B. & C. 827, 4 D. & R. 498, 2 L. J. K. B. O. S. 180, 9 E. C. L. 357; Rex *v.* Joliffe, 2 B. & C. 54, 3 D. & R. 240, 1 L. J. K. B. O. S. 232, 26 Rev. Rep. 264, 9 E. C. L. 33; Hanmer *v.* Chance, 4 De G. J. & S. 626, 11 Jur. N. S. 397, 34 L. J. Ch. 413, 12 L. T. Rep. N. S. 163, 13 Wkly. Rep. 556, 69 Eng. Ch. 479; Clarkson *v.* Woodhouse, 3 Dougl. 189, 5 T. R. 412 note, 26 E. C. L. 131; Cort *v.* Birkbeck, Dougl. (3d ed.) 218; Davidson *v.* Moscrop, 2 East 56, 6 Rev. Rep. 373; Salisbury *v.* Gladstone, 9 H. L. Cas. 692, 8 Jur. N. S. 625, 34 L. J. C. P. 222, 4 L. T. Rep. N. S. 849, 9 Wkly. Rep. 930; Muggleton *v.* Barnett, 2 H. & N. 653, 4 Jur. N. S. 139, 27 L. J. Exch. 125, 6 Wkly. Rep. 182 [*affirming* 1 H. & N. 282, 2 Jur. N. S. 1026, 26 L. J. Exch. 47]; Anglesea *v.* Hatherton, 12 L. J. Exch. 57, 10 M. & W. 218; Gard *v.* Callard, 6 M. & S. 69, 18 Rev. Rep. 310; Freeman *v.* Phillipps, 4 M. & S. 486, 16 Rev. Rep. 524; Denn *v.* Spray, 1 T. R. 466, 1 Rev. Rep. 250. And for examples of local customs of the city of London and other parts of England recognized by the courts see Atty.-Gen. *v.* Wright, [1897] 2 Q. B. 318, 66 L. J. Q. B. 834, 77 L. T. Rep. N. S. 295, 46 Wkly. Rep. 85; Elwood *v.* Bullock, 6 Q. B. 383, 51 E. C. L. 383; Salters *v.* Jay, 3 Q. B. 109, 2 G. & D. 414, 6 Jur. 803, 11 L. J. Q. B. 173, 43 E. C. L. 654; Pearce *v.* Scotcher, 9 Q. B. D. 162, 46 J. P. 248, 46 L. T. Rep. N. S. 342; Mills *v.* Colchester, L. R. 3 C. P. 575, 37 L. J. Ch. 278; Whitstable Free Fishers *v.* Foreman, L. R. 2 C. P. 688, 36 L. J. C. P. 273, 16 L. T. Rep. N. S. 747, 15 Wkly. Rep. 1133; Bickley *v.* Bickley, L. R. 4 Eq. 216, 36 L. J. Ch. 817; Bryant *v.* Foot, L. R. 3 Q. B. 497, 9 B. & S. 444, 37 L. J. Q. B. 217, 18 L. T. Rep. N. S. 587, 16 Wkly. Rep. 808; Lyons *v.* De Pass, 11 A. & E. 326, 39 E. C. L. 190, 9 C. & P. 68, 38 E. C. L. 52, 4 Jur. 505, 9 L. J. Q. B. 51, 3 P. & D. 177; Shaw *v.* Poynter, 2 A. & E. 312, 4 N. & M. 290, 29 E. C. L. 156; Atty.-Gen. *v.* Mylchreest, 4 App. Cas. 294; Magrath *v.* Hardy, 1 Arn. 352, 4 Bing. N. Cas. 782, 6 Dowl. P. C. 749, 2 Jur. 594, 7 L. J. C. P. 299, 6 Scott 627, 33 E. C. L. 974; Leicester *v.* Burgess, 5 B. & Ad. 246, 2 N. & M. 131, 27 E. C. L. 111; Middleton *v.* Cater, 4 Bro. Ch. 409; Bolton *v.* Jeffes, 2 Bro. P. C. 463, 1 Eng. Reprint 1066; Plummer *v.* Bentham, 1 Burr. 248; Webb *v.* Hurrell, 4 C. B. 287, 4 D. & L. 824, 16 L. J. C. P. 187, 56 E. C. L. 287; Shephard *v.* Payne, 16 C. B. N. S. 132, 10 Jur. N. S. 540, 33 L. J. C. P. 158, 10 L. T.

C. Classes of Customs and Usages. Laying aside the general common-law customs[8] and the general customs of merchants[9] already referred to, customs and usages may be divided into three classes, viz.: (1) Particular customs, or the usages of particular places; (2) usages of trade, or the customs of particular trades or occupations; and (3) customs of particular persons. Although the latter word has strictly a different signification, "usage" and "custom" have come to be used as synonymous and convertible terms, and will be so used in this article.[10]

D. Requisites — 1. Must Be Ancient — a. Common-Law Customs. A common-law custom must have existed so long that the memory of man runneth not to the contrary.[11] If a usage could be shown to have commenced it was void as a custom. Every custom of course must have had a commencement, but if its inception could be discovered, then the individual by whose particular will the custom had its birth would be discovered; and it was a maxim that no one man could be allowed to make a law, but that a custom could only have its origin in the will of the whole. The time "whereof the memory of man runneth not to

Rep. N. S. 193, 12 Wkly. Rep. 581, 111 E. C. L. 132 [*affirming* 12 C. B. N. S. 414, 9 Jur. N. S. 354, 31 L. J. C. P. 297, 6 L. T. Rep. N. S. 716, 104 E. C. L. 414]; Lanchburg *v.* Bode, [1892] 2 Ch. 120, 62 J. P. 248, 67 L. J. Ch. 196, 78 L. T. Rep. N. S. 14; Edwards *v.* Jenkins, [1896] 1 Ch. 308, 60 J. P. 167, 65 L. J. Ch. 222, 73 L. T. Rep. N. S. 574, 44 Wkly. Rep. 407; Chilton *v.* London, 7 Ch. D. 735, 47 L. J. Ch. 433, 38 L. T. Rep. N. S. 498, 26 Wkly. Rep. 474; Rex *v.* Johnson, 6 Cl. & F. 41, 7 Eng. Reprint 613, Macl. & R. 1, 9 Eng. Reprint 1; Layhurn *v.* Crisp, 8 C. & P. 397, 8 L. J. Exch. 118, 4 M. & W. 320, 34 E. C. L. 801; Blacquiere *v.* Hawkins, Dougl. (3d ed.) 378; Arnold *v.* Poole, 2 Dowl. P. C. N. S. 574, 7 Jur. 653, 12 L. J. C. P. 97, 4 M. & G. 860, 5 Scott N. R. 761, 43 E. C. L. 444; Bradbee *v.* Christ's Hospital, 2 Dowl. P. C. N. S. 164, 11 L. J. C. P. 209, 4 M. & G. 714, 5 Scott N. R. 79, 43 E. C. L. 368; Tiffin *v.* Tiffin, 1 Eq. Cas. Abr. 151, 1 Vern. Ch. 1, 21 Eng. Reprint 951; Truscott *v.* Merchant Tailors' Co., 11 Exch. 855, 2 Jur. N. S. 356, 25 L. J. Exch. 173, 4 Wkly. Rep. 295; Rivers *v.* Adams, 3 Ex. D. 361, 48 L. J. Exch. 47, 39 L. T. Rep. N. S. 39, 27 Wkly. Rep. 381; Thompson *v.* Daniel, 10 Hare 296, 17 Jur. 773, 22 L. J. Ch. 507, 1 Wkly. Rep. 532, 44 Eng. Ch. 288; Bruin *v.* Knott, 9 Jur. 979, 12 Sim. 436, 35 Eng. Ch. 368; Piper *v.* Chappell, 9 Jur. 601, 14 M. & W. 624; Anonymous, 1 L. J. Ch. O. S. 199; Crosby *v.* Hetherington, 12 L. J. C. P. 261, 4 M. & G. 933, 5 Scott N. R. 637, 43 E. C. L. 480; Collyer *v.* Stennett, 12 L. J. C. P. 73, 4 M. & G. 676, 5 Scott N. R. 34, 43 E. C. L. 349; London, etc. R. Co. *v.* Fobbing Levels, 66 L. J. Q. B. 127, 75 L. T. Rep. N. S. 629; New Windsor Corp. *v.* Taylor, 68 L. J. Q. B. 87, 79 L. T. Rep. N. S. 450; Allgood *v.* Gibson, 34 L. T. Rep. N. S. 883, 25 Wkly. Rep. 60; Pitts *v.* Kingsbridge Highway Bd., 25 L. T. Rep. N. S. 195, 19 Wkly. Rep. 884; Ewing *v.* Burns, Macl. & R. 435, 9 Eng. Reprint 160; Read *v.* Duck, Prec. Ch. 409; Adams *v.* Pierce, 3 P. Wms. 11; Stainton *v.* Jones, 2 Selw. 1225; Hartop *v.* Hoare, 2 Str. 1187, 1 Wils. C. P. 8; Wynstanley *v.* Lee, 2 Swanst. 333; Stephenson *v.* Houlditch, 2 Vern. Ch. 491; Woodroffe *v.* Farnham, 2 Vern. Ch. 291; Layer *v.* Nelson, 1 Vern. Ch. 456; Lewes *v.* Sutton, 5 Ves. Jr. 683, 31 Eng. Reprint 804; Bulbroke *v.* Goodere, 1 W. Bl. 569; *Ex p.* Costello, I. R. 2 C. L. 380.

8. See *supra*, II, A, 1.

9. See *supra*, II, A, 2.

A general custom prevailing among ordinary contractors is applicable to contracts with the government. Lyons *v.* U. S., 30 Ct. Cl. 352.

10. See Dickinson *v.* Gay, 7 Allen (Mass.) 29, 83 Am. Dec. 656; Jewell *v.* Grand Trunk R. Co., 55 N. H. 84; Richmond *v.* Union Steamboat Co., 87 N. Y. 240; Walls *v.* Bailey, 49 N. Y. 464, 40 Am. Rep. 407.

11. *Illinois.*— Currie *v.* Syndicate, 104 Ill. App. 165.

Maine.— Ulmer *v.* Farnsworth, 80 Me. 500, 15 Atl. 65.

New Hampshire.— Knowles *v.* Dow, 22 N. H. 387, 55 Am. Dec. 163.

New Jersey.— Ocean Beach Assoc. *v.* Brinley, 34 N. J. Eq. 438; Society, etc. *v.* Haight, 1 N. J. Eq. 393.

Pennsylvania.— Jones *v.* Wagner, 66 Pa. St. 429, 5 Am. Rep. 385.

Virginia.— Harris *v.* Carson, 7 Leigh 632, 30 Am. Dec. 510.

England.—Simpson *v.* Wells, L. R. 7 Q. B. 214, 41 L. J. M. C. 105, 26 L. T. Rep. N. S. 163; Scales *v.* Key, 11 A. & E. 819, 3 P. & D. 505, 39 E. C. L. 434; Bailey *v.* Appleyard, 8 A. & E. 161, 2 Jur. 872, 7 L. J. Q. B. 145, 3 N. & P. 257, 1 W. W. & H. 208, 35 E. C. L. 531; Rex *v.* Joliffe, 2 B. & C. 54, 3 D. & R. 240, 1 L. J. K. B. O. S. 232, 26 Rev. Rep. 264, 9 E. C. L. 33; Jenkins *v.* Harvey, 1 C. M. & R. 877, 1 Gale 23, 5 L. J. Exch. 17, 5 Tyrw. 326; Welcome *v.* Upton, 7 Dowl. P. C. 475, 5 M. & W. 398; Bradley *v.* New Castle upon Tyne, 2 E. & B. 427, 75 E. C. L. 427; Beaufort *v.* Smith, 4 Exch. 450, 19 L. J. Exch. 97; Rex *v.* Johns, Lofft 76; 1 Dane Abr. c. 26, art. 1.

See 15 Cent. Dig. tit. "Customs and Usages," § 3.

the contrary" received a technical limitation, and was understood to refer to the commencement of the reign of King Richard I.[12]

b. Particular Customs or Usages of Trade. The elements of antiquity need not be shown in the case of a usage or custom of trade. All that is required is to show that it is established, that is, that it has existed a sufficient length of time to have become generally known.[13] Time is of course an ingredient necessary to show that the custom in question has become established.[14] But what

Long-continued non-user is strong evidence of the custom never having existed. Hammerton *v.* Honey, 24 Wkly. Rep. 603.

12. See note to Cassidy *v.* Stuart, 9 Dowl. P. C. 366, 5 Jur. 25, 2 M. & G. 437, 2 Scott N. R. 432, 40 E. C. L. 680.

Such a test could not be applied in the United States. Delaplane *v.* Crenshaw, 15 Gratt. (Va.) 457; Harris *v.* Carson, 7 Leigh (Va.) 632, 30 Am. Dec. 510. And *quære* whether a custom could be proved in Ontario, there being no time immemorial on which to found it, especially where the land sought to be burdened therewith was only granted by the crown within fifty years. Grand Hotel Co. *v.* Cross, 44 U. C. Q. B. 153.

13. *Connecticut.*— Buckley *v.* Derby Fishery Co., 2 Conn. 252, 7 Am. Dec. 271.

Delaware.—Mears *v.* Waples, 3 Houst. 581; Townsend *v.* Whitby, 5 Harr. 55.

Illinois.— Wilson *v.* Bauman, 80 Ill. 493; People *v.* Chicago, etc., R. Co., 57 Ill. 436; Currie *v.* Syndicate, 104 Ill. App. 165; Mobile Fruit, etc., Co. *v.* Judy, 91 Ill. App. 82; Packer *v.* Pentecost, 50 Ill. App. 228.

Indiana.— Rastetter *v.* Reynolds, 160 Ind. 133, 66 N. E. 612.

Louisiana.— Tyson *v.* Laidlaw, 18 La. 380; Clark *v.* Gifford, 7 La. 524, 24 Am. Dec. 511.

Maine.— Wood *v.* Watson, 53 Me. 300.

Maryland.— Columbia Bank *v.* Fitzhugh, 1 Harr. & G. 239.

Michigan.— Pennell *v.* Delta Transp. Co., 94 Mich. 247, 53 N. W. 1049.

Missouri.— Cole *v.* Skrainka, 37 Mo. App. 427.

New York.— Schipper *v.* Milton, 51 N. Y. App. Div. 522, 64 N. Y. Suppl. 935; Smith *v.* Wright, 1 Cai. 43, 2 Am. Dec. 162.

Ohio.— Wrightson *v.* Pettinger, 2 Ohio Cir. Ct. 381.

Pennsylvania.— McMasters *v.* Pennsylvania R. Co., 69 Pa. St. 374, 8 Am. Rep. 264; Com. *v.* Mayloy, 57 Pa. St. 291; Adams *v.* Palmer, 30 Pa. St. 346; Newbold *v.* Wright, 4 Rawle 195; Silliman *v.* Whitmer, 11 Pa. Super. Ct. 243; Lowry *v.* Read, 3 Brewst. 452; Pratt *v.* Bank, 12 Phila. 378.

Texas.— Schumacher *v.* Trent, 18 Tex. Civ. App. 17, 44 S. W. 460; Ft. Worth, etc., R. Co. *v.* Johnson, 2 Tex. App. Civ. Cas. § 232.

Virginia.— Southwest Virginia Mineral Co. *v.* Chase, 95 Va. 50, 27 S. E. 826.

Wisconsin.— Hall *v.* Storrs, 7 Wis. 253.

United States.— McGregor *v.* Pennsylvania Ins. Co., 16 Fed. Cas. No. 8,811, 1 Wash. 39; Trott *v.* Wood, 24 Fed. Cas. No. 14,190, 1 Gall. 443; York *v.* Wistar, 30 Fed. Cas. No. 18,141.

England.— Thorpe *v.* Eyre, 1 A. & E. 926, 3 N. & M. 214, 28 E. C. L. 426; Gould *v.* Oliver, 4 Bing. N. Cas. 134, 33 E. C. L. 634; Legh *v.* Hewitt, 4 East 154, 7 Rev. Rep. 445; Edelstein *v.* Schuler, 71 L. J. K. B. 572; Wilkins *v.* Wood, 12 Jur. 583, 17 L. J. Q. B. 319; Juggomohun Ghose *v.* Mamickchund, 7 Moore Ind. App. 263, 19 Eng. Reprint 308.

See 15 Cent. Dig. tit. "Customs and Usages," § 3.

In an English case in 1824 the plaintiff's counsel having inquired of a witness whether it was not the custom to pay veterinary surgeons for attendance as well as for medicines, counsel on the other side objected: "There can be no custom; this is all modern." But Best, C. J., said: "They do not mean a custom whereof the memory of man runneth not to the contrary; but if there is a general usage applicable to a particular profession, parties employing an individual in that profession are supposed to deal with him according to that usage. You may cross-examine as to the extent of the usage." Sewell *v.* Corp, 1 C. & P. 392, 393, 12 E. C. L. 232. As early as 1780 in Noble *v.* Kennoway, Dougl. (3d ed.) 510, 512, Lord Mansfield said: "Every under-writer is presumed to be acquainted with the practice of the trade he insures, and that whether it is recently established, or not. If he does not know it, he ought to inform himself. It is no matter if the usage has only been for a year." And on the construction of a marine policy in the trade to Labrador, which was first opened to English shipping after the peace of Paris, and had been carried on but three years, he held that a custom which had been invariably observed ever since its opening was as binding on those who shipped on Labrador risks as though the trade itself had been of much longer continuance. In Williams *v.* Gilman, 3 Me. 276, 281, the court refer to a usage of trade in these words: "The counsel for the defendant have treated this usage among printers and booksellers as a custom; such as we find described in our law books; and have contended that to be valid it must have existed for time immemorial, uninterrupted, definite, reasonable, &c. We apprehend that the law of local customs is not applicable in this case. The usage relied on has nothing local in its nature; it relates to a certain class of people spread through the country, and to the peculiar business in which they are employed."

14. Buyck *v.* Schwing, 100 Ala. 355, 14 So. 48; Wall *v.* East River Ins. Co., 3 Duer (N. Y.) 264.

length of time shall be sufficient cannot be stated in the form of a general rule. Each case must depend upon the various relations of the trade to the public, the exigencies of the business, and the frequency of the repetition of the particular usage in the time within which it may be proved to have existed.[15]

2. Must Be Certain and Uniform. A common-law custom was required to be certain and uniform, both as to the persons claiming under it and the things claimed.[16] It is also strictly held that a usage or custom of trade must be certain

A special custom as to the meaning of terms in a particular locality, when used in a contract, cannot be considered in the absence of proof of antiquity. Thomas *v.* Hooker-Colville Steam Pump Co., 28 Mo. App. 563.

15. Thus three weeks in the city of New York, where a great number of transactions of the same character take place daily, was considered a sufficient length of time to establish a usage in the insurance business restricting the ordinary signification of the word "storehouse" as used in a fire policy. Wall *v.* East River Ins. Co., 3 Duer (N. Y.) 264. On the other hand five years in an Alabama county, in the year 1852, was thought by the court to be too short a time to establish a usage in the carrying trade contrary to the ordinary rules of law. Cooper *v.* Berry, 21 Ga. 526, 68 Am. Dec. 468. And see Smith *v.* Rice, 56 Ala. 417. The same has been held as to a certain banking practice in force in a particular bank only two years (Buford *v.* Tucker, 44 Ala. 89; Carlisle *v.* Wallace, 12 Ind. 252, 74 Am. Dec. 207; Adams *v.* Otterback, 15 How. (U. S.) 539, 14 L. ed. 805), and of the habit of a carrier for a month past to deposit goods in a certain place (Alabama, etc., R. Co. *v.* Kidd, 35 Ala. 209).

Proof of a special custom or usage at a particular place is not admissible to affect the construction of a contract where the contract was made a year before the trial, and there is nothing to show how long or when such special usage had been established. Taylor *v.* Mueller, 30 Minn. 343, 15 N. W. 413, 44 Am. Rep. 199.

16. Ely *v.* Warren, 2 Atk. 189, 26 Eng. Reprint 518; Rex *v.* Ecclesfield, 1 B. & Ald. 348, 1 Stark. 393, 19 Rev. Rep. 335, 2 E. C. L. 152; Lloyd *v.* Jones, 6 C. B. 81, 12 Jur. 657, 17 L. J. C. P. 206, 60 E. C. L. 81; Steel *v.* Houghton, 1 H. Bl. 51, 2 Rev. Rep. 715; Hayward *v.* Cunnington, 1 Lev. 231, Sud. 354; Valentine *v.* Penny, Noy 145; Manchester *v.* Vale, 1 Saund. 27; Peppin *v.* Shakespear, 6 T. R. 748; Shakespear *v.* Peppin, 6 T. R. 741, 3 Rev. Rep. 330; Duberley *v.* Page, 2 T. R. 391; Millechamp *v.* Johnson, Willes 205 note *b*; Bell *v.* Wardell, Willes 202; 1 Dane Abr. c. 26, § 5.

Illustrations.— From an early day in England a custom that land shall descend to the most worthy of the owner's blood was void, on the ground that the custom gives no certain means for the discovery of merit, while a custom that lands shall descend to the next male of the blood, exclusive of females, was good. In Selby *v.* Robinson, 2 T. R. 758, 1 Rev. Rep. 615, it was held by the queen's bench, in 1788, that a custom for poor and indigent householders living in A to cut and carry away rotten boughs and branches in a chase in A could not be supported, the description of the persons entitled being too vague. And in another early case it was held that no person had at common law a right to glean in the harvest-field; and that neither have the poor of a parish legally settled as such any such right, on the ground that such a right would be inconsistent with the nature of property, and that no right can exist at common law unless both the subject of it and they who claim it are certain. See Steel *v.* Houghton, 1 H. Bl. 51, 2 Rev. Rep. 715. So a custom to pay twopence an acre in lieu of tithes is good; but a custom to pay sometimes twopence and sometimes threepence as the occupier of the land chooses is bad on account of its uncertainty. Blewett *v.* Tregonning, 3 A. & E. 554, 1 Hurl. & W. 431, 4 L. J. K. B. 223, 5 N. & M. 234, 30 E. C. L. 260; Tanistry's Case, Dav. 32. "Yet a custom," as Blackstone puts it [1 Bl. Comm. 61] "to pay a year's improved value for a fine on a copyhold estate is good, though the value be uncertain; for the value may at any time be ascertained, and the maxim of the law is, *Id certum est, quod certum redi potest.*" So a custom for the tenants of collieries to throw earth, stones, coal, etc., in heaps upon land "near" to certain coal-pits was held bad, on the ground that the word "near" was too uncertain. Wilkes *v.* Broadbent, 1 Wils. C. P. 63. But see Salisbury *v.* Gladstone, 9 H. L. Cas. 692, 8 Jur. N. S. 625, 34 L. J. C. P. 222, 4 L. T. Rep. N. S. 849, 9 Wkly. Rep. 930. In Wilson *v.* Willes, 7 East 121, 3 Smith K. B. 107, 8 Rev. Rep. 604, the declaration was trespass for breaking and entering the close of the plaintiff, called Hampstead heath, and digging and carrying away turf covered with grass, etc. Plea: that the *locus in quo* was parcel of a waste in the manor of Hampstead; that there had been from time immemorial divers customary tenements by copy of court-roll. And it then alleged a custom for tenants of such tenements, "having a garden or gardens parcel of the same," to dig turf for the making or repairing of grass-plots in such gardens every year, at all times of the year, in such quantity as occasion hath required, and justified the taking accordingly. To this plea there was a general demurrer, and judgment was given for the plaintiff. Lord Ellenborough said that "a custom, however ancient, must not be in-

and uniform in order to be binding.[17] A usage or custom of trade to which no

definite and uncertain"; that it was "not defined what sort of improvement the custom extends to"; that "every part of the garden may be converted into grass plots"; that there was "nothing to restrain the tenants from taking the whole of the turbary of the common," and it resolved itself into "the mere will and pleasure of the tenant." Similarly, in Clayton *v.* Corby, 5 Q. B. 415, Dav. & M. 449, 8 Jur. 212, 14 L. J. Q. B. 364, 48 E. C. L. 415, an action for trespass for breaking plaintiff's close and digging and carrying away clay, the defendant justified as the owner of a brick-kiln, and pleaded that all occupiers thereof for thirty years had enjoyed as of right, etc., a right to dig, take, and carry away from the close so much clay as was at any time required by him and them for making bricks at the brick-kiln, in every year, and at all times of the year. The plea was held bad.

A custom to control the words of a covenant in a deed must be one which both parties to the covenant can know, and must be certain and invariable. Abbott *v.* Bates, 43 L. J. C. P. 150, 30 L. T. Rep. N. S. 99, 22 Wkly. Rep. 488 [*affirmed* in 45 L. J. C. P. 117, 33 L. T. Rep. N. S. 491, 24 Wkly. Rep. 101].

17. *Alabama.*— Desha *v.* Holland, 12 Ala. 513, 46 Am. Dec. 261.

Colorado.— Savage *v.* Pelton, 1 Colo. App. 148, 28 Pac. 948.

Delaware.— Bryan *v.* Brown, 3 Pennew. 504, 53 Atl. 55; Fraser *v.* Ross, 1 Pennew. 348, 41 Atl. 204.

Georgia.— Robertson *v.* Wilder, 69 Ga. 340. But see Horan *v.* Strachan, 86 Ga. 408, 12 S. E. 678, 22 Am. St. Rep. 471.

Illinois.— Illinois Masons' Benev. Soc. *v.* Baldwin, 86 Ill. 479; Cadwell *v.* Meek, 17 Ill. 220; Crawford *v.* Clark, 15 Ill. 561; Currie *v.* Syndicate, 104 Ill. App. 165; Quin *v.* Herhold, 100 Ill. App. 320.

Iowa.— Smith *v.* Hess, 83 Iowa 238, 48 N. W. 1030.

Maine.— Thorn *v.* Rice, 15 Me. 263.

Maryland.— Citizens' Bank *v.* Grafflin, 31 Md. 507, 1 Am. Rep. 66; Murray *v.* Spencer, 24 Md. 520; Foley *v.* Mason, 6 Md. 37.

Massachusetts.— Fay *v.* Alliance Ins. Co., 16 Gray 455; Berkshire Woollen Co. *v.* Proctor, 7 Cush. 417.

Michigan.— Strong *v.* Grand Trunk R. Co., 15 Mich. 206, 93 Am. Dec. 184.

Minnesota.— Nippolt *v.* Firemen's Ins. Co., 57 Minn. 275, 59 N. W. 191.

Missouri.— Johnston *v.* Parrott, 92 Mo. App. 199; Joseph *v.* Andrews Co., 72 Mo. App. 551.

New York.— McIntosh *v.* Miner, 37 N. Y. App. Div. 483, 55 N. Y. Suppl. 1074; Child *v.* Sun Mut. Ins. Co., 3 Sandf. 26; Vos *v.* Robinson, 9 Johns. 192.

Ohio.— Isham *v.* Fox, 7 Ohio St. 317; Huston *v.* McArthur, 7 Ohio 54, Pt. II.

Pennsylvania.— Adams *v.* Pittsburg Ins. Co., 76 Pa. St. 411; McKinney *v.* Chester, 2 Del. Co. Rep. 525.

South Carolina.— Singleton *v.* Hilliard, 1 Strobh. 203; Touro *v.* Cassin, 1 Nott & M. 173, 9 Am. Dec. 680.

Texas.— Philips *v.* Wheeler, 10 Tex. 536; Woldert *v.* Arledge, 11 Tex. Civ. App. 484, 33 S. W. 372; Davie *v.* Lynch, 1 Tex. App. Civ. Cas. § 695.

Utah.— Nelson *v.* Southern Pac. Co., 15 Utah 325, 49 Pac. 644.

Vermont.— Linsley *v.* Lovely, 26 Vt. 123.

West Virginia.— Sterling Organ Co. *v.* House, 25 W. Va. 64.

Wisconsin.— Hinton *v.* Coleman, 45 Wis. 165; Hall *v.* Storrs, 7 Wis. 253.

United States.— Oelricks *v.* Ford, 23 How. 49, 16 L. ed. 534; U. S. *v.* Buchanan, 8 How. 83, 12 L. ed. 997; Gronstadt *v.* Witthoff, 15 Fed. 265; Collings *v.* Hope, 6 Fed. Cas. No. 3,003, 3 Wash. 149; Rogers *v.* Mechanics' Ins. Co., 20 Fed. Cas. No. 12,016, 1 Story 603; U. S. *v.* Buchanan, 24 Fed. Cas. No. 14,678, Crabbe 563; U. S. *v.* Cadwalader, 25 Fed. Cas. No. 14,706, Gilp. 563; U. S. *v.* Duval, 25 Fed. Cas. No. 15,015, Gilp. 356.

England.— Svendson *v.* Wallace, 4 Aspin. 550, 46 L. T. Rep. N. S. 742, 30 Wkly. Rep. 841.

See 15 Cent. Dig. tit. "Customs and Usages," § 5.

Illustrations.— In the following cases evidence of the usage was rejected because of its want of certainty: A usage of the cloth trade that on the sale of cloth the buyer had three days within which to send word to the seller that he would keep the goods, otherwise the seller could send for them back, some of the witnesses called to support the usage speaking of three days as the time, others a week, and one a month (Wood *v.* Wood, 1 C. & P. 59, 12 E. C. L. 44); a custom to pay veterinary surgeons for attendance as well as medicines, the witness stating that the general rule was to charge for attendance when there was not much medicine required (Sewell *v.* Corp, 1 C. & P. 392, 12 E. C. L. 232); a custom among wholesale merchants to allow their salesmen pay for time lost by sickness (Sweet *v.* Leach, 6 Ill. App. 212); a usage among brokers that the margins put up to cover the advance in the commodity to be purchased must be "reasonable," no rule by which a "reasonable" margin can be determined being shown (Oelricks *v.* Ford, 23 How. (U. S.) 49, 16 L. ed. 534); a custom among commission merchants, on a sale of grain for cash, to wait two, three, or four days for the money (Catlin *v.* Smith, 24 Vt. 85; Stewart *v.* Scudder, 2 Am. L. Reg. 80); a usage among merchants in the city of Baltimore to deliver to purchasers merchandise sold for cash, without demanding the cash, and without the vendor waiving his right to cash payment, the witness called to establish it saying that he delivered the

limit is assigned to its extent is bad and will not therefore be given effect by the courts.[18]

3. Must Be Compulsory. A custom must be compulsory, and not left to each one's option to obey it.[19]

4. Must Be Consistent. Customs must be consistent with each other. One custom cannot be set up in opposition to another, for if contradictory they destroy each other.[20]

5. Must Be Continued. A custom must be continued; there must be no interruption or temporary ceasing of the right.[21] The same is required of a usage of trade.[22] A usage which is proved to exist at a period long before the time of the

article without the cash only when he considered the purchaser good (Foley *v.* Mason, 6 Md. 37); a usage that cash sales were not understood as for cash in hand, but that payment might afterward be made (Union R., etc., Co. *v.* Yeager, 34 Ind. 1); and a custom among commission merchants that flour of a grade not suitable for the market and sale in the city of Indianapolis was in the absence of special instructions forwarded to the city of New York (Wallace *v.* Morgan, 23 Ind. 399. And see Cincinnati, etc., Mail Line Co. *v.* Boal, 15 Ind. 345). Again a custom of stenographers to charge twenty cents per folio for copies of their minutes is not established by evidence that "the custom is to pay from fifteen to twenty cents a folio," since such evidence negatives the requirement of uniformity. Cavanagh *v.* O'Neill, 20 Misc. (N. Y.) 233, 45 N. Y. Suppl. 789.

18. Daun *v.* London Brewery Co., L. R. 8 Eq. 155, 38 L. J. Ch. 454, 20 L. T. Rep. N. S. 601.

19. 1 Dane Abr. c. 26, § 6. See also Adams *v.* Otterback, 15 How. (U. S.) 539, 14 L. ed. 805; Collings *v.* Hope, 6 Fed. Cas. No. 3,003, 3 Wash. 149; Donnell *v.* Columbian Ins. Co., 7 Fed. Cas. No. 3,987, 2 Sumn. 366; Wilcocks *v.* Phillips, 29 Fed. Cas. No. 17,639, 1 Wall. Jr. 47.

"Otherwise it loses the imperative character of a law. It is true that agreements which were founded in consent were the origin of customs; it is true that the observances which have become, as it were, acted or pictured laws were at first matters of option; but whenever they are established customs they must have ceased to be matters of choice, and must have an obligatory element — a binding force. Were it in the option of every man whether he would conform to a custom or not, were it a matter which might be referred for decision to his good pleasure, it is evident that it would be invalid upon another ground, viz., uncertainty. A custom, to be binding, must be current. It must be known and understood by those whose conduct is to be affected by its existence, whose transactions are to be influenced by its factual terms; but if its terms were alterable at the will of each man, if it was in the option of each man to be bound to-day and not bound to-morrow by the custom, any one whose conduct might have to conform to such a rule would find it impossible to shape his actions accordingly, and any transactions which might have to be influenced by such a precept would be varying, indefinite, uncertain, and absurd." Browne Usages and Customs 24. See also 1 Blackstone Comm. 61, where it is said: "A custom that all the inhabitants shall be rated towards the maintenance of a bridge will be good; but a custom that every man is to contribute thereto at his own pleasure is idle and absurd, and indeed no custom at all."

20. Parkin *v.* Radcliffe, 1 B. & P. 282, 4 Rev. Rep. 797; Aldred's Case, 9 Coke 57*b*; Kenchin *v.* Knight, 1 Wils. C. P. 253; 1 Dane Abr. c. 26, § 7.

If two customs are contradictory, it is evident that they cannot both have been established by mutual consent. Thus the allegation of one custom is not to be met by the allegation of another custom inconsistent with the first, but rather by the denial of the existence of the first as a custom. This rule might well fall within that other one which requires that a custom shall be reasonable; for the absurdity and unreasonableness of two mutually inconsistent customs is evident, and if one custom be admitted to exist, the other, which is inconsistent with it, violates the requisite of reasonableness, and is therefore invalid. Browne Usages and Customs 25.

21. Tyson *v.* Smith, 9 A. & E. 406, 1 P. & D. 307, W. W. & D. 749, 36 E. C. L. 224; 1 Dane Abr. c. 26, § 2.

"If a custom ceased and recommenced, its new beginning would be within the memory of man, and would be due to the will of an individual, which would exclude it from the definition of a custom, and make any usage subject to such a lapse void as a custom. But an interruption which is to prove valid as against a custom must be an actual interruption of the usage, and not simply an interruption of the possession of the right." Browne Usages and Customs 16.

22. Johnson *v.* Stoddard, 100 Mass. 306; McMasters *v.* Pennsylvania R. Co., 69 Pa. St. 374, 8 Am. Rep. 264. Thus the custom of a city department in charging interest on sums advanced to contractors was held inadmissible, it appearing that the custom had been one way down to the year 1858, under one controller, and another way from 1858 to 1878, under other controllers. Fellows *v.* New York, 17 Hun (N. Y.) 249. So

transaction which it is introduced to affect, and not since, is inadmissible.[23] Again acts of accommodation or indulgence do not make a usage.[24]

6. Must Be General. A common-law custom if general was a part of the law and hence not admissible in evidence as a custom.[25] But as to particular customs

where the knowledge of a witness who was introduced to prove a usage was not later than a year before that time, the usage was held not sufficiently proved. Hale *v.* Gibbs, 43 Iowa 380.

23. Michigan Cent. R. Co. *v.* Coleman, 28 Mich. 440; Walker *v.* Barron, 6 Minn. 508.

24. Cincinnati, etc., Mail Line Co. *v.* Boal, 15 Ind. 345; Farlow *v.* Ellis, 15 Gray (Mass.) 229. See also Metcalf *v.* Weld, 14 Gray (Mass.) 210.

Illustrations.—A creditor may indulge a debtor in one or two cases without thereby binding himself to do likewise in the future. Brent *v.* Cook, 12 B. Mon. (Ky.) 267. And the common act of courtesy which induces a man to call on his mechanic to rectify what is amiss in his job does not establish a custom to exonerate the trade from responsibility for bad work. Somerby *v.* Tappan, Wright (Ohio) 570. So however common it may be for persons in receiving payments to waive their strict legal rights and to make use of a paper currency, such a habit would not bind any one who chose to insist upon his legal right to receive gold and silver. Lord *v.* Burbank, 18 Me. 178. Again because plaintiffs had been constant customers of a bank, which had discounted for them many drafts and immediately sent them on for acceptance when the law did not require it, was no just reason to compel the bank at the risk of being held liable for negligence to pursue a similar course in the future. Citizens' Bank *v.* Grafflin, 31 Md. 507, 1 Am. Rep. 66. So a usage among mills to give a certificate of honorable discharge to an operative who had worked a certain term and performed certain conditions, which certificate would obtain him employment in other mills, does not render it obligatory to give such a certificate in all cases where the conditions have been complied with; the giving of such a discharge is a matter of discretion in the particular mill. Thornton *v.* Suffolk Mfg. Co., 10 Cush. (Mass.) 376. And where a contract as to land gives no right to cut the timber, evidence that the owner had permitted others under similar contracts to cut timber without considering them trespassers is irrelevant. Norton *v.* Heywood, 20 Me. 359. And the mere act of a railroad company in paying for the medical services of an employee injured in its service would hardly establish such a custom for subsequent cases which might arise. Mobile, etc., R. Co. *v.* Jay, 61 Ala. 247.

But, although the practice of a particular business may at any time be altered by those engaged in it, yet an arbitrary change cannot be made, to the prejudice of others, without some notice of the change. Perhaps even notice would not be sufficient, if a party was not given sufficient time to adapt his conduct to the new custom. Bankers had taken up certain bills for a customer upon the security of proceeds to be expected from certain consignments, and at the same time allowed him to continue to draw upon his deposit account with them. This practice had existed for some time, when, some goods remaining unsold and the market price having gone down, they refused to pay one of his drafts. In an action by the customer, it was left to the jury to say whether the course of dealing of the parties had been understood as on this footing, or whether it was a mere act of indulgence on the part of the bank; if the former, they were instructed that the bankers could not suddenly, and without notice to him, interfere with this custom. The jury found for the plaintiff. "I am of the opinion," said Pollock, C. B., "that the case was properly left to the jury. No doubt, if a person has been accustomed to accept bills for the accommodation of another, he may refuse to do so any longer; for there is no tenancy of a man's credit which requires any time to put an end to it. But that is not the case where a course of dealing has prevailed, and value has been given for the accommodation. It makes no difference whether the one party is a factor or a banker, if the circumstances are such as to justify the other in drawing though he has not a cash credit, he is entitled to do so until he has notice that the accommodation is discontinued. The question then is, whether there was, between the plaintiff and the Bank, a course of business which could not be put an end to without a reasonable notice. It seems to me that there is no objection to the mode in which the case was left to the jury, and that they have arrived at a proper conclusion." Cumming *v.* Shand, 5 H. & N. 95, 98, 29 L. J. Exch. 129. 1 L. T. Rep. N. S. 300. 8 Wkly. Rep. 182. And see Harper *v.* Calhoun, 7 How. (Miss.) 203; Van Amee *v.* Troy Bank, 8 Barb. (N. Y.) 312.

25. In Viner Abr. tit. "Custom," it is said: "Information in the Exchequer against a merchant for lading wine in a strong ship, the defendant pleaded licence of the King made to J. S. to do it, which J. S. had granted his authority thereof to the defendant; and that there is a custom among merchants throughout England, that one may assign such licence to another, and that the assignee shall enjoy it, &c., which was demurred in law, and it was agreed for law, that a man cannot prescribe custom throughout England; for if it be throughout England it is a common law and not a custom, *contra* if the custom had been pleaded to

or usages of trade, although it seems a contradiction in terms to say that they must be general and universal in order to be valid, yet it is so laid down in a number of cases.[26] In all cases in which this is stated as a requisite to the validity of a usage, the question at issue has been whether the party to be affected by it has been proved to have been acquainted with it. Knowledge of a usage[27] is necessary in every case in order to bind a person by its terms. Sometimes this notice must be expressly proved, and sometimes, from its generality and notoriety, the law raises the presumption that it was known. It is therefore only as affecting the question of notice that the generality of the usage becomes material; for a practice may exist between two only, and yet bind them in all subsequent dealings unless abrogated by both.[28] And as express notice is

be in such a city, or county. . . . Note the diversity." In Fitch *v.* Rawling, 2 H. Bl. 393, 398, 3 Rev. Rep. 425, while it was held that a custom for all the inhabitants of a parish to play all kinds of lawful games and pastimes in a close at all seasonable times of the year was good, yet a similar custom for all persons whatever happening to be in the said parish was held bad, Buller, J., saying: "How that which may be claimed by all the inhabitants of England, can be the subject of a custom, I cannot conceive. Customs must in their nature be confined to individuals of a particular description, and what is common to all mankind can never be claimed as a custom." Later, in Tyson *v.* Smith, 6 A. & E. 745, 6 L. J. K. B. 189, 1 N. & P. 784, 1 P. & D. 307, 310, 33 E. C. L. 392, which was an action of trespass, to which a custom for all victuallers to erect booths on the land in question during certain fair days was set up, it was objected that it was general, as amounting to the common law. But this objection was overruled. "Admitting for the purpose of argument," said Tindal, C. J., "that a custom which would comprehend within it all the liege subjects of the crown, would be bad, on the ground of its amounting to the common law: we think the custom before us is not of that description. For in the present custom there are three restrictions, which necessarily limit its generality. The parties who claim the benefit of it must be victuallers; they must be victuallers coming to keep the fair, and they must come at the precise period of the year at which the fair is fixed. Now under the description of victuallers, mentioned in the custom, we cannot consider that very large body of persons to be comprehended who in ancient times appear to have been classed under that designation by the statutes referred to in the argument; but we think the plea must be taken to speak in the language of the time at which it is pleaded; and as the only term used is that of victualler, it must be understood those only are comprehended who are now so termed, that is, persons authorized by law to keep houses of entertainment for the public. This removes the case at once from the application of the case of Fitch *v.* Rawling, [2 H. Bl. 393], where the custom comprehended all the liege subjects of the crown being in the parish at any time."

26. *Alabama.*— Syson *v.* Hieronymus, 127 Ala. 482, 28 So. 967; Fulton Ins. Co. *v.* Milner, 23 Ala. 420.

Illinois.— Coffman *v.* Campbell, 87 Ill. 98; Bissell *v.* Ryan, 23 Ill. 566.

Maine.— Ulmer *v.* Farnsworth, 80 Me. 500, 15 Atl. 65; Folsom *v.* Merchants' Mut. Mar. Ins. Co., 38 Me. 414.

Maryland.— Citizens' Bank *v.* Grafflin, 31 Md. 507, 1 Am. Rep. 66; Thomson *v.* Albert, 15 Md. 268; Duvall *v.* Farmers' Bank, 9 Gill & J. 31.

Massachusetts.— Scudder *v.* Bradbury, 106 Mass. 422; Berkshire Woollen Co. *v.* Proctor, 7 Cush. 417; Taunton Copper Co. *v.* Merchants' Ins. Co., 22 Pick. 108.

Missouri.— Park *v.* Viernow, 16 Mo. App. 383.

New York.— Holford *v.* Adams, 2 Duer 471; Coale *v.* Bennett, 31 Misc. 826, 64 N. Y. Suppl. 1116; Palmer *v.* Harrison, 28 Misc. 180, 58 N. Y. Suppl. 1107.

Pennsylvania.—Com. *v.* Philadelphia County Prison, 57 Pa. St. 291; Cope *v.* Dodd, 13 Pa. St. 33.

South Carolina.— Smetz *v.* Kennedy, Riley 218; Chastain *v.* Bowman, 1 Hill 270.

United States.— Oelricks *v.* Ford, 23 How. 49, 16 L. ed. 534; Richardson *v.* Goddard, 23 How. 28, 16 L. ed. 412; Southern Indiana Express Co. *v.* U. S. Express Co., 88 Fed. 659 [*affirmed* in 92 Fed. 1022, 35 C. C. A. 172]; Dodge *v.* Hedden, 42 Fed. 446; The Innocenta, 13 Fed. Cas. No. 7,050, 10 Ben. 410; Martin *v.* Delaware Ins. Co., 16 Fed. Cas. No. 9,161, 2 Wash. 254; Rogers *v.* Mechanics' Ins. Co., 20 Fed. Cas. No. 12,016, 1 Story 603; Trott *v.* Wood, 24 Fed. Cas. No. 14,190, 1 Gall. 443.

England.— Coventry *v.* Gladstone, L. R. 4 Eq. 493, 37 L. J. Ch. 30, 16 Wkly. Rep. 304; Sweeting *v.* Pearce, 7 C. B. N. S. 449, 6 Jur. N. S. 753, 97 E. C. L. 449; Gurney *v.* Behrend, 3 E. & B. 622, 18 Jur. 856, 23 L. J. Q. B. 265, 2 Wkly. Rep. 425, 77 E. C. L. 622.

Canada.— De Hertel *v.* Supple, 13 Grant Ch. (U. C.) 648; Fisher *v.* Western Assur. Co., 11 U. C. Q. B. 255.

See 15 Cent. Dig. tit. "Customs and Usages," § 4.

27. See *infra*, II, D, 7.

28. Hotchkiss *v.* Artisans' Bank, 42 Barb. (N. Y.) 517; Cumming *v.* Shand, 5 H. & N. 95, 29 L. J. Exch. 129, 1 L. T. Rep. N. S. 300, 8 Wkly. Rep. 182.

difficult to prove, because in the majority of cases nothing has been said by the parties in their negotiations about the usage, it is obvious that in the greatest number of instances it becomes absolutely necessary to prove such a usage as the law will presume the party intended to be bound by; and consequently in all these cases the generality of the custom becomes vital, and the rule that a usage must be general is applied by the courts with rigor. Therefore before proof of a custom can be received to affect the rights of parties, it must appear to have been so general that the parties will be presumed to have knowledge of it.[29] Evidence of isolated instances of a certain course of trade is not sufficient to establish a usage by which the rights of parties are to be measured and determined.[30] A usage may be "general," as this term is used here, notwithstanding that it is confined to a particular city, town, or village.[31] It may be generally

29. *Alabama.*— Herring *v.* Skaggs, 73 Ala. 446.

Delaware.— Bryan *v.* Brown, 3 Pennew. 504, 53 Atl. 55; Fraser *v.* Ross, 1 Pennew. 348, 41 Atl. 204.

Georgia.— Goette *v.* Lane, 111 Ga. 400, 36 S. E. 758; Madden *v.* Blain, 66 Ga. 49; Savannah *v.* Feely, 66 Ga. 31; Champion *v.* Wilson, 64 Ga. 184.

Illinois.— Papin *v.* Goodrich, 103 Ill. 86; Currie *v.* Syndicate. 104 Ill. App. 165.

Iowa.— Couch *v.* Watson Coal Co., 46 Iowa 17.

Louisiana.— Tyson *v.* Laidlaw, 18 La. 380.

Michigan.— Eaton *v.* Gladwell, 108 Mich. 678, 66 N. W. 598; Moore *v.* Michigan Cent. R. Co., 3 Mich. 23.

Minnesota.— Powell *v.* Luders, 84 Minn. 372, 87 N. W. 940; Pevey *v.* Schulenberg, etc., Lumber Co., 33 Minn. 45, 21 N. W. 844; Taylor *v.* Mueller, 30 Minn. 343, 15 N. W. 413, 44 Am. Rep. 199.

Missouri.— Johnston *v.* Parrott, 92 Mo. App. 199.

Nebraska.— See McConnell *v.* Bettman, (1902) 90 N. W. 648.

New York.— Sipperly *v.* Stewart, 50 Barb. 62.

Pennsylvania.— Anewalt *v.* Hummel, 109 Pa. St. 271; McKinney *v.* Chester, 2 Del. Co. Rep. 525.

Wisconsin.— Hibbard *v.* Peek, 75 Wis. 619, 44 N. W. 641; Bentley *v.* Doggett, 51 Wis. 224, 8 N. W. 155, 37 Am. Rep. 827; Lee *v.* Merrick, 8 Wis. 229.

United States.— Southern Indiana Express Co. *v.* U. S. Express Co., 88 Fed. 659; Isaksson *v.* Williams, 26 Fed. 642; Phillips *v.* Pennsylvania Ins. Co., 19 Fed. Cas. No. 11,102; York *v.* Wistar, 30 Fed. Cas. No. 18,141.

See 15 Cent. Dig. tit. "Customs and Usages," § 4.

Where a custom prevails so universally that the court will take judicial notice of it, a party to a transaction will not be allowed to plead ignorance of it. British, etc., Mortg. Co. *v.* Tibballs, 63 Iowa 468, 19 N. W. 319.

30. *Alabama.*— Herring *v.* Skaggs, 73 Ala. 446.

Arkansas.— Burr *v.* Sickles, 17 Ark. 428, 65 Am. Dec. 437.

Illinois.— Cahn *v.* Michigan Cent. R. Co., 71 Ill. 96.

Indiana.— Willcutts *v.* Northwestern Mut. L. Ins. Co., 81 Ind. 33.

Maryland.— Duvall *v.* Farmers' Bank, 9 Gill & J. 31.

Minnesota.— Flatt *v.* Osborne, 33 Minn. 98, 22 N. W. 440.

Missouri.— Ehrlich *v.* Ætna L. Ins. Co., 103 Mo. 231, 15 S. W. 530; Dellecella *v.* Harmonie Club, 34 Mo. App. 179. See also Shields *v.* Kansas City Suburban Belt R. Co., 87 Mo. App. 637.

New York.— Cogswell *v.* Chubb, 1 N. Y. App. Div. 93, 36 N. Y. Suppl. 1076.

Pennsylvania.— Cope *v.* Dodd, 13 Pa. St. 33; Lowry *v.* Read, 3 Brewst. 452.

Texas.—Barnes *v.* Zettlemoyer, 25 Tex. Civ. App. 468, 62 S. W. 111.

United States.— Garrison *v.* Memphis Ins. Co., 19 How. 312, 15 L. ed. 656; The Innocenta, 13 Fed. Cas. No. 7,050, 10 Ben. 410.

See 15 Cent. Dig. tit. "Customs and Usages," § 4.

Banking practice.— Isolated instances of a certain practice in a particular bank, as for instance the payment of a loss in an unusual case (Allen *v.* Merchants' Bank, 22 Wend. (N. Y.) 215), or proof of a few instances of dealings in one or two other banks (Chesapeake Bank *v.* Swain, 29 Md. 483), do not establish a general usage. A particular banking usage must apply to a place rather than to a particular bank. It must be the rule of all the banks in the place or it cannot be a valid usage. If every bank, it has been said, could establish its own usage, the confusion and uncertainty which would ensue would greatly exceed any local convenience resulting therefrom. Adams *v.* Otterback, 15 How. (U. S.) 539, 14 L. ed. 805. In Rickford *v.* Ridge, 2 Campb. 537, 539, Lord Ellenborough said: "I can not hear of any arbitrary distinction between one part of the city and another. It is not competent to bankers to lay down one rule for the eastward of St. Paul's and another for the westward. They might as well fix upon St. Peter's at Rome."

31. Gleason *v.* Walsh, 43 Me. 397; Perkins *v.* Jordan, 35 Me. 23; Clark *v.* Baker, 11 Metc. (Mass.) 186, 45 Am. Dec. 199; Thompson *v.* Hamilton, 12 Pick. (Mass.) 425, 23 Am. Dec. 619.

known in that city, town, or village, and be understood by all persons dealing there, and yet may not exist in any place beyond. But the usage of a single house,[32] of one person only,[33] of a single mill,[34] of one city or town,[35] or of one railroad company[36] is insufficient. It has been held that evidence of a custom in the cities of New Orleans, Cincinnati, and Louisville would not be alone sufficient to prove a general custom of merchants upon the Mississippi river and its tributaries.[37] So proof that a certain practice of factors "was very common in the trade, but a few factors in Mobile would not do so" is insufficient to establish a usage.[38] And evidence that it was "very unusual" to do a certain thing would not prove a usage not to do so.[39] A usage of trade may have a greater or less territorial extent, or a more general or restricted one, according to the circumstances which gave rise to it;[40] and so evidence that a certain custom prevailed in three different establishments was considered sufficient to establish it as general.[41] Deviation from a universal custom of a port in particular instances, due to strong competition in trade, does not affect the validity of such custom.[42]

7. Must Be Known — a. In General. Particular usages and customs of trade or business must be known by the party to be affected by them or they will not be binding,[43] unless they are so notorious, universal, and well established that his

32. Weber *v.* Kingsland, 8 Bosw. (N. Y.) 415. See also American Ins. Co. *v.* Neiberger, 74 Mo. 167.

Usage of particular class.— No presumption arises that parties contracted with reference to a particular custom, or made it a part of their agreement, when the record shows that the custom related to a particular class of which appellant was not a member. Bernard *v.* Mott, 89 Mo. App. 403.

33. Powell *v.* Thompson, 80 Ala. 51; Burr *v.* Sickles, 17 Ark. 428, 65 Am. Dec. 437. See also Child *v.* Sun Mut. Ins. Co., 3 Sandf. (N. Y.) 26.

34. Schlessinger *v.* Dickinson, 5 Allen (Mass.) 47; Stevens *v.* Reeves, 9 Pick. (Mass.) 198.

35. To establish a usage on the part of municipal corporations, it must be general usage among like towns and cities, and not a usage in a single town or city. Butler *v.* Charlestown, 7 Gray (Mass.) 12. "In considering this subject of usage," says Shaw, C. J., in Spaulding *v.* Lowell, 23 Pick. (Mass.) 71, 79, "it is proper to add, that it is not a casual or occasional exercise of a power, by one or a few towns, which will constitute such a usage; but it must be a usage, reasonable in itself, general among all towns of like situation, as to settlement and population, and of long continuance." "A casual or occasional exercise of a power by one or a few towns will not constitute a usage." Hood *v.* Lynn, 1 Allen (Mass.) 103, 106.

36. Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99. See also Thompson *v.* Minneapolis, etc., R. Co., 35 Minn. 428, 29 N. W. 148.

But a court may refuse to charge that the usage of one boat does not constitute a custom of the trade, where no foundation for such a charge appears from the evidence. Langford *v.* Cummings, 4 Ala. 46.

37. Walsh *v.* Frank, 19 Ark. 270.

Practice must be universal.— It does not show a usage of trade to show that many persons, or a majority of persons, engaged in the business practice a particular mode. The practice must be universal. Porter *v.* Hill, 114 Mass. 106.

38. Austill *v.* Crawford, 7 Ala. 335.

39. Rennell *v.* Kimball, 5 Allen (Mass.) 356. And see Cook *v.* Fiske, 12 Gray (Mass.) 491.

40. Dixon *v.* Dunham, 14 Ill. 324.

41. Sumner *v.* Tyson, 20 N. H. 354.

In an action to recover for a number of logs which had become lodged in the defendant's boom on the Pemigewassett river, and had been converted and sawed by him, the plaintiff offered testimony that it was the custom in that locality, where logs were thus mingled, for the party owning the boom to separate and pass by the boom all logs not his own; but it appeared that there was no other boom on that river. The trial court, however, admitted the evidence, and the ruling was affirmed on appeal. Saunders *v.* Clark, 106 Mass. 331.

42. Robertson *v.* Wilder, 69 Ga. 340.

43. *Arkansas.*— Marlatt *v.* Clary, 20 Ark. 251.

Connecticut.— Smith *v.* Phipps, 65 Conn. 302, 32 Atl. 367.

Georgia.— Hendricks *v.* W. G. Middlebrooks Co., 118 Ga. 131, 44 S. E. 835; Kelly *v.* Kauffman Milling Co., 92 Ga. 105, 18 S. E. 363; Ocean Steamship Co. *v.* McAlpin, 69 Ga. 437; Central R., etc., Co. *v.* Anderson, 58 Ga. 393; Sugart *v.* Mays, 54 Ga. 554; Scott *v.* Saffold, 37 Ga. 384.

Illinois.— Bank of Commerce *v.* Miller, 105 Ill. App. 224; Currie *v.* Syndicate, 104 Ill. App. 165; Corrigan *v.* Herrin, 44 Ill. App. 363; Larsen *v.* Johnson, 42 Ill. App. 198.

Iowa.— Underwood *v.* Iowa L. of H., 66 Iowa 134, 23 N. W. 300; Bradford *v.* Homestead F. Ins. Co., 54 Iowa 598, 7 N. W. 48; Murray *v.* Brooks, 41 Iowa 45; Rindskoff *v.* Barrett, 14 Iowa 101; Graydon *v.* Patterson, 13 Iowa 256, 81 Am. Dec. 432.

knowledge of them will be conclusively presumed.[44] Therefore the usage of auc-

Kentucky.— Caldwell *v.* Dawson, 4 Metc. 121.

Louisiana.— Sully *v.* Pratt, 106 La. 601, 31 So. 161; Pitre *v.* Offutt, 21 La. Ann. 679, 99 Am. Dec. 749; Lewis *v.* The Success, 18 La. Ann. 1.

Maine.— Marshall *v.* Perry, 67 Me. 78; Pierce *v.* Whitney, 29 Me. 188; Leach *v.* Perkins, 17 Me. 462, 35 Am. Dec. 268.

Massachusetts.— Howard *v.* Great Western Ins. Co., 109 Mass. 384; Dodge *v.* Favor, 15 Gray 82; Warren Bank *v.* Parker, 8 Gray 221; Fisher *v.* Sargent, 10 Cush. 250; Berkshire Woollen Co. *v.* Proctor, 7 Cush. 417; Stevens *v.* Reeves, 9 Pick. 198; Peirce *v.* Butler, 14 Mass. 303.

Michigan.— Blodgett *v.* Vogel, 130 Mich. 479, 90 N. W. 277; Lawrence *v.* Griswold, 30 Mich. 410; Hutchings *v.* Ladd, 16 Mich. 493.

Minnesota.—Thompson *v.* Minneapolis, etc., R. Co., 35 Minn. 428, 29 N. W. 148; Flatt *v.* Osborne. 33 Minn. 98, 22 N. W. 440; Johnson *v.* Gilfillan, 8 Minn. 395.

Missouri.— Walsh *v.* Mississippi Valley Transp. Co., 52 Mo. 434; Martin *v.* Hall, 26 Mo. 386; Baer *v.* Glaser, 90 Mo. App. 289; Hyde *v.* St. Louis Book, etc., Co., 32 Mo. App. 298; Brown *v.* Strimple, 21 Mo. App. 338; Boyd *v.* Graham, 5 Mo. App. 403.

Montana.— Fitzgerald *v.* Hanson, 16 Mont. 474, 41 Pac. 230.

Nebraska.— Bixby *v.* Bruce, (1903) 95 N. W. 34; Gamble *v.* A. Stauber Mfg. Co., 50 Nebr. 463, 69 N. W. 960; Atchison, etc., R. Co. *v.* Miller, 16 Nebr. 661, 21 N. W. 451.

New Hampshire.— Smith *v.* Gibbs, 44 N. H. 335; Goodall *v.* New England Mut. F. Ins. Co., 25 N. H. 169; Martin *v.* Maynard, 16 N. H. 165.

New York.— Rickerson *v.* Hartford F. Ins. Co., 149 N. Y. 307, 43 N. E. 856; Robertson *v.* National Steamship Co., 139 N. Y. 416, 34 N. E. 1053; Newhall *v.* Appleton, 102 N. Y. 133, 6 N. E. 120; Johnson *v.* De Peyster, 50 N. Y. 666; Bradley *v.* Wheeler, 44 N. Y. 495; Higgins *v.* Moore, 34 N. Y. 417; Hilbrand *v.* Dininny, 73 N. Y. App. Div. 511, 77 N. Y. Suppl. 317; Flour City Nat. Bank *v.* Traders' Nat. Bank, 35 Hun 241; Stoney *v.* Farmers' Transp. Co., 17 Hun 579; Boardman *v.* Gaillard, 1 Hun 217; Wadley *v.* Davis, 63 Barb. 500; Duguid *v.* Edwards, 50 Barb. 288; Butterworth *v.* Volkening, 4 Thomps. & C. 650; Lawrence *v.* Gallagher, 42 N. Y. Super. Ct. 309; Wheeler *v.* Newbould, 5 Duer 29; Holford *v.* Adams, 2 Duer 471; Scott *v.* Brown, 27 Misc. 203, 57 N. Y. Suppl. 763; Gough *v.* Davis, 24 Misc. 245, 52 N. Y. Suppl. 947; Woodruff *v.* Acosta, 11 N. Y. St. 286; Dawson *v.* Kittle, 4 Hill 107; Wood *v.* Hickok, 2 Wend. 501.

North Carolina.— Gilmer *v.* Young, 122 N. C. 806, 29 S. E. 830.

Ohio.— Hartford Protection Ins. Co. *v.* Harmer, 2 Ohio St. 452, 59 Am. Dec. 684; The Albatross *v.* Wayne, 16 Ohio 513; Mathias Planing Mill Co. *v.* Hazen, 20 Ohio Cir. Ct. 287; Lewis *v.* Gavlord, 1 Ohio Dec. (Reprint) 73, 1 West. L. J. 487.

Oregon.— McBee *v.* Caesar, 15 Oreg. 62, 13 Pac. 652.

Pennsylvania.—Ambler *v.* Phillips, 132 Pa. St. 167, 19 Atl. 71; McMasters *v.* Pennsylvania R. Co., 69 Pa. St. 374, 8 Am. Rep. 264; Whitesell *v.* Crane, 8 Watts & S. 369; McDowell *v.* Ingersoll, 5 Serg. & R. 101; Collins *v.* Mechling, 1 Pa. Super. Ct. 594, 38 Wkly. Notes Cas. 235; Patterson *v.* Ben Franklin Ins. Co., 22 Pittsb. Leg. J. 201.

South Carolina.— Heyward *v.* Searson, 1 Speers 249.

Tennessee.—Dabney *v.* Campbell, 9 Humphr. 680.

Texas.— Neill *v.* Billingsley, 49 Tex. 161; Mills *v.* Ashe, 16 Tex. 295; Missouri, etc., R. Co. *v.* Mayfield, 29 Tex. Civ. App. 477, 68 S. W. 807; Strozier *v.* Lewey, 3 Tex. App. Civ. Cas. § 129.

Vermont.— Stevens *v.* Smith, 21 Vt. 90.

Virginia.— Consumers' Ice Co. *v.* Jennings, 100 Va. 719, 42 S. E. 879.

Wisconsin.— Brunnell *v.* Hudson Saw Mill Co., 86 Wis. 587, 57 N. W. 364; Scott *v.* Whitney, 41 Wis. 504; Power *v.* Kane, 5 Wis. 265.

United States.— Chateaugay Ore, etc., Co. *v.* Blake, 144 U. S. 476, 12 S. Ct. 731, 36 L. ed. 510; Cincinnati First Nat. Bank *v.* Burkhardt, 100 U. S. 686, 25 L. ed. 766; Bliven *v.* New England Screw Co., 23 How. 420, 16 L. ed. 510, 514; Great Western Elevator Co. *v.* White, 118 Fed. 406, 56 C. C. A. 388; Isaksson *v.* Williams, 26 Fed. 642; Adams *v.* Manufacturers, etc., F. Ins. Co., 17 Fed. 630; Alexandria Bank *v.* Deneale, 2 Fed. Cas. No. 846, 2 Cranch C. C. 488; Davis *v.* New Brig, 7 Fed. Cas. No. 3,643, Gilp. 473; Pierpont *v.* Fowle, 19 Fed. Cas. No. 11,152, 2 Woodb. & M. 23.

England.— Buckle *v.* Knoop, L. R. 2 Exch. 125, 36 L. J. Exch. 49, 16 L. T. Rep. N. S. 231, 15 Wkly. Rep. 588; Lansdowne *v.* Somerville, 3 F. & F. 236; Marsh *v.* Jelf, 3 F. & F. 234; Sutton *v.* Great Western R. Co., 3 H. & C. 800, 11 Jur. N. S. 879, 35 L. J. Exch. 18, 13 L. T. Rep. N. S. 221, 13 Wkly. Rep. 1091; Lewis *v.* Marshall, 8 Jur. 848, 13 L. J. C. P. 193, 7 M. & G. 729, 8 Scott N. R. 477; Moore *v.* Voughton, 1 Stark. 487, 2 E. C. L. 186.

Canada.— Torrance *v.* Hayes, 2 U. C. C. P. 338.

See 15 Cent. Dig. tit. "Customs and Usages," § 23.

The denial by a party to a contract, who had been in a business for a number of years, of knowledge of a well-known and prevalent custom in that trade, being that of a party in interest, is not conclusive. De Cernea *v.* Cornell, 3 Misc. (N. Y.) 241, 22 N. Y. Suppl. 941.

A person is not chargeable with knowledge of a custom where the only evidence in regard thereto is his express denial under oath that he has any knowledge of it. Cavanagh *v.* O'Neill, 20 Misc. (N. Y.) 233, 45 N. Y. Suppl. 789.

44. *Alabama.*— West *v.* Ball, 12 Ala. 340.

tioneers to charge certain fees for their services is not binding on a purchaser;[45] the usage of factors as to the disposition of the funds of their principals will not affect the latter;[46] the usage of a merchant as to the commission allowed to agents will not bind an agent;[47] the usage of cabinet-makers not to employ workmen except by the day cannot affect a purchaser;[48] the private custom of brokers as to the deposit of checks will not change the legal obligation of a party indorsing a check on a bank to pay the same when legally presented;[49] the private custom of the lessor of a mine will not bind the lessee;[50] the usage of livery-stable keepers in a particular city to have a lien for their charges upon horses delivered to them to keep cannot affect a customer;[51] a custom among dealers in lampblack to deal in packages weighing only a half pound as a pound cannot bind a consumer buying of a trader by the pound;[52] a custom among horse-dealers that a warranty shall not extend to latent defects cannot bind a purchaser;[53] a custom among carpenters to use doors one-eighth of an inch less in thickness cannot bind the owner of the building;[54] a custom of the produce exchange by which commission merchants are personally liable on contracts for the sale of grain entered into on behalf of the principals, and are entitled to supply the grain themselves and charge it to their principals who fail to meet

California.— Laver *v.* Hotaling, (1896) 46 Pac. 1070.

Connecticut.— Beach *v.* Travelers Ins. Co., 73 Conn. 118, 46 Atl. 867.

Illinois.— Lyon *v.* Culbertson, 83 Ill. 33, 25 Am. Rep. 349; Cahn *v.* Michigan Cent. R. Co., 71 Ill. 96; Turner *v.* Dawson, 50 Ill. 85; Oldershaw *v.* Knoles, 4 Ill. App. 63.

Kentucky.— Kendall *v.* Russell, 5 Dana 501, 30 Am. Dec. 696.

Louisiana.— Ledoux *v.* Armor, 4 Rob. 381.

Maryland.— Duling *v.* Philadelphia, etc., R. Co., 66 Md. 120, 6 Atl. 592; Barker *v.* Borzone, 48 Md. 474; Citizens' Bank *v.* Graflin, 31 Md. 507, 1 Am. Rep. 66; Foley *v.* Mason, 6 Md. 37.

Massachusetts.— Byrne *v.* Massasoit Packing Co., 137 Mass. 313; Howard *v.* Great Western Ins. Co., 109 Mass. 384; Stevens *v.* Reeves, 9 Pick. 198.

Minnesota.— Johnson *v.* Gilfillan, 8 Minn. 395; Walker *v.* Barron, 6 Minn. 508.

Mississippi.— Natchez Ins. Co. *v.* Stanton, 2 Sm. & M. 340, 41 Am. Dec. 592.

Missouri.— Walsh *v.* Mississippi Valley Transp. Co., 52 Mo. 434; Phillips *v.* Scott, 43 Mo. 86, 97 Am. Dec. 369; Martin *v.* Hall, 26 Mo. 386; Baer *v.* Glaser, 90 Mo. App. 289; Cameron *v.* McNair, etc., Real Estate Co., 76 Mo. App. 366; Martin *v.* Ashland Mill Co., 49 Mo. App. 23; Cole *v.* Skrainka, 37 Mo. App. 427; Park *v.* Viernow, 16 Mo. App. 383.

Montana.— Fitzgerald *v.* Hanson, 16 Mont. 474, 41 Pac. 230.

Nebraska.—Union Stock Yards Co. *v.* Westcott, 47 Nebr. 300, 66 N. W. 419.

New York.— Stoney *v.* Farmers' Transp. Co., 17 Hun 579; Wadley *v.* Davis, 63 Barb. 500; Duguid *v.* Edwards, 50 Barb. 288; Sipperly *v.* Stewart, 50 Barb. 62; Botany Worsted Works *v.* Wendt, 22 Misc. 156, 48 N. Y. Suppl. 1024; Macklin *v.* New Jersey Steamboat Co., 7 Abb. Pr. N. S. 229; Wood *v.* Hickok, 2 Wend. 501.

Ohio.— Hartford Protection Ins. Co. *v.* Harmer, 2 Ohio St. 452, 59 Am. Dec. 684.

Pennsylvania.— Godcharles *v.* Wigeman, 113 Pa. St. 431, 6 Atl. 354; Adams *v.* Pittsburgh Ins. Co., 95 Pa. St. 348, 40 Am. Rep. 662; McMasters *v.* Pennsylvania R. Co., 69 Pa. St. 374, 8 Am. Rep. 264; Rapp *v.* Palmer, 3 Watts 178; Silliman *v.* Whitmer, 11 Pa. Super. Ct. 243; Bremerman *v.* Hayes, 9 Pa. Super. Ct. 8; Collins *v.* Mechling, 1 Pa. Super. Ct. 594, 38 Wkly. Notes Cas. 235.

Rhode Island.— Fletcher *v.* Seekell, 1 R. I. 267.

South Carolina.— Thomas *v.* Graves, 1 Mill 308; Thomas *v.* O'Gara, 1 Mill 303.

Texas.— Davie *v.* Lynch, 1 Tex. App. Civ. Cas. § 695.

Virginia.— Hansbrough *v.* Neal, 94 Va. 722, 27 S. E. 593.

United States.— Isaksson *v.* Williams, 26 Fed. 642; Blakemore *v.* Heyman, 6 Fed. 581; Collings *v.* Hope, 6 Fed. Cas. No. 3,003, 3 Wash. 149; Howe *v.* The Lexington, 12 Fed. Cas. No. 6, 767*a*; The Paragon, 18 Fed. Cas. No. 10,708, 1 Ware 326; Rogers *v.* Mechanics' Ins. Co., 20 Fed. Cas. No. 12,016, 1 Story 603; Trott *v.* Wood, 23 Fed. Cas. No. 14,190, 1 Gall. 443.

See 15 Cent. Dig. tit. "Customs and Usages," § 24.

45. Miller *v.* Burke, 68 N. Y. 615.

46. Farmers', etc., Nat. Bank *v.* Sprague, 52 N. Y. 605.

47. Flynn *v.* Murphy, 2 E. D. Smith (N. Y.) 378.

48. Butterworth *v.* Volkening, 4 Thomps. & C. (N. Y.) 650.

49. Currie *v.* Smith, 4 N. Y. Leg. Obs. 343.

50. Beatty *v.* Gregory, 17 Iowa 109, 85 Am. Dec. 546.

51. Saint *v.* Smith, 1 Coldw. (Tenn.) 51.

52. Ransom *v.* Masten, 4 N. Y. Suppl. 781.

53. Van Hoesen *v.* Cameron, 54 Mich. 609, 20 N. W. 609.

54. Eaton *v.* Gladwell, 108 Mich. 678, 66 N. W. 598.

their engagements, cannot bind a person employing such broker;[55] or a custom requiring the lessor to "cleanse" the leased premises before the lessee enters into possession cannot bind the lessor,[56] where in all these cases respectively the usages were unknown to the parties to be charged.

b. General Usages Need Not Be Known — (i) *In General.* General commercial usages — all men being presumed to know the law — all men are presumed to know and no one will be heard to contradict the presumption.[57]

(ii) *Usages of Different Trades and Professions.* If there is a general usage applicable to a particular profession or business, parties employing an individual in that profession are supposed to deal with him according to that usage.[58] All trades have their usages, and when a contract is made with a man about the business of his craft, it is framed on the basis of its usage, which becomes a part of it, except when its place is occupied by particular stipulations.[59] But the customs and regulations of employers requiring notice of intention to leave the master's service must, in order to affect the servant, be shown to have

55. Irwin *v.* Williar, 110 U. S. 499, 4 S. Ct. 160, 28 L. ed. 225.

56. Sawtelle *v.* Drew, 122 Mass. 228.

57. *Indiana.*— Toledo L. & M. Ins. Co. *v.* Speares, 16 Ind. 52; Grant *v.* Lexington F., etc., Ins. Co., 5 Ind. 23, 61 Am. Dec. 74.

Iowa.— Williams *v.* Niagara F. Ins. Co., 50 Iowa 561; Beatty *v.* Gregory, 17 Iowa 109, 85 Am. Dec. 546; Rindskoff *v.* Barrett, 14 Iowa 101.

Massachusetts.—Howard *v.* Great Western Ins. Co., 109 Mass. 384.

New York.— Hinton *v.* Locke, 5 Hill 437; Sleght *v.* Hartshorne, 2 Johns. 531; Buck *v.* Grimshaw, 1 Edw. 140.

United States.— Barrett *v.* Williamson, 2 Fed. Cas. No. 1,051, 4 McLean 589.

58. *Alabama.*— Waring *v.* Grady, 49 Ala. 465, 20 Am. Rep. 286; Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 27 Ala. 77.

Connecticut.— Halsey *v.* Brown, 3 Day 346.

District of Columbia.— Bragg *v.* Bletz, 7 D. C. 105.

Georgia.— Wheelwright *v.* Dyal, 99 Ga. 247, 25 S. E. 170.

Illinois.— Deshler *v.* Beers, 32 Ill. 368, 83 Am. Dec. 274; Currie *v.* Syndicate, 104 Ill. App. 165; McCurdy *v.* Alaska, etc., Commercial Co., 102 Ill. App. 120.

Indiana.— Lupton *v.* Nichols, 28 Ind. App. 539, 63 N. E. 477; Everitt *v.* Indiana Paper Co., 25 Ind. App. 287, 57 N. E. 281.

Kentucky.— Vaughn *v.* Gardner, 7 B. Mon. 326.

Maine.— Bodfish *v.* Fox, 23 Me. 90, 39 Am. Dec. 611.

Maryland.— Patterson *v.* Crowther, 70 Md. 124, 16 Atl. 531; Lyon *v.* George, 44 Md. 295; Given *v.* Charron, 15 Md. 502.

Massachusetts.— Ford *v.* Tirrell, 9 Gray 401, 69 Am. Dec. 297; Daniels *v.* Hudson River F. Ins. Co., 12 Cush. 416, 59 Am. Dec. 192.

Mississippi.— Burbridge *v.* Gumbel, 72 Miss. 371, 16 So. 792.

Missouri.— Hayworth *v.* Miller Grain, etc., Co., 174 Mo. 171, 73 S. W. 498; Soutier *v.* Kellerman, 18 Mo. 509.

New Hampshire.— Lebanon *v.* Heath, 47 N. H. 353.

New Jersey.— Barton *v.* McKelway, 22 N. J. L. 165.

New York.— Walls *v.* Bailey, 49 N. Y. 464, 10 Am. Rep. 407; Hartshorne *v.* Union Mut. Ins. Co., 36 N. Y. 172; Wall *v.* Howard Ins. Co., 14 Barb. 383; Gleason *v.* Morrison, 20 Misc. 320, 45 N. Y. Suppl. 684; De Cernea *v.* Cornell, 3 Misc. 241, 22 N. Y. Suppl. 941.

Ohio.— Lowe *v.* Lehman, 15 Ohio St. 179.

Pennsylvania.—Carter *v.* Philadelphia Coal Co., 77 Pa. St. 286; McCarty *v.* New York, etc., R. Co., 30 Pa. St. 247; Norris *v.* Insurance Co. of North America, 3 Yeates 84, 2 Am. Dec. 360.

United States.— Hazard *v.* New England Mar. Ins. Co., 8 Pet. 557, 8 L. ed. 1043; Baxter *v.* Leland, 2 Fed. Cas. No. 1,125, 1 Blatchf. 526 [*affirming* 2 Fed. Cas. No. 1,124, 1 Abb. Adm. 348]; Tidmarsh *v.* Washington F. & M. Ins. Co., 23 Fed. Cas. No. 14,024, 4 Mason 439.

England.— Sewell *v.* Corp, 1 C. & P. 392, 12 E. C. L. 232.

See 15 Cent. Dig. tit. "Customs and Usages," § 26.

Illustrations.— In the following instances, the usage being proved, it was held not material that the proof did not show, in addition, that the party to be affected by it had express notice of it: In an action by S, a veterinary surgeon, against C, for attendance and medicine furnished to C's horse, a custom to pay veterinary surgeons for attendance as well as medicines (Sewell *v.* Corp, 1 C. & P. 392, 12 E. C. C. L. 232); in an action by a dry-goods salesman against his employer for a wrongful dismissal, a custom among dry-goods jobbers that when a clerk or salesman begins a season without a special contract he cannot be dismissed until the end of it (Given *v.* Charron, 15 Md. 502); and in an action against a glassware manufacturer by an agent for commissions, a usage among manufacturers of glassware to allow their local agents commissions both upon goods ordered directly through such agents and upon goods ordered by buyers living in the territory of the agent directly through the manufacturer (Lyon *v.* George, 44 Md. 295).

59. Pittsburgh *v.* O'Neill, 1 Pa. St. 343.

been known by the latter at the time of entering the service.[60] So a usage of the servants of a corporation not shown to have come to the knowledge of the governing officers of the corporation does not bind it.[61] And in order to bind a person by a custom of merchants to charge interest it is not required that the party sought to be charged should have paid previous demands of interest to raise the presumption that he had notice of the custom in a later case. But it is requisite that some evidence, either of its extensive notoriety or of the party's dealings having brought him into contact with the custom, should be added to the bare proof that such is the custom of the particular dealer or of the trade in general.[62] Again a custom of a particular insurer which is unknown to the insured is not admissible to affect his rights.[63]

Usages of banks.— The usage of a bank is binding on persons dealing with it, whether known to them or not. Columbia Bank *v.* Fitzhugh, 1 Harr. & G. (Md.) 239; Dorchester, etc., Bank *v.* New England Bank, 1 Cush. (Mass.) 177; Smith *v.* Whiting, 12 Mass. 6, 7 Am. Dec. 25; Brent *v.* Metropolis Bank, 1 Pet. (U. S.) 89, 7 L. ed. 65; Washington Bank *v.* Triplett, 1 Pet. (U. S.) 25, 7 L. ed. 37; Mills *v.* U. S. Bank, 11 Wheat. (U. S.) 431, 6 L. ed. 512; Renner *v.* Columbia Bank, 9 Wheat. (U. S.) 581, 6 L. ed. 166; Yeaton *v.* Alexandria Bank, 5 Cranch (U. S.) 49, 3 L. ed. 43. All that is required is that it shall have been so long established that its customers may well be presumed to have known of it. Less than this, however, will not do. Pierce *v.* Butler, 14 Mass. 303; Dabney *v.* Campbell, 9 Humphr. (Tenn.) 680; Adams *v.* Otterback, 15 How. (U. S.) 539, 14 L. ed. 105.

60. Stevens *v.* Reeves, 9 Pick. (Mass.) 198; Bradley *v.* Salmon Falls Mfg. Co., 30 N. H. 487; Marhan *v.* Elliott, Hume 393; Morrison *v.* Allardyce, 2 Sc. Sess. Cas. 387. And see Harmon *v.* Salmon Falls Mfg. Co., 35 Me. 447, 58 Am. Dec. 718; and, generally, MASTER AND SERVANT.

61. Johnson *v.* Concord R. Corp., 46 N. H. 213, 88 Am. Dec. 199; Dietrich *v.* Pennsylvania R. Co., 71 Pa. St. 432, 10 Am. Rep. 711. Yet the necessary notice need not be express, but may be implied from the notoriety of the particular custom. Com. *v.* Ohio, etc., R. Co., 1 Grant (Pa.) 329.

62. *Illinois.*— Turner *v.* Dawson, 50 Ill. 85; Ayers *v.* Metcalf, 39 Ill. 307; Rayburn *v.* Day, 27 Ill. 46.

Massachusetts.— Fisher *v.* Sargent, 10 Cush. 250; Loring *v.* Gurney, 5 Pick. 15.

New York.— Esterly *v.* Cole, 3 N. Y. 502; Fellows *v.* New York, 17 Hun 249; Meech *v.* Smith, 7 Wend. 315; McAllister *v.* Reab, 4 Wend. 483 [*affirmed* in 8 Wend. 109]; Wood *v.* Hickok, 2 Wend. 501; Trotter *v.* Grant, 2 Wend. 413; Liotard *v.* Graves, 3 Cai. 226.

Vermont.— Goodnow *v.* Parsons, 36 Vt. 46; Birchard *v.* Knapp, 31 Vt. 679; Langdon *v.* Castleton, 30 Vt. 285; Wood *v.* Smith, 23 Vt. 706.

United States.— Barclay *v.* Kennedy, 2 Fed. Cas. No. 976, 3 Wash. 350.

Canada.— De Hertel *v.* Supple, 13 Grant Ch. 648, 14 Grant Ch. 421.

63. Carter *v.* Boehm, 3 Burr. 1905, 1 W. Bl. 593.

Illustrations.— In an action against the Dorchester fire company, the evidence of its agent that it was its custom to charge extra premiums on unoccupied dwelling-houses (Luce *v.* Dorchester Mut. F. Ins. Co., 105 Mass. 297, 7 Am. Rep. 522); in an action against the Ætna life company, evidence of a usage on its part to require, as proof of death, a certificate from the deceased's attending physician (Taylor *v.* Ætna L. Ins. Co., 13 Gray (Mass.) 434); in an action against the Globe fire company, evidence of a usage at New York, in case of the occurrence of any circumstance by the act of the insured after effecting the insurance, whereby the risk is increased, for the insured to give notice thereof to the insurer, who is then to have the option of continuing the policy or of annulling it (Stebbins *v.* Globe Ins. Co., 2 Hall (N. Y.) 675); in an action against the Washington fire company, evidence of a usage in the office of the company that the term "carpenters" in a policy referred to the employment and work of carpenters in erecting or adding to buildings insured (Washington F. Ins. Co. *v.* Davison, 30 Md. 91); in an action against the Protection fire company, evidence of a local usage among insurers in the county where the property destroyed was situated to reject an application for insurance on a building which had previously been fired by an incendiary, or to charge a higher premium thereon (Hartford Protection Ins. Co. *v.* Harmer, 2 Ohio St. 452, 59 Am. Dec. 684); in an action against the Illinois fire company, evidence of a usage in their office to require notice of additional insurance to be given by the insured (Illinois Mut. F. Ins. Co. *v.* O'Neile, 13 Ill. 89); in an action against the Germania life company, a custom of the company not to deliver or send policies to agents for delivery except upon the condition that the person whose life was insured was in good health (Schwartz *v.* Germania L. Ins. Co., 18 Minn. 448); in an action against the New England fire company, the testimony of the president as to the practice of the company in requiring applications for consent to additional insurance to be in writing (Goodall *v.* New England Mut. F. Ins. Co., 25 N. H. 169); in an action against the Hibernia fire company, evidence that the words "standing detached" in a policy meant "among insurance men generally" that the subject of insurance

(III) *USAGES OF STOCK EXCHANGE.* It is well settled that those who send goods to a market are presumed to know the customs of the market and to be bound by them.[64] Therefore a person employing a broker on the stock exchange impliedly gives him authority to act in accordance with the rules there established, although the principal himself be ignorant of them.[65]

c. When Knowledge of Custom Is Not Presumed. A custom cannot affect persons between whom there is no privity of contract;[66] nor can a custom of others to do certain acts support a similar act done by a party who was himself ignorant of any such custom, and whose actions therefore could not have influenced his conduct in the least.[67] So likewise a usage cannot bind a party

should be at least twenty-five feet from external exposure (Hill *v.* Hibernia Ins. Co., 10 Hun (N. Y.) 26); in an action against the American marine company, a usage of the company to require a survey of the goods damaged by the port wardens as a preliminary proof of the loss (Rankin *v.* American Ins. Co., 1 Hall (N. Y.) 682); in an action against the Niagara fire company (Williams *v.* Niagara F. Ins. Co., 50 Iowa 561), a usage of the company as to the mode of adjusting losses — all these have been held inadmissible in evidence for the purpose of affecting the rights of the insured. So where a fire policy on a factory was construed to engage that a watchman should be kept in the building through the hours of every night in the week, a usage of the factory for the watchman to leave at twelve o'clock on Saturday night, and not to return until twelve o'clock on Sunday night, was held not to affect the breach. Glendale Woolen Co. *v.* Protection Ins. Co., 21 Conn. 19, 54 Am. Dec. 309. And where a marine policy issued at Rockland, Maine, contained a warranty that the vessel should not enter the river and Gulf of St. Lawrence between September 1 and May 1, and she was lost in the strait of Northumberland, placed by geographers as within the gulf, in December, a usage at Boston not to regard the strait as within the gulf was not admitted. Cobb *v.* Lime Rock F. & M. Ins. Co., 58 Me. 326.

64. *Alabama.*—Guesnard *v.* Louisville, etc., R. Co., 76 Ala. 453.

Illinois.— Taylor *v.* Bailey, 169 Ill. 181, 48 N. E. 200 [*affirming* 68 Ill. App. 622]; Union Stock-Yard, etc., Co. *v.* Mallory, etc., Co., 157 Ill. 554, 41 N. E. 888, 48 Am. St. Rep. 341; Samuels *v.* Oliver, 130 Ill. 73, 22 N. E. 499; Cothran *v.* Ellis, 107 Ill. 413; Bailey *v.* Bensley, 87 Ill. 556; Lyon *v.* Culbertson, 83 Ill. 33, 25 Am. Rep. 349; Lonergan *v.* Stewart, 55 Ill. 44.

Massachusetts.— Dwight *v.* Whitney, 15 Pick. 179.

Michigan.— Austrian *v.* Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350.

New York.— De Forest *v.* Fulton F. Ins. Co., 1 Hall 84.

United States.— Charlotte Oil, etc., Co. *v.* Hartog, 85 Fed. 150, 29 C. C. A. 56.

65. Taylor *v.* Bailey, 169 Ill. 181, 48 N. E. 200 [*affirming* 68 Ill. App. 622]; Pardridge *v.* Cutler, 68 Ill. App. 569; Everingham *v.* Lord, 19 Ill. App. 565; Walls *v.* Bailey, 49 N. Y. 464, 10 Am. Rep. 407; Sutton *v.* Tatham, 10 A. & E. 27, 37 E. C. L. 39; Bayliffe *v.* Butterworth, 1 Exch. 425, 11 Jur. 1019, 17 L. J. Exch. 78, 5 R. & Can. Cas. 283.

Illustration.— Defendants (London merchants) employed a broker in Liverpool to purchase some wool. The broker negotiated a sale by the plaintiff to the defendants of certain bales deliverable at Odessa, "the names of the vessels to be declared as soon as the wools were shipped." In this transaction the broker acted for both plaintiff and defendants. By the custom of Liverpool, where a contract contained a stipulation that notice of an event should be given by the vendor to the vendee, it was usual for the vendor to give the notice to the broker, who communicated it to the vendee. It was held, both in the court of exchequer and in that of the exchequer chamber, that the defendants were bound by such usage, and therefore that a notice by the plaintiff to the broker of the names of the vessels on which the wools were shipped was a performance of that stipulation, although the broker omitted to communicate them to the defendants. Greaves *v.* Legg, 11 Exch. 642, 2 H. & N. 210. But see Scott *v.* Irving, 1 B. & Ad. 605, 9 L. J. K. B. O. S. 89, 20 E. C. L. 617; Gabay *v.* Lloyd, 3 B. & C. 793, 5 D. & R. 641, 3 L. J. K. B. O. S. 116, 27 Rev. Rep. 486, 10 E. C. L. 359; Bartlett *v.* Pentland, 10 B. C. 760, 8 L. J. K. B. O. S. 264, 21 E. C. L. 320; Sweeting *v.* Pearce, 7 C. B. N. S. 449, 6 Jur. N. S. 753, 97 E. C. L. 449; Adams *v.* Peters, 2 C. & K. 723, 61 E. C. L. 723, 3 Jur. N. S. 519, 26 L. J. Exch. 316, 5 Wkly. Rep. 597.

That the customs of the stock exchange cannot bind persons who do not know them and who have only occasional dealings with stock-brokers see Stone *v.* Marye, 14 Nev. 362; Harris *v.* Tumbridge, 8 Abb. N. Cas. (N. Y.) 291; Blakemore *v.* Heyman, 6 Fed. 581.

66. Menzies *v.* Lightfoot, L. R. 11 Eq. 459, 40 L. J. Ch. 561, 24 L. T. Rep. N. S. 695, 19 Wkly. Rep. 578; Daun *v.* London Brewing Co., L. R. 8 Eq. 155, 38 L. J. Ch. 454, 20 L. T. Rep. N. S. 601.

67. Kinne *v.* Ford, 52 Barb. (N. Y.) 194. See also Dorchester, etc., Bank *v.* New England Bank, 1 Cush. (Mass.) 177, holding that a usage is inadmissible if it can be shown to have been unknown at the time of the contract to the party setting it up and seeking

who has no occasion to believe that he will be brought within its operation or does not intend to be.[68] So a custom in one place cannot be presumed to be known to persons living in another place.[69] And although dealers with a "clearing-house" will be bound by its usages they cannot bind persons not parties to the association.[70]

8. Must Be Moral. A custom must not be of doubtful morality.[71]

9. Must Be Peaceable and Acquiesced in. A custom must have been peaceable and acquiesced in and not disputed at law or otherwise; for customs owe their origin to common consent, and this cannot be intended in disputed cases.[72] In like manner a usage of trade must be generally assented to as well as asserted before it can be established; it must be acquiesced in by all persons acting within the scope of its operations.[73]

10. Must Be Reasonable — a. In General. A custom or usage must be reasonable — an unreasonable custom is bad and will not be recognized.[74] In deciding as to what customs are reasonable and what unreasonable, regard must

its benefits, for in such a case there would be no presumption that the contract was made with reference to it.

Although a single instance of a certain practice will not prove a usage, yet it is sufficient to bring home notice of such a usage already established to a person sought to be bound by it. Nonotuck Silk Co. *v.* Fair, 112 Mass. 354. And see Fowler *v.* Pickering, 119 Mass. 33.

68. Lime Rock Bank *v.* Hewett, 52 Me. 531; Mohawk Bank *v.* Broderick, 13 Wend. (N. Y.) 133, 27 Am. Dec. 192.

A local usage in a particular market is not binding on persons dealing in such market, where it appears that neither of the parties to the transaction intended to comply with such usage. Lewis *v.* Metcalf, 53 Kan. 219, 36 Pac. 346.

69. Insurance Co. of North America *v.* Hibernia Ins. Co., 140 U. S. 565, 11 S. Ct. 909, 35 L. ed. 517; Williams *v.* Corbey, 5 Ont. App. 626. See also Milwaukee, etc., Invest. Co. *v.* Johnston, 35 Nebr. 554, 53 N. W. 475.

Illustrations. — It cannot be presumed that a person has knowledge of the customs of banks at places distant from that in which he himself lives and does business. Washington Bank *v.* Triplett, 1 Pet. (U. S.) 25, 7 L. ed. 37. And persons living in Sydney, Australia, will not be presumed to be acquainted with a mercantile usage existing at Liverpool. Kirchner *v.* Venus, 5 Jur. N. S. 395, 12 Moore P. C. 361, 7 Wkly. Rep. 455, 14 Eng. Reprint 948. So a custom in the town in which goods were sold to pay a traveling salesman is not binding on nonresident principals, in the absence of evidence of notice to them of such custom. Simon *v.* Johnson, 101 Ala. 368, 13 So. 491. Likewise a custom among underwriters in New York city to class certain stores as distinct buildings for purposes of insurance, and to insure them severally as separate risks, is not binding on an insurance company domiciled in Alabama, without proof that the latter had knowledge of such custom when a contract was made with another company for reinsurance in that city. German-American Ins. Co. *v.* Commercial F. Ins. Co., 95 Ala. 469, 11 So. 117, 16 L. R. A. 291. And the fact that a manufacturer in D maintained an agency in C, and that one of the officers of the manufacturer made weekly trips to that city for the purpose of selling goods, was not sufficient to charge such manufacturer with knowledge of a usage of the trade prevailing only in C. Mathias Planing-Mill Co. *v.* Hazen, 20 Ohio Cir. Ct. 287, 11 Ohio Cir. Dec. 54.

Where a merchant employs an agent to sell goods for him at a particular place, he is bound by the custom and usage of the trade at that place. Long *v.* J. K. Armsby Co., 43 Mo. App. 253.

70. Overman *v.* Hoboken City Bank, 30 N. J. L. 61.

Where plaintiffs agreed to purchase from defendants certain oil which defendants had received as security for a loan, evidence of a custom among members of the petroleum exchange whereby all oil must have storage charges paid up to the date of delivery is not admissible to bind defendants, although they were members of that exchange, since this transaction was made in their capacity as bankers rather than as brokers. Waugh *v.* Seaboard Bank, 54 N. Y. Super. Ct. 283.

71. Wellman *v.* Nutting, 3 Mass. 434; State *v.* Butner, 76 N. C. 118; Holmes *v.* Johnson, 42 Pa. St. 159.

Illustrations. — A custom which prevailed in Scotland in olden times that gave to the lord of the fee the right of concubinage with his tenants' wives on their wedding-nights (Gerald's Case, 23 How. St. Tr. 1407 note; 2 Bl. Comm. c. 6, p. 83), the custom of "bundling" shown to exist in New York and Pennsylvania (Seagar *v.* Sligerland, 2 Cai. (N. Y.) 219; Hollis *v.* Wells, 3 Pa. L. J. Rep. 169) and the American charivari (Bankus *v.* State, 4 Ind. 114; Com. *v.* Lewis, Add. (Pa.) 279) are illegal.

72. Arthur *v.* Bokenham, 11 Mod. 148; 1 Dane Abr. c. 26, art. 1, § 3.

73. Dixon *v.* Dunham, 14 Ill. 324; Strong *v.* Grand Trunk R. Co., 15 Mich. 206; McMasters *v.* Pennsylvania R. Co., 69 Pa. St. 374, 8 Am. Rep. 264.

74. *Illinois.* — Currie *v.* Syndicate, 104 Ill. App. 165.

be had to the legal decisions which have been made in times past upon cases involving similar questions; for "reasonable," says Coke, "is not always to be understood of every unlearned man's reason, but of the artificial and legal reason warranted by authority of law."[75] Therefore a custom may be good, although the particular reason of it cannot be assigned, for it suffices if no good legal reason can be assigned against it. A custom is not unreasonable merely because it is contrary to a particular rule or maxim of the common law.[76] A custom is not unreasonable simply because it is injurious to private persons or interests if it be for the public good.[77] Nor is a custom unreasonable because it might be inconvenient.[78] But a custom that is contrary to the public good or injurious or prejudicial to the many and beneficial only to some particular person is repugnant to the law of reason and void.[79]

b. Unreasonable Customs and Usages — (1) *In General.* These usages have been adjudged invalid by the courts on account of their unreasonableness: A

Maine.— Leach *v.* Perkins, 17 Me. 462, 35 Am. Dec. 268.

Michigan.— Strong *v.* Grand Trunk R. Co., 15 Mich. 206, 93 Am. Dec. 184.

New York.— Duguid *v.* Edwards, 50 Barb. 288.

Pennsylvania.— McMasters *v.* Pennsylvania R. Co., 69 Pa. St. 374, 8 Am. Rep. 264.

United States.— The Gran Canaria, 16 Fed. 868.

England.— Rogers *v.* Brenton, 10 Q. B. 26, 12 Jur. 263, 17 L. J. Q. B. 34, 59 E. C. L. 26; Hilton *v.* Granville, 5 Q. B. 701, Dav. & M. 614, 13 L. J. Q. B. 193, 48 E. C. L. 701; Clayton *v.* Corby, 5 Q. B. 415, Dav. & M. 449, 8 Jur. 212, 14 L. J. Q. B. 364, 48 E. C. L. 415; Bremner *v.* Hull, L. R. 1 C. P. 748, 1 Harr. & R. 800, 12 Jur. N. S. 648, 35 L. J. C. P. 332, 15 L. T. Rep. N. S. 352, 14 Wkly. Rep. 964; Rex *v.* Gordon, 1 B. & Ald. 524, 19 Rev. Rep. 376; Hix *v.* Gardiner, 2 Bulstr. 195; Wilkes *v.* Broadbent, 1 Wils. C. P. 63; 1 Dane Abr. c. 26, art. 1, § 4.

See 15 Cent. Dig. tit. "Customs and Usages," § 7.

75. Coke Litt. 62.

76. Tyson *v.* Smith, 9 A. & E. 406, 1 P. & D. 307, W. W. & D. 749, 36 E. C. L. 224; Horton *v.* Beckman, 6 T. R. 760.

77. Examples of such customs may be seen in those which allow the pulling down of houses to prevent the spreading of a conflagration, and which permit one to turn his plow on the headland of another; the former may stop a great public calamity, the latter favors and promotes agriculture (3 Salk. 112; Fawcet *v.* Lowther, 2 Ves. 300, 28 Eng. Reprint 193; 1 Dane Abr. c. 26, art. 1, § 9); the custom for surveyors duly chosen to destroy corrupt victuals exposed to sale (Vaughan *v.* Atwood, 1 Mod. 202). So the custom of a city to make a by-law to oblige a person to take an office, under a penalty. London *v.* Vanacre, 12 Mod. 269. So too the custom that where a duty was payable on corn imported into a city citizens, being factors, were exempt from it; this in encouragement of trade. Cocksedge *v.* Fanshaw, Dougl. (3d ed.) 119. Also to dig gravel in the adjacent land to repair a way (1 Dane Abr. c. 26, art. 2, § 1); to have a watering-place in the adjacent land (1 Dane Abr. c. 26, art. 2, § 1); to dig for ballast (1 Dane Abr. c. 26, art. 2, § 1); to dry nets on another's land (1 Dane Abr. c. 26, art. 2, § 1); to cut rushes in the lord's waste for one occupying a house and having common there, as against a stranger (Beau *v.* Bloom, 3 Wils. C. P. 456); to distrain the goods, etc., of a ship for the port duties (Vinkestine *v.* Ebden, 12 Mod. 216); for the lord of the manor to have toll for all goods landed at a wharf, in consideration of his keeping it in repair (Colton *v.* Smith, Cowp. 47, Lofft 463); to take three bushels of barley out of every ship's cargo brought to a certain quay to be exported (Serjeant *v.* Read, 1 Wils. C. P. 91); and for all the freemen and citizens of a town on a particular day in the year to enter upon a close for the purpose of horse-racing (Mounsey *v.* Ismay, 3 H. & C. 486, 11 Jur. N. S. 141, 34 L. J. Exch. 52, 12 L. T. Rep. N. S. 27, 13 Wkly. Rep. 521).

78. Thus a custom for all the inhabitants of a parish to play at games in a particular close was good, although if they were all to go there at the same time the object might become impossible. So a custom for fishermen to dry their nets on land adjacent to the sea is good, although if all were to resort there at the same time great inconvenience would follow. So all the subjects of the kingdom have a right to enter a port, even though a small port might be speedily filled. See Tyson *v.* Smith, 6 A. & E. 745, 6 L. J. K. B. 189, 1 N. & P. 784, 1 P. & D. 307, 33 E. C. L. 392; Hix *v.* Gardiner, 2 Bulstr. 195; Cocksedge *v.* Fanshaw, Dougl. (3d ed.) 119; Drake *v.* Wiglesworth, Willes 654; Lawson Usages and Customs 65.

79. Sowerby *v.* Coleman, L. R. 2 Exch. 96, 36 L. J. Exch. 57, 15 L. T. Rep. N. S. 667, 15 Wkly. Rep. 451; Taylor *v.* Devey, 7 A. & E. 409, 1 Jur. 892, 7 L. J. M. C. 11, 2 N. & P. 469, W. W. & D. 646, 34 E. C. L. 225; Winchester *v.* Willies, 11 Mod. 48.

A usage giving a finder of bees an absolute title to them wherever found cannot be recognized. Fisher *v.* Steward, Smith (N. H.) 60.

A custom whereby one person claims the right to take sand from the premises of another is invalid, since the right to a profit *a prendre* cannot be established by custom. Hill *v.* Lord, 48 Me. 83; Waters *v.* Lilley, 4

custom to use and imitate the trade-marks of foreigners with impunity;[80] a custom of publishers of newspapers to insert advertisements sent to them without express directions as to the number of insertions, until their publication is expressly countermanded, even after the object of the advertisement has ceased, and that fact is apparent on its face;[81] a custom to mine coal without leaving pillars or posts to support the surface;[82] a custom on the Connecticut river that when any person clears a place for seine-fishing he holds it against the world during the fishing season;[83] a custom of the owners of mines to dispose of water pumped therefrom, by allowing it to flow into the adjacent natural watercourses, even though it polluted the streams of adjoining proprietors;[84] a custom that the outgoing tenant of a farm shall look exclusively to the incoming tenant when there is one, and not to the landlord, for compensation for seeds, acts of husbandry, tillage, etc.;[85] a custom that a tenant may convert personal property of his landlord, found on the demised premises, without making compensation;[86] a custom that the act of staking ice off by itself on public waters was alone sufficient to constitute a legal appropriation;[87] and a custom in regard to placing a certain brand on all calves when persons do not know to whom they belong.[88]

(II) *Vendor and Purchaser.* In the relation of vendor and purchaser the following have been held unreasonable: A custom authorizing on a contract for goods of a specified character, the delivery of different goods, or on a sale of the goods of one mill the delivery of the goods of another mill;[89] a usage that sales of a particular class of goods are subject to the approval of a public inspector, but that if there is no such inspector a buyer may rescind his purchase at pleasure;[90] a usage that no title passes upon an ordinary sale and delivery without actual payment of the consideration within a certain number of days;[91] a custom that if a note is given for a gold mine and it proves unproductive or does not turn out according to expectation it is given up;[92] a custom for merchants to sign receipts presented by cartmen with goods, without any inquiry on the part of the receiving clerk or porter as to their ownership or the place from which they were received;[93] a custom of a board of trade, on cash sales of produce or provisions, giving the buyer the privilege of having them inspected at his own expense, but if he accepts them without inspection, he takes them at his own risk as to quality, even if the vendor occupies a position where he may be supposed to know the quality of the goods, and the vendee relies upon this supposition;[94] a custom among dealers in

Pick. (Mass.) 145, 16 Am. Dec. 333; Lufkin *v.* Haskell, 3 Pick. (Mass.) 356; Perley *v.* Langley, 7 N. H. 233; Kenyon *v.* Nichols, 1 R. I. 106.

That a custom is general and established raises a presumption of its reasonableness. Cox *v.* Charleston F. & M. Ins. Co., 3 Rich. (S. C.) 331, 45 Am. Dec. 771. Courts of law will not enforce unreasonable or absurd usages, however uniform and well known. Parties in framing their contracts have a right to disregard them, and cannot be held to have entered into written stipulations with any reference to them. Seccomb *v.* Provincial Ins. Co., 10 Allen (Mass.) 305; Macy *v.* Whaling Ins. Co., 9 Metc. (Mass.) 354. But a usage known to a person, and in accordance to whose burdens and obligations he has contracted, will not be set aside by a court of law simply because it is unreasonable. A man may with his eyes open make an absurd, oppressive, or unreasonable contract, and bind himself to the performance of strict and onerous obligations, yet a court of law will not for this reason interfere. Maxted *v.* Paine, L. R. 4 Exch. 203.

80. Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,785, 2 Woodb. & M. 1.

81. Thomas *v.* Graves, 1 Mill (S. C.) 308.

82. Coleman *v.* Chadwick, 80 Pa. St. 81, 21 Am. Rep. 93. And see Horner *v.* Watson, 79 Pa. St. 242, 21 Am. Rep. 55; Jones *v.* Wagner, 66 Pa. St. 429, 5 Am. Rep. 385.

83. Freary *v.* Cooke, 14 Mass. 488. And see Lufkin *v.* Haskell, 3 Pick. (Mass.) 356.

84. Pennsylvania Coal Co. *v.* Sanderson, 113 Pa. St. 126, 6 Atl. 453, 57 Am. Rep. 445.

85. Bradburn *v.* Foley, 17 Alb. L. J. 483.

86. Anewalt *v.* Hummel, 109 Pa. St. 271.

87. Becker *v.* Hall, 116 Iowa 589, 88 N. W. 324.

88. Rumfield *v.* Neal, (Tex. Civ. App. 1898) 46 S. W. 262.

89. Beals *v.* Terry, 2 Sandf. (N. Y.) 127.

90. Boardman *v.* Spooner, 13 Allen (Mass.) 353, 90 Am. Dec. 196.

91. Haskins *v.* Warren, 115 Mass. 514.

92. Leonard *v.* Peeples, 30 Ga. 61.

93. Gallup *v.* Lederer, 1 Hun (N. Y.) 282.

94. Chicago Packing, etc., Co. *v.* Tilton, 87 Ill. 547.

cotton that warehouse receipts to deliver to a person, or order, or bearer, the number of bales therein specified are transferable by delivery without indorsement, and that such transfer passes the cotton without inquiry as to title, unless notice is given that the receipts have been lost or have got into the hands of one not the owner or not entitled to them;[95] a usage that where the vendor of goods receives a note of the consignee without the indorsement of the purchaser the latter is discharged and the maker alone remains liable;[96] a custom among merchants to have their goods sent to their stores by long and circuitous routes, when purchased at the stores of near neighbors;[97] a custom of a shopkeeper to balance his books annually, and to charge interest on the balance of a running account where there has been no settlement;[98] a usage authorizing a dealer in bonds or securities, after an absolute sale and delivery to a customer, to retain a right to represent such customer, and to expend money for him in relation to such securities, without an express contract thereto;[99] and a custom authorizing a buyer of cotton after delivery and payment of the price to throw the cotton back upon the hands of the vendor and rescind the sale, because cotton of a finer quality than the sample had been mixed in the bale in packing.[1]

(III) *Banks and Banking.* A custom of banks to honor the occasional overdrafts of customers whose standing is good;[2] a custom of banks not to rectify mistakes unless discovered before the person leaves the room;[3] or a usage that a bank having marked a note payable at its office as good by mistake was not entitled to retract its certification, although done before the other party acted thereon[4] is unreasonable.

(IV) *Carrier and Customer.* Between carrier and customer the following usages and customs have been held unreasonable: A usage for wharfingers to act as agents in accepting in behalf of consignees goods arriving at the wharves;[5] a usage for the consignee of a vessel, who is also the owner of the cargo, to charge a commission on the freight paid by himself to the captain;[6] a custom that an intermediate carrier who received property subject to charges may deduct from the freight earned by the prior carrier the value of any deficiency between the quantity delivered and that stated in the bill of lading, and that the prior carrier shall not be allowed to show that an error occurred in stating the amount in the bill of lading;[7] a usage of a port that in order to constitute a delivery of goods by a carrier by water a receipt must be given to the carrier by the consignee or his agent;[8] a custom that freight paid in advance may not be recovered back, even though not earned;[9] a custom that a notice published in three newspapers in a city of the time and place of landing goods by steamboat is such a notice as places them at the risk of the consignee;[10] a custom among the owners of towboats that the first coming alongside of a ship on a signal for steam has an absolute towing contract;[11] a usage requiring those who are in the legal use of the waters as a highway to yield to others who are using them for an unlawful pur-

95. Lehman, etc., Co. *v.* Marshall, 47 Ala. 362.
96. Prescott *v.* Hubbell, 1 McCord (S. C.) 94.
97. Jacobs *v.* Shorey, 48 N. H. 100, 97 Am. Dec. 586.
98. Graham *v.* Williams, 16 Serg. & R. (Pa.) 257, 16 Am. Dec. 569.
99. Municipal Invest. Co. *v.* Industrial, etc., Trust Co., 89 Fed. 254.
1. Mure *v.* Donnell, 12 La. Ann. 369.
2. Lancaster Bank *v.* Woodward, 18 Pa. St. 357, 57 Am. Dec. 618.
3. Gallatin *v.* Bradford, 1 Bibb (Ky.) 209. *Aliter* of a custom which requires every depositor to produce his pass-book when demanding payment of a deposit. Warhus *v.* Bowery Sav. Bank, 5 Duer (N. Y.) 67.
4. Baltimore Second Nat. Bank *v.* Baltimore Western Nat. Bank, 51 Md. 128, 34 Am. Rep. 300.
5. The Middlesex, 17 Fed. Cas. No. 9,533, Brunn. Col. Cas. 605.
6. Jelison *v.* Lee, 13 Fed. Cas. No. 7,256, 3 Woodb. & M. 368.
7. Strong *v.* Grand Trunk R. Co., 15 Mich. 206, 93 Am. Dec. 184.
8. Reed *v.* Richardson, 98 Mass. 216, 93 Am. Dec. 155 [*citing* Dodd *v.* Farlow, 11 Allen 426, 87 Am. Dec. 726].
9. Emery *v.* Dunbar, 1 Daly (N. Y.) 408.
10. Kohn *v.* Packard, 3 La. 224, 23 Am. Dec. 453.
11. Clark *v.* Gifford, 7 La. 524, 26 Am. Dec. 511.

pose;[12] a custom among carriers and shippers that a contract made between them to furnish and carry coal to a certain port for sale may be thrown up by either at his convenience, no damage to be claimed from either;[13] a usage of a railroad company requiring losses to be made at the time the goods are delivered[14] or within ten days thereafter;[15] a custom of a railroad company that before a consignee can obtain his wheat from the company's bins he must receipt for the quantity;[16] a custom of a railroad company not to be responsible for the conduct of its agents in regard to the contents of chartered cars of which they hold the keys;[17] a usage of a steamboat company not to allow a passenger to take to his stateroom such baggage as he may require for his personal use;[18] a custom which would justify a steamboat carrier who had goods consigned to a person at a particular landing on the river — where there was a warehouse and a warehouse-keeper, who usually received and took care of goods landed there for the consignee — in putting out such goods on the river bank, without any protection, when the landing had in the meantime been broken up by an inundation, and the washing away of the buildings and the removal of the persons that constituted it a landing;[19] a custom that a carrier of brick must await the convenience of the vendee or subvendee in unloading, and that the master is bound to prevent putting on board inferior brick at the time of loading;[20] a custom of the port of New Orleans by which the cargo of a fruit vessel is commenced to be discharged for one day on the wharf, and then the further discharging is delayed for one day to sell that part discharged, and then if necessary is further delayed another day to remove the same from the wharf, before proceeding to further discharge the cargo;[21] a usage among masters and clerks of steamboats for a master to draw bills of exchange on the clerk and negotiate the same;[22] a usage for masters of whaling vessels to wait for their lays until the owners shall choose to sell the oil;[23] and a custom that an agency to act for a ship in distress is irrevocable.[24]

(v) *Insurer and Insured.* In the law of insurance these have been held unreasonable, viz.: A usage of marine companies to require a survey of the goods damaged by the port wardens, as a preliminary proof of the loss;[25] a usage of the same class of insurers to pay only two thirds of the gross freight on a total loss;[26] a custom that insurance agents after the termination of their agency may cancel all policies issued through them and transfer the insurance to other companies represented by them;[27] and a custom of the agent who procures insurance entitling him to the insurance scrip.[28]

(vi) *Master and Servant.* The following customs have also been held unreasonable: A custom that if a female slave hired by the month or the week should be confined and delivered of a child during the term the owner should pay a certain sum to the hirer;[29] a custom among wholesale dealers allowing their salesmen pay for time lost by sickness without regard to the length;[30] a custom

12. The Maverick, 16 Fed. Cas. No. 9,316, 1 Sprague 23.
13. Randall *v.* Smith, 63 Me. 105, 18 Am. Rep. 200.
14. Memphis R. Co. *v.* Holloway, 4 Law & Eq. Rep. 425.
15. Browning *v.* Long Island R. Co., 2 Daly (N. Y.) 117.
16. Christian *v.* St. Paul, etc., First Div. R. Co., 20 Minn. 21.
17. Central R., etc., Co. *v.* Anderson, 58 Ga. 393.
But a custom to give preference to the delivery of perishable property over other freight is reasonable. Peet *v.* Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446.
18. Macklin *v.* New Jersey Steamboat Co., 7 Abb. Pr. N. S. (N. Y.) 229.
19. Stone *v.* Rice, 58 Ala. 95.
20. Young *v.* One Hundred and Forty Thousand Hard Brick, 78 Fed. 149.
21. Lindsay *v.* Cusimano, 12 Fed. 504.
22. Clark *v.* Humphreys, 25 Mo. 99.
23. Bourne *v.* Smith, 2 Fed. Cas. No. 1,701, 1 Lowell 547.
24. Minis *v.* Nelson, 43 Fed. 777.
25. Rankin *v.* American Ins. Co., 1 Hall (N. Y.) 619.
26. McGregor *v.* Pennsylvania Ins. Co., 16 Fed. Cas. No. 8,811, 1 Wash. 39.
27. Merchants' Ins. Co. *v.* Prince, 50 Minn. 53, 52 N. W. 131, 36 Am. St. Rep. 626.
28. Fabbri *v.* Kalbfleisch, 2 Sweeny (N. Y.) 252.
29. Cooper *v.* Purvis, 46 N. C. 141.
30. Sweet *v.* Leach, 6 Ill. App. 212.

for sawyers to ship the lumber intrusted to them, and converted into logs, to lumber factors, to be sold by them;[31] a custom that a person employed to cut staves from another's bolts has a right to take to his own use the clippings, corner-pieces, and culls, without the consent of the owner;[32] a usage of plasterers to charge not only for the space covered, but for one half of the surface occupied by openings;[33] a custom whereby builders contracting to build houses in a workmanlike manner built them so carelessly that the windows were not vertical or at equal heights from the floor, the floors were not level, and the bricks were so put together that holes were left in the walls;[34] a custom requiring that when a person is employed to provide underpinning for a house to prevent its falling into an excavation made on an adjoining lot he must enter into a contract with the digger of the excavation by which they may work together, and his failure so to enter is a breach of contract;[35] a usage that the whole price of stone, sold at a certain price per cubic yard, is to be computed by measuring the stone after it has been laid in a solid wall;[36] a custom in the business of carpet-making, by which the results of the color mixer's skill and labor in the service of his employer are recognized as belonging exclusively to the mixer, and his employer is not regarded as having any title to them;[37] a usage where a contract for laying bricks is silent as to the manner in which the number of bricks is to be determined;[38] a custom of surveyors in making allowances to excavators on their being obliged to excavate below the depth mentioned in the contract to reach a level;[39] and a custom for the rest of the men in the engineer's department on a pleasure yacht to leave if the engineer is discharged.[40]

(VII) *PRINCIPAL AND AGENT.* The following usages affecting the relation of principal and agent have been declared void for unreasonableness: A custom that a man, without any authority from the owner of lands, and without his consent or knowledge, and without knowing whether he wishes to sell or not, may dispose of them on the ordinary terms, and by so doing bind the owner;[41] a usage among owners of vessels to accept all bills of their masters for supplies furnished abroad;[42] a custom that the master of a vessel as such may purchase a cargo on account of the owners without their authority,[43] or may have the right to sell the vessels without authority from the owners;[44] a usage for a broker employed to purchase stock to buy the stock for himself without his principal's knowledge;[45] a custom that an agent may sell the property of his principal before he is instructed to do so, and on demand of the property back may tender him similar articles in their stead;[46] a usage of agents in collecting drafts for absent parties to surrender them to the drawees at maturity and to take in exchange their checks upon banks;[47] a usage of brokers of tanned skins to insert in the memorandum of sale, unless forbidden by the vendor, and the buyer has an opportunity for examination, a warranty of merchantable quality;[48] a custom that a person employed by a company to devote his time to its business for its exclusive profit should be allowed to engage in a similar business on his own account;[49] a custom

31. Bean *v.* Bolton, 3 Phila. (Pa.) 87.
32. Wadley *v.* Davis, 63 Barb. (N. Y.) 500.
33. Jordan *v.* Meredith, 3 Yeates (Pa.) 318, 2 Am. Dec. 373.
34. Anderson *v.* Whittaker, 97 Ala. 690, 11 So. 919.
35. Nolte *v.* Hill, 36 Ohio St. 186.
36. Rogers *v.* Hayden, 91 Me. 24, 39 Atl. 283.
37. Dempsey *v.* Dobson, 184 Pa. St. 588, 39 Atl. 493, 63 Am. St. Rep. 809, 40 L. R. A. 550.
38. Richlands Flint Glass Co. *v.* Hiltebeitel, 92 Va. 91, 22 S. E. 806.
39. Pucci *v.* Barney, 2 Misc. (N. Y.) 354, 21 N. Y. Suppl. 1099.
40. Marsland *v.* The Yosemite, 18 Fed. 331. But see Moore *v.* Neafie, 3 Fed. 650.
41. Carr *v.* Callaghan, 3 Litt. (Ky.) 365.
42. Bowen *v.* Stoddard, 10 Metc. (Mass.) 375.
43. Hewett *v.* Buck, 17 Me. 147, 35 Am. Dec. 243.
44. Hershaw *v.* Clark, 2 Root (Conn.) 4.
45. Pickering *v.* Demerritt, 100 Mass. 416.
46. Foley *v.* Bell, 6 La. Ann. 760.
47. Whitney *v.* Esson, 99 Mass. 308, 96 Am. Dec. 762.
48. Dodd *v.* Farlow, 11 Allen (Mass.) 426, 87 Am. Dec. 726.
49. Stoney *v.* Farmers' Transp. Co., 17 Hun (N. Y.) 579.

for ship-brokers to receive a commission from the seller of a vessel when they introduce the purchaser to him, and are not otherwise employed in the transaction;[50] a custom for an agent to receive compensation from both buyer and seller;[51] a custom under which an insurance agent receives from the company commissions on the renewal premiums on all policies obtained by him for three years after the termination of his engagement;[52] a custom entitling a wharfinger to deliver goods, with credit for the freight, without incurring any responsibility, and entitling him to be regarded as still continuing the forwarder's agent to receive the amount;[53] and a usage between manufacturers of musical instruments and their agents, whereby agencies could be discontinued or terminated at the pleasure of either party unless expressly otherwise agreed.[54]

(VIII) *PUBLIC OFFICERS.* The following customs have been adjudged unreasonable, viz.: A custom for a flour inspector, who by statute is to receive a specified compensation in money to take to his own use the flour drawn from the barrel in the process of inspection, called the "draught flour," as an additional compensation or perquisite;[55] a usage of government officers to accept bills without consideration, or to pledge the credit of the nation as surety for, or the accommodation of, a contractor;[56] a custom for holders of settlements and preëmptions of land to give one half to another for surveying, obtaining preëmption warrants, and paying all expenses for carrying the claims to a grant;[57] a custom, in making surveys for locations of government land granted to a settler, to include more land than the warranty actually called for;[58] and a custom allowing a sheriff to leave attached goods with defendant in the custody of a watcher, and to charge for the latter's services.[59]

E. Validity — 1. REPUGNANCY TO RULES OF LAW.[60] It is laid down in a number of cases that a custom or usage in opposition to an established rule of law is void and of no effect.[61] But this is not correct. It was no objection to a com-

50. Winsor *v.* Dillaway, 4 Metc. (Mass.) 221.

51. Raisin *v.* Clark, 41 Md. 158, 20 Am. Rep. 66.

52. Castleman *v.* Southern Mut. L. Ins. Co., 14 Bush (Ky.) 197.

53. Torrance *v.* Hayes, 2 U. C. C. P. 338.

54. Sterling Organ Co. *v.* House, 25 W. Va. 64.

55. Delaplane *v.* Crenshaw, 15 Gratt. (Va.) 457.

56. Pierce *v.* U. S., 1 Ct. Cl. 270.

57. Hawkins *v.* Craig, 1 B. Mon. (Ky.) 27; Carr *v.* Callaghan, 3 Litt. (Ky.) 365; Watkins *v.* Eastin, 1 A. K. Marsh. (Ky.) 402.

But the usage of the land-office and the practice of the deputy-surveyors in early times to make surveys without warrants on being paid certain sums is relevant. Wood *v.* Galbreath, 2 Yeates (Pa.) 306. So evidence is competent as to the custom under the Spanish and Mexican governments with respect to getting possession of the public domain. Pino *v.* Hatch, 1 N. M. 125.

58. Huston *v.* McArthur, 7 Ohio 54, Pt. II.

59. Cutter *v.* Howe, 122 Mass. 541.

60. **As to custom that a person having a claim due upon contract** may not pursue the remedies provided by law to collect it see CORPORATIONS, 10 Cyc. 361 note 16.

61. *Alabama.*—Petty *v.* Gayle, 25 Ala. 472; West *v.* Ball, 12 Ala. 340.

Georgia.— Miller *v.* Moore, 83 Ga. 684, 10 S. E. 360, 20 Am. St. Rep. 329, 6 L. R. A. 374; Hatcher *v.* Comer, 73 Ga. 418.

Illinois.— Webster *v.* Granger, 78 Ill. 230.

Kentucky.— Butcher *v.* Krauth, 14 Bush 713.

Louisiana.— Cranwell *v.* The Fanny Fosdick, 15 La. Ann. 436, 77 Am. Dec. 190; Meeker *v.* Klemm, 11 La. Ann. 104; Ledoux *v.* Armor, 4 Rob. 381; Robertson *v.* Western M. & F. Ins. Co., 19 La. 227, 36 Am. Dec. 673; Segond *v.* Thomas, 10 La. 295; Devlin *v.* His Creditors, 2 La. 361; Glasgow *v.* Stevenson, 6 Mart. N. S. 567; Harrod *v.* Lafarge, 12 Mart. 21.

Maryland.— Raisin *v.* Clark, 41 Md. 158, 20 Am. Rep. 66.

Massachusetts.— Com. *v.* Cooper, 130 Mass. 285; Warren *v.* Franklin Ins. Co., 104 Mass. 518; Reed *v.* Richardson, 98 Mass. 216, 93 Am. Dec. 155; Boardman *v.* Spooner, 13 Allen 353, 90 Am. Dec. 196; Bliss *v.* Ropes, 9 Allen 339; Strong *v.* Bliss, 6 Metc. 393; Eager *v.* Atlas Ins. Co., 14 Pick. 141, 25 Am. Dec. 363; Vans *v.* Higginson, 10 Mass. 29; Homer *v.* Dorr, 10 Mass. 26.

Michigan.— Koppitz-Melchers Brewing Co. *v.* Behm, 130 Mich. 649, 90 N. W. 676.

Minnesota.— Healy *v.* Mannheimer, 74 Minn. 240, 76 N. W. 1126; Merchants' Ins. Co. *v.* Prince, 50 Minn. 53, 52 N. W. 131, 36 Am. St. Rep. 626; Globe Milling Co. *v.* Minneapolis Elevator Co., 44 Minn. 153, 46 N. W. 306.

Missouri.— Ober *v.* Carson, 62 Mo. 209; Southwestern Freight, etc., Co. *v.* Standard, 44 Mo. 71, 100 Am. Dec. 255.

mon-law custom that it was contrary to the common law of the land.[62] And a custom or usage of trade or of a particular place is not inadmissible because it is contrary to the principles of law governing such cases; for it is obvious that if proof of a usage could be rejected because it established something different from the law no custom would ever be proved, because if it were not different it would be a part of the law.[63] Nevertheless usages and customs have been rejected because inconsistent with established rules of law.[64] This apparent contradiction has been explained as follows:[65] The meaning of the rule that a usage or custom must not conflict with the law is clear and the rule itself easy of application. A usage or custom is not invalid simply because it is different in its effect from the general principles of law applicable to the particular circumstances in its absence. But if it conflicts with an established rule of public policy which it is not to the general interest to disturb; if its effect is injurious to the parties themselves in their relation to each other; if in short it is an unjust, oppressive, or impolitic usage, then it will not be recognized in courts of justice, for it will lack one of the requisites of a valid custom, viz., reasonableness.[66]

2. Repugnancy to Statutes — a. In General. A custom or usage repugnant to the express provisions of a statute is void,[67] and whenever there is a conflict

New Hampshire.— Rogers *v.* Allen, 47 N. H. 529.

New Jersey.— McCourry *v.* Suydam, 10 N. J. L. 245.

New York.— Corn Exch. Bank *v.* Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655; Baker *v.* Drake, 66 N. Y. 518, 23 Am. Rep. 80; Wright *v.* Boller, 42 Hun 77; Duguid *v.* Edwards, 50 Barb. 288; Otsego County Bank *v.* Warren, 18 Barb. 290; Dutch *v.* Harrison, 37 N. Y. Super. Ct. 306; Ayrault *v.* Pacific Bank, 6 Rob. 337 [*affirmed* in 47 N. Y. 570, 7 Am. Rep. 489]; Hone *v.* Mutual Safety Ins. Co., 1 Sandf. 137; Rankin *v.* American Ins. Co., 1 Hall 682; Emery *v.* Dunbar, 1 Daly 408; Coates *v.* Harvey, 2 N. Y. Suppl. 5; Frith *v.* Barker, 2 Johns. 327; Schieffelin *v.* Harvey, Anth. N. P. 76.

Ohio.— Morrison *v.* Bailey, 5 Ohio St. 13, 64 Am. Dec. 632; Inglebright *v.* Hammond, 19 Ohio 337, 53 Am. Dec. 430; Indianapolis Rolling Mill Co. *v.* Addy, 5 Ohio Dec. (Reprint) 588, 6 Am. L. Rec. 764.

Pennsylvania.— Silliman *v.* Whitmer, 196 Pa. St. 363, 46 Atl. 489; Coxe *v.* Heisler, 19 Pa. St. 243; Lancaster Bank *v.* Woodward, 18 Pa. St. 357, 57 Am. Dec. 618; Paull *v.* Lewis, 4 Watts 402; Rapp *v.* Palmer, 3 Watts 178; Bolton *v.* Colder, 1 Watts 360; Shaw *v.* Deal, 25 Wkly. Notes Cas. 39.

Rhode Island.— Beckwith *v.* Farnum, 5 R. I. 230.

South Carolina.— Smetz *v.* Kennedy, Riley 218.

Texas.— Tucker *v.* Smith, 68 Tex. 473, 3 S. W. 671; Meaher *v.* Lufkin, 21 Tex. 383; Stillman *v.* Hurd, 10 Tex. 109; Dewees *v.* Lockhart, 1 Tex. 535; Mercantile Banking Co. *v.* Landa, (Civ. App. 1896) 33 S. W. 681; Davie *v.* Lynch, 1 Tex. App. Civ. Cas. § 695; Russell *v.* Oppenheimer, 1 Tex. App. Civ. Cas. § 269.

Wisconsin.— Harrington *v.* Edwards, 17 Wis. 586, 86 Am. Dec. 768; Sauer *v.* Steinbauer, 14 Wis. 70.

United States.— Barnard *v.* Kellogg, 10 Wall. 383, 19 L. ed. 987; Thompson *v.* Riggs, 5 Wall. 663, 18 L. ed. 704; The Dora Mathews, 31 Fed. 619; Burne *v.* Ashley, 3 Fed. Cas. No. 1,698; Brown *v.* Jackson, 4 Fed. Cas. No. 2,016, 2 Wash. 24; Ruan *v.* Gardner, 20 Fed. Cas. No. 12,100, 1 Wash. 145; Seller *v.* The Pacific, 21 Fed. Cas. No. 12,644, Deady 17, 1 Oreg. 409.

England.— Edie *v.* East India Co., 2 Burr. 1216, 1 W. Bl. 295.

See 15 Cent. Dig. tit. "Customs and Usages," § 8.

62. Horton *v.* Beckman, 6 T. R. 760.

63. Milroy *v.* Chicago, etc., R. Co., 98 Iowa 188, 67 N. W. 276; Lawson Usages and Customs, § 225.

64. *Alabama.*— Antomarchi *v.* Russell, 63 Ala. 356, 35 Am. Rep. 40; Barlow *v.* Lambert, 28 Ala. 704, 65 Am. Dec. 374.

Kentucky.— Gallatin *v.* Bradford, 1 Bibb 209.

Louisiana.— Jackson *v.* Beling, 22 La. Ann. 377.

Michigan.— Strong *v.* Grand Trunk R. Co., 15 Mich. 206, 93 Am. Dec. 184.

Minnesota.— Johnson *v.* Gilfillan, 8 Minn. 395.

New York.— Mechanics', etc., Bank *v.* Smith, 19 Johns. 115.

Texas.— Dewees *v.* Lockhart, 1 Tex. 535.

England.— Menzies *v.* Lightfoot, L. R. 11 Eq. 459, 40 L. J. Ch. 561, 24 L. T. Rep. N. S. 695, 19 Wkly. Rep. 578; Daun *v.* London Brewery Co., L. R. 8 Eq. 155, 38 L. J. Ch. 454, 20 L. T. Rep. N. S. 601; Hopkinson *v.* Rolt, 9 H. L. Cas. 514, 7 Jur. N. S. 1209, 34 L. J. Ch. 468, 5 L. T. Rep. N. S. 90, 9 Wkly. Rep. 900; Shaw *v.* Neale, 6 H. L. Cas. 581, 4 Jur. N. S. 695, 27 L. J. Ch. 444, 6 Wkly. Rep. 635.

65. Lawson Usages and Customs, § 248.

66. See *supra*, II, D, 10.

67. *Alabama.*— Lehman *v.* Marshall, 47 Ala. 362.

Georgia.— Fleming *v.* King, 100 Ga. 449, 28 S. E. 239.

Illinois.— Chicago, etc., R. Co. *v.* People, 56 Ill. 365, 8 Am. Rep. 690; McCurdy *v.*

between a custom or usage and a statutory regulation the statutory regulation must control.[68]

b. Statutes Defining Words. If a statute has given a definite meaning to any particular word no evidence of custom will be admitted to attach any other meaning to it.[69]

Alaska, etc., Commercial Co., 102 Ill. App. 120.

Indiana.— Bankus *v.* State, 4 Ind. 114. See also Blizzard *v.* Walker, 32 Ind. 437.

Iowa.— McCune *v.* Burlington, etc., R. Co., 52 Iowa 600, 3 N. W. 615.

Massachusetts.— Mansfield *v.* Stoneham, 15 Gray 149; Perkins *v.* Franklin Bank, 21 Pick. 483. See also Cayzer *v.* Taylor, 10 Gray 274, 69 Am. Dec. 317.

Michigan.— See Tremble *v.* Crowell, 17 Mich. 493.

Montana.— Penn *v.* Oldhauber, 24 Mont. 287, 61 Pac. 649.

New Jersey.— Ocean Beach Assoc. *v.* Brinley, 34 N. J. Eq. 438.

New York.— Many *v.* Beekman Iron Co., 9 Paige 188; Hall *v.* Reed, 2 Barb. Ch. 500. See also Bogert *v.* Cauman, Anth. N. P. 97.

Ohio.— Mosier *v.* Harmon, 29 Ohio St. 220; Brown *v.* Farran, 3 Ohio 140.

Texas.— Gulf, etc., R. Co. *v.* McCown, (Civ. App. 1894) 25 S. W. 435; Hudson *v.* Henderson, 1 Tex. App. Civ. Cas. § 353.

Virginia.— Coleman *v.* McMurdo, 5 Rand. 51. But see Governor *v.* Withers, 5 Gratt. 24, 50 Am. Dec. 95.

United States.— Swift, etc., Co. *v.* U. S., 105 U. S. 691, 26 L. ed. 1108; Love *v.* Hinckley, 15 Fed. Cas. No. 8,548, Abb. Adm. 436; The Lucy Anne, 15 Fed. Cas. No. 8,596, 3 Ware 253; Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344. And see Phillips *v.* Innes, 4 Cl. & F. 234, 7 Eng. Reprint 90.

England.— Daun *v.* London Brewing Co., L. R. 8 Eq. 155, 38 L. J. Ch. 454, 20 L. T. Rep. N. S. 601.

Canada.— Monette *v.* Lefebvre, 16 Can. Supreme Ct. 387.

See 15 Cent. Dig. tit. "Customs and Usages," § 9.

Contra.— If a custom as to the manner of making wills has become so prevailing and notorious that the tacit assent of the authorities thereto may be presumed, it will operate to repeal a prior law, and the acts of individuals in accordance therewith are legitimate. Adams *v.* Norris, 23 How. (U. S.) 353, 16 L. ed. 539. And under the laws of Mexico a custom may overturn the positive and written law. Tevis *v.* Pitcher, 10 Cal. 465; Panaud *v.* Jones, 1 Cal. 488; Von Schmidt *v.* Huntington, 1 Cal. 55.

The statutes concerning legal tender cannot be affected by the local usages of banking houses. Marine Bank *v.* Ogden, 29 Ill. 248; Marine Bank *v.* Rushmore, 28 Ill. 463; Marine Bank *v.* Birney, 28 Ill. 90.

68. Basey *v.* Gallagher, 20 Wall. (U. S.) 670, 22 L. ed. 452.

Illustrations.— Usage among merchants to give a preference to accommodation loans made for a few days only, and without security or interest, cannot be enforced in the distribution of an insolvent estate, since it contravenes the insolvent law. Thomson *v.* Albert, 15 Md. 268. And a custom among the merchants of a town to consider accounts made with their customers for merchandise through the year not to be due and payable until the first of January of the following year could not control a statute which provides that time shall run against each item of an account from the date of delivery of the goods charged therein, unless otherwise specially contracted. Smyth *v.* Walton, 5 Tex. Civ. App. 673, 24 S. W. 1084. So evidence of a custom to have an agricultural lien on crops to be grown signed and delivered after supplies have been furnished is invalid, where the statute authorizing such lien requires that the agreement should be executed and delivered before the advancements are made and the supplies furnished. Patapsco Guano Co. *v.* Magee, 86 N. C. 350. And a custom or usage of paying debts in Confederate notes in the insurrectionary states during the Civil war was held illegal, as violative of the legal-tender act. Williamson *v.* Richardson, 30 Fed. Cas. No. 17,754.

69. Hughes *v.* Humphreys, 3 E. & B. 954, 1 Jur. N. S. 42, 23 L. J. Q. B. 356, 2 Wkly. Rep. 526, 77 E. C. L. 954; Giles *v.* Jones, 11 Exch. 393, 1 Jur. N. S. 982, 24 L. J. Exch. 259, 3 Wkly. Rep. 576; St. Cross' Hospital *v.* Howard, 6 T. R. 338; Hockin *v.* Cooke, 4 T. R. 314.

Illustrations.— Where a statute declares that every pound of butter shall weigh sixteen ounces a custom that every pound shall weigh eighteen ounces is bad. Noble *v.* Durell, 3 T. R. 271. So where a statute provided that "the hundred weight shall consist of one hundred pounds avoirdupois, and twenty such hundreds shall constitute a 'ton,'" it was held that evidence that by custom or mercantile usage a "ton" of hemp consisted of twenty-four hundred pounds instead of twenty hundred was not admissible to interpret a contract in which G agreed to sell to M "thirty-five tons of hemp of the best quality." Green *v.* Moffett, 22 Mo. 529. And where a statute enacted that "all round timber, the quantity of which is estimated by the thousand, shall be measured according to the following rule, viz.: A stick of timber sixteen inches in diameter, and twelve inches in length, shall constitute one cubic foot, and the same ratio for any size and quantity; each cubic foot shall constitute ten feet of a thousand," a local usage known as the Blodgett measure which allowed at the rate of one hundred and fifteen feet for a thousand was held to be inadmissible. Rogers *v.* Allen, 47 N. H. 529. And where a statute declares that "two thousand pounds shall make one

c. Statutes Governing Public Officers. Where an officer's duties are prescribed by statute, usage will not excuse their discharge in a different manner.[70] So proof of a custom is not permissible to enlarge the powers of officers whose authority is defined by statute.[71] And a custom which gives an officer a right to more than the fees prescribed by law will not be recognized.[72]

d. Statutes Prohibiting Usury. Where a transaction is within the statute against usury, the usage of trade as to such transaction cannot be received in evidence to show that it is not usurious.[73]

III. APPLICATION, OPERATION, AND EFFECT.

A. Conflict of Laws. Where a contract is drawn at a place where both parties reside, such ambiguities as it may contain are to be construed by the usage of that place.[74] When, however, one of the parties is a foreigner, the question arises

ton," a custom with dealers in pig-iron to buy and sell by the gross ton of two thousand two hundred and sixty-eight pounds is inadmissible. Weaver *v.* Fegely, 29 Pa. St. 27, 70 Am. Dec. 151; Evans *v.* Myers, 25 Pa. St. 114. So a custom among iron mills making a ton of iron two thousand two hundred and forty pounds is invalid, where it violates a statute fixing the legal ton at two thousand pounds. Godcharles *v.* Wigeman, 113 Pa. St. 431, 6 Atl. 354. So as to a statute establishing the measure of a barrel of corn. Mays *v.* Jennings, 4 Humphr. (Tenn.) 102.

70. Crocker *v.* Schureman, 7 Mo. App. 358; De Saussure *v.* Zeigler, 6 S. C. 12; Delaplane *v.* Haxall, 15 Gratt. (Va.) 457. And see Frazier *v.* Warfield, 13 Md. 279.

Illustrations.— Where a statute required the demand of acceptance or payment of a bill of exchange to be made in a certain manner, a custom among notaries in the city of New York to make a demand in a different manner was held to be inadmissible. Commercial Bank *v.* Varnum, 3 Lans. (N. Y.) 86; Otsego County Bank *v.* Warren, 18 Barb. (N. Y.) 290. So where a statute described certain prison limits beyond which prisoners should not be allowed to go a contrary usage was held to be bad. Trull *v.* Wheeler, 19 Pick. (Mass.) 240. And where a statute prohibits highway surveyors from engaging labor without the express authority of the board of selectmen a contrary usage is bad. Scribner *v.* Hollis, 48 N. H. 30. Again where the United States statutes require the licenses of vessels to be renewed at a certain time, under a penalty, a custom for purchasers to await the close of navigation before making application for a renewal will be no protection. U. S. *v.* The Forrester, 25 Fed. Cas. No. 15,132, Newb. Adm. 81. And where the capital stock of a foreign manufacturing corporation was required to be taxed at its full value, the usage of the assessors to make certain deductions was rejected. Dwight *v.* Boston, 12 Allen (Mass.) 316, 90 Am. Dec. 149.

71. McCrary *v.* McFarland, 93 Ind. 466; Walters *v.* Senf, 115 Mo. 524, 22 S. W. 511.

An unlawful expenditure of money of the town cannot be rendered valid by usage, however long continued. Such usage is against public policy. Murphy *v.* Calley, 1 Allen (Mass.) 107. So a long-continued usage in a town will not validate an assessment list not made out according to law. Middletown Bank *v.* Berlin, 18 Conn. 189.

72. Shattuck *v.* Woods, 1 Pick. (Mass.) 171; Delaplane *v.* Crenshaw, 15 Gratt. (Va.) 457.

Illustrations.— In an action against a justice of the peace for collecting extortionate fees, it is no defense that it was the custom of other officers of the same county habitually to receive greater fees than those which defendant had received. Lincoln *v.* Shaw, 17 Mass. 410. And where county commissioners receive by law a fixed *per diem* compensation, no evidence of a custom even fifty years old to recover additional compensation for incidental expenses is admissible to create an implied contract to pay such expenses. Albright *v.* Bedford County, 106 Pa. St. 582. So a custom of taxing fees of defendant's counsel in plaintiff's costs, where plaintiff in attachment is defeated, cannot prevail against the law which limits the tax fee to a certain amount. Hicks *v.* Duncan, 4 Mart. N. S. (La.) 314.

73. *Arkansas.*— Jones *v.* McLean, 18 Ark. 456.

Louisiana.— Daquin *v.* Coiron, 3 La. 387; Harrod *v.* Lafarge, 12 Mart. 21.

New York.—Utica Bank *v.* Smalley, 2 Cow. 770, 14 Am. Dec. 526; Utica Bank *v.* Wager, 2 Cow. 712; New York Firemen Ins. Co. *v.* Ely, 2 Cow. 678; Dunham *v.* Gould, 16 Johns. 367, 8 Am. Dec. 323; Dunham *v.* Dey, 13 Johns. 40.

North Carolina.— Gore *v.* Lewis, 109 N. C. 539, 13 S. E. 909.

Ohio.— Niagara County Bank *v.* Baker, 15 Ohio St. 68.

Pennsylvania.— Greene *v.* Tyler, 39 Pa. St. 361.

South Carolina.— Smetz *v.* Kennedy, Riley 218.

Tennessee.— Cooper *v.* Sandford, 4 Yerg. 452, 26 Am. Dec. 239.

See 15 Cent. Dig. tit. "Customs and Usages," § 9.

74. Story Confl. Laws, § 263 [*citing* Baltimore, etc., R. Co. *v.* Glenn, 28 Md. 287, 92 Am. Dec. 688; Benners *v.* Clemens, 58 Pa. St. 24; Watson *v.* Brewster, 1 Pa. St. 381; Allshouse *v.* Ramsay, 6 Whart. (Pa.) 331, 37 Am. Dec. 417]; Wharton Confl. Laws, § 424.

whether he knew of the local usage, and intended to accept it as part of his contract.[75] But if a contract to be performed in England was executed by two Englishmen traveling in America, the law of the place of performance and not that of the place of contract would govern.[76] Where a contract is entered into by correspondence, then the usage of the place of the writer who first employs the controverted terms must be followed to explain them, although this was not the place where the contract was closed, because the party who first introduces these terms is supposed to do so in the sense with which he is familiar.[77] But where there is a place of performance whose language and usages the parties meant to adopt, then such language and usages must prevail.[78]

B. Customs Construed Strictly. All common-law customs in derogation of the common law are strictly construed.[79] The same is true of the usages of trade; nothing will be held to be within them which it is not proved that they cover.[80]

C. Statutes Construed by Usage. If the meaning of the words of a

Where a vendee of land demands a deed with customary covenants, what is customary is determined by the *lex rei sitæ*. Gault *v.* Van Zile, 37 Mich. 22.

A contract made in Boston with a manufacturer of window-glass in Philadelphia for the purchase from him of glass there manufactured, or to be manufactured, and its delivery there to a carrier, referred for the designation of sizes of the glass and as to the basis of prices to cards issued by the manufacturer, without special reference to the Boston market. It was held that if there was a difference in the local usages of the two places as to the standard of measurement or the mode of cutting the glass so as to fit the corresponding sizes of sash, and no provision was made as to this in the contract, the usage at Philadelphia would govern. Star Glass Co. *v.* Morey, 108 Mass. 570.

75. Wharton Confl. Laws, § 434.

76. Wharton Confl. Laws, § 434.

77. Wharton Confl. Laws, § 435.

78. Thus when money is to be paid, or goods delivered, or lands conveyed in a foreign country, then the currency, weights, and measurements of such foreign country are to be the standards: first, because such is presumed to be the intention of the parties; and, second, because generally there will be no other currency, weights, or measurement in such country by which the contract could be performed. Wharton Confl. Laws, § 437 [*citing* De Wolf *v.* Johnson, 10 Wheat. (U. S.) 367, 6 L. ed. 343; Clayton *v.* Gregson, 5 A. & E. 302; Stapleton *v.* Conway, 3 Atk. 727; Rosetter *v.* Cahlman, 8 Exch. 261]. So where a contract was entered into in London for the loading of a cargo at Trinidad, it was held that it was to be construed by the usages of the port of Trinidad. Cuthbert *v.* Cumming, 11 Exch. 405, 1 Jur. N. S. 686, 24 L. J. Exch. 310, 3 Wkly. Rep. 553. And see Greaves *v.* Legg, 11 Exch. 642.

79. Richardson *v.* Walker, 2 B. & C. 827, 4 D. & R. 498, 2 L. J. K. B. O. S. 180, 9 E. C. L. 357; Muggleton *v.* Barnett, 2 H. & N. 653, 4 Jur. N. S. 139, 27 L. J. Exch. 125, 6 Wkly. Rep. 182; Arthur *v.* Bokenham, 11 Mod. 148; Denn *v.* Spray, 1 T. R. 466, 1 Rev. Rep. 250.

80. *Illinois.*— Leggat *v.* Sands' Ale Brewing Co., 60 Ill. 158.

Iowa.— Jeffrey *v.* Keokuk, etc., R. Co., 51 Iowa 439, 1 N. W. 765.

Maryland.—Maryland F. Ins. Co. *v.* Whiteford, 31 Md. 219, 100 Am. Rep. 45.

Missouri.— Chouteau *v.* The St. Anthony, 16 Mo. 216, 20 Mo. 519.

South Carolina.—Colcock *v.* Louisville, etc., R. Co., 1 Strobh. 329.

Illustrations.—A custom of delivering goods to a mate of a ship will not excuse a delivery to a deck-hand, or leaving them near the ship in charge of no one. Packard *v.* Getman, 6 Cow. (N. Y.) 757, 16 Am. Dec. 475; Leigh *v.* Smith, 1 C. & P. 638, R. & M. 224, 28 Rev. Rep. 791, 12 E. C. L. 362. A custom for passengers on a boat to place their baggage thereon without notice to the officers will not protect one who does not accompany a trunk which he leaves in this way, and who is therefore not a "passenger." Wright *v.* Caldwell, 3 Mich. 51. A carrier's usage being to give notice of the arrival of goods at the consignee's store, he is not obliged to seek him elsewhere. Ely *v.* New Haven Steamboat Co., 53 Barb. (N. Y.) 207. A usage of a bank-teller to issue certificates of deposit does not tend in any way to prove a usage for him to certify checks. Mussey *v.* Eagle Bank, 9 Metc. (Mass.) 306. A usage showing when a voyage is at an end so far as the payment of premium notes is concerned cannot be introduced to show when a voyage terminates as regards the payment of losses. Meigs *v.* Mutual Mar. Ins. Co., 2 Cush. (Mass.) 439. A usage of a captain of a boat to sign bills of lading for articles deliverable at one port is no proof of authority to sign bills of lading for a different port. Nichols *v.* De Wolf, 1 R. I. 277. A custom giving to brokers a certain commission will not help a middleman (Rupp *v.* Sampson, 16 Gray (Mass.) 398, 77 Am. Dec. 416) or one who is not strictly a broker (Canby *v.* Frick, 8 Md. 163; Main *v.* Eagle, 1 E. D. Smith (N. Y.) 619). A custom of hardware merchants will not be extended to help commission merchants. Field *v.* Banker, 9 Bosw. (N. Y.) 467. And a usage as to the term of employment of traveling salesmen cannot affect a party employed

statute be uncertain, usage may be resorted to for the purpose of interpreting them. In a general statute doubtful words may be explained by reference to general usage. In a statute applicable to a particular place only ambiguous words may be construed by the usage at that place.[81] In like manner corporate charters may be interpreted by custom and usage.[82] But although usage is competent to explain doubtful terms in a charter, it is not as to plain general terms;[83]

on a share of the profits of his sales. Dike *v.* Pool, 15 Minn. 315.

81. *Louisiana.*— Kernion *v.* Hills, 1 La. Ann. 419.

Maryland.— Frazier *v.* Warfield, 13 Md. 279; Bandel *v.* Isaac, 13 Md. 202.

Michigan.— Cameron *v.* Merchants', etc., Bank, 37 Mich. 240.

New Hampshire.— Bailey *v.* Rolfe, 16 N. H. 247.

New Jersey.— State *v.* Platt, 24 N. J. L. 108; Taylor *v.* Griswold, 14 N. J. L. 222, 27 Am. Dec. 33; Board *v.* Cronk, 6 N. J. L. 119.

New York.— Jackson *v.* Gumaer, 2 Cow. 552; Meriam *v.* Harsen, 2 Barb. Ch. 232.

Ohio.— Chesnut *v.* Shane, 16 Ohio 599, 47 Am. Dec. 387.

Pennsylvania.— Steiner *v.* Coxe, 4 Pa. St. 13; McFerran *v.* Powers, 1 Serg. & R. 102.

Tennessee.—Polk *v.* Hill, 2 Overt. 157 note.

Vermont.— Sherwin *v.* Bugbee, 16 Vt. 439.

United States.— McKeen *v.* Delancy, 5 Cranch 22, 3 L. ed. 25; Love *v.* Hinckley, 15 Fed. Cas. No. 8,548, Abb. Adm. 436.

England.— Atty.-Gen. *v.* Parker, 3 Atk. 576, 26 Eng. Reprint 1132, 1 Ves. 43, 27 Eng. Reprint 879; Bank of England *v.* Anderson, 3 Bing. N. Cas. 589, 2 Hodges 294, 1 Jur. 9, 2 Keen 328, 7 L. J. Ch. 265, 6 L. J. C. P. 158, 4 Scott 50, 32 E. C. L. 273; Buckingham *v.* Drury, 3 Bro. P. C. 492, 1 Eng. Reprint 1454, 2 Eden 60, 28 Eng. Reprint 818; London *v.* Long, 1 Campb. 22; Dunbar *v.* Roxburghe, 3 Cl. & F. 335, 6 Eng. Reprint 1462; Rex *v.* Aire, etc., Nav. Co., 2 T. R. 660, 1 Rev. Rep. 579; Atty.-Gen. *v.* Newcombe, 14 Ves. Jr. 1, 33 Eng. Reprint 422; Atty.-Gen. *v.* Forster, 10 Ves. Jr. 335, 32 Eng. Reprint 874.

Evidence of the universal custom allowing a previous owner of land to redeem it, after the expiration of the redemption period, from the county which bought it in for taxes, may be admitted, not to show that the custom must control over the statute, but to aid the court in deciding whether or not the statute shall be so construed as to allow discretionary redemption after the redemption period has expired. Steiner *v.* Coxe, 4 Pa. St. 13.

82. *Maine.*— Trott *v.* Warren, 11 Me. 227.

Maryland.— Hager's-Town Turnpike Road Co. *v.* Creeger, 5 Harr. & J. 122, 9 Am. Dec. 495.

Massachusetts.—Smith *v.* Cheshire, 13 Gray 318; Society, etc. *v.* Davis, 3 Metc. 133; Spaulding *v.* Lowell, 23 Pick. 71; Willard *v.* Newburyport, 12 Pick. 227; Stockbridge *v.* West Stockbridge, 12 Mass. 400; Dillingham *v.* Snow, 5 Mass. 547.

New Hampshire.— Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

New Jersey.— Taylor *v.* Griswold, 14 N. J. L. 222, 27 Am. Dec. 33.

New York.— Robie *v.* Sedgwick, 35 Barb. 319; All Saints' Church *v.* Lovett, 1 Hall 213; Dutchess Cotton Manufactory *v.* Davis, 14 Johns. 238, 7 Am. Dec. 459.

United States.— Pawlet *v.* Clark, 9 Cranch 292, 3 L. ed. 735.

England.— Rex *v.* Davie, 6 A. & E. 374, 33 E. C. L. 210; Rex *v.* Mashiter, 6 A. & E. 153, 6 L. J. K. B. 121, 1 N. & P. 314, 33 E. C. L. 101; Atty.-Gen. *v.* Parker, 3 Atk. 576, 26 Eng. Reprint 1132, 1 Ves. 43, 27 Eng. Reprint 879; Rex *v.* Attwood, 4 B. & Ad. 481, 2 L. J. K. B. 57, 1 N. & M. 286, 24 E. C. L. 213; Clark *v.* Denton, 1 B. & Ad. 92, 8 L. J. K. B. O. S. 333, 20 E. C. L. 409; Clark *v.* Le Cren, 9 B. & C. 52, 7 L. J. K. B. O. S. 186, 17 E. C. L. 33; Rex *v.* Westwood, 4 B. & C. 781, 10 E. C. L. 799, 7 Bing. 1, 20 E. C. L. 11, 4 Bligh N. S. 213, 5 Eng. Reprint 76, 2 Dow. & Cl. 21, 6 Eng. Reprint 637, 7 D. & R. 267; Carter *v.* Sanderson, 5 Bing. 79, 15 E. C. L. 480; Woolley *v.* Idle, 4 Burr. 1951; Hesketh *v.* Braddock, 3 Burr. 1847; Rex *v.* Spencer, 3 Burr. 1827; Harrison *v.* Godman, 1 Burr. 12; Calchester *v.* Goodwin, Carter 114; Case of Corporations, 4 Coke 77b; Shrewsbury *v.* Hart, 1 C. & P. 113, 12 E. C. L. 76; Wallis' Case, Cro. Jac. 555; Davies *v.* Morgan, 1 Cromp. & J. 587, 9 L. J. Exch. O. S. 153, 1 Tyrw. 457; London *v.* Compton, 7 D. & R. 597, 4 L. J. K. B. O. S. 49; Rex *v.* Tappenden, 3 East 186; Withnell *v.* Gartham, 1 Esp. 322, 6 T. R. 388, 3 Rev. Rep. 218; Rex *v.* Tomlyn, Hardw. 316; Lee *v.* Wallis, 1 Ld. Ken. 292; Clerk *v.* Tucket, 3 Lev. 281; Bosworth *v.* Budgen, 7 Mod. 459; Grafton's Case, 1 Mod. 10; Dundee Harbour *v.* Dougall, 1 Sc. App. Cas. 20; Perkins *v.* Cutlers' Co., 1 Selw. 1145; Rex *v.* Grosvenor, 2 Str. 1193, 1 Wils. C. P. 18; Bosworth *v.* Hearne, 2 Str. 1085; Fazakerley *v.* Wiltshire, 1 Str. 462; Rex *v.* Feversham, 8 T. R. 352, 4 Rev. Rep. 691; Rex *v.* Coopers' Co., 7 T. R. 543; Rex *v.* Miller, 6 T. R. 268, 3 Rev. Rep. 172; Player *v.* Vere, T. Raym. 288; Player *v.* Jones, Vent. 21; Atty.-Gen. *v.* Newcombe, 14 Ves. Jr. 1, 33 Eng. Reprint 422; Taylors' Co. *v.* Glazby, 2 Wils. C. P. 266; Bodivic *v.* Fennell, 1 Wils. C. P. 233.

83. Rex *v.* Grout, 1 B. & Ad. 104, 20 E. C. L. 414; Withnell *v.* Gartham, 1 Esp. 322, 6 T. R. 388, 3 Rev. Rep. 218; Davis *v.* Waddington, 8 Jur. 1142, 14 L. J. C. P. 45, 1 Lutw. Reg. Cas. 159, 7 M. & G. 37, 8 Scott N. R. 807, 49 E. C. L. 37; Rex *v.* Johns, Lofft 76; Tewkesbury *v.* Bricknell, 2 Taunt. 120; Blankley *v.* Winstanley, 3 T. R. 279, 1 Rev. Rep. 704; Lucton Free School *v.* Scarlett, 2 Y. & J. 330.

nor is usage admissible in evidence if it is repugnant to the express terms of the charter.[84]

D. In Particular Relations and Callings — 1. Banks and Banking — Negotiable Paper. The usage of banks in respect to the powers and duties of their officers, so far as such usage is known to the business public, enters into and qualifies the contracts made by such banks through their officers.[85] So the custom of a bank and its ordinary methods of transacting business, including the prescribed forms of notes offered for discount, enter into the contract of those giving notes for the purpose of having them discounted at such bank.[86] And these usages have been received in evidence and held binding: A usage that in the absence of the cashier the president signs drafts and checks;[87] or that either teller or cashier may certify checks;[88] the custom of banks in that vicinity to borrow money without special authority of the board of directors;[89] a usage as to the proper person to receive payment for the bank;[90] the usage of a bank as to demand and notice;[91] the usage of depositors in certain banks to deposit checks on the same or the next day after the day on which they were received, and of the bank immediately to return any checks from the "clearing-house"

84. Benoit *v.* Conway, 10 Allen (Mass.) 528; Hood *v.* Lynn, 1 Allen (Mass.) 103; Butler *v.* Charlestown, 7 Gray (Mass.) 12; Rex *v.* Salivay, 9 B. & C. 424, 17 E. C. L. 194; Powell *v.* Rex, 2 Bro. P. C. 298, 1 Eng. Reprint 956; Rex *v.* Chester, 1 M. & S. 101; Haddock's Case, T. Raym. 435.

85. Wharton Agency, § 676 [*citing* Stamford Bank *v.* Ferris, 17 Conn. 259; Hartford Bank *v.* Stedman, 3 Conn. 489; City Bank *v.* Cutter, 3 Pick. (Mass.) 414; Whitwell *v.* Johnson, 17 Mass. 449, 9 Am. Dec. 165; Smith *v.* Whiting, 12 Mass. 6, 7 Am. Dec. 25; Blanchard *v.* Hilliard, 11 Mass. 85; Lincoln, etc., Bank *v.* Page, 9 Mass. 155, 6 Am. Dec. 52; Widgery *v.* Munroe, 6 Mass. 449; Jones *v.* Fales, 4 Mass. 245; Pope *v.* Albion Bank, 57 N. Y. 126; Metropolis Bank *v.* New England Bank, 1 How. (U. S.) 234, 11 L. ed. 115; Brent *v.* Metropolis Bank, 1 Pet. (U. S.) 89, 7 L. ed. 65; Yeaton *v.* Alexandria Bank, 5 Cranch (U. S.) 49, 3 L. ed. 33]; Neiffer *v.* Knoxville Bank, 1 Head (Tenn.) 162. And see Shimmel *v.* Erie R. Co., 5 Daly (N. Y.) 396.

As to custom of bank as to authority to discount paper see Banks and Banking, 5 Cyc. 467.

As to usages of clearing-house see Banks and Banking, 5 Cyc. 614 note 50.

86. Fowler *v.* Brantly, 14 Pet. (U. S.) 318, 10 L. ed. 473. See also Banks and Banking, 5 Cyc. 488, 504, 555 note 78.

87. Wharton Agency, § 675 [*citing* Palmer *v.* Yates, 3 Sandf. (N. Y.) 137; Neiffer *v.* Knoxville Bank, 1 Head (Tenn.) 162].

88. Cooke *v.* State Nat. Bank, 52 N. Y. 96, 11 Am. Dec. 667; Meads *v.* Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 331; Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125, 69 Am. Dec. 678; Clarke Nat. Bank *v.* Albion Bank, 52 Barb. (N. Y.) 592; Willets *v.* Phœnix Bank, 2 Duer (N. Y.) 121; Girard Bank *v.* Pennsylvania Tp. Bank, 39 Pa. St. 92, 80 Am. Dec. 507; Merchants' Nat. Bank *v.* Boston State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008. *Contra*, U. S. Bank *v.* Fleckner, 8 Mart. (La.) 309, 13 Am. Dec. 287; Mussey *v.* Eagle Bank, 9 Metc. (Mass.) 306.

89. Huntington First Nat. Bank *v.* Arnold, 156 Ind. 487, 60 N. E. 134.

90. Stamford Bank *v.* Ferris, 17 Conn. 259; New England Mar. Ins. Co. *v.* Chandler, 16 Mass. 275; Fairfield *v.* Adams, 16 Pick. (Mass.) 381; East River Nat. Bank *v.* Gove, 57 N. Y. 597.

91. *Alabama.*—Gindrat *v.* Mechanics' Bank, 7 Ala. 324.

Connecticut.— Bridgeport Bank *v.* Dyer, 19 Conn. 136; Kilgore *v.* Bulkley, 14 Conn. 362; Hartford Bank *v.* Stedman, 3 Conn. 489.

Iowa.— Grinman *v.* Walker, 9 Iowa 426.

Kentucky.— Goddin *v.* Shipley, 7 B. Mon. 575.

Louisiana.—Louisiana State Bank *v.* Rowel, 6 Mart. N. S. 506.

Maryland.— Bell *v.* Hagerstown Bank, 7 Gill 216; Columbia Bank *v.* Fitzhugh, 1 Harr. & G. 239; Raborg *v.* Columbia Bank, 1 Harr. & G. 231; Columbia Bank *v.* Magruder, 6 Harr. & J. 172, 14 Am. Dec. 271. But see Jackson *v.* Union Bank, 6 Harr. & J. 146.

Massachusetts.—Shelburne Falls Nat. Bank *v.* Townsley, 102 Mass. 177, 3 Am. Rep. 445; Warren Bank *v.* Parker, 8 Gray 221; Chicopee Bank *v.* Eager, 9 Metc. 583; Wood *v.* Corl, 4 Metc. 203; Boston Bank *v.* Hodges, 9 Pick. 420; Taunton Bank *v.* Richardson, 5 Pick. 436; City Bank *v.* Cutter, 3 Pick. 414; Whitwell *v.* Johnson, 17 Mass. 449, 9 Am. Dec. 165; Peirce *v.* Butler, 14 Mass. 303; Smith *v.* Whiting, 12 Mass. 6, 7 Am. Dec. 25; Blanchard *v.* Hilliard, 11 Mass. 85; Weld *v.* Gorham, 10 Mass. 366; Lincoln, etc., Bank *v.* Page, 9 Mass. 155, 6 Am. Dec. 52; Widgery *v.* Munroe, 6 Mass. 449; Jones *v.* Fales, 4 Mass. 245.

Mississippi.— Cohea *v.* Hunt, 2 Sm. & M. 227, 49 Am. Dec. 581; Commercial, etc., Bank *v.* Hamer, 7 How. 448, 40 Am. Dec. 80; Planters' Bank *v.* Markham, 5 How. 397, 37 Am. Dec. 162; Lewis *v.* Planters' Bank, 3 How. 267.

which the bank has no funds to cover;[92] a custom on the part of banks of a particular place to demand payment and give notice to indorsers of negotiable paper on the fourth day of grace;[93] a custom as to the time in which a bank shall present a check which it has received for collection[94] and making it the duty of the bank to notify all indorsers,[95] or giving it the right to receive payment otherwise than in money;[96] a custom of banks to pass exchange drawn by a dealer in cotton, on his foreign customer, to the credit of the dealer, and to allow him to pay the persons of whom he had bought the cotton with his checks on the banks;[97] a usage of the banks in a city to receive on deposit for its customers checks drawn on the other banks by their respective depositors, and to make exchanges of checks and pay balances every business day between two and four o'clock, and if checks are received after the exchanges have been made to hold them until the next day, and if a check is dishonored to return it to the bank from which it came and receive the money paid in lieu of it;[98] a custom for the cashier and teller of a bank to whom a check drawn upon another bank was presented and payment or purchase requested by an unknown bearer, to take means to assure himself that all was right, and for the drawee bank, upon receiving a check through another bank, to assume, relying upon the custom, that such inquiries had been made;[99] a custom which fixed the time within business hours when the conditional payment of a note, made by the note having gone through a clearing-house, became absolute;[1] a usage of a bank to receive bills for discount, without

Nebraska.— Forbes *v.* Omaha Nat. Bank, 10 Nebr. 338, 6 N. W. 393, 35 Am. Rep. 480.

New York.—Bowen *v.* Newell, 5 Sandf. 326; Trask *v.* Martin, 1 E. D. Smith 505; Sheldon *v.* Benham, 4 Hill 129, 40 Am. Dec. 271; Ransom *v.* Mack, 2 Hill 587, 38 Am. Dec. 602; Ireland *v.* Kip, 11 Johns. 231; Ireland *v.* Kip, 10 Johns. 490. And see Hotchkiss *v.* Artisans' Bank, 42 Barb. 517.

Ohio.— Isham *v.* Fox, 7 Ohio St. 317.

South Carolina.— Halls *v.* Howell, Harp. 426.

United States.— Brent *v.* Metropolis Bank, 1 Pet. 89, 7 L. ed. 65; Washington Bank *v.* Triplett, 1 Pet. 25, 7 L. ed. 37; Mills *v.* U. S. Bank, 11 Wheat. 431, 6 L. ed. 512; Washington Patriotic Bank *v.* Farmers' Bank, 18 Fed. Cas. No. 10,811, 2 Cranch C. C. 560. But see Alexandria Bank *v.* Deneale, 2 Fed. Cas. No. 846, 2 Cranch C. C. 488.

England.— Heywood *v.* Pickering, L. R. 9 Q. B. 428, 43 L. J. Q. B. 145.

But although the time to make the demand may depend on usage, the omission of a demand altogether cannot be excused by usage. Farmers' Bank *v.* Duvall, 7 Gill & J. (Md.) 78. And where due presentment according to law has been made, a mercantile usage to make it in a different way is irrelevant. Kleekamp *v.* Meyer, 5 Mo. App. 444.

92. Marrett *v.* Brackett, 60 Me. 524. And see Overman *v.* Hoboken City Bank, 30 N. J. L. 61.

93. Renner *v.* Columbia Bank, 9 Wheat. (U. S.) 581, 6 L. ed. 166. See also COMMERCIAL PAPER, 8 Cyc. 213 note 29.

As to custom as to allowance of days of grace see COMMERCIAL PAPER, 7 Cyc. 872, 971 note 16.

The usage of banks in any particular place to regard drafts upon them, payable at a day certain after date as checks, and not entitled to days of grace, is inadmissible to control the rules of law. Woodruff *v.* Merchants' Bank, 25 Wend. (N. Y.) 673; Morrison *v.* Bailey, 5 Ohio St. 13, 64 Am. Dec. 632. But see Minturn *v.* Fisher, 4 Cal. 35; Bowen *v.* Newell, 13 N. Y. 290, 64 Am. Dec. 550; Champion *v.* Gordon, 70 Pa. St. 474, 10 Am. Rep. 681; Lawson *v.* Richards, 6 Phila. (Pa.) 179.

94. Mohawk Bank *v.* Broderick, 13 Wend. (N. Y.) 133, 27 Am. Dec. 192; Boddington *v.* Schlencker, 4 B. & Ad. 752, 2 L. J. K. B. 138, 1 N. & M. 541, 24 E. C. L. 328; Rickford *v.* Ridge, 2 Campb. 537.

95. Utica Bank *v.* Smedes, 3 Cow. (N. Y.) 662 [*affirming* 20 Johns. 372].

96. Levi *v.* National Bank, 7 Centr. L. J. 249; Russell *v.* Hankey, 6 T. R. 12.

But a custom permitting a bank to pay a depositor in anything but good money is void. Marine Bank *v.* Chandler, 27 Ill. 525, 81 Am. Dec. 249; Thompson *v.* Riggs, 5 Wall. (U. S.) 663, 18 L. ed. 704. See also Chicago M. & F. Ins. Co. *v.* Carpenter, 28 Ill. 360; Marine Bank *v.* Birney, 28 Ill. 90.

As to custom as to payment of note by check see COMMERCIAL PAPER, 7 Cyc. 1031.

97. Farmers', etc., Bank *v.* Slayden, 8 Tex. Civ. App. 63, 27 S. W. 424.

98. Decatur Nat. Bank *v.* Murphy, 9 Ill. App. 112.

99. Ellis *v.* Ohio L. Ins., etc., Co., 4 Ohio St. 628, 64 Am. Dec. 610.

A usage that the word "certified," when used in the certification of checks, imports an obligation on the part of the certifying bank to pay the amount stated in the check, notwithstanding the body of it was forged, is inadmissible. Security Bank *v.* National Bank of Republic, 67 N. Y. 458, 23 Am. Rep. 129.

1. Atlas Nat. Bank *v.* National Exch. Bank, 178 Mass. 531, 60 N. E. 121.

any purpose or practice on its part to present them for payment;[2] a custom among banks to return checks, in case of a mistake, which have been paid through the clearing-house before two o'clock P. M. on the day of presentation;[3] and a custom that a bank which in good faith receives a check from a depositor and passes it to his credit, and on the same day pays and charges against such deposit checks drawn by him, is a *bona fide* holder for value of the deposited check.[4] A note not negotiable under the general commercial law may be shown to be so by the custom of a particular locality.[5]

2. COMMON CARRIERS AND OTHER BAILEES.[6] In the case of common carriers these customs have been recognized: A usage as to the kind of property the carrier undertook to carry and be responsible for;[7] a usage as to what is a sufficient delivery of goods to a carrier;[8] a usage as to the right of the shipper to control the goods while in the carrier's custody;[9] a usage as to the storage of goods;[10] a usage as to delivery by the carrier;[11] a usage as to notice to the consignee of the

2. Statesville Bank *v.* Pinkers, 83 N. C. 377.

3. Albers *v.* Commercial Bank, 9 Mo. App. 59.

A custom of a bank not to pay any of its bills voluntarily cut in two, except on the production of both parts, is inadmissible. U. S. Bank *v.* Sill, 5 Conn. 106, 13 Am. Dec. 44. So is a usage to pay but half the amount of the note on the presentation of each half. Allen *v.* State Bank, 21 N. C. 3. So is a custom that the purchase of a note past due takes it free from equities. Vermilye *v.* Adams Express Co., 21 Wall. (U. S.) 138, 22 L. ed. 609.

4. National Gold Bank, etc., Co. *v.* McDonald, 51 Cal. 64, 64 Am. Rep. 697; Market Bank *v.* Hartshorne, 3 Abb. Dec. (N. Y.) 173, 3 Keyes (N. Y.) 137.

5. Rindskoff *v.* Barrett, 11 Iowa 172, 14 Iowa 101. But see Crouch *v.* Credit Foncier, L. R. 8 Q. B. 374.

6. **As to custom as to manner of storing goods** see BAILMENTS, 5 Cyc. 219.

As to custom that bailee is not entitled to compensation on destruction of goods see BAILMENTS, 5 Cyc. 191 note 55.

7. *Alabama.*— Garey *v.* Meagher, 33 Ala. 630; Knox *v.* Rives, 14 Ala. 249, 48 Am. Dec. 97; Hosea *v.* McCrory, 12 Ala. 349.

Maine.— Emery *v.* Hersey, 4 Me. 407, 16 Am. Dec. 268.

Michigan.— Frederick *v.* Marquette, etc., R. Co., 37 Mich. 342, 26 Am. Rep. 531.

New York.— Lee *v.* Salter, Lalor 163; Kemp *v.* Coughtry, 11 Johns. 107.

Pennsylvania.— Taylor *v.* Wells, 3 Watts 65; Harrington *v.* McShane, 2 Watts 443, 27 Am. Dec. 321.

England.— Walker *v.* Jackson, 12 L. J. Exch. 165, 10 M. & W. 161.

As to custom as to manner or method of transportation see CARRIERS, 6 Cyc. 428.

8. *Alabama.*— O'Bannon *v.* Southern Express Co., 51 Ala. 481.

Connecticut.— Converse *v.* Norwich, etc., Transp. Co., 33 Conn. 166; Hickox *v.* Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143; Meriam *v.* Hartford, etc., R. Co., 20 Conn. 354, 52 Am. Dec. 344.

Indiana.— Ford *v.* Mitchell, 21 Ind. 54.

Iowa.— Green *v.* Milwaukee, etc., R. Co., 38 Iowa 100, 41 Iowa 410.

Massachusetts.— Reed *v.* Richardson, 98 Mass. 216, 93 Am. Dec. 155.

New York.— Blanchard *v.* Isaacs, 3 Barb. 388; Freeman *v.* Newton, 3 E. D. Smith 246; Camden, etc., Transp. Co. *v.* Belknap, 21 Wend. 354; Packard *v.* Getman, 6 Cow. 757, 16 Am. Dec. 475.

England.— Buckman *v.* Levi, 3 Campb. 414; Burrell *v.* North, 2 C. & K. 679, 61 E. C. L. 679; Leigh *v.* Smith, 1 C. & P. 638, R. & M. 224, 28 Rev. Rep. 791, 12 E. C. L. 362; Cobban *v.* Downe, 5 Esp. 41, 8 Rev. Rep. 825.

But a complete delivery cannot be effected by a usage. Illinois Cent. R. Co. *v.* Smyser, 38 Ill. 354, 87 Am. Dec. 301.

9. East-India Co. *v.* Pullen, 1 Str. 690. But see Schieffelin *v.* Harvey, Anth. N. P. (N. Y.) 76.

10. Harris *v.* Moody, 30 N. Y. 266, 86 Am. Dec. 375; Clark *v.* Barnwell, 12 How. (U. S.) 272, 13 L. ed. 985; Baxter *v.* Leland, 2 Fed. Cas. No. 1,125, 1 Blatchf. 526; Lamb *v.* Parkman, 14 Fed. Cas. No. 8,020, 1 Sprague 343; Gould *v.* Oliver, 4 Bing. N. Cas. 134, 3 Hodges 307, 7 L. J. C. P. 68, 5 Scott 445, 33 E. C. L. 634.

11. *Illinois.*— Dixon *v.* Dunham, 14 Ill. 324.

Maine.— Witzler *v.* Collins, 70 Me. 290, 35 Am. Rep. 327.

Maryland.— Consolidation Coal Co. *v.* Shannon, 34 Md. 144; Bertollati *v.* A Cargo of Brimstone, 11 Centr. L. J. 354.

Massachusetts.— Croucher *v.* Wilder, 98 Mass. 322; Chickering *v.* Fowler, 4 Pick. 371.

New York.— Gibson *v.* Culver, 17 Wend. 305, 31 Am. Dec. 297. And see Cross *v.* Beard, 26 N. Y. 85.

Pennsylvania.— McCarty *v.* New York, etc., R. Co., 30 Pa. St. 247; Eagle *v.* White, 6 Whart. 505, 37 Am. Dec. 434; The M. S. Bacon *v.* Erie, etc., Transp. Co., 11 Pittsb. L. J. 35.

United States.—Bradstreet *v.* Heron, 3 Fed. Cas. No. 1,792, Abb. Adm. 209.

England.— The Felix, L. R. 2 A. & E. 273, 37 L. J. Adm. 48, 18 L. T. Rep. N. S. 587, 17 Wkly. Rep. 102; Petrocochino *v.* Bott, L. R.

arrival of the goods;[12] a usage as to when the carrier may sell goods in his charge;[13] a custom that a carrier's particular lien for charges may become a general one;[14] a custom that credit given to the customer does not destroy the lien;[15] a custom

9 C. P. 355, 2 Aspin. 310, 43 L. J. C. P. 214, 30 L. T. Rep. N. S. 840; Barmester *v.* Hodgson, 2 Campb. 488; Rodgers *v.* Forresters, 2 Campb. 483; Hide *v.* Trent, etc., Nav. Co., 1 Esp. 36, 5 T. R. 389, 2 Rev. Rep. 620; Garside *v.* Trent, etc., Nav. Co., 4 T. R. 581, 2 Rev. Rep. 468.

For cases in which the custom as to delivery did not prevail see the following cases:

Maine.— Sager *v.* Portsmouth, etc., R. Co., 31 Me. 228, 50 Am. Dec. 659.

New York.—Haslam *v.* Adams Express Co., 6 Bosw. 235; Gibson *v.* Culver, 17 Wend. 305, 31 Am. Dec. 297.

Pennsylvania.— American Union Express Co. *v.* Robinson, 72 Pa. St. 274.

South Carolina.— Galloway *v.* Hughes, 1 Bailey 553.

Wisconsin.— The Sultana *v.* Chapman, 5 Wis. 454.

United States.— Richardson *v.* Goddard, 23 How. 28, 16 L. ed. 412; Bazin *v.* Steamship, 2 Fed. Cas. No. 1,152, 3 Wall. Jr. 229; The Mary Washington, 16 Fed. Cas. No. 9,229, 1 Abb. 1, Chase 125; Strong *v.* Certain Quantity of Wheat, 23 Fed. Cas. No. 13,541.

England.— Streeter *v.* Horlock, 1 Bing. 34, 7 Moore C. P. 283, 25 Rev. Rep. 579, 8 E. C. L. 389; Wardell *v.* Mourillyan, 2 Esp. 693.

As to custom as to the right of the consignee to designate the particular wharf for the discharge of the consignment see CARRIERS, 6 Cyc. 468 note 31.

12. *Illinois.*—Dixon *v.* Dunham, 14 Ill. 324.

Kentucky.— Huston *v.* Peters, 1 Metc. 558.

New York.— Russell Mfg. Co. *v.* New Haven Steamboat Co., 50 N. Y. 121; Ely *v.* New Haven Steamboat Co., 53 Barb. 207; Gibson *v.* Culver, 17 Wend. 305, 31 Am. Dec. 297.

Pennsylvania.—McMasters *v.* Pennsylvania R. Co., 69 Pa. St. 374, 8 Am. Rep. 264.

Vermont.— Farmers', etc., Bank *v.* Champlain Transp. Co., 16 Vt. 52, 42 Am. Dec. 491, 18 Vt. 131, 23 Vt. 186, 56 Am. Dec. 68; Blin *v.* Mayo, 10 Vt. 56, 33 Am. Dec. 175.

Wisconsin.— Wood *v.* Milwaukee, etc., R. Co., 27 Wis. 541, 9 Am. Rep. 465.

United States.— Fulton *v.* Blake, 9 Fed. Cas. No. 5,153, 5 Biss. 371.

See also CARRIERS, 6 Cyc. 459.

The obligation of an expressman, on the refusal of the goods, to give notice thereof to the consignor (American, etc., Express Co. *v.* Wolf, 79 Ill. 430; Fisk *v.* Newton, 1 Den. (N. Y.) 45, 43 Am. Dec. 649; Mayell *v.* Potter, 2 Johns. Cas. (N. Y.) 371; Kremer *v.* Southern Express Co., 6 Coldw. (Tenn.) 356) may be excused by custom (Weed *v.* Barney, 45 N. Y. 344, 6 Am. Rep. 96). Where it is the custom of an express company to enter all packages before delivery in a delivery book, and upon which a receipt is taken upon the delivery, if no such entry has been made upon the delivery book it will not be presumed that the company has done its duty. Baldwin *v.* American Express Co., 23 Ill. 197, 74 Am. Dec. 190.

The liability of a carrier for the acts of connecting carriers may be altered by custom.

Illinois.— Indianapolis, etc., R. Co. *v.* Murray, 72 Ill. 128.

Massachusetts.— Simkins *v.* Norwich, etc., Steamboat Co., 11 Cush. 102.

Michigan.— Strong *v.* Grand Trunk R. Co., 15 Mich. 206, 93 Am. Dec. 184.

New Hampshire.— Knapp *v.* U. S., etc., Express Co., 55 N. H. 348.

New York.— Van Santvoord *v.* St. John, 6 Hill 157.

Wisconsin.— Hooper *v.* Chicago, etc., R. Co., 27 Wis. 81, 9 Am. Rep. 439.

13. Kemp *v.* Coughtry, 11 Johns. (N. Y.) 107; Rapp *v.* Palmer, 3 Watts (Pa.) 178; Taylor *v.* Wells, 3 Watts (Pa.) 65; Pickering *v.* Busk, 15 East 38, 13 Rev. Rep. 364. But see Bryant *v.* Commonwealth Ins. Co., 6 Pick. (Mass.) 131.

A custom allowing a custody commission fee of two and one-half per cent for taking charge of a vessel on fire in port and preserving her cargo, an undertaking that requires great skill, is not unreasonable. Horan *v.* Strachan, 86 Ga. 408, 12 S. E. 678, 22 Am. St. Rep. 471.

14. Pinney *v.* Wells, 10 Conn. 104; Chandler *v.* Belden, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193; Lucas *v.* Nockells, 4 Bing. 729, 1 Cl. & F. 438, 1 M. & P. 783, 2 Y. & J. 304, 29 Rev. Rep. 721, 13 E. C. L. 713; Raitt *v.* Mitchell, 4 Campb. 146, 16 Rev. Rep. 765; Rushforth *v.* Hadfield, 7 East 224, 6 East 519, 2 Smith K. B. 264, 8 Rev. Rep. 520 [*overruled* in Holderness *v.* Collinson, 7 B. & C. 212, 6 L. J. K. B. O. S. 17, 31 Rev. Rep. 174, 1 M. & R. 55, 14 E. C. L. 101]; Rex *v.* Humphery, M'Clel. & Y. 173, 29 Rev. Rep. 783; Cowell *v.* Simpson, 16 Ves. Jr. 275, 10 Rev. Rep. 181, 33 Eng. Reprint 989.

15. Raitt *v.* Mitchell, 4 Campb. 146, 16 Rev. Rep. 765.

Where goods were landed upon a wharf in October, and by usage the wharfage was not paid till Christmas, it was held that there could be no lien. Crawshay *v.* Homfray, 4 B. & Ald. 50, 22 Rev. Rep. 618, 6 E. C. L. 385. A frequent and general but not universal practice in a particular port on the part of ship-owners to allow goods brought on their vessels to be transported to the warehouse of the consignee and there inspected before freight is paid is not such a custom as will displace the right of the carrier to demand freight on the delivery of goods on the wharf. Mordecai *v.* Lindsay, 5 Wall. (U. S.) 481, 18 L. ed. 486.

Warehouse charges.— B purchased certain cotton stored in A's warehouse, and assumed the payment of charges thereon. It was a custom of warehousemen to collect charges

at the port of delivery for vessels to be unloaded through an elevator, each vessel waiting its turn;[16] and a custom among the railroads in a particular city to deliver consignments billed to a particular person, where the bill of lading does not read "or order," to the consignee, without requiring the production of the bill of lading.[17] So the carrier's reward, if not fixed by agreement, is regulated by custom,[18] and as to who is liable for it.[19] And the following customs have been recognized: A custom of captains to insure steamboats in their custody at large river ports, and to give notes of the owners for the premiums;[20] a custom of dividing fleets of barges in the Ohio and Mississippi rivers and towing part of them up at a time;[21] a usage that the master of a whale-ship should have a lien upon the lays of the seamen for supplies furnished them on the voyage;[22] and a custom among whalers in Massachusetts bay, whereby a whale belongs to the person whose lance is found in its body when it rises.[23] The construction of terms in bills of lading and other similar contracts of a carrier is also affected by custom.[24] Statutory

only when the cotton was ordered out. It was held that the accidental burning of the cotton before being ordered out did not release B from the payment of such charges. Jones *v.* Chaffin, 102 Ala. 382, 15 So. 143. And see as to warehouse charges Garmany *v.* Rust, 35 Ga. 108.

16. The Glover, 10 Fed. Cas. No. 5,488, Brown Adm. 166, 1 Flipp. 441.

17. Forbes *v.* Fitchburg R. Co., 133 Mass. 154.

18. Bancroft *v.* Peters, 4 Mich. 619; Weber *v.* Kingsland, 8 Bosw. (N. Y.) 415; Holford *v.* Adams, 2 Duer (N. Y.) 471; Kirtland *v.* Montgomery, 1 Swan (Tenn.) 452; Sutton *v.* Great Western R. Co., 3 H. & C. 800, 11 Jur. N. S. 879; 35 L. J. Exch. 18, 13 L. T. Rep. N. S. 221, 13 Wkly. Rep. 1091; Bastard *v.* Bastard, 2 Show. 81. And see Lewis *v.* Marshall, 8 Jur. 848, 13 L. J. C. P. 193, 7 M. & G. 729, 8 Scott N. R. 477. See also CARRIERS, 6 Cyc. 367 note 23.

Where there are no prescribed freight rates for a certain article, a rate established by custom, of which the shipper has knowledge, is controlling. Lamar *v.* New York, etc., Nav. Co., 16 Ga. 558.

Where a transfer company was in the habit of hauling freight belonging to consignees from the depot to their place of business, paying charges thereon, and collecting the same from the consignees, which custom was recognized by them, a contract to pay for such hauling and reimburse the transfer company will be implied, and such company is entitled to continue to haul such freight and pay the charges until notified to desist by the consignees. Kansas City Transfer Co. *v.* Neiswanger, 18 Mo. App. 103.

19. Middleton *v.* Heyward, 2 Nott & M. (S. C.) 9, 10 Am. Dec. 554.

20. Adams *v.* Pittsburgh Ins. Co., 95 Pa. St. 348, 40 Am. Rep. 662.

21. Pittsburgh Ins. Co. *v.* Dravo, 2 Wkly. Notes Cas. (Pa.) 194.

22. Barney *v.* Coffin, 3 Pick. (Mass.) 115.

23. Ghen *v.* Rich, 8 Fed. 159.

24. Where the terms of a bill of lading or other similar contract have acquired by usage a particular meaning, the parties will be presumed to have used them in that sense. Rawson *v.* Holland, 59 N. Y. 611, 17 Am. Rep. 394; Wayne *v.* The General Pike, 16 Ohio 421. But the usage must be uniform; and therefore if carriers on a particular river sometimes give bills of lading containing an exemption from loss by fire, and at other times containing no such exemption, such a usage is not established because not uniform; and this, although in a majority of cases the exception was contained in the bills of lading. Berry *v.* Cooper, 28 Ga. 543; Cooper *v.* Berry, 21 Ga. 526, 68 Am. Dec. 468. See also Robinson *v.* New York, etc., Steamship R. Co., 36 Misc. (N. Y.) 705, 74 N. Y. Suppl. 384. It has been expressly ruled in several cases that the common-law liability of a carrier cannot be restricted by anything less than a contract, and that a usage on the part of the carrier not to receive goods on any other terms than on those of a limited liability cannot be invoked for his protection in any case. Garey *v.* Meagher, 33 Ala. 630; Illinois Cent. R. Co. *v.* Smyser, 38 Ill. 354, 87 Am. Dec. 301; Evansville, etc., R. Co. *v.* Young, 28 Ind. 516; U. S. Express Co. *v.* Rush, 24 Ind. 403; Pitre *v.* Offutt, 21 La. Ann. 679, 99 Am. Dec. 749; Cranwell *v.* The Fanny Fosdick, 15 La. Ann. 436, 77 Am. Dec. 190; Clyde *v.* Graver, 54 Pa. St. 251; Coxe *v.* Heisley, 19 Pa. St. 243; Patton *v.* Magrath, Dudley (S. C.) 159, 31 Am. Dec. 552; The Pacific, 18 Fed. Cas. No. 10,645, Deady 192. Thus a usage not to be liable for accidental losses by fire (Illinois, etc., R. Co. *v.* Smyser, 38 Ill. 354, 87 Am. Dec. 301. But see Shelton *v.* Merchants' Despatch Transp. Co., 36 N. Y. Super. Ct. 527), and not to accept looking-glasses for transportation without exemption from breakage (The Pacific, 18 Fed. Cas. No. 10,645, Deady 192) have been held inadmissible. So the sending of goods under a restrictive contract in any number of instances does not bind the party sending them to a similar contract in the future, without his agreement to that effect. Erie, etc., Transp. Co. *v.* Dater, 91 Ill. 195, 33 Am. Rep. 51; McMillan *v.* Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208. But see Perry *v.* Thompson, 98 Mass. 249.

exceptions to a carrier's liability cannot, however, be altered or varied by mere usage.[25]

3. Corporations.[26] The ancient rule of the common law that corporations could express their assent only by means of a seal has been relaxed, if not entirely superseded, by the contrary customs of the corporations themselves,[27] and usage may validate the acts of its officers and agents[28] and prescribe the form in which the contract may be made.[29] So as to the lien of a corporation on the shares of

25. Walker *v.* Western Transp. Co., 3 Wall. (U. S.) 150, 18 L. ed. 172. And see Carriers, 6 Cyc. 408.

A custom or usage for a carrier to deliver cars for the shipment of coal before the coal is dug cannot extend the carrier's penal liability for treble damages imposed by Ill. Rev. St. c. 114, §§ 84, 85, in case of a common carrier's refusal to furnish cars to transport freight within a reasonable time. Illinois, etc., R., etc., Co. *v.* People, 19 Ill. App. 141.

26. As to custom that certificates of stock are not to be regarded as negotiable paper see Corporations, 10 Cyc. 629.

27. Columbia Bank *v.* Patterson, 7 Cranch (U. S.) 299, 3 L. ed. 351. See also Corporations, 10 Cyc. 1004.

28. Fayles *v.* National Ins. Co., 49 Mo. 350; Kansas City First Nat. Bank *v.* Hogan, 47 Mo. 472; Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120. See also Corporations, 10 Cyc. 1001 *et seq.*, 1121.

29. In the following cases corporations have been rendered liable on instruments issued and contracts made by them, on proof of usage: An insurance company, on a policy signed by the president and countersigned by his assistant, its charter providing that "all policies of insurance made by said company, signed by the president, or in his absence by the assistant and countersigned by the secretary shall be binding on the company." Bulkley *v.* Derby Fishing Co., 2 Conn. 252, 7 Am. Dec. 271. An insurance company, on a bill of exchange signed only by its president, the act of incorporation providing that "all notes and contracts signed by the president and countersigned by the secretary shall be binding on the corporation." Witte *v.* Derby Fishing Co., 2 Conn. 260. And see Safford *v.* Wyckoff, 4 Hill (N. Y.) 442. A bank, on a certificate of deposit signed by the cashier only, the law under which it was incorporated requiring that "contracts made by any such association, and all notes and bills by them issued and put in circulation as money, shall be signed by the president and vice-president and cashier thereof." Barnes *v.* Ontario Bank, 19 N. Y. 152. A banking corporation, on a contract for services executed by a less number of directors than the legal number. Bradstreet *v.* Royalton Bank, 42 Vt. 128. An insurance company, on an agreement signed by an agent giving the policy-holder permission to remove his property, although the charter of the company required that all agreements in relation to insurance should be signed by the president and secretary of the company. New England F. & M. Ins. Co. *v.* Schettler, 38 Ill. 166. An insurance company, on a parol contract made by its agent, although by its charter authorized only to make contracts by the signature of its president, or such other person as its rules and by-laws should direct. Sanborn *v.* Firemen's Ins. Co., 16 Gray (Mass.) 448, 77 Am. Dec. 419. An insurance company, on a promise not under seal, it being only authorized to "borrow money and issue its bonds therefor." McCullough *v.* Talladega Ins. Co., 46 Ala. 376. And see Jones *v.* Florence Wesleyan University, 46 Ala. 626; San Francisco Gas Co. *v.* San Francisco, 9 Cal. 453. A banking corporation, on a bill of exchange indorsed by its cashier, although the charter declared that its funds should in no case be liable for any contract or engagement whatever unless the same should be signed by the president and countersigned by the cashier. Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665; Preston *v.* Missouri, etc., Lead Co., 51 Mo. 43. An insurance company, on an agreement to insure, made by an agent, although the charter provided that "all policies of insurance made by the corporation shall be subscribed by the president, or, in case of his death or absence, by the vice-president, and countersigned and sealed by the secretary of the company." Davenport *v.* Peoria M. & F. Ins. Co., 17 Iowa 276. In an English case, seven days' notice was required by the charter of a bank previous to the transfer of shares, and this was held to be dispensed with by the previous usage and practice of the bank. *In re* Royal British Bank, 26 L. J. Ch. 545. So where the deed of settlement of a banking company allowed shares to be transferred upon obtaining the "consent of the board of directors," which was to be evidenced by a "certificate in writing, signed by three of the directors," and the practice of the bank had been for the managing director to receive the application and sign a certificate of consent, which was afterward signed by two of the directors, it was held that such transfers were valid. Bargate *v.* Shortridge, 3 Eq. Rep. 605, 5 H. L. Cas. 297, 24 L. J. Ch. 457, 3 Wkly. Rep. 423. Where the consent of the directors was required to a transfer of stock by a stock-holder indebted to the company, but in the practice of the company such cases were never brought before the board, a transfer made without such consent, but according to the usage of the company, was considered good. Cram *v.* Bangor House Proprietary, 12 Me. 354; Keyser *v.* Sunapee School Dist. No. 8, 35 N. H. 477; Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120.

its stock-holders[30] and as to a transfer of stock and notice thereof to stock-holders.[31]

4. Insurance — a. In General. The courts have in many cases treated the contract of insurance as one particularly to be considered and construed by the usages and customs of the mercantile world.[32]

b. Marine Insurance. In the law of marine insurance, it may be stated as a well-established rule that every usage of a particular trade which is so well settled or so generally known that all persons engaged in it may be fairly considered as contracting with reference to it, is considered to form part of every policy designed to protect risks in such trade, unless the express terms of the policy decisively repel the inference.[33] Thus evidence of usage has been held to determine the commencement and end of the risk;[34] the authority of the master of a vessel to insure without express direction;[35] as to what is to be considered a deviation;[36]

30. Morgan *v.* Bank of North America, 8 Serg. & R. (Pa.) 73, 11 Am. Dec. 575.

31. Hall *v.* U. S. Insurance Co., 5 Gill (Md.) 484; Commercial Bank *v.* Kortright, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; Kortright *v.* Buffalo Commercial Bank, 20 Wend. (N. Y.) 91.

32. Merchants', etc., Transp. Co. *v.* Associated Firemen's Ins. Co., 53 Md. 448, 36 Am. Rep. 428; Walch *v.* Horner, 10 Mo. 6, 45 Am. Dec. 342. But see Hone *v.* Mutual Safety Ins. Co., 1 Sandf. (N. Y.) 137; Robertson *v.* French, 4 East 130, 4 Esp. 246, 7 Rev. Rep. 535.

Where a written contract is susceptible on its face of a construction that is reasonable, resort cannot be had to evidence of custom or usage to explain its language; and this rule applies to an instrument so loose as an open or running policy of assurance, and even to one on which the phrases relating to the matter in contest are scattered about the document in a very disorderly way. Orient Mut. Ins. Co. *v.* Wright, 1 Wall. (U. S.) 456, 17 L. ed. 505.

33. *Maryland.*— Gray *v.* Swan, 1 Harr. & J. 142.

Massachusetts.— Murray *v.* Hatch, 6 Mass. 465.

Mississippi.— Stanton *v.* Natchez Ins. Co., 5 How. 744.

New York.— Fabbri *v.* Phœnix Ins. Co., 55 N. Y. 129; Block *v.* Columbia Ins. Co., 42 N. Y. 393; Hartshorne *v.* Union Mut. Ins. Co., 36 N. Y. 172.

Pennsylvania.— Pittsburgh Ins. Co. *v.* Dravo, 2 Wkly. Notes Cas. 194.

South Carolina.— Union Bank *v.* Union Ins. Co., Dudley 171.

United States.— Hazard *v.* New England Mar. Ins. Co., 8 Pet. 557, 8 L. ed. 1043; Buck *v.* Chesapeake Ins. Co., 1 Pet. 151, 7 L. ed. 90; Hancox *v.* Fishing Ins. Co., 11 Fed. Cas. No. 6,013, 2 Sumn. 132.

Every underwriter, said Lord Mansfield, in an early case (Noble *v.* Kennoway, Dougl. (3d ed.) 510) is presumed to be acquainted with the practice of the trade he insures. "The principle upon which evidence of usage is received at all to explain a policy," says Mr. Arnould (Arnould Ins. § 43), "is that the parties to it are supposed to have contracted with reference to such usage. With regard to usages which are either common to all trades, or perfectly well known and settled in the particular course of trade to which the insurance relates, it is obviously a fair presumption that the parties to the policy, as mercantile men, are conversant with such usages and have contracted with reference to them. Such usages, in fact, form part of the law-merchant, and to incorporate them with the policy is merely to admit the addition of known terms not inconsistent with the tenor of the instrument, and well understood by the contracting parties; but with regard to usages which only prevail in a given place, or amongst a particular description of persons, the presumption is the other way, and in such cases, accordingly, it must satisfactorily show that the party sought to be affected by the usage either had or might have had cognizance of it."

34. Gracie *v.* Baltimore Mar. Ins. Co., 8 Cranch (U. S.) 75, 3 L. ed. 492; Moxon *v.* Atkins, 3 Campb. 200, 13 Rev. Rep. 789; Brown *v.* Carstairs, 3 Campb. 161; Kingston *v.* Knibbs, 1 Campb. 508 note, 10 Rev. Rep. 742.

35. Adams *v.* Pittsburg Ins. Co., 95 Pa. St. 348, 40 Am. Rep. 662.

36. *Connecticut.*—Crosby *v.* Fitch, 12 Conn. 410, 31 Am. Dec. 745.

Massachusetts.— Odione *v.* New England Mut. Mar. Ins. Co., 101 Mass. 551, 3 Am. Rep. 401; Lowry *v.* Russell, 8 Pick. 360.

Missouri.— Walsh *v.* Homer, 10 Mo. 6, 45 Am. Dec. 342.

New York.— McCall *v.* Sun Mut. Ins. Co., 66 N. Y. 505.

Ohio.— Babcock *v.* May, 4 Ohio 334.

Pennsylvania.— Eyre *v.* Marine Ins. Co., 5 Watts & S. 116.

England.— Salvador *v.* Hopkins, 3 Burr. 1707; Vallance *v.* Dewar, 1 Campb. 503, 10 Rev. Rep. 738; Ougier *v.* Jennings, 1 Campb. 505 note *a*, 10 Rev. Rep. 739 note; Gregory *v.* Christie, 3 Dougl. 419, 26 E. C. L. 274; Cormack *v.* Gladstone, 11 East 347, 10 Rev. Rep. 518; Gairdner *v.* Senhouse, 3 Taunt. 16, 12 Rev. Rep. 573; Beatson *v.* Haworth, 6 T. R. 531, 3 Rev. Rep. 258; Delany *v.* Stoddart, 1 T. R. 22, 1 Rev. Rep. 139.

Canada.— Wright *v.* Holcombe, 6 U. C. C. P. 531. See also Fisher *v.* Western Assur. Co., 11 U. C. Q. B. 255.

as to what goods are subject to general average;[37] as to the stowage of goods;[38] and as to the apportionment of the premium when all the risk is not run.[39] So in a marine insurance case evidence of usage has been admitted to show when the outward-bound risk determined and the homeward-bound risk commenced;[40] to show the length of time allowed to shippers to discharge their cargo after the arrival of the vessel in port;[41] that the owner of goods stored on deck should not receive any contribution by way of general average from the ship-owner in respect of the jettison of goods so stowed;[42] that the underwriters on ships should not be liable to contribute by way of general average in respect to such goods;[43] that the destruction of rigging while stored on the banks of the Canton river was within the policy covering a "voyage";[44] that a policy of insurance on East India ships includes a chance of their being detained in India and the risk of what is known as the country trade there;[45] that a policy from London to Madras and China, with liberty to touch, stay, and trade at any ports, etc., until the vessel shall arrive at her last loading-place in the East Indies or China, covers an intermediate voyage from Madras to Bengal, the vessel arriving at Madras too late to proceed that season to China;[46] and that ships engaged in the Newfoundland trade, after their arrival at Newfoundland, make intermediate voyages from one American port to another before beginning to load a cargo on the homeward voyage.[47] And a party may exempt himself from the consequences of the general law that the insured must provide a pilot,[48] by showing that by the usage of the port he was exempted from providing one.[49] And although in the law of marine insurance a concealment of papers amounts to a breach of warranty, it was held in an early case in the supreme court of the United States that "when the underwriters know, or, by the usage and course of the trade insured, ought to know, that certain papers ought to be on board for the purpose of protection in one event, which, in another, might endanger the property, they tacitly consent that the papers shall be so used as to protect the property."[50] So evidence of usage is competent where the question is whether the risk has been increased by taking on board a deck-load of cotton.[51]

c. Fire Insurance. What has been said as to the effect of usage on contracts of marine insurance[52] is equally applicable to contracts of fire insurance. The parties are presumed to make their agreements in accordance with the customs of their business.[53] And the general rule that one engaged in a particular business

But the usage must not be in conflict with the express terms of a contract. Elliott *v.* Wilson, 4 Bro. P. C. 470, 2 Eng. Reprint 320.

37. Wood *v.* Phœnix Ins. Co., 14 Phila. (Pa.) 545; Miller *v.* Tetherington, 6 H. & N. 278, 7 Jur. N. S. 214, 3 L. T. Rep. N. S. 893, 9 Wkly. Rep. 437.

38. Orient Mut. Ins. Co. *v.* Reymershoffer, 56 Tex. 234; Hazleton *v.* Manhattan Ins. Co., 12 Fed. 159, 11 Biss. 210; Spooner *v.* Western Assur. Co., 38 U. C. Q. B. 62; Paterson *v.* Black, 5 U. C. Q. B. 481.

39. Homer *v.* Dorr, 10 Mass. 26; Eager *v.* Atlas Ins. Co., 14 Pick. (Mass.) 141, 25 Am. Dec. 363.

40. Camden *v.* Cowley, 1 W. Bl. 417.

41. Noble *v.* Kennoway, Dougl. (3d ed.) 510.

42. Milward *v.* Hibbert, 3 Q. B. 120, 2 G. & D. 142, 6 Jur. 706, 11 L. J. Q. B. 137, 43 E. C. L. 659.

43. Milward *v.* Hibbert, 3 Q. B. 120, 2 G. & D. 142, 6 Jur. 706, 11 L. J. Q. B. 137, 43 E. C. L. 659.

44. Pelly *v.* Royal Exch. Assur. Co., 1 Burr. 341.

45. Salvador *v.* Hopkins, 3 Burr. 1707.

46. Gregory *v.* Christie, 3 Dougl. 419, 26 E. C. L. 274.

47. Ougier *v.* Jennings, 1 Campb. 505 note *a*, 10 Rev. Rep. 739 note; Vallance *v.* Dewar, 1 Campb. 503, 10 Rev. Rep. 738.

48. Hollingworth *v.* Brodrick, 7 A. & E. 40, 1 Jur. 430, 8 L. J. Q. B. 80, 2 N. & P. 608, 34 E. C. L. 46; Phillips *v.* Headlam, 2 B. & Ad. 380, 9 L. J. K. B. O. S. 238, 22 E. C. L. 163; Sadler *v.* Dixon, 11 L. J. Exch. 435, 8 M. & W. 895; Law *v.* Hollingsworth, 7 T. R. 160.

49. Cox *v.* Charleston F. & M. Ins. Co., 3 Rich. (S. C.) 331, 45 Am. Dec. 771.

50. Livingston *v.* Maryland Ins. Co., 7 Cranch (U. S.) 506, 3 L. ed. 421.

51. Lapham *v.* Atlas Ins. Co., 24 Pick. (Mass.) 1 [*citing* Coolidge *v.* Gray, 8 Mass. 527].

52. See *supra*, III, D, 4, b.

53. *Connecticut.*— Woodbury Sav. Bank, etc., Assoc. *v.* Charter Oak F. & M. Ins. Co., 31 Conn. 517.

Illinois.— New York Home Ins. Co. *v.* Favorite, 46 Ill. 263.

is presumed to contract with reference to the well-known usages of that particular business may perhaps be extended beyond this statement, for it must include the

Maryland.— Planters' Mut. Ins. Co. *v.* Rowland, 66 Md. 236, 7 Atl. 257.

New York.— Standard Oil Co. *v.* Triumph Ins. Co., 64 N. Y. 658.

Oregon.— Cleveland Oil, etc., Co. *v.* Norwich Union F. Ins. Co., 34 Oreg. 228, 55 Pac. 435.

Tennessee.— Kirby *v.* Phœnix Ins. Co., 13 Lea 340.

United States.— Adams *v.* Manufacturers', etc., Ins. Co., 17 Fed. 630.

Customary incidents of business insured.— Where a certain trade, business, or occupation is insured, the insurer is to be taken as consenting and agreeing that all its customary incidents shall be allowed, although the policy does not in express words permit it, and may even by implication forbid it. The insurance being upon a printing and book-binding establishment, and the use of camphene being necessary and customary for the conduct of the business, the insurer was held liable for a loss caused by the ignition of camphene, and this although there was a condition in the policy exempting the insurer from any loss occasioned by camphene. Harper *v.* City Ins. Co., 1 Bosw. (N. Y.) 520. Following the principle of this case, where a policy on a fair building insured property therein "belonging to exhibitors," it was held that the use of fire and steam to exhibit machinery, and the keeping of a restaurant, and a kitchen with ovens therein, did not defeat the insurance, and that the keeping of articles to be exhibited or to be used as means of the exhibition was not a use of the building "for the purpose of keeping or storing" them therein. New York *v.* Hamilton F. Ins. Co., 10 Bosw. (N. Y.) 537; New York *v.* Exchange F. Ins. Co., 9 Bosw. (N. Y.) 424. Where a policy was issued on a building occupied as a manufactory of hat-bodies, and the conditions, among occupations denominated "extra-hazardous," included "carpenters in their own shops, or in buildings erecting or repairing," the use of a room in the building as a shop for the purpose of repairing the machinery necessary for the business of making hat-bodies was protected by the policy. Lounsbury *v.* Protection Ins. Co., 8 Conn. 459, 21 Am. Dec. 686. Where the policy was on a stock of flour, grain, and cooperage contained in a stone and brick steam flouring-mill, and prohibited the building from being used for mechanical operations requiring heat, the use of a kiln-drying cornmeal-mill requiring fire did not avoid the policy, if such a mill was a usual appendage of the business of a steam flouring-mill. Washington Mut. Ins. Co. *v.* Mechanics', etc., Mut. Ins. Co., 5 Ohio St. 450. Where a policy on the material of a photographer prohibited the keeping of kerosene in the building, if the use of a kerosene-oil stove was necessary and ordinary in the photographic business, the insured might use it without avoiding the policy. Hall *v.* Insurance Co. of North America, 58 N. Y. 292. Where a policy covers "a stock of dry goods and groceries, such as are usually kept in country stores," the language gives a license to keep for sale any article usually kept in country stores of that class, even though it involves the keeping of many articles coming under the head of "hazardous." Niagara F. Ins. Co. *v.* De Graff, 12 Mich. 124; Archer *v.* Merchants', etc., Ins. Co., 43 Mo. 434; Rafferty *v.* New Brunswick F. Ins. Co., 18 N. J. L. 480, 38 Am. Dec. 525; Pindar *v.* Kings County F. Ins. Co., 36 N. Y. 648, 93 Am. Dec. 544; Citizens' Ins. Co. *v.* McLaughlin, 53 Pa. St. 485; Girard F. & M. Ins. Co. *v.* Stephenson, 37 Pa. St. 293, 78 Am. Dec. 423; Leggett *v.* Ætna Ins. Co.. 10 Rich. (S. C.) 202. But where a policy covers a stock of merchandise "hazardous and not hazardous," no such license can be imputed, even though it be shown that the keeping of "extra-hazardous goods" was usual in such stores as that of the insured (Pindar *v.* Continental Ins. Co., 38 N. Y. 364, 97 Am. Dec. 795); nor where the term is restricted to a "stock of family groceries," even though the insurer knew that the plaintiff kept such goods, and the application called for insurance "upon a stock such as is usually kept in a country store" (Pindar *v.* Resolute F. Ins. Co., 47 N. Y. 114; People's Ins. Co. *v.* Kuhn, 12 Heisk. (Tenn.) 515). It being the custom of the grocery trade to keep oil and spirituous liquors in their stores for the purpose of ordinary retailing, this is not a "storing" within a policy of insurance on a grocery store prohibiting "the storing therein of oil and spirituous liquors" (Langdon *v.* New York Equitable Ins. Co., 1 Hall (N. Y.) 226); or, it being the custom of the dry-goods trade to keep cotton in bales for sale, such a keeping is not a violation of a condition against applying or using the store insured for storing articles of a hazardous character, cotton in bales being denominated in another part of the policy as an "article of a hazardous character" (Moore *v.* Protection Ins. Co., 29 Me. 97, 48 Am. Dec. 514). It being usual for dealers in fancy goods and toys to keep fireworks, a policy on the stock of a fancy-goods dealer, "with privilege to keep fire-crackers for sale," will embrace "fireworks," even though the policy provides that if the premises shall be used for keeping articles "specially hazardous" it shall be of no effect; and in this class are placed "fireworks." Steinback *v.* La Fayette F. Ins. Co., 54 N. Y. 90. It being usual in china factories to keep a carpenter constantly employed in and about the building making racks, shelves, etc., necessary for the proper conduct of the business, this will not be considered as within a provision in a policy as to "carpenters in their own shops, or in buildings erecting or repairing." Dylonguemare *v.* Tradesmen's Ins. Co., 2 Hall (N. Y.) 589. It being customary in country stores to keep a couple of

incidents of that business. Thus a fire insurance company insuring a manufacturing establishment must be presumed to be familiar with the usages and practices of that trade and with the use of terms employed in that trade.[54]

d. Life Insurance. It has been held competent to prove a usage that where there has been a verbal agreement for insurance, and the terms agreed upon and entered on the books of the company, the contract of insurance is considered as valid for the insured, although the premium is not paid.[55] A usage on the part of life-insurance companies to allow thirty days grace for non-payment of premiums due, where by its terms the policy is to be forfeited if the premiums are

kegs of gunpowder for sale in small quantities, this will not avoid a policy on such a store, one of the conditions of which may be that "the keeping of gunpowder for sale, or on storage upon or in the premises insured, shall render the policy void." Phœnix Ins. Co. *v.* Taylor, 5 Minn. 492; Leggett *v.* Ætna Ins. Co., 10 Rich. (S. C.) 202. But see Macomber *v.* Howard F. Ins. Co., 7 Gray (Mass.) 257; Beacon L., etc., Assur. Co. *v.* Gibb, 9 Jur. N. S. 185, 7 L. T. Rep. N. S. 574, 1 Moore P. C. N. S. 73, 1 New Rep. 110, 11 Wkly. Rep. 194, 15 Eng. Reprint 630. Benzine being used in the finishing of rustic window-shades, such a use in a "manufacturing establishment," insured as such, will not avoid the policy, although prohibited in terms therein (Viele *v.* Germania Ins. Co., 26 Iowa 9, 96 Am. Dec. 83); nor, being used in a wagon-maker's shop, and being customarily used in the manufacture of wagons, will a fire arising from this fluid prevent a recovery on a policy which expressly provides that the company shall not be liable for damage resulting from "the use of camphene, spirit-gas, or burning-fluid" (Archer *v.* Merchants', etc., Ins. Co., 43 Mo. 434). Benzole being commonly used in the manufacture of patent leather, such a use is not a breach of a condition in a policy on a patent-leather manufactory which allowed the keeping of benzole in no other place than in a shed detached from the building, where the insured in conducting their business carried it as needed into the factory in an open can. Citizens' Ins. Co. *v.* McLaughlin, 53 Pa. St. 485. In the manufacture of brass clock-works, turpentine is used for cleaning the works, alcohol in making a mixture called lacquer, and saltpeter in making a dipping, and all are employed in the business. A policy therefore on the stock in trade of a manufacturer of brass clocks is not avoided by using and keeping these articles on hand, although they are expressly prohibited. Bryant *v.* Poughkeepsie Mut. Ins. Co., 17 N. Y. 200. A policy on the stock of a "rope manufacturer" will permit the business of a "rope-maker" in the building insured, although that trade is prohibited in another part of the policy. Wall *v.* Howard Ins. Co., 14 Barb. (N. Y.) 383. A policy on railroad buildings will not be avoided by the customary use of a dummy-engine near the buildings, although such use increases the risk. Com. *v.* Hide, etc., Ins. Co., 112 Mass. 136, 17 Am. Rep. 72. A policy on merchandise such as is usually kept in country stores is not avoided by keeping hardware, china, glassware, and looking-glasses, without particularly describing them, although such particular description is required by its terms. Franklin F. Ins. Co. *v.* Updegraff, 43 Pa. St. 350. A policy upon stock such as is usually kept in country stores covers spirits of turpentine and gunpowder, if usually a part of the stock of country stores, although these articles are in another part of the policy prohibited from being kept therein. Pindar *v.* Kings County F. Ins. Co., 36 N. Y. 648, 93 Am. Dec. 544. A policy insuring all the articles constituting the stock of a pork-house, and all articles contained within the building described and appurtenant thereto, covers — such being the usage of the pork-packing business — all the property within the building, without regard to the particular ownership, or any part of it intended to be insured. Ætna Ins. Co. *v.* Jackson, 16 B. Mon. (Ky.) 242.

54. Cotrell *v.* Branin, 20 S. W. 703, 14 Ky. L. Rep. 580; Daniels *v.* Hudson River F., etc., Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192; Sims *v.* State Ins. Co., 47 Mo. 54, 4 Am. Rep. 311; May *v.* Buckeye Mut. Ins. Co., 25 Wis. 291, 3 Am. Rep. 76.

Increase of risk.— In determining whether or not there has been an increase of risk, it is necessary to ascertain what the parties must be presumed to have contemplated when the insurance was made, and this involves a consideration of the usages and incidents of the risk; because, if the change was one warranted by the usages or usual incidents of the risk, although it in fact increased the risk, it does not come within the prohibition, because it is presumed to have been contemplated by the parties. Billings *v.* Tolland County Mut. F. Ins. Co., 20 Conn. 139, 50 Am. Dec. 277; Washington F. Ins. Co. *v.* Davison, 30 Md. 91; Dobson *v.* Sotheby, 1 M. & M. 90, 31 Rev. Rep. 718, 22 E. C. L. 481.

55. Baxter *v.* Massasoit Ins. Co., 13 Allen (Mass.) 320.

Usage rejected.— In a Scotch case it was ruled that where the defense to a life policy was that a habit of dram-drinking was concealed in the application, it was incompetent to ask whether the party was reputed a dram-drinker. The proper way was to prove the number of drams he took, and then ask a medical man what effect they would have. Promoter L. Ins. Co. *v.* Barrie, 5 Murr. 135. A usage of a company to require particular proof of death by the family physician of the insured cannot bind the latter, unless it was known to him when he took the policy. Tay-

not paid on the very day mentioned, may be admitted in evidence to save a forfeiture by the terms of the policy.[56]

5. Landlord and Tenant. Many customs in the relation of landlord and tenant have been recognized[57] by the courts: As for example the obligation to farm according to the custom of the country;[58] as to what is or is not waste;[59] to what extent and in what property rent is collectable;[60] as to the term of a tenancy;[61] as to what are and what are not fixtures;[62] as to the right to the "waygoing" crop;[63] that a tenant may leave his waygoing crop in the barn of the farm after

lor *v.* Ætna Ins. Co., 13 Gray (Mass.) 434. And it is not competent to show that a person addicted to intoxicating liquor is not regarded as an insurable subject by persons engaged in the business of life insurance. Rawls *v.* American Mut. L. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280. It has been held that where the application fixed the time for the contract to take effect, a custom on the part of the company that its policies should take effect on a different day was not admissible, because contradicting the application (Winnesheik Ins. Co. *v.* Holzgrafe, 53 Ill. 516, 5 Am. Rep. 64); and evidence that an agent frequently waived a condition as to payment is not admissible to raise an inference of waiver in a particular case, in the absence of other proof tending to establish it (Wood *v.* Poughkeepsie Mut. Ins. Co., 32 N. Y. 619).

56. Helme *v.* Philadelphia L. Ins. Co., 61 Pa. St. 107, 100 Am. Dec. 621. *Contra,* Mutual Ben. L. Ins. Co. *v.* Ruse, 8 Ga. 534.

57. Customs rejected.— A local custom requiring a lessor to cleanse a leased house before the lessee enters into possession of it is not binding on one not having knowledge of it. Sawtelle *v.* Drew, 122 Mass. 228. So a custom of tenants in apartment buildings to carpet the hall and stairs cannot operate to create an implied contract on one of several tenants of such a building to reimburse a third person for money expended for carpets so used. Dobson *v.* Kuhnla, 20 N. Y. Suppl. 771.

58. *Maine.*— Lassell *v.* Reed, 6 Me. 222.

Maryland.— Gallagher *v.* Shipley, 24 Md. 418, 87 Am. Dec. 611.

Massachusetts.— Lewis *v.* Lyman, 22 Pick. 437; Daniels *v.* Pond, 21 Pick. 367, 32 Am. Dec. 269.

North Carolina.— Smithwick *v.* Ellison, 24 N. C. 326, 38 Am. Dec. 697.

Pennsylvania.— Aughinbaugh *v.* Coppenheffer, 55 Pa. St. 347; Barrington *v.* Justice, 2 Pa. L. J. Rep. 501.

Vermont.— Willey *v.* Conner, 44 Vt. 68.

England.— Stafford *v.* Gardner, L. R. 7 C. P. 242, 25 L. T. Rep. N. S. 876, 20 Wkly. Rep. 299; Martin *v.* Gilham, 7 A. & E. 540, 7 L. J. Q. B. 11, 2 N. & P. 568, 34 E. C. L. 290; Bickford *v.* Parson, 5 C. B. 920, 12 Jur. 377, 17 L. J. C. P. 192, 57 E. C. L. 920; Angerstein *v.* Handson, 1 C. M. & R. 789, 1 Gale 8, 4 L. J. Exch. 118, 5 Tyrw. 583; Falmouth *v.* Thomas, 1 Cromp. & M. 89, 2 L. J. Exch. 57, 3 Tyrw. 26; Hallifax *v.* Chambers, 7 Dowl. P. C. 342, 1 H. & H. 417, 8 L. J. Exch. 117, 4 M. & W. 662; Legh *v.* Hewitt, 4 East 154, 7 Rev. Rep. 445; Wilkins *v.* Wood, 12 Jur. 583, 17 L. J. Q. B. 319; Sutton *v.* Temple, 7 Jur. 1065, 13 L. J. Exch. 17, 12 M. & W. 52; Powley *v.* Walker, 5 T. R. 373, 2 Rev. Rep. 619.

59. Honywood *v.* Honywood, L. R. 18 Eq. 306, 43 L. J. Ch. 652, 30 L. T. Rep. N. S. 671, 22 Wkly. Rep. 749; Tucker *v.* Linger, 8 App. Cas. 508, 52 L. J. Ch. 941, 49 L. T. Rep. N. S. 373, 32 Wkly. Rep. 40.

60. Clem *v.* Martin, 34 Ind. 341; Mangum *v.* Farrington, 1 Daly (N. Y.) 236.

61. Wilcox *v.* Wood, 9 Wend (N. Y.) 346; American Academy of Music *v.* Bert, 8 Pa. Co. Ct. 223; Martyn *v.* Clue, 18 Q. B. 661, 22 L. J. Q. B. 147, 83 E. C. L. 661; Doe *v.* Benson, 4 B. & Ald. 588, 6 E. C. L. 613; Webb *v.* Plummer, 2 B. & Ald. 746, 21 Rev. Rep. 479; Doe *v.* Lea, 11 East 312; Furley *v.* Wood, 1 Esp. 198; White *v.* Nicholson, 11 L. J. C. P. 264, 4 M. & G. 95, 4 Scott N. R. 707. But see Kearney *v.* King, 2 B. & Ald. 301; Smith *v.* Walton, 8 Bing. 235, 2 L. J. C. P. 85, 1 Moore & S. 380, 21 E. C. L. 521; Hogg *v.* Morris, 2 F. & F. 246.

In New York it is a custom which has become law that a lease for one year, commencing on the first of May, expires at noon on the first of the following May. Marsh *v.* Masterson, 15 Daly (N. Y.) 114, 3 N. Y. Suppl. 414.

62. Teaff *v.* Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634; Keogh *v.* Daniell, 12 Wis. 163; Van Ness *v.* Pacard, 2 Pet. (U. S.) 137, 7 L. ed. 374; Davis *v.* Jones, 2 B. & Ald. 165, 20 Rev. Rep. 396; Holding *v.* Pigott, 7 Bing. 465, 9 L. J. C. P. O. S. 125, 5 M. & P. 427, 20 E. C. L. 210; Culling *v.* Tuffnal, Buller N. P. 34; Hutton *v.* Warren, 2 Gale 71, 5 L. J. Exch. 234, 1 M. & W. 466, Tyrw. & G. 646; Muncey *v.* Dennis, 1 H. & N. 216; Bishop *v.* Rufford, 5 Russ. 346, 29 Rev. Rep. 40, 5 Eng. Ch. 346. *Contra,* Richardson *v.* Copeland, 6 Gray (Mass.) 536, 66 Am. Dec. 424; Christian *v.* Dripps, 28 Pa. St. 271; Roberts *v.* Barker, 1 Cromp. & M. 808, 2 L. J. Exch. 268, 3 Tyrw. 945.

63. *Delaware.*— Templeman *v.* Biddle, 1 Harr. 522; State *v.* McClay, 1 Harr. 520.

Maryland.— Dorsey *v.* Eagle, 7 Gill & J. 321.

New Jersey.— Howell *v.* Schenck, 24 N. J. L. 89; Van Doren *v.* Everitt, 5 N. J. L. 460, 8 Am. Dec. 615; Society, etc. *v.* Haight, 1 N. J. Eq. 393.

New York.— Harris *v.* Gregg, 17 N. Y. App. Div. 210, 45 N. Y. Suppl. 364.

Ohio.— Foster *v.* Robinson, 6 Ohio St. 90.

Pennsylvania.— Clark *v.* Harvey, 54 Pa. St. 142; Iddings *v.* Nagle, 2 Watts & S. 22; Craig *v.* Dale, 1 Watts & S. 509, 37 Am. Dec.

he has quitted the premises;[64] for the off-going tenant of a farm in a particular district to bestow his work, labor, and expense in manuring, tilling, fallowing, and sowing, according to the course of husbandry;[65] as to the right of the proprietors of a common stairway to the use of the walls to put up business signs of tenants;[66] that the owner of a lot of land, after notice to the owner of the adjoining lot, and his refusal to join in putting up a partition fence, may put up such fence at his own expense and hold the party refusing for one half the costs;[67] that when persons owning adjoining lots build simultaneously adjoining houses having a common wall built equally on each lot, each is bound to contribute to the cost of the wall;[68] that on an agreement for a lease the lessor shall prepare it and the lessee pay for it;[69] a custom to charge goods to a landlord sold to a tenant at his landlord's request;[70] and a custom among coal-operators that the owner shall not receive compensation for the slack, but only for lump, coal.[71]

6. Master and Servant. In the relation of master and servant or employer and employee many customs have been recognized by the courts:[72] For example as to the term of a hiring;[73] as to the conditions of the service;[74] as to the proper performance of a service;[75] as to the proper mode for the measurement of

477; Forsythe *v.* Price, 8 Watts 282, 34 Am. Dec. 465; Demi *v.* Bossler, 1 Penr. & W. 224; Biggs *v.* Brown, 2 Serg. & R. 14; Stultz *v.* Dickey, 5 Binn. 285, 6 Am. Dec. 424; Comfort *v.* Duncan, 1 Miles 229; Hunter *v.* Jones, 2 Brewst. 370.

England.— Holding *v.* Pigott, 7 Bing. 465, 9 L. J. C. P. O. S. 125, 5 M. & P. 427, 20 E. C. L. 210; Caldecott *v.* Smythies, 7 C. & P. 808, 32 E. C. L. 884; Wigglesworth *v.* Dallison, Dougl. (3d ed.) 201; Boraston *v.* Green, 16 East 71, 14 Rev. Rep. 297; Beavan *v.* Delahay, 1 H. Bl. 5, 2 Rev. Rep. 696; Griffiths *v.* Puleston, 14 L. J. Exch. 33, 13 M. & W. 358.

Contra.— Hendrickson *v.* Ivins, 1 N. J. Eq. 562; Mason *v.* Moyers, 2 Rob. (Va.) 606; Harris *v.* Carson, 7 Leigh (Va.) 632, 30 Am. Dec. 510; Kelley *v.* Todd, 1 W. Va. 197; Burrowes *v.* Cairns, 2 U. C. Q. B. 288.

64. Lewis *v.* Harris, 1 H. Bl. 7 note *a*, 2 Rev. Rep. 698 note; Beavan *v.* Delahay, 1 H. Bl. 5, 2 Rev. Rep. 696.

65. Dalby *v.* Hirst, 1 Brod. & B. 224, 3 Moore P. C. 536, 21 Rev. Rep. 577, 5 E. C. L. 600; Faviell *v.* Gaskoin, 7 Exch. 273, 21 L. J. Exch. 85; Carlyon *v.* Hayward, 24 Sol. J. 807.

66. Bennett *v.* Seligman, 32 Mich. 500.

67. Walker *v.* Chicester [*cited* in Knox *v.* Artman, 3 Rich. (S. C.) 283, 284].

68. Rowland *v.* Hanna, 2 B. Mon. (Ky.) 129.

69. Grissell *v.* Robinson, 3 Bing. N. Cas. 10, 5 L. J. C. P. 313, 3 Scott 329, 32 E. C. L. 15.

70. White *v.* Tripp, 125 N. C. 523, 34 S. E. 686.

71. McGowan *v.* Bailey, 179 Pa. St. 470, 36 Atl. 325.

72. See Chicago, etc., R. Co. *v.* Harrington, 192 Ill. 9, 61 N. E. 622; Eastern Granite Co. *v.* Heim, 89 Iowa 698, 57 N. W. 437; Florence Mach. Co. *v.* Daggett, 135 Mass. 582; Gair *v.* Auerbach, 13 Misc. (N. Y.) 264, 34 N. Y. Suppl. 3.

73. Johnston-Woodbury Hat Co. *v.* Lightbody, (Colo. App. 1902) 70 Pac. 957; Harris *v.* Nicholas, 5 Munf. (Va.) 483; The Swallow, 23 Fed. Cas. No. 13,665, Olcott Adm. 334. In Cunningham *v.* Fonblanque, 6 C. & P. 44, 25 E. C. L. 313, a usage was admitted in evidence between the printers and proprietors of newspapers that the latter should give to the former four weeks' notice of taking the work from them or pay them four weeks' wages. In Given *v.* Charron, 15 Md. 502, which was an action for a wrongful dismissal, evidence of a custom among dry-goods jobbers in Baltimore that when a clerk or salesman begins a season without a special contract he cannot be dismissed till the end of it, and that the seasons are two — one from January 1 to July 1, and the other from July 1 to January 1 — was admitted. In an action for wrongfully dismissing the editor of a newspaper, the declaration stated that he was engaged for a year. There was no direct evidence as to the time for which he was engaged. It was held that he might show that it was customary for editors of newspapers to be engaged for a year unless there was an express stipulation to the contrary. Holcroft *v.* Barber, 1 C. & K. 4, 47 E. C. L. 4.

74. A custom under which journeymen and employees are required to work for their employers a certain number of hours a day and are allowed the privilege of working for themselves at other times is good. Barnes *v.* Ingalls, 39 Ala. 193. Not so of a custom that a person employed to cut staves from another's bolts has a right to take and appropriate to his own use both the clippings and corner-pieces and the culls, without the consent of the owner. Wadley *v.* Davis, 63 Barb. (N. Y.) 500. A usage on the part of business establishments to furnish each other's clerks with goods and charge them to each other has been recognized. Cameron *v.* Blackman, 39 Mich. 108. So of a custom whereby books sent by publishers to literary critics for purposes of review become the property of the critics. Ranous *v.* Hughes, 19 Misc. (N. Y.) 46, 42 N. Y. Suppl. 519.

75. Vaughn *v.* Gardner, 7 B. Mon. (Ky.) 326; Hunt *v.* Carlisle, 1 Gray (Mass.) 257; Hunt *v.* Mickey, 12 Metc. (Mass.) 346; Mar-

work;[76] and as to wages and compensation.[77] But evidence that a charge for services is a customary one is not necessarily evidence that it is a reasonable one.[78] And the custom must relate to the same kind of services as those sued for.[79]

7. PRINCIPAL AND AGENT. It is well settled that a mercantile agency must be executed in accordance with the usage of the particular trade or market to which it relates,[80] and the authority of the agent is regulated and controlled by the usage

tin *v.* Hilton, 9 Metc. (Mass.) 371; Reade *v.* Sweetzer, 6 Abb. Pr. N. S. (N. Y.) 9 note.

For example that a printer contracting to print for a bookseller a certain number of copies of any work is not at liberty to print from the same type, while standing, an extra number for his own disposal (Williams *v.* Gilman, 3 Me. 276); that the employment of an architect to make plans and designs for a building carries with it an employment to superintend its construction (Wilson *v.* Bauman, 80 Ill. 493); and that on a contract of hiring a slave to do ordinary and customary labor, the slave may be employed in cleaning out a well (Willis *v.* Harris, 26 Tex. 136).

76. *Colorado.*— Bradbury *v.* Butler, 1 Colo. App. 450, 29 Pac. 463.

Kansas.— Smythe *v.* Parsons, 37 Kan. 79, 14 Pac. 444.

Maryland.— Donohue *v.* Shedrick, 46 Md. 226.

Michigan.—Walker *v.* Syms, 118 Mich. 183, 76 N. W. 320.

New York.— De Cernea *v.* Cornell, 3 Misc. 241, 22 N. Y. Suppl. 941.

Pennsylvania.— McCullough *v.* Ashbridge, 155 Pa. St. 166, 26 Atl. 10; Corcoran *v.* Chess, 131 Pa. St. 356, 18 Atl. 876.

77. *Alabama.*— Partridge *v.* Forsyth, 29 Ala. 200; Pursell *v.* McQueen, 9 Ala. 380.

Illinois.— Hayes *v.* Moynihan, 60 Ill. 409. But see Sweet *v.* Leach, 6 Ill. App. 212.

Kentucky.— Ewing *v.* Beauchamp, 4 Bibb 496.

Maine.— Wyman *v.* Banton, 66 Me. 171; Emmons *v.* Lord, 18 Me. 351.

Maryland.— Lyon *v.* George, 44 Md. 295.

Massachusetts.— Eldredge *v.* Smith, 13 Allen 140; Dodge *v.* Favor, 15 Gray 82; Thayer *v.* Wadsworth, 19 Pick. 349.

Michigan.— McDonnell *v.* Ford, 87 Mich. 198, 49 N. W. 545.

New York.— Jonsson *v.* Thompson, 97 N. Y. 642; Johnson *v.* De Peyster, 50 N. Y. 666.

South Carolina.— Cummins *v.* Keckeley, Harp. 268; Thomas *v.* O'Hara, 1 Mill 303.

United States.— Sunday *v.* Gordon, 23 Fed. Cas. No. 13,616, 1 Blatchf. & H. 569.

England.— Sewell *v.* Corp, 1 C. & P. 392, 12 E. C. L. 232; Gillett *v.* Mawman, 1 Taunt. 137; Cutter *v.* Powell, 6 T. R. 320, 3 Rev. Rep. 185.

The proper criterion in the assessment of a *quantum meruit* is the usual and reasonable price which others have received for similar services. Murray *v.* Ware, 1 Bibb (Ky.) 325, 4 Am. Dec. 655; Swain *v.* Cheney, 41 N. H. 232.

A court may infer, or the jury may find from the general and known practice and usage in such cases, that although a contract for personal service is entire, yet the compensation is payable by instalments or is due as earned at stated periods. Cunningham *v.* Morrell, 10 Johns. (N. Y.) 203, 6 Am. Dec. 332.

78. Packer *v.* Pentecost, 50 Ill. App. 228.

79. Trenor *v.* Central Pac. R. Co., 50 Cal. 222.

80. *Connecticut.*— Willard *v.* Buckingham, 36 Conn. 395.

Illinois.— Phillips *v.* Moir, 69 Ill. 155.

Kansas.— American Cent. Ins. Co. *v.* McLanathan, 11 Kan. 533.

Louisiana.— Area *v.* Milliken, 35 La. Ann. 1150; White *v.* Jones, 14 La. Ann. 681.

Maine.— Randall *v.* Kehlor, 60 Me. 37, 11 Am. Rep. 169; Greely *v.* Bartlett, 1 Me. 172, 10 Am. Dec. 54.

Maryland.— Rosenstock *v.* Tormey, 32 Md. 169, 3 Am. Rep. 125.

Massachusetts.— Greely *v.* Doran Wright Co., 148 Mass. 116, 18 N. E. 878; Day *v.* Holmes, 103 Mass. 306; Greenleaf *v.* Moody, 13 Allen 363; Upton *v.* Suffolk County Mills, 11 Cush. 586, 59 Am. Dec. 163; Goodenow *v.* Tyler, 7 Mass. 36, 5 Am. Dec. 22.

New Hampshire.— Daylight Burner Co. *v.* Odlin, 51 N. H. 56, 12 Am. Rep. 45.

New York.— Iasigi *v.* Rosenstein, 158 N. Y. 678, 52 N. E. 1124; Lawrence *v.* Maxwell, 53 N. Y. 19; Smith *v.* Tracy, 36 N. Y. 79; Sims *v.* U. S. Trust Co., 35 Hun 533; *In re* Hayes, 37 Misc. 264, 75 N. Y. Suppl. 312; McKinstry *v.* Pearsall, 3 Johns. 319.

North Carolina.— Brown Chemical Co. *v.* Atkinson, 91 N. C. 389; New Hanover Bank *v.* Williams, 79 N. C. 129.

Ohio.— Frank *v.* Jenkins, 22 Ohio St. 597.

Pennsylvania.— Sumner *v.* Stewart, 69 Pa. St. 321.

United States.— Schuchardt *v.* Allen, 1 Wall. 359, 17 L. ed. 642; Ward *v.* Vosburgh, 31 Fed. 12.

England.— Sutton *v.* Tatham, 10 A. & E. 27, 37 E. C. L. 39; *Ex p.* Belchier, Ambl. 219; Young *v.* Cole, 3 Bing. N. Cas. 724, 3 Hodges 126, 6 L. J. C. P. 201, 4 Scott 489, 32 E. C. L. 334; Hodgson *v.* Davies, 2 Campb. 530, 11 Rev. Rep. 789; Brady *v.* Todd, 9 C. B. N. S. 592, 7 Jur. N. S. 827, 30 L. J. C. P. 223, 4 L. T. Rep. N. S. 212, 9 Wkly. Rep. 483, 99 E. C. L. 592; Pickering *v.* Busk, 15 East 38, 13 Rev. Rep. 364; Bayliffe *v.* Butterworth, 1 Exch. 425, 11 Jur. 1019, 17 L. J. Exch. 78, 5 R. & Can. Cas. 283; Graves *v.* Legg, 2 H. & N. 210, 3 Jur. N. S. 519, 26 L. J. Exch. 316, 5 Wkly. Rep. 597; Massey *v.* Banner, 1 Jac. & W. 241, 21 Rev. Rep. 150, 37 Eng. Reprint 367; Russell *v.* Hankey, 6 T. R. 12; Caffrey *v.* Darby, 6 Ves. Jr. 488, 31 Eng. Reprint 1159.

of the particular business[81] to pledge his principal's goods[82] or to sell on credit.[83] So by usage an agent may have an implied power to delegate his authority,[84] may be required to insure his principal's goods,[85] may have authority to receive pay-

Canada.— Sutherland *v.* Cox, 6 Ont. 505; Mara *v.* Cox, 6 Ont. 359.

81. *Alabama.*— Cawthon *v.* Lusk, 97 Ala. 674, 11 So. 731.

Connecticut.— Jones *v.* Warner, 11 Conn. 40.

Georgia.— Hatcher *v.* Comer, 73 Ga. 418; Mott *v.* Hall, 41 Ga. 117.

Illinois.— National Furnace Co. *v.* Keystone Mfg. Co., 110 Ill. 427; Corbett *v.* Underwood, 83 Ill. 324, 25 Am. Rep. 392; U. S. Life Ins. Co. *v.* Advance Co., 80 Ill. 549; Pardridge *v.* Bailey, 20 Ill. App. 351; Oldershaw *v.* Knoles, 4 Ill. App. 63, 6 Ill. App. 325.

Kentucky.— Wallace *v.* Bradshaw, 6 Dana 382.

Maine.— Nobleboro *v.* Clark, 68 Me. 87, 28 Am. Rep. 22; Trull *v.* True, 33 Me. 367.

Massachusetts.— Goldsmith *v.* Manheim, 109 Mass. 187; Greenfield Bank *v.* Crafts, 2 Allen 269; Bucknam *v.* Chaplin, 1 Allen 70; Potter *v.* Morland, 3 Cush. 384; Dwight *v.* Whitney, 15 Pick. 179; James *v.* Bixby, 11 Mass. 34.

Minnesota.— Earl Fruit Co. *v.* Thurston Cold-Storage, etc., Co., 60 Minn. 351, 62 N. W. 439.

Missouri.— Cameron *v.* McNair, etc., Real Estate Co., 76 Mo. App. 366.

New Hampshire.— Morris *v.* Bowen, 52 N. H. 416; Lebanon *v.* Heath, 47 N. H. 353; Haven *v.* Wentworth, 2 N. H. 93.

New York.— De Cordova *v.* Barnum, 130 N. Y. 615, 29 N. E. 1099, 27 Am. St. Rep. 538; Green *v.* Disbrow, 56 N. Y. 334; Hammond *v.* Varian, 54 N. Y. 398; Easton *v.* Clark, 35 N. Y. 225; White *v.* Fuller, 67 Barb. 267; McMorris *v.* Simpson, 21 Wend. 610; Andrews *v.* Kneeland, 6 Cow. 354.

Pennsylvania.— Brown *v.* Arrott, 6 Watts & S. 402.

Texas.— Wootiers *v.* Kaufman, 73 Tex. 395, 11 S. W. 390; Buzard *v.* Jolly, (Sup. 1887) 6 S. W. 422; Hollingsworth *v.* Holshousen, 25 Tex. 628.

Vermont.— Fay *v.* Richmond, 43 Vt. 25.

United States.— Moore *v.* Metropolis Bank, 13 Pet. 302, 10 L. ed. 172; Ernest *v.* Stoller, 8 Fed. Cas. No. 4,520, 5 Dill. 438, 2 McCrary 380; The Hendrick Hudson, 11 Fed. Cas. No. 6,358; Wilcocks *v.* Phillips, 29 Fed. Cas. No. 17,639, 1 Wall. Jr. 47.

England.— Baines *v.* Ewing, L. R. 1 Exch. 320, 4 H. & C. 511, 35 L. J. Exch. 194, 14 L. T. Rep. N. S. 733, 14 Wkly. Rep. 782; Dickinson *v.* Lilwall, 4 Campb. 279, 2 Stark. 128, 2 E. C. L. 57; Dingle *v.* Hare, 7 C. B. N. S. 145, 6 Jur. N. S. 679, 29 L. J. C. P. 143, 1 L. T. Rep. N. S. 38, 97 E. C. L. 145; Whitehead *v.* Tuckett, 15 East 400, 13 Rev. Rep. 509.

82. Laussatt *v.* Lippincott, 6 Serg. & R. (Pa.) 386, 9 Am. Dec. 440; Pultney *v.* Keymer, 3 Esp. 182; Graham *v.* Dyster, 6 M. & S. 1, 2 Stark. 21, 3 E. C. L. 299. *Contra,* Newhold *v.* Wright, 4 Rawle (Pa.) 195.

83. *Connecticut.*— Leach *v.* Beardslee, 22 Conn. 404.

Maine.— Greely *v.* Bartlett, 1 Me. 172, 10 Am. Dec. 54.

Massachusetts.— Dwight *v.* Whitney, 15 Pick. 179; Goodenow *v.* Tyler, 7 Mass. 36, 5 Am. Dec. 22.

New York.— Van Alen *v.* Vanderpool, 6 Johns. 69, 5 Am. Dec. 192.

Pennsylvania.— Geyer *v.* Decker, 1 Yeates 486.

South Carolina.—James *v.* McCredie, 1 Bay 297, 1 Am. Dec. 617.

Texas.— Neill *v.* Billingsley, 49 Tex. 161; Harbert *v.* Neill, 49 Tex. 143.

United States.— Burrill *v.* Phillips, 4 Fed. Cas. No. 2,200, 1 Gall. 360; Forrestier *v.* Bordman, 9 Fed. Cas. No. 4,945, 1 Story 43; Gerbier *v.* Emery, 10 Fed. Cas. No. 5,357, 2 Wash. 413.

England.—Houghton *v.* Matthews, 3 B. & P. 485.

A factor without special instructions to sell for cash and not on credit may sell on credit according to the general usage of the trade in the market in which the goods are sold, and if he sells in conformity with such usage, and uses due diligence to ascertain the solvency of the purchaser, he is not responsible if the latter afterward becomes insolvent.

Kentucky.— Byrne *v.* Schwing, 6 B. Mon. 199.

Louisiana.— Reano *v.* Mager, 11 Mart. 636.

Massachusetts.— Dwight *v.* Whitney, 15 Pick. 179; Etheridge *v.* Binney, 9 Pick. 272; Clark *v.* Van Northwick, 1 Pick. 343; Clark *v.* Moody, 17 Mass. 145; Goodenow *v.* Tyler, 7 Mass. 36, 5 Am. Dec. 22.

New York.— Van Alen *v.* Vanderpool, 6 Johns. 69, 5 Am. Dec. 192; McKinstry *v.* Pearsall, 3 Johns. 319.

South Carolina.— James *v.* McCredie, 1 Bay 294, 1 Am. Dec. 617.

Virginia.— McConnico *v.* Curzen, 2 Call 358, 1 Am. Dec. 540.

84. Johnson *v.* Cunningham, 1 Ala. 249; Gray *v.* Murray, 3 Johns. Ch. (N. Y.) 167; Moon *v.* Guardians of Poor, 3 Bing. N. Cas. 814, 32 E. C. L. 374. See Coles *v.* Trecothick, 1 Smith K. B. 233, 9 Ves. Jr. 234, 7 Rev. Rep. 167, 32 Eng. Reprint 592.

85. *Arkansas.*— Walsh *v.* Frank, 19 Ark. 270.

Louisiana.— Tonge *v.* Kennett, 10 La. Ann. 800.

New York.— Lee *v.* Adsit, 37 N. Y. 78; De Forest *v.* Fulton F. Ins. Co., 1 Hall 84; Thorne *v.* Deas, 4 Johns. 84.

United States.—Columbian Ins. Co. *v.* Lawrence, 2 Pet. 25, 7 L. ed. 335; Randolph *v.* Ware, 3 Cranch 503, 2 L. ed. 512; Collings *v.* Hope, 6 Fed. Cas. No. 3,003, 3 Wash. 149;

ment,[86] or may set off his private debt against his principal's rights.[87] So in the absence of contract usage may settle the agent's compensation,[88] or may render an agent personally liable on contracts made by him.[89] But no usage or custom

Kingston *v.* Wilson, 14 Fed. Cas. No. 7,823, 4 Wash. 310.

England.— French *v.* Backhouse, 5 Burr. 2727; Craufurd *v.* Hunter, 8 T. R. 13, 4 Rev. Rep. 576; Crosbie *v.* McDoual, 13 Ves. Jr. 138, 33 Eng. Reprint 251.

Where a factor has been accustomed to insure goods and charge for the insurance in his account rendered to his principals, he will be liable for failure so to insure, since the principal has a right to assume that he will follow his ordinary custom until he receives notice of a change. Area *v.* Milliken, 35 La. Ann. 1150.

86. *Maryland.*— Miller *v.* Lea, 35 Md. 396, 6 Am. Dec. 417.

Massachusetts.—Lime Rock Bank *v.* Plimpton, 17 Pick. 159, 28 Am. Dec. 286.

Missouri.— Benny *v.* Pegram, 18 Mo. 191, 59 Am. Dec. 298.

New York.— Beach *v.* Forsyth, 14 Barb. 499; Guy *v.* Oakley, 13 Johns. 332. But see Higgins *v.* Moore, 34 N. Y. 417.

United States.—Warner *v.* Martin, 11 How. 209, 13 L. ed. 667.

England.— Turner *v.* Thomas, L. R. 6 C. P. 610, 40 L. J. C. P. 271, 24 L. T. Rep. N. S. 879; Scott *v.* Irving, 1 B. & Ad. 605, 9 L. J. K. B. O. S. 89, 20 E. C. L. 617; Bartlett *v.* Pentland, 10 B. & C. 760, 8 L. J. K. B. O. S. 264, 21 E. C. L. 320; Westwood *v.* Bell, 4 Camph. 349, 16 Rev. Rep. 800; Underwood *v.* Nicholls, 17 C. B. 239, 25 L. J. C. P. 79, 4 Wkly. Rep. 153, 84 E. C. L. 239; Sweeting *v.* Pearce, 9 C. B. N. S. 534, 7 Jur. N. S. 806, 30 L. J. C. P. 109, 5 L. T. Rep. N. S. 79, 9 Wkly Rep. 343, 99 E. C. L. 534, 7 C. B. N. S. 449, 6 Jur. N. S. 753, 97 E. C. L. 449; Dresser *v.* Norwood, 17 C. B. N. S. 466, 10 Jur. N. S. 851, 34 L. J. C. P. 48, 11 L. T. Rep. N. S. 111, 12 Wkly. Rep. 1030, 112 E. C. L. 466; Stewart *v.* Aberdein, 1 H. & H. 284, 7 L. J. Exch. 292, 4 M. & W. 211.

Proof of the usage of commercial travelers and of the houses which they represent as to their authority to receive payment for goods sold by them is immaterial on the question of the authority of such a traveler to receive payment for goods sold by him for a house which he did not represent. Janney *v.* Boyd, 30 Minn. 319, 15 N. W. 308.

87. Vail *v.* Durant, 7 Allen (Mass.) 408, 83 Am. Dec. 695; Warner *v.* Martin, 11 How. (U. S.) 209, 13 L. ed. 667; Catterall *v.* Hindle, L. R. 2 C. P. 368; Scott *v.* Irving, 1 B. & Ad. 605, 9 L. J. K. B. O. S. 89, 20 E. C. L. 617; Sweeting *v.* Pearce, 9 C. B. N. S. 534, 7 Jur. N. S. 806, 30 L. J. C. P. 109, 5 L. T. Rep. N. S. 79, 9 Wkly. Rep. 343, 99 E. C. L. 534; Stewart *v.* Aberdein, 1 H. & H. 284, 7 L. J. Exch. 292, 4 M. & W. 211. But see Chesterfield Mfg. Co. *v.* Dehon, 5 Pick. (Mass.) 7, 16 Am. Dec. 367; Evans *v.* Waln, 71 Pa. St. 69.

Where a consignee has made advances on goods, he has no right to sell the same to repay such charges without notice to the principal in calling on him for reimbursement under a custom to sell goods to pay advances. Barnett *v.* Warren, 82 Ala. 557, 2 So. 457; Porter *v.* Patterson, 15 Pa. St. 229; Porter *v.* Heath, 2 Tex. App. Civ. Cas. § 124. *Contra*, Talcott *v.* Chew, 27 Fed. 273; Rice *v.* Brook, 20 Fed. 611.

88. *Alabama.*— Brown *v.* Harrison, 17 Ala. 774.

Connecticut.— Halsey *v.* Brown, 3 Day 346.

Illinois.— Dyer *v.* Sutherland, 75 Ill. 583.

Kansas.— Campbell *v.* Fuller, 25 Kan. 723.

Louisiana.— Moreau *v.* Dumagene, 20 La. Ann. 230.

Maryland.— Beale *v.* Creswell, 3 Md. 196.

Massachusetts.— Loud *v.* Hall, 106 Mass. 404; Cook *v.* Welch, 9 Allen 350.

Missouri.— Green *v.* Wright, 36 Mo. App. 298.

New York.— Erhen *v.* Lorillard, 2 Keyes 567; Lyon *v.* Valentine, 33 Barb. 271; Morgan *v.* Mason, 4 E. D. Smith 636; Leitner *v.* Boehm, 26 Misc. 790, 56 N. Y. Suppl. 227; Miller *v.* Insurance Co. of North America, 1 Abh. N. Cas. 470; Suydam *v.* Westfall, 4 Hill 211.

Pennsylvania.— Masterson *v.* Masterson, 121 Pa. St. 605, 15 Atl. 652; Hartje *v.* Collins, 46 Pa. St. 268; Edwards *v.* Goldsmith, 16 Pa. St. 43; Inslee *v.* Jones, Brightly 76.

South Carolina.— Kuhtman *v.* Brown, 4 Rich. 479.

Texas.— Harrell *v.* Zimpleman, 66 Tex. 292, 17 S. W. 478.

Virginia.— Hansbrough *v.* Neal, 94 Va. 722, 27 S. E. 593.

Wisconsin.— Power *v.* Kane, 5 Wis. 265.

United States.— Barnard *v.* Adams, 10 How. 270, 13 L. ed. 417; U. S. *v.* Fillebrown, 7 Pet. 28, 8 L. ed. 596; U. S. *v.* Macdaniel, 7 Pet. 1, 8 L. ed. 587.

England.— Read *v.* Rann, 10 B. & C. 438, 8 L. J. K. B. O. S. 144, 21 E. C. L. 189; Cohen *v.* Paget, 4 Campb. 96; Eicke *v.* Meyer, 3 Campb. 412; *In re* Leigh, 6 Ch. D. 256; Marshall *v.* Parsons, 9 C. & P. 656, 38 E. C. L. 382; Stewart *v.* Kahle, 3 Stark. 161, 3 E. C. L. 636; Roberts *v.* Jackson, 2 Stark. 225, 19 Rev. Rep. 706, 3 E. C. L. 387; Auriol *v.* Thomas, 2 T. R. 52; Baynes *v.* Fry, 15 Ves. Jr. 120, 33 Eng. Reprint 700.

But in an action by one of two real-estate brokers against the other for a division of the commissions for a certain sale, evidence of a usage among real-estate brokers that two making a sale divide the commissions equally, unless a different arrangement is made, is not admissible, since it would be creating a contract between them. Smith *v.* Barringer, 37 Minn. 94, 33 N. W. 116.

89. Hutchinson *v.* Tatham, L. R. 8 C. P. 482, 42 L. J. C. P. 260, 29 L. T. Rep. N. S. 103, 22 Wkly. Rep. 18; Fleet *v.* Murton, L. R. 7 Q. B. 126, 41 L. J. Q. B. 49, 26 L. T. Rep. N. S. 181, 20 Wkly. Rep. 97; Humfrey *v.*

will warrant an agent or factor in departing from the positive instructions of his principal.[90]

8. Attorney and Client. A custom for attorneys to charge a client with a term-fee at each term, excepting at the term at which the case is argued, when an arguing fee is taxed instead, and in addition thereto, when defendant prevails, to charge the client with the taxable costs, exclusive of witnesses' fees and money advanced by the client, is reasonable and valid.[91] So retainers are chargeable by custom without a special contract;[92] and attorneys may by custom become responsible for a sheriff's fees in the stead of the client.[93]

9. Partners and Partnership. The powers of a partner may depend on usage and custom.[94]

Dale, 7 E. & B. 266, 3 Jur. N. S. 213, 26 L. J. Q. B. 137, 90 E. C. L. 266.

But evidence of a usage that a person contracting in his own name is not personally liable is inadmissible. Magee *v.* Atkinson, 6 L. J. Exch. 115, 2 M. & W. 440. So a custom authorizing a factor, in his discretion, without the assent or knowledge of his principal, to ship goods intrusted to him for sale in his own market, to a factor of his own choosing, unknown to his principal, at his principal's risk, and in case of loss without any responsibility on himself, is void. Wallace *v.* Morgan, 23 Ind. 399.

90. *Michigan.*— Hutchings *v.* Ladd, 16 Mich. 493.

New York.— Douglass *v.* Leland, 1 Wend. 490.

South Carolina.— Barksdale *v.* Brown, 1 Nott & M. 517, 9 Am. Dec. 720.

Vermont.— Catlin *v.* Smith, 24 Vt. 85; Bliss *v.* Arnold, 8 Vt. 252, 30 Am. Dec. 467.

Wisconsin.— Hall *v.* Storrs, 7 Wis. 253.

Compare Clark *v.* Van Northwick, 1 Pick. 343.

Illustration.— An order of a customer to a broker to buy stock, deliverable at any time, at buyer's option, in sixty days, will not authorize the broker to buy the stock himself at thirty days, and deliver it to his customer at the end of sixty days at an increased price and interest, besides the usual commission, although a general usage among stock-brokers to act in this manner is proved. Rosenstock *v.* Tormey, 32 Md. 169, 3 Am. Rep. 125; Day *v.* Holmes, 103 Mass. 306; Pickering *v.* Demerritt, 100 Mass. 416; Parsons *v.* Martin, 11 Gray (Mass.) 111; Strong *v.* Bliss, 6 Metc. (Mass.) 393; Cropper *v.* Cook, L. R. 3 C. P. 194, 17 L. T. Rep. N. S. 603, 16 Wkly. Rep. 596.

91. Codman *v.* Armstrong, 28 Me. 91; Bodfish *v.* Fox, 23 Me. 90, 39 Am. Dec. 611.

92. Eggleston *v.* Boardman, 37 Mich. 14.

93. Doughty *v.* Paige, 48 Iowa 483.

94. *Alabama.*— Waring *v.* Grady, 49 Ala. 465, 20 Am. Rep. 286.

Massachusetts.— Smith *v.* Collins, 115 Mass. 388; Boardman *v.* Gore, 15 Mass. 331; Etheridge *v.* Binney, 9 Pick. 272.

Missouri.— Cayton *v.* Hardy, 27 Mo. 536.

South Carolina.— Galloway *v.* Hughes, 1 Bailey 553.

England.— Hasleham *v.* Young, 5 Q. B. 833, Dav. & M. 700, 8 Jur. 338, 13 L. J. Q. B. 205, 48 E. C. L. 833; Sandilands *v.* Marsh, 2 B. & Ald. 673; Dickinson *v.* Valpy, 10 B. & C. 128, 8 L. J. K. B. O. S. 51, 5 M. & R. 126, 21 E. C. L. 63; Duncan *v.* Lowndes, 3 Campb. 478, 14 Rev. Rep. 815; Matter of Joint-Stock Co.'s Winding-up Act, 4 De G. M. & G. 19, 18 Jur. 710, 53 Eng. Ch. 16; Hope *v.* Cust [*cited* in Shirreff *v.* Wilks, 1 East 48, 53]; Brettel *v.* Williams, 4 Exch. 623, 19 L. J. Exch. 121 [*overruling Ex p.* Gardom, 15 Ves. Jr. 286, 33 Eng. Reprint 762]; *Ex p.* Nolte, 2 Glyn & J. 295; Hawtayne *v.* Bourne, 5 Jur. 118, 10 L. J. Exch. 244, 7 M. & W. 595.

But authority to sign as maker or surety cannot be inferred from a general usage to indorse. Early *v.* Reed, 6 Hill (N. Y.) 12.

Name of firm.— Where the partnership has not adopted a composite name, the fact that they did business in the individual name of one partner may be shown by usage. Ontario Bank *v.* Hennessey, 48 N. Y. 545; Le Roy *v.* Johnson, 2 Pet. (U. S.) 186, 7 L. ed. 391.

Usages of whaling trade.— As to the usage of masters of whaling-vessels entering into partnership in their catches and as to usages of the whaling business generally see Thompson *v.* Hamilton, 12 Pick. (Mass.) 425, 23 Am. Dec. 619; Baxter *v.* Rodman, 3 Pick. (Mass.) 435; Aberdeen Arctic Co. *v.* Sutter, 2 Macq. H. L. Cas. 1106, 6 L. T. Rep. N. S. 229; Fennings *v.* Lord Grenville, 1 Taunt. 241. As to the usages of the whaling trade, where the compensation is generally a share in the catchings, see Smith *v.* Lawrence, 26 Conn. 468; Rich *v.* Ryder, 105 Mass. 306; Shaw *v.* Mitchell, 2 Metc. (Mass.) 65; Swift *v.* Gifford, 23 Fed. Cas. No. 13,696, 2 Lowell 110.

Holding out as partnership.— The firm of Gill, Canonge & Co. entered into a contract with one Peter Kuhn, an auctioneer, in which it was agreed between all the parties to follow their several occupations together in the same establishment, but without any copartnership, which it was expressly agreed should not exist. It being shown that it was their practice to issue bills of lading and give receipts containing their names jointly, and to issue circular letters signed "Peter Kuhn & Son, auctioneers; Gill, Canonge & Co., commission merchants," it was held that as to third persons they had made themselves responsible as partners. Gill *v.* Kuhn, 6 Serg. & R. (Pa.) 333. So a habit of advertising (*Ex p.* Matthews, 3 Ves. & B. 125, 35 Eng. Reprint 426) or making out bills (McNamara

10. VENDOR AND PURCHASER — a. In General. Evidence of usage in a particular trade is admissible for the purpose of showing the modes of effecting sales — as for example the usage of the cloth trade relative to the return of cloth sent for inspection;[95] or that according to the known usages of the cotton trade cotton is always sold by sample;[96] that upon the sale of berries in bags by sample, the custom of the trade is that the sample represents the average quality of the entire lot, and not the average quality of the amount contained in each bag taken separately;[97] that it is the custom among flour merchants that the vendee may rescind the sale and return the flour within ten days, if it prove to be unsound and damaged;[98] that an offer sent by mail, by one who understands that according to the usage of business a reply may be sent by mail, carries with it an authority to communicate acceptance by mail;[99] that it is the custom upon the sale of liquor in barrels to measure but one barrel in ten, and then make an estimate of the whole based on this measurement;[1] that cider casks go to the purchaser with their contents who is obliged to return others of equal value;[2] that the weight of tobacco is computed as previously ascertained at the time of packing and marked on the cases, and not by the actual weight at the time of the sale;[3] that lumber is sold without measuring it;[4] that orders received of customers are filled in their regular order, according to date, and as fast as the articles can be made;[5] that on a sale of coal shipped from the United States to Canada, the purchasers pay the customs duties when they land the goods;[6] that on a sale of corn the purchaser may keep so much of the commodity as answers the warranty or representation

v. Dratt, 33 Iowa 385; Young *v.* Axtell, 2 H. Bl. 242) in the joint name, or distributing hand-bills in which the name of defendant appeared as a partner (Walcott *v.* Canfield, 3 Conn. 194; Tumlin *v.* Goldsmith, 40 Ga. 221), or marking merchandise with a firm-name (Penn *v.* Kearny, 21 La. Ann. 21), or executing contracts or conveyances jointly (Crowell *v.* Western Reserve Bank, 3 Ohio St. 406. And see Conklin *v.* Barton, 43 Barb. (N. Y.) 435) may be shown in evidence for this purpose. See also Bennett *v.* Holmes, 32 Ind. 108; Cragin *v.* Carleton, 21 Me. 492; Hall *v.* Lanning, 91 U. S. 160, 23 L. ed. 271. So where the issue is whether a certain house is a hotel, the custom of its proprietors to so advertise it is relevant. Stringer *v.* Davis, 35 Cal. 25.

95. Wood *v.* Wood, 1 C. & P. 59, 12 E. C. L. 44. And see Leigh *v.* Mobile, etc., R. Co., 58 Ala. 165.

96. Boorman *v.* Jenkins, 12 Wend. (N. Y.) 566, 27 Am. Dec. 158; Consequa *v.* Willings, 6 Fed. Cas. No. 3,128, Pet. C. C. 225. And see Atwater *v.* Clancy, 107 Mass. 369.

A custom that one buying cotton which had been previously weighed at the public scales without any stipulation for reweighing shall be considered as purchasing at the wharfinger's weights, although there may be a deficiency on the reweighing and the buyer loses the difference, so far as the loss in the weighing is the effect of natural causes, is valid. Conner *v.* Robinson, 2 Hill (S. C.) 354.

97. Schnitzer *v.* Oriental Print Works, 114 Mass. 123; Leonard *v.* Fowler, 44 N. Y. 289.

98. Randall *v.* Kehlor, 60 Me. 37, 11 Am. Rep. 169.

A usage to sell flour in store by order, and to pass it by the transfer of the order from hand to hand, without actual delivery of the flour, has been recognized in Virginia. Pleasants *v.* Pendleton, 6 Rand. (Va.) 473, 18 Am. Dec. 726.

99. *In re* Imperial Land Co., L. R. 15 Eq. 18.

A custom that on an offer made by cable a reply must be sent within twenty-four hours is valid. Robeson *v.* Pels, 202 Pa. St. 399, 51 Atl. 1028.

1. Dalton *v.* Daniels, 2 Hilt. (N. Y.) 472.

2. Sturges *v.* Buckley, 32 Conn. 18.

3. Jones *v.* Hoey, 128 Mass. 585.

A custom of the tobacco trade by which the purchaser was required to take tobacco at the last ascertained weight, looking to the seller to make good any loss or diminution, is valid. Thompson *v.* Brannin, 94 Ky. 490, 21 S. W. 1057, 15 Ky. L. Rep. 36.

A custom that the purchaser must pass definitely on the quality of the tobacco before delivery, and that thereafter no drawback on account of defects would be allowed is valid. Harris *v.* Nasits, 23 La. Ann. 457.

4. Lee *v.* Kilburn, 3 Gray (Mass.) 594.

A custom that an inspector of lumber is the agent of both buyer and seller, and that the purchaser has the privilege to designate the place of delivery, and the seller is bound to deliver it there is good. Buie *v.* Browne, 28 N. C. 404.

5. Bliven *v.* New England Screw Co., 23 How. (U. S.) 420, 433, 16 L. ed. 510, 514.

A custom among the merchants of the city in which plaintiffs did business to enter their bills for goods sold, not on the day on which they were shipped, but as of the day on which the orders were received, is valid. Garrett *v.* Trabue, 82 Ala. 227, 3 So. 149.

6. Brown *v.* Browne, 9 U. C. Q. B. 312.

and decline taking the residue;[7] that the proper storing of herring when receiving it, without immediate examination, does not waive objections to quality;[8] that a delivery to a carrier in the usual and ordinary course of business transfers the property to the purchaser, and that the risk from that time is the risk of the purchaser;[9] that the seller of goods who delivers them to a railroad company, to be first transported on their road and then forwarded by steamboat, should take out an internal bill of lading, and send it to the purchaser at or about the time of despatching the goods;[10] that the seller has not performed his duty or parted with the property in the goods until he has boxed them, delivered them to a carrier, and taken a bill of lading;[11] that under a contract between a manufacturer of iron plates and a customer for the supply of them the seller must, in the absence of stipulation to the contrary, supply plates of his own make, and that the purchaser is entitled to reject other plates if tendered, although of the quality contracted for;[12] that a mine-owner is required to load the ore on the purchaser's boats, and that he is not entitled to compensation until the ore has been weighed after reaching its destination;[13] a custom to require warehouse receipts for well-known brands, and to buy on the reputation of the packer, and that the parties relied on the warehouseman's receipt only for the custody of the property, and not for the quality or contents of the barrels;[14] a custom or usage in regard to the delivery, inspection, and acceptance (or rejection) of cross-ties placed along the line of the railroad by persons desiring to sell;[15] a custom to accept the weigher's receipts as showing the weights stipulated;[16] a usage in the grain trade to deliver barley in sacks;[17] a custom to examine the staple article of the country

7. Doane *v.* Dunham, 79 Ill. 131; Clark *v.* Baker, 5 Metc. (Mass.) 452, 11 Metc. (Mass.) 186, 45 Am. Dec. 199. But see Marshall *v.* Perry, 67 Me. 78; Morse *v.* Brackett, 98 Mass. 205.

A custom that when corn is sold by sample, if the buyer does not on the day it is sold examine the bulk and reject it, he cannot afterward reject it or refuse to pay the whole price is binding. Sanders *v.* Jameson, 2 C. & K. 557, 61 E. C. L. 557.

8. Henkel *v.* Welsh, 41 Mich. 664, 3 N. W. 171.

9. Magruder *v.* Gage, 33 Md. 344, 3 Am. Rep. 177.

A custom among seed dealers to deliver at the purchaser's store is valid. Gehl *v.* Milwaukee Produce Co., 105 Wis. 573, 81 N. W. 666.

A custom in the boot and shoe trade that when shoes are ordered of a manufacturer by a purchaser at a distance, and no special mode of conveyance is mentioned by the purchaser, the manufacturer takes the goods to a certain point at his own risk, and there delivers them to some regular line of packets running to the purchaser's place of business, and takes duplicate bills of lading, and forwards one of them to the purchaser by mail, and from that time the delivery is complete and the purchaser takes the risk of loss is valid. Putnam *v.* Tillotson, 13 Metc. (Mass.) 517.

A usage in the place of sale to allow a week or ten days to elapse after delivery, for the purposes of examination by the purchaser as to the condition and quantity of the articles purchased, within which time the purchaser could resell is valid. Lees *v.* Richardson, 2 Hilt. (N. Y.) 164.

10. Johnson *v.* Stoddard, 100 Mass. 306.

11. Woods *v.* Half, 44 Tex. 633. And see Meldrum *v.* Snow, 9 Pick. (Mass.) 441, 20 Am. Dec. 489; Furniss *v.* Hone, 8 Wend. (N. Y.) 247; Keeler *v.* Field, 1 Paige (N. Y.) 312; Haggerty *v.* Palmer, 6 Johns. Ch. (N. Y.) 437; Priestley *v.* Pratt, L. R. 2 Exch. 101, 36 L. J. Exch. 89, 16 L. T. Rep. N. S. 64, 15 Wkly. Rep. 639.

12. Johnson *v.* Raylton, 7 Q. B. D. 438, 50 L. J. Q. B. 753, 45 L. T. Rep. N. S. 374, 30 Wkly. Rep. 350.

13. Dewey *v.* Swift's Iron, etc., Works, 7 Ohio Dec. (Reprint) 377, 2 Cinc. L. Bul. 261.

A custom for the purchasers of potatoes to furnish a boat for their shipment and notify the seller when it will be there is valid. Holmes *v.* Whitaker, 23 Oreg. 319, 31 Pac. 705.

14. Hale *v.* Milwaukee Dock Co., 23 Wis. 276, 99 Am. Dec. 169.

15. Kinney *v.* South, etc., R. Co., 82 Ala. 368, 3 So. 113.

16. Loeb *v.* Crow, 15 Tex. Civ. App. 537, 40 S. W. 506.

Where a custom prevailed at the port of New York to submit the quality of Manilla hemp bought to arbitrators, in case of doubt as to quality, and that the price fixed therefor by the arbitrators in lieu of the contract price should be binding, the custom having prevailed for a long series of years, and having been regarded as indispensable, will be presumed reasonable. Schipper *v.* Milton, 51 N. Y. App. Div. 522, 64 N. Y. Suppl. 935 [*affirmed* in 169 N. Y. 583, 62 N. E. 1100].

17. U. S. *v.* Robinson, 27 Fed. Cas. No. 16,177, 1 Sawy. 219 [*affirmed* in 13 Wall. (U. S.) 363, 20 L. ed. 653].

before shipping it away;[18] a custom of dealers in bonds and stocks, whereby an option to sell at the end of a given period expires on the last day of such period;[19] and a custom that a sale is conditional on the acceptance of the goods by the buyer's customers.[20] Evidence of usage is competent for the purpose of showing which party is chargeable with the expense of packing, wrappers, and cases;[21] and in an action between a manufacturer of picture-frames and a dealer in them, the dispute being as to which should pay freight on frames sold to the latter by the former, evidence of a usage between manufacturers and dealers in the place where the goods were made and sold that the manufacturers should pay freight was held to be admissible.[22] Again the usual market price is presumed to be the purchase-price when the contract of sale is silent.[23] So where there is no express contract the time of delivery,[24] the time of credit,[25] the time of payment,[26] and what shall be considered as a payment[27] may be regulated by usage. But where a seller revokes an order before the goods are delivered, a usage that such an order vests the title *eo instanti* in the purchaser will not avail the latter.[28] And usage cannot convert a voluntary and unqualified delivery, without payment, of goods sold for cash into a mere deposit for examination.[29]

b. Warranty of Quality. An implied warranty of quality according to the general rule of law, it has been held in England, may be altered by the usage of the particular trade;[30] and in some of the states of the United States the English rule is followed,[31] while in others it is denied.[32]

18. Vanderhorst *v.* McTaggart, 2 Bay (S. C.) 498.

19. Weld *v.* Barker, 153 Pa. St. 465, 26 Atl. 239.

20. Lyon *v.* Motley, 9 Misc. (N. Y.) 500, 30 N. Y. Suppl. 218.

21. Cole *v.* Kerr, 20 Vt. 21; Robinson *v.* U. S., 13 Wall. (U. S.) 363, 20 L. ed. 653.

22. Howe *v.* Hardy, 106 Mass. 329.

23. Harris *v.* Panama R. Co., 58 N. Y. 600; Konitzky *v.* Meyer, 49 N. Y. 571; Booth *v.* Bierce, 38 N. Y. 463, 98 Am. Dec. 73; Dwyht *v.* Cutting, 91 Hun (N. Y.) 38, 36 N. Y. Suppl. 99; Bennett *v.* Drew, 3 Bosw. (N. Y.) 355; Sturm *v.* Williams, 38 N. Y. Super. Ct. 325; Hall *v.* Peck, 10 Vt. 474; Cliquot *v.* U. S., 3 Wall. (U. S.) 114, 18 L. ed. 116.

Proof of a custom among merchants as to the price at which employees are authorized to purchase goods for their own use is admissible, the contract of employment being silent on that subject. Stoudenmire *v.* Harper, 81 Ala. 242, 1 So. 857.

24. Kriete *v.* Myer, 61 Md. 558.

25. *Illinois.*— Deshler *v.* Beers, 32 Ill. 368, 83 Am. Dec. 274.

Massachusetts.— Scudder *v.* Bradbury, 106 Mass. 422.

New Hampshire.— Farnsworth *v.* Chase, 19 N. H. 534, 51 Am. Dec. 206.

New York.— Goulds Mfg. Co. *v.* Munckenbeck, 20 N. Y. App. Div. 612, 47 N. Y. Suppl. 325; Stewart *v.* Ranney, 23 How. Pr. 205.

Pennsylvania.— Hursh *v.* North, 40 Pa. St. 241.

England.— Gordon *v.* Swan, 2 Campb. 429 note, 12 East 419, 11 Rev. Rep. 758 note; Swancott *v.* Westgarth, 4 East 75.

26. Phœnix Mut. L. Ins. Co. *v.* Batchen, 6 Ill. App. 621; Mand *v.* Trail, 92 Ind. 521, 47 Am. Rep. 163; Austin *v.* Bingham, 31 Vt. 577; Salmon Falls Mfg. Co. *v.* Goddard, 14 How. (U. S.) 446, 14 L. ed. 493.

A custom for the merchants in a certain city to retain the notes and bills of their country customers, paid by them, until a settlement at the end of the year is admissible. Remy *v.* Duffee, 4 Ala. 365. And see Winans *v.* Hassey, 48 Cal. 634.

27. Gurney *v.* Howe, 9 Gray (Mass.) 404, 69 Am. Dec. 299; Fargo First Nat. Bank *v.* Minneapolis, etc., Elevator Co., 11 N. D. 280, 91 N. W. 436; Warwicke *v.* Noakes, Peake N. P. 186; Hawkins *v.* Rutt, Peake N. P. 67.

28. Ober *v.* Carson, 62 Mo. 209; Southwestern Freight, etc., Co. *v.* Stanard, 44 Mo. 71, 100 Am. Dec. 255. But see Stanton *v.* Small, 3 Sandf. (N. Y.) 230; Furniss *v.* Hone, 8 Wend. (N. Y.) 247.

A usage of trade that on a sale of goods for cash they are delivered to the buyer without payment or demand of payment, and after a few days a bill of the goods is sent to the buyer and the price demanded, and in the meantime the seller retains a lien on the goods for the price, and that such a delivery is conditional, is invalid. Smith *v.* Lynes, 3 Sandf. (N. Y.) 203. The same is true of a usage of trade that the delivery of an order for flour by the seller to the buyer, the receipt thereof by him, and his presentation to the drawee of it, the seller not being notified of the non-acceptance of the order, is a delivery of the flour sold. Suydam *v.* Clark, 2 Sandf. (N. Y.) 133.

29. Haskins *v.* Warren, 115 Mass. 514.

30. Bywater *v.* Richardson, 1 A. & E. 508, 3 L. J. K. B. 164, 3 N. & M. 748, 28 E. C. L. 246; Smart *v.* Hyde, 1 Dowl. P. C. N. S. 60, 10 L. J. Exch. 479, 8 M. & W. 723; Weall *v.* King, 12 East 452, 11 Rev. Rep. 445; Jones *v.* Bowden, 4 Taunt. 847, 14 Rev. Rep. 683.

31. Gunther *v.* Atwell, 19 Md. 157; Sumner *v.* Tyson, 20 N. H. 384; Fatman *v.* Thompson, 2 Disn. (Ohio) 482.

32. *Kentucky.*—Baird *v.* Matthews, 6 Dana 129.

11. OFFICE AND OFFICER. Usage may prescribe an officer's duty,[33] his powers,[34] and his compensation.[35] In regard to the filling of offices the usage of the government[36] and the custom of a church society[37] have been recognized. So the long-continued practice of the executive department of the government to sign bills passed by the legislature in a certain mode is noticed by the courts.[38] But where a justice of the peace was indicted for malpractice in office in not returning a warrant and recognizance issued by him to the supreme court, but wilfully and corruptly suppressing it, evidence of a practice of other justices going to excuse defendant's acts was rejected.[39]

12. INTEREST. Whether or not interest is to be allowed and under what circumstances may be decided by evidence of custom and usage.[40]

Massachusetts.— Boardman *v.* Spooner, 13 Allen 353, 90 Am. Dec. 196; Dodd *v.* Farlow, 11 Allen 426, 87 Am. Dec. 726; Dickinson *v.* Gay, 7 Allen 29, 83 Am. Dec. 656; Whitmore *v.* South Boston Iron Co., 2 Allen 52; Casco Mfg. Co. *v.* Dixon, 3 Cush. 407; Mixer *v.* Coburn, 11 Metc. 559, 45 Am. Dec. 230.

New York.— Bierne *v.* Dord, 5 N. Y. 73; People's Bank *v.* Bogart, 16 Hun 270; Thompson *v.* Ashton, 14 Johns. 316.

Pennsylvania.— Wetherill *v.* Neilson, 20 Pa. St. 448, 54 Am. Dec. 741; Coxe *v.* Heiley, 19 Pa. St. 243; Snowden *v.* Warder, 3 Rawle 101.

Rhode Island.— Beckwith *v.* Farnum, 5 R. I. 230.

United States.— Barnard *v.* Kellogg, 10 Wall. 383, 19 L. ed. 987.

33. Eddy *v.* Faulkner, 3 Yeates (Pa.) 580; Woods *v.* Galbreath, 2 Yeates (Pa.) 306; Fennings *v.* Grenville, 1 Taunt. 241, 9 Rev. Rep. 760.

34. Taylor *v.* De Sotolingo, 6 La. Ann. 154.

Illustrations.— The following acts have been supported by the courts on proof of usage, viz.: A sale by the sheriff, by virtue of writs of venditioni exponas, after the return-day (Blythe *v.* Richards, 10 Serg. & R. (Pa.) 261, 13 Am. Dec. 672); the approval of an administration bond (Mayhew *v.* Soper, 10 Gill & J. (Md.) 366); the receipt by a deputy-sheriff of the amount due on an execution, and its discharge after the return-day (Wyer *v.* Andrews, 13 Me. 168, 29 Am. Dec. 497); and the employment by a notary public of clerks to perform a part of his duties (Munroe *v.* Woodruff, 17 Md. 159). And in an action by a sheriff on the bond of one of his deputies, the question being whether a certain return was a false one, evidence that it was in accordance with custom was held competent. Naylor *v.* Simmes, 4 Gill & J. (Md.) 273.

Where an acknowledgment was taken by a deputy-clerk who at the time was a minor the court said: "There is no statute in this state prescribing the qualifications of a deputy clerk. It has been the immemorial custom of clerks to appoint minor deputies, and, as far as we are advised, the legality of such appointments has never before been called in question, and we must regard such long-continued acquiescence on the part of the legislature, the bench, and the bar as the very highest possible evidence of its legality." Talbott *v.* Hooser, 12 Bush (Ky.) 408, 415.

35. U. S. *v.* Fillebrown, 7 Pet. (U. S.) 28, 8 L. ed. 596; U. S. *v.* Macdaniel, 7 Pet. (U. S.) 1, 8 L. ed. 587.

36. State *v.* Sorrells, 15 Ark. 664.

37. Miller *v.* Eschbach, 43 Md. 1.

38. Solomon *v.* Cartersville, 41 Ga. 157.

39. Lynes *v.* State, 46 Ga. 208.

40. *Alabama.*— Williams *v.* McConnico, 44 Ala. 627; Tate *v.* Innerarity, 1 Stew. & P. 33.

Connecticut.— Crosby *v.* Mason, 32 Conn. 482; Selleck *v.* French, 1 Conn. 32, 6 Am. Dec. 185.

Florida.— Pearson *v.* Grice, 8 Fla. 214.

Illinois.— Hitt *v.* Allen, 13 Ill. 592; Sammis *v.* Clark, 13 Ill. 544; Knoblock *v.* Romeis, 34 Ill. App. 577.

Indiana.— Shewel *v.* Givan, 2 Blackf. 312.

Iowa.— Veiths *v.* Hagge, 8 Iowa 163.

Louisiana.— But see Glasgow *v.* Stevenson, 6 Mart. N. S. 567.

Maine.— Goodwin *v.* Clark, 65 Me. 280.

Massachusetts.— Goff *v.* Rehoboth, 2 Cush. 475.

Michigan.— Comstock *v.* Smith, 20 Mich. 338; Kermott *v.* Ayer, 11 Mich. 181.

Mississippi.— Hendricks *v.* Robinson, 56 Miss. 694, 31 Am. Rep. 382; Effinger *v.* Henderson, 33 Miss. 449.

New Jersey.— Erie R. Co. *v.* Ackerson, 33 N. J. L. 33; Morris *v.* Allen, 14 N. J. Eq. 44.

New York.— Esterly *v.* Cole, 3 N. Y. 502; Salter *v.* Parthurst, 2 Daly 240; Reab *v.* McAlister, 8 Wend. 109; Meech *v.* Smith, 7 Wend. 315; Trotter *v.* Grant, 2 Wend. 413; Rensselaer Glass Factory *v.* Reid, 5 Cow. 587; Newell *v.* Griswold, 6 Johns. 45; Liotard *v.* Graves, 3 Cai. 226.

Pennsylvania.— Adams *v.* Palmer, 30 Pa. St. 346; Watt *v.* Hoch, 25 Pa. St. 411; Koons *v.* Miller, 3 Watts & S. 271; Knox *v.* Jones, 2 Dall. 193, 1 L. ed. 345.

South Carolina.— Knight *v.* Mitchell, 3 Brev. 506; Righton *v.* Blake, 1 Brev. 159. But see Heyward *v.* Searson, 1 Speers 249.

Vermont.— Goodnow *v.* Parsons, 36 Vt. 46; Raymond *v.* Isham, 8 Vt. 258.

Wisconsin.— Lamb *v.* Klaus, 30 Wis. 94.

United States.—Barclay *v.* Kennedy, 2 Fed. Cas. No. 976, 3 Wash. 350; Bispham *v.* Pollock, 3 Fed. Cas. No. 1,442, 1 McLean 411.

England.— Clancarty *v.* Latouche, 1 Ball & B. 420; Mosse *v.* Salt, 32 Beav. 269; Eddowes *v.* Hopkins, Dougl. (3d ed.) 376.

13. NEGLIGENCE. What is negligence and what is due care may depend upon the customs and habits of people in the same place and under similar circumstances.[41] So the drivers of horses and carriages on the highways[42] and the masters or pilots of ships and steamboats on the waters[43] must follow the customary mode of passing each other, and a failure to comply with such custom will amount to negligence. And the presentment of a check may be shown by usage to be in time, which without such proof would be deemed to be negligently delayed.[44] Again where the question was whether a guest at a hotel had been guilty of negligence in leaving the key in the door of his room, in which was a

Evidence of a custom among merchants to charge interest on capital invested by the principal in business is incompetent, in a suit by a salesman on an express contract entitling him to a share of the net profits of his principal's business for his services, without providing that interest on the capital should be deducted. Paine *v.* Howells, 90 N. Y. 660.

Where a certain period of credit is stipulated for, interest may be charged on an open account; but periodical rests will not be allowed when interest shall be converted into principal, and no custom or agreement to that effect can change the rule. Marr *v.* Southwick, 2 Port. (Ala.) 351.

41. Batson *v.* Donovan, 4 B. & Ald. 21, 22 Rev. Rep. 599, 6 E. C. L. 373; Vaughan *v.* Menlove, 3 Bing. N. Cas. 468, 3 Hodges 51, 1 Jur. 215, 6 L. J. C. P. 92, 4 Scott 244, 32 E. C. L. 219. See also the following cases:

Alabama.— Maxwell *v.* Eason, 1 Stew. 514.

Georgia.— Wright *v.* Central R., etc., Co., 16 Ga. 38.

Kentucky.—McKibben *v.* Bakens, 1 B. Mon. 120.

Massachusetts.— Cass *v.* Boston, etc., R. Co., 14 Allen 448; Lichtenhein *v.* Boston, etc., R. Co., 11 Cush. 70.

Pennsylvania.— Tower *v.* Grocers' Supply, etc., Co., 159 Pa. St. 106, 28 Atl. 229.

Vermont.—Brown *v.* Hitchcock, 28 Vt. 452.

Illustrations.— Where goods in the hands of a carrier were injured while he was descending a river with two flat-boats lashed together, the fact that this was a customary mode of navigating the river was held relevant on the question of negligence. Johnson *v.* Lightsey, 34 Ala. 169, 73 Am. Dec. 450. And a custom of the officers of a boat on the river to notify passengers of their arrival at their place of destination will render the carrier liable for taking a passenger who had failed to land at the proper place through not receiving the proper notice beyond his destination. Carson *v.* Leathers, 57 Miss. 650. So where a railroad company was sued for an injury to a passenger, received while alighting from the train at the depot, and the negligence charged was the failure of the train to stop a sufficient length of time to enable plaintiff to alight in safety, evidence of the usual and customary period of the train's stopping at the place was admitted. Fuller *v.* Naugatuck R. Co., 21 Conn. 557. And in an action for an injury to a passenger, one of the questions being whether a passenger is bound to wait in the depot until the arrival of the train, or whether he may go on to and stand upon the platform while it approaches, the usage of other passengers there is relevant. Caswell *v.* Boston, etc., R. Co., 98 Mass. 194, 93 Am. Dec. 151. And see Loveland *v.* Burke, 120 Mass. 139, 21 Am. Rep. 507; Jewell *v.* Grand Trunk R. Co., 55 N. H. 84.

As to the force of a custom on the contributory negligence of a servant in an action against the master for injuries received while in his employ see the following cases:

Illinois.— Pennsylvania Co. *v.* Hankey, 93 Ill. 580.

Iowa.— Kroy *v.* Chicago, etc., R. Co., 32 Iowa 357.

Minnesota.— Hughes *v.* Winona, etc., R. Co., 27 Minn. 137, 6 N. W. 553.

New York.— Sprong *v.* Boston, etc., R. Co., 60 Barb. 30.

Wisconsin.— Flannagan *v.* Chicago, etc., R. Co., 50 Wis. 462, 7 N. W. 337; Berg *v.* Chicago, etc., R. Co., 50 Wis. 419, 7 N. W. 347.

42. Bolton *v.* Colder, 1 Watts (Pa.) 360; Turley *v.* Thomas, 8 C. & P. 104, 34 E. C. L. 633; Leame *v.* Bray, 3 East 593.

43. *Alabama.*— Jones *v.* Pitcher, 3 Stew. & P. 135, 24 Am. Dec. 716.

Louisiana.— Domingo *v.* Merchants' Mut. Ins. Co., 19 La. Ann. 479; Myers *v.* Perry, 1 La. Ann. 372.

Michigan.— Drew *v.* The Steamboat Chesapeake, 2 Dougl. 33.

Ohio.— Boyce *v.* The Steamboat Empress, 1 Ohio Dec. (Reprint) 173, 3 West. L. J. 174.

Pennsylvania.— Simpson *v.* Hand, 6 Whart. 311, 36 Am. Dec. 231.

United States.— The City of Washington *v.* Baillie, 92 U. S. 31, 23 L. ed. 600; Barrett *v.* Williamson, 2 Fed. Cas. No. 1,051, 4 McLean 589; The Clement, 5 Fed. Cas. No. 2,879, 2 Curt. 363; The Maverick, 16 Fed. Cas. No. 9,316, 1 Sprague 23.

England.— General Steam Nav. Co. *v.* Morrison, 13 C. B. 581, 17 Jur. 673, 22 L. J. C. P. 178, 1 Wkly. Rep. 330, 76 E. C. L. 581; Morrison *v.* General Steam Nav. Co., 8 Exch. 733, 22 L. J. Exch. 233.

44. Smith *v.* Miller, 43 N. Y. 171, 52 N. Y. 545; Johnson *v.* Bank of North America, 5 Rob. (N. Y.) 554; Turner *v.* Fox Lake Bank, 4 Abb. Dec. (N. Y.) 434, 3 Keyes (N. Y.) 425, 2 Transcr. App. (N. Y.) 344 [*affirming* 23 How. Pr. 399]; Kelty *v.* Erie Second Nat. Bank, 52 Barb. (N. Y.) 328.

large sum of money, evidence of the usage of guests at the hotel of leaving keys in the doors of their rooms was held to be relevant.[45] But usage and custom will not excuse a carrier for neglect of any duty which he owes to a passenger[46] or to a customer whose goods he is bound to carry safely.[47] And in an action against a town for an injury caused by a defective bridge, the question as to how the particular bridge compared as to safety and repair with other bridges of like character on roads of like amount of travel is irrelevant.[48] So in an action against a railroad company for damages caused by fire from one of its locomotives, the issue being whether defendant had used due caution and diligence in preventing the spread of the fire, evidence that it was not the usual practice among railroads in that section of the country to employ watchmen is inadmissible.[49] And a usage cannot excuse an agent for any wilful neglect in securing the property of his principal.[50]

14. TRESPASS. What is a reasonable and proper use of a public or private way depends much on public usage. The general use and acquiescence of the public is evidence of the right. Many acts, although technically trespasses, are, considering the usages and customs of the community, not so.[51] So where there is a general usage in a neighborhood to let cattle run at large upon the highway and uninclosed lands adjoining, one adopting the usage is taken to have thereby licensed the cattle of others to run at large on his lands so situated.[52] But a cus-

45. Berkshire Woollen Co. *v.* Proctor, 7 Cush. (Mass.) 417.

46. Miller *v.* Pendleton, 8 Gray (Mass.) 547; Maury *v.* Talmadge, 16 Fed. Cas. No. 9,315, 2 McLean 157.

47. Hibler *v.* McCartney, 31 Ala. 501; Merchants', etc., Transp. Co. *v.* Story, 50 Md. 4, 33 Am. Rep. 293.

48. Bliss *v.* Wilbraham, 8 Allen (Mass.) 564.

In an action against a city for an injury to a pedestrian, caused by an opening in the sidewalk, it was ruled that the existence of similar apertures in various other parts of the city for a long period did not show that the alleged defect was not one for which the city was liable if any damage was occasioned thereby. Champaign *v.* Patterson, 50 Ill. 61; Bacon *v.* Boston, 3 Cush. (Mass.) 174. And in an action against a town for an injury received by reason of an uncovered drain, evidence that it was usual for towns in that part of the country to leave drains uncovered was excluded. Hinckley *v.* Barnstable, 109 Mass. 126.

Defendants were street-sprinklers, whose duty it was to keep the hydrants which they used in proper order. Plaintiff was injured in the winter time by slipping on a piece of ice formed by water which they had allowed to escape from a hydrant. It was held not competent to show a custom among street-sprinklers that at the close of the season for sprinkling the streets, when the water was supposed to be shut off, the boxes and pipes were not visited until the opening of the season in the spring. Crocker *v.* Schureman, 7 Mo. App. 358.

49. Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 23 L. ed. 356.

Where the question was whether a railroad company had been negligent in blowing the whistles of locomotives at crossings so as to frighten horses. it was held incompetent to show a custom on other railroads to blow whistles in a similar way. Hill *v.* Portland, etc., R. Co., 55 Me. 438, 92 Am. Dec. 601. And see Gahagan *v.* Boston, etc., R. Co., 1 Allen (Mass.) 187, 79 Am. Dec. 724. And where the negligence imputed to a railroad company was the failure to maintain a flagman at a crossing, the custom of other railroads in maintaining flagmen at crossings was excluded. Bailey *v.* New Haven, etc., R. Co., 107 Mass. 496.

50. Goodenow *v.* Tyler, 7 Mass. 36, 5 Am. Dec. 22. And see Stephens, etc., Transp. Co. *v.* Tuckerman, 33 N. J. L. 543.

51. Com. *v.* Blaisdell, 107 Mass. 234; Underwood *v.* Carney, 1 Cush. (Mass.) 285; O'Linda *v.* Lothrop, 21 Pick. (Mass.) 292; Philadelphia *v.* Presbyterian Bd., 29 Leg. Int. (Pa.) 53; Gerrard *v.* Cooke, 2 B. & P. N. R. 109; Hall *v.* Nottingham, 1 Ex. D. 1, 45 L. J. Exch. 50, 33 L. T. Rep. N. S. 697, 24 Wkly. Rep. 58.

Invalid customs.— Where a person had erected a bay-window to his house, projecting over the land of an adjoining owner, the court said: "If there be a custom in Boston to erect bay-windows, balconies and other structures over the streets, provided they do not interfere with the rights of the public, by proprietors who own the soil of the street, such a custom has no application to the case. If it be the custom to erect them over the land of other people, such a custom is illegal; and the defendant cannot justify himself in occupying his neighbor's property as a part of his dwelling-house on the ground that such trespasses are customary in Boston." Codman *v.* Evans, 5 Allen (Mass.) 308, 310, 81 Am. Dec. 748. And the custom of the inhabitants of a part of a city to allow children to play in the streets does not show that such a use of the streets is lawful. Schierhold *v.* North Beach, etc., R. Co., 40 Cal. 447.

52. Wheeler *v.* Rowell, 7 N. H. 515.

tom to take anything from another's land could not be supported at common law, the rule being that a profit *a prendre* could not be claimed *in alieno solo*.[53] So a custom to occupy or take from the land of another is bad.[54] What is a reasonable use of water in a stream is always a question of fact, and is to be determined by the capacity of the stream, the nature and character of the works sought to be propelled thereby, the machinery used, or the reasonable necessities of the mill-owner in view of all the facts, and finally by the custom of the country.[55]

E. Explaining Written Contract — 1. In General — a. Statement of Rule. It is well settled that evidence of custom and usage is admissible to explain the meaning of a written instrument. The admission of evidence of a custom is not dependent on the rule that parol evidence is not admissible to vary a written contract, but on the ground that the law makes the custom a part of the contract.[56]

b. Common Words and Terms. While words in a contract relating to the ordinary transactions of life are to be construed according to their plain, ordinary, and popular meaning, yet if, in reference to the subject-matter of the contract, particular words and expressions have by usage acquired a meaning different from their plain, ordinary, and popular meaning, the parties using those words in such a contract must be taken to have used them in their peculiar sense, and that sense may be fixed by parol evidence.[57] The evidence is not incompetent because the

A colt five weeks old, following its dam, was held not to be running at large, the universal custom of the country being for colts thus to follow the dam. Hillyard *v.* Grand Trunk R. Co., 8 Ont. 583.

Where plaintiff's colt had been killed by, as was alleged, the negligence of defendant in removing trees on his land, it was held that, it being shown to be the custom of the neighborhood to permit horses and cattle to run at large, defendant could not resist the action on the ground that the colt was trespassing on his land when it was killed. Durham *v.* Musselman, 2 Blackf. (Ind.) 96, 18 Am. Dec. 133. But in an action of trespass for killing a mare with dogs, that it is the custom of the neighborhood to set dogs on horses which broke into fences or inclosures is irrelevant. Evans *v.* Hesler, 1 Bibb (Ky.) 561.

53. Smith *v.* Floyd, 18 Barb. (N. Y.) 522; Churton *v.* Frewen, L. R. 2 Eq. 634, 12 Jur. N. S. 879, 35 L. J. Ch. 692, 14 L. T. Rep. N. S. 846; Lloyd *v.* Jones, 6 C. B. 81, 12 Jur. 657, 17 L. J. C. P. 206, 60 E. C. L. 81; Shuttleworth *v.* Le Fleming, 19 C. B. N. S. 687, 11 Jur. N. S. 840, 34 L. J. C. P. 309, 14 Wkly. Rep. 13, 115 E. C. L. 687; Constable *v.* Nicholson, 14 C. B. N. S. 230, 32 L. J. C. P. 240, 11 Wkly. Rep. 698, 108 E. C. L. 230.

54. Littlefield *v.* Maxwell, 31 Me. 135, 50 Am. Dec. 653; Waters *v.* Lilley, 4 Pick. (Mass.) 145, 16 Am. Dec. 333; Cobb *v.* Davenport, 32 N. J. L. 369; Kenyon *v.* Nichols, 1 R. I. 106.

A usage cannot excuse a trespass. Rivers *v.* Burbank, 13 Nev. 398; Knowles *v.* Dow, 22 N. H. 387, 55 Am. Dec. 163; Nudd *v.* Hobbs, 17 N. H. 524; Perley *v.* Langley, 7 N. H. 233.

A general usage of depositing lumber on the bank of a river without more cannot raise a presumption of a grant. Bethum *v.* Turner, 1 Me. 111, 10 Am. Dec. 36. And see Adams *v.* Morse, 51 Me. 497; Heath *v.* Ricker, 2 Me. 72.

A license to enter upon land and take fish cannot be implied by proving a custom in the country at large for every person to enter upon such lands and take fish. Winder *v.* Blake, 49 N. C. 332. *Contra*, Marsh *v.* Colby, 39 Mich. 626, 33 Am. Rep. 439.

55. Wood Nuisances, § 416.

"Usage is some proof of what is considered a reasonable and proper use of that which is a common right; because it affords evidence of the tacit consent of all parties interested, to the general convenience of such use." Per Shaw, C. J., in Gould *v.* Boston Duck Co., 13 Gray (Mass.) 442, 452.

56. Branch *v.* Palmer, 65 Ga. 210.

57. *Alabama.*— McClure *v.* Cox, 32 Ala. 617, 70 Am. Dec. 552; Hibler *v.* McCartney, 31 Ala. 501.

Illinois.— Dixon *v.* Dunham, 14 Ill. 324.

Indiana.— Lyon *v.* Lenon, 106 Ind. 567, 7 N. E. 311.

Kentucky.— Finnie *v.* Clay, 2 Bibb 351.

Louisiana.— Moore *v.* Johnston, 8 La. Ann. 488; Thompson *v.* Packwood, 2 La. Ann. 624.

Maine.— Farrar *v.* Stackpole, 6 Me. 154, 19 Am. Dec. 201.

Maryland.— Drury *v.* Young, 58 Md. 546, 42 Am. Rep. 343; Foley *v.* Mason, 6 Md. 37.

Massachusetts.— Shaw *v.* Mitchell, 2 Metc. 65.

Michigan.— Kelly *v.* Waters, 31 Mich. 404.

New Jersey.— Smith *v.* Lunger, 64 N. J. L. 539, 46 Atl. 623.

New York.— Miller *v.* Stern, 25 Misc. 690, 55 N. Y. Suppl. 765.

North Carolina.— Norris *v.* Fowler, 87 N. C. 9.

Washington.— Bowman *v.* Spokane First Nat. Bank, 9 Wash. 614, 38 Pac. 211, 43 Am. St. Rep. 870.

words are in their ordinary meaning unambiguous, for the principle of admission is that words perfectly unambiguous in their ordinary meaning are used by the parties in a different sense.[58] Thus evidence of usage has been admitted to show that "a thousand" meant twelve hundred;[59] "a week," a week only during a portion of the year;[60] and "a day," only a working-day.[61] So evidence has been admitted to expound the word "currency,"[62] as used in negotiable instruments; and the terms "bond,"[63] "borrowed money,"[64] and "expected,"[65] as used in other contracts.

c. Technical Terms or Words Peculiar to Some Art, Calling, or Occupation. Words technical or ambiguous on their face, or foreign or peculiar to the sciences or the arts, or to particular trades, professions, occupations, or localities, are explainable where they are employed in written instruments by parol evidence of usage.[66]

d. Adding Unexpressed Terms to Written Agreements — (i) *In General.* Evidence of usage is allowed not only to explain but to add tacitly implied incidents to the contract in addition to those which are actually expressed.[67]

United States.—Cincinnati First Nat. Bank *v.* Burkhardt, 100 U. S. 686, 25 L. ed. 766; Salmon Falls Mfg. Co. *v.* Goddard, 14 How. 446, 14 L. ed. 493; Ward *v.* Vosburgh, 31 Fed. 12; Turnbull *v.* Citizens' Bank, 16 Fed. 145, 4 Wood 193; The Queen of the East, 12 Fed. 165; Hancox *v.* Fishing Ins. Co., 11 Fed. Cas. No. 6,013, 3 Sumn. 132.

England.— Shore *v.* Wilson, 9 Cl. & F. 355, 7 Jur. 781, 11 Sim. 592, 34 Eng. Ch. 592, 8 Eng. Reprint 450; Atty.-Gen. *v.* Drummond, 1 C. & L. 210, 1 Dr. & War. 353; Myers *v.* Sarl, 7 Jur. N. S. 97, 30 L. J. Q. B. 9, 9 Wkly. Rep. 96; Drummond *v.* Atty.-Gen., 2 H. L. Cas. 837, 14 Jur. 137.

Canada.— Nordheimer *v.* Robinson, 2 Ont. App. 305; Burke *v.* Blake, 6 Ont. Pr. 260; Prior *v.* Atkinson, 19 Quebec Super. Ct. 210.

See 15 Cent. Dig. tit. "Customs and Usages," § 32.

Plain words have a stronger presumption in their favor than ambiguous ones; and therefore when it is sought to vary the meaning of such words, the evidence of custom should be very strong. Lewis *v.* Marshall, 8 Jur. 848, 13 L. J. C. P. 193, 7 M. & G. 729, 8 Scott N. R. 477.

58. Off *v.* J. B. Inderrieden Co., 74 Ill. App. 105; Brown *v.* Byrne, 2 C. L. R. 1599, 3 E. & B. 703, 18 Jur. 700, 23 L. J. Q. B. 313, 2 Wkly. Rep. 471, 77 E. C. L. 703; Myers *v.* Sarl, 7 Jur. N. S. 97, 30 L. J. Q. B. 9, 9 Wkly. Rep. 96.

A general dictionary of the English language is no authority to show on a trial the meaning of a word, which is relied on, as deriving a peculiar meaning from mercantile usage. Houghton *v.* Gilbart, 7 C. & P. 701, 32 E. C. L. 829.

Where it does not appear that the parties to a contract agreed on the meaning of a particular word in it, the custom of the trade will determine it. Bullock *v.* Finley, 28 Fed. 514.

59. Smith *v.* Wilson, 3 B. & Ad. 728, 1 L. J. K. B. 194, 23 E. C. L. 319.

60. Grant *v.* Maddox, 16 L. J. Exch. 227, 15 M. & W. 737.

61. Cochran *v.* Retberg, 3 Esp. 121.

62. Pilmer *v.* Des Moines Branch State Bank, 16 Iowa 321; Chambers *v.* George, 5 Litt. (Ky.) 335; Cockrill *v.* Kirkpatrick, 9 Mo. 697; Farwell *v.* Kennett, 7 Mo. 595.

"Canada money" see Thompson *v.* Sloan, 23 Wend. (N. Y.) 71, 35 Am. Dec. 546.

"Ills. cy." see Hulbert *v.* Carver, 37 Barb. (N. Y.) 62.

"Kentucky currency" see Lampton *v.* Haggard, 3 T. B. Mon. (Ky.) 149.

"Texas money" see Roberts *v.* Short, 1 Tex. 373.

63. Stone *v.* Bradbury, 14 Me. 185.

64. Murray *v.* Spencer, 24 Md. 520.

65. Bold *v.* Rayner, 1 M. & W. 343. And see Fawkes *v.* Lamb, 8 Jur. N. S. 385, 31 L. J. Q. B. 98, 10 Wkly. Rep. 348.

66. *Alabama.*— Barlow *v.* Lambert, 28 Ala. 704, 65 Am. Dec. 374.

Illinois.— Broadwell *v.* Broadwell, 6 Ill. 599.

Maryland.— Williams *v.* Woods, 16 Md. 220.

Massachusetts.— Eaton *v.* Smith, 20 Pick. 150.

New Jersey.— Smith *v.* Clayton, 29 N. J. L. 357; Hartwell *v.* Camman, 10 N. J. Eq. 128, 64 Am. Dec. 448.

United States.—Moran *v.* Prather, 23 Wall. 492, 23 L. ed. 121; Seymour *v.* Osborne, 11 Wall. 516, 20 L. ed. 33.

England.— Hills *v.* Evans, 8 Jur. N. S. 525, 31 L. J. Ch. 457, 6 L. T. Rep. N. S. 90; Grant *v.* Maddox, 16 L. J. Exch. 227, 15 M. & W. 737.

See 15 Cent. Dig. tit. "Customs and Usages," § 32.

67. *Alabama.*— Waring *v.* Grady, 49 Ala. 465, 20 Am. Rep. 286; Smith *v.* Mobile Nav., etc., Ins. Co., 30 Ala. 167; Alabama, etc., R. Co. *v.* Kidd, 29 Ala. 221; Barlow *v.* Lambert, 28 Ala. 704, 65 Am. Dec. 374; Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 27 Ala. 77; Ezell *v.* Miller, 6 Port. 307; Sampson *v.* Gazzam, 6 Port. 123, 30 Am. Dec. 578.

Arkansas.— Worthington *v.* Curd, 15 Ark. 491; Buckner *v.* Real Estate Bank, 5 Ark. 536, 41 Am. Dec. 105; *Ex p.* Conway, 4 Ark. 302.

(II) *Terms Added by Usage Cannot Establish Contract.* The incident added by a usage cannot alone establish the contract. Before the incident can be added the contract as made must be shown.[68] So where a statute lays down a

California.— Callahan *v.* Stanley, 57 Cal. 476.

Connecticut.— Seymour *v.* Page, 33 Conn. 61; Kilgore *v.* Bulkley, 14 Conn. 362; Halsey *v.* Brown, 3 Day 346.

District of Columbia.— Bragg *v.* Bletz, 7 D. C. 105.

Georgia.— Wheelwright *v.* Dyal, 99 Ga. 247, 25 S. E. 170.

Illinois.— Lyon *v.* Culbertson, 83 Ill. 33, 25 Am. Rep. 349; U. S. Life Ins. Co. *v.* Advance Co., 80 Ill. 549; Doane *v.* Dunham, 79 Ill. 131; Munn *v.* Burch, 25 Ill. 35; Oldershaw *v.* Knoles, 4 Ill. App. 63.

Indiana.— Morningstar *v.* Cunningham, 110 Ind. 328, 11 N. E. 593, 59 Am. Rep. 211; Leiter *v.* Emmons, 20 Ind. App. 22, 50 N. E. 40.

Kentucky.—Kendall *v.* Russell, 5 Dana 501, 30 Am. Dec. 696.

Louisiana.— Moore *v.* Johnston, 8 La. Ann. 488.

Maine.— Robinson *v.* Fiske, 25 Me. 401; Bodfish *v.* Fox, 23 Me. 90, 39 Am. Dec. 611.

Maryland.— Kraft *v.* Fancher, 44 Md. 204; Appleman *v.* Fisher, 34 Md. 540; Williams *v.* Woods, 16 Md. 220; Foley *v.* Mason, 6 Md. 37; Merchants' Mut. Ins. Co. *v.* Wilson, 2 Md. 217; Allegre *v.* Maryland Ins. Co., 2 Gill & J. 136, 20 Am. Dec. 424.

Massachusetts.— Nonantum Worsted Co. *v.* North Adams Mfg. Co., 156 Mass. 331, 31 N. E. 293; Loveland *v.* Burke, 120 Mass. 139, 21 Am. Rep. 507; Day *v.* Holmes, 103 Mass. 306; Parkhurst *v.* Gloucester Mut. Fishing Ins. Co., 100 Mass. 301, 97 Am. Dec. 100, 1 Am. Rep. 105; Whitmarsh *v.* Conway F. Ins. Co., 16 Gray 359, 77 Am. Dec. 414; Eaton *v.* Smith, 20 Pick. 150; Thompson *v.* Hamilton, 12 Pick. 425, 23 Am. Dec. 619; Lowry *v.* Russell, 8 Pick. 360.

Michigan.— Ledyard *v.* Hibbard, 48 Mich. 421, 12 N. W. 637, 42 Am. Rep. 474.

Mississippi.— Burbridge *v.* Gumbel, 72 Miss. 371, 16 So. 792; Harper *v.* Calhoun, 7 How. 203.

Missouri.— Kimball *v.* Brawner, 47 Mo. 398; Soutier *v.* Kellerman, 18 Mo. 509.

Montana.— Hayes *v.* Union Mercantile Co., 27 Mont. 264, 70 Pac. 975.

Nebraska.— McKee *v.* Wild, 52 Nebr. 9, 71 N. W. 958.

New Hampshire.— Lebanon *v.* Heath, 47 N. H. 353; Foye *v.* Leighton, 22 N. H. 71, 53 Am. Dec. 231.

New Jersey.— Barton *v.* McKelway, 22 N. J. L. 165.

New York.— Wilson *v.* Randall, 67 N. Y. 338; Walls *v.* Bailey, 49 N. Y. 464, 10 Am. Rep. 407; Dent *v.* North American Steamship Co., 49 N. Y. 390; Badley *v.* Wheeler, 44 N. Y. 495; Mead *v.* Northwestern Ins. Co., 7 N. Y. 530; Esterly *v.* Cole, 3 N. Y. 502; Fellows *v.* New York, 17 Hun 249; Jones *v.* Bradner, 10 Barb. 193; Lawrence *v.* Gallagher, 42 N. Y. Super. Ct. 309; Mallory *v.* Commercial Ins. Co., 9 Bosw. 101; Hone *v.* Mutual Safety Ins. Co., 1 Sandf. 137; Sewall *v.* Gibbs, 1 Hall 663; Mangum *v.* Farrington, 1 Daly 236; Dalton *v.* Daniels, 2 Hilt. 472; Allen *v.* Merchants' Bank, 22 Wend. 215, 34 Am. Dec. 289; Boorman *v.* Jenkins, 12 Wend. 566, 27 Am. Dec. 158; Turner *v.* Burrows, 8 Wend. 144 [*affirming* 5 Wend. 541]; Coit *v.* Commercial Ins. Co., 7 Johns. 385, 5 Am. Dec. 282.

North Carolina.— Long *v.* Davidson, 101 N. C. 170, 7 S. E. 758.

Ohio.— Inglebright *v.* Hammond, 19 Ohio 337, 53 Am. Dec. 430; Babcock *v.* May, 4 Ohio 335; Pullan *v.* Cochran, 6 Ohio Dec. (Reprint) 1070, 10 Am. L. Rec. 184, 6 Cinc. L. Bul. 390.

Pennsylvania.— Burger *v.* Farmers' Mut. Ins. Co., 71 Pa. St. 422; Gordon *v.* Little, 8 Serg. & R. 553, 11 Am. Dec. 632; Stone *v.* Van Nort, 3 L. T. N. S. 84; Adams *v.* Insurance Co., 11 Pittsb. Leg. J. 265.

South Carolina.— Conner *v.* Robinson, 2 Hill 354.

Vermont.— Linsley *v.* Lovely, 26 Vt. 123.

Virginia.— Harris *v.* Nicholas, 5 Munf. 483.

West Virginia.— Connolly *v.* Bruner, 48 W. Va. 71, 35 S. E. 927.

Wisconsin.— Gehl *v.* Milwaukee Produce Co., (1903) 93 N. W. 36; Lamb *v.* Klaus, 30 Wis. 94; Vliet *v.* Campbell, 13 Wis. 198.

United States.—Cincinnati First Nat. Bank *v.* Burkhardt, 100 U. S. 686, 25 L. ed. 766; Turner *v.* Yates, 16 How. 14, 14 L. ed. 824; U. S. *v.* McDaniel, 7 Pet. 1, 8 L. ed. 587; Renner *v.* Columbia Bank, 9 Wheat. 581, 6 L. ed. 166; Bullock *v.* Finley, 28 Fed. 514; The Queen of the East, 12 Fed. 165; Hostetter *v.* Gray, 11 Fed. 179; Sanderson *v.* Columbian Ins. Co., 21 Fed. Cas. No. 12,298, 2 Cranch C. C. 218.

England.— Abinger *v.* Ashton, L. R. 17 Eq. 358, 22 Wkly. Rep. 582; Robertson *v.* Jackson, 2 C. B. 412, 10 Jur. 98, 15 L. J. C. P. 28, 52 E. C. L. 412; Brown *v.* Byrne, 2 C. L. R. 1599, 3 E. & B. 703, 18 Jur. 700, 23 L. J. Q. B. 313, 2 Wkly. Rep. 471, 77 E. C. L. 703; Sotilichos *v.* Kemp, 3 Exch. 105, 18 L. J. Exch. 36; Kempson *v.* Boyle, 3 H. & C. 763, 11 Jur. N. S. 832, 34 L. J. Exch. 191, 14 Wkly. Rep. 15.

See 15 Cent. Dig. tit. "Customs and Usages," § 27.

That parties to a contract had a different understanding concerning the usage governing it does not bring the case within the rule that where the minds of the parties do not meet as to its subject-matter or its essential terms there is no binding contract, for the difference is only as to its legal effect. Scudder *v.* Bradbury, 106 Mass. 422.

68. *Georgia.*— Cooper *v.* Berry, 21 Ga. 526, 68 Am. Dec. 468.

certain rule, but prescribes that the parties may contract otherwise, a usage will not take the place of a contract.[69] And where a contract is by word of mouth, and the controversy is not as to the meaning of the terms used by the parties, but as to what precise terms had been in fact used, evidence of custom is not admissible.[70]

2. CONTRACTS OF SALE — a. Quality and Description of Goods. The meaning of technical terms, or of words not in themselves technical except when used in a particular trade, has been explained by evidence of usage in cases where the question was one of quality or description.[71] Thus evidence of usage among dealers has been admitted to show the meaning of "season," in a contract to pur-

Illinois.—Currie *v.* Syndicate, 104 Ill. App. 165.

Maine.— Ulmer *v.* Farnsworth, 80 Me. 500, 15 Atl. 65.

New Jersey.—Schenck *v.* Griffin, 38 N. J. L. 462.

United States.—Tilley *v.* Chicago, 103 U. S. 155, 26 L. ed. 374; Cincinnati First Nat. Bank *v.* Burkhardt, 100 U. S. 686, 25 L. ed. 766; District of Columbia Nat. Sav. Bank *v.* Ward, 100 U. S. 195, 25 L. ed. 621. See also Municipal Ins. Co. *v.* Industrial, etc., Trust Co., 89 Fed. 254.

See 15 Cent. Dig. tit. "Customs and Usages," § 22.

69. Walker *v.* Western Transp. Co., 3 Wall. (U. S.) 150, 18 L. ed. 172.

70. Lawson Usages and Customs 371.

71. *California.*— Merchin *v.* Ball, 68 Cal. 205, 8 Pac. 886.

Iowa.— Coulter Mfg. Co. *v.* Ft. Dodge Grocery Co., 97 Iowa 616, 66 N. W. 875.

Massachusetts.— Page *v.* Cole, 120 Mass. 37; Swett *v.* Shumway, 102 Mass. 365, 9 Am. Rep. 471.

Minnesota.— Merchant *v.* Howell, 53 Minn. 295, 55 N. W. 131.

New Jersey.— Barton *v.* McKelway, 22 N. J. L. 165.

New York.— Sawyer *v.* Dean, 114 N. Y. 469, 21 N. E. 1012; Baker *v.* Squier, 1 Hun 448.

North Carolina.— Littlejohn *v.* Gilchrist, 3 N. C. 393.

United States.—South Bend Iron-Works Co. *v.* Cothrell, 31 Fed. 254.

England.— Lucas *v.* Bristow, E. B. & E. 907, 5 Jur. N. S. 68, 27 L. J. Q. B. 364, 6 Wkly. Rep. 685, 96 E. C. L. 907; Mackenzie *v.* Dunlop, 2 Jur. N. S. 957, 8 Macq. H. L. 22, 4 Wkly. Rep. 815; Mitchell *v.* Henry, 24 Sol. J. 689.

Illustrations.— Where one contracted to sell "1170 bales of gambier," and the purchaser refused to receive the bales, evidence was held admissible to show that by the usage of the trade a bale of gambier was understood to mean a package of a particular description, and that the contract was not satisfied by a tender of packages of a totally different size and description. Gorrissen *v.* Perrin, 2 C. B. N. S. 681, 3 Jur. N. S. 867, 27 L. J. C. P. 29, 5 Wkly. Rep. 709, 89 E. C. L. 681. And on a sale of "18 pockets Kent hops, at 100s," evidence may be given that by the usage of the hop trade a contract so worded means one hundred shillings a hundred-weight. Spicer *v.* Cooper, 1 Q. B. 424, 1 G. & D. 52, 5 Jur. 1036, 10 L. J. Q. B. 241, 41 E. C. L. 608. So in a contract for the sale of "all patterns that are staple and down to date," evidence regarding the standard usually adopted by the trade in selecting and purchasing such patterns is admissible. Hayden *v.* Frederickson, 55 Nebr. 156, 75 N. W. 530. On a contract for the sale of "prime barley," the quality called for by such terms may be ascertained by mercantile usage. Whitmore *v.* Coates, 14 Mo. 9. So as to "strictly choice" apples (Long *v.* J. K. Armsby Co., 43 Mo. App. 253) and "yearlings" in the cattle business (Parks *v.* O'Connor, 70 Tex. 377, 8 S. W. 104). So evidence is admissible to show the meaning of "product," in an instrument which recited: "Received from teams in our pork house, No. 114 West Harrison street, 280 hogs, weighing 45,545 pounds, the product of which we promise to deliver to the order of Messrs. Stevens & Brother indorsed hereon. G. & J. Stewart." Stewart *v.* Smith, 28 Ill. 397. And it may be shown that "300 bales S. F. drills, 7¼; 190 cases blue do., 8¾," mean the first quantities at seven and one-quarter, and eight and three-quarter cents a yard (Salmon Falls Mfg. Co. *v.* Goddard, 14 How. (U. S.) 446, 14 L. ed. 493); that "mess pork of Scott & Co." means mess pork manufactured by Scott & Co. (Powell *v.* Horton, 2 Bing N. Cas. 668, 2 Hodges 12, 5 L. J. C. P. 204, 3 Scott 110, 29 E. C. L. 710); and that oil is "wet" if it contains any water, however little (Warde *v.* Stuart, 1 C. B. N. S. 88, 5 Wkly. Rep. 6, 87 E. C. L. 88). And the following terms in written contracts of sale have been explained by parol evidence of usage: "Copper-fastened vessel" (Shepherd *v.* Kain, 5 B. & Ald. 240, 24 Rev. Rep. 344, 7 E. C. L. 137; Schneider *v.* Heath, 3 Campb. 506, 14 Rev. Rep. 506); "No. 1 log" (Busch *v.* Pollock, 41 Mich. 64, 1 N. W. 921. And see Hopkins *v.* Sanford, 41 Mich. 243, 2 N. W. 39); "good team," in a contract for a mower which should be "capable, with one man and a good team, of cutting and raking off from twelve to twenty acres of grain a day" (Ganson *v.* Madigan, 15 Wis. 144, 82 Am. Dec. 659); "best E X F F madder" (Dana *v.* Fiedler, 1 E. D. Smith (N. Y.) 463); "150 tons of soft English lead, of Walker, Parker & Walker brand" (Pollen *v.* Le Roy, 30 N. Y. 549); and "fresh seed," in a contract for onion seed (Ferris *v.* Comstock, 33 Conn. 513).

chase and deliver corn "on board our boats the coming season";[72] to show the meaning of "good custom cowhide boots," in an agreement to pay for a number of those articles at a certain price;[73] to show what is called for on a contract to deliver "winter strained lamp oil,"[74] and on a contract to deliver "good merchantable hay";[75] to explain the meaning of "prime logs,"[76] and "merchantable pine lumber";[77] to show that the words "with all faults," in a contract for the sale of hides, mean all that are not inconsistent with the identity of the goods;[78] that under a contract to build a "drawbridge" it is the common understanding among persons skilled in bridge-building that the bridge should be so constructed as to be easily turned in two or three minutes by one man;[79] that "cider" in a contract of sale meant the juice of the apples as soon as pressed;[80] that "gas-fixtures" in a contract did not include meters;[81] and that a certain glass is known in the market as "German cylinder glass."[82]

b. Quantity, Terms, and Price. In like manner and for like reason evidence of usage on the question as to quantity, terms, and price is admissible.[83] Thus where a contract called for "sixty thousand cubic feet square white-oak lumber," a custom in the market to reject fractions of a foot in its measurement was held to be admissible.[84] And where goods were "to be taken by" a certain time, custom is admissible to show that these words meant as the purchaser might from time to time specifically order, and that if all were not ordered within the time specified it was customary to send the purchaser a bill for the balance, and to hold such balance subject to his order for a reasonable time.[85] So usage has defined a cord of wood to mean one hundred and twenty-eight cubic feet.[86] It has also defined the manner of weighing paper in the paper trade.[87] So it is competent to show that ten ounces of silk thread signified between dealers not a full pound but a trade pound.[88] Again it is competent to show by commercial usage that the

72. Myers *v.* Walker, 24 Ill. 133.
73. Wait *v.* Fairbanks, Brayt. (Vt.) 77.
74. Hart *v.* Hammett, 18 Vt. 127.
75. Fitch *v.* Carpenter, 43 Barb. (N. Y.) 40.
76. Spring *v.* Cockburn, 19 U. C. C. P. 63.
In a contract "to saw lumber, and to retain any spoiled," it is competent to show that "spoiled lumber" is such as is rendered unmarketable. Harris *v.* Rathbun, 2 Abb. Dec. (N. Y.) 326, 2 Keyes (N. Y.) 312.
77. Ragland *v.* Butler, 18 Gratt. (Va.) 323. See also Jones *v.* Clarke, 2 H. & N. 725, 27 L. J. Exch. 165.
78. Whitney *v.* Boardman, 118 Mass. 242.
79. Florida R. Co. *v.* Smith, 21 Wall. (U. S.) 255, 22 L. ed. 513.
80. Studdy *v.* Sanders, 5 B. & C. 628, 8 D. & R. 403, 11 E. C. L. 614.
81. Downs *v.* Sprague, 1 Abb. Dec. (N. Y.) 550.
82. Mixer *v.* Coburn, 11 Metc. (Mass.) 559, 45 Am. Dec. 230.
83. *Maryland.*— Pinckney *v.* Dambmann, 72 Md. 173, 19 Atl. 450.
Massachusetts.— Miller *v.* Stevens, 100 Mass. 518, 97 Am. Dec. 123, 1 Am. Rep. 139.
Missouri.— Soutier *v.* Kellerman, 18 Mo. 509.
Montana.— Hayes *v.* Union Mercantile Co., 27 Mont. 264, 70 Pac. 975.
New York.— Goodrich *v.* Stevens, 5 Lans. 230. And see Smith *v.* Clews, 114 N. Y. 190, 21 N. E. 160, 11 Am. St. Rep. 627, 4 L. R. A. 392.
Pennsylvania.— Guillon *v.* Earnshaw, 169 Pa. St. 463, 32 Atl. 545.
Vermont.— Humphreysville Copper Co. *v.* Vermont Copper Min. Co., 33 Vt. 92.
England.— Smith *v.* Wilson, 3 B. & Ad. 728, 1 L. J. K. B. 194, 23 E. C. L. 319; Fawkes *v.* Lamb, 8 Jur. N. S. 385, 31 L. J. Q. B. 98, 10 Wkly. Rep. 348.
84. Merick *v.* McNally, 26 Mich. 374. And see McGraw *v.* Sturgeon, 29 Mich. 426.
On a contract for lumber, evidence is admissible to show that in the phrase "one thousand feet in each raft," the words "one thousand feet" mean linear measure. Brown *v.* Brooks, 25 Pa. St. 210.
A contract which provides for the sale of "all the timber" six inches in diameter but which is silent as to laps passes the laps also by the local custom and usage of lumbermen. Allen *v.* Crank, (Va.) 1895) 23 S. E. 772.
Where logs are to be sold at a certain price for so much lumber as they are "estimated" to make, the mode of estimating is to be shown by custom. Heald *v.* Cooper, 8 Me. 32.
85. Atkinson *v.* Truesdell, 127 N. Y. 230, 27 N. E. 844 [*affirming* 57 N. Y. Super. Ct. 226, 6 N. Y. Suppl. 509].
The words, "consigned 6 mo.," may be shown to mean that the goods were consigned if returned in six months, but that if not so returned they were regarded as sold. George *v.* Joy, 19 N. H. 544.
86. Kennedy *v.* Oswego, etc., R. Co., 67 Barb. (N. Y.) 169. And see McManus *v.* Louden, 53 Minn. 339, 55 N. W. 139.
87. Everitt *v.* Indiana Paper Co., 25 Ind. App. 287, 57 N. E. 281.
88. Baer *v.* Glaser, 90 Mo. App. 289.

words "net balance" mean the balance of the proceeds after deducting the expenses incident to the sale;[89] that the words "terms cash" in a bill of goods imply that a discount would be made if it was paid in six months;[90] that where goods are sold to a broker at a certain price "cash" a discount is allowed;[91] that "about" so many tons of hemp has a definite meaning when used in a delivery order;[92] that a contract for the sale of gold "short" means a sale of that which the seller does not at the time have, but which he expects to be able to purchase at a lower price;[93] that the word "honored" means paid, and not accepted, in the phrase in a merchant's letter, "when the bills are duly honored";[94] that upon a note payable in cotton yarn, at "wholesale factory prices," a certain discount is allowed by manufacturers and dealers;[95] and that on a sale "on note with approved security" negotiable notes are meant.[96] And evidence of usage has been admitted to show the meaning of "your wool," in a written offer to buy "your wool, 16*s* per stone, deliverable at Liverpool;"[97] to show the meaning of the words "ex boats Spencer and Galt," in a contract for "two boat loads western mixed corn in B.'s stores, Clinton wharf, ex boats Spencer and Galt";[98] to show the meaning of "season," in a contract for the delivery of grain "the coming season";[99] of "month";[1] of "for shipment in June or July";[2] of "to be paid for in from six to eight weeks";[3] of "on freight";[4] of "bale";[5] and of "six per cent off for cash."[6] So as to "buyer's option"[7] and "immediate delivery."[8] And abbreviations and ambiguous expressions as to the price in a written contract are properly explained by proof as to the customary meaning of such characters or contractions.[9]

3. Contracts For Work and Materials. Contracts for work to be performed and materials to be furnished are the frequent subject of construction by evidence of usage. Thus the number of bricks laid in a pavement under a contract may be computed by allowing a given number to the square yard according to the usage of pavers.[10] And the same has been held of a usage of measuring cellar

89. Evans *v.* Waln, 71 Pa. St. 69.
90. George *v.* Joy, 19 N. H. 544.
91. Drury *v.* Young, 58 Md. 546, 42 Am. Rep. 343.
92. Moore *v.* Campbell, 2 C. L. R. 1084, 10 Exch. 323, 23 L. J. Exch. 310.
93. Appleman *v.* Fisher, 34 Md. 540.
94. Lucas *v.* Groning, 2 Marsh. 460, 1 Stark. 391, 2 E. C. L. 151, 7 Taunt. 164, 2 E. C. L. 308.
95. Avery *v.* Stewart, 2 Conn. 69, 7 Am. Dec. 240.
96. Frum *v.* Keeney, 109 Iowa 393, 80 N. W. 507.
97. Macdonald *v.* Longbottom, 1 E. & E. 977, 9 Jur. N. S. 724, 29 L. J. Q. B. 256, 2 L. T. Rep. N. S. 606, 8 Wkly. Rep. 614, 102 E. C. L. 977.
98. Hay *v.* Leigh, 48 Barb. (N. Y.) 393. And see Rhoades *v.* Castner, 12 Allen (Mass.) 130.
99. Myers *v.* Walker, 24 Ill. 133.
1. Simpson *v.* Margitson, 11 Q. B. 23, 17 L. J. Q. B. 81, 63 E. C. L. 23.
2. Alexander *v.* Vanderzee, L. R. 7 C. P. 530, 20 Wkly. Rep. 871.
3. Ashforth *v.* Redford, L. R. 9 C. P. 20.
4. Outwater *v.* Nelson, 20 Barb. (N. Y.) 29.
5. Taylor *v.* Briggs, 2 C. & P. 525, M. & M. 28, 12 E. C. L. 712.
6. Linsley *v.* Lovely, 26 Vt. 123.
7. Hackett *v.* Smith, 4 Wkly. Notes Cas. (Pa.) 475.
8. Neldon *v.* Smith, 36 N. J. L. 148.
9. Thus in one case "40 of 3.——58*l*" (Cooper *v.* Smith, 15 East 103, 13 Rev. Rep. 397); in another, "five per cent advance" (Cole *v.* Wendel, 8 Johns. (N. Y.) 116); in another, "best madder, 12¼" (Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130); in another, "at the rate of one 100 + dolls. per ton" (Taylor *v.* Beavers, 4 E. D. Smith (N. Y.) 215); in another, "cost" (Gray *v.* Harper, 10 Fed. Cas. No. 5,716, 1 Story 574. And see Buck *v.* Burk, 18 N. Y. 337); in another "cost price" (Herst *v.* Comeau, 1 Sweeny (N. Y.) 590); in another, "cas" (Farmers', etc., Bank *v.* Day, 13 Vt. 36) were interpreted by evidence of usage.
10. Cole *v.* Skrainka, 37 Mo. App. 427; Pittsburgh *v.* O'Neill, 1 Pa. St. 342 [apparently *overruling* Jordan *v.* Meredith, 3 Yeates (Pa.) 318, 2 Am. Dec. 373]. And see Loftus *v.* Rilly, 83 Iowa 503, 50 N. W. 17.

In a contract to construct "two boilers and a cylinder for a steam engine," it may be proved that those terms, used as terms of the trade, meant the entire engine. James *v.* Bostwick, Wright (Ohio) 143.

Where A and B entered into a contract by which A was to cut and fit the stone for walls of a tunnel at a specified price per foot, "the face of the work that shows to be measured, and none else," and A claimed that "the face of the work" included all the cut and dressed surface exposed, both horizontal and perpendicular, while B insisted on an oppo-

walls.[11] So also a contract requiring "brick to be laid close, and the joints thoroughly flushed with mortar" may be controlled by a custom among bricklayers of the locality which gives meaning to the term "flushed."[12] Where by a building contract plaintiff agreed to make certain alterations and repairs upon defendant's house, for which the latter agreed to pay a certain amount "per day" for each man employed, it was held competent to show a usage among carpenters that ten hours constituted a "day's work, and that they were entitled to charge one day and a quarter for each day during which the men worked twelve hours and a half."[13] So where a contract for the erection of a building specifies the dimensions of the walls, floors, etc., but says nothing about the roof, it may be shown by evidence of the custom of the trade that such a contract did not call for a tin roof, or indeed for any roof.[14] And on a similar principle and for the same reasons evidence of usage has been received to prove the meaning of "hard-pan" in a contract to make excavations,[15] and to explain the terms "business card," "advertising chart," and the word "published," in an agreement to pay another a certain sum "for inserting business card in two hundred copies of his advertising chart, to be paid when the chart is published."[16]

4. Principal and Agent. Where in a written contract of sale signed by brokers the names of the principals did not appear, evidence was held admissible of a usage of trade that when a broker purchased without disclosing the name of his principal he was liable to be looked to as principal.[17] And evidence is admissible to show that the word "agent" in the piano trade includes those who buy and sell pianos on their own account,[18] and as to what share of commission brokers in a transaction arising out of a written authority are entitled to.[19] So a usage which the agents of a railroad company have allowed to grow up in the business and be acted on is binding on such company, although contrary to its established regulations and unknown to its managing officers.[20]

5. Mines and Mining. The custom of miners is admissible to explain the meaning of words in a mining lease.[21]

site meaning, the difference was settled by evidence of usage. St. Martin *v.* Thrasher, 40 Vt. 460.

11. Ford *v.* Tirrell, 9 Gray (Mass.) 401, 69 Am. Dec. 297. See also Walls *v.* Bailey, 49 N. Y. 464, 10 Am. Rep. 407; Lowe *v.* Lehman, 15 Ohio St. 179; Welsh *v.* Huckestein, 152 Pa. St. 27, 25 Atl. 138.

As to custom of estimating on walls shown on plan see Builders and Architects, 6 Cyc. 23 note 81.

12. Laycock *v.* Parker, 103 Wis. 161, 79 N. W. 327.

One contracting to deliver one hundred thousand brick, to be counted and measured according to the custom of bricklayers, is bound to furnish only the specified number according to such estimate, even though the number of brick will be less than one hundred thousand. Brown *v.* Cole, 45 Iowa 601; Brunold *v.* Glasser, 25 Misc. (N. Y.) 285, 53 N. Y. Suppl. 1021; Sweeney *v.* Thomason, 9 Lea (Tenn.) 359, 42 Am. Rep. 676.

Where polished marble slabs of a certain thickness were ordered it was held proper to prove that in the marble trade such an order means slabs of the stated thickness as they come from the saw, and does not require them to be of such thickness when prepared for use. Evans *v.* Western Brass Mfg. Co., 118 Mo. 548, 24 S. W. 175.

13. Hinton *v.* Locke, 5 Hill (N. Y.) 437.

14. Reynolds *v.* Jourdan, 6 Cal. 108.

15. Currier *v.* Boston, etc., R. Co., 34 N. H. 498; Dickinson *v.* Poughkeepsie Water Com'rs, 2 Hun (N. Y.) 615; Dubois *v.* Delaware, etc., R. Co., 12 Wend. (N. Y.) 334.

16. Stoops *v.* Smith, 100 Mass. 63, 1 Am. Rep. 85, 97 Am. Dec. 76. *Compare* Zerrahn *v.* Ditson, 117 Mass. 553; Hotson *v.* Browne, 9 C. B. N. S. 442, 7 Jur. N. S. 633, 30 L. J. C. P. 106, 9 Wkly. Rep. 233, 99 E. C. L. 442.

17. Hutchinson *v.* Tatham, L. R. 8 C. P. 482, 42 L. J. C. P. 260, 29 L. T. Rep. N. S. 103, 22 Wkly. Rep. 18; Humfrey *v.* Dale, 7 E. & B. 266, 3 Jur. N. S. 213, 26 L. J. Q. B. 137, 90 E. C. L. 266 [*affirmed* in E. B. & E. 1004, 5 Jur. N. S. 191, 27 L. J. Q. B. 390, 6 Wkly. Rep. 854, 96 E. C. L. 1004]. And see Fleet *v.* Murton, L. R. 7 Q. B. 126, 41 L. J. Q. B. 49, 26 L. T. Rep. N. S. 181, 20 Wkly. Rep. 97.

18. Whittemore *v.* Weiss, 33 Mich. 348.

19. Allan *v.* Sundius, 1 H. & C. 123.

20. Montgomery, etc., R. Co. *v.* Kolb, 73 Ala. 396, 49 Am. Rep. 54.

21. Clayton *v.* Gregson, 5 A. & E. 302, 1 Hurl. & W. 159, 4 N. & M. 602, 6 N. & M. 694, 31 E. C. L. 623.

As to customs of mines and mining see Table Mountain Tunnel Co. *v.* Stranahan, 31 Cal. 387; Morton *v.* Solambo, etc., Min. Co., 26 Cal. 527; St. John *v.* Kidd, 26 Cal. 263; Colman *v.* Clements, 23 Cal. 245; Gore *v.* McBrayer, 18 Cal. 582; Prosser *v.* Parks, 18 Cal.

6. MASTER AND SERVANT. Evidence of usage is admissible to explain a written contract of service and attach incidents thereto.[22]

7. INSURANCE — a. In General. Where the sense of the words and expressions used in a policy is either ambiguous or obscure on the face of the instrument, or is made so by proof of extrinsic circumstances, parol evidence is admissible to explain by usage their meaning in a given case.[23]

b. Marine Insurance. Evidence of usage has been admitted to show that the word "corn" includes every kind of grain and also beans and peas[24] and malt,[25] but does not include rice;[26] that "salt" does not include saltpeter;[27] that the words "loading off shore" include loading at a bridge pier;[28] that "skins" include furs;[29] that "roots" are limited to such as are perishable in their nature, as beets and other garden roots, and do not include sarsaparilla;[30] that insurance upon an "outfit" of a whaler covers a quarter of the catchings;[31] that bundles of rods are considered as "bar-iron";[32] that live stock is comprehended within the term "cargo";[33] as to what is a "bale";[34] and as to the meaning of "furniture,"[35] of "goods, species, and effects,"[36] and of "sea letter."[37] So evidence of a

47; English *v.* Johnson, 17 Cal. 107, 76 Am. Dec. 574; Roach *v.* Gray, 16 Cal. 383; Waring *v.* Crow, 11 Cal. 366; Packer *v.* Heaton, 9 Cal. 568; Hicks *v.* Bell, 3 Cal. 219. And see Strang *v.* Ryan, 46 Cal. 33; Harvey *v.* Ryan, 42 Cal. 626; Correa *v.* Frietas, 42 Cal. 339; Bradley *v.* Lee, 38 Cal. 362; Dutch Flat Water Co. *v.* Mooney, 12 Cal. 534; Sullivan *v.* Hense, 2 Colo. 424. As to customs under the Mexican law see Von Schmidt *v.* Huntington, 1 Cal. 55. See also Golden Fleece Co. *v.* Cable Co., 12 Nev. 312; Oreamuno *v.* Uncle Sam, etc., Co., 1 Nev. 215; Mallett *v.* Uncle Sam, etc., Co., 1 Nev. 188, 90 Am. Dec. 484; Kinney *v.* Consolidated Virginia Min. Co., 14 Fed. Cas. No. 7,827, 4 Sawy. 382.

22. For example the holidays to which the employee was entitled to by custom (Reg. *v.* Stoke-Upon-Trent, 5 Q. B. 303, Dav. & M. 357, 8 Jur. 34, 13 L. J. M. C. 41, 48 E. C. L. 303); what "years" and "week" meant in a contract for the services of an actor (Leavitt *v.* Kennicott, 157 Ill. 235, 41 N. E. 737; Grant *v.* Maddox, 16 L. J. Exch. 227, 15 M. & W. 737); and to explain the duties of an employment under a written contract; what service the employee was to render, where his work was to be done, what goods he was to sell, and what hours he was to be employed (Hosley *v.* Black, 28 N. Y. 438; Hagan *v.* Domestic Sewing Mach. Co., 9 Hun (N. Y.) 73; Price *v.* Mouat, 11 C. B. N. S. 508, 103 E. C. L. 508; Sweet *v.* Lee, 5 Jur. 1134, 3 M. & G. 452, 4 Scott N. R. 77). Engaged as a "lace buyer," the servant may show that an order from his employer to fold some lace on cards was not within his contract, and that his refusal to do so would not justify his dismissal (Price *v.* Mouat, 11 C. B. N. S. 508, 103 E. C. L. 508); or, engaged as a traveling salesman, and agreeing not to go over "the same ground" for any other house, these words may be explained by parol evidence of usage (Mumford *v.* Gething, 7 C. B. N. S. 305, 6 Jur. N. S. 428, 29 L. J. C. P. 105, 1 L. T. Rep. N. S. 64, 8 Wkly. Rep. 187, 97 E. C. L. 305); and usage may explain what is included in "ship-carpenters' work," as these words are used in a contract (Collyer *v.* Collins, 17 Abb. Pr. (N. Y.) 467). A dancing-girl was engaged in France as a danseuse for a New Orleans theater. It was held that she might justify her refusal to dance a parlor dance in full dress in the comedy of "The Serious Family" by showing that such was not by custom required of danseuses. Baron *v.* Placide, 7 La. Ann. 229. See also Hichhorn *v.* Bradley, 117 Iowa 130, 90 N. W. 592; Newhall *v.* Appleton, 114 N. Y. 140, 21 N. E. 105, 3 L. R. A. 859; Brown *v.* Baldwin, etc., Co., 13 N. Y. Suppl. 893; McCulsky *v.* Klosterman, 20 Oreg. 108, 25 Pac. 366, 10 L. R. A. 785.

23. Arnould Ins. 89. And see Mooney *v.* Howard Ins. Co., 138 Mass. 375, 52 Am. Rep. 277; Cogswell *v.* Chubb, 157 N. Y. 709, 53 N. E. 1124; Astor *v.* Union Ins. Co., 7 Cow. (N. Y.) 202; Coit *v.* Commercial Ins. Co., 7 Johns. (N. Y.) 385, 5 Am. Dec. 282; Sleght *v.* Rhinelander, 1 Johns. (N. Y.) 192, 2 Johns. (N. Y.) 531; Baker *v.* Ludlow, 2 Johns. Cas. (N. Y.) 289.

24. Mason *v.* Skurray, Park. Ins. 245.

25. Moody *v.* Surridge, Park. Ins. 245.

26. Scott *v.* Bourdillion, 2 B. & P. N. R. 213.

27. Journu *v.* Bourdieu, Park. Ins. 245.

28. Johnson *v.* Northwestern, etc., Ins. Co., 39 Wis. 87.

29. Astor *v.* Union Ins. Co., 7 Cow. (N. Y.) 202.

30. Coit *v.* Commercial Ins. Co., 7 Johns. (N. Y.) 385, 5 Am. Dec. 282; Baker *v.* Ludlow, 2 Johns. Cas. (N. Y.) 289.

31. Macy *v.* Whaling Ins. Co., 9 Metc. (Mass.) 354.

32. Evans *v.* Commercial, etc., Ins. Co., 6 R. I. 47.

33. Allegre's *v.* Maryland Ins. Co., 2 Gill & J. (Md.) 136, 20 Am. Dec. 424, 6 Harr. & J. (Md.) 408, 14 Am. Dec. 289.

34. Taylor *v.* Briggs, 2 C. & P. 525, M. & M. 28, 12 E. C. L. 712. See also Gray *v.* Harper, 10 Fed. Cas. No. 5,716, 1 Story 574.

35. Brough *v.* Whitmore, 4 T. R. 206, 2 Rev. Rep. 361.

36. Gregory *v.* Christie, 3 Dougl. 419, 26 E. C. L. 274.

37. Sleght *v.* Rhinelander, 1 Johns. (N. Y.) 192, 2 Johns. (N. Y.) 531.

custom would be admissible to show that the words "whaling voyage" include the taking of sea-elephants on the beaches of islands and coasts as well as the catching of whales wherever found;[38] that the word "proceeds" includes the identical goods insured if brought back on the return voyage;[39] and that the term "particular average" does not include expenses which are necessarily incurred in order to save the subject-matter of insurance from a loss for which the insurers would have been liable, and that these are usually allowed under the name of particular charges.[40] So the words "port risk" in a policy may be explained.[41] It has been held that the words "sail from St. Domingo in the month of October" were to be understood, when taken in connection with the usage of the trade, as indicating that the ship would not sail until the twenty-fifth.[42] And the phrase, "warranted to depart with convoy," has been literally construed according to the usage among merchants.[43] If geographical terms are used in a policy, it may be shown that the meaning put upon them by mercantile men is different from their common meaning as given in books.[44]

c. Fire Insurance. When a word is used in a technical or peculiar sense, as applicable to any trade or branch of business insured or to any particular class of people, it is proper to receive evidence of usage to explain and illustrate it.[45]

8. Carriers of Goods. It has been held proper to prove that according to the usage of the transportation business the words "quantity guaranteed," in a bill of lading for grain, meant that the bill of lading was conclusive evidence of the amount of grain to be delivered, and that if it fell short the carrier was to pay for the shortage.[46] So the terms in a letter to carriers of goods from their cus-

38. Child *v.* Sun Mut. Ins. Co., 3 Sandf. (N. Y.) 26.

39. Dow *v.* Whetten, 8 Wend. (N. Y.) 160.

40. Kidston *v.* Empire Mar. Ins. Co., L. R. 1 C. P. 535, 12 Jur. N. S. 665, 36 L. J. C. P. 156, 16 L. T. Rep. N. S. 119, 15 Wkly. Rep. 769.

41. Nelson *v.* Sun Mut. Ins. Co., 71 N. Y. 453.

42. Yates *v.* Duff, 5 C. & P. 369, 24 E. C. L. 609; Chaurand *v.* Angerstein, Peake N. P. 61.

43. Lethulier's Case, 2 Salk. 443. And see Robertson *v.* French, 4 East 130, 4 Esp. 246, 7 Rev. Rep. 535.

44. *Alabama.*— Mobile Mar., etc., Ins. Co. *v.* McMillan, 27 Ala. 77.

Iowa.— Steyer *v.* Dwyer, 31 Iowa 20.

Maine.— Cobb *v.* Lime Rock F. & M. Ins. Co., 58 Me. 326.

Massachusetts.— Fay *v.* Alliance Ins. Co., 16 Gray 455; Martin *v.* Hilton, 9 Metc. 371, "harbor of Boston."

United States.— Gracie *v.* Marine Ins. Co., 8 Cranch 75, 3 L. ed. 492.

England.—Robertson *v.* Clarke, 1 Bing. 445, 2 L. J. C. P. O. S. 71, 8 Moore C. P. 622, 25 Rev. Rep. 676, 8 E. C. L. 587; Moxon *v.* Atkins, 3 Campb. 200, 13 Rev. Rep. 789; Uhde *v.* Walters, 3 Campb. 16, 13 Rev. Rep. 737; Mallan *v.* May, 9 Jur. 19, 14 L. J. Exch. 48, 13 M. & W. 511, "city of London."

45. White *v.* Mutual F. Ins. Co., 8 Gray (Mass.) 566; Mead *v.* Northwestern Ins. Co., 7 N. Y. 530; Babcock *v.* Montgomery, etc., Ins. Co., 4 N. Y. 326; New York Belting, etc., Co. *v.* Washington F. Ins. Co., 10 Bosw. (N. Y.) 428; Webb *v.* National F. Ins. Co., 2 Sandf. (N. Y.) 497; Fowler *v.* Ætna F. Ins. Co., 7 Wend. (N. Y.) 270; Franklin F. Ins. Co. *v.* Brock, 57 Pa. St. 74. And see Percival *v.* Maine Mut. Ins. Co., 33 Me. 242; Mooney *v.* Howard Ins. Co., 138 Mass. 375, 52 Am. Rep. 277; Whitmarsh *v.* Conway F. Ins. Co., 16 Gray (Mass.) 359, 77 Am. Dec. 414; Daniels *v.* Hudson River F. Ins. Co., 12 Cush. (Mass.) 416, 50 Am. Dec. 192; Crocker *v.* People's Mut. Ins. Co., 8 Cush. (Mass.) 79; Houghton *v.* Manufacturers' Ins. Co., 8 Metc. (Mass.) 114, 41 Am. Dec. 489; Sims *v.* State Ins. Co., 47 Mo. 54, 4 Am. Rep. 311.

46. Bissel *v.* Campbell, 54 N. Y. 353.

Where a bill of lading does not define what shall constitute a car-load, a general custom among railroad men and shippers, by which a car-load is made to consist of a certain number of pounds, governs the contract. Goode *v.* Chicago, etc., R. Co., 92 Iowa 371, 60 N. W. 631. And where a bill of lading recited that certain cotton was shipped on a specified steamboat, it was ruled admissible to show that by the custom of the river, when the river was low, barges were carried in tow and freight stored at the option of the carrier on either the boat or the barge. McClure *v.* Cox, 32 Ala. 617, 70 Am. Dec. 552. And where a railroad company received goods addressed to a point beyond its terminus and gave a bill of lading for the transportation of the goods to its terminus, it was held that parol evidence was admissible to prove that there was a custom in such cases to deliver to a connecting carrier, such evidence not tending to vary or contradict the bill of lading. Hooper *v.* Chicago, etc., R. Co., 27 Wis. 81, 9 Am. Rep. 439. So evidence of usage is admissible to explain a bill of lading, as to the time in which loading is to be done or delivery is to be made. Higgins *v.* U. S. Mail Steamship Co., 12 Fed. Cas. No. 6,469, 3 Blatchf. 282;

tomers, "Please send the marbles not insured," are to be read "according to the understanding of the language between carrier and customers."[47] And evidence of a custom to present bills for wharfage as soon as the vessel arrives is admissible to establish what the intention of the parties was as to the time when such bills were due.[48] Again evidence of usage has been frequently resorted to to explain charter-parties and maritime contracts of like character.[49] So if the charter of a railroad company provides that the company may charge certain rates for the transportation of "heavy articles," and other rates on "articles of measurement," the custom prevailing at the time the charter was granted must decide to which class an article belongs.[50]

9. Deeds. Usage is admissible to explain the language of a deed,[51] when ambiguous or equivocal.[52] The form of deeds is also a matter of usage.[53] A purchaser under a land contract that does not specify what sort of deed he is entitled to may demand a deed with the customary covenants.[54] And usage may prove a dedication.[55] Again where a lease did not contain any provision as to the length of time it was to run, and no agreement as to time, parol evidence of a custom or usage as to the length of time in such cases was held to be admissible.[56] And in enforcing a lessee's covenant to pay all taxes "which may be payable or assessed in respect of the premises or any part thereof during the term," the lessor may prove a usage to apportion the taxes among the different tenants according to the amount of rent paid by each.[57]

10. Wills. Evidence of usage is of value in arriving at the intent of a testator

Balfour *v.* Wilkins, 9 Cent. L. J. 56; Commercial Steamship Co. *v.* Boulton, L. R. 10 Q. B. 346, 3 Aspin. 111, 44 L. J. Q. B. 219, 33 L. T. Rep. N. S. 707, 23 Wkly. Rep. 854; Cochran *v.* Retberg, 3 Esp. 121. The meaning of "Derby Line" (Connecticut, etc., R. Co. *v.* Baxter, 32 Vt. 805) and "their freight" (Noyes *v.* Canfield, 27 Vt. 79) as used in these instruments has been arrived at by evidence of usage; and "privilege of reshipping" has also been explained in the same way (Broadwell *v.* Butler, 4 Fed. Cas. No. 1,910, 6 McLean 296). And see The Tybee, 24 Fed. Cas. No. 14,304, 1 Woods 358.

47. Peek *v.* North Staffordshire R. Co., 10 H. L. Cas. 473, 9 Jur. N. S. 914, 32 L. J. Q. B. 241, 8 L. T. Rep. N. S. 768, 11 Wkly. Rep. 1023.

48. Aiken *v.* Eager, 35 La. Ann. 567.

49. Barker *v.* Borzone, 48 Md. 474; Ogden *v.* Parsons, 23 How. (U. S.) 167, 16 L. ed. 410; Sorensen *v.* Keyser, 51 Fed. 30, 2 C. C. A. 92; Lindsay *v.* Cusimano, 10 Fed. 302; Peisch *v.* Dickson, 19 Fed. Cas. No. 10,911, 1 Mason 9; Philadelphia, etc., R. Co. *v.* Northam, 19 Fed. Cas. No. 11,090, 2 Ben. 1; Buckle *v.* Knoop, L. R. 2 Exch. 125, 36 L. J. Exch. 49, 16 L. T. Rep. N. S. 231, 15 Wkly. Rep. 588; Bottomley *v.* Forbes, 1 Arn. 481, 5 Bing. N. Cas. 121, 2 Jur. 1016, 8 L. J. C. P. 85, 6 Scott 816, 35 E. C. L. 74; Birch *v.* Depeyster, 4 Campb. 385, 1 Stark. 210, 2 E. C. L. 86; Hudson *v.* Clementson, 18 C. B. 213, 25 L. J. C. P. 234, 86 E. C. L. 213; Liedemann *v.* Schultz, 14 C. B. 38, 2 C. L. R. 87, 18 Jur. 42, 23 L. J. C. P. 17, 2 Wkly. Rep. 35, 78 E. C. L. 38; Robertson *v.* Jackson, 2 C. B. 412, 10 Jur. 98, 15 L. J. C. P. 28, 52 E. C. L. 412; Russian Steam Nav. Trading Co. *v.* Silva, 13 C. B. N. S. 610, 106 E. C. L. 610; Brown *v.* Byrne, 2 C. L. R. 1599, 3 E. & B. 703, 18 Jur. 700, 23 L. J. Q. B. 313, 2 Wkly. Rep. 471, 77 E. C. L. 703; Norden Steamship Co. *v.* Dempsey, 1 C. P. D. 654, 45 L. J. C. P. 764, 24 Wkly. Rep. 984; Cuthbert *v.* Cumming, 11 Exch. 405, 1 Jur. N. S. 686, 24 L. J. Exch. 310, 3 Wkly. Rep. 553, 10 Exch. 809; Robertson *v.* Wait, 8 Exch. 299, 22 L. J. Exch. 209, 1 Wkly. Rep. 132; Phillipps *v.* Briard, 1 H. & N. 21, 25 L. J. Exch. 233, 4 Wkly. Rep. 486; Gibbon *v.* Young, 2 Moore C. P. 224, 19 Rev. Rep. 510.

50. Bonham *v.* Charlotte, etc., R. Co., 13 S. C. 267.

51. Cortelyou *v.* Van Brundt, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439; Mitchel *v.* U. S., 9 Pet. (U. S.) 711, 9 L. ed. 283; U. S. *v.* Percheman, 7 Pet. (U. S.) 51, 8 L. ed. 604.

52. Jenny Lind Co. *v.* Bower, 11 Cal. 194; Collins *v.* Driscoll, 34 Conn. 43; Seymour *v.* Page, 33 Conn. 61; Prather *v.* Ross, 17 Ind. 495; Seay *v.* Walton, 5 T. B. Mon. (Ky.) 368; Farrar *v.* Stackpole, 6 Me. 154, 19 Am. Dec. 201; Brown *v.* Brown, 8 Metc. (Mass.) 573; Cambridge *v.* Lexington, 17 Pick. (Mass.) 222; New Jersey Zinc Co. *v.* Boston Franklinite Co., 15 N. J. Eq. 418; Springsteen *v.* Samson, 32 N. Y. 703; French *v.* Carhart, 1 N. Y. 96; Parsons *v.* Miller, 15 Wend. (N. Y.) 561; Livingston *v.* Ten Broeck, 16 Johns. (N. Y.) 14, 8 Am. Dec. 287; Carey *v.* Bright, 58 Pa. St. 70; U. S. *v.* Perot, 98 U. S. 428, 25 L. ed. 251.

53. Kirkendall *v.* Mitchell, 14 Fed. Cas. No. 7,841, 3 McLean 144.

54. Gault *v.* Van Zile, 37 Mich. 22; Allen *v.* Hazen, 26 Mich. 142; Dwight *v.* Cutler, 3 Mich. 566, 64 Am. Dec. 105.

55. Sevey's Case, 6 Me. 118.

56. Brincefield *v.* Allen, 25 Tex. Civ. App. 258, 60 S. W. 1010.

57. Amory *v.* Melvin, 112 Mass. 83.

or the proper construction of a charitable gift.[58] So where the testator has been accustomed to designate a person by his surname alone,[59] or a pet name or nickname,[60] or even a wrong name,[61] these names when appearing in his will may be explained by proof of his usage.

F. Repugnancy to Express Contract — 1. General Rule. A custom or usage which is repugnant to the terms of an express contract is not permitted to operate against it, and evidence of it is inadmissible;[62] for while usage may be

58. *Connecticut.*— American Bible Soc. *v.* Wetmore, 17 Conn. 181; Ayres *v.* Weed, 16 Conn. 291.

Maine.— Howard *v.* American Peace Soc., 49 Me. 288.

New York.— Lefevre *v.* Lefevre, 59 N. Y. 434; Hart *v.* Marks, 4 Bradf. Surr. 161.

Vermont.— Button *v.* American Tract. Soc., 23 Vt. 336.

England.— Doe *v.* Allen, 12 A. & E. 451, 9 L. J. Q. B. 395, 4 P. & D. 320, 40 E. C. L. 227; Shore *v.* Wilson, 9 Cl. & F. 355, 8 Eng. Reprint 450, 7 Jur. 781, 11 Sim. 592, 34 Eng. Ch. 592; Beaumont *v.* Fell, 2 P. Wms. 141; Thomas *v.* Thomas, 6 T. R. 671. And see Doe *v.* Hiscocks, 2 H. & H. 54, 3 Jur. 955, 5 M. & W. 363, 368.

59. Clayton *v.* Nugent, 13 L. J. Exch. 363, 13 M. & W. 200.

The same rule would apply to any unusual mode of designating his property, either his real or personal estate. Redfield Wills 631. See also Hopkins *v.* Grimes, 14 Iowa 73; Atty.-Gen. *v.* Dublin, 38 N. H. 459; Ryerss *v.* Wheeler, 22 Wend. (N. Y.) 148; Anstee *v.* Nelms, 1 H. & N. 225, 26 L. J. Exch. 5, 4 Wkly. Rep. 612; Goblet *v.* Beechy, 3 Sim. 24, 9 L. J. Ch. O. S. 200, 6 Eng. Ch. 24 [*reversed* in 2 R. & M. 624, 11 Eng. Ch. 624, on another ground, which was vigorously attacked by Sir James Wigram (Wigram Wills 141)]. *Compare* Kell *v.* Charmer, 23 Beav. 195, 4 Wkly. Rep. 787.

60. Andrews *v.* Dobson, 1 Cox Ch. 425, 29 Eng. Reprint 1232; 1 Redfield Wills 630.

61. Lee *v.* Pain, 4 Hare 201, 9 Jur. 247, 14 L. J. Ch. 346, 30 Eng. Ch. 201.

62. *Alabama.*— Wilson *v.* Smith, 111 Ala. 170, 20 So. 134; Powell *v.* Thompson, 80 Ala. 51; Wilkinson *v.* Williamson, 76 Ala. 163; Barlow *v.* Lambert, 28 Ala. 704, 65 Am. Dec. 374.

California.— Ah Tong *v.* Earle Fruit Co., 112 Cal. 679, 45 Pac. 7; Burns *v.* Sennett, 99 Cal. 363, 33 Pac. 916; Corwin *v.* Patch, 4 Cal. 204.

Connecticut.— Glendale Woolen Co. *v.* Protection Ins. Co., 21 Conn. 19, 54 Am. Dec. 309.

District of Columbia.— Thompson *v.* Riggs, 6 D. C. 99.

Georgia.— Branch *v.* Palmer, 65 Ga. 210; Park *v.* Piedmont, etc., L. Ins. Co., 48 Ga. 601.

Illinois.— Lake Shore, etc., R. Co. *v.* Richards, 126 Ill. 448, 18 N. E. 794; Corbett *v.* Underwood, 83 Ill. 324, 25 Am. Rep. 392; Galena Ins. Co. *v.* Kupfer, 28 Ill. 332, 81 Am. Dec. 284; Currie *v.* Syndicate, 104 Ill. App. 165; Mobile Fruit, etc., Co. *v.* Judy, 91 Ill. App. 82; Abendpost Co. *v.* Hertel, 67 Ill. App. 501; Mayer *v.* Lawrence, 58 Ill. App. 194; Corrigan *v.* Herrin, 44 Ill. App. 363; Mulliner *v.* Bronson, 14 Ill. App. 355.

Indiana.— Scott *v.* Hartley, 126 Ind. 239, 25 N. E. 826; Van Camp Packing Co. *v.* Hartman, 126 Ind. 177, 25 N. E. 901; Seavey *v.* Shurick, 110 Ind. 494, 11 N. E. 597; Sohn *v.* Jarvis, 101 Ind. 578, 1 N. E. 73; Spears *v.* Ward, 48 Ind. 541; Rafert *v.* Scroggins, 40 Ind. 195; Atkinson *v.* Allen, 29 Ind. 375.

Iowa.— Ryan *v.* Dubuque, 112 Iowa 284, 83 N. W. 1073; Stansbury *v.* Kephart, 54 Iowa 674, 7 N. W. 110; Smyth *v.* Ward, 46 Iowa 339; Randolph *v.* Halden, 44 Iowa 327; Windland *v.* Deeds, 44 Iowa 98; Duncan *v.* Green, 43 Iowa 679; Marks *v.* Cass County Mill, etc., Co., 43 Iowa 146; Wilmering *v.* McGaughey, 30 Iowa 205, 6 Am. Rep. 673; Phillips *v.* Starr, 26 Iowa 349.

Kansas.— Graham *v.* Trimmer, 6 Kan. 230.

Kentucky.— Western Dist. Warehouse Co. *v.* Hayes, 97 Ky. 16, 29 S. W. 738, 16 Ky. L. Rep. 763; Caldwell *v.* Dawson, 4 Mete. 121; Kendall *v.* Russell, 5 Dana 501, 30 Am. Dec. 696; Capital Gas, etc., Co. *v.* Gaines, 49 S. W. 462, 20 Ky. L. Rep. 1464.

Louisiana.— Crook *v.* Tensas Basin Levee Dist., 51 La. Ann. 285, 25 So. 88.

Maine.— Ripley *v.* Crooker, 47 Me. 370, 74 Am. Dec. 491; Bodfish *v.* Fox, 23 Me. 90, 39 Am. Dec. 611.

Maryland.— Susquehanna Fertilizer Co. *v.* White, 66 Md. 444, 7 Atl. 802, 59 Am. Rep. 186; Rich *v.* Bryce, 39 Md. 314; Foley *v.* Mason, 6 Md. 37.

Massachusetts.— Menage *v.* Rosenthal, 175 Mass. 358, 56 N. E. 579; Hadden *v.* Roberts, 134 Mass. 38, 45 Am. Rep. 276; Grinnell *v.* Western Union Tel. Co., 113 Mass. 299, 18 Am. Rep. 485; Brown *v.* Foster, 113 Mass. 136, 18 Am. Rep. 463; Thwing *v.* Great Western Ins. Co., 111 Mass. 93; Sneeling *v.* Hall, 107 Mass. 134; Palmer *v.* Clark, 106 Mass. 373; Potter *v.* Smith, 103 Mass. 68; Boardman *v.* Spencer, 13 Allen 353, 90 Am. Dec. 196; Rice *v.* Codman, 1 Allen 377; Macomber *v.* Parker, 13 Pick. 175; Randall *v.* Rotch, 12 Pick. 107.

Michigan.— Meloche *v.* Chicago, etc., R. Co., 116 Mich. 69, 74 N. W. 301; Brigham *v.* Martin, 103 Mich. 150, 61 N. W. 276; Lamb *v.* Henderson, 63 Mich. 302, 29 N. W. 732; Ledyard *v.* Hibbard, 48 Mich. 421, 12 N. W. 637, 42 Am. Rep. 474; Erwin *v.* Clark, 13 Mich. 10; Harvey *v.* Cady, 3 Mich. 431.

Minnesota.— Keavy *v.* Thuett, 47 Minn. 766, 50 N. W. 126; Globe Milling Co. *v.* Minneapolis Elevator Co., 44 Minn. 153, 46 N. W. 306; Paine *v.* Smith, 33 Minn. 495, 24 N. W. 305.

Missouri.— Wolff *v.* Campbell, 110 Mo. 114, 19 S. W. 622; Kimball *v.* Brawner, 47 Mo.

admissible to explain what is doubtful it is never admissible to contradict what is plain.[63] The test as to whether or not the custom is repugnant is whether or not the custom or usage if written into the contract would make it insensible or inconsistent.[64]

2. CARRIER AND CUSTOMER. The meaning of the letters "C. O. D." in an express receipt cannot be changed by evidence of custom.[65] So evidence of a custom among ship-owners that the exception of "dangers of the seas," in a bill of lading, extended to all losses except those arising from their neglect is inadmissible.[66]

398; Goodfellow *v.* Meegan, 32 Mo. 280; Pavey *v.* Burch, 3 Mo. 447, 26 Am. Dec. 682; Keller *v.* Meger, 74 Mo. App. 318; Miller *v.* Dunlap, 22 Mo. App. 97.

Montana.— Keefe *v.* Doreland, 16 Mont. 16, 39 Pac. 916.

New Hampshire.— Swamscot Mach. Co. *v.* Partridge, 25 N. H. 369; New Hampshire Mut. F. Ins. Co. *v.* Rand, 24 N. H. 428; George *v.* Bartlett, 22 N. H. 496.

New Jersey.—Schenck *v.* Griffin, 38 N. J. L. 462; Steward *v.* Scudder, 24 N. J. L. 96; Barton *v.* McKelway, 22 N. J. L. 165; Society, etc. *v.* Haight, 1 N. J. Eq. 393.

New York.— O'Donohue *v.* Leggett, 134 N. Y. 40, 31 N. E. 269; Hopper *v.* Sage, 112 N. Y. 530, 20 N. E. 350, 8 Am. St. Rep. 771; Bigelow *v.* Legg, 102 N. Y. 652, 6 N. E. 107; Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224 [*reversing* 64 Barb. 457]; McIntosh *v.* Pendleton, 75 N. Y. App. Div. 621, 78 N. Y. Suppl. 152; Howell *v.* Dimock, 15 N. Y. App. Div. 102, 44 N. Y. Suppl. 271; Lane *v.* Bailey, 47 Barb. 395; Hone *v.* Mutual Safety Ins. Co., 1 Sandf. 137; Dalton *v.* Daniels, 2 Hilt. 472; Main *v.* Eagle, 1 E. D. Smith 619; De Cernea *v.* Cornell, 1 Misc. 399, 20 N. Y. Suppl. 895; Gotze *v.* Dunphy, 31 N. Y. Suppl. 302; Hinton *v.* Locke, 5 Hill 437; Parsons *v.* Miller, 15 Wend. 561; Cortelyou *v.* Van Brundt, 2 Johns. 357, 3 Am. Dec. 439.

North Carolina.— Thompson *v.* Exum, 131 N. C. 111, 42 S. E. 543; Silver Valley Min. Co. *v.* North Carolina Smelting Co., 122 N. C. 542, 29 S. E. 940; Cooper *v.* Purvis, 46 N. C. 141.

North Dakota.— Deacon *v.* Mattison, 11 N. D. 190, 91 N. W. 35.

Ohio.— Beer *v.* Forest City Mut. Ins. Co., 39 Ohio St. 109; Babcock *v.* May, 4 Ohio 334; Tillyer *v.* Van Cleve Glass Co., 13 Ohio Cir. Ct. 99, 7 Ohio Cir. Dec. 209; Appalachian Bank *v.* Gatch, 2 Ohio S. & C. Pl. Dec. 366, 7 Ohio N. P. 307.

Pennsylvania.— Riley *v.* Pennsylvania Mut. L. Ins. Co., 189 Pa. St. 307, 42 Atl. 191; Pittsburgh Ins. Co. *v.* Frazee, 107 Pa. St. 521; Coxe *v.* Heisley, 19 Pa. St. 243; Porter *v.* Patterson, 15 Pa. St. 229; Keener *v.* U. S. Bank, 2 Pa. St. 237; Shaw *v.* Deal, 7 Pa. Co. Ct. 379, 25 Wkly. Notes Cas. 59; Stokes *v.* Fenner, 10 Phila. 14.

Rhode Island.— Watkins *v.* Greene, 23 R. I. 34, 46 Atl. 38; Sweet *v.* Jenkins, 1 R. I. 147, 36 Am. Dec. 242.

South Carolina.— Coates *v.* Early, 46 S. C. 220, 24 S. E. 305; Fairly *v.* Wappoo Mills, 44 S. C. 227, 22 S. E. 108, 29 L. R. A. 215.

Tennessee.— Bryan *v.* Spurgin, 5 Sneed 681.

Texas.— Moore *v.* Kennedy, 81 Tex. 144, 16 S. W. 740; Meaher *v.* Lufkin, 21 Tex. 383; Waters Pierce Oil Co. *v.* Davis, 24 Tex. Civ. App. 508, 60 S. W. 453; Greer *v.* Marble Falls First Nat. Bank, (Civ. App. 1898) 47 S. W. 1045.

Utah.— Anderson *v.* Daly Min. Co., 16 Utah 28, 50 Pac. 815.

Vermont.— Linsley *v.* Lovely, 26 Vt. 123.

Virginia.— Harris *v.* Carson, 7 Leigh 632, 30 Am. Dec. 510.

Washington.— Swadling *v.* Barneson, 21 Wash. 699, 57 Pac. 506; Vollrath *v.* Crowe, 9 Wash. 374, 37 Pac. 474.

West Virginia.— Exchange Bank *v.* Cookman, 1 W. Va. 69.

Wisconsin.—Mowatt *v.* Wilkinson, 110 Wis. 176, 85 N. W. 661; Shores Lumber Co. *v.* Stitt, 102 Wis. 450, 78 N. W. 562; Burnham *v.* Milwaukee, 98 Wis. 128, 75 N. W. 1018.

United States.— The Gazelle, 128 U. S. 474, 9 S. Ct. 139, 32 L. ed. 496; District of Columbia Nat. Sav. Bank *v.* Ward, 100 U. S. 168, 25 L. ed. 621; Moran *v.* Prather, 23 Wall. 492, 23 L. ed. 121; Hearne *v.* New England Mut. Mar. Ins. Co., 20 Wall. 488, 22 L. ed. 395 [*affirming* 11 Fed. Cas. No. 6,302, 4 Cliff. 200]; Bliven *v.* New England Screw Co., 23 How. 420, 433, 16 L. ed. 510, 514 [*affirming* 18 Fed. Cas. No. 10,157, 4 Blatchf. 97]; Jefferson *v.* Burhans, 85 Fed. 949, 29 C. C. A. 481; Lowenfeld *v.* Curtis, 72 Fed. 105; Partridge *v.* Life Ins. Co., 18 Fed. Cas. No. 10,786, 1 Dill. 139; The Reeside, 20 Fed. Cas. No. 11,657, 2 Sumn. 567; Tyson *v.* Belmont, 24 Fed. Cas. No. 14,316 [*affirmed* in 3 Fed. Cas. No. 1,281, 3 Blatchf. 530].

See 15 Cent. Dig. tit. "Customs and Usages," § 34.

63. Blackett *v.* Royal Exch. Assur. Co., 2 Cromp. & J. 244, 1 L. J. Exch. 101, 2 Tyrw. 266.

64. Humfrey *v.* Dale, 7 E. & B. 266, 3 Jur. N. S. 213, 26 L. J. Q. B. 137, 90 E. C. L. 266.

65. Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224.

66. Turney *v.* Wilson, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515; Baxter *v.* Leland, 2 Fed. Cas. No. 1,124, Abb. Adm. 348; The Reeside, 20 Fed. Cas. No. 11,657, 2 Sumn. 567.

The words "perils of the seas" having been judicially construed not to cover an injury to a cargo by rats or other vermin, evidence of mercantile usage and understanding at New York and New Orleans is not admissible to show that injury by rats was included in the exception of "perils of the seas" in a bill of lading. Aymar *v.* Astor, 6 Cow. (N. Y.) 266. And a loss by an accidental fire not being within this phrase, a custom to include it therein is subject to the same

And where a bill of lading contained the words, "with shipper's reconsignment option," evidence that by usage the option was exercised by the consignee also was held incompetent.[67] Again on receipt of property with directions to deliver it at the consignee's place of business, the obligation of the carrier is not satisfied by a delivery at a wharf, although such was his custom in all similar cases;[68] and placing a horse in an open car when the owner ordered it to be placed in a closed car will make a railroad company responsible for its loss or injury from such change, although its custom was to carry horses in either kind of car indiscriminately.[69] So too an express contract by the sender of a message with a telegraph company cannot be varied by the usage of a local office.[70]

3. INSURER AND INSURED. A custom or usage which contradicts the express terms of a policy of insurance is not controlling.[71] So where a policy is issued

objection. Garrison *v.* Memphis Ins. Co., 19 How. (U. S.) 312, 15 L. ed. 656. *Aliter* in Alabama. McClure *v.* Cox, 32 Ala. 617, 70 Am. Dec. 552; Hibler *v.* McCartney, 31 Ala. 501; Ezell *v.* English, 6 Port. 311; Ezell *v.* Miller, 6 Port. 307; Sampson *v.* Gazzam, 6 Port. 123, 30 Am. Dec. 578; Jones *v.* Pitcher, 3 Stew. & P. 135, 24 Am. Dec. 716. But it has been held in this state, in actions against carriers for the non-delivery of goods upon bills of lading containing only the above exception, that evidence of a custom among steamboat-men to ascend the river as high as the water permits, and then land the cargo and deposit the goods in warehouses there (Cox *v.* Peterson, 30 Ala. 608, 68 Am. Dec. 145), or of a custom exempting them from liability for a loss caused by the forcible and illegal seizure of the boat by a body of armed men, without fault or neglect on the part of the officers or crew, is inadmissible (Boon *v.* The Belfast, 40 Ala. 184, 88 Am. Dec. 761 [*overruling* Steele *v.* McTyer, 31 Ala. 667, 70 Am. Dec. 516]).

67. McGovern *v.* Heissenbuttel, 16 Fed. Cas. No. 8,805, 8 Ben. 46.

68. Wardell *v.* Mourillyan, 2 Esp. 693.

In an action by a consignor to recover the value of goods delivered to a carrier, which the latter agreed to transport and tender to the consignee at the destination, evidence of a custom dispensing with the requirement of tender of delivery in the case of freight shipments as distinguished from express matter was held to be inadmissible. Diamant *v.* Long Island R. Co., 30 Misc. (N. Y.) 444, 62 N. Y. Suppl. 519. And where wheat was to be transported by the carrier to New York on account and order of plaintiff, and the bill of lading contained the memorandum, "Notify E. S. Brown, New York," and the carrier delivered the wheat to Brown instead of to plaintiff, it was held not to be admissible to show that by the custom of New York under such bills of lading property was rightly delivered to the person to be notified. Bank of Commerce *v.* Bissell, 72 N. Y. 615; Farmers', etc., Nat. Bank *v.* Erie R. Co., 72 N. Y. 188. And see Hayton *v.* Irwin, 28 Wkly. Rep. 665. So where goods are shipped by a bill of lading running to the order of the shipper, a custom is not admissible to make the consignee liable for deterioration during transit, since it is in violation of the terms of the contract. Charles *v.* Carter, 96 Tenn. 607, 36 S. W. 396. And where a railroad company agreed to transport a certain quantity of hay, no time being mentioned, for a certain price, a custom of railroads for all special rates to expire at the end of each year was rejected. Martin *v.* Union Pac. R. Co., 1 Wyo. 143. Again under a bill of lading for the carriage of treasure from San Francisco via the Isthmus to New York, which made the carrier liable as such for its transportation across the isthmus, evidence was held to be inadmissible to prove that it was the custom of shippers of treasure to insure it against risks upon the isthmus, or that there was a custom by which the carrier of gold refused to assume any risk of transportation across the isthmus. Simmons *v.* Law, 8 Bosw. (N. Y.) 213 [*affirmed* in 4 Abb. Dec. 241, 3 Keyes 217]. And see Phillips *v.* Briard, 1 H. & N. 21.

69. Sager *v.* Portsmouth, etc., R. Co., 31 Me. 228, 50 Am. Dec. 659. And see Bazin *v.* Liverpool, etc., Steamship Co., 2 Fed. Cas. No. 1,152, 3 Wall. Jr. 229.

70. Grinnell *v.* Western Union Tel. Co., 113 Mass. 229, 18 Am. Rep. 485.

71. King *v.* Enterprise Ins. Co., 45 Ind. 43; Orient Mut. Ins. Co. *v.* Wright, 1 Wall. (U. S.) 456, 17 L. ed. 505; Hall *v.* Janson, 3 C. L. R. 737, 4 E. & B. 500, 1 Jur. N. S. 571, 24 L. J. Q. B. 97, 3 Wkly. Rep. 213, 82 E. C. L. 500. See also Van Alstyne *v.* Ætna Ins. Co., 14 Hun (N. Y.) 360; Rankin *v.* American Ins. Co., 1 Hall (N. Y.) 619.

Thus where a policy was upon "the body, tackle, apparel, ordnance, munition, boat, and other furniture of the ship called the Thames," evidence of a usage at Lloyd's that boats slung on the ship's quarter were not protected by such policy was rejected. Blackett *v.* Royal Exch. Assur. Co., 2 Cromp. & J. 244, 1 L. J. Exch. 101, 2 Tyrw. 266. And where oil had been lost by leakage, caused by the violent laboring of the ship in a cross sea, the court refused to admit evidence of a mercantile usage that unless the cargo was shifted or the casks damaged underwriters were not liable for leakage as a "peril of the sea." Gabay *v.* Lloyd, 3 B. & C. 793, 5 D. & R. 641, 3 L. J. K. B. O. S. 116, 27 Rev. Rep. 486, 10 E. C. L. 359; Crofts *v.* Marshall, 7 C. & P. 597, 32 E. C. L. 778. And

covering a certain class of risks at a stipulated premium a usage to abate a portion of it cannot affect the contract.[72] And so to an action on a policy against a fire company for the amount of the loss insured by it, a custom of the company to contribute and pay on such policy only in proportion to what is paid on the same goods insured in another company is no defense.[73] The words "free from average," having a certain and well-settled meaning, cannot be construed by the public or the officers of insurance companies as denoting something different from their general acceptation.[74] And evidence of commercial usage is not proper to show that a policy executed in blank is equivalent to a policy "for whom it may concern."[75] And where a policy obliges the insurer to pay the value of the net freight, a usage to pay two thirds of the gross freight is bad.[76] The word "advances" in a marine insurance policy does not cover the outfit of the vessel; and evidence that before the policy was executed it was orally agreed that the term should mean something different from its ordinary meaning or that established by usage is not admissible to vary the written agreement.[77] Again evidence of a usage among insurance underwriters to require a written application is incompetent to contradict evidence of the assured tending to prove an oral insurance contract.[78]

4. Landlord and Tenant. The legal right of a landlord under an express contract for a time certain cannot be evaded by a custom.[79] And if a tenant should agree in his lease that the landlord was to have the waygoing crop, the custom of the country giving it to the tenant would not be allowed to prevail against the express contract.[80] So if parties agree to leave a mine "in good working order," a custom among miners to remove the pillars and supports is inadmissible.[81]

5. Master and Servant. Where a contract of hiring is for a term certain, a custom of the trade for the master or the servant to determine it at any time

where the policy was on "the Swedish brig Sophia," this was held to be a warranty that the vessel was Swedish, and evidence was rejected which was offered to show that the vessel was in fact an American ship. Lewis *v.* Thatcher, 15 Mass. 431. Again where the policy read, "To port in Cuba, and at and thence to port of advice and discharge in Europe," evidence of a usage for such vessels to stop at two ports in the island was held incompetent, because repugnant to the language of the contract. Hearne *v.* New England Mut. Mar. Ins. Co., 20 Wall. (U. S.) 488, 22 L. ed. 395. And see Seccomb *v.* Provincial Ins. Co., 10 Allen (Mass.) 305. And where a policy stipulated that the risk on the goods was to commence "from and immediately following the loading thereof on board the sail vessel or boat at New Orleans," it was ruled that usage could not render the insurer liable for a loss while on the wharf awaiting transportation or while being carried overland by rail. Smith *v.* Mobile Nav., etc., Ins. Co., 30 Ala. 167. And see Hall *v.* Janson, 3 C. L. R. 737, 4 E. & B. 500, 1 Jur. N. S. 571, 24 L. J. Q. B. 97, 3 Wkly. Rep. 213, 82 E. C. L. 500; Hare *v.* Barstow, 8 Jur. 928. So where a policy insured a wharf-boat "lying at the wharf at the city of Evansville, Indiana," it was not competent to prove a custom prevailing at Evansville of removing property of the character of that insured from that place to a neighboring ice harbor for safety during the season of running ice. Franklin Ins. Co. *v.* Humphrey, 65 Ind. 549, 32 Am. Rep. 78.

So where the premiums to be paid are expressly stated in the policy, evidence of a usage as to the rate of premiums is inadmissible. Hartshorn *v.* Shoe, etc., Dealers' Ins. Co., 15 Gray (Mass.) 240. So evidence of a general custom by agents of life-insurance companies to grant short credits on first premiums is inadmissible, where the policy provides that they shall not go into effect until the premiums are paid. Union Cent. L. Ins. Co. *v.* Chowning, 8 Tex. Civ. App. 455, 28 S. W. 117; Smith *v.* Provident Sav. L. Assur. Soc., 65 Fed. 765, 13 C. C. A. 284.

72. St. Nicholas Ins. Co. *v.* Mercantile Mut. Ins. Co., 5 Bosw. (N. Y.) 238.

73. Lattomus *v.* Farmers' Mut. F. Ins. Co., 3 Houst. (Del.) 254.

74. Bargett *v.* Orient Mut. Ins. Co., 3 Bosw. (N. Y.) 385.

75. Turner *v.* Burrows, 8 Wend. (N. Y.) 144.

76. McGregor *v.* Pennsylvania Ins. Co., 16 Fed. Cas. No. 8,811, 1 Wash. 39.

77. Burnham *v.* Boston Mar. Ins. Co., 139 Mass. 399, 1 N. E. 837.

78. Emery *v.* Boston Mar. Ins. Co., 138 Mass. 398.

79. Werner *v.* Footman, 54 Ga. 128.

Where a written lease forbids underletting, a tenant cannot prove a local custom of landlords permitting tenants to sublet during the summer months. Spota *v.* Hayes, 36 Misc. (N. Y.) 532, 73 N. Y. Suppl. 959.

80. Stultz *v.* Dickey, 5 Binn. (Pa.) 285, 6 Am. Dec. 411.

81. Randolph *v.* Halden, 44 Iowa 327.

without notice is inadmissible to control the contract.[82] So where a cooper covenanted "to instruct, or cause to be instructed in the trade of a cooper," an apprentice indentured to him, a custom for coopers to send their apprentices on whaling voyages was held to be repugnant to the contract and inadmissible.[83] And evidence of a custom entitling architects, on completion of the plans and specifications, to two per cent of the total estimated cost of the work is not admissible, where the contract expressly provides for a compensation of three per cent on the total cost of the work, with payments to be made on monthly estimates.[84]

6. PRINCIPAL AND AGENT. Evidence of a usage is not admissible where an agent's contract is clear and unambiguous as to his duties or his compensation.[85] So where a commission merchant is directed to sell for cash, a custom among commission merchants to deliver articles under cash sales and wait a week or ten days for payment cannot confer authority on him to give such credit.[86] And where a note authorized the payee, to whom stocks had been given as collateral security, to sell them in a certain contingency, evidence that where stock was deposited with a broker as collateral security it was the general usage of brokers for the latter to hypothecate or dispose of it at pleasure, and on payment or tender of the principal debt to return an equal number of shares of the same kind of stock was rejected.[87]

7. VENDOR AND PURCHASER. In an action on a sale note of "prime singed bacon," evidence was offered and rejected of a usage in the bacon trade that a certain latitude of deterioration called "average taint" was allowed before the bacon ceased to answer the description of prime bacon.[88] So the phrase "current

82. Peters *v.* Staveley, 15 L. T. Rep. N. S. 275.

A custom between employers and employees of giving and taking two weeks' notice of an intention to sever their relations cannot affect a specific contract of employment for a specific period. Mitchell *v.* Waite, 61 N. Y. Suppl. 1108 [*affirmed* in 63 N. Y. Suppl. 165]. So where a contract is entered into under which one is to work for another for one year at certain wages, a usage in the place by which either party may terminate contracts to labor for a given time at will without assigning any cause for so doing is incompetent. Sweet *v.* Jenkins, 1 R. I. 147, 36 Am. Dec. 242. And where A sued a baseball club for breach of a written contract of hiring, whereby he contracted with them "to play ball . . . for the season of 1892, for the sum of three thousand ($3,000) dollars," evidence of a custom that all professional baseball clubs had the right on ten days' notice to discharge a player who does not play satisfactorily was held to be inadmissible. Baltimore Baseball Club, etc., Co. *v.* Pickett, 78 Md. 375, 28 Atl. 279, 44 Am. St. Rep. 304, 22 L. R. A. 690.

83. Randall *v.* Rotch, 12 Pick. (Mass.) 107.

84. Davis *v.* New York Steam Co., 33 N. Y. App. Div. 401, 54 N. Y. Suppl. 78.

85. Ware *v.* Hayward Rubber Co., 3 Allen (Mass.) 84; Kimball *v.* Brawner, 47 Mo. 398; Porter *v.* Patterson, 15 Pa. St. 229; Partridge *v.* Phœnix Mut. L. Ins. Co., 15 Wall. (U. S.) 573, 21 L. ed. 229; Stagg *v.* Connecticut Mut. L. Ins. Co., 10 Wall. (U. S.) 589, 19 L. ed. 1038.

Where the contract of an agent with an insurance company provided that certain specified commissions should be "as compensation in full for any and all services under this agreement," a custom in the insurance business giving the agent commissions on the renewal premiums on policies obtained by him was rejected. Castleman *v.* Southern Mut. L. Ins. Co., 14 Bush (Ky.) 197.

86. Wanless *v.* McCandless, 38 Iowa 20; White *v.* Fuller, 67 Barb. (N. Y.) 267; Barksdale *v.* Brown, 1 Nott & M. (S. C.) 517, 9 Am. Dec. 720; Catlin *v.* Smith, 24 Vt. 85; Bliss *v.* Arnold, 8 Vt. 252, 30 Am. Dec. 467.

87. Allen *v.* Dykens, 3 Hill (N. Y.) 593.

Where an option for the purchase of stock declared that the holder of the option was to be entitled during its life to all the dividends declared on it, evidence that by the general custom of brokers and dealers in stocks the words "dividends or surplus dividends," in the contract were intended to mean dividends declared on the stock, whether they had been announced before or after the date of the contract, provided that on the day the contract was made the stock was selling in the market "dividend on," and not "ex dividend," was ruled to be inadmissible. Lombardo *v.* Case, 45 Barb. (N. Y.) 95.

88. Yates *v.* Pym, 6 Taunt. 446, 1 E. C. L. 697.

Under a written contract to deliver wool "in good order" a custom which would relieve the vendor from the obligation is inadmissible. Polhemus *v.* Heiman, 50 Cal. 438. And a contract for the purchase of "100,000 oranges, more or less, at the rate of $72 per 1000, to be delivered to us, boxed, in good order," cannot be affected by a custom of orange-dealers to require a larger and better fruit than that delivered in the particular

funds," in a note, cannot be explained by usage, as its meaning is settled.[89] And where there was a written contract to deliver certain quantities of flour at a certain price at a named place, on the seller's option, proof of a usage in the market to demand margins of the seller as security for the delivery was held to be inadmissible.[90] Under a contract to sell "one hundred shares of stock," a custom that something more passes to the purchaser is invalid.[91] And where buyer and seller asserted a different time for the delivery of goods, proof of a custom in the trade not to stipulate to fill orders within a specified time was properly excluded.[92]

8. Innkeepers. Where there is an express agreement between a landlord and a guest that absences shall be deducted from the charges for board, evidence that it is the custom of hotels not to allow such deductions is irrelevant.[93]

G. Retrospective Effect. A usage or custom cannot operate retrospectively.[94]

case. Corwin *v.* Patch, 4 Cal. 204. So where a contract calls for a specific parcel or lot, described as being of a certain quantity, "more or less," evidence of a usage to limit the words "more or less" to a certain percentage is not admissible. Vail *v.* Rice, 5 N. Y. 155. And see Cabot *v.* Winsor, 1 Allen (Mass.) 546; Brawley *v.* U. S., 96 U. S. 168, 24 L. ed. 622. Again where a contract calls for the delivery of eight thousand barrels of cement, each to weigh one hundred and eighty kilos gross, evidence of a usage to deliver less than this for a barrel is incompetent. Richard *v.* Haebler, 36 N. Y. App. Div. 94, 55 N. Y. Suppl. 583. So where a contract of sale names a price "f. o. b. cars" at a certain place, it cannot be shown by proof of custom that these letters have a meaning or effect different from what would have attached to the full words if they had been inserted in the contract. Sheffield Furnace Co. *v.* Hull Coal, etc., Co., 101 Ala. 446, 14 So. 672. And where a seller contracts to deliver the goods sold, in certain quantities monthly, at a designated place, the right of the vendee cannot be enlarged by the customs and usages of other persons who purchased from the same seller, nor by the quantity delivered on other contracts during the same season. Rowlan *v.* Lehigh Coal, etc., Co., 28 Pa. St. 215.

89. Marc *v.* Kupfer, 34 Ill. 286; Osgood *v.* McConnell, 32 Ill. 74; Galena Ins. Co. *v.* Kupfer, 28 Ill. 332, 81 Am. Dec. 284; Moore *v.* Morris, 20 Ill. 255.

90. Oelrichs *v.* Ford, 23 How. (U. S.) 49, 16 L. ed. 534.

A usage that a sale of hides was subject to the approval of the purchaser or of an inspector was held to be repugnant to the following contract in a broker's book, and therefore inadmissible: "Boston, September 9, 1865. Sold Wm. B. Spooner & Co. acc. B. G. Boardman, 5 bales D. G. cow hides, 1 bale dry do. @ 17c pr. lb. net cash delivered in N. Y." Boardman *v.* Spooner, 13 Allen (Mass.) 353, 90 Am. Dec. 196. So where W contracted with R for the sale of salt, as follows: "Sold J. H. Rogers one thousand sacks coarse Liverpool, and two thousand sacks fine Liverpool salt at $2.10 per sack, to arrive by the 15th November," evidence that by the custom of merchants, the words "to arrive by the 15th November," meant "deliverable on or before the 15th of November" was held to be inadmissible. Rogers *v.* Woodruff, 23 Ohio St. 632, 13 Am. Rep. 276. And where defendant, by a written contract, agreed to sell plaintiff "sixty tons of ware potatoes, at £5 a ton," it was held to be inadmissible to show that a particular kind of ware potatoes was meant by plaintiff. Smith *v.* Jeffryes, 15 L. J. Exch. 325, 15 M. & W. 561. Again where a memorandum of a contract was as follows: "Of Edward Yates, 39 pockets of Sussex hops, Springett's, 5 pockets of Sussex hops, Kenward's 78s. Springett's to wait orders," it was held that evidence of custom was inadmissible to show that the sale was on a credit of six months. Ford *v.* Yates, 10 L. J. C. P. 117, 2 M. & G. 549, 2 Scott N. R. 645, 40 E. C. L. 738. But see Lockett *v.* Nicklin, 2 Exch. 93, 19 L. J. Exch. 403.

91. Spear *v.* Hart, 3 Rob. (N. Y.) 420. See also Groat *v.* Gile, 51 N. Y. 431, holding that where A contracted to sell to B "two flocks of sheep, except 'two bucks and a lame ewe,'" at a certain price, evidence of a custom that the wool of sheep does not go to the purchaser is incompetent.

Where a contract for a sale of oats provides for their delivery on the cars at the place of shipment, proof of a custom that the place of delivery and payment is the place of destination is inadmissible. Duncan *v.* Green, 43 Iowa 679. And where a contract was made for the sale of a horse, the horse delivered, and a note for the price given, evidence that it was the custom in selling horses to give the purchaser time to try the animal before the sale was final was rejected. Schenck *v.* Griffin, 38 N. J. L. 462. So where a bill of goods is marked "O K" by the agent effecting the sale, proof of custom is inadmissible to show that the letters used implied a guaranty of payment by the agent. Salomon *v.* McRae, 9 Colo. App. 23, 47 Pac. 409.

92. Hirsch *v.* Annin, 28 Misc. (N. Y.) 228, 58 N. Y. Suppl. 1019.

93. Stebbins *v.* Brown, 65 Barb. (N. Y.) 274.

The custom of an innkeeper to deposit baggage in the guest's bedroom does not affect a case where the guest has ordered it to be placed in the commercial room. Richmond *v.* Smith, 8 B. & C. 9, 6 L. J. K. B. O. S. 279, 2 M. & R. 235, 15 E. C. L. 14.

94. U. S. *v.* Buchanan, 24 Fed. Cas. No.

IV. ESTABLISHMENT.

A. Pleading[95] — **1. Necessity.** A general usage or custom need not be pleaded;[96] but the custom of a particular place[97] and local commercial usages must be pleaded; and so of a custom to excuse the non-performance of a duty prescribed by law.[98] A custom introduced as an affirmative defense or for the purpose of recoupment, it seems, should be specially pleaded.[99]

2. Sufficiency. Where a local usage is set up all the requisites of a valid usage should be averred;[1] but if a custom is set forth generally and it is proved that there are exceptions it is a variance.[2] A usage is not sufficiently pleaded by

14,678, Crabbe 563. See also Sullivan *v.* Jernigan, 21 Fla. 264, holding that where a person had a right to drive logs on a navigable stream without confining them in rafts or clamps, he could not be deprived of such right by a custom subsequently arising among logmen to so confine their logs.

95. See, generally, Pleading.

96. It may be given in evidence at the trial or judicially noticed by the court for the first time on appeal.

California.— Goldsmith *v.* Sawyer, 46 Cal. 209.

Delaware.— Templeman *v.* Biddle, 1 Harr. 522.

Michigan.— Fish *v.* Crawford Mfg. Co., 120 Mich. 500, 79 N. W. 693.

Pennsylvania.— Stultz *v.* Dickey, 5 Binn. 285, 6 Am. Dec. 411; Carson *v.* Blazer, 2 Binn. 475, 4 Am. Dec. 463.

West Virginia.— Connolly *v.* Bruner, 49 W. Va. 71, 35 S. E. 927.

Wisconsin.— Hewitt *v.* John Week Lumber Co., 77 Wis. 548, 46 N. W. 822.

United States.— Coyle *v.* Gozzler, 6 Fed. Cas. No. 3,312, 2 Cranch C. C. 625.

See 15 Cent. Dig. tit. "Customs and Usages," § 40; and *infra*, IV, B, 1.

In a suit on a writing, where certain incidents are attached by usage or certain words have a peculiar meaning, the usage need not be specially pleaded. Breen *v.* Moran, 51 Minn. 525, 53 N. W. 755; Lowe *v.* Lehman, 15 Ohio St. 179.

Where the contract is silent regarding the custom, one suing on the contract made with full knowledge of the existence of a custom must allege the custom in order to rely upon it. Pullan *v.* Cochran, 6 Ohio Dec. (Reprint) 1070, 10 Am. L. Rec. 184. And see Society, etc. *v.* Haight, 1 N. J. Eq. 393.

Where a complaint alleges title in the plaintiff, it may be supported by evidence of mining customs, even though they are not mentioned in the pleadings. Colman *v.* Clements, 23 Cal. 245.

97. *Delaware.*— Templeman *v.* Biddle, 1 Harr. 522.

Illinois.— Mobile Fruit, etc., Co. *v.* Judy, 91 Ill. App. 82.

Iowa.— Lindley *v.* Waterloo First Nat. Bank, 76 Iowa 629, 41 N. W. 381, 14 Am. St. Rep. 254, 2 L. R. A. 709.

Mississippi.— Turner *v.* Fish, 28 Miss. 306.

Missouri.—Hayden *v.* Grillo, 42 Mo. App. 1.

Nebraska.— Hastings First Nat. Bank *v.* Farmers', etc., Bank, 56 Nebr. 149, 76 N. W. 430.

New York.— Dommerich *v.* Garfunkel, 32 Misc. 740, 65 N. Y. Suppl. 564.

Pennsylvania.— Girard L. Ins., etc., Co. *v.* New York Mut. L. Ins. Co., 13 Phila. 90.

Texas.— Norwood *v.* Alamo F. Ins. Co., 13 Tex. Civ. App. 475, 35 S. W. 717; Anderson *v.* Rogge, (Civ. App. 1894) 28 S. W. 106.

Virginia.— But see Hansbrough *v.* Neal, 94 Va. 722, 27 S. E. 593; Governor *v.* Withers, 5 Gratt. 24, 50 Am. Dec. 95; Jackson *v.* Henderson, 3 Leigh 196.

Compare Hendricks *v.* W. G. Middlebrooks Co., 118 Ga. 131, 44 S. E. 835, holding that where plaintiff claims that defendant entered into a contract with reference to a local custom he must allege with particularity that the contract was entered into with reference to such usage.

See 15 Cent. Dig. tit. "Customs and Usages," § 40.

98. Governor *v.* Withers, 5 Gratt. (Va.) 24, 50 Am. Dec. 95.

99. McCurdy *v.* Alaska, etc., Commercial Co., 102 Ill. App. 120 [*citing* Leggat *v.* Sands' Ale Brewing Co., 60 Ill. 158]. And *compare* Hight *v.* Bacon, 126 Mass. 10, 30 Am. Rep. 639, holding that in an action for goods sold and delivered, evidence of a usage of trade, which gives the purchaser a right to revoke the contract when the article which appears to be good is sold as good but turns out to be rotten and nearly worthless is not admissible under an answer which does not allege that the sale had been revoked.

But in New York evidence of the usage has been held to be admissible under a general denial. Miller *v.* Insurance Co. of North America, 1 Abb. N. Cas. 470 and note.

1. Dutch Flat Water Co. *v.* Mooney, 12 Cal. 534; Wallace *v.* Morgan, 23 Ind. 399.

Knowledge of custom.— It is not enough to plead a custom without alleging that the other party to the contract knew of it. Gano *v.* Palo Pinto County, 71 Tex. 99, 8 S. W. 634. But as one who deals with brokers is presumed to deal with reference to their usages, in a complaint by a broker against his principal it is not necessary to allege that the latter knew of the existence of a custom on which the action is founded. Whitehouse *v.* Moore, 13 Abb. Pr. (N. Y.) 142.

2. Griffin *v.* Blandford, Cowp. 62. And see Peter *v.* Kendal, 6 B. & C. 703, 5 L. J. K. B. O. S. 282, 13 E. C. L. 316.

a single averment that it has been constantly and uniformly recognized and abided by in a certain city in similar cases.[3]

B. Evidence[4] — **1. Necessity of Proof.**[5] General customs of the country and the general customs of merchants are judicially noticed by the courts;[6] but local and particular usages must be proved like other facts and necessarily by parol evidence.[7]

2. Burden of Proof. The custom must be proved by the party setting it up; the burden is on him.[8]

3. Order of Proof and Proper Questions. The court must know, from a distinct statement by the party making the offer to prove the existence of a usage, what the usage is before evidence of its existence is admissible;[9] and it has been held that a question to a witness as to what was the general custom in regard to certain transactions is not admissible before the existence of such a custom has been established by evidence.[10] When a witness is interrogated as to a custom, the object and pertinency of the proof should first be shown, either by the question itself or independently, in order that the court may understand its relevancy.[11] Either party may give evidence of a custom without accompanying it with direct evidence that it was known to the opposite party, provided he intends, on all the evidence to be produced in the case, to show that knowledge.[12] To ask a wit-

3. Antomarchi *v.* Russell, 63 Ala. 356, 35 Am. Rep. 40.

Allegations in an answer that plaintiff sent cotton to factors to sell or otherwise dispose of as they might think proper for and according to the custom of the trade, and that the factors held themselves out as the owners of the cotton with plaintiff's consent, are sufficient to admit evidence that plaintiff had authorized the factors to use and dispose of the cotton as their own. Wootiers *v.* Kaufman, 73 Tex. 395, 11 S. W. 390.

4. See, generally, Evidence.

5. Presumption of knowledge of custom or usage see *supra*, II, D, 7, c.

6. See, generally, Evidence.

7. *Illinois.*— Packard *v.* Van Schoick, 58 Ill. 79.

Kentucky.— Ward *v.* Everett, 1 Dana 429.

Louisiana.— Senac *v.* Pritchard, 4 La. 160.

Maine.— Randall *v.* Kehlor, 60 Me. 37, 11 Am. Rep. 169.

Maryland.— Merchants' Mut. Ins. Co. *v.* Wilson, 2 Md. 217; Drake *v.* Hudson, 7 Harr. & J. 399.

Massachusetts.— Murray *v.* Hatch, 6 Mass. 465; Eager *v.* Atlas Ins. Co., 14 Pick. 141, 25 Am. Dec. 363.

New York.— Smith *v.* Wright, 1 Cai. 43, 2 Am. Dec. 162.

Pennsylvania.— Snowden *v.* Warder, 3 Rawle 101; Blythe *v.* Richards, 10 Serg. & R. 261, 13 Am. Dec. 672; Gordon *v.* Little, 8 Serg. & R. 533, 11 Am. Dec. 632.

United States.— Livingston *v.* Maryland Ins. Co., 7 Cranch 506, 3 L. ed. 421.

See 15 Cent. Dig. tit. "Customs and Usages," § 41 *et seq.*

Custom as to improving streets.— Nor can a court take judicial notice of a custom in a city in improving streets first to regulate and grade and then to pave, as separate and distinct works. *In re* Walter, 75 N. Y. 354.

The usage of banks in regard to the mode in which current deposits and the proceeds of notes and drafts placed with them for collection are paid cannot be judicially noticed, but must be proved. Planters' Bank *v.* Farmers', etc., Bank, 8 Gill & J. (Md.) 449.

The usages of another state may be proved by the testimony of witnesses skilled therein. McNeill *v.* Arnold, 17 Ark. 154. And see, generally, Evidence.

8. Thomas *v.* Hooker-Colville Steam Pump Co., 28 Mo. App. 563; Ohio Oil Co. *v.* McCrory, 14 Ohio Cir. Ct. 304, 7 Ohio Cir. Dec. 344; Caldecott *v.* Smythies, 7 C. & P. 808, 32 E. C. L. 884.

9. Susquehanna Fertilizer Co. *v.* White, 66 Md. 444, 7 Atl. 802, 59 Am. Rep. 186; Goldsmith *v.* Newwitter, 10 Misc. (N. Y.) 36, 30 N. Y. Suppl. 815.

10. Dwight *v.* Badgley, 60 Hun (N. Y.) 144, 14 N. Y. Suppl. 498; Kenyon *v.* Luther, 4 N. Y. Suppl. 498. But *compare* Park *v.* Piedmont, etc., L. Ins. Co., 48 Ga. 601, 606, where a witness was asked, "Do you know of any usage or custom in the life insurance business as to the commutation of renewals?" and it was said on appeal that the proper form would have been, "What is the general or universal usage and custom in the life insurance business as to the commutation of renewals?" And see Citizens' State Bank *v.* Cowles, 39 Misc. (N. Y.) 571, 80 N. Y. Suppl. 598.

At the trial of an action for not accepting goods, described in a colonial broker's catalogue, the defendant's counsel put the catalogue into the hands of a witness, and, without laying foundation for the question by asking whether there was any usage, asked at once whether from the catalogue it would be inferred by custom that the goods were sound and in their original packages. It was held that the question in that form was inadmissible. Curtis *v.* Peek, 13 Wkly. Rep. 230.

11. Ecker *v.* Moore, 2 Pinn. (Wis.) 425, 2 Chandl. (Wis.) 85.

12. Dodge *v.* Favor, 15 Gray (Mass.) 82. But see Flynn *v.* Murphy, 2 E. D. Smith

ness how a certain kind of business is done, as for example the usual mode of transferring notes and drafts from one bank to another, is not asking a question of law.[13]

4. Admissibility of Evidence — a. Parol Evidence. The usage of trade may be proved by parol, whether it arises out of a public written law, the edicts or instructions of a foreign government, and whether the trade be allowed or prohibited by such edicts or instructions.[14]

b. Documentary Evidence — (i) *In General.* Where a party relies upon the reputation of a mining district contained in a book, he must put in evidence the whole book. He cannot offer a single extract or clause alone.[15]

(ii) *Published Decisions.* The usages of the land-office must be proved by its published decisions.[16] A reported case in which a certain commercial usage was held to be established by testimony is relevant in subsequent cases between other parties, involving a similar usage at the time and place, or at a time and place not far removed.[17] And the decisions of state courts are evidence in the federal courts of local usages.[18]

c. Opinion Evidence — (i) *In General.* A usage of trade cannot be proved by the opinion of witnesses as to the law or as to what should be the rule. The witness or witnesses must testify to the existence of the usage.[19] The custom must be proved by instances and not by opinion.[20]

(N. Y.) 378, to the effect that the proper order being to prove the usage first and the notice afterward, evidence of the usage may well be excluded when the party offering it does not intimate his intention to follow it by proof of knowledge of some kind, either express or presumptive.

13. It is a matter of fact, and the legal effect of doing the business in the manner described by him is another and a different question. Pennsylvania Commercial Bank *v.* New York City Union Bank, 19 Barb. (N. Y.) 391.

14. Drake *v.* Hudson, 7 Harr. & J. (Md.) 399; Livingston *v.* Maryland Ins. Co., 7 Cranch (U. S.) 506, 3 L. ed. 421.

Evidence of non-existence of custom.— Where a principal claimed that its broker had been notified of its custom to give only quitclaim deeds to purchasers of its real estate, evidence to show that, after its refusal to give a deed with warranty, it offered to give such a deed if an increased price was paid, was admissible as tending to show that no such custom in fact existed. Beach *v.* Travelers' Ins. Co., 73 Conn. 118, 46 Atl. 867.

15. English *v.* Johnson, 17 Cal. 107, 76 Am. Dec. 574.

16. Hammond *v.* Warfield, 2 Harr. & J. (Md.) 151.

17. Allen *v.* Merchants' Bank, 15 Wend. (N. Y.) 482.

But it seems that this is not so where the decision proceeded upon the stipulation or concession of the parties that the usage existed. Crouch *v.* Credit Foncier, L. R. 8 Q. B. 374, 42 L. J. Q. B. 183, 29 L. T. Rep. N. S. 259, 21 Wkly. Rep. 946.

18. Carpenter *v.* Providence Washington Ins. Co., 16 Pet. (U. S.) 495, 10 L. ed. 1044; Swift *v.* Tyson, 16 Pet. (U. S.) 1, 10 L. ed. 865; Meade *v.* Beale, 16 Fed. Cas. No. 9,371, Taney 339. But where it was claimed that there existed at a particular point a particular custom or usage in regard to the mode of handling and delivering iron ore, adjudged cases were held not admissible in proof thereof, as such a custom is not necessarily stable, but subject to change. Iron Cliffs Co. *v.* Buhl, 42 Mich. 86, 3 N. W. 269.

19. The custom of merchants or mercantile usage does not depend upon the private opinions of merchants as to what the law is, or even upon their opinions publicly expressed, but it depends upon their acts. The inquiry is not into the opinions of traders and merchants as to the law upon a mercantile question, but for the evidence of a fact, viz., the usage or practice in the course of mercantile business in the particular case.

New York.— Hawes *v.* Lawrence, 4 N. Y. 345 [*affirming* 3 Sandf. 193]; Allen *v.* Merchants' Bank, 15 Wend. 482; Mills *v.* Hallock, 2 Edw. 652.

Ohio.—Austin *v.* Williams, 2 Ohio 61.

Rhode Island.— Fletcher *v.* Seekell, 1 R. I. 267.

Wisconsin.— Pfeil *v.* Kemper, 3 Wis. 315.

United States.— Ruan *v.* Gardner, 20 Fed. Cas. No. 12,100, 1 Wash. 145; Winthrop *v.* Union Ins. Co., 30 Fed. Cas. No. 17,901, 2 Wash. 7.

England.— Hall *v.* Benson, 7 C. & P. 711, 32 E. C. L. 835. And see Edie *v.* East India Co., 2 Burr. 1216, 1 W. Bl. 295.

See 15 Cent. Dig. tit. "Customs and Usages," § 45.

20. *Arkansas.*— McClintock *v.* Lary, 23 Ark. 215.

Connecticut.— Bishop *v.* Clay F. & M. Ins. Co., 45 Conn. 430.

Georgia.— Park *v.* Piedmont, etc., L. Ins. Co., 48 Ga. 601.

Illinois.— Bissell *v.* Ryan, 23 Ill. 566; Sigsworth *v.* McIntyre, 18 Ill. 126.

(II) *As to Construction of Words.* The opinions of merchants or other persons engaged in a particular trade or business are admitted by the courts for the purpose of ascertaining the sense in which certain words or mercantile terms are used in contracts.[21] This meaning being ascertained their opinion as to its legal effect is of course irrelevant.[22]

d. Evidence of Customs at Different Places or in Different Trades. The English courts hold that to prove the manner of conducting a particular trade at one place, evidence may be given as to the manner in which it is carried on in another place;[23] but such evidence is generally rejected in the American courts;[24] and where the custom in one place is proved, evidence that it is different in another is inadmissible.[25]

5. Weight and Sufficiency of Evidence — a. In General. The custom must be clearly proved;[26] and where the evidence is uncertain and contradictory the cus-

Indiana.— Cox *v.* O'Riley, 4 Ind. 368, 58 Am. Dec. 633.

Massachusetts.— Haskins *v.* Warren, 115 Mass. 514; Chenery *v.* Goodrich, 106 Mass. 566; Hamilton *v.* Nickerson, 13 Allen 351.

Mississippi.— Shackelford *v.* New Orleans, etc., R. Co., 37 Miss. 202.

New York.— Robinson *v.* Chittenden, 7 Hun 133; Gallup *v.* Lederer, 1 Hun 282; Mills *v.* Hallock, 2 Edw. 652.

Texas.— Hagerty *v.* Scott, 10 Tex. 525; Bryant *v.* Kelton, 1 Tex. 434.

Washington.— Williams *v.* Ninemire, 23 Wash. 393, 63 Pac. 534.

United States.— Home Ins. Co. *v.* Weide, 11 Wall. 438, 20 L. ed. 197; Consequa *v.* Willings, 6 Fed. Cas. No. 3,128, Pet. C. C. 225.

England.— Cunningham *v.* Fonblanque, 6 C. & P. 44, 25 E. C. L. 313; Syers *v.* Bridge, Dougl. (3d ed.) 527; Camden *v.* Cowley, 1 W. Bl. 417.

See 15 Cent. Dig. tit. "Customs and Usages," § 45.

Proof of particular instances is not competent to show the existence of a custom, but may be competent as tending to show a party's knowledge of the custom. Off *v.* J. B. Inderrieden Co., 74 Ill. App. 105.

21. Allen *v.* Merchants' Bank, 15 Wend. (N. Y.) 482; Powell *v.* Horton, 2 Hodges 12. A usage or custom relied on as giving a peculiar and technical meaning to words and phrases used in a commercial contract, and as controlling the interpretation and effect of such contract, must be proved and determined as a fact on the trial. Marine Nat. Bank *v.* National City Bank, 59 N. Y. 67, 17 Am. Rep. 305.

22. Collyer *v.* Collins, 17 Abb. Pr. (N. Y.) 467. And see Huston *v.* Roots, 30 Ind. 461.

23. Milward *v.* Hibbert, 3 Q. B. 120, 2 G. & D. 142, 6 Jur. 706, 11 L. J. Q. B. 137, 43 E. C. L. 659; Falkner *v.* Earle, 3 B. & S. 360, 9 Jur. N. S. 847, 32 L. J. Q. B. 124, 7 L. T. Rep. N. S. 672, 11 Wkly. Rep. 307, 113 E. C. L. 360; Noble *v.* Kennoway, Dougl. (3d ed.) 510; Plaice *v.* Allcoch, 4 F. & F. 1074. M & W, fruit-brokers in London, being employed by F & D, merchants in London, to sell for them, gave them the following contract note, addressed to F & D: "We have this day sold for your account to our principal . . . tons of raisins. M. & W, brokers." The principal having accepted part of the raisins, and not having accepted the rest, F & D brought an action on the contract against M & W, and sought to make them personally liable by the custom of the trade. On the trial, in addition to evidence of a custom in the London fruit-trade that if brokers did not give the names of their principals in the contract they were held personally liable, although they contracted as brokers for a principal, they offered evidence of a similar custom in the London colonial market. It was held that the latter was also admissible, being evidence in a similar trade in the same place, and as tending to corroborate the evidence as to the existence of such a custom in the fruit trade. Fleet *v.* Murton, L. R. 7 Q. B. 126, 41 L. J. Q. B. 49, 26 L. T. Rep. N. S. 181, 20 Wkly. Rep. 97.

24. Mears *v.* Waples, 3 Houst. (Del.) 581; Walker *v.* Barron, 6 Minn. 508. But see Barnes *v.* Ingalls, 39 Ala. 193.

In Illinois it is held that a custom of bankers as to checks in New York cannot affect the general law in other places. Strong *v.* King, 35 Ill. 9, 85 Am. Dec. 336.

In Maryland it is held that an insurance policy on a vessel being built in Baltimore is not affected by a usage existing in New York. Mason *v.* Franklin F. Ins. Co., 12 Gill & J. (Md.) 468.

In Massachusetts it is held that a usage of underwriters in Boston to expressly except barratry of the master from risks, whenever the assured is the owner of the vessel insured, cannot import this exception by implication into a policy written in Gloucester. Parkhurst *v.* Gloucester Mut. Fishing Ins. Co., 100 Mass. 301, 97 Am. Dec. 100, 1 Am. Rep. 105.

25. Reynolds *v.* Continental Ins. Co., 36 Mich. 131; Allen *v.* Lyles, 35 Miss. 513. And see Natchez Ins. Co. *v.* Stanton, 2 Sm. & M. (Miss.) 340, 41 Am. Dec. 592.

26. Adams *v.* Pittsburg Ins. Co., 76 Pa. St. 411; Isaksson *v.* Williams, 26 Fed. 642. Evidence by plaintiff and his witnesses to the effect that they have individually assumed a custom to exist, and acted on it, although they have not tested it nor heard of it from others, is legally insufficient to establish it. Duling *v.* Philadelphia, etc., R. Co., 66 Md. 120, 6 Atl. 592.

tom is not established.[27] The custom must be given in evidence, and may not be left to be found by the jury from their own familiarity with business affairs.[28] In weighing the testimony of witnesses as to trade usage, the jury should consider the extent to which any of the witnesses may have an interest in the result of the litigation which might color their evidence.[29]

b. Quantum of Evidence — (I) *In General.* It is not necessary in order to prove a valid custom that all the witnesses on both sides of the case should agree concerning it.[30]

(II) *Proof by One Witness.* The testimony of one witness who has adequate means of knowledge may be sufficient to prove the existence of a usage in a given trade or business;[31] but a usage of a particular business is not sufficiently proved by the testimony of only one witness to support it, where another

"Clear, uncontradictory, and distinct" evidence.— It is not necessary, in order to prove a custom or usage, that the evidence should be "clear, uncontradictory, and distinct." Hichhorn *v.* Bradley, 117 Iowa 130, 90 N. W. 592. But see Adams *v.* Pittsburg Ins. Co., 76 Pa. St. 411, 414, where it is said: "But in order to establish such custom, the evidence by which it is proposed to prove it, must be clear, uncontradictory and distinct," it being sought to prove a custom that the captain of a steamboat had authority to bind the owners by giving a premium note for insurance.

"Doubt must be wholly eliminated from the evidence adduced, or the usage is not well proved." Adams *v.* Pittsburg Ins. Co., 76 Pa. St. 411.

Merely stating that it is the "custom of the country," nothing being shown as to its extent or the length of time it has existed, does not prove a custom. Kendall *v.* Russell, 5 Dana (Ky.) 501, 30 Am. Dec. 696.

27. *Alabama.*— Desha *v.* Holland, 12 Ala. 513, 46 Am. Dec. 261.

Colorado.— Savage *v.* Pelton, 1 Colo. App. 148, 27 Pac. 948.

Illinois.— Cleveland, etc., R. Co. *v.* Jenkins, 174 Ill. 398, 51 N. E. 811, 66 Am. St. Rep. 296.

Maine.— Cobb *v.* Lime Rock F. & M. Ins. Co., 58 Me. 326.

Massachusetts.—Parrott *v.* Thacher, 9 Pick. 426.

Missouri.—Boyd *v.* Graham, 5 Mo. App. 403.

New Jersey.— Steward *v.* Scudder, 24 N. J. L. 96.

New York.— Dickinson *v.* Poughkeepsie, 75 N. Y. 65; Booth Bros., etc., Granite Co. *v.* Baird, 87 Hun 452, 34 N. Y. Suppl. 392.

Pennsylvania.—Adams *v.* Pittsburg Ins. Co., 76 Pa. St. 411; Pratt *v.* Bank, 12 Phila. 378.

Texas.—Wootters *v.* Kauffman, 67 Tex. 488, 3 S. W. 465.

Wisconsin.— Hinton *v.* Coleman, 45 Wis. 165.

United States.— The Harbinger, 50 Fed. 941; Adams *v.* Manufacturers', etc., F. Ins. Co., 17 Fed. 630.

See 15 Cent. Dig. tit. "Customs and Usages," § 46.

28. Green *v.* Hill, 4 Tex. 465.

29. Dodge *v.* Hedden, 42 Fed. 446.

30. They may differ as to its existence in the same place or in all places, and in such case the question is one for the jury. But if one set of witnesses prove that they knew of and followed a certain custom in some localities and as to some contracts, and another set show that there was no such custom in other localities and as to other contracts, and none of them state that the custom is notorious, the evidence simply shows a custom local and partial and is insufficient. Dickinson *v.* Poughkeepsie, 75 N. Y. 65.

If plaintiff and defendant introduce evidence of different usages, the refusal of the court to rule that if the evidence is conflicting the defendant cannot maintain his defense on the ground of usage gives the plaintiff no ground of exception, if the defendant relies upon his evidence of usage only to negative the usage set up by the plaintiff. Upton *v.* Sturbridge Cotton Mills, 111 Mass. 446. And see Southwestern Freight, etc., Co. *v.* Stanard, 44 Mo. 71, 100 Am. Dec. 255.

31. *Alabama.*— Smith *v.* Rice, 56 Ala. 417; Partridge *v.* Forsyth, 29 Ala. 200; Jewell *v.* Center, 25 Ala. 498; Marston *v.* Mobile Bank, 10 Ala. 284; Price *v.* White, 9 Ala. 563.

Illinois.— Bissell *v.* Ryan, 23 Ill. 566.

Massachusetts.— Jones *v.* Hoey, 128 Mass. 585.

Mississippi.— Cohea *v.* Hunt, 2 Sm. & M. 227, 49 Am. Dec. 581.

New Hampshire.— Goodall *v.* New England F. Ins. Co., 25 N. H. 169.

New York.— Vail *v.* Rice, 5 N. Y. 155; Miller *v.* Insurance Co., 1 Abb. N. Cas. 470. But see Wood *v.* Hickok, 2 Wend. 501.

Pennsylvania.— Citizens' Ins. Co. *v.* McLaughlin, 53 Pa. St. 485; Pittsburgh *v.* O'Neill, 1 Pa. St. 342.

South Carolina.— Halwerson *v.* Cole, 1 Speers 321, 40 Am. Dec. 603; Thomas *v.* Graves, 1 Mill 308; Thomas *v.* O'Hara, 1 Mill 303.

United States.— Robinson *v.* U. S., 13 Wall. 363, 20 L. ed. 653; Greenwich Ins. Co. *v.* Waterman, 54 Fed. 839, 4 C. C. A. 600; Barclay *v.* Kennedy, 2 Fed. Cas. No. 976, 3 Wash. 350; York *v.* Wistar, 30 Fed. Cas. No. 18,141.

England.— Sewell *v.* Corp, 1 C. & P. 392, 12 E. C. L. 232.

See 15 Cent. Dig. tit. "Customs and Usages," § 46.

witness equally familiar with the business denies it, and where other witnesses on the subject might be had.[32]

C. Competency of Witness to Prove Custom.[33] The witness or witnesses called to give evidence of the existence of a usage may do so from their own knowledge and experience or from information derived through the course of trade;[34] all that is necessary is that they should have occupied such a position as to know of its existence as a fact.[35] That a witness knew of a custom existing at one time does not prove that he had a knowledge of its existence at another.[36]

D. Questions of Law and Fact. Proof of a usage or custom involves questions of both law and fact. It is a question of law what is a sufficient usage to bind the parties;[37] for how long a time, at what places, and with what degree of uniformity it must have been observed; whether, in short, a given state of facts establishes a usage is a question for the court.[38] Whether such a state of facts has been proved is a question for the jury,[39] and also whether the parties acted

32. Parrott *v.* Thacher, 9 Pick. (Mass.) 426. And see Southwest Virginia Mineral Co. *v.* Chase, 95 Va. 50, 27 S. E. 826.

An appellate court would probably not interfere with the verdict of a jury which had refused to recognize a usage proved by the testimony of but one witness.

Massachusetts.— Haskins *v.* Warren, 115 Mass. 514.

Nevada.— Treadway *v.* Sharon, 7 Nev. 37.

South Carolina.— Thomas *v.* Graves, 1 Mill 308.

United States.— Winthrop *v.* Union Ins. Co., 30 Fed. Cas. No. 17,901, 2 Wash. 7.

England.—Holderness *v.* Collinson, 7 B. & C. 212, 6 L. J. K. B. O. S. 17, 1 M. & R. 55, 31 Rev. Rep. 174, 14 E. C. L. 101; Green *v.* Farmer, 4 Burr. 2214, 1 W. Bl. 651; Rushforth *v.* Hadfield, 6 East 519, 7 East 224, 2 Smith K. B. 264, 8 Rev. Rep. 520; Lewis *v.* Marshall, 8 Jur. 848, 13 L. J. C. P. 193, 7 M. & G. 729, 8 Scott N. R. 477.

33. See, generally, WITNESSES.

34. Allen *v.* Merchants' Bank, 15 Wend. (N. Y.) 482.

35. Therefore a custom that the employment of an architect to make plans and designs for a building carries with it an employment to superintend its construction may be proved by builders or contractors as well as by architects. Wilson *v.* Bauman, 80 Ill. 493. To prove a custom as to adjusting losses on policies on iron, insurance brokers as well as iron merchants are competent. Evans *v.* Commercial Mut. Ins. Co., 6 R. I. 47. To prove a usage of banks, one who is in the habit of dealing with banks is as capable to explain these usages as a banker or a bank employee. Griffin *v.* Rice, 1 Hilt. (N. Y.) 184. But in an action for the price of a safe, the order for which was obtained by a traveling agent, testimony that traveling agents are by custom authorized to bind their principals by fixing the price of goods sold was held to be inadmissible, when none of the witnesses claimed to have any knowledge of such custom in the sale of safes. Deane *v.* Everett, 90 Iowa 242, 57 N. W. 874.

36. Farnum *v.* Pitcher, 151 Mass. 470, 24 N. E. 590; Newhall *v.* Appleton, 57 N. Y. Super. Ct. 343, 9 N. Y. Suppl. 306.

37. Currie *v.* Syndicate, 104 Ill. App. 165, and cases cited *infra*, note 38.

38. Chicago Packing, etc., Co. *v.* Tilton, 87 Ill. 547; Runyan *v.* Central R. Co., 64 N. J. L. 67, 44 Atl. 985, 48 L. R. A. 744; Nolte *v.* Hill, 7 Ohio Dec. (Reprint) 297, 2 Cinc. L. Bul. 86. But see Wilson *v.* Bauman, 80 Ill. 493.

39. *Alabama.*— Haas *v.* Hudmon, 83 Ala. 174, 3 So. 302.

Delaware.— Mears *v.* Waples, 4 Houst. 62.

Florida.— Sullivan *v.* Jernigan, 21 Fla. 264.

Georgia.— Branch *v.* Palmer, 65 Ga. 210.

Illinois.— Chicago Packing, etc., Co. *v.* Tilton, 87 Ill. 547; Currie *v.* Syndicate 104 Ill. App. 165.

Indiana.— Hitesman *v.* State, 48 Ind. 473.

Iowa.— Hichhorn *v.* Bradley, 117 Iowa 130, 90 N. W. 592.

Maine.— Bodfish *v.* Fox, 23 Me. 90, 39 Am. Dec. 611.

Massachusetts.— Paddock *v.* Franklin Ins. Co., 11 Pick. 227.

Michigan.— Bourke *v.* James, 4 Mich. 336.

Missouri.— Hill *v.* Morris, 21 Mo. App. 256.

New York.— Dickinson *v.* Poughkeepsie, 75 N. Y. 65.

North Carolina.— New Hanover Bank *v.* Williams, 79 N. C. 129.

Ohio.— Boyce *v.* The Steamboat Empress, 1 Ohio Dec. (Reprint) 173, 3 West. L. J. 174.

South Carolina.— Carolina Nat. Bank *v.* Wallace, 13 S. C. 347, 36 Am. Rep. 694.

Wisconsin.— The Sultana *v.* Chapman, 5 Wis. 454.

United States.— McLanah n *v.* Universal Ins. Co., 1 Pet. 170, 7 L. ed. 98.

See 15 Cent. Dig. tit. "Customs and Usages," § 47.

An erroneous ruling excluding as immaterial evidence of a custom is cured by a charge to the jury recognizing a general custom of the character sought to be proved. Clark *v.* Cox, 32 Mich. 204.

The mere fact of a conflict in the testimony as to the existence of a usage or custom pleaded does not as a matter of law negative such custom; and if plaintiff has produced evidence which, when fairly and reasonably considered, would prove the alleged custom,

with reference to the usage.[40] On the other hand the reasonableness of an alleged custom is a question of law for the court,[41] and it is error to submit it to the jury.[42] Where evidence of usage is given to control the construction of a written instrument the jury are to determine its effect;[43] but when the jury have decided on the meaning of the terms by the assistance of the usage it is still for the court to construe the entire contract or document.[44]

the question is for the jury, under proper instructions. Milroy *v.* Chicago, etc., R. Co., 98 Iowa 188, 67 N. W. 276.

40. Burroughs *v.* Langley, 10 Md. 248; Powell *v.* Bradlee, 9 Gill & J. (Md.) 220; Scott *v.* Brown, 29 Misc. (N. Y.) 320, 60 N. Y. Suppl. 511.

What may properly be done under a good agricultural usage is a question of fact for the jury. So held in Knoll *v.* Mayer, 13 Ill. App. 203, where plaintiff sued defendant for so ditching his land as to cast the water back on plaintiff's land.

41. *Florida.*— Sullivan *v.* Jernigan, 21 Fla. 264.

Illinois.— Chicago Packing, etc., Co. *v.* Tilton, 87 Ill. 547.

Iowa.— Milroy *v.* Chicago, etc., R. Co., 98 Iowa 188, 67 N. W. 276.

Maine.— Codman *v.* Armstrong, 28 Me. 91; Bodfish *v.* Fox, 23 Me. 90, 39 Am. Dec. 611.

Maryland.— Given *v.* Charron, 15 Md. 502.

Massachusetts.— Mussey *v.* Eagle Bank, 9 Metc. 306.

Michigan.— Bourke *v.* James, 4 Mich. 336.

Ohio.— Somerby *v.* Tappan, Wright 570.

England.— Tyson *v.* Smith, 9 A. & E. 406, 1 P. & D. 307, W. W. & D. 749, 36 E. C. L. 224.

See 15 Cent. Dig. tit. "Customs and Usages. § 47.

42. Randall *v.* Smith, 63 Me. 105, 18 Am. Rep. 200; Codman *v.* Armstrong, 28 Me. 91. See Bodfish *v.* Fox, 23 Me. 90, 39 Am. Dec. 611.

43. Dawson *v.* Kittle, 4 Hill (N. Y.) 107; Goodyear *v.* Ogden, 4 Hill (N. Y.) 104.

44. Neilson *v.* Harford, 11 L. J. Exch. 20, 8 M. & W. 806; Hutchison *v.* Bowker, 5 M. & W. 535.

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CROSS-REFERENCES

For Matters Relating to:
Internal Revenue, see INTERNAL REVENUE.

I. DEFINITION.

Customs are duties charged upon commodities on their being imported into or exported from a country.[1]

II. IMPOSITION IN GENERAL.

A. Authority For — 1. IN GENERAL — a. Constitutional Limitations. Under our system of government authority to lay and collect duties, imposts, or excises is placed entirely within the hands of congress,[2] and no duty can be lawfully collected unless provision is made therefor.[3]

b. What Constitutes Exports and Imports. The words "exports and imports" as used in the federal constitution[4] refer only to property.[5] The term "export," if properly applied, refers only to goods exported to a foreign country.[6] To con-

1. Marriott *v.* Brune, 9 How. (U. S.) 619, 632, 13 L. ed. 282.

Other definitions are: "Taxes levied upon goods and merchandise imported or exported." Bouvier L. Dict. [*citing* Story Const. § 949].

"The duties, toll, tribute, or tariff, payable upon merchandise exported and imported." 1 Bl. Comm. 313.

["The term 'customs'] seems to be derived from the French word *coustum* or *coutum* which signifies toll or tribute, and owes its own etymology to the word *coust* which signfies price, charge, or, as we have adopted it in English, cost." 1 Bl. Comm. 314, note v.

The most ancient part of this specie of revenue arose, it would seem, only from exports, the consideration therefor being not only the privilege of taking goods from the realm, but also as an aid to the king in the maintenance of ports and havens, and in the protection of merchants from pirates. 1 Bl. Comm. 314. It has been said that the right to make such exactions was an inheritance of the king by common law. 1 Dyer 43*b* (24). The better authority, however, is to the contrary. 1 Bl. Comm. 314 [*citing* 2 Inst. 58, 59], holding that the king's first claim to them was by grant of parliament 3 Edw. I.

2. U. S. Const. art. 1, § 8.

3. Anglo-California Bank *v.* Secretary of Treasury, 76 Fed. 742, 747, 22 C. C. A. 527, where the court say: "In the outset, it will be conceded that revenue statutes are enacted under the general power of the government to impose a tax; that in order to sustain the tax in any given case it must affirmatively appear that the power to impose it comes within the letter and spirit of the law authorizing it."

The purpose of such enactments is not only to supply the government with revenue, but in some instances to protect or stimulate home manufacture as well. See *infra*, II, B, 1, a, (I).

4. U. S. Const. art. 1, § 10, cl. 2.

5. Therefore free human beings (New York *v.* Compagnie Generale Transatlantique, 107 U. S. 59, 2 S. Ct. 87, 27 L. ed. 383) or a dead human body (*In re* Wong Yung Quy, 2 Fed. 624, 6 Sawy. 442), are not within the meaning of the constitution. See also COMMERCE, X, B, 2, a [7 Cyc. 472].

6. Dooley *v.* U. S., 183 U. S. 151, 22 S. Ct. 62, 46 L. ed. 128, holding that Porto Rico was not a foreign country within the meaning of U. S. Const. art. 1, § 9, declaring that no taxes or duties shall be laid on articles exported from any state, and that the goods sent out under the Foraker Act of April 12, 1900, could not be considered as exported unless they went to a foreign country. See also Downes *v.* Bidwell, 182 U. S. 244, 21 S. Ct. 770, 45 L. ed. 1088; Dooley *v.* U. S., 182 U. S. 222, 21 S. Ct. 762, 45 L. ed. 1074; and COMMERCE, X, B, 2, a [7 Cyc. 472].

stitute an importation within the meaning of the customs laws goods must be voluntarily[7] brought from a foreign jurisdiction[8] to a proper port of entry[9] within the jurisdiction of the United States,[10] with an intent to unlade the

Transportation from one state into another is not within the meaning of the customs laws. Pittsburgh, etc., Coal Co. *v.* Louisiana, 156 U. S. 590, 15 S. Ct. 459, 39 L. ed. 544; Brown *v.* Houston, 114 U. S. 622, 5 S. Ct. 1091, 29 L. ed. 257; Hinson *v.* Lott, 8 Wall. (U. S.) 148, 19 L. ed. 387; Woodruff *v.* Parham, 8 Wall. (U. S.) 123, 19 L. ed. 382.

The intended disposition of goods after they have been landed in a foreign country is not material in determining whether or not they are "exported" within the meaning of that term. Indeed it would be almost impossible to administer the customs laws if such an inquiry was pertinent, and a collector could seize goods upon the pretext that the intent of the exporter was to bring them back again, whether they had been in a foreign jurisdiction one month, one year, or twenty years; but from the various definitions given to the term "export" it would seem to be clear that merchandise is exported from this country when it is landed in a foreign country. The moment that goods become "imports" to a foreign country they become "exports" as to this country. Kidd *v.* Flagler, 54 Fed. 367. Nor would the fact that a cargo, after its removal from a warehouse for importation, had not been landed in some foreign port or place, affect its character as an importation when subsequently brought within the jurisdiction of our revenue laws. McGlinchy *v.* U. S., 16 Fed. Cas. No. 8,803, 4 Cliff. 312.

7. The Concord, 9 Cranch (U. S.) 387, 3 L. ed. 768 [*followed* in The Nereid, 1 Wheat. (U. S.) 171, 4 L. ed. 63], where it was held that goods brought by superior force, inevitable necessity, or salvors into the United States, are not "imported" in the sense that the right to duties necessarily attaches. If, however, such goods are afterward sold or consumed in the country or incorporated into the general mass of its property, they become retroactively subject to payment of duties.

In the case of salvage the right of the government to duties would not take precedence of the salvage claims. Merritt *v.* One Package of Merchandise, 30 Fed. 195 [*affirmed* in 32 Fed. 111]. But see The Waterloo, 29 Fed. Cas. No. 17,257, 1 Blatchf. & H. 114. See, generally, SALVAGE.

Wrecked goods.—In England wrecked goods were originally exempted from the payment of duties not only on the ground that wrecked property belonged to the king, and that the king was not chargeable with customs, inasmuch as they were in supposition of law paid only to himself, but also upon the ground that goods cast upon the shore as wrecks could not be deemed to be imported as merchandise and to be embraced by the statutes relative to customs. Sheppard *v.* Gosnold, Vaugh. 159. This was changed, however, by 5 Geo. I, c. 11, and the acts of congress in this country have placed such goods upon the same footing as if imported in the regular course of trade. The Waterloo, 29 Fed. Cas. No. 17,257, 1 Blatchf. & H. 114.

8. De Lima *v.* Bidwell, 182 U. S. 1, 21 S. Ct. 743, 45 L. ed. 1041.

Porto Rico, after its cession to the United States by the treaty with Spain, was no longer a "foreign country" within the Dingley Tariff Act providing for duties on articles "imported from foreign countries." De Lima *v.* Bidwell, 182 U. S. 1, 21 S. Ct. 743, 45 L. ed. 1041 [*distinguishing* Fleming *v.* Page, 9 How. (U. S.) 603, 13 L. ed. 276]. *Compare* Goetze *v.* U. S., 103 Fed. 72.

The Philippine islands, subsequent to the proclamation of the ratification of the treaty of peace between the United States and Spain, were not a foreign country within the meaning of the Dingley Tariff Act. *In re* Fourteen Diamond Rings, 183 U. S. 176, 22 S. Ct. 59, 46 L. ed. 138.

Canada is foreign within the meaning of our customs laws. U. S. *v.* Seventy-Eight Cases of Books, 27 Fed. Cas. No. 16,258, 2 Bond 271.

Occupation by the military authorities of the United States of a foreign port by order of the president will not make such port a domestic port. Fleming *v.* Page, 9 How. (U. S.) 603, 13 L. ed. 276.

An intermediate stoppage at a foreign port will not make goods shipped from one domestic port to another "imports" within the meaning of the law. U. S. *v.* The Forrester, 25 Fed. Cas. No. 15,132, Newb. Adm. 81.

9. Meredith *v.* U. S., 13 Pet. (U. S.) 486, 10 L. ed. 258.

An arrival at a port is essential, and a mere arrival within the limits of the United States and of a collection district is insufficient. Arnold *v.* U. S., 9 Cranch (U. S.) 104, 3 L. ed. 671; U. S. *v.* Vowell, 5 Cranch (U. S.) 368, 3 L. ed. 128.

10. **The conquest and occupation of a portion of the territory of the United States by a public enemy** constitutes it a foreign country within the meaning of our revenue laws, and goods imported into such territory are not therefore imported into the United States, and are not liable to its customs duties; nor would a subsequent evacuation by the enemy, and the resumption of authority by the United States, affect the liability for duties on goods so imported. U. S. *v.* Rice, 4 Wheat. (U. S.) 246, 4 L. ed. 562; U. S. *v.* Hayward, 26 Fed. Cas. No. 15,336, 2 Gall. 485. But the fact that a port of the United States is under the control of an insurgent body, such as the Confederate states, and that such states have been conceded belligerent rights, does not make it a foreign port within the meaning of our customs laws, and relieve one importing goods to such port

same,[11] although the liability to duty attaches at the time of entry to the port, and not at the time the goods are entered at the custom-house.[12]

2. As Affected by Treaty. Although a treaty is under the constitution a law of the land,[13] congress may, so far as it is municipal law, repeal it, and whether a promise in a treaty that the products of one country shall not be subjected to a higher rate of duty than like products of another country is observed in the enactment of a customs law is a matter for congress and not for the judiciary.[14]

3. Infringement of Authority. The constitutional prohibition as to the taxation of exports by the United States,[15] and to the taxation of both exports and imports by a state[16] refers to the imposition of duties on goods by reason or because of their exportation or intended exportation, or while they are in course of exportation.[17] Hence a general tax laid on all property alike, and not because of the exportation of a part of it, or of an intended exportation, is not a constitutional infringement.[18] But a duty on imports is not confined to a duty levied while the article is entering the country, but may extend to a duty levied after it is so entered.[19]

B. Exercise of Authority — 1. In General — a. Construction of Laws — (1) *In General.* If the general purpose of a tariff act is the protection of the American manufacturer the courts will in construing it keep such purpose in

from his liability to the United States. U. S. *v.* Stark, 27 Fed. Cas. No. 16,378 [*distinguishing* U. S. *v.* Rice, 4 Wheat. (U. S.) 246, 4 L. ed. 562; U. S. *v.* Hayward, 26 Fed. Cas. No. 15,336, 2 Gall. 485, on the ground that those cases were decided upon the theory that Great Britain had acquired the sovereignty of Castine, and that the inhabitants thereof owed the government of Great Britain allegiance; while with regard to the Confederate states it was clear that sovereignty always rested in the United States].

11. McAndrew *v.* Robertson, 29 Fed. 246; The Gertrude, 10 Fed. Cas. No. 5,370, 3 Story 71, 2 Ware 181; The Missouri, 17 Fed. Cas. No. 9,653, 4 Ben. 410 [*affirmed* in 26 Fed. Cas. No. 15,785, 9 Blatchf. 433]; Perots *v.* U. S., 19 Fed. Cas. No. 10,993, Pet. C. C. 256; U. S. *v.* Lyman, 26 Fed. Cas. No. 15,647, 1 Mason 482. See also Kohne *v.* Insurance Co. of North America, 14 Fed. Cas. No. 7,922, 1 Wash. 158.

Articles shipped from one foreign port to another via a port in this country, where it was intended to transfer them without landing to another steamer, bound for its port of destination, and reported to the customs officials of this country as being in transit, are not imported within the meaning of the law, and would not be liable to duty. McLean *v.* Hager, 31 Fed. 602. And see The Apollon, 9 Wheat. (U. S.) 362, 6 L. ed. 111.

12. U. S. *v.* Cobb, 11 Fed. 76; Perots *v.* U. S., 19 Fed. Cas. No. 10,993, Pet. C. C. 256; U. S. *v.* Arnold, 24 Fed. Cas. No. 14,469, 1 Gall. 348; U. S. *v.* Dodge, 25 Fed. Cas. No. 14,973, Deady 124; U. S. *v.* Lindsey, 26 Fed. Cas. No. 15,603, 1 Gall. 365.

13. U. S. Const. art. 6, § 2. See, generally, Treaties.

14. Taylor *v.* Morton, 23 Fed. Cas. No. 13,799, 2 Curt. 454. See also Ropes *v.* Clinch, 20 Fed. Cas. No. 12,041, 8 Blatchf. 304.

An exemption from duty of certain goods from a country, in consideration of certain reciprocal concessions, is not an abrogation or repeal of such a treaty, at least until similar concessions are offered by the country with whom the treaty was made. Bartram *v.* Robertson, 122 U. S. 116, 7 S. Ct. 1115, 30 L. ed. 1118 [*affirming* 15 Fed. 212, 21 Blatchf. 211]; Kelly *v.* Hedden, 31 Fed. 607; Netherclift *v.* Robertson, 27 Fed. 737, 23 Blatchf. 546; Whitney *v.* Robertson, 21 Fed. 566. See also Oldfield *v.* Marriott, 10 How. (U. S.) 146, 13 L. ed. 364.

15. U. S. Const. art. 1, § 9, cl. 5.

16. U. S. Const. art. 1, § 10, cl. 2.

As to imposition of duties on exports or imports by states see Commerce, X, B, 2, a [7 Cyc. 472].

17. Turpin *v.* Burgess, 117 U. S. 504, 6 S. Ct. 835, 29 L. ed. 988.

18. Turpin *v.* Burgess, 117 U. S. 504, 6 S. Ct. 835, 29 L. ed. 988; Coe *v.* Errol, 116 U. S. 517, 6 S. Ct. 475, 29 L. ed. 715; Brown *v.* Houston, 114 U. S. 622, 5 S. Ct. 1091, 29 L. ed. 257. See also Myers *v.* Baltimore County, 83 Md. 385, 35 Atl. 144, 55 Am. St. Rep. 349, 34 L. R. A. 309.

Police regulation.— A law providing that a fee of ten dollars must be paid before a body may be disinterred and removed is a proper exercise of the police power of a state, and is not void as a duty on exports. *In re* Wong Yung Quy, 2 Fed. 624, 6 Sawy. 442. Likewise the imposition of a penalty upon a person found traveling from place to place within a state for the purpose of selling goods, etc., without having obtained a hawkers' and peddlers' license, is a proper exercise of police power. Morrill *v.* State, 38 Wis. 428, 20 Am. Rep. 12. See also Commerce, 7 Cyc. 441.

19. Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678.

mind.[20] Plain provisions of a law must be observed, however, although they operate in contravention of this general purpose;[21] and as the imposition by the government of burdens or taxes is not to be presumed beyond what the statute expressly or clearly imports, it follows that in case of ambiguity or doubt the construction will be in favor of the importer.[22]

(11) *As to Abrogation or Repeal.* The rule as to the repeal of a prior statute by implication will not be applied with strictness in the interpretation of customs laws, and unless the repugnancy is such as to leave no doubt as to the intent of congress the latter act will be considered as auxiliary to and in aid of the former, and both will be upheld.[23] But an act imposing different rates of duty "in lieu" of those formerly imposed is a repeal of the former.[24]

Hence a tax by a state on the amount of sales made by an auctioneer is void as a duty on imports, so far as it applies to the sale of goods for the importer, in the original packages. Cook *v.* Pennsylvania, 97 U. S. 566, 24 L. ed. 1015. See also COMMERCE, 7 Cyc. 429.

20. Lawrence *v.* Allen, 7 How. (U. S.) 785, 12 L. ed. 914; *In re* Schallenberger, 72 Fed. 491.

Articles which have been subjected to extra or additional process of manufacture may well be considered as intended to be subjected to a higher duty than articles upon which less work has been expended. Arnold *v.* U. S., 147 U. S. 494, 13 S. Ct. 406, 37 L. ed. 253; U. S. *v.* Eschwege, 98 Fed. 600, 39 C. C. A. 169. *Compare dictum* in Hadden *v.* Barney, 5 Wall. (U. S.) 107, 18 L. ed. 518.

Where it is evident that the literal meaning of the words used would be inconsistent with or directly opposite to the policy, object, and purpose which the framers of the statute had in view in enacting it, great latitude is allowed in their interpretation, and the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the remedy had in view; and the intention is to be taken or presumed according to what is consonant with sound reason and judicial discretion. Coles *v.* San Francisco, 100 Fed. 442, 40 C. C. A. 478.

21. *In re* Schallenberger, 72 Fed. 491.

22. American Net, etc., Co. *v.* Worthington, 141 U. S. 468, 12 S. Ct. 55, 35 L. ed. 821; Hartranft *v.* Wiegmann, 121 U. S. 609, 7 S. Ct. 1240, 30 L. ed. 1012; *In re* Guggenheim Smelting Co., 112 Fed. 517, 50 C. C. A. 374; *In re* Puget Sound Reduction Co., 96 Fed. 90; Ducas *v.* U. S., 71 Fed. 954; Matheson *v.* U. S., 71 Fed. 394, 18 C. C. A. 143 [*reversing* 65 Fed. 422]; U. S. *v.* Davis, 54 Fed. 147, 4 C. C. A. 251; McCoy *v.* Hedden, 38 Fed. 89; Adams *v.* Bancroft, 1 Fed. Cas. No. 44, 3 Sumn. 384; Powers *v.* Barney, 19 Fed. Cas. No. 11,361, 5 Blatchf. 202; U. S. *v.* Ullman, 28 Fed. Cas. No. 16,593, 4 Ben. 547; U. S. *v.* Whidden, 28 Fed. Cas. No. 16,670, 3 Ware 269; U. S. *v.* Wiglesworth, 28 Fed. Cas. No. 16,690, 2 Story 369. See also U. S. *v.* Massachusetts Gen. Hospital, 100 Fed. 932, 41 C. C. A. 114, where it is said that this rule, although often stated, is not so often applied.

If an article is placed both on the free and dutiable list the ambiguity must be resolved in favor of the importer and the goods will be admitted free. U. S. *v.* Merck, 91 Fed. 639.

23. Saxonville Mills *v.* Russell, 116 U. S. 13, 6 S. Ct. 237, 29 L. ed. 554; U. S. *v.* Walker, 22 How. (U. S.) 299, 16 L. ed. 382; U. S. *v.* One Package of Merchandise, 17 How. (U. S.) 98, 15 L. ed. 58; U. S. *v.* Nine Cases of Silk Hats, 17 How. (U. S.) 97, 15 L. ed. 57; U. S. *v.* Sixty-seven Packages of Dry-Goods, 17 How. (U. S.) 85, 15 L. ed. 54; Stuart *v.* Maxwell, 16 How. (U. S.) 150, 14 L. ed. 883; Aldridge *v.* Williams, 3 How. (U. S.) 9, 11 L. ed. 469; *In re* Secretary of Treasury, 71 Fed. 505; *In re* De Long, 70 Fed. 775 [*affirmed* in 76 Fed. 453, 22 C. C. A. 274]; Clark *v.* Peaslee, 5 Fed. Cas. No. 2,831, 1 Cliff. 545; Morlot *v.* Lawrence, 17 Fed. Cas. No. 9,815, 1 Blatchf. 608; Stalker *v.* Maxwell, 22 Fed. Cas. No. 13,283, 3 Blatchf. 138; U. S. *v.* Cuba, 25 Fed. Cas. No. 14,898, 2 Hughes 489; U. S. *v.* Seventy-Eight Cases of Books, 27 Fed. Cas. No. 16,258*a*, 2 Bond 281; U. S. *v.* Twenty-Five Cases of Cloths, 28 Fed. Cas. No. 16,563, Crabbe 356.

Even when such repugnancy exists the old law is repealed by implication only *pro tanto* to the extent of the repugnancy. Fabbri *v.* Murphy, 95 U. S. 191, 24 L. ed. 468; Wood *v.* U. S., 16 Pet. (U. S.) 342, 16 L. ed. 987. See also Wilson *v.* Spaulding, 19 Fed. 304.

Repeal by treaty.— The reciprocity treaty between the United States and Great Britain, June 5, 1854, did not operate to repeal the previous laws as to penalties and forfeitures already incurred, but only to suspend the previous statutes after a given time by admitting certain enumerated articles free of duty. *In re* One Hundred and Thirty-Four Thousand Nine Hundred and One Feet of Pine Lumber, 18 Fed. Cas. No. 10,523, 4 Blatchf. 182.

24. Gossler *v.* Goodrich, 10 Fed. Cas. No. 5,631, 3 Cliff. 71; Washington Mills *v.* Russell, 29 Fed. Cas. No. 17,247, Holmes 245. See also Gautier *v.* Arthur, 104 U. S. 345, 26 L. ed. 773 [*reversing* 10 Fed. Cas. No. 5,278, 13 Blatchf. 432].

But the rule that when a later statute is a complete revision of the subject to which the earlier statute related, and the new legislation was manifestly intended as a substitute for the former, the prior act will be repealed

(III) *As to Classification of Goods* — (A) *In General.* The imposition of a duty upon an article by a specific name or by a restrictive provision, the language of which will only apply to articles of a special class or kind, will determine its classification, although general terms are elsewhere used in the act which might otherwise have embraced such article.[25] This rule applies, although the effect would be to reduce,[26] or to exempt the article from duty altogether.[27]

(B) *Commercial Designation Governs.* It is a rule generally recognized that congress in enumerating articles in a customs act refers to them by the name by which they are generally known commercially in our markets at the time of the passage of the act,[28] unless it appears by the act itself that a different meaning

applies. U. S. *v.* Ranlett, 172 U. S. 133, 19 S. Ct. 114, 43 L. ed. 393; Saunders *v.* U. S., 114 Fed. 42, 51 C. C. A. 668; Kent *v.* U. S., 73 Fed. 680, 19 C. C. A. 642 [*affirming* 68 Fed. 536]. And see U. S. *v.* Schoverling, 146 U. S. 76, 13 S. Ct. 24, 36 L. ed. 893.

If two provisions are repugnant in a customs law the latter will prevail. Powers *v.* Barney, 19 Fed. Cas. No. 11,361, 5 Blatchf. 202.

25. Chew Hing Lung *v.* Wise, 176 U. S. 156, 20 S. Ct. 320, 44 L. ed. 412 [*reversing* 83 Fed. 162, 27 C. C. A. 494]; Fink *v.* U. S., 170 U. S. 584, 18 S. Ct. 770, 42 L. ed. 1153; Bogle *v.* Magone, 152 U. S. 623, 14 S. Ct. 718, 38 L. ed. 574; American Net, etc., Co. *v.* Worthington, 141 U. S. 468, 12 S. Ct. 55, 35 L. ed. 821; Seeberger *v.* Cahn, 137 U. S. 95, 11 S. Ct. 28, 34 L. ed. 599; Robertson *v.* Glendinning, 132 U. S. 158, 10 S. Ct. 44, 33 L. ed. 298; Arthur v. Davies, 96 U. S. 135, 24 L. ed. 810; Arthur *v.* Stephani, 96 U. S. 125, 24 L. ed. 771; Arthur *v.* Zimmerman, 96 U. S. 124, 24 L. ed. 770; Arthur *v.* Unkart, 96 U. S. 118, 24 L. ed. 768; Arthur *v.* Lahey, 96 U. S. 112, 24 L. ed. 766; Movius *v.* Arthur, 95 U. S. 144, 24 L. ed. 420; Homer *v.* Austin, 1 Wall. (U. S.) 486, 17 L. ed. 688; Roche *v.* U. S., 116 Fed. 911; Tilge *v.* U. S., 115 Fed. 254; Guiterman *v.* U. S., 113 Fed. 994; Battle, etc., Chemists' Corp. *v.* U. S., 108 Fed. 216; Lake Ontario Fish Co. *v.* U. S., 99 Fed. 551; Koechl *v.* U. S., 91 Fed. 110, 33 C. C. A. 363; Arbib *v.* U. S., 86 Fed. 121; *In re* Zante Currants, 73 Fed. 183; U. S. *v.* Field, 71 Fed. 513, 18 C. C. A. 225; U. S. *v.* Davis, 54 Fed. 147, 4 C. C. A. 251; Hagedon *v.* Seeberger, 38 Fed. 401; Stodder *v.* Spalding, 24 Fed. 89; Dodge *v.* Arthur, 7 Fed. Cas. No. 3,950; Hutton *v.* Schell, 12 Fed. Cas. No. 6,962; Tong Duck Chung *v.* Kelly, 24 Fed. Cas. No. 14,093.

26. Arthur *v.* Rheims, 96 U. S. 143, 24 L. ed. 813.

27. Tong Duck Chung *v.* Kelly, 24 Fed. Cas. No. 14,093.

Illustrations of rule.— Where there is a provision for goods "made wholly or in part of wool," and in another schedule a provision for goods "made of silk, or of which silk is the component material of chief value," the latter provision will be held to be the more specific enumeration of the two. Hartranft *v.* Meyer, 135 U. S. 237, 10 S. Ct. 751, 34 L. ed. 110 [*affirming* 28 Fed. 358]. Likewise where there are operative provisions in a tariff act, one providing a duty for "manufactures composed of mixed materials, in part of cotton, silk, etc.," and in another act a clause provides for a different duty upon "manufactures of which silk is the component part of chief value," the latter clause will be considered the more specific, and the two phrases will be construed as follows: "Goods made of mixed materials, cotton, silk, etc., shall pay a specified duty, . . . but if silk is the component part of chief value, they shall pay a duty of 50 per cent." Solomon *v.* Arthur, 102 U. S. 208, 26 L. ed. 147.

The fact that certain goods had never been manufactured, or that certain articles were unknown to commerce at the time of the passage of an act, will not exempt them from its operation if they clearly fall within the class contemplated by the statute. Pickhardt *v.* Merritt, 132 U. S. 252, 10 S. Ct. 80, 33 L. ed. 353; Newman *v.* Arthur, 109 U. S. 132, 3 S. Ct. 88, 27 L. ed. 883; Smith *v.* Field, 105 U. S. 52, 26 L. ed. 1007; U. S. *v.* Sehlbach, 90 Fed. 798, 33 C. C. A. 277; Matheson *v.* U. S., 90 Fed. 276.

28. Chew Hing Lung *v.* Wise, 176 U. S. 156, 20 S. Ct. 320, 44 L. ed. 412; U. S. *v.* Buffalo Natural Gas Fuel Co., 172 U. S. 339, 19 S. Ct. 200, 43 L. ed. 469; De Jonge *v.* Magone, 159 U. S. 562, 16 S. Ct. 119, 40 L. ed. 260; Patton *v.* U. S., 159 U. S. 500, 16 S. Ct. 89, 40 L. ed. 233; Maddock *v.* Magone, 152 U. S. 368, 14 S. Ct. 588, 38 L. ed. 482; Hedden *v.* Richard, 149 U. S. 346, 13 S. Ct. 891, 37 L. ed. 763; Worthington *v.* Abbott, 124 U. S. 434, 8 S. Ct. 562, 31 L. ed. 494 [*affirming* 20 Fed. 495]; Schmieder *v.* Barney, 113 U. S. 645, 5 S. Ct. 624, 28 L. ed. 1130; Greenleaf *v.* Goodrich, 101 U. S. 278, 25 L. ed. 845; Arthur *v.* Davies, 96 U. S. 135, 24 L. ed. 810; Arthur *v.* Lahey, 96 U. S. 112, 24 L. ed. 766; Arthur *v.* Morrison, 96 U. S. 108, 24 L. ed. 764; Curtis *v.* Martin, 3 How. (U. S.) 106, 11 L. ed. 516; Elliott *v.* Swartwout, 10 Pet. (U. S.) 137, 9 L. ed. 373; U. S. *v.* One Hundred Twenty Casks of Sugar, 8 Pet. (U. S.) 277, 8 L. ed. 944; Nordlinger *v.* U. S., 115 Fed. 828; Tiffany *v.* U. S., 103 Fed. 619; *In re* Hope, etc., Engraving, etc., Co., 100 Fed. 286; *In re* Wieland, 98 Fed. 99; U. S. *v.* Jonas, 83 Fed. 167, 27 C. C. A. 500; *In re* Zante Currants, 73 Fed. 183; *In re* Herrman, 52 Fed. 941; Fox *v.* Cadwalader, 42 Fed. 209; Lamb *v.* Robertson, 38 Fed. 716; McCoy *v.* Hedden, 38 Fed. 89; Weilbacher *v.* Merritt, 37 Fed. 85; Young *v.* Spalding, 24 Fed. 22; Ross *v.* Fuller, 17 Fed. 224; May *v.*

was intended,[29] or unless the article designated has, by the general usage of the trade to which it appertains, a special or restricted meaning,[30] or has been so altered or so adapted to special purposes as to come under a special commercial designation.[31] It is necessary, however, that the commercial designation be the result of established usage which at the passage of the act was definite, uniform, and general,[32] and hence the commercial designation since the passage of the act must not be considered.[33]

(c) *Condition at Time of Importation Material.* It is also a rule recognized by the courts that where the use of an article is not intended to be the test by which its classification is to be governed,[34] its dutiable classification must, in order to produce uniformity, be determined by an examination of it in the condition in which it is imported.[35]

Simmons, 4 Fed. 499; Bacon *v.* Bancroft, 2 Fed. Cas. No. 714, 1 Story 341; Cochrane *v.* Swartout, 5 Fed. Cas. No. 2,928; Farnham *v.* Bancroft, 8 Fed. Cas. No. 4,671; Hutton *v.* Schell, 12 Fed. Cas. No. 6,962; Jaffray *v.* Murphy, 13 Fed. Cas. No. 7,172; Lee *v.* Lincoln, 15 Fed. Cas. No. 8,195, 1 Story 610; U. S. *v.* Sarchet, 27 Fed. Cas. No. 16,224, Gilp. 273.

Statements contained in the report of a senate committee to show an inferential intent to place the article in another clause are insufficient to affect the general rule, if the commercial meaning clearly includes the article. *In re* Downing, 56 Fed. 470, 5 C. C. A. 575.

If the commercial designation fails (Robertson *v.* Salomon, 130 U. S. 412, 9 S. Ct. 559, 32 L. ed. 995), or if the term has no commercial meaning (Tiffany *v.* U. S., 103 Fed. 619), or where the evidence as to the commercial designation is conflicting (Bour *v.* U. S., 91 Fed. 533) resort must then be had to its common designation, or by the name given it in the dictionaries; and the ordinary dictionary meaning of the word must govern if it cannot be shown that it has a commercial meaning (Milne *v.* U. S., 115 Fed. 410).

The commercial and ordinary use will be presumed to be the same unless the contrary is shown. Maddock *v.* Magone, 152 U. S. 368, 14 S. Ct. 588, 38 L. ed. 482; Schmieder *v.* Barney, 113 U. S. 645, 5 S. Ct. 624, 28 L. ed. 1130; Swan *v.* Arthur, 103 U. S. 597, 26 L. ed. 525.

29. Maddock *v.* Magone, 153 U. S. 368, 14 S. Ct. 588, 38 L. ed. 482; *In re* Salomon, 48 Fed. 287; Bailey *v.* Schell, 2 Fed. Cas. No. 745, 5 Blatchf. 195; Roosevelt *v.* Maxwell, 20 Fed. Cas. No. 12,034, 3 Blatchf. 391.

30. Hedden *v.* Richard, 149 U. S. 346, 13 S. Ct. 891, 37 L. ed. 763; U. S. *v.* Massachusetts Gen. Hospital, 100 Fed. 932, 41 C. C. A. 114; U. S. *v.* Roessler, etc., Chemical Co., 79 Fed. 313, 24 C. C. A. 604; Kennedy *v.* Hartranft, 9 Fed. 18.

The meaning used between parties who are engaged in that particular occupation as the business of their lives is the criterion, and not that used between the retail dealer and the individual purchaser. Lamb *v.* Robertson, 38 Fed. 716; Morrison *v.* Miller, 37 Fed. 82.

It must be shown that prior to the passage of the law such term was in commerce and trade at all ports and trade centers of the country a well-known, uniform, and universally accepted designation of such particular class. Carson *v.* Nixon, 90 Fed. 409, 33 C. C. A. 135. See also Cohn *v.* Erhardt, 44 Fed. 747.

31. McLeod *v.* U. S., 75 Fed. 927. See also Wilkinson *v.* Greely, 29 Fed. Cas. No. 17,672, 1 Curt. 439.

32. Sonn *v.* Magone, 159 U. S. 417, 16 S. Ct. 67, 40 L. ed. 203; Maddock *v.* Magone, 152 U. S. 368, 14 S. Ct. 588, 38 L. ed. 482; Berbecker *v.* Robertson, 152 U. S. 373, 14 S. Ct. 590, 38 L. ed. 484; Woolworth *v.* U. S., 113 Fed. 1007; Field *v.* U. S., 90 Fed. 412, 33 C. C. A. 138; Claflin *v.* Robertson, 38 Fed. 92; Wilkinson *v.* Greely, 29 Fed. Cas. No. 17,672, 1 Curt. 439.

33. Curtis *v.* Martin, 3 How. (U. S.) 106, 11 L. ed. 516 [*affirming* 16 Fed. Cas. No. 9,160]; U. S. *v.* One Hundred Twenty Casks of Sugar, 8 Pet. (U. S.) 277, 8 L. ed. 944; *In re* Two Hundred Chests of Tea, 9 Wheat. (U. S.) 430, 6 L. ed. 128; Ross *v.* Fuller, 17 Fed. 224; Christ *v.* Schell, 5 Fed. Cas. No. 2,699; Lee *v.* Lincoln, 15 Fed. Cas. No. 8,195, 1 Story 610.

34. See *infra*, II, B, 1, a, (III), (D).

35. Dwight *v.* Merritt, 140 U. S. 213, 11 S. Ct. 768, 35 L. ed. 450; Magone *v.* Luckemeyer, 139 U. S. 612, 11 S. Ct. 651, 35 L. ed. 298; Seeberger *v.* Farwell, 139 U. S. 608, 11 S. Ct. 650, 35 L. ed. 297; Worthington *v.* Robbins, 139 U. S. 337, 11 S. Ct. 581, 35 L. ed. 181; Merritt *v.* Welsh, 104 U. S. 694, 26 L. ed. 896; U. S. *v.* Wotton, 53 Fed. 344, 3 C. C. A. 553; U. S. *v.* Nichols, 46 Fed. 359; U. S. *v.* Cook, 25 Fed. Cas. No. 14,852, 1 Sprague 213. See also Jessup, etc., Paper Co. *v.* Cooper, 46 Fed. 186; U. S. *v.* Levitt, 26 Fed. Cas. No. 15,594, 1 N. Y. Leg. Obs. 92.

An application of this rule is found in U. S. *v.* Schoverling, 146 U. S. 76, 13 S. Ct. 24, 36 L. ed. 893, where the statute having imposed one rate of duty upon shot-guns, and a different rate upon manufactured articles or wares not provided for and composed in part of iron and steel, the question arose as to whether an importation of finished shot-gun stocks, with locks and mountings, should be assessed as shot-guns or as articles composed in part of iron and steel. It appeared

(D) *Determinable by Use.* With regard to some articles, however, congress may make the actual use to which they may be put the test by which their classification is to be governed.[36] It may also be said that where the schedule within which an article should fall is uncertain,[37] the chief or predominant use to which the article is applied will determine its classification.[38] So too in analogy to the rules of commerical classification,[39] the classification must be determined by the use at the time the law was passed.[40]

(E) *Noscitur a Sociis Applicable.* It is a rule of construction frequently and consistently declared that when a general descriptive term or clause is employed in a tariff act in connection with words of a particular description or

from the evidence that this importation was ordered from one manufacturing establishment, while the barrels evidently intended for the same were to be obtained from another firm, with the expectation that the two should be put together and sold as shot-guns. It was held that the intent of the importer to put the gun-stocks with the barrels separately imported could not affect the rate of duty on the gun-stocks as a separate importation, and that they were not therefore dutiable as firearms. In accord with this case is Robertson *v.* Gerdan, 132 U. S. 454, 10 S. Ct. 119, 33 L. ed. 403, where a statute having imposed a duty on musical instruments, but not the same duty on parts of musical instruments, it was held that pieces of ivory for the keys of pianos and organs, to be used exclusively for such musical instruments, and made for such purposes, were not dutiable as musical instruments, but must be classed as manufactures of ivory. The mere fact, however, that gun-stocks are separately packed from the barrels before importation cannot change the dutiable character of the goods, where they are shipped by the same vessel for the same importation and entered at the same custom-house. Under such circumstances the parts would be dutiable as a whole, and must be assessed as firearms. U. S. *v.* Irwin, 78 Fed. 799, 24 C. C. A. 349. To the same effect see Isaacs *v.* Jonas, 148 U. S. 648, 13 S. Ct. 677, 37 L. ed. 596, where it was held that cigarette papers in one package, and the book forms therefor in another, were dutiable collectively as smoker's articles. So an article which is invoiced and intended to be sold as a single thing is not resolvable into its constituents for the purpose of ascertaining its liability to duty. Wanamaker *v.* Cooper, 69 Fed. 465.

36. See *infra*, II, B, 3, a, (II), (N); II, B, 4, a, (I).

The test of the suitableness of an article for a certain purpose, when use is made the test, is whether it possesses actual, practical fitness for that purpose (White *v.* U. S., 69 Fed. 93), it being sufficient if its use for the purpose in question is a substantial one (Zucker, etc., Chemical Co. *v.* Magone, 37 Fed. 776).

This mode of classification was first used in the tariff act of 1846, and is usually applied to articles not known in trade and commerce by any particular appellation. Maillard *v.* Lawrence, 16 Fed. Cas. No. 8,971, 1 Blatchf. 504. See also Thomson *v.* Maxwell, 23 Fed. Cas. No. 13,983, 2 Blatchf. 385. The method is a very philosophical and logical way of classifying articles for duty, but in practice it is at times extremely inconvenient; so much so is this true that unless the language of the act clearly indicates the plain intent on the part of congress that the use of an article should determine its classification the courts are cautious in applying this test. Clay *v.* Magone, 40 Fed. 230.

37. Smith *v.* U. S., 93 Fed. 194, 35 C. C. A. 265, holding that the test of predominant use is only resorted to in those cases where it is necessary to find the proper location of a suitable article which falls within two or more classifications, either of which standing alone would adequately describe it, and in those cases in which an article is enumerated by reference to its use. See also Chew Hing Lung *v.* Wise, 176 U. S. 156, 20 S. Ct. 320, 44 L. ed. 412 [*reversing* 83 Fed. 162, 27 C. C. A. 494], holding that tapioca flour, used by Chinese laundrymen on the Pacific coast as starch, and by calico-printers and carpet manufacturers to thicken colors, and in the manufacture of a substitute for gum arabic as well as for sizing cotton goods, and as an adulterant in the manufacture of candy and other articles, but commercially known in the United States as tapioca flour, should not be included under the expression "preparations fit for use as starch," but should be included under the class "tapioca, cassava, or cassady."

38. Magone *v.* Wiederer, 159 U. S. 555, 16 S. Ct. 122, 40 L. ed. 258; Hartranft *v.* Meyer, 149 U. S. 544, 13 S. Ct. 982, 983, 37 L. ed. 840; Cadwalader *v.* Wanamaker, 149 U. S. 532, 13 S. Ct. 979, 983, 37 L. ed. 837; Robertson *v.* Edelhoff, 132 U. S. 614, 10 S. Ct. 186, 33 L. ed. 477; Hartranft *v.* Langfeld, 125 U. S. 128, 8 S. Ct. 732, 31 L. ed. 672; U. S. *v.* Fougera, 90 Fed. 801; Meyer *v.* Cadwalader, 89 Fed. 963, 32 C. C. A. 456 [*reversing* 49 Fed. 26]; Hagedon *v.* Seeberger, 38 Fed. 401; Dallet *v.* Smythe, 6 Fed. Cas. No. 3,545, 6 Blatchf. 419.

Especially is this true when the article is of recent manufacture, and is a substitute for other articles. Koch *v.* Seeberger, 30 Fed. 424.

39. See *supra*, II, B, 1, a, (III), (B).

40. Rossman *v.* Hedden, 145 U. S. 561, 12 S. Ct. 925, 36 L. ed. 817 [*affirming* 37 Fed. 99].

enumeration, its meaning is to be ascertained by a reference to the words of particular designation, and its otherwise general inclusiveness is restricted by reason of its collocation with such enumeration.[41]

(IV) *CONSTRUCTION OF ANALOGOUS ACTS.* Where the language of a customs act is substantially the same as a previous act, the construction placed upon the latter by the proper officials, while not controlling upon the courts, will nevertheless be considered by them in construing the former.[42]

41. U. S. *v.* Nicholls, 186 U. S. 298, 22 S. Ct. 918, 46 L. ed. 1173; Hollender *v.* Magone, 149 U. S. 586, 13 S. Ct. 932, 37 L. ed. 860 [*reversing* 38 Fed. 912]; Forbes Lithograph Mfg. Co. *v.* Worthington, 132 U. S. 655, 10 S. Ct. 180, 33 L. ed. 453; Reiche *v.* Smythe, 13 Wall. (U. S.) 162, 20 L. ed. 566 [*reversing* 20 Fed. Cas. No. 11,666, 7 Blatchf. 235]; Wiebusch *v.* U. S., 84 Fed. 451, 28 C. C. A. 154; Dodge *v.* U. S., 84 Fed. 449, 28 C. C. A. 152 [*explaining* Ingersoll *v.* Magone, 53 Fed. 1008, 4 C. C. A. 150]; White *v.* Barney, 43 Fed. 474; Swayne *v.* Hager, 37 Fed. 780, 13 Sawy. 618; U. S. *v.* Sixty-Five Terra Cotta Vases, 18 Fed. 508, 21 Blatchf. 511; Adams *v.* Bancroft, 1 Fed. Cas. No. 44, 3 Sumn. 384; Butterfield *v.* Arthur, 4 Fed. Cas. No. 2,249, 16 Blatchf. 216.

An illustration of the rule is found in Dingelstedt *v.* U. S., 91 Fed. 112, 33 C. C. A. 395 [*affirming* 87 Fed. 190], where it was held that the phrase "all articles composed of earthen or mineral substances, . . . not specially provided for in this act," as used in the act of 1894, par. 86, being in schedule B, which relates to earth, earthenware, and glassware, must be construed, by the reason of the collocation of the paragraph, in a restricted sense, as applying only to articles composed of mineral substances similar to those enumerated in that schedule. See also Chapon *v.* Smythe, 5 Fed. Cas. No. 2,611, 11 Blatchf. 120, holding that the word "ribbons," when found in a clause in the silk schedule which reads "all dress and piece silks, ribbons, and silk velvets, or velvets of which silk is the component material of chief value," must be understood as including only silk ribbons.

The "not otherwise provided for" clause which is used so often in the tariff acts that it has been designated the "n. o. p. f." clause (U. S. *v.* Stearns, 79 Fed. 953, 25 C. C. A. 256 [*affirming* 75 Fed. 833]) is employed out of abundant caution that nothing may escape duty (Smythe *v.* Fiske, 23 Wall. (U. S.) 374, 23 L. ed. 47). But where an article is of such nature that it might reasonably be included under a dutiable schedule containing this clause, and also in the same act under a free enumeration containing this clause or its equivalent, it is held that their presence in both provisions neutralizes their effect in each, so that each enumeration might be read, so far as the article in question is concerned, as though the clause were omitted; and in such case the article would be classed under that part of the act in which it is the more specifically enumerated. Matheson *v.* U. S., 71 Fed. 394, 18 C. C. A. 143. And as statutes enacted at different times are to be considered as parts of one composite general system of customs laws, if it is evident in an act that congress did not intend to make a complete enumeration or a complete revision of the tariff law with regard to that particular subject, this clause when used may be held to refer to enumerations in former tariff acts. Saxonville Mills *v.* Russell, 116 U. S. 13, 6 S. Ct. 237, 29 L. ed. 554. On the other hand if the section in which this clause is used contains a very full enumeration, and is evidently intended to be exhaustive, the phrase "not otherwise provided for" will be held to apply not to preceding acts which may not have been present in the minds of the draftsmen, and to which there was no necessity to refer, but will be construed as intending to refer to the preceding enumeration in the same section where it is found. Smythe *v.* Fiske, 23 Wall. (U. S.) 374, 23 L. ed. 47. Where, however, congress uses the expression, "not otherwise herein provided for," the word "herein" will exclude any reference to earlier acts, and will be held to refer only to the tariff act in which the expression is found. Miller *v.* Vietor, 127 U. S. 572, 8 S. Ct. 1225, 32 L. ed. 201; Arthur *v.* Butterfield, 125 U. S. 70, 8 S. Ct. 714, 31 L. ed. 643; Dieckerhoff *v.* Miller, 93 Fed. 651, 35 C. C. A. 525. See also Coles *v.* San Francisco, 100 Fed. 442, 40 C. C. A. 478; Zucker, etc., Chemical Co. *v.* Magone, 37 Fed. 776.

"Similar description" is to be understood in its popular and general meaning, i. e. goods similar in product and adapted to similar uses, and not necessarily produced by similar methods of manufacture. Greenleaf *v.* Goodrich, 101 U. S. 278, 25 L. ed. 845 [*affirming* 10 Fed. Cas. No. 5,778, 1 Hask. 586].

42. Smythe *v.* Fiske, 23 Wall. (U. S.) 374, 23 L. ed. 47; U. S. *v.* Townsend, 113 Fed. 442, 51 C. C. A. 276; U. S. *v.* Massachusetts Gen. Hospital, 100 Fed. 932, 41 C. C. A. 114; U. S. *v.* H. B. Claflin Co., 92 Fed. 914, 35 C. C. A. 800; U. S. *v.* Wotten, 50 Fed. 693; U. S. *v.* Kaub, 26 Fed. Cas. No. 15,507.

The contemporaneous exposition by the government of a customs act should be given great weight in the subsequent interpretation of the same (Clark *v.* Peaslee, 5 Fed. Cas. No. 2,831, 1 Cliff. 545), especially where such a construction has been followed unquestioned for thirty years (U. S. *v.* The Recorder, 27 Fed. Cas. No. 16,129, 1 Blatchf. 218).

Where a special meaning was attached to certain words in a prior tariff act, it is fair to presume that congress intended that they

b. Operation and Effect — (i) *As Dependent Upon Time of Signing.* The legal fiction that the law recognizes no divisions or fractions of a day being one of convenience rather than of justice,[43] the exact time at which a customs bill was signed by the president may be shown; the courts holding that it becomes operative only from the moment of such signing.[44]

(ii) *Upon Goods in Transportation or Custody of Government.* Goods in course of importation will, in the absence of special provisions to the contrary, be affected by any change in the law during such time, and will be liable to the duties leviable at the time they are entered.[45] With regard to goods in public stores and bonded warehouses, it may be said that congress does not regard their importation as complete while they so remain in the custody of the customs officials, and during such time they are subject to any changes which may be made in the duties.[46] Where the duties are increased it is usually provided, however, that the importer may withdraw the goods within a certain time by paying the former rate of duty;[47] and if the duty is decreased, the importer is usually required to pay the rate leviable at the time of their withdrawal for consumption.[48]

should have the same signification when used in a subsequent act in relation to the same subject-matter. Reiche *v.* Smythe, 13 Wall. (U. S.) 162, 20 L. ed. 566.

43. U. S. *v.* Stoddard, 89 Fed. 699. See, generally, TIME.

44. Nunn *v.* William Gerst Brewing Co., 99 Fed. 939, 40 C. C. A. 190; U. S. *v.* Stoddard, 89 Fed. 699 [*affirmed* in 91 Fed. 1005, 34 C. C. A. 175]; U. S. *v.* Iselin, 87 Fed. 194. *Compare* U. S. *v.* Williams, 28 Fed. Cas. No. 16,723, 1 Paine 261. See also U. S. *v.* Burr, 159 U. S. 78, 15 S. Ct. 1002, 40 L. ed. 82.

45. Arnold *v.* U. S., 9 Cranch (U. S.) 104, 3 L. ed. 671 [*affirming* 24 Fed. Cas. No. 14,469, 1 Gall. 348]; *In re* Gardiner, 53 Fed. 1013, 4 C. C. A. 155; Gossler *v.* Goodrich, 10 Fed. Cas. No. 5,631, 3 Cliff. 71; Smith *v.* Draper, 22 Fed. Cas. No. 13,037, 5 Blatchf. 238.

The same rule applies where there is a diminution, as where there is an increase of duties. U. S. *v.* Vowell, 5 Cranch (U. S.) 368, 3 L. ed. 128. See also Heinemann *v.* Rollins, 120 U. S. 82, 7 S. Ct. 446, 30 L. ed. 605; Perots *v.* U. S., 19 Fed. Cas. No. 10,993, Pet. C. C. 256.

The act will be presumed to take effect from the day of its passage, and goods arriving on the day of the passage of the act will be subject to the new duties. Arnold *v.* U. S., 9 Cranch (U. S.) 104, 3 L. ed. 671 [*affirming* 24 Fed. Cas. No. 14,469, 1 Gall. 348]; Smith *v.* Draper, 22 Fed. Cas. No. 13,037, 5 Blatchf. 238.

46. U. S. *v.* Benzon, 24 Fed. Cas. No. 14,577, 2 Cliff. 512. See also Smith *v.* Draper, 22 Fed. Cas. No. 13,037, 5 Blatchf. 238.

The fact that after importation from Porto Rico, but before withdrawal from the bonded warehouse, Porto Rico had become United States territory would not relieve the importer from liability for customs duties. Mosle *v.* Bidwell, 119 Fed. 480.

No implied contract arises in a case where congress has exercised its power to lay a tax on an article that another tax shall not be laid within the same year, or within a shorter period, or that congress shall not in any manner in which it may see fit revise the tariff laws or the warehouse system, either by increasing or diminishing the rate of duty. U. S. *v.* Benzon, 24 Fed. Cas. No. 14,577, 2 Cliff. 512. See also Cunard Steamship Co. *v.* U. S., 25 Ct. Cl. 428, 432, where the court say: "The right of the Government to impose taxes, duties, imposts, and exeises is not a right sounding in contract with the individual. A tax may at any time be increased or diminished or a new tax or a new duty may be at any time imposed without founding any right in contract upon the part of the individual against the Government."

47. U. S. *v.* McGrath, 50 Fed. 404 [*distinguishing* Fabbri *v.* Murphy, 95 U. S. 191, 24 L. ed. 468].

If the goods are not withdrawn within the time provided by the statute they are subject to the prescribed higher rate of duty. Fabbri *v.* Murphy, 95 U. S. 191, 24 L. ed. 468; U. S. *v.* Benzon, 24 Fed. Cas. No. 14,577, 2 Cliff. 512.

48. Hartranft *v.* Oliver, 125 U. S. 525, 8 S. Ct. 958, 31 L. ed. 813 [*followed* in Sherman *v.* Robertson, 136 U. S. 570, 10 S. Ct. 1063, 34 L. ed. 540]; Oppenheimer *v.* U. S., 90 Fed. 796; U. S. *v.* E. L. Goodsell Co., 84 Fed. 439, 28 C. C. A. 453; *In re* Mathews, 45 Fed. 850; U. S. *v.* Duvivier, 25 Fed. Cas. No. 15,017, 12 Blatchf. 449. See also Abbot *v.* U. S., 20 Ct. Cl. 280.

What constitutes government custody. — It is not necessary that the goods be actually placed in the government warehouse to receive the benefit of the statute. If upon their arrival in port they are taken into custody by one of the customs officials they are within the meaning of the act the same as if they had been placed within the warehouse. Hartranft *v.* Oliver, 125 U. S. 525, 8 S. Ct. 958, 31 L. ed. 813. To the same effect see U. S. *v.* E. L. Goodsell Co., 84 Fed. 439, 28 C. C. A. 453. But see McAndrew *v.* Robertson, 29 Fed. 246, where, although the vessel had arrived in port, it did not appear that any customs official had taken charge of her between the time of the arrival and the change of law; and that therefore the duty

2. Nature of Duties Imposed. Congress has not as a rule in the imposition of duties confined itself to any fixed method in the determination of the same, but has had more in mind the convenience of collecting such duties and the end sought to be accomplished. Hence as to some articles the duties are purely specific; as to others purely *ad valorem*; as to others both specific and *ad valorem*;[49] while in still other instances a discriminating duty is provided for on articles, the exportation of which is encouraged by the payment of a bounty.[50]

3. Manner of Imposition — a. By Specific Designation or Special Classification — (i) *In General.* Inasmuch as the scope or meaning of a certain term or expression found in a tariff schedule is directly affected by the inclusion or omission of other terms or expressions in the same act, and as congress in the enactment of such statutes has often apparently had in view the effect of former decisions,[51] it is evident that a judicial determination of the meaning of a word or expression is often one of difficulty and perplexity.[52] However, as congress has followed a general system of schedules since the act of 1883 to the present time,[53] and designated or specially classified articles under this system, it is evident that the judicial construction given certain terms and clauses when thus used is of

leviable was that prescribed upon the arrival of the vessel; the facts in the case showing that they could not be considered as in a bonded warehouse.

49. See Hoeninghaus *v.* U. S., 172 U. S. 622, 19 S. Ct. 305, 43 L. ed. 576.

50. The Dingley Tariff Act provides that whenever any country "shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article of merchandise from such country" which is dutiable under the act "an additional duty equal to such bounty or grant shall be collected thereon" upon its importation into the United States. 30 U. S. St. at L. 205 [U. S. Comp. St. (1901) p. 1693].

When statute applies.— The laws of Russia which in substance remit the excise tax due upon sugar exported, and issues to the exporter a certificate of exportation which authorizes a sale in the domestic market, of an equal quantity of "free reserve or free surplus" sugar, without the payment of the additional tax otherwise required to be paid thereon, and which certificate is transferable and has a substantial market value, is within the meaning of this statute, and sugar so exported is subject to the additional duty. Downs *v.* U. S., 113 Fed. 144, 51 C. C. A. 100 [*affirmed* in 187 U. S. 496, 23 S. Ct. 222, 47 L. ed. 275]. On the other hand where a country gives a bounty for the production of sugar and provides that such bounty shall be deducted from the excise thereon, but that the excise shall be remitted on exportation, the duty is not a bounty on the exportation, either directly or indirectly, but on the production, and is not within the meaning of the statute. Hills *v.* U. S., 99 Fed. 425. And see as to discriminating duties under prior acts Russell *v.* Williams, 106 U. S. 623, 1 S. Ct. 409, 27 L. ed. 220; Powers *v.* Conly, 101 U. S. 789, 25 L. ed. 805; Sturges *v.* Draper, 12 Wall. (U. S.) 19, 20 L. ed. 255; Hadden *v.* Barney, 5 Wall. (U. S.) 107, 18 L. ed. 518; Strange *v.* Barney, 35 Fed. 196; Campbell *v.* Barney, 4 Fed. Cas. No. 2,354, 5 Blatchf. 221; Williams *v.* Barney, 29 Fed. Cas. No. 17,713, 5 Blatchf. 219.

51. Thus it may be assumed that the framers of the tariff act of 1894 had in view the decision of the court in *In re* Duncan, 57 Fed. 197, which was a construction of the term "wafers unmedicated," as used in the act of 1890, par. 750, when they added to the corresponding clause (par. 667), the words "and not edible." So it may be assumed that the framers of the same act had in view the case of U. S. *v.* Perry, 146 U. S. 71, 13 S. Ct. 26, 36 L. ed. 890, which was a construction of the act of 1890, par. 677, when they inserted in the corresponding paragraph (par. 686), the phrase "stained or painted window glass, and stained or painted glass windows." Likewise it may be inferred that congress intended to sanction and approve, and possibly render more certain the construction put upon the act of 1890, par. 648, providing for medals of gold, silver, or copper in U. S. *v.* McSorley, 65 Fed. 492, 13 C. C. A. 15, when they changed the phraseology to that as found in the act of 1894, par. 551.

52. Difficulties of construction. — While neither mere awkwardness of expression nor imperfect punctuation are of much weight in the construction of tariff acts (U. S. *v.* H. B. Claflin Co., 92 Fed. 914, 35 C. C. A. 80), it may well be expected that in statutes so long, detailed, comprehensive, and intricate as tariff acts, there will be found not only awkward and obscure sentences, but also errors and actual or apparent inconsistencies, contradictions, and duplications (Wiebusch *v.* U. S., 84 Fed. 451, 28 C. C. A. 154). The fact must also be recognized that as time goes by and new processes become known to trade, and old differences are obliterated or new ones created, congress is supposed to keep informed as to such change, and when it passes a tariff act it will be assumed that it does so with the full understanding of the condition of things at that time. Ballin *v.* Magone, 41 Fed. 921.

53. See *infra*, II, B, 3, a, (II) *et seq.*

special value in determining the import of the same or similar terms when used in the existing or in future acts.

(II) *By Schedule*—(A) *Chemicals, Oils, and Paints.* In the schedule of chemicals, oils, and paints congress has intended to specify a rate of duty for all products of a chemical nature.[54] Under it as used in the more recent acts is found a judicial determination of the scope or meaning of the terms, alcoholic compounds,[55] alumina,[56] chemical compounds generally,[57] coal-tar preparations,[58] collodion or cellnloid,[59] dentifrice,[60] drugs not edible, which are advanced in value or condition, by refining or other process,[61] dyewood extracts,[62] medicinal, or medicinal proprietary, preparations,[63] oils,[64] paints and colors.[65] There is also found

54. The classification is intended to be such that a reference to the similitude clause (*infra*, II, B, 3, b, (II), (A)) which, although affording a convenient and valuable test as applied to many articles of manufacture, will not be often necessary, inasmuch as this test would often be found difficult of application to chemical products without such scientific knowledge as could not be expected of custom-house officers. Mason *v.* Robertson, 139 U. S. 624, 11 S. Ct. 668, 35 L. ed. 293.

55. This term is used by congress in its common acceptation, and no specific amount or percentage of alcohol is necessary to bring an article within its meaning. Mackie *v.* Erhardt, 77 Fed. 610, 23 C. C. A. 351 [*affirming* 59 Fed. 771]; Smith *v.* Rheinstrom, 65 Fed. 984, 13 C. C. A. 261 [*reversing* 60 Fed. 599]; Fritzsche *v.* Magone, 40 Fed. 228.

56. A fine powder commonly known as "hydrate of alumina" and manufactured from a mineral known as "bauxite" would be dutiable as alumina, and not entitled to free entry as bauxite, under the tariff act of 1890. Irwin *v.* U. S., 67 Fed. 232, 14 C. C. A. 381 [*affirming* 62 Fed. 150].

57. Mason *v.* Robertson, 139 U. S. 624, 11 S. Ct. 668, 35 L. ed. 293 (bichromate of soda); Schering *v.* U. S., 119 Fed. 472 (salol); U. S. *v.* Lehn, 113 Fed. 1005 (dulcin); U. S. *v.* Utard, 91 Fed. 522 (perfumed smelling salts); U. S. *v.* Ducas, 78 Fed. 339, 24 C. C. A. 121 (acetate of copper); Hirzel *v.* U. S., 58 Fed. 772, 7 C. C. A. 491 (crude cocaine).

58. Matheson *v.* U. S., 90 Fed. 275 (oil of mirbane or nitrobenzole); U. S. *v.* Roessler, etc., Chemical Co., 79 Fed. 313, 24 C. C. A. 604 (acetanilid); Pickhardt *v.* U. S., 67 Fed. 111, 14 C. C. A. 341 (gallein); *In re* Roessler, etc., Chemical Co., 56 Fed. 481, 4 C. C. A. 1 (naphthionate of soda); *In re* Matheson, 56 Fed. 482, 4 C. C. A. 3 (toludine base); *In re* Roessler, etc., Chemical Co., 49 Fed. 272 [*affirmed* in 56 Fed. 481, 4 C. C. A. 1]. See also Farbenfabriken *v.* U. S., 102 Fed. 603, 42 C. C. A. 525 [*affirming* 99 Fed. 553].

59. U. S. *v.* Eschwege, 98 Fed. 600, 39 C. C. A. 169.

60. Russman *v.* U. S., 107 Fed. 266. See also *In re* Merchandise, 75 Fed. 998.

61. U. S. *v.* American Ferment Co., 108 Fed. 802 (powder from juice of papaw melon); Haulenbeck *v.* U. S., 84 Fed. 148 (olive pits, ground); *In re* Kraft, 53 Fed. 1016 (dried moss used by florists).

62. Keller *v.* U. S., 90 Fed. 274, extract of logwood, mordanted with a salt of chromium for printing colors on cotton goods. See also *In re* Matheson, 54 Fed. 492, holding that primuline buff, which is composed of quercitron or black-oak bark and alizarine in the preparation, respectively of eighty and twenty per cent, should be classified as a dyewood extract rather than as a coal-tar dye.

63. Erhardt *v.* Steinhardt, 153 U. S. 177, 14 S. Ct. 775, 38 L. ed. 678 (Boonekamp Bitters); Ferguson *v.* Arthur, 117 U. S. 482, 6 S. Ct. 861, 29 L. ed. 979 (Henry's Calcined Magnesia); U. S. *v.* Schering, 119 Fed. 473 (chloral hydrate); Battle, etc., Chemists' Corp. *v.* U. S., 108 Fed. 216; Wolfe *v.* U. S., 105 Fed. 940, 45 C. C. A. 144 (Wolfe's Aromatic Schiedam Schnapps); Phair *v.* U. S., 105 Fed. 508 (chloral hydrate and salol); Koechl *v.* U. S., 84 Fed. 448, 28 C. C. A. 458 (antitoxine); U. S. *v.* Roessler, etc., Chemical Co., 79 Fed. 313, 24 C. C. A. 604; Movius *v.* U. S., 66 Fed. 734 (lanoline); Grommes *v.* Seeberger, 41 Fed. 32 (Arp's Pepsin Bitters).

Preparations in which alcohol is used.—The tariff acts usually prescribe different duties for medicinal preparations in which alcohol is a component part, or in the preparation of which alcohol is used, from a medicinal preparation in which alcohol is not the component part. Schering *v.* U. S., 119 Fed. 472; U. S. *v.* Shoemaker, 84 Fed. 146. It would thus appear that congress has intended to make not only a medicinal preparation which contains alcohol as one of its component parts dutiable, but also any preparation which, even though it contains no alcohol, has been prepared by the alcoholic process. Battle, etc., Chemists' Corp. *v.* U. S., 108 Fed. 216; Koechl *v.* U. S., 91 Fed. 110, 33 C. C. A. 363. See also Fink *v.* U. S., 170 U. S. 584, 18 S. Ct. 770, 42 L. ed. 1153, holding that muriate of cocaine was dutiable as a medicinal preparation in which alcohol was used, and not as a chemical salt. *Compare In re* Mallinckrodt Chemical Works, 66 Fed. 746; Lehn *v.* U. S., 66 Fed. 748, in which cases the opposite conclusion was reached.

64. Swan *v.* U. S., 109 Fed. 949; Wells *v.* U. S., 99 Fed. 258. See also Dodge *v.* U. S., 77 Fed. 602.

65. Harrison *v.* Merritt, 115 U. S. 577, 6 S. Ct. 191, 29 L. ed. 494 [*reversing* 23 Fed.

in this schedule an interpretation of the meaning of the terms perfumery,[66] and soaps.[67]

(B) *Earths, Earthenware, and Glassware.* Under the schedule of earths, earthenware, and glassware is found a judicial determination of the meaning and scope of the terms, brick,[68] carbons,[69] cement,[70] decorated earthenware,[71] marble,[72] plaques,[73] and tiles.[74] Under the subdivision imposing duties upon glass and glassware are found a determination of the meaning of the terms, bottles or vials,[75] blown glassware,[76] cut glass,[77] mirrors,[78] and articles manufactured of glass or of which glass is a component material.[79] An additional duty has been placed upon such wares, when painted, colored, stained, or otherwise ornamented or decorated.[80]

(C) *Metals and Manufactures Thereof.* Under the metal schedule, judicial construction has been placed upon the terms or clauses therein of boiler flues,[81] cables,[82] cast hollow ware,[83] chains,[84] copper,[85] cutlery,[86] drill rods,[87] and firearms.[88] Judicial construction has also been placed upon the terms

653]; Vandegrift *v.* U. S., 107 Fed. 265; U. S. *v.* Gabriel, 97 Fed. 934 (lithofone); Smith *v.* U. S., 93 Fed. 194, 35 C. C. A. 265 (crocus); Gabriel *v.* U. S., 65 Fed. 422; Rich *v.* U. S., 61 Fed. 501, 9 C. C. A. 596 (artists' colors); U. S. *v.* Zentgraf, 60 Fed. 1014, 9 C. C. A. 335 (ultramarine blue); *In re* Downing, 56 Fed. 470, 5 C. C. A. 575; Thayer *v.* Seeberger, 31 Fed. 883; Boving *v.* Lawrence, 3 Fed. Cas. No. 1,711, 1 Blatchf. 607 (vermilion).

66. Fritzsche *v.* Magone, 40 Fed. 228. See also Volkman *v.* U. S., 84 Fed. 442.

67. Park *v.* U. S., 66 Fed. 731.

68. Fleming Cement, etc., Co. *v.* U. S., 84 Fed. 158, magnesic brick.

69. U. S. *v.* Reisinger, 94 Fed. 1002, 36 C. C. A. 626 [*reversing* 91 Fed. 638].

70. Anglo-American Portland Cement Co. *v.* Seeberger, 39 Fed. 763.

71. Maddock *v.* Magone, 41 Fed. 882, plates and mugs, decorated with pictures and letters of the alphabet, and intended for children.

72. Fisher *v.* U. S., 91 Fed. 759 (Istrian stone); Mexican Onyx, etc., Co. *v.* U. S., 66 Fed. 732 (Mexican onyx); U. S. *v.* Davis, 54 Fed. 147, 4 C. C. A. 25 (marble paving tile); *In re* Herter Bros., 53 Fed. 913, 4 C. C. A. 107 [*reversing* 50 Fed. 72]; Batterson *v.* Magone, 48 Fed. 289; Davis *v.* Seeberger, 44 Fed. 260.

73. Bour *v.* U. S., 91 Fed. 533. See also Altman *v.* U. S., 71 Fed. 393.

74. U. S. *v.* Richard, 99 Fed. 268, 39 C. C. A. 504 [*reversing* 91 Fed. 517]; Morris *v.* Seeberger, 40 Fed. 58; Rossman *v.* Hedden, 37 Fed. 99.

75. Schmidt *v.* Badger, 107 U. S. 85, 1 S. Ct. 530, 27 L. ed. 328 [*followed* in Merritt *v.* Park, 108 U. S. 109, 2 S. Ct. 310, 27 L. ed. 669]; Carberry *v.* U. S., 116 Fed. 773; U. S. *v.* Hensel, 106 Fed. 70, 45 C. C. A. 226; Eimer *v.* U. S., 99 Fed. 423; U. S. *v.* De Luze, 95 Fed. 971, 37 C. C. A. 344 [*reversing* 81 Fed. 156]; *In re* Grace, 75 Fed. 2; Smith *v.* Mihalovitch, 61 Fed. 399, 9 C. C. A. 552; *In re* Smith, 55 Fed. 476; *In re* Salomon, 55 Fed. 285; Marine *v.* Packham, 52 Fed. 579, 3 C. C. A. 210.

76. Rogers *v.* U. S., 115 Fed. 233.

77. *In re* Popper, 50 Fed. 66; Fox *v.* Cadwalader, 42 Fed. 209.

Glass tumblers, with bottoms smoothed by cutting or grinding, or with engraved sides, are properly classed as "glass, cut." Binns *v.* Lawrence, 12 How. (U. S.) 9, 13 L. ed. 871.

78. Wiederer *v.* U. S., 78 Fed. 809. See also U. S. *v.* Snow's U. S. Sample Co., 71 Fed. 953.

79. U. S. *v.* Morrison, 179 U. S. 456, 21 S. Ct. 195, 45 L. ed. 275; Arthur *v.* Sussfield, 96 U. S. 128, 24 L. ed. 772; U. S. *v.* Louis Hinsberger Cut-Glass Co., 94 Fed. 645; Loewenthal *v.* U. S., 91 Fed. 644; U. S. *v.* Fensterer, 84 Fed. 148; Borgfeldt *v.* U. S., 78 Fed. 809; *In re* Steiner, 66 Fed. 726; Goldberg *v.* U. S., 61 Fed. 91, 9 C. C. A. 380 [*affirming* 56 Fed. 818]; U. S. *v.* Semmer, 41 Fed. 324; Roosevelt *v.* Maxwell, 20 Fed. Cas. No. 12,034, 3 Blatchf. 391. But see U. S. *v.* Popper, 66 Fed. 51, 13 C. C. A. 325.

80. Stern *v.* U. S., 105 Fed. 937, 45 C. C. A. 141 [*affirming* 99 Fed. 260]; Koscherak *v.* U. S., 98 Fed. 596, 39 C. C. A. 166; Bache *v.* U. S., 81 Fed. 162, 26 C. C. A. 325 [*affirming* 77 Fed. 603]. See also Herrman *v.* U. S., 62 Fed. 149.

81. *In re* Whitney, 53 Fed. 235. See also Downing *v.* U. S., 99 Fed. 423.

82. U. S. *v.* Thirty-One Boxes, etc., 28 Fed. Cas. No. 16,465*a*.

83. Strausky *v.* Erhardt, 52 Fed. 808.

84. *In re* Lorsch, 49 Fed. 221.

85. Magone *v.* King, 51 Fed. 525, 2 C. C. A. 363; U. S. *v.* Ullman, 28 Fed. Cas. No. 16,593, 4 Ben. 547. See also Crocker *v.* Redfield, 6 Fed. Cas. No. 3,400, 4 Blatchf. 378, 18 How. Pr. (N. Y.) 85.

86. U. S. *v.* Silberstein, 99 Fed. 263; U. S. *v.* Curley, 66 Fed. 720; Simmons Hardware Co. *v.* Lancaster, 31 Fed. 445; Koch *v.* Seeberger, 30 Fed. 424.

87. U. S. *v.* Frasse, 94 Fed. 483.

88. U. S. *v.* Schoverling, 146 U. S. 76, 13 S. Ct. 24, 36 L. ed. 893 [*affirming* 45 Fed. 349, *approving* Robertson *v.* Gerdan, 132 U. S. 450, 10 S. Ct. 119, 33 L. ed. 403, and *distinguishing* Falk *v.* Robertson, 137 U. S. 225, 11

hoop iron,[89] iron ore,[90] lame,[91] lead,[92] metallic mineral substances in a crude state,[93] unwrought metal,[94] mica,[95] nickel,[96] pins,[97] scrap iron,[98] steel,[99] steel slabs,[1] scrap steel,[2] terne tin,[3] track tools,[4] watches,[5] and zinc in sheets.[6] This schedule also concludes with the customary catch-all paragraph intended to include articles composed wholly or in part of metal, whether partly or wholly manufactured, which, by reason of a deficiency in enumeration, have escaped specific designation.[7] To bring an article within the meaning of this paragraph there must be a

S. Ct. 41, 34 L. ed. 645]; U. S. *v.* Irwin, 78 Fed. 799, 24 C. C. A. 349. See also *supra*, II, B, 1, a, (III), (C).

89. Kennedy *v.* Hartranft, 9 Fed. 18.

90. Earnshaw *v.* Cadwalader, 145 U. S. 247, 12 S. Ct. 851, 36 L. ed. 693; Francklyn *v.* U. S., 119 Fed. 470.

91. Marsching *v.* U. S., 113 Fed. 1006.

92. Newark *v.* Balbach Smelting, etc., Co., 81 Fed. 950.

93. Hempstead *v.* U. S., 115 Fed. 256.

94. Dana *v.* U. S., 116 Fed. 933.

95. Myers *v.* U. S., 110 Fed. 940.

96. Boker *v.* U. S., 97 Fed. 205, 38 C. C. A. 114 [*affirming* 86 Fed. 119].

97. Steinhardt *v.* U. S., 92 Fed. 139; Worthington *v.* U. S., 90 Fed. 797; U. S. *v.* Wolff, 69 Fed. 327. See also Dieckerhoff *v.* Robertson, 44 Fed. 160.

98. Schlesinger *v.* Beard, 120 U. S. 264, 7 S. Ct. 546, 30 L. ed. 656 [*reversing* 14 Fed. 687].

Iron rolls that have never been in use, although they are old and rusty, and in fact intended by the importer to be remanufactured, are not dutiable as scrap iron. Dwight *v.* Merritt, 140 U. S. 213, 11 S. Ct. 768, 35 L. ed. 450.

99. Gary *v.* Cockley, 65 Fed. 497, 13 C. C. A. 17.

1. Farris *v.* Magone, 46 Fed. 845.

Sheet-steel.— See Belcher *v.* U. S., 91 Fed. 975. See also Magone *v.* Vom Cleff, 70 Fed. 980, 17 C. C. A. 549; U. S. *v.* Wetherell, 65 Fed. 987, 13 C. C. A. 264 [*reversing* 60 Fed. 267].

Steel strips.— See U. S. *v.* Boker, 90 Fed. 804; U. S. *v.* Wolff, 87 Fed. 201. See also Boker *v.* U. S., 116 Fed. 1015.

2. U. S. *v.* Milne, 117 Fed. 352.

3. Bruce *v.* Murphy, 4 Fed. Cas. No. 2,047, 10 Blatchf. 229. See also Arthur *v.* Dodge, 101 U. S. 34, 25 L. ed. 948 [*affirming* 7 Fed. Cas. No. 3,950].

4. Proctor *v.* Spalding, 26 Fed. 610.

5. Racine *v.* U. S., 107 Fed. 111, 46 C. C. A. 171 [*affirming* 99 Fed. 557].

6. Langerman *v.* U. S., 75 Fed. 1.

7. Dieckerhoff *v.* Robertson, 44 Fed. 160. See also Robertson *v.* Perkins, 129 U. S. 233, 9 S. Ct. 279, 32 L. ed. 686 [*reversing* 29 Fed. 842]; Chicago Tire, etc., Works Co. *v.* Spalding, 116 U. S. 541, 6 S. Ct. 498, 29 L. ed. 720 [*affirming* 19 Fed. 412]; Hampton *v.* U. S., 116 Fed. 109; Drucker *v.* Robertson, 38 Fed. 97; Manasse *v.* Spalding, 24 Fed. 86.

Illustrations.— Scythes, grass-hooks, and carpenter's pinchers, subjected before completion to grinding, tempering, or polishing (Saltonstall *v.* Wiebusch, 156 U. S. 601, 15 S. Ct. 476, 39 L. ed. 549 [*reversing* 45 Fed. 40]); opera-glasses composed of metal tubes covered with polished pearl and held together by a metal framework (Seeberger *v.* Schlesinger, 152 U. S. 581, 14 S. Ct. 729, 38 L. ed. 560); iron show or advertising cards printed in different colors on plates of sheet iron from lithographic stones, on hand-presses, containing generally the name of the person and the article advertised, with some ornament thereon (Forbes Lithograph Mfg. Co. *v.* Worthington, 132 U. S. 655, 10 S. Ct. 180, 33 L. ed. 453 [*reversing* 25 Fed. 899]); cotton ties, each tie consisting of an iron strip and an iron buckle, and imported in bundles, each bundle consisting of thirty strips and thirty buckles, and each strip eleven feet long, the whole blackened (Badger *v.* Ranlett, 106 U. S. 255, 1 S. Ct. 346, 27 L. ed. 194; Kennedy *v.* Hartranft, 9 Fed. 18); old cannon practically worthless for use against modern implements of war (Downing *v.* U. S., 116 Fed. 779); buckles used on shoulder-straps of overalls, and which are of the character of suspender buttons (U. S. *v.* Topken, 115 Fed. 233); metal beads or strung beads of glass metal-lined or coated, the metal being the chief value (Steinhardt *v.* U. S., 113 Fed. 996; Schiff *v.* U. S., 90 Fed. 795); steel rods of about one and one-eighth inches in length, and less than one-fourth inch in diameter, tipped with diamond chips and used in an engraving machine (*In re* Hope, etc., Engraving, etc., Co., 100 Fed. 286); "gold straw braids" and "silver straw braids" composed mostly of hemp fiber, the remainder being metal, cotton, and glue (Schiff *v.* U. S., 99 Fed. 555, 39 C. C. A. 652); cords, fringes, tassels, and braids, composed in chief value of metal and not known commercially as metal thread nor as bullion (Bloomingdale *v.* U. S., 89 Fed. 663); silver-handle nail-cleaners, although they may have a file attached to them (Stern *v.* U. S., 72 Fed. 52); bronze statuary, made by casting from bronze, clay, or plaster model made by the artist (Tiffany *v.* U. S., 71 Fed. 691, 18 C. C. A. 297 [*affirming* 65 Fed. 494]); "soutache gilt braid," consisting of cotton cables around which is braided gilt thread composed of metal wire and cotton thread (Wolff *v.* U. S., 71 Fed. 291, 18 C. C. A. 41); traveling clocks (Tiffany *v.* U. S., 66 Fed. 737); steel rims used in the manufacture of bicycle wheels (Stone *v.* U. S., 56 Fed. 826, 6 C. C. A. 153; Stover Bicycle Co. *v.* U. S., 56 Fed. 1023, 16 C. C. A. 683); bedstead mounts, brass and iron castings, bedstead tubes, bedstead knobs, vases, castors, etc., for use in the manufacture of metallic bedsteads (Combs *v.* Erhardt, 49 Fed. 635);

substantial part thereof composed of metal.[8] And no article should be included within it which, upon a fair and reasonable interpretation, may be properly included in a preceding paragraph.[9]

(D) *Wood and Manufactures Thereof.* Little contention seems to have arisen with regard to the specific designations in the schedule as to wood and the manufactures thereof and the scope of its concluding or catch-all clause, which is held to refer to or include articles made wholly or partly of wood, and wrought into things different from what the wood was before its manufacture.[10]

(E) *Sugar and Manufactures Thereof.* The later customs laws in providing for duties upon different grades of sugar seem to make the color and not the quality of the sugar the test by which the rate of duty is to be determined.[11]

(F) *Tobacco and Manufactures Thereof.* If a bale or other separate and concrete quantity of leaf tobacco contains only leaves of such uniformity of character as to be in their collective form of one class, the bale or other separate collection is the unit contemplated in the percentage and weight tests of the tobacco schedule.[12] On the other hand if the bale consists of tobacco of two classes, the unit upon which the percentage is calculated is the ascertained quantity of each class.[13] It has also been said that the act of 1897 intended with but

iron hooks, used in the manufacture of feeders for wicker cards in carding machines, and known to the trade as hooks and not as iron forgings (Lemaire Feeder Co. *v.* Cadwalader, 42 Fed. 529); card clothing, which is attached by means of rivets to iron flats for the purpose of being attached to machines for carding cotton (U. S. *v.* Leigh, 41 Fed. 33); pieces of iron specially manufactured, fitted, purchased, and shaped as parts of a particular floor frame (Birtwell *v.* Saltonstall, 39 Fed. 383); paper lamp-shades, with rings of wire at the top and bottom to hold the paper in position, and with a wire framework across the top to hold the shade on the chimney of the lamp, and metal constituting a substantial part of the article, both in value and in use (Hohenstein *v.* Hedden, 38 Fed. 94); currycombs made of wood and iron if at the time of the passage of the act they were not known in trade among "combs" (McCoy *v.* Hedden, 38 Fed. 89); and telegraph cables composed of iron wire and gutta-percha, iron being the material of chief value (U. S. *v.* U. S. Tel. Co., 28 Fed. Cas. No. 16,603, 2 Ben. 362) have all been held to be included within the scope and meaning of this clause.

8. Seeberger *v.* Schlesinger, 152 U. S. 581, 14 S. Ct. 729, 38 L. ed. 560; Meyer *v.* Arthur, 91 U. S. 570, 23 L. ed. 455; Aloe *v.* Churchill, 44 Fed. 50.

9. Dieckerhoff *v.* Robertson, 44 Fed. 160.

10. Dudley *v.* U. S., 74 Fed. 548 [*approving* Hartranft *v.* Wiegmann, 121 U. S. 609, 7 S. Ct. 1240, 30 L. ed. 1012].

Illustrations.— Holly whips, kept for sale by carriage men and hardware men (Davies *v.* U. S., 107 Fed. 266); ornamental picture frames, whether the picture be free or subject to a different rate of duty (Hensel *v.* U. S., 99 Fed. 722); wood ground into powder by a dry process, and although sometimes known as wood pulp yet not uniformly and generally so known (Goldman *v.* U. S., 87 Fed. 193); partly manufactured whipstocks, fishing poles, and canes, having the outer rind or enamel removed, and turned, sandpapered, and varnished (Foppes *v.* U. S., 72 Fed. 45; *In re* Foppes, 56 Fed. 817); bamboo scrolls for wall decorations, and bamboo blinds for window shades, composed of strips of bamboo joined together by cords (U. S. *v.* China, etc., Trading Co., 71 Fed. 864, 18 C. C. A. 335 [*reversing* 66 Fed. 733]); antique, carved-wood picture frames, imported in connection with a single painting (U. S. *v.* Gunther, 71 Fed. 499, 18 C. C. A. 219); household furniture, if finished (Richard *v.* Hedden, 42 Fed. 672); gun blocks which are planed on two sides (U. S. *v.* Windmuller, 42 Fed. 292); and shingles (Stockwell *v.* U. S., 23 Fed. Cas. No. 13,466, 3 Cliff. 284) have been held to have been properly included within this clause.

For construction of the expression "manufactures of ebony, rosewood," etc., see Sill *v.* Lawrence, 22 Fed. Cas. No. 12,850, 1 Blatchf. 605.

11. Merritt *v.* Welsh, 104 U. S. 694, 26 L. ed. 896.

The words "loaf sugar" as used in the early revenue acts were understood according to the general meaning in trade and commerce, and where it was shown that loaf sugar meant sugar in loaves, it was held that crushed loaf sugar was not within the meaning of the term. U. S. *v.* Breed, 24 Fed. Cas. No. 14,638, 1 Sumn. 159.

12. Erhardt *v.* Schroeder, 155 U. S. 124, 15 S. Ct. 45, 39 L. ed. 94; U. S. *v.* Rosenwald, 67 Fed. 323, 14 C. C. A. 399; Hubbard *v.* Soby, 55 Fed. 388, 5 C. C. A. 147; U. S. *v.* Blumlein, 55 Fed. 383, 5 C. C. A. 142 [*affirming* 49 Fed. 228, and *distinguishing* Falk *v.* Robertson, 137 U. S. 225, 11 S. Ct. 41, 34 L. ed. 645].

13. Rothschild *v.* U. S., 179 U. S. 463, 21 S. Ct. 197, 45 L. ed. 277 [*affirming* 87 Fed. 798]; Erhardt *v.* Schroeder, 155 U. S. 124, 15 S. Ct. 45, 39 L. ed. 94; Falk *v.* Robertson, 137 U. S. 225, 11 S. Ct. 41, 34 L. ed. 645.

one exception to abandon the percentage system altogether, and that wrapper tobacco, wherever found, in whatever amount, must pay the higher duty.[14]

(G) *Agricultural Products and Provisions.* Under the schedule as to agricultural products and provisions a judicial construction has been rendered as to the meaning and scope of the terms or phrases, cocoa butterine,[15] chicory,[16] chocolate,[17] cleaned rice,[18] comfits, sweetmeats, or fruits preserved in sugar, syrup, or molasses,[19] fruits preserved in their own juice,[20] garden seeds,[21] lemon peel preserved,[22] plants used for forcing under glass for cut flowers or decorative purposes,[23] potato starch,[24] stearine,[25] vegetables,[26] and vegetables prepared,[27] wool grease,[28] Zante currants,[29] and edible fruits dried.[30] Under the subdivision of this schedule providing the duties upon fish judicial explanation has been made of the terms anchovies,[31] pickled herring,[32] sardines,[33] and fish in tin cans or in packages made of tin.[34]

(H) *Spirits, Wines, and Other Beverages.* The schedule as to spirits, wines, and other beverages endeavors to impose a duty upon beverages, wines, and com-

14. U. S. *v.* Rothschild, 87 Fed. 798 [*affirmed* in 179 U. S. 463, 21 S. Ct. 197, 45 L. ed. 277].

Smoking tobacco.— The mere fact that tobacco prepared in cigar-shaped bundles can be smoked does not constitute them cigars within the meaning of the customs act. If they are of such size that they are not ordinarily used for smoking, but more often as an ornament in cigar-dealers' windows, they should be classed as manufactures of tobacco and not as cigars. D'Estrinoz *v.* Gerker, 43 Fed. 285. See also Lilienthal *v.* U. S., 97 U. S. 237, 24 L. ed. 901.

Scrap tobacco.— Tobacco consisting of remnants left after making cigars was held to be dutiable under the act of 1883, as "tobacco, unmanufactured, not specially provided for." Seeberger *v.* Castro, 153 U. S. 32, 14 S. Ct. 766, 38 L. ed. 624 [*affirming* 40 Fed. 531]; Cohn *v.* Spalding, 24 Fed. 19. And see Sheldon *v.* U. S., 55 Fed. 818, 5 C. C. A. 282 (where it is held that tobacco of this description was "manufactured tobacco," within the meaning of the act of 1890, par. 244); *In re* Phelps, 53 Fed. 238.

15. Apgar *v.* U. S., 78 Fed. 332, 24 C. C. A. 113.

16. U. S. *v.* Rosenstein, 60 Fed. 74, 8 C. C. A. 474 [*affirming* 56 Fed. 824].

17. *In re* Schilling, 53 Fed. 81, 3 C. C. A. 440 [*affirming* 48 Fed. 547]; *In re* Austin, 47 Fed. 873. See also Arthur *v.* Stephani, 96 U. S. 125, 24 L. ed. 771.

18. Talmage *v.* U. S., 80 Fed. 887, 26 C. C. A. 218 [*affirming* 77 Fed. 826].

19. Hills *v.* Erhardt, 59 Fed. 768.

20. U. S. *v.* Rosenstein, 90 Fed. 801; Johnson *v.* U. S., 66 Fed. 725.

21. Ferry *v.* Livingston, 115 U. S. 542, 6 S. Ct. 175, 29 L. ed. 489; U. S. *v.* Kauffman, 84 Fed. 446, 28 C. C. A. 150 [*reversing* 78 Fed. 804]; Clay *v.* Magone, 40 Fed. 230. See also Nordlinger *v.* Robertson, 33 Fed. 241.

22. Hill Bros. Co. *v.* U. S., 113 Fed. 857.

23. Cleary *v.* U. S., 99 Fed. 432; Richard *v.* U. S., 87 Fed. 192.

24. Union Nat. Bank *v.* Seeberger, 30 Fed. 429.

25. Fairbanks *v.* Spaulding, 19 Fed. 416.

26. Beans in a dry state used for food (Sonn *v.* Magone, 159 U. S. 417, 16 S. Ct. 67, 40 L. ed. 203; Salomon *v.* Robertson, 41 Fed. 517; Windmuller *v.* Robertson, 23 Fed. 652, 23 Blatchf. 233), and tomatoes (Nix *v.* Hedden, 149 U. S. 304, 13 S. Ct. 881, 37 L. ed. 745 [*affirming* 39 Fed. 109]) are properly classed under this term, rather than seeds or fruits respectively.

27. Petry *v.* U. S., 99 Fed. 261 (kiln-dried, sliced beets); Alart *v.* U. S., 61 Fed. 500 (cucumbers packed in salt); Park *v.* U. S., 61 Fed. 398 (truffles).

28. U. S. *v.* Leonard, 108 Fed. 42, 47 C. C. A. 181 [*reversing* 100 Fed. 288]. *Compare* Miller *v.* Seeberger, 44 Fed. 261.

29. *In re* Zante Currants, 73 Fed. 183.

30. U. S. *v.* Wing Wo Chong, 98 Fed. 602, 39 C. C. A. 172 [*reversing* 91 Fed. 637].

31. Reiss *v.* U. S., 113 Fed. 1001.

32. U. S. *v.* Rosenstein, 98 Fed. 420, 39 C. C. A. 122 [*affirming* 91 Fed. 637]; Rosenstein *v.* U. S., 71 Fed. 949.

33. Wieland *v.* San Francisco, 104 Fed. 541, 44 C. C. A. 23 [*affirming* 98 Fed. 99]; Meyer *v.* U. S., 86 Fed. 120.

34. Kauffmann *v.* U. S., 99 Fed. 430. See also Meyer *v.* U. S., 86 Fed. 120.

The form of the box or can is important in this schedule, and an importation in cans of another size or form cannot claim the same rate of duty. Leggett *v.* U. S., 99 Fed. 426 (where it was held that anchovies packed in cylindrical tin boxes must pay forty per cent *ad valorem*, under the act of 1894, par. 208); La Manna *v.* U. S., 67 Fed. 233, 14 C. C. A. 381 (where it was held that sardines imported in boxes smaller than those prescribed in the schedule of 1890 must pay forty per cent *ad valorem*).

Fish caught by citizens of Canada, in Lake Ontario, notwithstanding the fact that such citizens may have been employed by a New York corporation, are not within the exemption of the act of July, 1897, par. 555, placing on the free list fish caught in the Great Lakes by citizens of the United States. It is essential, in claiming an exemption upon this ground, that the citizen of the United States

pounds or preparations containing spirits not previously provided for.[35] With regard to the terms or clauses employed in this phraseology, judicial construction has been rendered as to the scope of the terms fruit juices,[36] malt extract,[37] and bitters, or cordials containing spirits.[38]

(I) *Cotton Manufactures.* In the schedule as to cotton manufactures it is intended to impose in some manner duties upon goods of cotton manufacture or of which cotton is the component part. In its construction the courts have been called upon to determine the meaning and scope of the terms or expressions, cotton braid,[39] cotton cloth filling,[40] cotton cloth in which other than an ordinary warp and filled threads have been introduced in the process of weaving to form a figure,[41] cotton laces,[42] dyed pile fabric,[43] galloons,[44] handkerchiefs,[45] manufactures of cotton chenille,[46] rovings,[47] and wearing apparel, made up or manufactured wholly or in part.[48] Construction has also been placed upon the so-called "countable clauses" in these acts.[49] This schedule in its concluding paragraph has a catch-all clause imposing a duty upon manufactures of cotton not specifically provided for.[50]

(J) *Flax, Hemp, and Jute, and Manufactures Thereof.* Under the schedule which includes flax, hemp, jute, and the various manufactures thereof, the general rule that words are used in their trade and commercial meaning[51] has been particularly applied.[52] Judicial construction has also been placed upon the

be himself actually engaged in the catching of the fish. Lake Ontario Fish Co. *v.* U. S., 99 Fed. 551.

35. See *supra*, II, B, 3, (II), (A).

36. U. S. *v.* Johnson, 90 Fed. 805; Park *v.* U. S., 84 Fed. 159.

37. U. S. *v.* Eisner, etc., Co., 59 Fed. 352, 8 C. C. A. 148 [*reversing* 54 Fed. 671, and *distinguishing* Ferguson *v.* Arthur, 117 U. S. 482, 6 S. Ct. 861, 29 L. ed. 979].

38. *In re* Gourd, 49 Fed. 728; Curiel *v.* Beard, 44 Fed. 551. See also Dallet *v.* Smythe, 7 Fed. Cas. No. 3,545, 6 Blatchf. 419, holding that under the act of 1864 "Angostura bitters," which are used principally as a flavoring extract for mixed drinks, would be dutiable as "spirituous liquors not otherwise provided for," and not as "medicinal preparations."

Chinese spirituous beverages.— See Kwong Chin Chong *v.* U. S., 119 Fed. 383.

Juniper cordial, which contained sufficient saccharine matter to disguise eleven per cent of alcohol, was held to be a sweet cordial, within the meaning of the tariff act of 1799. U. S. *v.* Three Hundred Casks of Juniper Cordial, 28 Fed. Cas. No. 16,511.

39. Zimmerman *v.* U. S., 61 Fed. 938; *In re* Dieckerhoff, 54 Fed. 161. See also Hague *v.* U. S., 73 Fed. 810 [*affirmed* in 89 Fed. 1017, 32 C. C. A. 468].

40. U. S. *v.* Pinney, etc., Co., 105 Fed. 934, 45 C. C. A. 138.

41. Claflin Co. *v.* U. S., 114 Fed. 259, 52 C. C. A. 94 [*affirming* 109 Fed. 562]. See also Mills *v.* U. S., 114 Fed. 257, 52 C. C. A. 92 [*affirming* 109 Fed. 564].

42. Sidenberg *v.* Robertson, 41 Fed. 763.

43. Stewart, etc., Co. *v.* U. S., 113 Fed. 928, 51 C. C. A. 558 [*reversing* 107 Fed. 267].

44. Wotton *v.* U. S., 84 Fed. 954.

45. Robbins *v.* U. S., 90 Fed. 805; U. S. *v.* Jonas, 83 Fed. 167, 27 C. C. A. 500; U. S. *v.* Amster, 71 Fed. 958; U. S. *v.* Harden, 68 Fed. 182, 15 C. C. A. 358; Wilson *v.* U. S., 57 Fed. 199, 6 C. C. A. 310; Rice *v.* U. S., 53 Fed. 910, 4 C. C. A. 104. See also *In re* Claflin Co., 52 Fed. 121, 2 C. C. A. 647.

46. Oppenheimer *v.* U. S., 71 Fed. 869, 18 C. C. A. 340 [*affirming* 66 Fed. 740].

47. Dunham *v.* U. S., 87 Fed. 800.

48. *In re* Spielman, 66 Fed. 724 (veils); *In re* Mills, 56 Fed. 820; *In re* Kursheedt Mfg. Co., 56 Fed. 469; *In re* Boyd, 55 Fed. 599, 5 C. C. A. 223 (lace aprons); *In re* Ottenheimer, 49 Fed. 222 (cotton corsets). See also Arthur *v.* Unkart, 96 U. S. 118, 24 L. ed. 768.

The term "wearing apparel," as used in the tariff acts, is not a technical term. Maillard *v.* Lawrence, 16 How. (U. S.) 251, 14 L. ed. 925.

49. Hedden *v.* Robertson, 151 U. S. 520, 14 S. Ct. 434, 38 L. ed. 257 [*reversing* 40 Fed. 322]; Newman *v.* Arthur, 109 U. S. 132, 3 S. Ct. 88, 27 L. ed. 883; U. S. *v.* Albert, 60 Fed. 1012, 9 C. C. A. 332. See also *In re* Blankensteyn, 116 Fed. 776; Pinney, etc., Co. *v.* U. S., 99 Fed. 720; Ullmann *v.* Hedden, 38 Fed. 95.

50. U. S. *v.* Zeimer, 107 Fed. 912, 47 C. C. A. 60; U. S. *v.* Churchill, 106 Fed. 672; U. S. *v.* Loeb, 91 Fed. 636; Meyer *v.* U. S., 90 Fed. 803; *In re* Kursheedt Mfg. Co., 54 Fed. 159, 4 C. C. A. 262. See also Lesser *v.* U. S., 89 Fed. 197.

For the application of this phrase as used in tariff acts prior to 1883 see Kohlsaat *v.* Murphy, 96 U. S. 153, 24 L. ed. 844; Arthur *v.* Herman, 96 U. S. 141, 24 L. ed. 812; Morlot *v.* Lawrence, 17 Fed. Cas. No. 9,815, 1 Blatchf. 608; Weihenmyer *v.* Arthur, 29 Fed. Cas. No. 17,360.

51. See *supra*, II, B, 1, a, (III), (B).

52. American Net, etc., Co. *v.* Worthington, 141 U. S. 468, 12 S. Ct. 55, 35 L. ed. 821

meaning or scope of the terms or clauses, articles embroidered by hand or machinery,[53] bagging for cotton,[54] burlaps made of jute,[55] embroidered and hemstitched handkerchiefs,[56] laces,[57] plain woven fabrics,[58] wearing apparel made wholly or in part of lace or imitation thereof,[59] and woven fabrics or articles of flax.[60] This schedule, like the others, also has a concluding paragraph providing for the manufactures of which flax, jute, or hemp is a material or component part.[61]

(K) *Wool and Manufactures Thereof.* By the provisions of the schedule as to wool and the manufactures thereof it is plain that it was the intention of congress to lay duties not only upon wool, but upon most articles composed of wool or of which wool is a component material.[62] A provision of this nature is made especially applicable to dress goods.[63] Construction has also been rendered as to the scope and meaning of the terms astrakhan trimmings,[64] blankets,[65] carpets and rugs,[66] cloaks,[67] hosiery,[68] knit goods and knit fabrics,[69] manufactures of hair,[70]

[*reversing* 33 Fed. 826], holding that although an article imported for the manufacture of gill nets is linen thread, and the greater part of the whole importation of thread of like character is used for other purposes, the fact that for many years before the passage of the tariff act this kind of thread was imported under the name of "gilling twine," will bring it within the meaning of that term as used by congress. To the same effect see Leeson *v.* Young, 45 Fed. 627; McNab *v.* Seeberger, 39 Fed. 759. See also Bailey *v.* Cadwalader, 43 Fed. 294, where it is held that an article known in trade as "East India Bombay hemp" and invoiced and entered as such in the custom-house is dutiable as hemp; and the fact that it is in fact a specie of sisal-grass will not make it dutiable at the rate of that article.

53. Wells *v.* U. S., 99 Fed. 431; U. S. *v.* Einstein, 78 Fed. 797, 24 C. C. A. 346; Field *v.* U. S., 73 Fed. 808, 20 C. C. A. 19.

54. White *v.* U. S., 69 Fed. 93. And see Troost *v.* Barney, 24 Fed. Cas. No. 14,185, 5 Blatchf. 196.

55. Arthur *v.* Cumming, 91 U. S. 362, 23 L. ed. 438. See also *In re* White, 53 Fed. 787.

56. Field *v.* U. S., 90 Fed. 412, 33 C. C. A. 138; Carson *v.* Nixon, 90 Fed. 409, 33 C. C. A. 135; *In re* Gribbon, 55 Fed. 874, 5 C. C. A. 287 [*affirming* 53 Fed. 78]. See also Robertson *v.* Glendinning, 132 U. S. 158, 10 S. Ct. 44, 33 L. ed. 298; Richardson *v.* Lawrence, 20 Fed. Cas. No. 11,785, 1 Blatchf. 501.

57. U. S. *v.* Van Blankensteyn, 91 Fed. 977. Thread lace as used in an earlier tariff act was held to include only laces manufactured by hand, and would not include laces made by machinery or from linen thread. Meyerheim *v.* Robertson, 144 U. S. 601, 12 S. Ct. 754, 36 L. ed. 559.

58. U. S. *v.* Lamb, 99 Fed. 262.

59. Wanamaker *v.* U. S., 120 Fed. 16, 57 C. C. A. 36; U. S. *v.* Altman, 107 Fed. 15, 46 C. C. A. 116.

60. U. S. *v.* McBratney, 105 Fed. 767, 45 C. C. A. 37.

61. For construction of this catch-all clause in the different tariff acts see, generally, Klump *v.* Thomas, 108 Fed. 799; McLeod *v.* U. S., 75 Fed. 927; White *v.* U. S., 72 Fed. 251, 18 C. C. A. 541 [*affirming* 65 Fed. 788]; *In re* Wilmerding, 49 Fed. 824; Smith *v.* Schell, 27 Fed. 648; Baxter *v.* Maxwell, 2 Fed. Cas. No. 1,126, 4 Blatchf. 32; Hadden *v.* Hoyt, 11 Fed. Cas. No. 5,890.

62. Arnold *v.* U. S., 113 Fed. 1004; Veil *v.* U. S., 113 Fed. 856; Converse *v.* U. S., 113 Fed. 817; U. S. *v.* Rouss, 113 Fed. 816; Levi *v.* U. S., 87 Fed. 193; *In re* Schefer, 53 Fed. 1011, 4 C. C. A. 153; Bernheimer *v.* Robertson, 39 Fed. 190.

For application of analogous expression as used in former acts see Miller *v.* Victor, 127 U. S. 572, 8 S. Ct. 1225, 32 L. ed. 201; U. S. *v.* Clarke, 25 Fed. Cas. No. 14,813, 5 Mason 30. See also Robertson *v.* Salomon, 144 U. S. 603, 12 S. Ct. 752, 36 L. ed. 560; Drucker *v.* Robertson, 38 Fed. 97.

63. Bister *v.* U. S., 59 Fed. 452, 8 C. C. A. 175 [*distinguishing* Hartranft *v.* Meyer, 135 U. S. 237, 10 S. Ct. 751, 34 L. ed. 110]; *In re* Crowley, 55 Fed. 283, 5 C. C. A. 109 [*affirming* 50 Fed. 465]; Sullivan *v.* Robertson, 37 Fed. 778; Ellison *v.* Hartranft, 24 Fed. 136. See also Magone *v.* Luckemeyer, 139 U. S. 612, 11 S. Ct. 651, 35 L. ed. 298 [*affirming* 38 Fed. 30]; Seeberger *v.* Farwell, 139 U. S. 608, 11 S. Ct. 650, 35 L. ed. 297 [*affirming* 40 Fed. 529].

64. Lowenthal *v.* U. S., 71 Fed. 692, 18 C. C. A. 299 [*affirming* 65 Fed. 420]. *Compare In re* Downing, 56 Fed. 815.

65. Bredt *v.* U. S., 65 Fed. 496.

66. U. S. *v.* Bouttell, 99 Fed. 260. See also Beuttell *v.* Magone, 157 U. S. 154, 15 S. Ct. 566, 39 L. ed. 654 [*reversing* 48 Fed. 157]; Ingersoll *v.* Magone, 53 Fed. 1008, 4 C. C. A. 150 [*reversing* 48 Fed. 159].

67. *In re* Certain Merchandise, 64 Fed. 576.

68. Dorr *v.* Hoyt, 7 Fed. Cas. No. 4,009; Hall *v.* Hoyt, 10 Fed. Cas. No. 5,934. See also Reimer *v.* Schell, 20 Fed. Cas. No. 11,676, 4 Blatchf. 328.

69. Arnold *v.* U. S., 147 U. S. 494, 13 S. Ct. 406, 37 L. ed. 253.

70. Arthur *v.* Butterfield, 125 U. S. 70, 8 S. Ct. 714, 31 L. ed. 643 [*followed* in Herman *v.* Robertson, 41 Fed. 881]. See also Wolff *v.* U. S., 113 Fed. 1001; Oppenheimer *v.* U. S.,

pile fabrics,[71] wearing apparel,[72] and wool and worsted.[73] With regard to the part of the schedule imposing duties upon unmanufactured wool, it may be said that the clauses imposing increased duties upon wools imported, washed, or scoured refer not so much to the commercial designation of certain material, as to the fact of whether or not it has actually been washed or scoured.[74] To bring wool within the clause providing for an increase of duty when imported in other than its ordinary condition, it has been held that the change from ordinary condition need not be for the purpose of evading the duty.[75] Judicial construction has also been given to the terms goat hair,[76] noils,[77] wools of merino blood, near or remote,[78] and waste.[79]

(L) *Silk and Silk Goods.* Under the schedule which provides for duties upon silk or manufactures thereof, judicial construction has been placed upon the terms ribbons,[80] silk laces,[81] veilings,[82] and wearing apparel.[83] This schedule concludes with a catch-all clause providing for articles manufactured of silk or of which silk is the component material of chief valne.[84]

(M) *Pulp, Papers, and Books.* Under the schedule as to pulp, papers, and books judicial explanation has been given of the meaning of the terms or expressions, articles produced either in whole or in part by lithographic process,[85]

90 Fed. 796; Thorp *v.* Lawrence, 23 Fed. Cas. No. 14,005, 1 Blatchf. 351.

71. *In re* Herrman, 56 Fed. 477, 5 C. C. A. 582 [*affirming* 52 Fed. 941]. *Compare In re* Downing, 56 Fed. 815.

72. Arnold *v.* U. S., 147 U. S. 494, 13 S. Ct. 406, 37 L. ed. 253. See also Stone *v.* Heineman, 100 Fed. 940; Wanamaker *v.* Cooper, 69 Fed. 465.

"Clothing" and "articles of wearing apparel" are more specific terms than "cloths" and "knit fabrics," as used in tariff legislation, since from cloths and knit fabrics wearing apparel is made. The term "wearing apparel" being used and including articles of dress. Arnold *v.* U. S., 147 U. S. 494, 13 S. Ct. 406, 37 L. ed. 253.

73. U. S. *v.* Klumpp, 169 U. S. 209, 18 S. Ct. 311, 42 L. ed. 720 [*reversing* 72 Fed. 1008, 19 C. C. A. 343]. See also Lesher *v.* U. S., 94 Fed. 641.

While the material composing worsted is woolen, the earlier tariff acts made a distinction with respect to the duties between worsted and woolen goods, apparently placing the difference upon the process of manufacture, which distinction was at one time recognized by the courts. Seeberger *v.* Cahn, 137 U. S. 95, 11 S. Ct. 28, 34 L. ed. 599 [*affirming* 30 Fed. 425]; Elliott *v.* Swartwout, 10 Pet. (U. S.) 137, 9 L. ed. 373; Ballin *v.* Magone, 41 Fed. 291; Riggs *v.* Frick, 20 Fed. Cas. No. 11,825, Taney 100.

74. Patton *v.* U. S., 159 U. S. 500, 16 S. Ct. 89, 40 L. ed. 233 [*affirming* 46 Fed. 461].

75. Juillard *v.* Magone, 37 Fed. 857.

To bring an importation within the meaning of the clause providing an increase of duty where the wool has been "sorted" for the purpose of evading duty, there must be a breaking up of the fleeces to obtain a subdivision in the grades, and not a mere separation of the whole importation into different fleeces. *In re* Higgins, 55 Fed. 278, 5 C. C. A. 104 [*affirming* 50 Fed. 910].

76. U. S. *v.* Hopewell, 51 Fed. 798, 2 C. C. A. 510 [*reversing* 48 Fed. 630]. See also Cooper *v.* Dobson, 157 U. S. 148, 15 S. Ct. 568, 39 L. ed. 652 [*reversing* 46 Fed. 184].

77. Lobsitz *v.* U. S., 75 Fed. 834.

78. U. S. *v.* Midgley, 42 Fed. 668. See also Lyon *v.* Marine, 55 Fed. 964, 5 C. C. A. 359.

79. Patton *v.* U. S., 159 U. S. 500, 16 S. Ct. 89, 40 L. ed. 233 [*affirming* 46 Fed. 461, and *distinguishing* Seeberger *v.* Farwell, 139 U. S. 608, 11 S. Ct. 650, 35 L. ed. 297; Merritt *v.* Welsh, 104 U. S. 694, 26 L. ed. 896]. See also U. S. *v.* Cummings, 65 Fed. 495.

80. Chapon *v.* Smythe, 5 Fed. Cas. No. 2,611, 11 Blatchf. 120 [*criticizing* Lane *v.* Russell, 14 Fed. Cas. No. 8,053, 4 Cliff. 122].

81. Drew *v.* Grinnell, 115 U. S. 477, 6 S. Ct. 117, 29 L. ed. 453; Morrison *v.* Miller, 37 Fed. 82; Jaffray *v.* Murphy, 13 Fed. Cas. No. 7,172. See also Field's Appeal, 50 Fed. 908 [*affirmed* in 54 Fed. 367, 4 C. C. A. 371].

82. U. S. *v.* Lahey, 83 Fed. 691, 28 C. C. A. 379.

83. Oppenheimer *v.* U. S., 66 Fed. 52, 13 C. C. A. 327 [*affirming* 61 Fed. 283].

84. Hartranft *v.* Meyer, 135 U. S. 237, 10 S. Ct. 751, 34 L. ed. 110 [*affirming* 28 Fed. 358]; Swan *v.* Arthur, 103 U. S. 597, 26 L. ed. 525; Arthur *v.* Morrison, 96 U. S. 108, 24 L. ed. 764; Smythe *v.* Fiske, 23 Wall. (U. S.) 374, 23 L. ed. 47; U. S. *v.* McGibbon, 113 Fed. 1021 (tapestries); McCreery *v.* U. S., 87 Fed. 191; U. S. *v.* Jaffray, 77 Fed. 868, 23 C. C. A. 497 (velvet ribbons); U. S. *v.* McAlpin, 76 Fed. 451; Kleeberg *v.* U. S., 72 Fed. 252 (insertions of silk); U. S. *v.* Stern, 72 Fed. 44; Zimmern *v.* U. S., 69 Fed. 467; *In re* Mills, 49 Fed. 726; Lesher *v.* Seeberger, 40 Fed. 61; Hermann *v.* Robertson, 33 Fed. 654; Wilson *v.* Spaulding, 19 Fed. 413; Lottimer *v.* Smythe, 15 Fed. Cas. No. 8,523.

85. U. S. *v.* Weiller, 65 Fed. 418, 12 C. C. A. 668. See also U. S. *v.* Wagner, 84 Fed. 161.

books,[86] engravings,[87] parchment paper,[88] printed matter,[89] and tissue paper.[90] This schedule also concludes with a catch-all clause providing for a duty upon articles not specially enumerated, of which paper is the component material.[91]

(N) *Sundries.* Under the schedule as to sundries congress has enumerated a variety of articles known more especially by the names applied to them, or by the use to which they are subjected. Among the terms and clauses employed in this schedule, construction has been given to the meaning and scope of bead, beaded, or jet trimmings, or ornaments,[92] bone manufactures,[93] bristles,[94] coal, bituminous, and all other coals containing less than ninety-two per cent of carbon,[95] chip, or manufactures thereof,[96] furs, pressed on the skin, but not made up in an article,[97] India rubber, and manufactures thereof,[98] ivory, or manufactures thereof,[99] jewelry and precious stones,[1] leather, and manufactures

86. Eichler *v.* U. S., 71 Fed. 956. See also Pott *v.* Arthur, 104 U. S. 735, 26 L. ed. 909.

87. Knoedler *v.* Schell, 14 Fed. Cas. No. 7,890.

88. U. S. *v.* Stone, 101 Fed. 713, 41 C. C. A. 624.

89. The distinction made by the customs officials between printed matter and manufactures of paper is one dependent upon the use to be made of the printed matter; that is to say whether or not the matter consists of labels, etc., ready for use without extra work being expended thereon, or to be used as reading matter on the one hand; or whether such matter is partly printed for the purpose of being filled up by writing or other decoration. It has accordingly been held that decalcomanie pictures (Arthur *v.* Moller, 97 U. S. 365, 24 L. ed. 1046), enameled cards, called "photographic mounts," which have passed through a printing-press and have printed thereon the name and address of the photographer for whom they are intended (Bonte *v.* Seeberger, 31 Fed. 884), pattern books consisting of sheets of paper stitched and folded together, upon which designs or patterns are printed in colors (Weihenmyer *v.* Arthur, 29 Fed. Cas. No. 17,360), and German lottery tickets printed in full when imported, so as to require no additions in writing (U. S. *v.* Kaub, 26 Fed. Cas. No. 15,507) would fall within the meaning of this term. But cardboard, on which is imprinted in colors an ornamental design and pattern for the purpose of showing the method of embroidering patterns upon canvas, would not be within the term. Weihenmyer *v.* Arthur, 29 Fed. Cas. No. 17,360.

90. U. S. *v.* Moses, 84 Fed. 329, 28 C. C. A. 425; Dennison Mfg. Co. *v.* U. S., 72 Fed. 258, 18 C. C. A. 543 [*reversing* 66 Fed. 728]; Kraft *v.* U. S., 61 Fed. 398. See also Lawrence *v.* Merritt, 127 U. S. 113, 8 S. Ct. 1099, 32 L. ed. 91, holding that under a schedule which omitted tissue paper *eo nomine*, such paper is dutiable under a clause providing for a duty on "all other paper not otherwise provided for," and not within a clause providing for "printing, unsized, used for books and newspapers exclusively."

91. Liebenroth *v.* Robertson, 144 U. S. 35, 12 S. Ct. 607, 36 L. ed. 336 [*reversing* 33 Fed. 457]; U. S. *v.* China, etc., Trading Co., 71 Fed. 864, 18 C. C. A. 335 [*affirming* 66 Fed. 733]; Magone *v.* American Trading Co., 57 Fed. 394, 6 C. C. A. 407; Keary *v.* Magone, 40 Fed. 873. See also De Jonge *v.* Magone, 159 U. S. 562, 16 S. Ct. 119, 40 L. ed. 260; U. S. *v.* Zeimer, 107 Fed. 912, 47 C. C. A. 60.

92. Morrison *v.* U. S., 107 Fed. 113, 46 C. C. A. 173. See also Loewenthal *v.* U. S., 91 Fed. 644.

93. Gardiner *v.* Wise, 84 Fed. 337, 28 C. C. A. 148 [*affirming* 72 Fed. 494].

94. Von Stade *v.* Arthur, 28 Fed. Cas. No. 16,998, 13 Blatchf. 251.

95. Evans *v.* San Francisco, 107 Fed. 110, 46 C. C. A. 170; Coles *v.* San Francisco, 100 Fed. 442, 40 C. C. A. 478 [*affirming* 93 Fed. 954].

96. Zinn *v.* U. S., 71 Fed. 952.

97. Mavtner *v.* U. S., 84 Fed. 155. See also Seeberger *v.* Schlesinger, 152 U. S. 581, 14 S. Ct. 729, 38 L. ed. 560.

98. U. S. *v.* Slazenger, 113 Fed. 524 (tennis balls of wool and rubber); Slazenger *v.* U. S., 91 Fed. 517; U. S. *v.* Simon, 84 Fed. 154; Riley *v.* U. S., 66 Fed. 741; U. S. *v.* Shattuck, 59 Fed. 454, 8 C. C. A. 176 [*affirming* 54 Fed. 365]; Paturel *v.* Robertson, 41 Fed. 329; Vanacker *v.* Seeberger, 40 Fed. 57; Vanacker *v.* Spalding, 24 Fed. 88. See also Junge *v.* Hedden, 146 U. S. 233, 13 S. Ct. 88, 36 L. ed. 953 [*affirming* 37 Fed. 197]; Beard *v.* Nichols, 120 U. S. 260, 7 S. Ct. 548, 30 L. ed. 652 [*affirming* 7 Fed. 579]; Lawrence *v.* Allen, 7 How. (U. S.) 785, 12 L. ed. 914; Faxon *v.* Russell, 8 Fed. Cas. No. 4,707.

99. Robertson *v.* Gerdan, 132 U. S. 454, 10 S. Ct. 119, 33 L. ed. 403, holding that pieces of ivory used for keys for pianos and organs and sold for that purpose are dutiable as manufactures of ivory and not as musical instruments. See also *in re* Gerdau, 54 Fed. 143.

1. U. S. *v.* Frankel, 68 Fed. 186.

Imitations of precious stones.— See Morrison *v.* U. S., 84 Fed. 444, 28 C. C. A. 456. See also Tiffany *v.* U. S., 105 Fed. 766.

Imitations of precious stones not set.—See Lorsch *v.* U. S., 119 Fed. 476.

The word "jewelry" is ordinarily used as including articles of personal adornment, and further imports that the articles are of value in the community where they are used. Imitation jewelry as used in the tariff act need not necessarily be a counterfeit — that is, it need not be an exact simulation of a particu-

thereof,[2] mother-of-pearl manufactures,[3] paintings in oil or water colors,[4] papier-mache,[5] paste, or manufactures thereof,[6] pearl buttons,[7] pencils of wood, filled with lead or other material,[8] toys,[9] trimmings for hats, bonnets, and hoods,[10] smokers' articles,[11] statuary,[12] and waste.[13]

b. By General Designation — (i) *Coverings.* The usual and necessary coverings of goods subject to specific duties are not dutiable unless directly provided for in the tariff acts.[14] Congress has, however, carried a provision through the later tariff acts to the effect that additional duty should be levied and collected upon coverings of imported merchandise when the coverings of such merchandise are of an unusual nature, or are formed and designed for use otherwise than in the *bona fide* transportation of the merchandise.[15] Otherwise, under the pro-

lar article which it is intended to take the place of; for if by a proper arrangement of parts an article is produced bearing a general resemblance to real jewelry ornaments, and for similar uses, it may fairly be called imitation jewelry. Robbins *v.* Robertson, 33 Fed. 709.

2. Wertheimer *v.* U. S., 77 Fed. 600; Wertheimer *v.* U. S., 73 Fed. 296, 19 C. C. A. 504 [*affirming* 68 Fed. 186]; *In re* Holzmaister, 61 Fed. 645. See also Wanamaker *v.* Cooper, 69 Fed. 465.

3. U. S. *v.* U. S. Express Co., 94 Fed. 642; *In re* John Russell Cutlery Co., 56 Fed. 221; *In re* Blumenthal, 51 Fed. 76.

4. White *v.* U. S., 113 Fed. 855; Godwin *v.* U. S., 71 Fed. 950; Tiffany *v.* U. S., 66 Fed. 736; U. S. *v.* China, etc., Trading Co., 58 Fed. 690, 7 C. C. A. 433; *In re* Davis Collamore, 53 Fed. 1006. See also Arthur *v.* Jacoby, 103 U. S. 677, 26 L. ed. 454.

5. Wanamaker *v.* Cooper, 69 Fed. 465.

6. Worthington *v.* U. S., 90 Fed. 797; U. S. *v.* Field, 85 Fed. 862, 29 C. C. A. 458.

7. *In re* Rosenthal, 56 Fed. 1015.

8. *In re* Blumenthal, 49 Fed. 226.

9. Toys eo nomine have been known in the various tariff acts since 1842 (Strauss *v.* U. S., 71 Fed. 959), and are to be taken in their commercial meaning if shown to have any trade or commercial meaning different from their popular meaning (Cadwalader *v.* Zeh, 151 U. S. 171, 14 S. Ct. 288, 38 L. ed. 115 [*affirming* 42 Fed. 525]). It has accordingly been held that "brownie albums" or decalcomanie books containing lithographic prints, so prepared that they may be transferred to articles by what is known as the "decalcomanie process," their object being not to serve as lithographic prints but as toys (U. S. *v.* Borgfeldt, 86 Fed. 899, 30 C. C. A. 454); decorated china earthenware, if bought and sold, and used under this name (Cadwalader *v.* Zeh, 151 U. S. 171, 14 S. Ct. 288, 38 L. ed. 115 [*affirming* 42 Fed. 525]); hollow papier-mache rabbits for holding candy, and used chiefly for the amusement of children (U. S. *v.* Schwartz, 89 Fed. 1020, 32 C. C. A. 495); hollow glass spheres, too large to be described as beads, covered with tinsel, and strung for hanging on Christmas trees (Shevill *v.* U. S., 87 Fed. 192); harmonicas made of wood and metal, and harmonica cases of celluloid, imported on the same vessel, but in different boxes, and under different invoices (Blumenthal *v.* U. S., 72 Fed. 48); small, cheap music-boxes, inferior in quality, and easily operated by a child (Jacot *v.* U. S., 65 Fed. 415, 12 C. C. A. 666); and slides designed for use in magic lanterns, for the amusement of children (*In re* Borgfeldt, 65 Fed. 791) properly fall within the meaning of this term.

10. Hartranft *v.* Meyer, 149 U. S. 544, 13 S. Ct. 982, 983, 37 L. ed. 840; Cadwalader *v.* Wanamaker, 149 U. S. 532, 13 S. Ct. 979, 983, 37 L. ed. 837; Robertson *v.* Edelhoff, 132 U. S. 614, 10 S. Ct. 186, 33 L. ed. 477; Hartranft *v.* Langfeld, 125 U. S. 128, 8 S. Ct. 732, 31 L. ed. 672; Bader *v.* U. S., 116 Fed. 541; Meyer *v.* Cadwalader, 49 Fed. 19; Marsh *v.* Seeberger, 30 Fed. 422.

11. Isaacs *v.* Jonas, 148 U. S. 648, 13 S. Ct. 677, 37 L. ed. 596; Wedemeyer *v.* Lancaster, 31 Fed. 446.

12. Tutton *v.* Viti, 108 U. S. 312, 2 S. Ct. 687, 27 L. ed. 737 [*affirming* 14 Fed. 241]; U. S. *v.* Townsend, 112 Fed. 1023, 50 C. C. A. 680 [*affirming* 108 Fed. 801]. See also Merritt *v.* Tiffany, 132 U. S. 167, 10 S. Ct. 52, 33 L. ed. 299.

13. Train *v.* U. S., 107 Fed. 261; Standard Varnish Works *v.* U. S., 59 Fed. 456, 8 C. C. A. 178; *In re* Salomon, 47 Fed. 711. See also U. S. *v.* Schroeder, 93 Fed. 448, 35 C. C. A. 376 [*affirming* 87 Fed. 201]; Wimpfheimer *v.* Erhardt, 59 Fed. 451; Lennig *v.* Maxwell, 15 Fed. Cas. No. 8,243, 3 Blatchf. 125.

14. U. S. *v.* Leggett, 66 Fed. 300, 13 C. C. A. 448; Karthaus *v.* Frick, 14 Fed. Cas. No. 7,615, Taney 94.

The same rule applies to coverings of articles on the free list. U. S. *v.* Ross, 91 Fed. 108, 33 C. C. A. 361 [*affirming* 84 Fed. 153].

Where boxes used as coverings for imported tobacco were not the usual coverings in which such tobacco was imported, but were of no value, and were thrown away or destroyed after the tobacco had been removed, they were not taxable under 26 U. S. St. at L. 139 [U. S. Comp. St. (1901) p. 1924]. Laverge *v.* U. S., 119 Fed. 481.

15. Thus if the ornamental boxes in which crackers are imported enhance the value of such crackers or facilitate their sale, such boxes have a use independent altogether of the protection of the crackers, and are therefore subject to increased duty. Martindale *v.* Cadwalader, 42 Fed. 303. To the same

visions of these acts, the coverings[16] of goods are dutiable as part of the market value of the goods.[17]

(II) *Comprehensive Clauses* — (A) *Similitude Clause.* While the tariff acts have with more or less careful phraseology specifically exempted[18] or specified[19] the duty on many articles coming to our shores as imports, it is evident that a verbal enumeration of every known article would be impracticable if not in fact impossible. There is therefore found in each of the schedules, aside from the specific enumeration contained therein, general clauses or phrases intended to cover a variety of articles of the kind enumerated.[20] Lest, however, some articles should not fall within the broad enumeration of the schedules, two general catch-all clauses are provided. One of these, commonly known as the similitude clause, is to the effect that a non-enumerated article, similar either in material, quality, or texture, or in the use to which it may be applied, to any enumerated article, shall pay the same rate of duty as the article which it most resembles; and if it resembles two or more articles equally the rate of the article paying the highest duty.[21] This paragraph also provides that on articles not enumerated, manufactured of two or more materials, the duty shall be assessed at

effect is Meyer *v.* Cooper, 44 Fed. 55. So coverings or cases made of silk, leather, or paper, containing needles, being ornamental articles designed as permanent receptacles for needles, are not entitled to free entry as usual coverings. U. S. *v.* Mathews, 78 Fed. 345, 24 C. C. A. 127 [*reversing* 72 Fed. 43]. It has been held, however, that small, thin, wood match-boxes, having a prepared surface, to be used in igniting the matches (Magone *v.* Rosenstein, 142 U. S. 604, 12 S. Ct. 391, 35 L. ed. 1130 [*affirming* 34 Fed. 120, and *following* Oberteuffer *v.* Robertson, 116 U. S. 499, 6 S. Ct. 462, 29 L. ed. 706]); glass tubes in which chloride of ethyl is imported, so constructed that the liquid, which is very volatile, can be directly applied therefrom in the form of a spray or vapor to the part of the body to be treated, and after which the tubes are worthless (*In re* Hempstead, 96 Fed. 94); brass boxes for mourning pins, although in fact costing more than the pins (Dieckerhoff *v.* U. S., 84 Fed. 443); wooden cases with cardboard partitions in which opal glass bottles were packed and imported (U. S. *v.* Richards, 66 Fed. 730); small glass jars without necks, having straight inside walls and metal tops, and used for covering for Roquefort cheese (U. S. *v.* Leggett, 66 Fed. 300, 13 C. C. A. 448); or tin match-boxes, containing high-grade matches and used to protect them from dampness and accidental ignition, and being of the usual quality and shape (Slattery's Appeal, 59 Fed. 450) are not unusual coverings, or coverings designed for use otherwise than in *bona fide* transportation of the merchandise. See also Merck *v.* U. S., 99 Fed. 432; U. S. *v.* Ross, 91 Fed. 108, 33 C. C. A. 361 [*affirming* 84 Fed. 153]; De Luze *v.* U. S., 84 Fed. 156; Winters *v.* Cadwalader, 42 Fed. 405.

If they are found to be intended for other than transportation uses, such finding cannot be reviewed in a suit to enforce payment for duties, but only in a suit to recover back after payment. U. S. *v.* Thurber, 28 Fed. 56.

16. U. S. *v.* Nichols, 186 U. S. 298, 22 S. Ct. 918, 46 L. ed. 1173.

17. Smith *v.* U. S., 91 Fed. 757; U. S. *v.* Wood, 85 Fed. 212.

18. See *infra*, II, B, 4.

19. See *supra*, II, B, 3, a, *et seq.*

20. *In re* Guggenheim Smelting Co., 112 Fed. 517, 50 C. C. A. 374; Weilbacher *v.* Merritt, 37 Fed. 85.

21. Schoenemann *v.* U. S., 115 Fed. 842; Tiffany *v.* U. S., 112 Fed. 672, 50 C. C. A. 419; *In re* Guggenheim Smelting Co., 112 Fed. 517, 50 C. C. A. 374; Hahn *v.* U. S., 100 Fed. 635, 40 C. C. A. 622 [*reversing* 91 Fed. 755]; Mandel *v.* Seeberger, 39 Fed. 760; Walker *v.* Seeberger, 38 Fed. 724; Lloyd *v.* McWilliams, 31 Fed. 261.

If an article is not found enumerated in the tariff laws, **the first inquiry is as to** whether it bears a similitude to any enumerated article. Arthur *v.* Fox, 108 U. S. 125, 2 S. Ct. 371, 27 L. ed. 675; Hahn *v.* U. S., 100 Fed. 635, 40 C. C. A. 622 [*reversing* 91 Fed. 755]; Aloe *v.* Churchill, 44 Fed. 50; Ross *v.* Peaslee, 20 Fed. Cas. No. 12,077, 2 Curt. 499.

The similitude referred to in the statute must be a substantial similitude, not importing merely an adaptability to sale as a substitute for the article to which it is said to be assimilated, but referring rather to its employment, or to its effect in producing results. Sykes *v.* Magone, 38 Fed. 494; Weilbacher *v.* Merritt, 37 Fed. 85. It is not essential, however, that an article, to be within the operation of this clause, should be similar in the four particulars of material, quality, texture, and use. Greenleaf *v.* Goodrich, 101 U. S. 278, 25 L. ed. 845; Weilbacher *v.* Merritt, 37 Fed. 85; Boker *v.* Redfield, 3 Fed. Cas. No. 1,606*a*. *Contra*, Lazard *v.* Magone, 40 Fed. 662. It is also evident that the terms of the clause are satisfied; and an article would be included within its meaning if the use to which it was adapted was similar to the use of an enumerated article, although in other particulars there is no similarity between the two. This similarity of use must be, however, a similarity in the employment of the article and of its effects, and not a

the highest rate at which the same would be chargeable if composed wholly of the component material thereof of chief value.[22]

(B) *Non-Enumerated Articles.* If a non-enumerated, manufactured article bears no substantial similitude to any enumerated one, or no substantial resemblance to two or more enumerated articles chargeable with duty, and if not provided for either specifically or otherwise in the schedules, it would still be subject to duty under that universal and comprehensive provision in the tariff acts providing for a certain rate of duty on all raw or unmanufactured articles not enumerated or provided for, and a higher rate of duty on such non-enumerated articles manufactured in whole or in part.[23]

4. Exemptions From Duty — a. By Express Designation or Classification — (I) *In General.* It is evident that the interests of the people as a whole would be best subserved by the admission of certain articles of trade free of duty. There is therefore found not only exemptions by virtue of the more general provisions having this end in view,[24] but also by a specific enumeration known as the "free list." In this enumeration there is a judicial construction placed upon the

similarity to another article as a marketable commodity. Murphy *v.* Arnson, 96 U. S. 131, 24 L. ed. 773. See also Pickhardt *v.* Merritt, 132 U. S. 258, 10 S. Ct. 80, 33 L. ed. 353; U. S. *v.* Dana, 99 Fed. 433, 39 C. C. A. 590.

22. Rossman *v.* Hedden, 145 U. S. 561, 12 S. Ct. 925, 36 L. ed. 817 [*affirming* 37 Fed. 99]; Mason *v.* Robertson, 139 U. S. 624, 11 S. Ct. 668, 35 L. ed. 293; Hartranft *v.* Meyer, 135 U. S. 237, 10 S. Ct. 751, 34 L. ed. 110; Arthur *v.* Butterfield, 125 U. S. 70, 8 S. Ct. 714, 31 L. ed. 643; Benziger *v.* Robertson, 122 U. S. 211, 7 S. Ct. 1169, 30 L. ed. 1149; Murphy *v.* Arnson, 96 U. S. 131, 24 L. ed. 773; Arthur *v.* Sussfield, 96 U. S. 128, 24 L. ed. 772; Arthur *v.* Unkart, 96 U. S. 118, 24 L. ed. 768; Smythe *v.* Fiske, 23 Wall. (U. S.) 374, 23 L. ed. 47; Stuart *v.* Maxwell, 16 How. (U. S.) 150, 14 L. ed. 883; *In re* Wise, 93 Fed. 443; Wolff *v.* U. S., 71 Fed. 291, 18 C. C. A. 41 [*distinguishing* Benziger *v.* Robertson, 122 U. S. 211, 7 S. Ct. 1169, 30 L. ed. 1149]; Tiffany *v.* U. S., 66 Fed. 737; U. S. *v.* Semmer, 41 Fed. 324; Swayne *v.* Hager, 37 Fed. 780, 13 Sawy. 618; Lottimer *v.* Lawrence, 15 Fed. Cas. No. 8,521, 1 Blatchf. 613. *Compare* Lloyd *v.* McWilliams, 31 Fed. 261.

23. Worthington *v.* Robbins, 139 U. S. 337, 11 S. Ct. 581, 35 L. ed. 181; Hartranft *v.* Sheppard, 125 U. S. 337, 8 S. Ct. 920, 31 L. ed. 763; Hartranft *v.* Winters, 121 U. S. 616, 7 S. Ct. 1244, 30 L. ed. 1015 [*following* Hartranft *v.* Wiegmann, 121 U. S. 609, 7 S. Ct. 1240, 30 L. ed. 1012]; De Forest *v.* Lawrence, 13 How. (U. S.) 274, 14 L. ed. 143; Lawrence *v.* Allen, 7 How. (U. S.) 785, 12 L. ed. 914; De Ronde *v.* U. S., 113 Fed. 858; Kessler *v.* U. S., 107 Fed. 264; U. S. *v.* Dodge, 107 Fed. 106, 46 C. C. A. 166; Tiffany *v.* U. S., 103 Fed. 619; U. S. *v.* Gabriel, 99 Fed. 716; Dingelstedt *v.* U. S., 91 Fed. 112, 33 C. C. A. 395 [*affirming* 87 Fed. 190]; U. S. *v.* Watson, 84 Fed. 160; Wilkens *v.* U. S., 84 Fed. 152; U. S. *v.* Borgfeldt, 79 Fed. 953, 25 C. C. A. 257; Stemmler *v.* U. S., 72 Fed. 47; Standard Varnish Works *v.* U. S., 59 Fed. 456, 8 C. C. A. 178 [*affirming* 53 Fed. 786]; *In re* Duncan, 57 Fed. 197; Erhardt *v.* Hahn, 55 Fed. 273, 5 C. C. A. 99; Foppes *v.* Magone, 40 Fed. 570 [*followed* in U. S. *v.* Foppes, 99 Fed. 558]; Sykes *v.* Magone, 38 Fed. 494; Weilbacher *v.* Merritt, 37 Fed. 85; Coggill *v.* Lawrence, 6 Fed. Cas. No. 2,956, 1 Blatchf. 602; King *v.* Smith, 14 Fed. Cas. No. 7,806; Rheimer *v.* Maxwell, 20 Fed. Cas. No. 11,738, 3 Blatchf. 124; Riggs *v.* Frick, 20 Fed. Cas. No. 11,825, Taney 100; Schneider *v.* Lawrence, 21 Fed. Cas. No. 12,470, 3 Blatchf. 115.

The mere fact of the application of labor to an article, either by hand or by mechanism, does not necessarily make it a "manufactured article" within the meaning of the tariff laws, unless the labor has been carried to such an extent that the article suffers a species of transformation, and is in a sense at least changed into a different article, having a changed or different character or use. Baumgarten *v.* Magone, 50 Fed. 69 [*following* Hartranft *v.* Wiegmann, 121 U. S. 609, 7 S. Ct. 1240, 30 L. ed. 1012; U. S. *v.* Semmer, 41 Fed. 324]. A change of name and manipulation does not necessarily constitute a manufacture within the meaning of the law; each case must be decided according to its own circumstances. Frazee *v.* Moffitt, 18 Fed. 584, 20 Blatchf. 267. So natural grass, sunbleached, and used for emblems, is not a manufactured article. U. S. *v.* Richards, 99 Fed. 262 [*citing* Frazee *v.* Moffitt, 18 Fed. 584, 20 Blatchf. 267]. Likewise material may be subjected to a process of manufacture, and thereby be transformed into an "unmanufactured article" of another name. Davies *v.* U. S., 115 Fed. 232. See also U. S. *v.* Wilson, 28 Fed. Cas. No. 16,736. Where, however, an article has been advanced through one or more processes into a completed commercial article, and known and recognized in trade by a specific and distinctive name other than the name of the material, and is designed and adapted for a particular use, it is to be deemed a manufacture. Erhardt *v.* Hahn, 55 Fed. 273, 5 C. C. A. 99.

24. See *infra*, II, B, 4, a, (II) *et seq.*

terms or expressions: Acids used for medicinal, chemical, or manufacturing purposes, not otherwise specially provided for;[25] alizarine, and alizarine colors or dyes;[26] animals specially imported for breeding purposes;[27] antimony;[28] articles in a crude state, used in dyeing or tanning, and not specially provided for;[29] crude mineral, not advanced in value by manufacture;[30] dressed lumber;[31] fur skins of all kinds, not dressed;[32] manure, and all substances used for manure;[33] medals of gold, silver, or copper, actually bestowed as trophies or prizes;[34] non-edible drugs in a crude state, not advanced in value or condition by refining or other process of manufacture, and not specially provided for;[35] sheep dip;[36] paraffine;[37] shells not sawed, cut, polished, or otherwise manufactured or advanced in value from the natural state;[38] sago, crude;[39] and tapioca.[40]

(II) *Collection of Antiquities.* Congress, in exempting from duty articles constituting "a collection of antiquities," intended that the articles should in fact consist of a collection,[41] and articles, although in every respect within the meaning of the term "antiquities," if otherwise imported, would be subject to the rates of duty prescribed for articles of their kind in the various schedules.[42] But the mere fact that through mistake or inadvertence the articles forming the collection are imported on different vessels would not take them without the meaning of the provision.[43]

(III) *Exported Goods Reimported.* Congress has, with slight variations in the phraseology of the different acts, provided for an exemption from duty of

25. Schultz's Appeal, 94 Fed. 820; Schoellkopf *v.* U. S., 94 Fed. 640; Matheson *v.* U. S., 71 Fed. 394, 18 C. C. A. 143. See also Wise *v.* Southern Pac. Co., 87 Fed. 863, 31 C. C. A. 263; Koechl *v.* U. S., 84 Fed. 954; U. S. *v.* Warren Chemical, etc., Co., 84 Fed. 638, 28 C. C. A. 500 [*affirming* 78 Fed. 810].

26. Keppelmann *v.* U. S., 116 Fed. 777; Matheson *v.* U. S., 99 Fed. 430 [*affirming* 90 Fed. 276]; Klipstein *v.* U. S., 94 Fed. 356; Sehlbach *v.* U. S., 84 Fed. 157.

27. Beck *v.* U. S., 84 Fed. 150; U. S. *v.* Eleven Horses, 30 Fed. 916; U. S. *v.* One Hundred and Ninety-Six Mares, 29 Fed. 139. See also U. S. *v.* One Sorrel Stallion, etc., 51 Fed. 877.

28. McKesson *v.* U. S., 113 Fed. 996.

29. Roessler, etc., Chemical Co. *v.* U. S., 94 Fed. 822 [*affirmed* in 99 Fed. 552, 39 C. C. A. 651].

30. U. S. *v.* Buffalo Natural Gas Fuel Co., 172 U. S. 339, 19 S. Ct. 200, 43 L. ed. 469 [*affirming* 78 Fed. 110, 24 C. C. A. 4]. See also Marvel *v.* Merritt, 116 U. S. 11, 6 S. Ct. 207, 29 L. ed. 550, for a judicial construction of the term "mineral."

31. U. S. *v.* Dudley, 174 U. S. 670, 19 S. Ct. 801, 43 L. ed. 1129 [*affirming* 79 Fed. 75, 24 C. C. A. 449]. See also *In re* Myers, 69 Fed. 237.

32. Keen-Sutterle Co. *v.* U. S., 107 Fed. 263; U. S. *v.* Bennet, 66 Fed. 299, 13 C. C. A. 446. See also U. S. *v.* Wotton, 53 Fed. 344, 3 C. C. A. 553 [*affirming* 50 Fed. 693].

33. Magone *v.* Heller, 150 U. S. 70, 14 S. Ct. 18, 37 L. ed. 1001 [*affirming* 38 Fed. 908]; Schultz *v.* Cadwalader, 43 Fed. 290.

34. U. S. *v.* McSorley, 65 Fed. 492, 13 C. C. A. 15.

35. U. S. *v.* Hensel, 107 Fed. 260; U. S. *v.* Merck, 66 Fed. 251, 13 C. C. A. 432; Cruikshank *v.* U. S., 59 Fed. 446, 8 C. C. A. 171 [*reversing* 54 Fed. 676]; Clay *v.* Erhardt, 48 Fed. 293.

36. Wyman *v.* U. S., 118 Fed. 202.

37. Shoellkopf *v.* U. S., 71 Fed. 694, 8 C. C. A. 301.

38. Schoenemann *v.* U. S., 119 Fed. 584, 56 C. C. A. 104.

39. Littlejohn *v.* U. S., 119 Fed. 483.

40. Chew Hing Lung *v.* Wise, 176 U. S. 156, 20 S. Ct. 320, 44 L. ed. 412 [*reversing* 83 Fed. 162, 27 C. C. A. 494]; *In re* Townsend, 56 Fed. 222, 5 C. C. A. 488.

41. Davis *v.* U. S., 77 Fed. 172, 23 C. C. A. 113 (holding that the exemption referred to a collection which was such at the time of the importation, and did not exist as to articles imported singly, which were to become a part of a collection); Tiffany *v.* U. S., 66 Fed. 729; U. S. *v.* Glaenzer, 55 Fed. 642, 5 C. C. A. 225; Baumgarten *v.* Magone, 41 Fed. 770. But *compare* Marine *v.* Robson, 47 Fed. 34.

42. Davis *v.* U. S., 77 Fed. 172, 23 C. C. A. 113 [*affirming* 72 Fed. 49]; U. S. *v.* Gunther, 71 Fed. 499, 18 C. C. A. 219; *In re* Glaenzer, 67 Fed. 532; Tiffany *v.* U. S., 66 Fed. 729; Baumgarten *v.* Magone, 41 Fed. 770.

43. *In re* Glaenzer, 55 Fed. 642, 5 C. C. A. 225, where it was held that the fact that a single vase of an acknowledged collection of antiquities chanced to be sent with a separate invoice did not disturb its character as a collection of antiquities. To the same effect see *In re* Godwin, 46 Fed. 361, holding that the fact that an Oriental rug purchased with other antique rugs and articles of antique tapestry was not imported in the same vessel with the other articles would not render it subject to duty.

The intention of the importer to sell a part or the whole of the collection after its im-

articles of growth, produce, or manufacture of the United States, when returned after having been exported without having been advanced in value, or improved in condition, by manufacture or other means.[44] Proof of identity of such articles, in conformity with the rules of the customs officials, is, however, an indispensable prerequisite to the right of exemption;[45] but the regulations prescribing the time within which such proof must be furnished will not be strictly construed against the importer.[46]

(IV) *IMPORTATIONS IN INTEREST OF LEARNING, SCIENCE, AND OCCUPATION.* Exemptions from duty have been made by congress in the different tariff acts, having in view the interest of the public, with regard to science, learning, and the advancement of research generally. In accord with this principle are included: Books for the use of a state or public library,[47] or printed exclusively in language other than English,[48] or devoted to original scientific research,[49] periodicals,[50] publications for gratuitous private circulation,[51] philosophical and scientific apparatus, instruments,[52] and preparations[53] imported in good faith, for the use of any society or institution incorporated and established for certain specified purposes;[54] works of art, imported for benevolent purposes,[55] articles imported expressly for the promotion and encouragement of science, art, or industry,[56] professional books, implements, instruments, and tools of trade, occupation, or employment, in the actual possession of persons at the time of arrival,[57] and in some instances articles of occupation or profession for temporary use only.[58]

portation was not material under the act of 1890. Godwin *v.* U. S., 66 Fed. 739.

44. Knight *v.* Schell, 24 How. (U. S.) 526, 16 L. ed. 760 [*affirming* 14 Fed. Cas. No. 7,887, 19 How. Pr. (N. Y.) 168]; Belcher *v.* Linn, 24 How. (U. S.) 508, 533, 16 L. ed. 758; U. S. *v.* Dunbar, 67 Fed. 783, 14 C. C. A. 639.

The sale of a part of the importation before its reimportation will not take the remainder without the operation of the statute. Kidd *v.* Swartwout, 14 Fed. Cas. No. 7,756. Nor will such damage as results to property from being shipwrecked and submerged, with the attendant breakage and loss of coverings, so change its condition as to exclude it from free entry, under this provision. The Edward, 12 Fed. 508. See also Balfour *v.* Sullivan, 19 Fed. 578.

The exemption does not apply to cattle which are exported as young and immature animals far in the interior of a foreign country for the stocking of a ranch, and returned after fully matured and suitable for market. U. S. *v.* Cloete, 81 Fed. 399, 26 C. C. A. 452.

45. U. S. *v.* Brewer, 92 Fed. 343, 34 C. C. A. 390. See also Bartran *v.* U. S., 77 Fed. 604.

Proof of identity furnished in any other form than that prescribed by such regulations will not entitle the articles to exemption. U. S. *v.* Dominici, 78 Fed. 334, 24 C. C. A. 116 [*reversing* 72 Fed. 46]; Gauthier *v.* Bell, 10 Fed. Cas. No. 5,277.

46. Hensel *v.* U. S., 72 Fed. 52.

47. Little *v.* U. S., 104 Fed. 540.

48. Fisher *v.* U. S., 99 Fed. 260, holding that music-books with exclusively German words were within the exemption.

49. Read *v.* Certain Merchandise, 103 Fed. 197, 43 C. C. A. 178 [*affirming* 95 Fed. 967]; *In re* Boston Book Co., 50 Fed. 914.

50. New York Daily News *v.* U. S., 65 Fed. 493, 13 C. C. A. 16 [*reversing* 61 Fed. 647]. See also in this connection Richards *v.* U. S., 91 Fed. 516.

51. Schieffelin *v.* U. S., 84 Fed. 880, 28 C. C. A. 554.

52. U. S. *v.* Massachusetts Gen. Hospital, 100 Fed. 932, 41 C. C. A. 114 [*affirming* 95 Fed. 973]; U. S. *v.* Hensel, 72 Fed. 41; U. S. *v.* Presbyterian Hospital, 71 Fed. 866, 18 C. C. A. 338.

53. *In re* Kny, 57 Fed. 190.

54. Massachusetts Gen. Hospital *v.* U. S., 112 Fed. 670, 50 C. C. A. 417; U. S. *v.* Hensel, 72 Fed. 41.

The affidavit that they were imported by order of such institution, as required by the regulations of the treasury department, and not for sale or distribution, must be filed before the arrival of such articles. Otherwise they will be subjected to the duties leviable upon such instruments. Eimer *v.* U. S., 87 Fed. 202.

55. *In re* Hempstead, 95 Fed. 969; Morris European, etc., Express Co. *v.* U. S., 85 Fed. 964. See also U. S. *v.* Perry, 146 U. S. 71, 13 S. Ct. 26, 36 L. ed. 890 [*reversing* 47 Fed. 110]. *Compare* Benziger *v.* U. S., 107 Fed. 257 [*affirmed* in 113 Fed. 1016, 51 C. C. A. 587].

56. U. S. *v.* Boussod-Valadon Co., 71 Fed. 503, 18 C. C. A. 223 [*reversing* 66 Fed. 718].

57. Barrett *v.* U. S., 115 Fed. 206; U. S. *v.* Magnon, 71 Fed. 293, 18 C. C. A. 43 [*affirming* 66 Fed. 151]; *In re* Lindner, 66 Fed. 723; Rosenfeld *v.* U. S., 66 Fed. 303, 13 C. C. A. 450 [*followed* in Sandow *v.* U. S., 84 Fed. 146]; Henderson *v.* U. S., 66 Fed. 53, 13 C. C. A. 328.

58. U. S. *v.* Russell, 84 Fed. 878, 28 C. C. A. 552.

Likewise an exemption is made in the interest of foreign commerce and deep-sea navigation.[59]

(v) *Wearing Apparel and Household Effects.* The provision in the customs laws exempting wearing apparel from duty is not to be considered as meaning only apparel actually worn by the person at the time of entry, but is intended to admit wearing apparel owned by the passenger and intended for his use or wear, suitable for the season of the year immediately approaching the time of his arrival, in a condition to be worn without further manufacture, and in such quantity, quality, or value as he is in the habit of ordinarily providing himself with, and does not include apparel purchased for another or intended to be given to another.[60]

b. Through Non-Applicability of Customs Laws — (i) *Property of United States.* Property purchased by the United States and imported for its use is not subject to an import duty.[61]

(ii) *Ships or Vessels.* As ships or vessels are not dutiable *eo nomine* under the tariff acts, and are not properly included within the meaning of the terms articles or goods, wares, and merchandise, it follows that they are not subject to duty within the meaning of the customs laws.[62] By the same reasoning it is held that a chain cable, purchased *bona fide*, with the intention of using it as a part of the ship,[63] and the tackle, apparel, and furniture of a foreign vessel wrecked upon our shores, and landed and sold separate from the hull[64] are not not dutiable.

III. ASCERTAINMENT AND COLLECTION.

A. Officials — 1. Powers and Duties — a. Secretary of Treasury and Assistants. The rules and regulations of the secretary of the treasury, as chief administrative officer in the collection of duties,[65] when fairly within the scope and

59. *In re* Spreckels, 104 Fed. 879. But this exemption would not apply to the shipbuilding materials used in the construction of a vessel built for a foreign government, for use between ports in its own country. Russell *v.* U. S., 21 Fed. Cas. No. 12,164, 15 Blatchf. 26.

Trade between the Atlantic and Pacific ports in the United States is considered foreign and not coastwise trade. U. S. *v.* Patten, 27 Fed. Cas. No. 16,007, Holmes 421.

60. Astor *v.* Merritt, 111 U. S. 202, 4 S. Ct. 413, 28 L. ed. 401. See also U. S. *v.* One Pearl Necklace, 111 Fed. 164, 49 C. C. A. 287, 56 L. R. A. 130.

Household effects.— A carriage which was used abroad by its owner and brought to this country for his own use, and not for another person, or for sale (Arthur *v.* Morgan, 112 U. S. 495, 5 S. Ct. 241, 28 L. ed. 825), and family carriage horses, used as such and brought to this country for the same use (Sandow *v.* U. S., 84 Fed. 146) are held to be exempt from duty within the meaning of the term "household effects."

A person who goes abroad for the purpose of buying clothes, and not for the purpose of other business or for pleasure, was held not to be within the meaning of this provision, as used in the act of 1857, although he actually wore the articles on his return home. Simmons' Case, 22 Fed. Cas. No. 12,865, Brown Adm. 128.

61. U. S. *v.* Lutz, 26 Fed. Cas. No. 15,644, 2 Blatchf. 383.

Application of rule to prize goods.— With regard to goods which have been captured in war, and fall under the statute regulating the apportionment of prize goods, it is held that although the statute provides that prize goods imported into the United States shall pay duties, nevertheless the moiety belonging to the United States is exempt from duty; while that moiety belonging to the captors is subject to duty. The Liverpool Hero, 15 Fed. Cas. No. 8,405, 2 Gall. 184.

62. The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. ed. 937.

Dredges, and scows used in connection therewith, are "vessels" within the meaning of this holding. The fact that they are not subject to all the regulations and provisions applicable to vessels engaged in foreign or domestic commerce does not affect their legal status. The International, 89 Fed. 484, 32 C. C. A. 258 [*affirming* 83 Fed. 840].

63. U. S. *v.* Chain Cable, 25 Fed. Cas. No. 14,776, 2 Sumn. 362.

Sails, rigging, cables, or anchors are to be considered as attached to the ship, and so belonging to the ship that it is no more necessary to include them in the manifest than the ship itself. U. S. *v.* One Hempen Cable, 27 Fed. Cas. No. 15,931*a*.

It is necessary that such equipment be *bona fide* a part of the vessel. To be merely used as such is not sufficient. Weld *v.* Maxwell, 29 Fed. Cas. No. 17,374, 4 Blatchf. 136.

64. The Gertrude, 10 Fed. Cas. No. 5,370, 3 Story 68.

65. See U. S. *v.* Ballin, 144 U. S. 1, 12 S. Ct. 507, 36 L. ed. 321 [*reversing* 45 Fed. 170].

purpose of the statute authorizing such regulations, have the force of law.[66] Such regulations must, however, be reasonable.[67] He has no right to make any regulations the effect of which would be to alter or amend the law,[68] impose a duty not provided by congress,[69] or to change the law as to the competency of evidence.[70]

b. Collector. It being the duty of the collector and those under him to directly collect the duties provided for by the customs laws,[71] it follows that owing to the comprehensiveness and intricacies of the same his powers or duties may in some instances be uncertain or onerous.[72] It may, however, be said that like any other public officer he cannot bind the government by any acts beyond or contrary to his lawful authority,[73] and has no power therefore to waive the requirements of the law, and allow an entry without a compliance therewith;[74] nor can he collect after his removal outstanding duties which had accrued during his incumbency.[75] He may, however, with the sanction of the secretary of the

The assistant secretary of the treasury is not a deputy of the secretary, but only his aid; and while his acts are not valid unless specially authorized by law or prescribed by the secretary, they will be presumed to have been performed by such authority until the contrary appears. U. S. *v.* Adams, 24 Fed. 348 [*approved* in Shillito Co. *v.* McClung, 51 Fed. 868, 2 C. C. A. 526].

66. Aldridge *v.* Williams, 3 How. (U. S.) 9, 11 L. ed. 469; Ferry *v.* U. S., 85 Fed. 550, 29 C. C. A. 345; Von Cotzhausen *v.* Nazro, 15 Fed. 891; U. S. *v.* Hutton, 26 Fed. Cas. No. 15,433, 10 Ben. 268.

As to the power of congress to pass statutes empowering the secretary of the treasury or his assistants to fix a standard to which an article must conform to render its importation permissible see Cruikshank *v.* Bidwell, 86 Fed. 7 [*followed* in Buttfield *v.* Bidwell, 94 Fed. 126].

67. Campbell *v.* U. S., 107 U. S. 407, 2 S. Ct. 759, 27 L. ed. 592; Pascal *v.* Sullivan, 21 Fed. 496. See also Knoedler *v.* U. S., 113 Fed. 999, holding that the arbitrary limitation of five years as the time within which an artist must return from abroad to have his paintings admitted free of duty, under the act of 1897, par. 703, could not be upheld.

Valid exercise of authority.— A regulation requiring that a shipment of goods without an invoice shall be sent to the public store for examination and appraisement is a proper exercise of authority. Kennedy *v.* Magone, 158 U. S. 212, 15 S. Ct. 814, 39 L. ed. 954. Likewise the secretary has an undoubted right, upon seeing the error of former rulings, to change the same. U. S. *v.* Cobb, 11 Fed. 76. So too a regulation forbidding the inspection of custom-house books and papers except on written application to the collector, if intended to provide an orderly mode for the exercise of the right of access by the importer, would be reasonable and fair; but such regulation would be unreasonable and void if construed to deny all access by the importer. Nor would such regulations make it unlawful for the collector to produce such books and papers in court at the request of the district attorney. U. S. *v.* Hutton, 26 Fed. Cas. No. 15,433, 10 Ben. 268.

68. Morrill *v.* Jones, 106 U. S. 466, 1 S. Ct. 423, 27 L. ed. 267; Tracy *v.* Swartwout, 10 Pet. (U. S.) 80, 9 L. ed. 354; U. S. *v.* Beebe, 103 Fed. 785 [*affirmed* in 106 Fed. 75, 45 C. C. A. 230]; *In re* Puget Sound Reduction Co., 96 Fed. 90; Pascal *v.* Sullivan, 21 Fed. 496; U. S. *v.* Leng, 18 Fed. 15; Maillard *v.* Lawrence, 16 Fed. Cas. No. 8,972, 3 Blatchf. 378; Morlot *v.* Lawrence, 17 Fed. Cas. No. 9,816, 3 Blatchf. 122.

His power to order the collectors to disobey the positive requirement of an unrepealed act of congress because later legislation in his opinion has rendered the act unnecessary may well be doubted. Foster *v.* Peaslee, 9 Fed. Cas. No. 4,979, holding that inasmuch as the act of 1799, which required the delivery, to the importer of distilled spirits, of a certain certificate to accompany each cask, as evidence that the same had been lawfully imported, and that the finding of such cask without the certificate would be presumptive evidence of its liability to forfeiture, had for its object the prevention of illegal importations as well as fraudulent claims for drawbacks. The secretary had no right to withhold the certificate on the ground that subsequent legislation had rendered them unnecessary, so far as the claims for drawbacks were concerned.

69. Balfour *v.* Sullivan, 19 Fed. 578; Gray *v.* Lawrence, 10 Fed. Cas. No. 5,722, 3 Blatchf. 117.

70. Pascal *v.* Sullivan, 21 Fed. 496. See also Downs *v.* U. S., 113 Fed. 144, 51 C. C. A. 100.

71. U. S. *v.* Leng, 18 Fed. 15; U. S. *v.* Campbell, 10 Fed. 816; Brissac *v.* Lawrence, 4 Fed. Cas. No. 1,888, 2 Blatchf. 121.

72. McLane *v.* U. S., 6 Pet. (U. S.) 404, 8 L. ed. 443. See also U. S. *v.* Desmond, 25 Fed. Cas. No. 14,951.

73. Johnson *v.* U. S., 13 Fed. Cas. No. 7,419, 5 Mason 425.

74. One Hundred and Thirty-Four Thousand Nine Hundred and One Feet of Pine Lumber, 18 Fed. Cas. No. 10,523, 4 Blatchf. 182. And see U. S. *v.* Randall, 27 Fed. Cas. No. 16,119, 1 Sprague 546.

75. Sthreshley *v.* U. S., 4 Cranch (U. S.) 169, 2 L. ed. 584. See also Champney *v.*

treasury, appoint,[76] and likewise discharge,[77] necessary deputies or assistants. He may also, with the consent of the secretary of the treasury, appoint necessary inspectors,[78] who are public officers, and not mere servants of the collector.[79] So too it has been held that he may delegate to his deputy the duty of receiving and handling customs moneys without violating a regulation which prohibits customs officers from performing their duties by substitutes.[80]

c. Deputy-Collectors and Inspectors. Generally speaking the deputy-collector, unless restricted, may perform the same functions, powers, and duties as the collector;[81] and, although appointed with the approval of the secretary of the treasury, the tenure of his office is at the will of the collector.[82] So too it is held that the office of inspector and deputy-collector may be held by one person at the same time.[83]

d. Appraisers. By a recent statute[84] it is provided that general appraisers shall be appointed by the president with the advice and consent of the senate.

2. Compensation — a. Of Collector. The compensation usually allowed a collector[85] consists of a prescribed sum, usually less than a reasonable compensa-

Bancroft, 5 Fed. Cas. No. 2,587, 1 Story 423, holding that a collector after his term of office had expired could not pay to officers of the customs moneys in his hands, in compliance with the statute providing therefor, as such payment was clearly an official act.

76. Schmaire *v.* Maxwell, 21 Fed. Cas. No. 12,460, 3 Blatchf. 408.

77. Turner *v.* U. S., 21 Ct. Cl. 24.

78. U. S. *v.* Bachelder, 24 Fed. Cas. No. 14,490, 2 Gall. 15.

The residence of the inspector thus appointed need not be at a port of entry or delivery. Rowley *v.* Gibbs, 14 Johns. (N. Y.) 385.

79. Hooper *v.* Fifty-One Casks of Brandy, 12 Fed. Cas. No. 6,674, 2 Ware 371.

80. Dignan *v.* Shields, 51 Tex. 322. See also Slaight *v.* Hedden, 39 Fed. 103, where it is held that under a statute making it the right and duty of an importer to affix stamps to importations of cigars, tobacco, etc., if the importer desired to perform this act by an agent, it was a reasonable regulation of the collector that the agent thus selected must be one who is satisfactory to him as well as to the importer.

81. Falleck *v.* Barney, 8 Fed. Cas. No. 4,625, 5 Blatchf. 38; Schmaire *v.* Maxwell, 21 Fed. Cas. No. 12,460, 3 Blatchf. 408; Spring *v.* Russell, 22 Fed. Cas. No. 13,261, 1 Lowell 258; U. S. *v.* Barton, 24 Fed. Cas. No. 14,534, Gilp. 439.

He may swear reappraisers (Falleck *v.* Barney, 8 Fed. Cas. No. 4,625, 5 Blatchf. 38; Lehmaier *v.* Maxwell, 15 Fed. Cas. No. 8,214), or administer any oath required to be administered by the collector (Schmaire *v.* Maxwell, 21 Fed. Cas. No. 12,460, 3 Blatchf. 408).

He cannot waive a tender proposed to be made by importers by acknowledging a tender when none is made. U. S. *v.* Nash, 27 Fed. Cas. No. 15,856, 4 Cliff. 107.

82. Dignan *v.* Shields, 51 Tex. 322.

Right to resign.— A deputy-collector has an absolute right to resign his office; and while a final resignation cannot be withdrawn, a prospective one may be at any time before acceptance, or even after acceptance, with the consent of the authority accepting, if no new rights have intervened. Bunting *v.* Willis, 27 Gratt. (Va.) 144, 21 Am. Rep. 338.

83. U. S. *v.* Morse, 27 Fed. Cas. No. 15,820, 3 Story 87.

84. 26 U. S. St. at L. 136 [U. S. Comp. St. (1901) p. 1931].

Removal.— The statute further provides that such appraisers may be removed at any time by the president for inefficiency, neglect of duty, or malfeasance in office. Under this statute it is held that the method of obtaining knowledge of the existence of one or any of these causes is within the president's discretion, and he need not assign the particular cause for which he removes an appraiser, it being assumed that the charges were such as were prescribed by law, and that the president was guided by the statute prescribing the grounds on which the removal might be made. Shurtleff *v.* U. S., 36 Ct. Cl. 34.

The merchant appraisers provided for under former acts were selected by the collector either at his own instance or upon the request of the importer. It was required that the person selected be an experienced merchant, familiar with the character of the goods in question. Auffmordt *v.* Hedden, 137 U. S. 310, 11 S. Ct. 103, 34 L. ed. 674 [*affirming* 30 Fed. 360]. If the collector refused to appoint a merchant appraiser, the remedy of the importer was an action on the case. Lehmaier *v.* Maxwell, 15 Fed. Cas. No. 8,214. And it would seem that the collector, and not an official appraiser, should administer the oath to such merchant appraisers. Vaccari *v.* Maxwell, 28 Fed. Cas. No. 16,810, 3 Blatchf. 368.

85. Congress may, by using the appropriate words, manifest an intention that the salary of the collector shall constitute his entire compensation. U. S. *v.* Lawson, 101 U. S. 164, 25 L. ed. 860. Thus in Saunders *v.* U. S., 114 Fed. 42, 51 C. C. A. 668 [*affirming* 98 Fed. 196], it is held that the act of Aug. 28, 1890, fixed the compensation of the collector of the district of Puget sound at a salary of thirty-five hundred dollars annually and repealed the statute allowing the officer

tion for the services required, to which is added certain enumerated fees, commissions, and allowances.[86] He can, however, exact no fees not authorized by statute,[87] and usage in regard to their collection cannot make their exaction legal.[88] Limitations or restrictions as to the amount lawfully collected, which may be claimed for compensation, will not be presumed.[89] In conformity with this idea congress has repeatedly declared such limitations in positive terms;[90] and the courts uniformly hold that in no case shall his compensation exceed the prescribed maximum,[91] unless in pursuance of official request by the treasury or other department he performs extra service, foreign to the legitimate duties of his office as collector, and having no connection therewith,[92] and which the law

at that place a certain amount of fees. See also U. S. *v.* Collier, 25 Fed. Cas. No. 14,833, 3 Blatchf. 325, where it was held that the limitations and restrictions of the acts of 1822 and 1841 were inapplicable as to the amount of the compensation allowed a collector of the district of upper California.

The fees are due and recoverable at law as soon as the periodical accounts required by the statute are rendered to the treasury department and the collections paid thereto, and the statute of limitations would begin running from that date. Carter *v.* U. S., 6 Ct. Cl. 31.

86. U. S. *v.* Lawson, 101 U. S. 164, 25 L. ed. 860; Donovan *v.* U. S., 23 Wall. (U. S.) 383, 23 L. ed. 104 [*affirming* 7 Fed. Cas. No. 3,994, 3 Dill. 53]; U. S. *v.* Walker, 22 How. (U. S.) 299, 16 L. ed. 382.

Nature of fees allowed.— There is no distinction between the fees received by a collector from the owners of steamers, and from engineers and pilots, and other fees, within the meaning of the law, and therefore such fees may be retained by the collector. U. S. *v.* Ballard, 14 Wall. (U. S.) 457, 20 L. ed. 845.

Emoluments cease on death or disability.— Under a statute providing that a collector may appoint a deputy to act in his absence, or in case of his death or disability, the collector is entitled to the perquisites and emoluments of his office only when the deputy acts during his necessary absence or sickness; but if he is disabled or dies he thereupon ceases to act through the deputy, and the emoluments of the office do not belong to him or to his estate. Merriam *v.* Clinch, 17 Fed. Cas. No. 9,460, 6 Blatchf. 5.

Commissions on outstanding bonds.—It was held to be within the equity of the earlier acts providing that the collector should have a certain percentage on bonds taken by him to allow a collector whose term of office had expired half of the commissions on bonds taken by him, and then outstanding, which were collected by his successor. Bates *v.* Drury, 2 Fed. Cas. No. 1,100, 4 Mason 118. He could not, however, claim such share of the commissions if he had been removed from office. Doane *v.* Phillips, 12 Pick. (Mass.) 223. And inasmuch as the law does not intend that he should receive more than a certain salary the burden is upon him to show that the emoluments received by him did not reach such maximum, and a failure so to do will preclude his recovery. Prieur *v.* Morgan, 11 Rob. (La.) 292. See also Hoyt *v.* Curtis, 12 Fed. Cas. No. 6,808.

87. Cochran *v.* Schell, 107 U. S. 617, 2 S. Ct. 301, 27 L. ed. 490.

If his authorized compensation be inadequate he must look to the generosity of congress for additional reward. Andrews *v.* U. S., 1 Fed. Cas. No. 381, 2 Story 202.

If the maximum is collected before the removal of an officer by the proper authorities, and the statute merely provides that the excess of the emoluments over a certain amount in any one year shall be paid into the treasury, it has been held that no part of the amount within the maximum can be recovered by the government. U. S. *v.* Pearce, 27 Fed. Cas. No. 16,021, 2 Sumn. 575.

88. Ogden *v.* Maxwell, 18 Fed. Cas. No. 10,458, 3 Blatchf. 319, holding that the exaction of a fee for every five passengers, although customary, was illegal, and might therefore be recovered back.

89. U. S. *v.* Collier, 25 Fed. Cas. No. 14,833, 3 Blatchf. 325.

90. U. S. Rev. St. (1878) § 2688 [U. S. Comp. St. (1901) p. 1833]; U. S. *v.* Collier, 25 Fed. Cas. No. 14,833, 3 Blatchf. 325.

91. Prieur *v.* Morgan, 11 Rob. (La.) 292; Donovan *v.* U. S., 23 Wall. (U. S.) 383, 23 L. ed. 104 [*affirming* 7 Fed. Cas. No. 3,994, 3 Dill. 53]; U. S. *v.* Shoemaker, 7 Wall. (U. S.) 338, 19 L. ed. 80; U. S. *v.* Macdonald, 5 Wall. (U. S.) 647, 18 L. ed. 512; U. S. *v.* Walker, 22 How. (U. S.) 299, 16 L. ed. 382; Hoyt *v.* U. S., 10 How. (U. S.) 109, 646, 13 L. ed. 348, 576; Hoyt *v.* Curtis, 12 Fed. Cas. No. 6,808; Burke *v.* U. S., 19 Ct. Cl. 420.

This statutory limitation applies to the money legitimately constituting the emoluments of the office. It has therefore been held that the amount received by officers of the customs for forfeitures was not within the meaning of the statute. Hooper *v.* Fifty-One Casks of Brandy, 12 Fed. Cas. No. 6,674, 2 Ware 371.

92. Converse *v.* U. S., 21 How. (U. S.) 463, 16 L. ed. 192 [*reversing* 25 Fed. Cas. No. 14,848]; U. S. *v.* Austin, 24 Fed. Cas. No. 14,480, 2 Cliff. 325.

What constitutes incidental duties.— The duty of preparing and furnishing certificates of imported liquors is one having such connection with the duties of the office that fees beyond the statutory maximum cannot be claimed therefor. U. S. *v.* Austin, 26 Fed.

has not directly imposed upon another as one of the duties of his employment as an officer of the government.[93]

b. Deputies and Assistants. The collector, being empowered with certain limitations[94] to appoint deputies, it would seem that one so appointed should receive a reasonable compensation, although no amount therefor be fixed;[95] but if the appointment of a custom-house clerk to the position of a deputy expressly provides that it is made without increase of compensation as clerk the appointee cannot recover the usual salary due a deputy.[96] Likewise it is held that an inspector who for several years accepts a regular statutory compensation without claiming extra charges for work done overtime will be considered in the absence of fraud or coercion to have accepted such payments as in full.[97]

3. Liability of Collector — a. In General. While the liability of a collector in his official capacity, to an action, under the present statute, is restricted,[98] he was formerly liable for any excess exacted as duties, or for a retention of or refusal

Cas. No. 14,480, 2 Cliff. 325. Likewise it has been held in the absence of statute or regulations, or orders from the executive department, that the care and custody of the custom-house was incidental to, and formed a part of the duties of the office of collector, and that he was not entitled to extra compensation for the same. Gray *v.* U. S., 23 Ct. Cl. 323. But *compare* Andrews *v.* U. S., 1 Fed. Cas. No. 381, 2 Story 202, where the court took the view that such charges were authorized by statute.

93. Stewart *v.* U. S., 17 How. (U. S.) 116, 15 L. ed. 65.

94. See *supra*, III, A, 1, b.

95. Andrews *v.* U. S., 1 Fed. Cas. No. 381, 2 Story 202.

An "occasional weigher" is not one of the weighers designated by the statute of 1886, who is to receive a fixed salary; but his compensation is fixed by the contract which he makes with the secretary of the treasury and he must abide thereby. Pray *v.* U. S., 106 U. S. 594, 1 S. Ct. 483, 27 L. ed. 265.

Surveyors performing the duties of a collector of customs are entitled to no greater compensation than the collector. Donovan *v.* U. S., 23 Wall. (U. S.) 383, 23 L. ed. 104 [*affirming* 7 Fed. Cas. No. 3,994, 3 Dill. 53]; Bachelor *v.* U. S., 8 Ct. Cl. 235. See also Ayer *v.* Thacher, 2 Fed. Cas. No. 684, 3 Mason 153; U. S. *v.* Sherlock, 27 Fed. Cas. No. 16,277; Neff *v.* U. S., 8 Ct. Cl. 233.

Performance of extra duties.— The statute providing a certain salary for the deputy does not, in the absence of express provisions to the contrary, prevent him from receiving additional compensation for independent services; and where he performs the duties of inspector also he may receive additional compensation therefor. U. S. *v.* Morse, 27 Fed. Cas. No. 15,820, 3 Story 87.

96. Jackson *v.* U. S., 8 Ct. Cl. 354.

No privity exists between the deputies and the government where under the statute the secretary of the treasury merely makes allowance as he sees fit for the payment of the collectors and deputies, and the collector appoints and pays them. Herndon *v.* U. S., 15 Ct. Cl. 446.

Recovery from collector.— Although the government does not allow the collector's account for money paid for the services of a deputy-collector unless accompanied by a voucher, executed and sworn to by the deputy, to the effect that the money has in fact been paid him, it is not necessary that the deputy to recover from the collector for his services shall first execute such voucher; but it is sufficient if he offers to furnish the voucher when the money is paid him. So too it is held that although it is the custom to pay deputies from the funds collected and charge the same to the government, nevertheless where it appears that it was the understanding of both parties that the collector would be personally responsible the deputy may recover from him. Fuller *v.* Briggs, 22 Vt. 80. It is also held that the statute authorizing the collector to pay his assistants from revenue collected creates no lien thereon in favor of the assistant, and if he refuses so to do the claim remains valid against the government. Champney *v.* Bancroft, 5 Fed. Cas. No. 2,587, 1 Story 423.

97. U. S. *v.* Garlinger, 169 U. S. 316, 18 S. Ct. 364, 42 L. ed. 762. See also Johnston *v.* U. S., 37 Ct. Cl. 309, holding that where the secretary of the treasury may legally exercise the discretion of paying inspectors of customs or surveyors' watchmen less than three dollars per day, and they accept the compensation allowed, they cannot maintain an action for the difference.

98. 26 U. S. St. at L. 141 [U. S. Comp. St. (1901) p. 1896] absolves the collector or other officers of the customs from all liability to an action by an owner, importer, consignee, or agent of merchandise on account of any action, charges, or other matter as to which such owner, importer, consignee, or agent would, under this statute, be entitled to appeal from the decision of said collector or other officer, or from any board of appraisers provided for therein.

As to the liability of a collector by virtue of U. S. Rev. St. (1878) § 2981 [U. S. Comp. St. (1901) p. 1953] for the detention of goods upon which the carrier has a lien for freight after a tender of a sufficient bond for the security of the carrier see Wyman *v.* Lancaster, 32 Fed. 720.

to deliver goods,[99] and the fact that the unlawful imposition of duties or detention of goods was made in pursuance of instructions from the secretary of the treasury was no defense.[1] He is also liable for the acts of his deputies in the performance of their official duties under him,[2] but not for their negligence or default unless he had knowledge of their incompetency at the time of their employment, or had failed to discharge them after having received such knowledge; in other words, unless there be some personal negligence of the collector himself shown,[3] and that the loss occurred by reason of such negligence.[4]

b. On Bond.[5] The collector and his sureties are of course liable upon his official bond for neglect or malfeasance as to his official duties,[6] and no change made in the method of conducting or performing the usual duties of the office will operate as a discharge of the sureties;[7] but the failure to properly perform services foreign to the duty of collector will incur no liability upon his surety.[8] And as the obligation of a surety is usually limited to acts performed by the

99. Cantzler *v.* Gordon, 6 La. 258; Rankin *v.* Hoyt, 4 How. (U. S.) 327, 11 L. ed. 996; Tracy *v.* Swartwout, 10 Pet. (U. S.) 80, 9 L. ed. 354; McLane *v.* U. S., 6 Pet. (U. S.) 404, 8 L. ed. 443; Conrad *v.* Pacific Ins. Co., 6 Pet. (U. S.) 262, 8 L. ed. 392; Burke *v.* Trevitt, 4 Fed. Cas. No. 2,163, 1 Mason 96; Fiedler *v.* Maxwell, 8 Fed. Cas. No. 4,760, 2 Blatchf. 552. See also Blake *v.* Johnson, 1 N. H. 91.

1. Maxwell *v.* Griswold, 10 How. (U. S.) 242, 13 L. ed. 405; Greely *v.* Thompson, 10 How. (U. S.) 225, 13 L. ed. 397; Tracy *v.* Swartwout, 10 Pet. (U. S.) 80, 9 L. ed. 354; Fiedler *v.* Maxwell, 8 Fed. Cas. No. 4,760, 2 Blatchf. 552; Lennig *v.* Maxwell, 15 Fed. Cas. No. 8,243, 3 Blatchf. 125; Munsell *v.* Maxwell, 17 Fed. Cas. No. 9,932, 3 Blatchf. 364.

It is a justification of the collector, who had seized goods believing that they had been imported contrary to the law, that they were subsequently condemned by the court. Sailly *v.* Smith, 11 Johns. (N. Y.) 500.

2. Ogden *v.* Maxwell, 18 Fed. Cas. No. 10,458, 3 Blatchf. 319, holding that the collector would be liable personally for the exaction of illegal fees by his deputy *colore officii*, although he had paid them over to the government believing their exaction lawful.

It is essential to the liability of the collector that the exactions or charges of the deputy be within the lawful scope, either actual or apparent, of the authority of the collector's office. Cleveland, etc., R. Co. *v.* McClung, 119 U. S. 454, 7 S. Ct. 262, 30 L. ed. 465 [*affirming* 15 Fed. 905], holding that it was not the official duty of the collector of customs, under an act requiring him when notified of a carrier's lien upon goods to give to the carrier reasonable notice of their delivery, to receive the freights due to carriers for the transportation of such goods, before delivering them to the consignees.

3. Robertson *v.* Sichel, 127 U. S. 507, 8 S. Ct. 1286, 32 L. ed. 203; Rubens *v.* Robertson, 38 Fed. 86; U. S. *v.* Collier, 25 Fed. Cas. No. 14,833, 3 Blatchf. 325.

Such negligence cannot be inferred from the mere loss of goods. Brissac *v.* Lawrence, 4 Fed. Cas. No. 1,888, 2 Blatchf. 121.

4. Brissac *v.* Lawrence, 4 Fed. Cas. No. 1,888, 2 Blatchf. 121.

The reason for this rule is stated in Robertson *v.* Sichel, 127 U. S. 507, 8 S. Ct. 1286, 32 L. ed. 203, where it is said: "Competent persons could not be found to fill positions of this kind, if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person."

5. See, generally, PRINCIPAL AND SURETY.

6. U. S. *v.* Morgan, 11 How. (U. S.) 154, 13 L. ed. 643.

Moneys received from predecessor.— The faithful application by the collector of moneys received by him from his predecessor in office is part of his official duties for which his sureties are responsible. Broome *v.* U. S., 15 How. (U. S.) 143, 14 L. ed. 636.

The bond of the collector takes effect from the time that he and his sureties part with it in the course of transmission to the controller of the treasury, although a party thereto dies before its approval by the controller, as required by statute. Broome *v.* U. S., 15 How. (U. S.) 143, 14 L. ed. 636. And a bond given under the act of March 2, 1799, in so far as it relates to the performance of his duties as collector, binds his sureties from the time when he commenced to act as collector; but in so far as it relates to his liability as a depositary of public moneys, it contemplates only security for transactions subsequent to his giving the bond. U. S. *v.* Ellis, 25 Fed. Cas. No. 15,047, 4 Sawy. 590.

7. Borden *v.* Houston, 2 Tex. 594; Gaussen *v.* U. S., 97 U. S. 584, 24 L. ed. 1009 [*affirming* 25 Fed. Cas. No. 15,192, 2 Woods 92].

Judgment against the surety is limited to the amount of the penalty provided for in the bond. U. S. *v.* Ricketts, 27 Fed. Cas. No. 16,159, 2 Cranch C. C. 553.

8. U. S. *v.* Adams, 24 Fed. 348, holding that the sureties on the bond of a collector are not responsible for the loss of funds in his custody, which he under orders from the treasury department was transporting from one city to another.

principal while acting under the appointment by virtue of which the bond is required,[9] it is held that the treasury department cannot from receipts accruing during one term of a collector pay a defalcation which had arisen against him during his previous term.[10]

c. Certificate of Probable Cause. Inasmuch, however, as it would be unjust that a collector in the honest discharge of his duties or in obedience to instructions from his superior should suffer, it is provided[11] that if the court certify that there was probable cause for the seizure, detention, or exaction, or that it was done under the direction of the secretary of the treasury, the amount recovered against the collector shall, upon final judgment, be disbursed by proper appropriations from the treasury.[12]

B. Entry— 1. Necessity. Upon the arrival of a vessel the importer, consignee, or other agent must enter the goods at the custom-house and pay or make

9. U. S. *v.* Ellis, 25 Fed. Cas. No. 15,047, 4 Sawy. 590, holding that the obligation of the surety on a bond of the collector appointed during a recess of the senate was limited to such collector's acts while acting under this appointment, and not after he had accepted a new appointment made by the president, by and with the advice of the senate.

10. U. S. *v.* Irving, 1 How. (U. S.) 250, 11 L. ed. 120; U. S. *v.* January, 7 Cranch (U. S.) 572, 3 L. ed. 443. See also U. S. *v.* Wardwell, 28 Fed. Cas. No. 16,640, 5 Mason 82.

A second official bond with different sureties does not of itself merge or extinguish the first, because it is a security of no higher nature than the first, and an unsatisfied judgment on one does not bar an action on the other for the same breach. U. S. *v.* Hoyt, 26 Fed. Cas. No. 15,409, 1 Blatchf. 326.

A statutory release of sureties on a bond of a collector, enacted by congress after one of the sureties had been sued to judgment, and part of the execution made against him, operates merely to relieve him from further liability, and he cannot recover the amount he has already paid on the execution. Parker *v.* U. S., 22 Ct. Cl. 100.

11. U. S. Rev. St. (1878) § 989 [U. S. Comp. St. (1901) p. 708].

12. See The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. ed. 937.

"Probable cause" to which the judge is to certify, under the statute, in order to exempt the collector, does not necessarily mean *prima facie* evidence, but less evidence than that which would justify a condemnation will justify the issuance of the certificate (U. S. *v.* Three Bales Cloth, 28 Fed. Cas. No. 16,495); it imports a seizure under circumstances which warrants suspicion (U. S. *v.* One Sorrel Horse, 27 Fed. Cas. No. 15,953, 22 Vt. 655; U. S. *v.* The Recorder, 27 Fed. Cas. No. 16,130, 2 Blatchf. 119). A doubt respecting the law (U. S. *v.* Riddle, 5 Cranch (U. S.) 311, 3 L. ed. 110; The Friendship, 9 Fed. Cas. No. 5,125, 1 Gall. 111; U. S. *v.* The Recorder, 27 Fed. Cas. No. 16,130, 2 Blatchf. 119; U. S. *v.* Twenty-Six Diamond Rings, 28 Fed. Cas. No. 16,572, 1 Sprague 294); concealment and undervaluation (Taylor *v.* U. S., 3 How. (U. S.) 197, 11 L. ed. 559); a seizure in good faith, in the belief that the law was being violated, and after consultation with the surveyor, naval officer, district attorney, and recognition of the treasury department instructions in analogous cases (U. S. *v.* One Hempen Cable, 27 Fed. Cas. No. 15,931*a*); a seizure while acting under the instructions of a former officer, upon a construction of the statute adopted by the secretary of the treasury in conformity with the opinion of the attorney-general (U. S. *v.* The Recorder, 27 Fed. Cas. No. 16,130, 2 Blatchf. 119); a report by public appraisers that in their opinion an importation and entry was fraudulently made with intent to evade the payment of the proper duties, and the recommendation of the seizure thereof (U. S. *v.* Thirty-One Boxes, etc., 28 Fed. Cas. No. 16,465*a*); and the fact that the claimant was selling the goods at a low price in an obscure town, declaring them to have been imported, and the fact being that duty had been paid on only a small portion thereof (The Gala Plaid, 9 Fed. Cas. No. 5,183, Brown Adm. 1) have all been held proper grounds for the granting of this certificate.

Time of application for certificate.— If the statute confers upon the collector an absolute right to a certificate in every case where he has acted under the direction of the secretary, it must be considered as implying that the application therefor is to be duly made and at the proper time. Faber *v.* Barney, 8 Fed. Cas. No. 4,601, 6 Blatchf. 305. And while such certificate may be granted by a different judge from the one before whom the action for the overcharge was tried (Cox *v.* Barney, 6 Fed. Cas. No. 3,300, 14 Blatchf. 289), it has been held that where the application was not made until the expiration of nearly two years after the trial, and then made before a judge who took no part in the trial, and upon affidavits, defendant must be deemed to have waived his right to the same, and that the delay under such circumstances was fatal (Faber *v.* Barney, 8 Fed. Cas. No. 4,601, 6 Blatchf. 305). It is no objection, however, that the motion for the certificate was made subsequent to the decree (The Gala Plaid, 9 Fed. Cas. No. 5,183, Brown Adm. 1); and it is held that the application for such certificate is not too late after a judgment is obtained against the collector, and execution is issued against his property therefor (Cox *v.*

provisions for the payment of the duties upon the same;[13] and such entry must be considered as made from the time the importer so presents himself for this purpose.[14]

2. INVOICE. It is necessary that the statute requiring a true invoice be complied with,[15] and no merchandise can be lawfully entered without such document,[16] or a certified statement of the cause of its non-production,[17] in conformity with the statute.[18] Provision is made, however, for the execution of a bond when the duly certified invoice cannot be presented.[19]

3. ADDITIONS TO ENTRY OR INVOICE VALUE. To allow an importer an opportunity to avoid the penalty or forfeiture because of undervaluation[20] a provision has been carried up through the various acts permitting him to make additions in the entry[21] to the invoice price to raise the same to the true market value.[22] An importer cannot, however, qualify or restrict the effect of such addition by stating that it was made to prevent a seizure.[23]

Barney, 6 Fed. Cas. No. 3,300, 14 Blatchf. 289).

The effect of the certificate is to absolve the collector from responsibility, and practically to convert the suit against the officer into a claim against the United States. Cox *v.* Barney, 6 Fed. Cas. No. 3,300, 14 Blatchf. 289.

13. Sampson *v.* Peaslee, 20 How. (U. S.) 571, 15 L. ed. 1022; Harris *v.* Dennie, 3 Pet. (U. S.) 292, 7 L. ed. 683.

For penalties or forfeitures for failure to make entry see *infra*, V, C, 2 *et seq.*

Effect.— Where an entry has been made it is conclusive upon the importer as to the contents and declared value of the invoice; and for all of those consequences which the law may impose upon the examination and appraisement of it, and for any deficiency or non-compliance with the revenue laws, and for any violation or substantial departure from the rules governing the entry of goods. Sampson *v.* Peaslee, 20 How. (U. S.) 571, 15 L. ed. 1022.

The term "entry," in the acts of congress, is used in two senses. It may refer to the bill of entry, that is, the paper or declaration which the merchant or importer in the first instance hands to the entry clerk; or it may be so used as to denote not a document but a transaction, that is, a series of acts which are necessary to the end to be accomplished, viz, entry of the goods. U. S. *v.* Baker, 24 Fed. Cas. No. 14,500, 5 Ben. 251; U. S. *v.* Cargo of Sugar, 25 Fed. Cas. No. 14,722, 3 Sawy. 46; U. S. *v.* Six Hundred and Sixty-One Bales of Tobacco, 27 Fed. Cas. No. 16,297. The word is frequently used as referring to the particular documents which the statutes require and which they designate as "entries." U. S. *v.* Legg, 105 Fed. 930, 45 C. C. A. 134.

14. U. S. *v.* Legg, 105 Fed. 930, 45 C. C. A. 134.

15. For fraud in the invoice as ground of forfeiture see *infra*, V, C, 2, a, (I), (C).

Knowledge of other invoices.— The fact that at the time the person entered merchandise at the custom-house there were in existence to his knowledge several copies of the bills of lading and invoices presented by him does not make his sworn statement that he does not know of or believe in the existence of any invoices or bills of lading other than those produced by him a false oath. U. S. *v.* Harrison, 32 Fed. 386, 13 Sawy. 36.

16. U. S. *v.* Tappan, 11 Wheat. (U. S.) 419, 6 L. ed. 509; U. S. *v.* Thirty-Nine Thousand One Hundred and Fifty Cigars, 28 Fed. Cas. No. 16,464, 3 Ware 324.

17. Phelps *v.* Siegfried, 142 U. S. 602, 12 S. Ct. 391, 35 L. ed. 1128 [*following* U. S. *v.* Mosby, 133 U. S. 273, 10 S. Ct. 327, 33 L. ed. 625].

18. 26 U. S. St. at L. 131 [U. S. Comp. St. (1901) p. 1888].

19. Nature of bond.— This bond is not intended to secure a penalty for breach of a duty, but rather to act as security for the actual damages which may be sustained by reason of the irregularity or entire absence of the invoice. U. S. *v.* Cutajar, 67 Fed. 530, 14 C. C. A. 515.

20. See *infra*, III, C, 2, b; V, C, 2, a, (I), (C).

21. 26 U. S. St. at L. 134; 30 U. S. St. at L. 211 [U. S. Comp. St. (1901) p. 1892].

The addition need not be in the paper technically called the entry, and an addition marked upon the invoice itself becomes a part of the entered value; and a collector cannot ignore the same. U. S. *v.* Merck, 91 Fed. 641. And see Fiedler *v.* Maxwell, 8 Fed. Cas. No. 4,760, 2 Blatchf. 552.

22. Focke *v.* Lawrence, 9 Fed. Cas. No. 4,894, 2 Blatchf. 508; Harding *v.* Whitney, 11 Fed. Cas. No. 6,052, 4 Cliff. 96.

23. Haas *v.* Arthur, 11 Fed. Cas. No. 5,885, 14 Blatchf. 346.

After an entry and a direction to appraise the goods has been made a collector may refuse an amendment of the entry, if it is stated to be made in order to avoid a penalty. Harriman *v.* Maxwell, 11 Fed. Cas. No. 6,105, 3 Blatchf. 421. Where, however, the importer, immediately upon discovering the error in the invoice, obtains a true one as soon as possible, the collector has no right to impose the statutory penalties or forfeitures. Carnes *v.* Maxwell, 5 Fed. Cas. No. 2,417, 3

4. Consignee of Importation as Owner. For the purpose of preventing frauds upon the government arising from collusive transfers[24] and to save the government the trouble and inconvenience of hunting up the ultimate consignee,[25] it has from the earliest acts been provided that an importation shall for the purposes of the tariff acts[26] be deemed and held to be the property of the consignee.[27] This provision confers, however, no right upon a mere consignee to make a declaration as "owner."[28]

C. Appraisement—1. In General—a. Purpose. If the collector is not satisfied that the value as given in the invoice is the true one, or if an appraisal is necessary to determine the dutiable value of the goods,[29] it is his duty to direct an appraisement of the same.[30]

b. Proceedings on—(1) *In General.* In some instances the manner of appraisement of certain articles is governed by special provisions of the statute,[31] and regulations consistent with the statute providing a mode of procedure may be made by the treasury department.[32] It is incumbent upon the importer not to increase the difficulties of this work by indiscriminately commingling free and dutiable goods,[33] and the value given to similar goods upon a prior appraisal is not binding.[34] The appraisers may not, however, extend their inquiries

Blatchf. 420; Howland *v.* Maxwell, 12 Fed. Cas. No. 6,799, 3 Blatchf. 146.

24. Harris *v.* Dennie, 3 Pet. (U. S.) 292, 7 L. ed. 683; U. S. *v.* Fawcett, 86 Fed. 900; D'Wolf *v.* Harris, 8 Fed. Cas. No. 4,221, 4 Mason 515; Howland *v.* Harris, 12 Fed. Cas. No. 6,794, 4 Mason 497.

25. Baldwin *v.* U. S., 113 Fed. 217, 51 C. C. A. 174.

26. Burke *v.* Davis, 63 Fed. 456, holding that this provision is confined to the purposes of the tariff acts, and does not mean that there shall be no consignment to a person other than the real owner.

27. U. S. *v.* Fawcett, 86 Fed. 900.

28. U. S. *v.* Fawcett, 86 Fed. 900.

29. Aldridge *v.* Williams, 3 How. (U. S.) 9, 11 L. ed. 469.

The framers of the revenue laws of the United States have encountered two difficulties which have given them much embarrassment and trouble. The first was to devise a mode by which the true cost or value of imported goods which were subject to pay a duty according to their value could be ascertained. The second was to detect and punish frauds. The objects are distinct, and the means provided to accomplish them are equally so. U. S. *v.* Twenty-Five Cases of Cloths, 28 Fed. Cas. No. 16,563, Crabbe 356.

30. Kimball *v.* Goodrich, 10 Wall. (U. S.) 436, 19 L. ed. 964; Greely *v.* Thompson, 10 How. (U. S.) 225, 13 L. ed. 397; Rankin *v.* Hoyt, 4 How. (U. S.) 327, 11 L. ed. 996; Harding *v.* Whitney, 11 Fed. Cas. No. 6,052, 4 Cliff. 96, holding that a preliminary appraisement, in order to ascertain whether merchandise was subject to duty at all, or entitled to free entry, was not necessary, before its appraisal as required by law to ascertain its dutiable value.

The authority and feasibility of directing an appraisement is regulated by the collector's own suspicions that the invoice is untrue, and does not state the actual cost of the goods as required by law. This suspicion may be aroused from his own knowledge, or from the information he gets from others, of the market price of the goods. Whether such suspicions are well or ill founded must be determined by an inquiry before the appraisers. But the collector cannot be called upon to avow or show grounds upon which his suspicions rest. U. S. *v.* Tappan, 11 Wheat. (U. S.) 419, 6 L. ed. 509.

31. Arthur *v.* Pastor, 109 U. S. 139, 3 S. Ct. 96, 27 L. ed. 882; *In re* Schefer, 49 Fed. 216.

Thus in determining the component material of chief value in a manufactured article, the value of the materials must be taken at the time they were put together in the completed article, and not in their raw state. Seeberger *v.* Hardy, 150 U. S. 420, 14 S. Ct. 170, 37 L. ed. 1129. See also U. S. *v.* Volkmann, 107 Fed. 109, 46 C. C. A. 169 [*affirming* 99 Fed. 264]; *In re* Puget Sound Reduction Co., 96 Fed. 90; U. S. *v.* Mayer, 71 Fed. 501, 18 C. C. A. 221 [*reversing* 66 Fed. 719].

32. Auffmordt *v.* Hedden, 137 U. S. 310, 11 S. Ct. 103, 34 L. ed. 674.

Such regulations may be directory and not mandatory in the sense that neglect to conform thereto will create an illegal appraisement. U. S. *v.* Loeb, 107 Fed. 692, 46 C. C. A. 562.

Summary character of proceedings.—Proceedings for appraisal are and must necessarily be to some extent of a summary character. In one sense it is a system of corrective justice as well as of taxation. Auffmordt *v.* Hedden, 137 U. S. 310, 11 S. Ct. 103, 34 L. ed. 674 [*citing* Cheatham *v.* Norvekl, 92 U. S. 85, 23 L. ed. 561].

33. U. S. *v.* Brewer, 92 Fed. 343, 34 C. C. A. 390. See also Weil *v.* U. S., 115 Fed. 592.

34. Goodsell *v.* Briggs, 10 Fed. Cas. No. 5,548, Holmes 299. See also U. S. *v.* Nash, 27 Fed. Cas. No. 15,856, 4 Cliff. 107, holding that while fraud would not be imputed to an importer in invoicing the goods at the weight obtained by the customary method of weigh-

beyond what is necessary to enable them to make the appraisal as required by law.[35]

(II) *EXAMINATION* — (A) *Necessity of Personal Inspection.* The appraisers who are said to be quasi-judges or legislative referees[36] must act in person, and upon their own inspection, in each case;[37] and an appraisal made on the inspection and certificate of a deputy is void.[38]

(B) *Sufficiency.* It has uniformly been held that inasmuch as the powers of appraisers are derived expressly from the statute, it is incumbent upon them in making an appraisal to observe the restrictions and directions contained therein, and to make such personal examination, either in fact or substance, as is therein directed, with sufficient thoroughness to insure the accuracy intended.[39] The later cases, however, seem to regard the statute providing the mode of examination as intended for the benefit of the government, and not as mandatory, and that therefore an appraisement will not be necessarily invalidated for want of a strict compliance therewith.[40]

(III) *DETERMINATION OF VALUE* — (A) *Of Goods* — (1) IN GENERAL. During the first half century of tariff legislation the value of an importation subject to an *ad valorem* duty,[41] if appraised, was determined by its true value or actual cost,[42] at the time and place of its purchase or procurement.[43] The

ing, yet the appraisers were not bound thereby.

35. U. S. *v.* Nash, 27 Fed. Cas. No. 15,856, 4 Cliff. 107.

That the appraisers have the right to carry the goods out of the district for the purpose of taking evidence as to the value of the importation see Goodsell *v.* Briggs, 10 Fed. Cas. No. 5,548, Holmes 299.

36. Hoyt *v.* U. S., 10 How. (U. S.) 109, 646, 13 L. ed. 348, 576.

37. Greely *v.* Thompson, 10 How. (U. S.) 225, 13 L. ed. 397. See also U. S. *v.* Frazer, 25 Fed. Cas. No. 15,161, 10 Ben. 347.

38. Barker *v.* Lawrence, 2 Fed. Cas. No. 991.

This does not mean, in the absence of a statute to the contrary, that all the appraisers must make an examination, but only that those who certified to the same should have actually made it. McCall *v.* Lawrence, 15 Fed. Cas. No. 8,672, 3 Blatchf. 360 [*distinguishing* Greely *v.* Thompson, 10 How. (U. S.) 225, 13 L. ed. 397].

39. Oelbermann *v.* Merritt, 123 U. S. 356, 8 S. Ct. 151, 31 L. ed. 164; Burgess *v.* Converse, 18 How. (U. S.) 413, 15 L. ed. 455; Greely *v.* Thompson, 10 How. (U. S.) 225, 13 L. ed. 397; U. S. *v.* Loeb, 107 Fed. 692, 46 C. C. A. 562; *In re* Rosenwald, 59 Fed. 765; Ystalifera Iron Co. *v.* Redfield, 23 Fed. 650, 21 Blatchf. 311; Gibb *v.* Washington, 10 Fed. Cas. No. 5,380, 1 McAll. 430; U. S. *v.* McKean, 26 Fed. Cas. No. 15,681*a*; U. S. *v.* One Thousand Three Hundred and Sixty-Three Bags of Merchandise, 27 Fed. Cas. No. 15,964, 2 Sprague 85.

Examination by samples.— Where an examination of certain articles is made under the provision of the act of congress authorizing an appraisal by samples, it is a sufficient compliance therewith that the samples were fairly selected from one in ten of the packages, and it is of no importance whether they were drawn from the packages by the appraisers themselves, or by the official sampler of the appraisers' department. Yznaga *v.* Peaslee, 30 Fed. Cas. No. 18,196, 1 Cliff. 493.

40. U. S. *v.* Ranlett, 172 U. S. 133, 19 S. Ct. 114, 43 L. ed. 393; Erhardt *v.* Schroeder, 155 U. S. 124, 15 S. Ct. 45, 39 L. ed. 94; Origet *v.* Hedden, 155 U. S. 288, 15 S. Ct. 92, 39 L. ed. 130. See also Sampson *v.* Peaslee, 20 How. (U. S.) 571, 15 L. ed. 1022.

41. Bailey *v.* Goodrich, 2 Fed. Cas. No. 735, 2 Cliff. 597.

42. The term "true value" was used in the same sense as the term "actual cost" (U. S. *v.* Tappan, 11 Wheat. (U. S.) 419, 6 L. ed. 509), and meant the cost at the place of exportation with the addition of all dutiable charges. The fact that the goods could have been manufactured for the invoiced price was immaterial (U. S. *v.* Eighty-Two Packages of Glass, 25 Fed. Cas. No. 15,038). The collector could not substitute for the actual market value a fictitious value expressed in a spurious currency. Loewenstein *v.* Maxwell, 14 Fed. Cas. No. 8,462, 2 Blatchf. 401. But these provisions only applied to cases where an actual purchase had been made. Alfonso *v.* U. S., 1 Fed. Cas. No. 188, 2 Story 421.

43. Maxwell *v.* Griswold, 10 How. (U. S.) 242, 13 L. ed. 405; Greely *v.* Thompson, 10 How. (U. S.) 225, 13 L. ed. 397; U. S. *v.* Tappan, 11 Wheat. (U. S.) 419, 6 L. ed. 509; Griswold *v.* Lawrence, 11 Fed. Cas. No. 5,837, 1 Blatchf. 599; Maillard *v.* Lawrence, 16 Fed. Cas. No. 8,972, 3 Blatchf. 378; Morlot *v.* Lawrence, 17 Fed. Cas. No. 9,816, 3 Blatchf. 122; U. S. *v.* Twelve Casks of Cudbear, 28 Fed. Cas. No. 16,553, Gilp. 507.

An article was not purchased within the meaning of these tariff acts until it was acquired by the importer in a condition for shipment. Wilson *v.* Lawrence, 30 Fed. Cas.

previous laws have been changed,[44] and have been carried with slight variations down to the present time, in that the valuation is to be determined by the actual market value and wholesale price[45] at the period of exportation[46] in the principal

No. 17,816, 2 Blatchf. 514. And an accepted order for goods to be manufactured, although a purchase in the usage of trade as between parties, was not a purchase within the meaning of these acts. Pierson *v.* Lawrence, 19 Fed. Cas. No. 11,158, 2 Blatchf. 495.

Place of purchase.— In the absence of any evidence to the contrary, a customs official was justified in assuming that the place of the shipment of an importation was the place of its purchase, within the meaning of these acts. Focke *v.* Lawrence, 9 Fed. Cas. No. 4,894, 2 Blatchf. 508.

Time of purchase.— The date of an invoice was *prima facie* evidence as to the time of the purchase of the goods. Pierson *v.* Lawrence, 19 Fed. Cas. No. 11,158, 2 Blatchf. 495; Pierson *v.* Maxwell, 19 Fed. Cas. No. 11,159, 2 Blatchf. 507. It was only *prima facie* evidence, however, and an importer had the right to show that the time of purchase was not the date of the invoice or bill of sale. Greely *v.* Thompson, 10 How. (U. S.) 225, 13 L. ed. 397; Maxwell *v.* Griswold, 10 How. (U. S.) 242, 13 L. ed. 405. And a collector was justified in taking the time of the shipment as the time of the purchase unless informed otherwise. Crowley *v.* Maxwell, 6 Fed. Cas. No. 3,449, 3 Blatchf. 401; Focke *v.* Lawrence, 9 Fed. Cas. No. 4,894, 2 Blatchf. 508. Therefore, where orders for goods were accepted by foreign vendors at the ruling market price, which price, however, was greater before the goods were delivered for shipment and the invoice made out, the purchase was to be considered as made at the date of the invoice and not at the date the orders were accepted. Wilson *v.* Lawrence, 30 Fed. Cas. No. 17,816, 2 Blatchf. 514.

44. The act of 1851 was the first act changing the rule as to the time the valuation must be made, and under that act the goods were to be appraised at the period of exportation rather than the time of their purchase. Stairs *v.* Peaslee, 18 How. (U. S.) 521, 15 L. ed. 474; Forman *v.* Peaslee, 9 Fed. Cas. No. 4,941; Morris *v.* Maxwell, 17 Fed. Cas. No. 9,834, 3 Blatchf. 143. The statute was, however, confined to that change only (Ballard *v.* Thomas, 19 How. (U. S.) 382, 15 L. ed. 690; Barnard *v.* Morton, 2 Fed. Cas. No. 1,005, 1 Curt. 404), and did not affect the question of the imposition of extra duties because of undervaluation (Morris *v.* Maxwell, 17 Fed. Cas. No. 9,834, 3 Blatchf. 143).

45. The market value may be defined as the price at which the owner, producer, or manufacturer of goods holds them for sale; the price at which they are freely offered in the markets to all the world; such prices as dealers are willing to receive, and purchasers are made to pay in the ordinary course of trade. Muser *v.* Magone, 155 U. S. 240, 15 S. Ct. 77, 39 L. ed. 135; Cliquot *v.* U. S., 3 Wall. (U. S.) 114, 18 L. ed. 116; *In re* Six Cases of Silk Ribbons, 22 Fed. Cas. No. 12,914, 3 Ben. 536; *In re* Three Thousand One Hundred and Nine Cases Champagne, 23 Fed. Cas. No. 14,012, 1 Ben. 241; U. S. *v.* Sixteen Cases of Silk Ribbons, 27 Fed. Cas. No. 16,301.

In the determination of this value it has been held that inasmuch as the so-called "bonification of tax," under the German laws, accrues when a manufacturer sells, his wholesale price would include it. Therefore such tax should be included in determining the market value and wholesale price of goods in Germany. U. S. *v.* Passavant, 169 U. S. 16, 18 S. Ct. 219, 42 L. ed. 644. On the other hand it is held that inasmuch as the royalty fees paid by a purchaser in this country for the use of machinery subject to letters patent in the United States and Great Britain form no part of the price paid in England for the machinery, it could not be considered as part of the wholesale price or market value. U. S. *v.* Leigh, 39 Fed. 764.

Evidence of market value.— Inasmuch as the law requires that the appraised value shall be that of the foreign country, any evidence not tending to show the value of the goods in that country is inadmissible. U. S. *v.* Doherty, 27 Fed. 730; *In re* Three Thousand One Hundred and Nine Cases of Champagne, 23 Fed. Cas. No. 14,012, 1 Ben. 241. So the appraisement of goods for the purpose of bonding them is not admissible as evidence of their market value. *In re* Three Thousand One Hundred and Nine Cases of Champagne, 23 Fed. Cas. No. 14,012, 1 Ben. 241. But a series of sales or a single sale, or offers to sell in the usual course of trade, constitute the best evidence of the market value of an article. *In re* Six Cases of Silk Ribbons, 22 Fed. Cas. No. 12,914, 3 Ben. 536. See also Comacho *v.* U. S., 115 Fed. 191. If, however, this evidence cannot be had, the cost of production or of the raw material with the addition of the manufacturer's profit is admissible as tending to show the market value. *In re* Six Cases of Silk Ribbons, 22 Fed. Cas. No. 12,914, 3 Ben. 536. See also *In re* Twelve Hundred and Nine Quarter Casks, etc., of Wine, 24 Fed. Cas. No. 14,279, 2 Ben. 249. But it is only when the evidence of sales cannot be had that it is proper to resort to this inferior evidence, and even then such cost is not to be received as a substitute for market value, but only as evidence tending to show market value. U. S. *v.* Sixteen Cases of Silk Ribbons, 27 Fed. Cas. No. 16,301.

46. The period of exportation means the day when the vessel sails, and not the one on which the bill of lading is given. Sampson *v.* Peaslee, 20 How. (U. S.) 571, 15 L. ed. 1022. See also Irvine *v.* Redfield, 23 How. (U. S.)

markets[47] of the country,[48] and in the condition in which such merchandise is bought and sold for exportation.[49]

(2) Commissions, Costs, and Charges. While not of uniform phraseology, and subject to occasional exceptions, the early tariff acts as a rule provided that the cost of transportation,[50] of shipment, the value of the sacks, boxes, or coverings,[51] commissions,[52] brokerage, and all other actual or usual charges,[53] except insurance, incidental to preparing the goods for transportation, should be included by the appraisers in determining the dutiable value.[54] But in 1883 these provisions were repealed, and such charges can no longer be included,[55] although if they become a part of the entered value by being included without objection as a part of the market value it would seem that the collector has no right to make any reduction.[56] By the act of 1890 previous acts providing for certain fees were

170, 16 L. ed. 418; Forman *v.* Peaslee, 9 Fed. Cas. No. 4,941.

47. See Goddard *v.* Maxwell, 10 Fed. Cas. No. 5,492, 3 Blatchf. 131, where it was held that Liverpool being the principal market of the iron-producing country of England, the appraisal of the value of iron in that market was proper, although it had been produced or purchased in Wales and shipped from Liverpool.

48. The word "country" as used in this sense is construed to embrace all the possessions of a foreign state, however widely separated, which are subject to the same supreme, executive, and legislative control. Stairs *v.* Peaslee, 18 How. (U. S.) 521, 15 L. ed. 474.

49. U. S. *v.* Keane, 84 Fed. 330.

50. Transportation.— This provision was held to apply only where the place of production and the shipment were in the same country, and not where the import came from one country and was transported into and shipped from another. Robertson *v.* Downing, 127 U. S. 607, 8 S. Ct. 1328, 32 L. ed. 269; Barnard *v.* Morton, 2 Fed. Cas. No. 1,006, 1 Sprague 186; Gant *v.* Peaslee, 9 Fed. Cas. No. 5,212, 2 Curt. 250; Grinnell *v.* Lawrence, 11 Fed. Cas. No. 5,831, 1 Blatchf. 346; Griswold *v.* Maxwell, 11 Fed. Cas. No. 5,838, 3 Blatchf. 145; Millar *v.* Millar, 17 Fed. Cas. No. 9,546, 2 Curt. 256. See also Vaccari *v.* Maxwell, 28 Fed. Cas. No. 16,810, 3 Blatchf. 368; Wilbur *v.* Lawrence, 29 Fed. Cas. No. 17,635, 2 Blatchf. 314. The freight and transportation charges accruing after the vessel left the port of shipment could not be included. Benkard *v.* Schell, 3 Fed. Cas. No. 1,307; Bliss *v.* Redfield, 3 Fed. Cas. No. 1,549; Griswold *v.* Maxwell, 11 Fed. Cas. No. 5,838, 3 Blatchf. 145; Vaccari *v.* Maxwell, 28 Fed. Cas. No. 16,810, 3 Blatchf. 368. Under the earlier acts, however, the expenses for land transportation to get the merchandise on ship-board constituted dutiable charges. Hoffman *v.* Williams, 12 Fed. Cas. No. 6,579, Taney 69; Warren *v.* Peaslee, 29 Fed. Cas. No. 17,198, 2 Curt. 231. But see Forman *v.* Peaslee, 9 Fed. Cas. No. 4,941; Gibb *v.* Washington, 10 Fed. Cas. No. 5,380, 1 McAll. 430; Hutton *v.* Schell, 12 Fed. Cas. No. 6,961, 6 Blatchf. 48.

51. Coverings.— Under some of the earlier tariff acts the value of the boxes or coverings of merchandise were held to be properly included in determining the dutiable value. U. S. *v.* Clement, 25 Fed. Cas. No. 14,815, Crabbe 499. See also Marriott *v.* Brune, 9 How. (U. S.) 619, 13 L. ed. 282; Saxonville Mills *v.* Russell, 21 Fed. Cas. No. 12,413, 1 Lowell 450. Under some of the other acts the opposite seems to have been the rule. U. S. *v.* May, 26 Fed. Cas. No. 15,752, 3 Mason 98; Wilson *v.* Maxwell, 30 Fed. Cas. No. 17,824, 2 Blatchf. 316. See also Cobb *v.* Hamlin, 5 Fed. Cas. No. 2,922, 3 Cliff. 191.

52. For the inclusion of commissions under the earlier acts as a part of the dutiable value see Benkard *v.* Schell, 3 Fed. Cas. No. 1,307; Hutton *v.* Schell, 12 Fed. Cas. No. 6,961, 6 Blatchf. 48; Munsell *v.* Maxwell, 17 Fed. Cas. No. 9,932, 3 Blatchf. 364; Norcross *v.* Greely, 18 Fed. Cas. No. 10,294, 1 Curt. 114; Riess *v.* Redfield, 20 Fed. Cas. No. 11,821, 4 Blatchf. 381, 18 How. Pr. (N. Y.) 87; U. S. *v.* May, 26 Fed. Cas. No. 15,752, 3 Mason 98; Warren *v.* Peaslee, 29 Fed. Cas. No. 17,198, 2 Curt. 231.

53. The "cost and charges" could include only those actually paid, and customs officers had no power to fix an arbitrary amount. Benkard *v.* Schell, 3 Fed. Cas. No. 1,307; Hutton *v.* Schell, 12 Fed. Cas. No. 6,961, 6 Blatchf. 48; Riess *v.* Redfield, 20 Fed. Cas. No. 11,821, 4 Blatchf. 381, 18 How. Pr. (N. Y.) 87.

54. Kimball *v.* Goodrich, 10 Wall. (U. S.) 436, 19 L. ed. 964; Belcher *v.* Linn, 24 How. (U. S.) 508, 533, 16 L. ed. 754, 758; Armstrong *v.* Hoyt, 1 Fed. Cas. No. 544*a*; Bailey *v.* Goodrich, 2 Fed. Cas. No. 735, 2 Cliff. 597; Barnard *v.* Morton, 2 Fed. Cas. No. 1,005, 1 Curt. 404; Cobb *v.* Hamlin, 5 Fed. Cas. No. 2,922, 3 Cliff. 191; Harding *v.* Whitney, 11 Fed. Cas. No. 6,052, 4 Cliff. 96.

55. Badger *v.* Cusimano, 130 U. S. 39, 9 S. Ct. 431, 32 L. ed. 851; Magone *v.* Origet, 70 Fed. 778, 17 C. C. A. 363; Morris *v.* Cadwalader, 33 Fed. 243; Tryon *v.* Hartranft, 31 Fed. 443; U. S. *v.* Thurber, 28 Fed. 56; Glanz *v.* Spalding, 24 Fed. 20; Meyers *v.* Shurtleff, 23 Fed. 577.

56. Vantine *v.* U. S., 91 Fed. 519 [*distinguishing* Robertson *v.* Frank Bros. Co., 132 U. S. 17, 10 S. Ct. 5, 33 L. ed. 236].

abrogated.[57] The customs officials have the right, however, to inquire into the nature and origin of the disbursements claimed by the importer to be paid as charges and commissions, and if they prove to be in fact a part of the wholesale price they will be included in the dutiable value.[58]

(3) As Affected by Invoiced Valuation — (a) In General. Inasmuch as the tariff statutes have from the beginning provided that duties shall not under any circumstances be assessed upon an amount less than the invoice or entry value, the appraisers have no authority to make an appraisement for less than that amount.[59] Nor can the appraisal be for a less sum than the increased invoice which the importer may make to avoid a penalty or forfeiture.[60]

(b) Allowance For Deficiencies and Damages. Duties are not to be estimated upon goods which never arrived in port, merely because they are included in the invoice.[61] Any regulation of the treasury department to the contrary is void.[62] Provision for allowances for deficiencies and damages incurred during the voyage has also been carried up since the inception of tariff legislation.[63] The many claims for damages so presented, and the continuous efforts made for the abatement of duties, induced, however, a radical change, and in lieu of such allowances

57. U. S. *v.* Jahn, 65 Fed. 792, 13 C. C. A. 134.

58. U. S. *v.* Herrman, 91 Fed. 116, 33 C. C. A. 400 [*reversing* 84 Fed. 151]. See also U. S. *v.* Kenworthy, 68 Fed. 904, 16 C. C. A. 61 [*reversing* 59 Fed. 570].

The expense of changing goods from one condition to another in a foreign country so that they may be entered at a lower rate of duty cannot be deducted by the importers as a non-dutiable charge. Bullock *v.* Magone, 39 Fed. 191.

Question for jury.— Whether or not a certain expenditure upon goods is necessary to render them merchantable, or is made only for convenience in transportation, is a question for the jury. Stephenson *v.* Cooper, 44 Fed. 53.

59. Saxonville Mills *v.* Russell, 116 U. S. 13, 6 S. Ct. 237, 29 L. ed. 554; Kimball *v.* Goodrich, 10 Wall. (U. S.) 436, 19 L. ed. 964; Ballard *v.* Thomas, 19 How. (U. S.) 382, 15 L. ed. 690; Haas *v.* Arthur, 11 Fed. Cas. No. 5,885, 14 Blatchf. 346. See also Roebling *v.* U. S., 77 Fed. 601; Schmeider *v.* Barney, 6 Fed. 150; Davidson *v.* Draper, 7 Fed. Cas. No. 3,604.

In the application of this statute it is held that where goods are invoiced or entered at a certain value with a certain per cent discount for cash, such value less the discount must be considered the entry value. Arthur *v.* Goddard, 96 U. S. 145, 24 L. ed. 814; Gray *v.* Lawrence, 10 Fed. Cas. No. 5,722, 3 Blatchf. 117. *Compare* Riess *v.* Redfield, 20 Fed. Cas. No. 11,821, 4 Blatchf. 381.

If the invoiced value of goods is unlawfully increased by the addition of unlawful charges, the importer is entitled to have the valuation corrected even though the appraiser has approved the same. U. S. *v.* Zuricaldy, 71 Fed. 955 [*citing* Robertson *v.* Bradbury, 132 U. S. 491, 10 S. Ct. 158, 33 L. ed. 405].

60. Haas *v.* Arthur, 11 Fed. Cas. No. 5,885, 14 Blatchf. 346. See also *supra*, III, B, 3.

61. American Sugar Refining Co. *v.* U. S., 181 U. S. 610, 21 S. Ct. 830, 45 L. ed. 1024; Lawrence *v.* Caswell, 13 How. (U. S.) 488, 14 L. ed. 235; U. S. *v.* Southmayd, 9 How. (U. S.) 637, 13 L. ed. 290; Marriott *v.* Brune, 9 How. (U. S.) 619, 13 L. ed. 282; U. S. *v.* Park, 77 Fed. 608; Shaw *v.* Dix, 72 Fed. 166 [*distinguishing* U. S. *v.* Bache, 59 Fed. 762, 8 C. C. A. 258]; Weaver *v.* Saltonstall, 38 Fed. 493; Balfour *v.* Sullivan, 17 Fed. 231, 8 Sawy. 648; Austin *v.* Peaslee, 2 Fed. Cas. No. 666; Schuchardt *v.* Lawrence, 21 Fed. Cas. No. 12,484, 3 Blatchf. 397; U. S. *v.* Chotean, 25 Fed. Cas. No. 14,793; U. S. *v.* Nash, 27 Fed. Cas. No. 15,856, 4 Cliff. 107. See also Giglio *v.* U. S., 91 Fed. 758; U. S. *v.* Perkins, 66 Fed. 50, 13 C. C. A. 324; Louisville Public Warehouse Co. *v.* Collector of Customs, 49 Fed. 561, 1 C. C. A. 371 [*affirming* 48 Fed. 372].

Ordinary leakage and deterioration which may occur during the time that the goods are necessarily held for appraisement cannot be considered in the imposition of duties, but the assessment must be made on the quantity imported. Belcher *v.* Linn, 24 How. (U. S.) 508, 533, 16 L. ed. 754, 758.

When loss of weight does not diminish the value of an importation so that the quantity received in port is worth as much as the original quantity shipped and *ex necessitate* of a better grade or quality, it is held that the importer must pay the duty prescribed for that grade of merchandise which arrives at the port, and not necessarily the grade or quality at the time the merchandise was purchased abroad. American Sugar Refining Co. *v.* U. S., 181 U. S. 610, 21 S. Ct. 830, 45 L. ed. 1024; Reiss *v.* Magone, 39 Fed. 105. *Compare* Austin *v.* Peaslee, 2 Fed. Cas. No. 666.

62. Balfour *v.* Sullivan, 17 Fed. 231, 8 Sawy. 648.

63. Earnshaw *v.* Cadwalader, 145 U. S. 247, 12 S. Ct. 851, 36 L. ed. 693; U. S. *v.* Phelps, 107 U. S. 320, 2 S. Ct. 389, 27 L. ed. 505; U. S. *v.* Six Hundred and Sixty-One Bales of

it has been provided that an importer, if the portion of his goods damaged amounted to ten per cent or more of the invoice value, may, by abandoning such portion to the government, thereby escape the duty otherwise leviable upon the same.[64]

(B) *Of Foreign Coin.* From the origin of tariff legislation the value of foreign coins for the purpose of liquidating duties has been based upon their pure metal or intrinsic value as expressed in the money of account of the United States.[65] The method of estimating such value has varied at different times,[66] but under any of them it has been uniformly held that the value when lawfully determined was conclusive.[67] The valuation must, however, be made of the standard or legal currency of the country of exportation,[68] and that at the time of exportation will govern.[69]

c. Reappraisal and Reliquidation — (1) *Right to.* If the collector deems the value placed upon the merchandise by the appraisers too low, or if the importer, owner, or consignee is dissatisfied with such appraisement, it is provided[70] that

Tobacco, 27 Fed. Cas. No. 16,297; Wight *v.* Curtis, 29 Fed. Cas. No. 17,628. And see Tyack *v.* Brumley, 1 Barb. Ch. (N. Y.) 519.

64. 26 U. S. St. at L. 140; 30 U. S. St. at L. 417 [U. S. Comp. St. (1901) p. 1930]; Stone *v.* Lawder, 101 Fed. 710, 41 C. C. A. 621.

Construction of act.—This section evidently contemplates a case where there remains something to be abandoned, in the sense of being impaired in value, and it is not applicable to a case where the specified items of the invoice have been so entirely destroyed that they cannot be counted and are entirely valueless. Shaw *v.* Dix, 72 Fed. 166 [*distinguishing* U. S. *v.* Bache, 59 Fed. 762, 8 C. C. A. 258]. See also Lawder *v.* Stone, 187 U. S. 281, 23 S. Ct. 79, 47 L. ed. 178, holding that that portion of a cargo of pineapples which on arrival within the limits of a port of entry of the United States was found to be so decayed as to be utterly worthless is not dutiable, although the loss was less than ten per cent of the total invoice.

65. U. S. *v.* Beebe, 122 Fed. 762 [*affirming* 117 Fed. 670]; U. S. *v.* Beebe, 103 Fed. 785; U. S. *v.* Newhall, 91 Fed. 525; U. S. *v.* Knauth, 77 Fed. 599; De Forest *v.* Redfield, 7 Fed. Cas. No. 3,746, 4 Blatchf. 478.

66. See U. S. *v.* Newhall, 91 Fed. 525; Wood *v.* U. S., 72 Fed. 254, 18 C. C. A. 553. See also Alsop *v.* Maxwell, 1 Fed. Cas. No. 264, 3 Blatchf. 399; De Forest *v.* Redfield, 7 Fed. Cas. No. 3,746, 4 Blatchf. 478; Dutilh *v.* Maxwell, 8 Fed. Cas. No. 4,207, 2 Blatchf. 541; Grant *v.* Maxwell, 10 Fed. Cas. No. 5,699, 2 Blatchf. 220; Loewenstein *v.* Maxwell, 15 Fed. Cas. No. 8,462, 2 Blatchf. 401; Rich *v.* Maxwell, 20 Fed. Cas. No. 11,759, 3 Blatchf. 127.

67. Hadden *v.* Merritt, 115 U. S. 25, 5 S. Ct. 1169, 29 L. ed. 333; Cramer *v.* Arthur, 102 U. S. 612, 26 L. ed. 259; Arthur *v.* Richards, 23 Wall. (U. S.) 246, 23 L. ed. 95; U. S. *v.* Newhall, 91 Fed. 525; U. S. *v.* Knauth, 77 Fed. 599; Meyer *v.* Cooper, 44 Fed. 55.

68. *In re* McCarty, 46 Fed. 360.

Where goods are invoiced in the legal currency of the country of exportation, and also in another foreign currency, the valuation given to the former must prevail. U. S. *v.* Klingenberg, 77 Fed. 279.

69. U. S. *v.* Knauth, 77 Fed. 599; Wood *v.* U. S., 72 Fed. 254, 18 C. C. A. 553 [*distinguishing* Heinemann *v.* Arthur, 120 U. S. 82, 7 S. Ct. 446, 30 L. ed. 605].

A coin, the value of which is a proper subject of estimation by the director of the mint and proclamation by the secretary of the treasury, need not bear the date of its issue, the name or the signature of the sovereign, or be of any particular form; nor is it necessary that the counterfeiting of it be made a crime by statute. Gordon *v.* Magone, 40 Fed. 747.

70. **Repeal of former statutes.**— 26 U. S. St. at L. 136 [U. S. Comp. St. (1901) p. 1932] expressly repealed analogous provisions of earlier acts which provided *inter alia* for the appointment of merchant appraisers to act in conjunction with the general appraisers upon a reappraisement, and for an appeal to the secretary of the treasury, should such appraisement be unsatisfactory. For construction of earlier acts and the rights and liabilities of the parties thereunder see Origet *v.* Hedden, 155 U. S. 228, 15 S. Ct. 92, 39 L. ed. 130; Earnshaw *v.* U. S., 146 U. S. 60, 13 S. Ct. 14, 36 L. ed. 887; U. S. *v.* Schlesinger, 120 U. S. 109, 7 S. Ct. 442, 30 L. ed. 607; Westray *v.* U. S., 18 Wall. (U. S.) 322, 21 L. ed. 763; Iasigi *v.* Whitney, 1 Wall. (U. S.) 375, 17 L. ed. 686; Converse *v.* Burgess, 18 How. (U. S.) 413, 15 L. ed. 455; Greely *v.* Thompson, 10 How. (U. S.) 225, 13 L. ed. 397; Shillito Co. *v.* McClung, 51 Fed. 868, 2 C. C. A. 526; U. S. *v.* Phillips, 46 Fed. 466; Hedden *v.* Iselin, 31 Fed. 266, 24 Blatchf. 455; U. S. *v.* Leng, 18 Fed. 15; Bangs *v.* Maxwell, 2 Fed. Cas. No. 841, 3 Blatchf. 135; Bannendahl *v.* Redfield, 2 Fed. Cas. No. 964, 4 Blatchf. 223; Lehmaier *v.* Maxwell, 15 Fed. Cas. No. 8,214; Schmaire *v.* Maxwell, 21 Fed. Cas. No. 12,460, 3 Blatchf. 408; Tucker *v.* Kane, 24 Fed. Cas. No. 14,220, Taney 146; *In re* Twenty-Eight Cases of Wine, 24 Fed. Cas. No. 14,281, 2 Ben. 63; U. S. *v.* Eighty-Two Packages of Glass, 25 Fed. Cas. No. 15,038.

the collector may, upon his own motion, or shall, upon proper notice of such dissatisfaction by the importer or owner, direct a reappraisement by one of the general appraisers. Should this appraisement be unsatisfactory to either of the parties, provision is made for an appraisement by a board of three general appraisers.[71]

(II) *Limitation of Right.* The statute[72] limiting the time within which duties may be reliquidated to one year from the date of entry in the absence of fraud or protest by the owner or importer does not operate to prevent the liquidation of duties on an article at any time after its entry in bond upon or after its withdrawal for consumption when there had been no previous liquidation.[73]

2. Effect — a. Conclusiveness as to Value. Inasmuch as to allow a jury to review or revise the valuation of goods when made by customs officials would produce great uncertainty or inequality in the collection of duties,[74] the policy of the customs laws is to make the appraisement conclusive as to the dutiable value of the goods, provided the appraisers are selected in conformity to statute, and do not proceed fraudulently, or upon principles contrary to law, or transcend the powers conferred upon them by the statute.[75]

b. Liability For Additional Duties. If an importation is of such nature that the duties thereon must be regulated by the value thereof,[76] and the importer

71. 26 U. S. St. at L. 136 [U. S. Comp. St. (1901) p. 1932].

A reappraisal may fix a higher value to an importation than fixed by the local appraiser, even though the reappraisement be had at the instance of the importer and not at the instance of the collector. *In re* Megroz, 49 Fed. 828.

72. 18 U. S. St. at L. 190 [U. S. Comp. St. (1901) p. 1986].

73. Abner Dohle Co. *v.* U. S., 119 Fed. 152, 56 C. C. A. 40. See also Beard *v.* Porter, 124 U. S. 437, 8 S. Ct. 556, 31 L. ed. 492; Jacot *v.* U. S., 84 Fed. 159; Gandolfi *v.* U. S., 74 Fed. 549, 20 C. C. A. 652; U. S. *v.* De Rivera, 73 Fed. 679; U. S. *v.* Leng, 18 Fed. 15; U. S. *v.* Campbell, 10 Fed. 816.

What constitutes reliquidation.—A reweighing of goods by the collector and regular weighers, but concerning the result of which no notice or order was given, and no record made thereof, is a mere investigation, and does not constitute a reliquidation of the duties. U. S. *v.* Seidenberg, 17 Fed. 227.

Presence of goods.— The general rule that the packages of goods must themselves be present upon a reëxamination and reliquidation does not apply where the importation is all of the same character and kind, and there is no question as to their value; it appearing that a single specimen is a perfect representation of the whole importation. U. S. *v.* Fox, 53 Fed. 531.

74. Hilton *v.* Merritt, 110 U. S. 97, 3 S. Ct. 548, 28 L. ed. 83. See also Passavant *v.* U. S., 148 U. S. 214, 13 S. Ct. 572, 37 L. ed. 426.

75. Muser *v.* Magone, 155 U. S. 240, 15 S. Ct. 77, 39 L. ed. 135; Erhardt *v.* Schroeder, 155 U. S. 124, 15 S. Ct. 45, 39 L. ed. 94; Passavant *v.* U. S., 148 U. S. 214, 13 S. Ct. 572, 37 L. ed. 426; Auffmordt *v.* Hedden, 137 U. S. 310, 11 S. Ct. 103, 34 L. ed. 674; Robertson *v.* Frank Bros. Co., 132 U. S. 17, 10 S. Ct. 5, 33 L. ed. 236; Hilton *v.* Merritt, 110 U. S. 97, 3 S. Ct. 548, 28 L. ed. 83; Iasigi *v.* Whitney, 1 Wall. (U. S.) 375, 17 L. ed. 686; Belcher *v.* Linn, 24 How. (U. S.) 508, 533, 16 L. ed. 754, 758; Stairs *v.* Peaslee, 18 How. (U. S.) 521, 15 L. ed. 474; Bartlett *v.* Kane, 16 How. (U. S.) 263, 14 L. ed. 931; Rankin *v.* Hoyt, 4 How. (U. S.) 327, 11 L. ed. 996; U. S. *v.* Loeb, 107 Fed. 692, 46 C. C. A. 562; Magone *v.* Origet, 70 Fed. 778, 17 C. C. A. 363; U. S. *v.* McDowell, 21 Fed. 563; U. S. *v.* Earnshaw, 12 Fed. 283; Chase *v.* U. S., 9 Fed. 882; Stewart *v.* Merritt, 2 Fed. 531; Saxonville Mills *v.* Russell, 1 Fed. 118; Bailey *v.* Goodrich, 2 Fed. Cas. No. 735, 2 Cliff. 597; Hertz *v.* Maxwell, 12 Fed. Cas. No. 6,432, 3 Blatchf. 137; Loewenstein *v.* Maxwell, 15 Fed. Cas. No. 8,462, 2 Blatchf. 401; McCall *v.* Lawrence, 15 Fed. Cas. No. 8,672, 3 Blatchf. 360; Morris *v.* Maxwell, 17 Fed. Cas. No. 9,834, 3 Blatchf. 143; Roller *v.* Maxwell, 20 Fed. Cas. No. 12,025, 3 Blatchf. 142; Schmaire *v.* Maxwell, 21 Fed. Cas. No. 12,460, 3 Blatchf. 408; Tappan *v.* U. S., 23 Fed. Cas. No. 13,749, 2 Mason 393; Tucker *v.* Kane, 24 Fed. Cas. No. 14,220, Taney 146; *In re* Twelve Hundred and Nine Quarter Casks, etc., of Wine, 24 Fed. Cas. No. 14,279, 2 Ben. 249; U. S. *v.* Cousinery, 25 Fed. Cas. No. 14,878, 7 Ben. 251; U. S. *v.* Nash, 27 Fed. Cas. No. 15,856, 4 Cliff. 107; U. S. *v.* Sowers, 27 Fed. Cas. No. 16,363; Watt *v.* U. S., 29 Fed. Cas. No. 17,292, 15 Blatchf. 29.

76. Hoeninghaus *v.* U. S., 172 U. S. 622, 19 S. Ct. 305, 43 L. ed. 576. See also Pings *v.* U. S., 72 Fed. 260, 18 C. C. A. 557, holding that where the importation is of such a nature that the question whether or not it is subject to specific or *ad valorem* duties depends upon whether or not it exceeds a certain value, an appraisement is essential; and if the appraisement discloses the fact that the goods have been undervalued more than the per cent allowed by statute they are subject to the penalty of an increased duty, although the excess of such per cent on the invoice value would not be sufficient to re-

refuses to make any addition to his entry,[77] or if after such addition the appraised value exceeds the invoice value, a provision has been carried through all the acts to the effect that there should be exacted an additional duty in the nature of a penalty[78] for such undervaluation.[79] Although to incur a liability for additional duties the undervaluation need not be fraudulently made,[80] it is clear that the valuation referred to is that of the cost or market value of the merchandise.[81] The fact, however, that a proceeding has been instituted by the government for the forfeiture of the goods[82] does not, under the present statute, relieve an importer from his liability for such additional duties.[83]

3. Appeal — a. To Board of General Appraisers — (1) *Powers and Jurisdiction.* The board of general appraisers which in a sense is an essential part of the custom-house machinery[84] has in some respects the same powers as a court regarding the admission of evidence.[85] Their jurisdiction extends only to merchandise lawfully entered and regularly invoiced and appraised.[86] Any alleged inclusion of unlawful charges by the collector or appraiser is clearly subject to their review;[87] likewise they may correct a clerical error in the invoice value.[88] They have, however, no jurisdiction to review the action of the collector in adopt-

quire an *ad valorem* instead of a specific duty. And see U. S. *v.* Nuckolls, 118 Fed. 1005, 55 C. C. A. 499.

77. See *supra*, III, B, 3.

78. See also *infra*, V, C, 2, 3.

79. Passavant *v.* U. S., 148 U. S. 214, 13 S. Ct. 572, 37 L. ed. 426; Sampson *v.* Peaslee, 20 How. (U. S.) 571, 15 L. ed. 1022; Stairs *v.* Peaslee, 18 How. (U. S.) 521, 15 L. ed. 474; Belmont *v.* Lawrence, 3 Fed. Cas. No. 1,280, 3 Blatchf. 119; Crowley *v.* Maxwell, 6 Fed. Cas. No. 3,448, 3 Blatchf. 383; Goddard *v.* Maxwell, 10 Fed. Cas. No. 5,492, 3 Blatchf. 131; Howland *v.* Maxwell, 12 Fed. Cas. No. 6,799, 3 Blatchf. 146; Lehmaier *v.* Maxwell, 15 Fed. Cas. No. 8,214; Schmaire *v.* Maxwell, 21 Fed. Cas. No. 12,460, 3 Blatchf. 408; Vaccari *v.* Maxwell, 28 Fed. Cas. No. 16,810, 3 Blatchf. 368. See also Belcher *v.* Lawrason, 21 How. (U. S.) 251, 16 L. ed. 123; Christ *v.* Maxwell, 5 Fed. Cas. No. 2,698, 3 Blatchf. 129.

When goods are entered at a port with the intent of being transported to another port, the entry should be completed at the former port, and the collector of that port, if the goods be assessed too low, must levy the additional duty. The collector of the second port has no authority to levy such duties, nor can the collector of the first port make the addition upon mere hearsay information derived from the collector of the second port. Spring *v.* Russell, 22 Fed. Cas. No. 13,261, 1 Lowell 258.

80. U. S. *v.* One Thousand Six Hundred and Twenty-One Pounds of Fur Clippings, 106 Fed. 161, 45 C. C. A. 263.

The fact that the revenue did not and could not in a particular instance suffer anything by the undervaluation, and that the importers were not benefited thereby because of the fact that specific duties and not *ad valorem* were assessed in a particular case is no defense. Hoeninghaus *v.* U. S., 172 U. S. 622, 19 S. Ct. 305, 43 L. ed. 576.

81. Manhattan Gaslight Co. *v.* Maxwell, 16 Fed. Cas. No. 9,023, 2 Blatchf. 405; Yznaga *v.* Redfield, 30 Fed. Cas. No. 18,197, 4 Blatchf. 469. See also Morris *v.* Robertson, 37 Fed. 199 [*distinguishing* Schmeider *v.* Barney, 6 Fed. 150].

The actual cost need not be stated in a sum total, but may be made by reference to prices of measurable quantities or qualities of the importation; and a valuation thus made, if shown to be the true one, is sufficient, and no penalty can be imposed. U. S. *v.* American Sugar-Refining Co., 71 Fed. 951.

82. **For undervaluation as grounds of forfeiture** see *infra*, V, C, 2 *et seq.*

83. Gray *v.* U. S., 113 Fed. 213, 51 C. C. A. 170 [*affirming* 107 Fed. 104].

Under the earlier statutes it was held that after judgment of condemnation had been rendered in a proceeding for the forfeiture of goods, the penal duty could not be exacted (U. S. *v.* Linens, 26 Fed. Cas. No. 15,604, 3 Phila. (Pa.) 523), although if the forfeiture proceedings were unsuccessful the rule was otherwise (Falleck *v.* Barney, 8 Fed. Cas. No. 4,625, 5 Blatchf. 38).

84. U. S. *v.* Shea, 114 Fed. 38, 51 C. C. A. 664.

85. Marine *v.* Lyon, 65 Fed. 992, 13 C. C. A. 268.

Necessity of taking original testimony.— There is no necessity that the board shall require any original testimony to be given before them. *In re* Hempstead, 95 Fed. 967. It is also clear that it was intended that this board should possess expert knowledge of their own, and that their decision should be based to some extent at least upon such knowledge, and that therefore no evidence need be submitted at all aside from the record necessarily sent up by the collector as provided by the statute. *In re* Muser, 49 Fed. 831 [*citing* Holy Trinity Church *v.* U. S., 143 U. S. 457, 12 S. Ct. 511, 36 L. ed. 226].

86. *In re* Chichester, 48 Fed. 281.

87. U. S. *v.* Passavant, 169 U. S. 16, 18 S. Ct. 219, 42 L. ed. 644.

88. As for instance, where goods were invoiced as worth so many marks instead of so many pfennigs. U. S. *v.* Benjamin, 72 Fed. 51.

ing the estimated value of a foreign coin as determined by the director of the mint, and proclaimed by the secretary of the treasury,[89] although if he declines to accept the proclaimed value and adopts another,[90] or attempts to fix the date at which the value of a foreign coin is to be estimated,[91] the rule would be otherwise. Nor does their jurisdiction accrue where the question is whether or not an article was brought from a foreign country.[92]

(II) *PROTEST*—(A) *In General.* Although as we have seen it is essential that the appraised value of merchandise be considered as conclusive upon the importer,[93] he may nevertheless feel himself injured by the classification of his merchandise,[94] or of the rate of duty imposed thereon under such classification, in which case it is incumbent upon him to file a proper protest as a prerequisite to his right to appeal.[95] The provisions of the statute requiring such protest and designating the time[96] within which it must be filed are peremptory, and the collector has no authority to waive the same,[97] or to accept it either before[98] or after the specified time.[99]

89. U. S. *v.* Klingenberg, 153 U. S. 93, 14 S. Ct. 790, 38 L. ed. 647 [*reversing* 57 Fed. 195]. And see *supra*, III, C, 1, b, (III), (B).

90. U. S. *v.* Beebe, 103 Fed. 785; U. S. *v.* Newhall, 91 Fed. 525, 532, where it is said: "The Klingenberg Case [see *supra*, note 89] is not an authority upon the proposition that where the collector declines to accept the proclaimed value of a foreign standard coin, and adopts another standard, thereby increasing the amount of duties upon imported merchandise, his action is not the subject of review, under the act of 1890."

91. Wood *v.* U. S., 72 Fed. 254, 18 C. C. A. 553 [*distinguishing* U. S. *v.* Klingenberg, 153 U. S. 93, 14 S. Ct. 790, 38 L. ed. 647].

92. Goetze *v.* U. S., 182 U. S. 221, 21 S. Ct. 742, 45 L. ed. 1065; De Lima *v.* Bidwell, 182 U. S. 1, 21 S. Ct. 743, 45 L. ed. 1041.

Formal notice to the board of dissatisfaction by either the importer or collector is not necessary under this statute to give the board of general appraisers jurisdiction. U. S. *v.* Loeb, 107 Fed. 692, 46 C. C. A. 562 [*reversing* 99 Fed. 723]. Likewise it is held that under a regulation of the treasury department providing that, after an appraisement has been completed, and the return thereof received and accepted by the importer, the appraisement cannot be recalled, even for the correction of a clerical error, if the effect of such correction is to change the appraisal. It is also held that if such action is attempted the importer has the right to protest against the second valuation on the ground that it amounts to a new appraisement, and in such instances it is unnecessary that he give the notice of dissatisfaction as provided in this section. U. S. *v.* Morewood, 94 Fed. 639.

93. See *supra*, III, C, 2, a.

94. It is sometimes difficult to tell just whether or not the grievance of the importer arises from the imposition of an unsatisfactory dutiable value, or whether the question is one of classification rather than of value; and if his protest fails to show whether the objection is to the valuation or to the classification it will be presumed that it exists as to the former, and that his remedy is by appeal for reappraisement rather than by protest. Cottier *v.* U. S., 101 Fed. 423. See also Wanamaker *v.* Cooper, 69 Fed. 329. On the other hand it has been held that where upon an importation of ginger ale in bottles a collector adds the value of the bottles to that of the ale, the question of the propriety of such action is one of classification rather than of valuation, and therefore remedial by protest. Dickson *v.* U. S., 68 Fed. 534. To the same effect see Oberteuffer *v.* Robertson, 116 U. S. 499, 6 S. Ct. 462, 29 L. ed. 706.

95. 26 U. S. St. at L. 138 [U. S. Comp. St. (1901) p. 1933].

96. Notice of a protest left by the importer in the proper place after business hours on the last day but one for giving notice, the last day being a holiday, on which the custom-house is closed by special order but not by law, is a lawful compliance with regard to time, and such protest cannot be disregarded (Frankenburg *v.* U. S., 77 Fed. 606); altbough it would be otherwise if the custom-house was closed by law on the last day, as for instance where the last day falls on Sunday; in which case a protest served on the following Monday would be insufficient (Shefer *v.* Magone, 47 Fed. 872).

97. U. S. *v.* Schefer, 71 Fed. 959. See also Abegg *v.* U. S., 71 Fed. 960, where the board of general appraisers refused to assume jurisdiction, where it did not appear that the protest offered was filed by one having a right so to do under the statute.

98. *In re* Bailey, 112 Fed. 413, where it is said that the reason why the act of 1890 provided that the protest should be filed after, and not before, the ascertainment and liquidation of duties was to avoid the effect of the decision of Davies *v.* Miller, 130 U. S. 284, 9 S. Ct. 960, 32 L. ed. 932, decided in 1888.

99. *In re* Guggenheim Smelting Co., 112 Fed. 517, 50 C. C. A. 374.

And therefore a protest cannot after the expiration of ten days be amended, if the effect thereof would be to make it a new protest. *In re* Sherman, 49 Fed. 224.

The payment of duties within the ten days is not, however, a condition precedent to the right of a review by the board of general

(B) *Sufficiency.*[1] Although there is a lack of uniformity found in the expressions of the courts with regard to the sufficiency of this protest, it is agreed that no technical precision in form or statement is required,[2] and the general concensus of the decisions is to the effect that it will be held sufficient if it so distinctly informs the collector of the position taken by the importer that no one is misled thereby.[3]

b. To Circuit Court — (I) *JURISDICTION.* The jurisdiction of the circuit court is not limited to a review of the decisions of the board with regard to the classification of merchandise and the rate of duty imposed thereon, but extends to a review of the decisions of the board upon all questions and matters properly appealable to them.[4]

(II) *FILING STATUTORY APPLICATION.* The provision of the statute providing for the filing with the clerk of a statement of the errors of law and fact

appraisers, if the protest is filed within such time. U. S. *v.* Goldenberg, 168 U. S. 95, 18 S. Ct. 3, 42 L. ed. 394.

1. For forms of protest in full or in substance see U. S. *v.* Salambier, 170 U. S. 621, 18 S. Ct. 771, 14 L. ed. 1167; *In re* Claflin, 113 Fed. 944; *In re* Hagop Bogigian Co., 104 Fed. 75; Smith *v.* U. S., 91 Fed. 757.

2. U. S. *v.* Salambier, 170 U. S. 621, 18 S. Ct. 771, 42 L. ed. 1167; U. S. *v.* Shea, 114 Fed. 38, 51 C. C. A. 664; *In re* Claflin, 113 Fed. 944; Shaw *v.* Prior, 68 Fed. 421.

3. U. S. *v.* Salambier, 170 U. S. 621, 18 S. Ct. 771, 42 L. ed. 1167; *In re* Claflin, 113 Fed. 944; U. S. *v.* Pilditch, 99 Fed. 938; Smith *v.* U. S., 91 Fed. 757; Richards *v.* U. S., 91 Fed. 516; Shaw *v.* Prior, 68 Fed. 421; Boussod Valadon Co. *v.* U. S., 66 Fed. 718; *In re* Houdlette, 48 Fed. 545.

Necessity of protest pointing out proper classification.— It cannot be said that the decisions are uniform upon the question as to whether or not the protest under this act must point out the classification contended for by the importer. In the very recent case of U. S. *v.* Salambier, 170 U. S. 621, 18 S. Ct. 771, 42 L. ed. 1167, a protest which did not refer to any paragraph of the tariff act but briefly stated "that the said goods under existing laws are dutiable at two cents per pound, and the exaction of a higher rate is unjust and illegal," was held sufficient, although there were two paragraphs relating to the class of goods in question, under either of which the duty was two cents per pound. This case is approved in *In re* Claflin, 113 Fed. 944; U. S. *v.* Pilditch, 99 Fed. 938; and a similar conclusion was reached in *In re* Houdlette, 48 Fed. 545, although this exact point was not in issue in that case. *Compare In re* Guggenheim Smelting Co., 112 Fed. 517, 50 C. C. A. 374; Battle, etc., Chemists' Corp. *v.* U. S., 108 Fed. 216. And where the only question between the importer and collector is as to whether the goods in question were dutiable under the act of 1894 or that of 1897, a protest by the importer claiming that they should have been assessed under the former act is sufficient, without specifying the classification, as this latter question is not in issue. *In re* Hagop Bogigian Co., 104 Fed. 75. There is, however, a line of cases to the effect that where the importer claims in his protest that the merchandise is dutiable under a specific paragraph he cannot recover under a different paragraph, although perhaps the classification of the collector was not correct. Tuska *v.* U. S., 84 Fed. 442; *In re* Herter Bros., 53 Fed. 913, 4 C. C. A. 107 [*reversing* 50 Fed. 72]; *In re* Sherman, 49 Fed. 224; *In re* Austin, 47 Fed. 873. But this cannot be said to be settled law, as the very recent decision of U. S. *v.* Shea, 114 Fed. 38, 41, 51 C. C. A. 664, refuses to acquiesce in this holding, the court observing that "it is no part of the purpose of the law as it now stands to exact such nice precision that the importer may not indicate his impressions as to what paragraph governs except at his peril." See also *In re* Crowley, 55 Fed. 283, 5 C. C. A. 109.

A protest alternative in form seems, however, to have always been unobjectionable, under this statute, where the proper classification is doubtful, and an importer is in no way estopped by such alternative protest. Koechl *v.* U. S., 91 Fed. 110, 33 C. C. A. 363; Blumenthal *v.* U. S., 72 Fed. 48. And under an earlier statute it was held that the voluntary refunding to an importer, whose protest was in this form, of the excess of duties collected according to one of his claims, did not, in the absence of a release or evidence of an accord and satisfaction, preclude him from maintaining another suit to recover the remaining excess according to his other claim. Robertson *v.* Edelhoff, 91 Fed. 642, 34 C. C. A. 34.

4. U. S. *v.* Klingenberg, 153 U. S. 93, 14 S. Ct. 790, 38 L. ed. 647 [*followed* in U. S. *v.* Jahn, 155 U. S. 109, 15 S. Ct. 39, 39 L. ed. 87]; Tartar Chemical Co. *v.* U. S., 116 Fed. 726; U. S. *v.* Newhall, 91 Fed. 525. *Compare Ex p.* Fasset, 142 U. S. 479, 12 S. Ct. 295, 35 L. ed. 1087; Foster *v.* Vocke, 60 Fed. 745.

The circuit court for the district in which the port is situated where the merchandise is entered and the duties are liquidated is the court contemplated by the statute to review the decision of the board of appraisers, and not the court of the district where the board of appraisers meets. *In re* Wyman, 45 Fed. 469.

Commission to take testimony.— The circuit court has no power to issue a commis-

of which appellant complains, and a service of a copy thereof upon the appellee,[5] must be observed, and an appellee cannot obtain the benefits of an appeal without filing such statement, merely because the other party has appealed.[6]

(III) *Proceedings on Review* — (A) *Return of Board.* The statute provides[7] that the board upon order of the court shall make a return of the record and evidence taken by them, together with the certified statement of the facts involved in the case, and their decision thereon.[8] While such evidence is competent before the court either party may controvert the same.[9]

(B) *Recognition of Findings of Board.* The rule that a presumption should be indulged in favor of the legality and regularity of the proceedings of the board will be recognized and respected,[10] and their finding with regard to questions of fact will not be disturbed unless wholly without evidence to support it, or clearly contrary to the weight thereof.[11] But this rule has little if any application where the additional testimony taken by the court is of an important character, and the decisive question is as much one of law as of fact.[12]

(C) *Judgment — Costs.* Upon a finding in favor of the importer the court may enter judgment against the United States;[13] but in the absence of a more specific authorization than is found in the statute it would seem that costs cannot be awarded against the United States in an action of this character when the decision is adverse to it.[14]

D. Bonds For Duties — 1. In General. To allow an importer the custody of his merchandise while the samples thereof are being inspected or appraised, pro-

sion to take the testimony of a foreign witness. Bartram *v.* U. S., 106 Fed. 878.

5. 26 U. S. St. at L. 138 [U. S. Comp. St. (1901) p. 1933].

6. U. S. *v.* Lies, 170 U. S. 628, 18 S. Ct. 780, 42 L. ed. 1170. See also *In re* Crowly, 50 Fed. 465.

The application is sufficient when duly made by the collector, and he need not first obtain authority from the secretary of the treasury to take the appeal. *In re* Zante Currants, 73 Fed. 183.

7. 26 U. S. St. at L. 138 [U. S. Comp. St. (1901) p. 1933].

8. **Nature and sufficiency of return.** — The return should be considered substantially as the report of a master in an equity cause would be considered by the circuit court, or as the record, including the opinion of the court in an equity or admiralty cause in the district or circuit court, would be considered by the circuit court of appeals upon an appeal from the decree. *In re* Van Blankensteyn, 56 Fed. 474, 5 C. C. A. 579. It is essential that it embody all the evidence which was considered by the board in reaching the decision. *In re* Van Blankensteyn, 56 Fed. 474, 5 C. C. A. 579. It is also essential that the return contain not only the evidence, but a certified statement of the facts involved in the case. *In re* Downing, 45 Fed. 412; *In re* Blumlein, 45 Fed. 236; *In re* Dieckerhoff, 45 Fed. 235; *In re* Sterubach, 44 Fed. 413. But the fact that the return so made was not signed by the appraisers who took the evidence does not overcome the presumption that the appraisers who took such evidence decided the case. Mexican Onyx, etc., Co. *v.* U. S., 66 Fed. 732.

9. *In re* Muser, 49 Fed. 831.

The right to introduce new evidence is coextensive with the right of appeal. Lesser *v.* U. S., 89 Fed. 197.

10. Earnshaw *v.* U. S., 146 U. S. 60, 13 S. Ct. 14, 36 L. ed. 887.

11. Bader *v.* U. S., 116 Fed. 541; Gabriel *v.* U. S., 114 Fed. 401; Page *v.* U. S., 113 Fed. 1006; U. S. *v.* Jackson, 113 Fed. 1000; Leerburger *v.* U. S., 113 Fed. 976; Myers *v.* U. S., 110 Fed. 940; Morris European, etc., Express Co. *v.* U. S., 94 Fed. 643; Klipstein *v.* U. S., 91 Fed. 520; Apgar *v.* U. S., 78 Fed. 332, 24 C. C. A. 113; *In re* Buffalo Natural Gas Fuel Co., 73 Fed. 191; White *v.* U. S., 72 Fed. 251, 18 C. C. A. 541; *In re* Bing, 66 Fed. 727; Boussod Valadon Co. *v.* U. S., 66 Fed. 718; Marine *v.* Lyon, 65 Fed. 992, 13 C. C. A. 268; *In re* Van Blankensteyn, 56 Fed. 474, 5 C. C. A. 579; *In re* White, 53 Fed. 787; *In re* Kursheedt Mfg. Co., 49 Fed. 633.

12. *In re* Zante Currants, 73 Fed. 183.

Question of law or fact. — Although the existence of a similitude may be considered a fact, yet whether there is any occasion in the particular instance for resorting to the similitude section is a question of law rather than of fact. U. S. *v.* Hahn, 91 Fed. 755. See also Oberteuffer *v.* Robertson, 116 U. S. 499, 6 S. Ct. 462, 29 L. ed. 706; Dana *v.* U. S., 91 Fed. 522.

13. U. S. *v.* Davis, 54 Fed. 147, 4 C. C. A. 251.

For form of judgment rendered against the United States in favor of the importer see U. S. *v.* Davis, 54 Fed. 147, 4 C. C. A. 251.

14. Marine *v.* Lyon, 62 Fed. 153, 10 C. C. A. 315; *In re* Chase, 50 Fed. 695. *Contra*, U. S. *v.* Davis, 54 Fed. 147, 4 C. C. A. 251.

vision is made for the execution of a bond by him to the collector, whereby he may retain the same.[15]

2. Effect of. While the execution of such bond transfers the custody of the goods from the government to the importer,[16] it does not operate as an extinguishment of the debt due the government, but merely as a security for its payment;[17] and it has been held that the United States need not resort to the surety on such bond in the first instance, but may proceed against the sureties upon the probate bond of an executor who had executed such security;[18] but if this security be lawfully executed by the consignee, no recourse can be had against the real owner.[19]

3. Liability on — a. Extent of. The amount recoverable for the breach of a custom-house bond taken under section 2899 of the Revised Statutes by the refusal of the principal obligor to return packages on demand of the collector is double the estimated value of the particular packages so withheld, as liquidated damages.[20]

b. Enforcement of. While under the earlier acts it was provided that in a suit on such a bond for the recovery of duties due the United States, judgment thereon should be granted at the return-term, upon motion,[21] such provision was merely intended as an interdict to any contrivance for delay, and did not preclude a party from setting up a good defense to the merits.[22]

c. Rights of Surety. Under the earlier acts the surety on such a bond, upon the payment of the same, was expressly accorded the same priority as the United States against the estate of his principal in the hands of an assignee.[23]

15. U. S. Rev. St. (1878) § 2899 [U. S. Comp. St. (1901) p. 1921].

By whom given.—Under the present act the bond may be given by the owner, importer, consignee, or agent. Under the act of 1799, it was held that a purchaser after importation could not lawfully furnish such bond, and the collector would have no authority to receive the same from such party. U. S. *v.* Lyman, 26 Fed. Cas. No. 15,647, 1 Mason 482. But it seems that an executor, as such, should be allowed to furnish such bond, and to bind the estate of his testator thereby. U. S. *v.* Aborn, 24 Fed. Cas. No. 14,418, 3 Mason 126.

Condition of bond.— See U. S. Rev. St. (1878) § 2899 [U. S. Comp. St. (1901) p. 1921]. Under an earlier act, although the law made no provision for such a bond where the duties amounted to less than two hundred dollars, yet it was held that a bond for a less amount was valid. U. S. *v.* Linn, 26 Fed. Cas. No. 15,605, Crabbe 307.

For form of bond to secure duties see U. S. *v.* Dieckerhoff, 103 Fed. 789.

It is not incumbent on a collector to take a bond for duties, and to issue a permit to land a cargo where he can show that a previous bond for duties given by the real owner of the cargo was due and unpaid, and that such real owner had fraudulently transferred the cargo to another, thereby expecting to procure a greater credit by the execution of such bond. Olney *v.* Arnold, 3 Dall. (U. S.) 308, 1 L. ed. 614.

Teas.— Distinction for the securing of duties was also made in the earlier acts between merchandise commonly imported and teas, the duties on the latter being secured not only by the bond of the importer, but by the deposit of the teas as well. U. S. *v.* Three Hundred Fifty Chests of Tea, 12 Wheat. (U. S.) 486, 16 L. ed. 702.

16. And therefore if the goods are accidentally destroyed while in the possession of the importer he and not the government should suffer the loss. Ferry *v.* U. S., 85 Fed. 550, 29 C. C. A. 345.

17. U. S. *v.* Cobb, 11 Fed. 76; U. S. *v.* Lyman, 26 Fed. Cas. No. 15,647, 1 Mason 482. See also Six Hundred and Fifty-One Chests of Tea *v.* U. S., 22 Fed. Cas. No. 12,916, 1 Paine 499.

18. U. S. *v.* Aborn, 24 Fed. Cas. No. 14,418, 3 Mason 126.

19. At least where the statute provides that the consignee shall be deemed the owner for the purposes of the tariff act. Knox *v.* Devens, 14 Fed. Cas. No. 7,905, 5 Mason 380 [*distinguishing* U. S. *v.* Lyman, 26 Fed. Cas. No. 15,647, 1 Mason 482].

20. U. S. *v.* Dieckerhoff, 103 Fed. 789.

21. *Ex p.* Davenport, 6 Pet. (U. S.) 661, 8 L. ed. 537; U. S. *v.* Johns, 26 Fed. Cas. No. 15,480, 1 Cranch C. C. 284.

22. *Ex p.* Davenport, 6 Pet. (U. S.) 661, 8 L. ed. 537.

That the bond was given by the obligors without knowledge of the existence of an alleged defense, arising from delay in demanding payment, is not, however, a good defense. U. S. *v.* McKewan, 26 Fed. Cas. No. 15,692, 4 Blatchf. 383.

23. U. S. *v.* Hunter, 26 Fed. Cas. No. 15,426, 5 Mason 62; U. S. *v.* Preston, 27 Fed. Cas. No. 16,087, 4 Wash. 446. But this priority or preference was confined in its provision to the principal in the bond, and not extended to a preference on the estate of the real owner of the goods, if the principal in the bond be another person, as for instance the consignee. Childs *v.* Shoemaker, 5 Fed.

4. PAYMENT OR DISCHARGE. Nothing short of an actual payment will operate as a discharge of such bond, and therefore payment by a check will not constitute a liquidation until the check is paid.[24]

E. Provisions For Warehousing — 1. NATURE AND PURPOSE OF. In view of certain emergencies which may render it necessary to warehouse importations provisions have been enacted providing for the warehousing of such importations, under the direction and supervision of the government.[25] And as not only convenience in the transaction of public business but also the best interest of the government requires the prompt payment of duties within a prescribed time, provisions have been carried up providing for the abandonment,[26]

Cas. No. 2,681, 1 Wash. 494; Knox *v.* Devens, 14 Fed. Cas. No. 7,905, 5 Mason 380. See also U. S. *v.* Preston, 27 Fed. Cas. No. 16,087, 4 Wash. 446. Nor could he claim thereunder a preference over other creditors of a cosurety. State Bank *v.* Adger, 2 Hill Eq. (S. C.) 262. Nor could he maintain an assumpsit in the name of the United States against the assignees of the principal. U. S. *v.* Preston, 27 Fed. Cas. No. 16,087, 4 Wash. 446. And see Bouchaud *v.* Dias, 1 N. Y. 201 [*reversing* 3 Edw. 485] (holding that this provision was not to be carried beyond the cases where the assignment was made for the benefit of creditors in general); Sluby *v.* Champlin, 4 Johns. (N. Y.) 461; Johns *v.* Brodhag, 13 Fed. Cas. No. 7,362, 1 Cranch C. C. 235.

For proceedings under the acts previous to that of 1799 see Reed *v.* Emory, 1 Serg. & R. (Pa.) 339; Gallagher *v.* Davis, 2 Yeates (Pa.) 548.

The release of the surety by the secretary of the treasury, pursuant to an act of congress, is inoperative unless it be shown that all the requirements of the act relative to such release have been complied with, and a recital of such facts in the release itself is not evidence of this compliance. Bouchaud *v.* Dias, 3 Den. (N. Y.) 238.

24. Johnson *v.* U. S., 13 Fed. Cas. No. 7,419, 5 Mason 425; U. S. *v.* Williams, 28 Fed. Cas. No. 16,724, 1 Ware 173.

A bond with a disjunctive condition to either pay a specific sum or the amount of duties to be ascertained to be due, being authorized by the earlier tariff acts, the general rule that obligations in the disjunctive can be discharged by a performance of either of the conditions at the election of the obligor was held to apply. U. S. *v.* Thompson, 28 Fed. Cas. No. 16,486, 1 Gall. 388 [*followed* in U. S. *v.* Carlton, 25 Fed. Cas. No. 14,725, 1 Gall. 400].

Debenture certificates as set-off.— Where a bond is given for duties and the goods are subsequently exported and the bond is not paid, whereupon suit is brought thereon, the debenture certificate should be applied in part payment at the time the bond became due, and interest should not be charged upon any greater sum than the balance remaining after the value of such certificate has been deducted. Morton *v.* Ludlow, 5 Paige (N. Y.) 519 [*affirming* 1 Edw. 639]; Jones *v.* Moore, 1 Edw. (N. Y.) 632.

Right of collector to accept check.— Under the earlier customs acts, although it was the common practice at the custom-house to receive the check of the importer in payment of duty, the statute nowhere recognizes the right of the collector to receive anything but money of the United States or foreign gold or silver coin; and therefore the acceptance of a check by the collector, and the cancellation of the bond or a receipt acknowledging payment, if the payment be in fact made by check, is open to explanation, and does not bar a suit on the bond by the government. Johnson *v.* U. S., 13 Fed. Cas. No. 7,419, 5 Mason 425; U. S. *v.* Williams, 28 Fed. Cas. No. 16,724, 1 Ware 173.

25. U. S. Rev. St. (1878) §§ 2954–2969 [U. S. Comp. St. (1901) pp. 1943–1949].

26. The word "abandonment" as used in U. S. Rev. St. (1878) § 2971 [U. S. Comp. St. (1901) p. 1950] is not to be construed as an absolute abandonment of the goods so as to vest the title thereof in the government; but the word is used in the sense of vesting absolute authority and power in the government when the goods have remained in the warehouse for a period of more than three years, to sell and dispose of the same for the purpose of collecting the duties, charges, and expenses thereon. Anglo-California Bank *v.* Secretary of Treasury, 76 Fed. 742, 22 C. C. A. 527.

Imposition of additional duties on non-payment.— The statute formerly provided for the imposition of additional duty if the merchandise was not withdrawn within a certain time after its original importation. U. S. Rev. St. (1878) § 2970 [U. S. Comp. St. (1901) p. 1950], which provided for an extra duty of ten per cent on goods remaining in a bonded warehouse longer than one year. Under this provision it was held that this additional duty should be imposed upon goods never withdrawn, but sold to satisfy duties. U. S. *v.* Unger, 28 Fed. Cas. No. 16,595. For further construction of this provision see Merritt *v.* Cameron, 137 U. S. 542, 11 S. Ct. 174, 34 L. ed. 772. This provision was repealed by the customs act of 1890, which extended the time for withdrawal to three years from the date of the importation, and dispensed altogether with a duty additional *per se*; and it was held that the additional duty could not be levied on goods which had been in bond more than a year before the pas-

after a specific time, of the goods to the government, and for the sale thereof.[27] But as such regulations are obviously for the benefit of the importer,[28] the general trend of the regulations has always been that the expense and risk must be borne by him.[29]

2. EFFECT OF WAREHOUSING. The effect of warehousing goods under these provisions is to place them in possession of the sovereign, and no lien thereon can be obtained by an execution creditor.[30]

3. WAREHOUSE BONDS[31] — a. Purpose of. In providing the importer the convenience of the warehouse system, the government does not purpose, however, to assume any risk of loss which may attend the holding of the goods, or their mis-

sage of this latter act, but not withdrawn until after its passage. Schmid *v.* U. S., 66 Fed. 744 [*affirming* 54 Fed. 145].

The date of original importation within the meaning of this statute was held to be the date at which the goods first arrived at a port of the United States, and it was therefore held that when goods arriving at an exterior port have been transported to a port in the interior of the country, the date of original importation must be reckoned from the time of their arrival at the exterior port. Seeberger *v.* Schweyer, 153 U. S. 609, 14 S. Ct. 881, 38 L. ed. 839. *Contra*, Farwell *v.* Spalding, 24 Fed. 18.

27. U. S. Rev. St. (1878) §§ 2971–2974 [U. S. Comp. St. (1901) pp. 1950–1951].

The general purpose of these statutes is best discussed in U. S. *v.* De Visser, 10 Fed. 642. See also Anglo-California Bank *v.* Secretary of Treasury, 76 Fed. 742, 749, 22 C. C. A. 527. where it is said: "Throughout the entire legislation of this country upon the subject, the intent of congress to limit the right of the importer to withdraw his goods within a certain time, and to impose condition for his failure so to do, is made manifest."

Time within which goods must be withdrawn.— Under the present statute, the government does not as a rule take charge of the goods until they have been in storage for a period of three years. U. S. Rev. St. (1878) § 2971 [U. S. Comp. St. (1901) p. 1950]. See also modification of the same as provided by section 2973. The act of 1846, which may be said to be the foundation of the warehouse system, allowed but one year for the payment of duties, or for reëxportation without payment. Like the present statute, however, it provided for the payment to the owner, importer, or consignee, of the residue after all the charges and expenses of the government had been paid; but during the period of our late Civil war it would seem that a provision was in force providing for the forfeiture of the surplus to the government. See U. S. *v.* De Visser, 10 Fed. 642, where these enactments are reviewed.

The rights and liabilities of the parties become fixed at the expiration of the three years, and the government is entitled to retain from the proceeds of the sale or to collect upon the bond the amount of duties according to the law existing at the time of the appraisal, although a different rate of duty has gone into effect before the sale is consummated. Buxbaum *v.* U. S., 80 Fed. 885, 26 C. C. A. 216.

Sale of perishable goods.— See Gould *v.* Hammond, 10 Fed. Cas. No. 5,638, McAll. 235. See also Rubens *v.* Robertson, 38 Fed. 86, holding that the collector may delegate to the appraiser the duty of examining merchandise, to see whether or not it is deteriorating in value, within the meaning of the statute providing for the sale of merchandise when found to be in such condition.

28. U. S. *v.* Georgi, 44 Fed. 255.

29. Kennedy *v.* Magone, 158 U. S. 212, 15 S. Ct. 814, 39 L. ed. 954 [*affirming* 41 Fed. 768], construing U. S. Rev. St. (1878) §§ 2859, 2965 [U. S. Comp. St. (1901) pp. 1903, 1947], and holding that where unclaimed goods with no invoice are sent to a general warehouse, and subsequently, upon application of the assignees of the bill of lading for entry of the same, are sent to the public store for examination and appraisement, the charges for cartage to the store and for the storage and labor may be exacted from the importer, although the goods are of less value than one hundred dollars. To the same effect see Hempstead *v.* Cadwalader, 42 Fed. 529. And for construction of an earlier act see Corkle *v.* Maxwell, 6 Fed. Cas. No. 3,231, 3 Blatchf. 413. See also U. S. *v.* MacDonald, 5 Wall. (U. S.) 647, 18 L. ed. 512 [*affirming* 26 Fed. Cas. No. 15,668, 2 Cliff. 270]; Atkins *v.* Peaslee, 2 Fed. Cas. No. 603, 1 Cliff. 446; Clark *v.* Peaslee, 5 Fed. Cas. No. 2,831, 1 Cliff. 545; Harriman *v.* Maxwell, 11 Fed. Cas. No. 6,105, 3 Blatchf. 421. But it has been held that a note by the importer on the entry of goods "vessel, as warehouse," does not constitute a warehouse entry or authorize a collector to charge for half storage. Ogden *v.* Barney, 18 Fed. Cas. No. 10,454, 5 Blatchf. 189. And see, generally, U. S. Rev. St. (1878) §§ 2960–2965 [U. S. Comp. St. (1901) pp. 1945–1947].

30. *In re* Johnston, 13 Fed. Cas. No. 7,424.

31. **For forms of warehouse bond** see U. S. *v.* Duys, 112 Fed. 875; U. S. *v.* De Visser, 10 Fed. 642.

For form of exportation bond see The S. Oteri, 67 Fed. 146, 14 C. C. A. 344.

An instrument satisfying the requirements of a statute which provided for the execution of a transportation bond, although not in the form of a bond, and being so conditioned that it did not prejudice the liability

carriage to, or warehousing at, another port in retransportation, or to look to them alone as security for the payment of duties, but requires also the security of a bond,[32] to which it may also look should the goods be released or unlawfully parted with without the payment of the duties due thereon.[33]

b. Liability on — (I) *In General* — (A) *Of Principal.* The rule is well settled that the importer, as principal, is liable either on the bond or otherwise,[34] for any deficiency in the amount of lawful duties payable, irrespective of any extension of time which may be granted upon the bond, or of the wrongful release of the goods without payment of duties.[35]

(B) *Of Surety.* But the situation of the surety is different; his liabilities being of course limited to the bond itself;[36] and while the sureties on warehouse bonds have the same liabilities as ordinary sureties, except as modified by the laws and regulations,[37] it is held that the provisions of the statute tending to determine the duration of his risk must be considered as part of his contract of suretyship, and not merely directory to the government officials;[38] and that therefore any attempt to prolong this liability without his consent cannot be upheld.[39]

(II) *For Stipulated Penalty.* If the purpose of the bond given by an importer on putting goods in a warehouse is purely to prevent fraud upon the revenue rather than to secure the payment of duties leviable on the goods, it is

of the obligors, was held sufficient under an earlier statute providing for the execution of transportation bonds. U. S. *v.* Pingree, 27 Fed. Cas. No. 16,050, 1 Sprague 339, holding also that under the provisions of that statute the bond properly included the original duty as well as the additional duty provided for should the goods not be duly re-warehoused, and that such additional duty should be reckoned on the original duty, and not on the invoice value.

32. U. S. *v.* Georgi, 44 Fed. 255, where the general purposes of these bonds are discussed. See also Minturn *v.* U. S., 106 U. S. 437, 1 S. Ct. 402, 27 L. ed. 208 [*affirming* 26 Fed. Cas. No. 15,783]; U. S. Rev. St. (1878) § 2964 [U. S. Comp. St. (1901) p. 1946].

33. Minturn *v.* U. S., 106 U. S. 437, 1 S. Ct. 402, 27 L. ed. 208 [*affirming* 26 Fed. Cas. No. 15,783].

34. See *infra*, III, G, 1.

35. Minturn *v.* U. S., 106 U. S. 437, 1 S. Ct. 402, 27 L. ed. 208 [*affirming* 26 Fed. Cas. No. 15,783]; Dumont *v.* U. S., 98 U. S. 142, 25 L. ed. 65; Anglo-California Bank *v.* Secretary of Treasury, 76 Fed. 742, 22 C. C. A. 527; U. S. *v.* Georgi, 44 Fed. 255; U. S. *v.* Campbell, 10 Fed. 816; U. S. *v.* De Visser, 10 Fed. 642.

Payment to a Confederate collector, or the fact that there was no United States collector to whom payment could be made within the time which, by the terms of the bond, the duties were to be made, is not a good defense to an action of this nature. U. S. *v.* Low, 26 Fed. Cas. No. 15,634. See also U. S. *v.* Pensacola, etc., R. Co., 27 Fed. Cas. No. 16,028.

Pleading. — It is essential in an action on a bond of this nature to allege that there were duties on the goods, the amount of such duties, and to what amount they remained unpaid; since if no duties remained unpaid there would be no breach of the bond. U. S. *v.* Duys, 112 Fed. 875.

36. Dumont *v.* U. S., 98 U. S. 142, 25 L. ed. 65, also holding that as the bond was conditioned in the alternative, the performance by the surety of one of the conditions would therefore operate to discharge him. See also U. S. *v.* Campbell, 10 Fed. 816.

37. U. S. *v.* De Visser, 10 Fed. 642, 647, where it is also said: "The inquiry in any such case must be, what are the general rules of law applicable to the particular contract, and to what extent, if at all, have these rules been modified by the special laws and regulations concerning the collection of the revenue?"

38. U. S. *v.* Georgi, 44 Fed. 255, 258 (where it is said: "There is nothing in the warehouse act that I can discover showing any purpose to hold a surety liable for the mere possibility of a reliquidation, after the goods have been delivered, and the liquidated duties paid"); U. S. *v.* De Visser, 10 Fed. 642.

39. U. S. *v.* Campbell, 10 Fed. 816, where the court refused to uphold a claim against the surety based upon a reliquidation made several years after the time for which the bond was given had expired. To a similar effect see U. S. *v.* Georgi, 44 Fed. 255. In U. S. *v.* De Visser, 10 Fed. 642, where a sale of goods which had remained in bond for three years, having been directed according to the regulations of the treasury department, the secretary of the treasury, at the request of the purchaser of the goods, but without consulting the surety, intervened and directed a postponement of the sale, it was held that such a favor could not be granted at the expense of the surety, by thus prolonging his risk, without his consent, and that as such an order necessarily prolonged his risk and suspended his right to proceed for his indemnity, it should be held to operate as his discharge.

held that the liability upon a breach thereof should be the full amount of the penalty stipulated therein.[40]

F. Drawback Provisions — 1. Purpose and Nature of. For the purpose of enabling a manufacturer to compete in foreign markets, thereby building up an export trade, as well as to encourage manufacturing in this country, provisions are made for a rebate of duties, known as drawbacks,[41] upon certain imported materials which are after manufacture reëxported;[42] and in the construction of such provisions these objects should be kept in mind,[43] but should not induce the court to make an illogical interpretation of the statute.[44] Such statutes are prospective, rather than retroactive, in their effect,[45] and follow the general rule of designating articles by their commercial signification.[46]

2. Construction and Application of. The statutes, which in substance provide that a drawback shall be allowed upon imported materials when used in the manufacture of articles manufactured or produced in the United States and subsequently exported, mean that the "imported material" must enter into and form one of the ingredients of the manufactured article;[47] they also contemplate that at least a considerable part of the cost of the production of the completed article shall be expended in the United States,[48] and that they be *bona fide* exported.[49] It is also essential when the imported article is made in part from

40. The S. Oteri, 67 Fed. 146, 14 C. C. A. 344 [*distinguishing* U. S. *v.* Cutajar, 59 Fed. 1000, which was a bond to produce an authenticated invoice within a prescribed time, in that in that case the bond was only incidentally, if at all, for the purpose of preventing fraud on the revenue], construing U. S. Rev. St. (1878) § 2979 [U. S. Comp. St. (1901) p. 1953], and holding that although the treasury regulations provided that in case of withdrawal for export, the importer should give bond in a penal sum equal to double the amount of the estimated duties, yet, if he gave a bond for a lump sum without containing reference to the amount of estimated duties, the liability must be for the whole sum, and not for double the amount of duties as subsequently estimated.

41. A drawback is a device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign markets on the same terms as if it had not been taxed at all. U. S. *v.* Passavant, 169 U. S. 16, 18 S. Ct. 219, 42 L. ed. 646.

42. Tide-Water Oil Co. *v.* U. S., 171 U. S. 210, 18 S. Ct. 837, 43 L. ed. 139 [*affirming* 31 Ct. Cl. 90]; Campbell *v.* U. S., 107 U. S. 407, 2 S. Ct. 759, 27 L. ed. 592; U. S. *v.* Dean Linseed-Oil Co., 87 Fed. 453, 31 C. C. A. 51 [*reversing* 78 Fed. 467]; U. S. *v.* Whidden, 28 Fed. Cas. No. 16,670, 3 Ware 269.

43. Tide-Water Oil Co. *v.* U. S., 171 U. S. 210, 18 S. Ct. 837, 43 L. ed. 139 [*affirming* 31 Ct. Cl. 90]; U. S. *v.* Whidden, 28 Fed. Cas. No. 16,670, 3 Ware 269.

44. Joseph Schlitz Brewing Co. *v.* U. S., 181 U. S. 584, 21 S. Ct. 740, 45 L. ed. 1013.

45. Kennedy *v.* U. S., 23 Ct. Cl. 363. But this does not mean that a provision restricting the application of a prior act would not be applicable to an importation made before its enactment, if not withdrawn from bond, and application made for the drawback prior to its passage. Cunard Steamship Co. *v.* U. S., 25 Ct. Cl. 428.

46. U. S. *v.* Eighty-Five Hogsheads of Sugar, 7 Pet. (U. S.) 404, 8 L. ed. 728 [*affirming* 25 Fed. Cas. No. 15,037, 2 Paine 54]. And see *supra*, II, B, 1, a, (III), (B).

47. And therefore a drawback of duties upon imported bottles and corks used in the manufacture of bottled beer cannot be permitted; and the mere fact that the beer after bottling is steamed for the purpose of killing the yeast germs therein does not convert the bottles from an encasement to an ingredient of the beer itself. Joseph Schlitz Brewing Co. *v.* U. S., 181 U. S. 584, 21 S. Ct. 740, 45 L. ed. 1013; Beadleston *v.* U. S., 104 Fed. 295; Wheeler *v.* U. S., 75 Fed. 654. So too a raw material like coal, in the production of which no materials are used which enter into and form a part of the exported product, would not be within the statute. U. S. *v.* Allen, 163 U. S. 499, 16 S. Ct. 1071, 41 L. ed. 242 [*reversing* 58 Fed. 864, 7 C. C. A. 547].

48. Tide-Water Oil Co. *v.* U. S., 171 U. S. 210, 18 S. Ct. 837, 43 L. ed. 139 [*affirming* 31 Ct. Cl. 90], holding that where, in the building of boxes from boards imported from Canada, the cost of the labor expended in the United States represented only one tenth in value of the boxes, it was altogether improbable that congress intended to permit a drawback upon nine tenths of the value represented by foreign manufactures for the benefit of the one tenth of the labor represented as put upon the boxes in this country.

Oil cake is a manufactured article within the meaning of this statute and not waste. Campbell *v.* U. S., 107 U. S. 407, 2 S. Ct. 759, 27 L. ed. 592; U. S. *v.* Dean Linseed-Oil Co., 87 Fed. 453, 31 C. C. A. 51.

49. And hence when bags made of imported material are leased to steamers for foreign voyages, with the understanding that they are to be brought back to the United States, no right of drawback arises. Kennedy *v.* U. S., 95 Fed. 127, 37 C. C. A. 25 [*affirming* 79 Fed. 893].

domestic material that the imported materials, or the parts of the articles made from such materials, shall so appear in the completed articles that the quantity or measure thereof may be ascertained.[50]

3. BOND. For the purpose of preventing a furtive relanding[51] of the goods after they have been exported and a drawback claimed, a bond is required that the same[52] shall not be relanded in any port within the limits of the United States;[53] and the surety on such a bond is estopped from denying that the quantity of the goods specified therein had not in fact been laden on the vessel.[54]

4. DETERMINATION AND APPORTIONMENT. Where the statute is silent as to the amount of drawback or the method of proportioning the same,[55] the court will adopt the construction of the statute or the method of division which seems to it the most reasonable and just.[56]

5. COLLECTION — a. Jurisdiction — Court of Claims. While the jurisdiction of the court of claims in all matters relating to the recovery of duties was at one time denied,[57] the later cases hold that the statutes providing drawbacks raise an implied contract that the government will refund to the importer this amount when he has brought himself within the terms of the statute, and that therefore that court has jurisdiction as well as the courts particularly provided by the revenue laws.[58]

b. Compliance With Statutory Conditions. An allowance of drawback being an exemption from the operation of the general statutes applicable to the imposition of customs, a party claiming such benefit or gratuity must bring himself clearly within the intent[59] and operation of such provisions,[60] and show that he

Foreign destination.— The shipment of an article, upon a foreign-going vessel, for use and consumption upon the voyage, is not "exportation" within the extent of the statute. In all drawback statutes foreign destination is intended. Swan, etc., Co. *v.* U. S., 37 Ct. Cl. 101 [*affirmed* in 190 U. S. 143, 23 S. Ct. 702, 47 L. ed. 984].

50. This means that the completed article itself shall furnish the standard for measuring the amount of the imported material used in the manufacture thereof, and does not contemplate that the government shall have a bookkeeper and inspector in every exporter's manufacturing establishment. Anglo-American Provision Co. *v.* U. S., 116 Fed. 248, 53 C. C. A. 28.

51. A transaction in which certain sugars after being laden on a vessel are fraudulently relanded on the dock, and the marks obliterated and others substituted in their stead, and then replaced on the vessel so as to show on the return a larger quantity of sugar than was actually put on board, is a "relanding" within the meaning of the bond, and would constitute a breach of the same. U. S. *v.* Heckscher, 26 Fed. Cas. No. 15,338.

52. But goods which have passed through a foreign custom-house and become mingled with the common merchandise of the country are no longer the same goods within the meaning of the bond, and may be again reimported. U. S. *v.* Whidden, 28 Fed. Cas. No. 16,670, 3 Ware 269.

53. U. S. Rev. St. (1878) § 3043 [U. S. Comp. St. (1901) p. 1999].

The whole object of the bond is to prevent goods thus reëxported from being brought back and going into the consumption of the country. U. S. *v.* Whidden, 28 Fed. Cas. No. 16,670, 3 Ware 269.

54. U. S. *v.* Heckscher, 26 Fed. Cas. No. 15,338.

55. As where for instance imported material upon which duties have been paid is manufactured into two separate products. U. S. *v.* Dean Linseed-Oil Co., 87 Fed. 453, 31 C. C. A. 51 [*reversing* 78 Fed. 467].

56. U. S. *v.* Dean Linseed-Oil Co., 87 Fed. 453, 31 C. C. A. 51 [*reversing* 78 Fed. 467], where the court followed the practice of the treasury department in such cases, by distributing the duty paid between the manufactured articles in proportion to their value, whether the original duties were specific or *ad valorem*; this system appearing to the court to be reasonable and equitable as well to the importer as to the government.

57. Nicholl *v.* U. S., 7 Wall. (U. S.) 122, 19 L. ed. 125, where, however, the action was to recover for an excess of duties paid, and the decision went adversely to the claimant, not only on the ground that the court of claims had no jurisdiction, but also that a protest was an absolute prerequisite to the right of action regardless of the forum in which the action was brought.

58. Durant *v.* U. S., 28 Ct. Cl. 356; Kennedy *v.* U. S., 23 Ct. Cl. 363; Campbell *v.* U. S., 12 Ct. Cl. 470 [*affirmed* in 107 U. S. 407, 2 S. Ct. 759, 27 L. ed. 592]. And see, generally, COURTS.

For jurisdiction of the commercial court of New Orleans over actions for drawbacks see Gove *v.* Breedlove, 5 Roh. (La.) 78.

59. Such provisions have always been understood to establish relations between the regular and honest importer and the government, and do not include in their purview any return of the forfeitures or amercements resulting from illegal or fraudulent dealings on the part of the importer or his agents. Bartlett *v.* Kane, 16 How. (U. S.) 263, 14 L. ed. 931.

60. A claim for drawbacks is within the general principle that exemptions must be

has performed all the preliminary steps and acts prescribed by law.[61] Failure so to do is fatal to an allowance.

G. Actions For Collection — 1. In General. The right of the government to enforce payment of duties does not depend upon the enforcement of its lien upon the goods,[62] or to its recourse upon any bond it may have required.[63] Such duties constitute a personal debt from the importer,[64] which may be enforced against him in an appropriate action[65] regardless of the existence of any lien or bond, or of the fact that the goods may have been smuggled, or through mistake or fraud delivered up by the customs officials, without the payment of the duties;[66] nor, if the action be for the amount due upon a final liquidation, can the importer set up as a defense any irregularities in the appraisement, unless he has complied

strictly construed, and that doubt must be resolved against the one asserting the exemption. U. S. *v.* Allen, 163 U. S. 499, 16 S. Ct. 1071, 41 L. ed. 242 [*reversing* 58 Fed. 864, 7 C. C. A. 547].

61. Hence it must appear, as prescribed by the treasury regulations, that the collector's certificate and the manufacturer's affidavit had been filed with the superintendent of exports within sixty days after the clearing of the vessel. And the very fact that a time is limited within which the affidavit must be filed shows that its filing within the prescribed time is material, and constitutes a condition precedent which must be fulfilled before the right to the gratuity can be fixed. Davis *v.* U. S., 17 Ct. Cl. 292.

The six years' limitation within which time suits against the United States for drawbacks must be brought, as provided by the act of March 3, 1887, begins to run from the date of exportation, and not from the date of the decision of the treasury department passing upon the claim. Kennedy *v.* U. S., 95 Fed. 127, 37 C. C. A. 25 [*affirming* 79 Fed. 893].

The statute relating to assignment of claims against the United States does not, however, apply to a claim for drawbacks, since the treasury regulations provide that the person producing the bill of lading, properly indorsed, shall be deemed the exporter for the purpose of making entry, and receiving the drawback or refund. Kennedy *v.* U. S., 95 Fed. 127, 37 C. C. A. 25 [*affirming* 79 Fed. 893].

62. See *infra*, III, G, 2.

63. See *supra*, III, D.

64. But one cannot be made the consignee of goods against his will; and if he chooses to renounce that character, and refuses to have anything to do with the goods, the government acquires no right against him as virtual importer. Du Peirat *v.* Wolfe, 29 N. Y. 436. So too it is held that a purchaser of goods, after they have passed the custom-house, without the payment of duties, would not be liable for the duty, in the absence of a showing of connivance with the importer. U. S. *v.* Koblitz, 15 Fed. 900.

65. A complaint by the United States, alleging that defendant made a withdrawal entry, and withdrew from a bonded warehouse for consumption imported goods which were dutiable, and upon subsequent liquidation of the duties thereon paid the greater portion of such duties without protest, states a cause of action for the recovery of the remainder, although it shows that defendant was not the importer, the presumption being from the facts alleged that it bore such relation to the goods as to be chargeable with the duties. Abner Doble Co. *v.* U. S., 119 Fed. 152, 56 C. C. A. 40.

Burden of proof.— In an action of this nature the burden of proof is on the government to show the quantity of merchandise imported by the defendant, and that he imported the same without paying the required duties. U. S. *v.* Koblitz, 15 Fed. 900. But on the other hand it is held that where the classification of an article has been changed, the collector, in bringing an action to recover the increased duties, is entitled to a presumption that the change was rightfully made, and that therefore the burden of proof was on the defendant to show that the change of classification should not have been made. U. S. *v.* Midgley, 42 Fed. 668.

Evidence.— In an action of *indebitatus assumpsit* to enforce the payment of duties the collector's books, in the handwriting of a deceased clerk, are admissible in evidence on behalf of the United States. U. S. *v.* Howland, 26 Fed. Cas. No. 15,406, 2 Cranch C. C. 508.

The defendant has a right, in the preparation of his defense, to the invoices, entries, warehouse bonds, and official weigher's returns, in an action against him to recover for duties claimed of him, and if the collector refuses him the right to such instruments, mandamus will issue to compel their production. U. S. *v.* Hutton, 26 Fed. Cas. No. 15,433, 10 Ben. 268; U. S. *v.* Youngs, 28 Fed. Cas. No. 16,783, 10 Ben. 264.

The amount of recovery cannot exceed the amount claimed in the complaint and therefore the government would not be entitled to interest on the unpaid duties. U. S. *v.* Koblitz, 15 Fed. 900.

66. U. S. *v.* Murdock, 18 La. Ann. 305, 89 Am. Dec. 651; State *v.* Williams, 8 Tex. 384; Meredith *v.* U. S., 13 Pet. (U. S.) 486, 10 L. ed. 258; U. S. *v.* Boyd, 24 Fed. 690, 23 Blatchf. 299; U. S. *v.* Koblitz, 15 Fed. 900; U. S. *v.* Cobb, 11 Fed. 76; Stockwell *v.* U. S., 23 Fed. Cas. No. 13,466, 3 Cliff. 284; *In re* An Ullage Box of Sugar, 24 Fed. Cas. No. 14,324, 1 Ware 355; U. S. *v.* Dodge, 25 Fed. Cas. No. 14,973, Deady 124; U. S. *v.* George, 25 Fed. Cas. No. 15,198, 6 Blatchf. 406;

with the statutory provisions providing for appeals from such appraisals.[67] And the fact that certain duties were refunded upon a reclassification does not preclude the government from recovering under a second reliquidation, if the action be brought within the time prescribed by statute.[68]

2. By Enforcement of Lien.[69] The lien of the government for duties is restricted to the goods on which the duties in question accrued, and does not exist as to duties due by the importer on previous importations,[70] although if a part of a single consignment is fraudulently withdrawn without payment of the duties thereon, the remainder can be held until the duties on the entire importation are paid.[71] Such lien ceases upon the taking of a bond and security for the goods and the delivery of them to the consignee,[72] or upon the tender of the legal duties or proper security therefor,[73] although it seems that an unsuccessful proceeding by the United States for an alleged violation of the revenue laws would not deprive it of such a lien.[74]

IV. Recovery of Duties Paid.

A. Subsequent to Act of 1890. Since the enactment of the customs administrative act of 1890, it is held that the remedy therein provided the importer is exclusive, and that no action lies against the collector to recover duties paid,[75] provided the point at issue is one within the purview of the customs law;[76] but if the case, although arising under the revenue laws, is not within such pur-

U. S. *v.* Howland, 26 Fed. Cas. No. 15,406, 2 Cranch C. C. 508; U. S. *v.* Lyman, 26 Fed. Cas. No. 15,647, 1 Mason 482. Nor is he relieved from such obligation by the violation of a different provision of the customs law, whereby he incurs a penalty or even a forfeiture of his entire importation. U. S. *v.* One Case of Paintings, etc., 99 Fed. 426, 39 C. C. A. 586.

67. U. S. *v.* Earnshaw, 45 Fed. 782; Chase *v.* U. S., 9 Fed. 882 [*affirming* 25 Fed. Cas. No. 14,747]; U. S. *v.* Cousinery, 25 Fed. Cas. No. 14,878, 7 Ben. 251; Watt *v.* U. S., 29 Fed. Cas. No. 17,292, 15 Blatchf. 29. *Compare* U. S. *v.* Schlesinger, 14 Fed. 682 [*explaining* and *criticizing* U. S. *v.* Cousinery, 25 Fed. Cas. No. 14,878, 7 Ben. 251].

68. U. S. *v.* Fox, 53 Fed. 531.

The fact that a collector fails to levy an additional duty upon imported goods, to which they are subject under the statute by reason of undervaluation, does not affect the right of the United States to recover the same by suit. U. S. *v.* Nuckolls, 118 Fed. 1005, 55 C. C. A. 499.

69. An action to enforce the lien must be on the common-law side of the court, and admiralty jurisdiction cannot be invoked. U. S. *v.* Five Hundred Boxes of Pipes, 25 Fed. Cas. No. 15,116, 2 Abb. 500 [*following* U. S. *v.* Three Hundred Fifty Chests of Tea, 12 Wheat. (U. S.) 486, 6 L. ed. 702]. And see, generally, Liens.

70. Dennie *v.* Harris, 9 Pick. (Mass.) 364; Hodges *v.* Harris, 6 Pick. (Mass.) 360; Harris *v.* Dennie, 3 Pet. (U. S.) 292, 7 L. ed. 683 [*reversing* 5 Pick. (Mass.) 120]; Howland *v.* Harris, 12 Fed. Cas. No. 6,794, 4 Mason 497.

The owner has the right to bid in the property which is sold for the payment of duties accrued thereon in the absence of a showing of fraud or conspiracy upon his part to defraud the revenue. Ney *v.* Ladd, (Tex. Civ. App. 1902) 68 S. W. 1014.

71. Hendricks *v.* Schmidt, 68 Fed. 425, 426, 15 C. C. A. 504, the court saying that "if there had been different consignments, — separate entries of different classes of goods, — the lien upon one consignment would probably not have attached to the others. But in this particular each consignment covered by a single entry is indivisible, and the lien upon the whole attaches to each and every part thereof." See also U. S. *v.* Three Hundred Fifty Chests of Tea, 12 Wheat. (U. S.) 486, 6 L. ed. 702.

72. U. S. *v.* Murdoch, 27 Fed. Cas. No. 15,836, 2 Cranch C. C. 486.

73. Conard *v.* Pac. Ins. Co., 6 Pet. (U. S.) 262, 281, 8 L. ed. 392, where it is said: "There is no pretense to say that the property of the importer in the goods is devested by any possession subsequently taken by the United States after the arrival of the goods, for the purpose of maintaining their lien for duties. That possession is not adverse to the title of the importer; and, indeed, it may be properly deemed not so much an exclusive as a concurrent and mixed possession, for the joint benefit of the importer and of the United States. It leaves the importer's right to the immediate possession perfect the moment the lien for the duties is discharged; and if he tenders the duties, or the proper security therefor, and the collector or other officer refuses the delivery of the goods, it is a tortious conversion of the property, for which an action of trespass or trover will lie."

74. U. S. *v.* Five Hundred Boxes of Pipes, 25 Fed. Cas. No. 15,116, 2 Abb. 500.

75. See *supra*, III, C, 3, *et seq.*; Schoenfeld *v.* Hendricks, 152 U. S. 691, 14 S. Ct. 754, 38 L. ed. 601 [*affirming* 57 Fed. 568].

76. Dooley *v.* U. S., 182 U. S. 222, 21 S. Ct. 762, 45 L. ed. 1074 [*followed* in Armstrong *v.*

view, an action may still be maintained,[77] unless the payment was made voluntarily.[78]

B. Previous to Act of 1890 — 1. Nature of Action. In the earlier stages of tariff legislation, an action at common law would lie to recover duties not voluntarily[79] paid.[80] The effect of the later statutes was to convert the prior common-law action into one based wholly on statutory liability.[81]

2. By Whom Brought. Under the statutes superseded by the act of 1890,[82] it was held that a mere assignee of the claim of the importer could not maintain this action;[83] nor under the earlier acts was it essential that the suit be brought in the name of the consignee; but such action could be maintained by the actual owner of the goods.[84]

U. S., 182 U. S. 243, 21 S. Ct. 827, 45 L. ed. 1086].

77. Downes *v.* Bidwell, 182 U. S. 244, 21 S. Ct. 770, 45 L. ed. 1088; Dooley *v.* U. S., 182 U. S. 222, 21 S. Ct. 762, 45 L. ed. 1074 [*followed* in Armstrong *v.* U. S., 182 U. S. 243, 21 S. Ct. 827, 45 L. ed. 1086]; De Lima *v.* Bidwell, 182 U. S. 1, 21 S. Ct. 743, 45 L. ed. 1041.

Form of remedy.— In De Lima *v.* Bidwell, 182 U. S. 1, 21 S. Ct. 743, 45 L. ed. 1041, the court hold that in a case not within the meaning of the Customs Administrative Act the common law must still be held to prevail, and that therefore an action at common law would lie. While this case was expressly approved in Dooley *v.* U. S., 182 U. S. 222, 21 S. Ct. 762, 45 L. ed. 1074, it was held that the common-law remedy was not exclusive, but that the importer might also, under the present statutes, avail himself of his right of action in the circuit court as a court of claims. Or an action may be maintained in the circuit court as such. Downes *v.* Bidwell, 182 U. S. 244, 21 S. Ct. 770, 45 L. ed. 1088.

78. Dewell *v.* Mix, 116 Fed. 664.

For sufficiency of protest under the former cases as precedent to right of action for the recovery of duties paid see *infra*, IV, B, 3, c, (III).

79. See *infra*, IV, B, 3, b.

80. **Review of statutory enactments.**—Previous to the act of 1839, the court uniformly held that if the payment was made under protest or with the understanding that the importer would sue to recover it back, that an action of *indebitatus assumpsit* could be maintained against the collector, and under this procedure the collector in such instance usually retained the amount in dispute and did not pay the same to the treasury department until the claim had been adjudicated; but if he did pay such moneys to the treasury department with knowledge that the claim was to be assessed, assumpsit would nevertheless lie against him. See Gantzler *v.* Gordon, 6 La. 258; Cary *v.* Curtis, 3 How. (U. S.) 236, 11 L. ed. 576; Bend *v.* Hoyt, 13 Pet. (U. S.) 263, 10 L. ed. 154; Elliott *v.* Swartwout, 10 Pet. (U. S.) 137, 9 L. ed. 373. The embarrassments which ensued in consequence of the large amount of duties withheld from the public treasury by the collector induced the passage of the act of 1839, which required the collector, upon the collection of moneys, to pay the same into the treasury department, without awaiting the result of any litigation in relation thereto. Under this statute it was held that assumpsit would no longer lie. See Barney *v.* Watson, 92 U. S. 449, 23 L. ed. 730; Curtis *v.* Fiedler, 2 Black (U. S.) 461, 72 L. ed. 763; Cary *v.* Curtis, 3 How. (U. S.) 236, 11 L. ed. 576; Knoedler *v.* Schell, 14 Fed. Cas. No. 7,889, 4 Blatchf. 484, 20 How. Pr. (N. Y.) 216; Richardson *v.* Curtis, 20 Fed. Cas. No. 11,781, 3 Blatchf. 385. This statute did not, however, leave the importer without his remedy, inasmuch as it also provided that whenever it was shown to the satisfaction of the secretary of the treasury that more money had been paid than the law required, it was made his duty to draw his warrant upon the treasury to refund the overpayment. Barney *v.* Watson, 92 U. S. 449, 23 L. ed. 730; Curtis *v.* Fiedler, 2 Black (U. S.) 461, 17 L. ed. 273; Sturges *v.* U. S., Ct. Cl. (Dev.) § 207; Sturges *v.* U. S., Ct. Cl. (Dev.) § 203. By the act of 1845, however, congress modified this act by providing that an action at law could be maintained against the collector to recover the amount of duties when paid under a sufficient protest, etc., which enactment was in substance carried down until repealed by the act of 1890.

81. Arnson *v.* Murphy, 115 U. S. 579, 6 S. Ct. 185, 29 L. ed. 491, where the former statutory provisions are fully reviewed and discussed. See also Schoenfeld *v.* Hendricks, 152 U. S. 691, 14 S. Ct. 754, 38 L. ed. 601; Haynes *v.* Brewster, 46 Fed. 471; Wedemeyer *v.* Lancaster, 30 Fed. 670.

82. U. S. Rev. St. §§ 2931, 3011.

83. Hager *v.* Swayne, 149 U. S. 242, 13 S. Ct. 841, 31 L. ed. 719.

But one who purchased goods in bond pending an appeal to the treasury department, and who after its decision paid duties in order to obtain possession of the goods, was held not to be an assignee in the sense that he should be debarred from bringing an action. Spalding *v.* Castro, 153 U. S. 38, 14 S. Ct. 768, 38 L. ed. 626; Seeberger *v.* Castro, 153 U. S. 32, 14 S. Ct. 766, 38 L. ed. 624 [*affirming* 40 Fed. 531, and *distinguishing* Hager *v.* Swayne, 149 U. S. 242, 13 S. Ct. 841, 37 L. ed. 719]. See also Simpson *v.* Schell, 14 Fed. 286.

84. Mason *v.* Kane, 16 Fed. Cas. No. 9,241, Taney 173.

3. Prerequisites to Right of — a. Compliance With Statutory Provisions. Inasmuch as the action for the last half century was one purely statutory,[85] it was incumbent upon the importer to show, not only that the statute prescribing the time within which the action could be brought had been observed,[86] but that all other statutory conditions had been complied with as well.[87]

b. Payment Must Be Involuntary. It was of course essential to the importer's right of recovery that the payment of duties by him should not be made voluntarily;[88] but a payment in order to get possession of one's goods was not considered as voluntarily made.[89]

c. Protest — (i) *Form and Necessity of.* It will thus be seen that a protest in some form[90] to the collector of customs was a prerequisite to the right of the

85. See *supra*, IV, B, 1.

86. The statute (U. S. Rev. St. (1878) § 2930), provided that the action must be brought within ninety days from the decision of the secretary, and that if such decision was delayed more than ninety days from the date of appeal, or if the case arose west of the Rocky mountains more than five months after the date of appeal, the delay might be considered as an adverse decision, and the action then brought if the importer so desired. This remedy was held to be exclusive. Arnson *v.* Murphy, 109 U. S. 238, 3 S. Ct. 184, 27 L. ed. 920. Nor was an importer entitled to notice of the decision of the secretary of the treasury, and the fact that the collector by his silence may have led the importer to suppose that the appeal had not been acted upon, would not obviate the necessity of bringing the action within the ninety days prescribed. Shillito Co. *v.* McClung, 45 Fed. 778. See also Chung Yune *v.* Shurtleff, 10 Fed. 239, 7 Sawy. 448. Likewise it was held that a decision by the secretary that he would not entertain an appeal from the decision of the collector because of an insufficient filing of the protest was a decision "on the appeal" within the meaning of this statute. Shillito Co. *v.* McClung, 51 Fed. 868, 2 C. C. A. 528. But this statute was held not to prohibit the institution of a suit before the decision. Moller *v.* Merritt, 29 Fed. 678.

Under the earlier acts, for the time of institution of suits, see Bend *v.* Hoyt, 13 Pet. (U. S.) 263, 10 L. ed. 154; Richardson *v.* Curtis, 20 Fed. Cas. No. 11,781, 3 Blatchf. 385.

87. Schoenfeld *v.* Hendricks, 152 U. S. 691, 14 S. Ct. 754, 38 L. ed. 601; Arnson *v.* Murphy, 115 U. S. 579, 6 S. Ct. 185, 29 L. ed. 491 [*affirming* 24 Fed. 355]; Haynes *v.* Brewster, 46 Fed. 471; Cousinery *v.* Schell, 34 Fed. 272; Grandmange *v.* Schell, 32 Fed. 655 (where it was held that the facts in the case were insufficient to authorize a submission to the jury of the question of statutory compliance); Drake *v.* Redfield, 7 Fed. Cas. No. 4,065, 4 Blatchf. 116; Dutilh *v.* Maxwell, 8 Fed. Cas. No. 4,208, 2 Blatchf. 548; Gamble *v.* Mason, 9 Fed. Cas. No. 5,209.

An appeal to the secretary of the treasury must be shown to have been made in compliance with statutory provisions. Reimer *v.* Schell, 20 Fed. Cas. No. 11,676, 4 Blatchf. 328; Shaw *v.* Grinnell, 21 Fed. Cas. No. 12,719, 9 Blatchf. 471; U. S. *v.* Sowers, 27 Fed. Cas. No. 16,363; Watt *v.* U. S., 29 Fed. Cas. No. 17,292, 15 Blatchf. 29. Although under this provision as used in the act of 1857 it was held that an appeal to the secretary of the treasury was not a condition precedent, where the question was only as to the rate or amount of duty and not to an exemption therefrom. Benkard *v.* Schell, 3 Fed. Cas. No. 1,307; Schmieder *v.* Barney, 21 Fed. Cas. No. 12,462, 13 Blatchf. 37.

88. Rossman *v.* Hedden, 145 U. S. 561, 8 S. Ct. 925, 37 L. ed. 817 [*affirming* 37 Fed. 99]; Porter *v.* Beard, 124 U. S. 429, 8 S. Ct. 554, 31 L. ed. 490; Elliott *v.* Swartwout, 10 Pet. (U. S.) 137, 9 L. ed. 373; Erhardt *v.* Winter, 92 Fed. 918, 35 C. C. A. 84; Drake *v.* Redfield, 7 Fed. Cas. No. 4,065, 4 Blatchf. 116; Marshall *v.* Redfield, 16 Fed. Cas. No. 9,131, 4 Blatchf. 221; U. S. *v.* Clement, 25 Fed. Cas. No. 14,815, Crabbe 499; Shantz *v.* U. S., 23 Ct. Cl. 384; De Celis *v.* U. S., 13 Ct. Cl. 117. See also Irvin *v.* Schell, 13 Fed. Cas. No. 7,072, 5 Blatchf. 157, holding that the payment to a collector of an arbitrary charge prescribed by the secretary of the treasury for permit to land goods for consumption which were still on shipboard, but which had been entered for warehousing, in compliance with the statute, was not, although made under protest, an involuntary payment, and hence an action would not lie.

89. Robertson *v.* Bradbury, 132 U. S. 491, 10 S. Ct. 158, 33 L. ed. 405; Robertson *v.* Frank Bros. Co., 132 U. S. 17, 10 S. Ct. 5, 33 L. ed. 236; Maxwell *v.* Griswold, 10 How. (U. S.) 242, 13 L. ed. 405; Erhardt *v.* Winter, 92 Fed. 918, 35 C. C. A. 84; Fauche *v.* Schell, 33 Fed. 336; Benkard *v.* Schell, 3 Fed. Cas. No. 1,307; Griswold *v.* Lawrence, 11 Fed. Cas. No. 5,837, 1 Blatchf. 599.

90. Form of protest. — Previous to the act of 1845, no particular form of protest was required; it was simply incumbent upon the importer to in some manner notify the collector of his objections to the assessment of the duties in question in such manner that the collector would understand the reasons for his objections; but it was not necessary for him to give written notice thereof. Swartwout *v.* Gihon, 3 How. (U. S.) 110, 11 L. ed. 517. The act of 1845, however, provided that the protest must be made in writing and set forth distinctly and specifically

importer to maintain his action against the collector for the recovery of duties[91] paid.[92]

(II) *Time of Filing.* Under the earlier statutes it was necessary that the protest be filed at or before the time of payment of the duties in dispute.[93] Subsequently the time of filing was extended to ten days after the ascertainment and liquidation of duties;[94] and under this provision, while it was held to be in every case necessary that the protest be made within the prescribed time,[95] it was held that if made within such time it need not necessarily be made before payment.[96]

(III) *Sufficiency.* It was necessary that the protest should point out distinctly and specifically the omission or irregularity complained of; general expressions which might include specific objections being insufficient;[97] although

the grounds of the objection to the payment of the duties. Curtis *v.* Fiedler, 2 Black (U. S.) 461, 17 L. ed. 273. This statute continued in force until the passage of the act of June 30, 1864 (Barney *v.* Watson, 92 U. S. 449, 23 L. ed. 730), and the language of this latter act was embodied in U. S. Rev. St. (1878) § 2931 (Arnson *v.* Murphy, 115 U. S. 579, 29 L. ed. 491); and this is substantially the same language as is used in the act of 1890, which is the present law regarding the form of protest.

Protest made by an agent will of course in law be considered as made by his principal, and will therefore be sufficient (Gray *v.* Lawrence, 10 Fed. Cas. No. 5,722, 3 Blatchf. 117), although it must appear that the party making the protest was in fact the agent (Grandmange *v.* Schell, 32 Fed. 655).

91. For the statutes applied only to duties and not to other illegal exactions, such as for instance fees for permits to land the baggage of passengers. Ogden *v.* Maxwell, 18 Fed. Cas. No. 10,458, 3 Blatchf. 319.

92. Nicholl *v.* U. S., 7 Wall. (U. S.) 122, 19 L. ed. 125; Curtis *v.* Fiedler, 2 Black (U. S.) 461, 17 L. ed. 273; Burroughs *v.* Erhardt, 88 Fed. 256, 31 C. C. A. 524; Bodart *v.* Schell, 33 Fed. 825; U. S. *v.* Schlesinger, 14 Fed. 682; Boker *v.* Redfield, 3 Fed. Cas. No. 1,606*a*; Crocker *v.* Redfield, 6 Fed. Cas. No. 3,400, 4 Blatchf. 378, 18 How. Pr. (N. Y.) 85; Falleck *v.* Barney, 8 Fed. Cas. No. 4,625, 5 Blatchf. 38; Greenleaf *v.* Schell, 10 Fed. Cas. No. 5,782, 6 Blatchf. 225; Kriesler *v.* Morton, 14 Fed. Cas. No. 7,934, 2 Curt. 239; Maillard *v.* Lawrence, 16 Fed. Cas. No. 8,972, 3 Blatchf. 378; Moke *v.* Barney, 17 Fed. Cas. No. 9,698, 5 Blatchf. 274; Beatty *v.* U. S., Ct. Cl. (Dev.) § 248. And as the action against the collector is substantially one against the United States, it is held that no action can be maintained in a court of claims against the United States unless such protest be made. Schlesinger *v.* U. S., 1 Ct. Cl. 16 [*followed* in Ogden *v.* U. S., 1 Ct. Cl. 96; Nicoll *v.* U. S., 1 Ct. Cl. 70].

93. This was the provision of the act of 1845, and was in force up to the passage of the act of 1864. See Barney *v.* Rickard, 157 U. S. 352, 15 S. Ct. 642, 39 L. ed. 730; Barney *v.* Watson, 92 U. S. 449, 23 L. ed. 730; Crocker *v.* Redfield, 6 Fed. Cas. No. 3,400, 4 Blatchf. 378, 18 How. Pr. (N. Y.) 85. And see Marriott *v.* Brune, 9 How. (U. S.) 619, 13 L. ed. 282 [*followed* in Lillie *v.* Redfield, 15 Fed. Cas. No. 8,351, 4 Blatchf. 41], which, although sometimes cited to the contrary, affirms this proposition in the main, but under the facts in that case held that inasmuch as the importer did not know the final amount of duties required at the time he made his payment, and that as the moneys still remained in the hands of the collector, the protest was sufficient, although not made until after the payment.

94. This amendment was made by the act of 1864, which was substantially reënacted by U. S. Rev. St. (1878) § 2931 (Barney *v.* Rickard, 157 U. S. 352, 15 S. Ct. 642, 39 L. ed. 730) and is substantially reënacted in the act of 1890.

95. This statute fixed the limit beyond which a protest should not be given, and did not fix the final ascertainment and liquidation of duties as the time at which the protest must be first given, and therefore notice might be given after the collectors' estimation of the rate and amount of duties, although before final ascertainment and liquidation. Davies *v.* Miller, 130 U. S. 284, 9 S. Ct. 560, 32 L. ed. 932. And if made within the prescribed time its validity is not affected by a subsequent revision of the liquidation. Keyser *v.* Arthur, 14 Fed. Cas. No. 7,749.

The ten days must be reckoned from the time of the decision of the collector at the entry of the goods for warehousing, and not within the ten days from the final withdrawal of the goods for consumption; and the fact that the treasury department had for several years construed the statute to mean otherwise will not be controlling upon the courts. Merritt *v.* Cameron, 137 U. S. 542, 11 S. Ct. 174, 34 L. ed. 772 [*followed* in Cadwalader *v.* Patridge, 137 U. S. 553, 11 S. Ct. 182, 34 L. ed. 783]. See also Saltonstall *v.* Russell, 152 U. S. 628, 14 S. Ct. 733, 38 L. ed. 576; Foster *v.* Simmons, 9 Fed. Cas. No. 4,982*a*.

96. Saltonstall *v.* Birtwell, 164 U. S. 54, 17 S. Ct. 19, 41 L. ed. 348 [*affirming* 66 Fed. 969, 14 C. C. A. 205], Fuller, C. J., and Field, Harlan, and Brewer, JJ., dissenting.

97. Presson *v.* Russell, 152 U. S. 577, 14 S. Ct. 728, 38 L. ed. 559; Herrman *v.* Robertson, 152 U. S. 521, 14 S. Ct. 686, 38 L. ed. 538 [*affirming* 41 Fed. 881]; Nicholl *v.* U. S., 7 Wall. (U. S.) 122, 19 L. ed. 125; Curtis

under some of the earlier statutes a separate protest for each specific importation was not absolutely essential.[98] The purpose required of it did not, however, demand that it possess the technical precision of a legal document.[99]

v. Fiedler, 2 Black (U. S.) 461, 17 L. ed. 273; Converse *v.* Burgess, 18 How. (U. S.) 413, 15 L. ed. 455 [*affirming* 4 Fed. Cas. No. 2,154, 2 Curt. 216]; Smith *v.* Schell, 27 Fed. 648; Bangs *v.* Maxwell, 2 Fed. Cas. No. 841, 3 Blatchf. 135; Baxter *v.* Maxwell, 2 Fed. Cas. No. 1,126, 4 Blatchf. 32; Christ *v.* Maxwell, 5 Fed. Cas. No. 2,698, 3 Blatchf. 129; Cornett *v.* Lawrence, 6 Fed. Cas. No. 3,241, 2 Blatchf. 512; Crowley *v.* Maxwell, 6 Fed. Cas. No. 3,449, 3 Blatchf. 401; Durand *v.* Lawrence, 8 Fed. Cas. No. 4,187, 2 Blatchf. 396; Fielden *v.* Lawrence, 9 Fed. Cas. No. 4,774, 3 Blatchf. 120; Focke *v.* Lawrence, 9 Fed. Cas. No. 4,894, 2 Blatchf. 508; Goddard *v.* Maxwell, 10 Fed. Cas. No. 5,492, 3 Blatchf. 131; Hutton *v.* Schell, 12 Fed. Cas. No. 6,961, 6 Blatchf. 48; Kriesler *v.* Morton, 14 Fed. Cas. No. 7,933, 1 Curt. 413; Mason *v.* Kane, 16 Fed. Cas. No. 9,241, Taney 173; Norcross *v.* Greely, 18 Fed. Cas. No. 10,294, 1 Curt. 114; Pierson *v.* Lawrence, 19 Fed. Cas. No. 11,158, 2 Blatchf. 495; Sadler *v.* Maxwell, 21 Fed. Cas. No. 12,207, 3 Blatchf. 134; Scheerdt *v.* Schell, 21 Fed. Cas. No. 12,444; Schmaire *v.* Maxwell, 21 Fed. Cas. No. 12,460, 3 Blatchf. 408; Swanston *v.* Morton, 23 Fed. Cas. No. 13,677, 1 Curt. 294; Thomson *v.* Maxwell, 23 Fed. Cas. No. 13,983, 2 Blatchf. 385; Willison *v.* Hoyt, 30 Fed. Cas. No. 17,772.

98. Prospective or continuous protest.— Thus under the acts of 1845 and 1857 it was held that a protest might be prospective or continuous. Schell *v.* Fauche, 138 U. S. 562, 11 S. Ct. 376, 34 L. ed. 1040 [*affirming* 33 Fed. 336]; Marriott *v.* Brune, 9 How. (U. S.) 619, 13 L. ed. 282 [*affirming* 4 Fed. Cas. No. 2,052, Taney 132]; Benkard *v.* Schell, 3 Fed. Cas. No. 1,307; Fowler *v.* Redfield, 9 Fed. Cas. No. 5,003; Hutton *v.* Schell, 12 Fed. Cas. No. 6,961, 6 Blatchf. 48; Steegman *v.* Maxwell, 22 Fed. Cas. No. 13,344, 3 Blatchf. 365; Wetter *v.* Schell, 29 Fed. Cas. No. 17,470, 11 Blatchf. 193. But under these statutes it was held that a prospective protest by a firm as to importations made by it was not valid as to similar importations made by a firm succeeding it in business. Sorchan *v.* Schell, 33 Fed. 580. Although where an importer took a partner in his business, and added "& Co." to his name, it was held that his previous protest was nevertheless sufficient to cover subsequent importations. Herman *v.* Schell, 18 Fed. 891, 21 Blatchf. 560. So too an addition at the end of a protest of a clause intended to thereby constitute it a prospective protest was held to be insufficient as an aid to an invalid protest subsequently made. Baxter *v.* Maxwell, 2 Fed. Cas. No. 1,126, 4 Blatchf. 32. But under the statute as amended by the act of 1864 it was held that such protests were not valid. Ullman *v.* Murphy, 24 Fed. Cas. No. 14,325, 11 Blatchf. 354.

99. Davies *v.* Arthur, 96 U. S. 148, 24 L. ed. 758; Converse *v.* Burgess, 18 How. (U. S.) 413, 15 L. ed. 455 [*affirming* 4 Fed. Cas. No. 2,154, 2 Curt. 216]; Hahn *v.* Erhardt, 78 Fed. 620, 24 C. C. A. 265; Herman *v.* Schell, 18 Fed. 891, 21 Blatchf. 560; Swanston *v.* Morton, 23 Fed. Cas. No. 13,677, 1 Curt. 294.

For illustrations of protest held to be sufficient see Schell *v.* Fauche, 138 U. S. 562, 11 S. Ct. 376, 34 L. ed. 1040 [*affirming* 33 Fed. 336]; Arthur *v.* Morgan, 112 U. S. 495, 5 S. Ct. 241, 28 L. ed. 825; Marriott *v.* Brune, 9 How. (U. S.) 619, 13 L. ed. 282; Legg *v.* Hedden, 37 Fed. 861; Frazee *v.* Moffitt, 18 Fed. 584, 20 Blatchf. 267; Boker *v.* Bronson, 3 Fed. Cas. No. 1,605, 4 Blatchf. 472; Craig *v.* Maxwell, 6 Fed. Cas. No. 3,334, 2 Blatchf. 545; Loewenstein *v.* Maxwell, 15 Fed. Cas. No. 8,462, 2 Blatchf. 401; Schuchardt *v.* Lawrence, 21 Fed. Cas. No. 12,484, 3 Blatchf. 397; Steegman *v.* Maxwell, 22 Fed. Cas. No. 13,344, 3 Blatchf. 365; Vaccari *v.* Maxwell, 28 Fed. Cas. No. 16,810, 3 Blatchf. 368.

Omission of the date from a protest in proper form and attached to the invoice of the merchandise mentioned therein is immaterial. Schell *v.* Fauche, 138 U. S. 562, 11 S. Ct. 376, 34 L. ed. 1040 [*affirming* 33 Fed. 336]. So too if the protest is written on the entry, the description of the goods as given in such entry need not be repeated in the protest. Thomson *v.* Maxwell, 23 Fed. Cas. No. 13,983, 2 Blatchf. 385.

Signature of protest.— While it has been held that a statutory requirement of the claimants' signature to the protest could not be dispensed with (Florio *v.* Peaslee, 9 Fed. Cas. No. 4,890, 2 Curt. 452. And see also Grandmange *v.* Schell, 32 Fed. 655), it has also been held that a signature by the importer to one only of two papers, pasted together, and attached to the entry by a wafer, was a sufficient compliance with the statute, especially where it appears that the custom-house officials regarded the two papers as one protest (Schell *v.* Fauche, 138 U. S. 562, 11 S. Ct. 376, 34 L. ed. 1040 [*affirming* 33 Fed. 336]).

Statement that a reappraisement had been requested should of course generally be included in such protest (Fielden *v.* Lawrence, 9 Fed. Cas. No. 4,774, 3 Blatchf. 120), although if the importer is told by the customs officials that he must enter his goods at the value expressed in the invoice, and in no other way, a request for a reappraisement would be unnecessary as a prerequisite to the right to recover for the excess paid (Robertson *v.* Bradbury, 132 U. S. 491, 10 S. Ct. 158, 33 L. ed. 405).

Protest as distinguished from that under the act of 1890.—The provision of the statute requiring the protest to set forth distinctly and specifically the grounds of the objections

4. Pleadings. While the pleadings in this action expressly required by statute could not be dispensed with,[1] it was also provided that the mode of procedure should be analogous to that of the state courts wherein the action was held.[2] Hence many questions as to the sufficiency of the pleadings, and whether or not they contained conclusions of law rather than of fact, were dependent upon the procedure and code provisions existing in such courts.[3]

5. Evidence — a. Presumptions and Burden of Proof. In actions to recover duties paid, the presumption was in favor of the regularity and correctness of the acts of the customs officials,[4] hence the burden was upon one contesting the validity of the result obtained.[5] But if a collector refused to accept the performance

made by the importer has been carried up substantially unchanged since 1845, and the question naturally arises whether or not a protest need be less specific under this latter act than under the former ones. In passing upon the sufficiency of the protest under the act of 1890, the courts very properly rely upon the cases decided under these former statutes, and in some respects there can at present be said to be no difference in the essentials of a protest under the present act than under the former act. Thus under the former act it is held that although the classification made by the collector is not the proper one, yet, if the importer also improperly classifies them he cannot recover. Davies *v.* Arthur, 96 U. S. 148, 24 L. ed. 758 [*affirming* 7 Fed. Cas. No. 3,611, 13 Blatchf. 34]. And while it has been held that the protest did not necessarily need to specify under what provision the goods were dutiable (Heinze *v.* Miller, 144 U. S. 28, 12 S. Ct. 604, 36 L. ed. 333), yet in the recent case of Herrman *v.* Robertson, 152 U. S. 521, 14 S. Ct. 686, 38 L. ed. 538, a protest was held insufficient which failed to point out or suggest in any way the provision under which the goods should have been classified, and in effect raised only the question as to under which of two clauses the classification should be made. There is a tendency, however, to depart from this under the latter act, and the cause thereof is perhaps hinted at rather strongly in the very recent case of U. S. *v.* Shea, 114 Fed. 38, 51 C. C. A. 664, where the distinction is made that under the former acts if the importer was successful in the courts he could recover from the treasury the excess paid, together with the cost of the suit. While by the procedure under the act of 1890 the whole affair must be settled by the board of general appraisers, on appeal to which no cost is incurred.

1. Castner *v.* Magone, 32 Fed. 578 [*distinguishing* Pott *v.* Arthur, 19 Fed. Cas. No. 11,319, 15 Blatchf. 314]; Dieckerhoff *v.* Robertson, 32 Fed. 758; Sherman *v.* Hedden, 32 Fed. 756 (bill of particulars); Rickard *v.* Barney, 32 Fed. 581 (applying U. S. Rev. St. (1878) § 954 [U. S. Comp. St. (1901), p. 696]).

2. U. S. Rev. St. (1878) § 914 [U. S. Comp. St. (1901) p. 684].

3. Robertson *v.* Perkins, 129 U. S. 233, 9 S. Ct. 279, 32 L. ed. 686; Wedemeyer *v.* Lancaster, 30 Fed. 670; Muser *v.* Robertson, 17 Fed. 500, 21 Blatchf. 368.

The United States statutes are complied with when the complaint states that the payment was made under protest, and a bill of particulars is served within the time prescribed by statute showing that the protest and appeal were properly made within the prescribed time. Wedemeyer *v.* Lancaster, 30 Fed. 670; Muser *v.* Robertson, 17 Fed. 500, 21 Blatchf. 368. See also Beard *v.* Porter, 124 U. S. 437, 8 S. Ct. 556, 31 L. ed. 492, holding that inasmuch as the statute required the bill of particulars to be filed within a certain time, that declaration need not of itself show that the action was brought within the statutory time.

A replication was held to be inconsistent where it relied upon the promise made by the secretary of the treasury, the collector being considered merely as nominal defendant; former replications in the same action having been filed in which the promises made by the collector were relied upon. Andreae *v.* Redfield, 1 Fed. Cas. No. 368 [*affirmed* in 98 U. S. 225, 25 L. ed. 158].

Form of declaration.— The ordinary count in *indebitatus assumpsit* for money had and received is an appropriate declaration to recover excessive duties. Muser *v.* Robertson, 17 Fed. 500, 21 Blatchf. 368 [*citing* Elliott *v.* Swartwout, 10 Pet. (U. S.) 137, 9 L. ed. 373].

4. Rankin *v.* Hoyt, 4 How. (U. S.) 327, 11 L. ed. 996; Davies *v.* Miller, 91 Fed. 647, 34 C. C. A. 37; U. S. *v.* Patton, 46 Fed. 461; Weilbacher *v.* Merritt, 37 Fed. 85. *Compare* Ross *v.* Fuller, 17 Fed. 224.

In an action tried many years after the time of importation, the production of the protests from the proper repository raises the presumption that they were properly served, and therefore they are admissible as specified proof as to the party on whom or the time when they were served. Schell *v.* Fauche, 138 U. S. 562, 11 S. Ct. 376, 34 L. ed. 1040 [*affirming* 33 Fed. 336].

5. Earnshaw *v.* Cadwalader, 145 U. S. 247, 12 S. Ct. 851, 36 L. ed. 693; Merwin *v.* Magone, 70 Fed. 776, 17 C. C. A. 361 (holding that the plaintiff's evidence was entirely insufficient to overcome this burden); Jessup, etc., Paper Co. *v.* Cooper, 46 Fed. 186; Walker *v.* Seeberger, 38 Fed. 724; Fisk *v.* Seeberger, 38 Fed. 718; Hagedon *v.* Seeberger, 38 Fed. 401; Kidd *v.* Swartwout, 14 Fed. Cas.

of a certain act on the part of the importer it was presumed that he would have declined to be governed by the act if it had been performed.[6]

b. Admissibility. Evidence that the importer seasonably protested was competent.[7] So too records kept in conformity to treasury regulations[8] or the original protest[9] were admissible. And as the commercial designation of an importation when properly established would govern,[10] evidence tending to show such designation was admissible;[11] and likewise evidence tending to show that the examination and appraisal were not conducted in compliance with the statute was competent.[12]

6. TRIAL — a. Confined to Scope of Protest. As the object of the protest was also to confine the importer on the trial to the objections contemplated by him at the time of making it,[13] no objections could be taken, or matters offered in defense on the trial which were not stated therein.[14]

No. 7,756. *Compare* Kennedy *v.* Hartranft, 9 Fed. 18; Wilkinson *v.* Greely, 29 Fed. Cas. No. 17,672, 1 Curt. 439.

6. See Craig *v.* Maxwell, 6 Fed. Cas. No. 3,334, 2 Blatchf. 545, holding that it being the duty of a collector to take a bond of the importer to produce a consular certificate if the importer so desired, it must be presumed that the collector refused to be governed by said certificate if exhibited, and the parties must be considered as standing in the same relation as if it in fact had been so presented. See also Reynolds *v.* Maxwell, 20 Fed. Cas. No. 11,731, 2 Blatchf. 555, where the consular certificate with regard to the first of two importations entered within a short interval of time, having been rejected by the collector, it was held that it might be presumed that the collector acted as to the second entry with full knowledge of that certificate, and that the importer might avail himself of it to obtain a deduction of duties in the second case, it having been shown that the collector was in error in rejecting the certificate as to the first entry.

7. Hedden *v.* Iselin, 142 U. S. 676, 12 S. Ct. 330, 25 L. ed. 1155.

8. Grandmange *v.* Schell, 32 Fed. 655, holding that such records would be admissible without the testimony of the individual who made the entries.

9. Schell *v.* Fauche, 138 U. S. 562, 11 S. Ct. 376, 34 L. ed. 1040 [*affirming* 33 Fed. 336], and holding that the failure of the custom-house officials to make a record of such protest did not destroy the competency of the original as evidence, the object of the copy being merely to supply secondary evidence if the original should be lost.

10. See *supra*, II, B, 1, a, (III), (B).

11. Toplitz *v.* Hedden, 146 U. S. 252, 13 S. Ct. 70, 36 L. ed. 961; Robertson *v.* Salomon, 130 U. S. 412, 9 S. Ct. 559, 32 L. ed. 995; Erhardt *v.* Ullman, 51 Fed. 414, 2 C. C. A. 319.

Likewise if the trade designation is relied upon, evidence showing such designation at the time of importation will be admissible, although it be offered years after the statute under which they were held dutiable was enacted. Pickhardt *v.* Merritt, 132 U. S. 252, 10 S. Ct. 80, 33 L. ed. 353.

Expert testimony as to whether the goods were known in commerce as goods of similar description to other specified goods would not be admissible, inasmuch as its effect would be to put the opinion of such experts in the place of that of the jury upon a question which was as well understood by the community at large as by merchants and importers. Schneider *v.* Barney, 113 U. S. 645, 5 S. Ct. 624, 28 L. ed. 1130.

12. Mustin *v.* Cadwalader, 123 U. S. 369, 8 S. Ct. 158, 31 L. ed. 169; Oelbermann *v.* Merritt, 123 U. S. 356, 8 S. Ct. 151, 31 L. ed. 164; Magone *v.* Origet, 70 Fed. 778, 17 C. C. A. 363.

But an appraiser cannot be asked if he complied with the instructions of the treasury department, since such question would merely call for his opinion. Auffmordt *v.* Hedden, 137 U. S. 310, 11 S. Ct. 103, 34 L. ed. 674 [*affirming* 30 Fed. 360].

If no reappraisement was asked for in the protest, evidence concerning a conversation with regard to such reappraisement would be incompetent. Origet *v.* Hedden, 155 U. S. 228, 15 S. Ct. 92, 39 L. ed. 130.

Samples would not be admissible in evidence upon a trial many years after the date of importation, unless they consisted of a part of the importation itself, or unless there was very strong evidence of a substantial identity between the importation and the sample; testimony tending to show that there was somewhat of a resemblance is not sufficient to render such samples admissible. Barney *v.* Rickard, 157 U. S. 352, 15 S. Ct. 642, 39 L. ed. 730.

Variance. — An answer alleging that the amount collected by the customs officials was the amount properly due according to the rate of duty imposed by law on the goods in question may be supported by evidence that they were liable to such rate of duty on grounds other than that on which the assessment was at first made. Herrman *v.* Miller, 127 U. S. 363, 8 S. Ct. 1090, 32 L. ed. 186.

13. Davies *v.* Arthur, 96 U. S. 148, 24 L. ed. 758 [*citing* Thomson *v.* Maxwell, 23 Fed. Cas. No. 13,983, 2 Blatchf. 385; Warren *v.* Peaslee, 29 Fed. Cas. No. 17,198, 2 Curt. 231]; Shaw *v.* Prior, 68 Fed. 421.

14. Davies *v.* Arthur, 96 U. S. 148, 24 L. ed. 758; Gelpcke *v.* Dubuque, 1 Wall.

b. Province of Court and Jury. Under the rule ably and succinctly stated by the supreme court[15] questions as to whether or not an article was included within the commercial or trade meaning of a word or clause,[16] the similarity of an article to another article,[17] whether the chief or preponderant use of an article was such as to bring it within the purview of a term or expression,[18] or whether the proceedings on appraisement substantially complied with the statute,[19] were questions of fact for the jury; while the interpretation of words of common speech was within judicial knowledge and was a matter of law.[20]

7. VERDICT — a. In General. The verdict was construed in the light of and with reference to the terms of the protest,[21] although it would seem that a ver-

(U. S.) 175, 17 L. ed. 520; Converse *v.* Burgess, 18 How. (U. S.) 413, 15 L. ed. 455 [*affirming* 4 Fed. Cas. No. 2,154, 2 Curt. 216]; Hahn *v.* Erhardt, 78 Fed. 620, 24 C. C. A. 265; U. S. *v.* Curley, 66 Fed. 720; Fisk *v.* Seeberger, 38 Fed. 718; Legg *v.* Hedden, 37 Fed. 861; Chung Yune *v.* Kelly, 14 Fed. 639, 8 Sawy. 415; Boker *v.* Redfield, 3 Fed. Cas. No. 1,606*a*; Cornett *v.* Lawrence, 6 Fed. Cas. No. 3,241, 2 Blatchf. 512; Crowley *v.* Maxwell, 6 Fed. Cas. No. 3,449, 3 Blatchf. 401; Durand *v.* Lawrence, 8 Fed. Cas. No. 4,187, 2 Blatchf. 396; Kriesler *v.* Morton, 14 Fed. Cas. No. 7,933, 1 Curt. 413; Maillard *v.* Lawrence, 16 Fed. Cas. No. 8,972, 3 Blatchf. 378; Norcross *v.* Greely, 18 Fed. Cas. No. 10,294, 1 Curt. 114; Pierson *v.* Maxwell, 19 Fed. Cas. No. 11,159, 2 Blatchf. 507; Stalker *v.* Maxwell, 22 Fed. Cas. No. 13,283, 3 Blatchf. 138; Swanston *v.* Morton, 23 Fed. Cas. No. 13,677, 1 Curt. 294; Thomson *v.* Maxwell, 23 Fed. Cas. No. 13,983, 2 Blatchf. 385; Tucker *v.* Maxwell, 24 Fed. Cas. No. 14,224, 2 Blatchf. 517; Wilson *v.* Lawrence, 30 Fed. Cas. No. 17,816, 2 Blatchf. 514. See also Warburg *v.* Maxwell, 29 Fed. Cas. No. 17,142, 3 Blatchf. 382.

Thus under a protest which stated only that the invoice value was correct the plaintiff could not show that the appraisement was not made in conformity to the law. Kriesler *v.* Morton, 14 Fed. Cas. No. 7,933, 1 Curt. 413.

A new trial should be granted upon the payment of costs, where it appeared that certain papers in the custom-house had been lost, and also where it was doubtful whether the truth of the transaction appeared on the trial, for want of preparation of the defense. Boker *v.* Bronson, 3 Fed. Cas. No. 1,605, 4 Blatchf. 472. So too under the later practice, where because of the insufficiency of the record the court was unable to direct judgment for either party, the cause should be remanded for a new trial. Saltonstall *v.* Birtwell, 150 U. S. 417, 14 S. Ct. 169, 37 L. ed. 1128.

15. Sonn *v.* Magone, 159 U. S. 417, 421, 16 S. Ct. 67, 40 L. ed. 203, where the court say: "As stated by counsel for the government, a verdict should not be directed where, before the meaning of the statute can be known, it is necessary to learn from conflicting evidence the controlling use of the article in question; or its similitude to some other article; or the value of its component materials; or its weight and fitness; or whether labor is necessary to fit it for use by the consumer; or its commercial designation."

16. Bogle *v.* Magone, 152 U. S. 623, 14 S. Ct. 718, 38 L. ed. 574 [*reversing* 40 Fed. 226]; Toplitz *v.* Hedden, 146 U. S. 252, 13 S. Ct. 70, 36 L. ed. 961; Robertson *v.* Salomon, 144 U. S. 603, 12 S. Ct. 752, 36 L. ed. 560; Smith *v.* Field, 105 U. S. 52, 26 L. ed. 1007; Recknagel *v.* Murphy, 102 U. S. 197, 26 L. ed. 130; Tyng *v.* Grinnell, 92 U. S. 467, 23 L. ed. 733; Curtis *v.* Martin, 3 How. (U. S.) 106, 11 L. ed. 516 [*affirming* 16 Fed. Cas. No. 9,160]; *In re* Zante Currants, 73 Fed. 183; *In re* Herter Bros., 50 Fed. 72; Baumgarten *v.* Magone, 50 Fed. 69; Weilbacher *v.* Merritt, 37 Fed. 85; Hansen *v.* Robertson, 29 Fed. 686; Ross *v.* Fuller, 17 Fed. 224; Bacon *v.* Bancroft, 2 Fed. Cas. No. 714, 1 Story 341; Duden *v.* Arthur, 7 Fed. Cas. No. 4,112; Duden *v.* Murphy, 7 Fed. Cas. No. 4,113; Hadden *v.* Hoyt, 11 Fed. Cas. No. 5,891; Hall *v.* Hoyt, 11 Fed. Cas. No. 5,934; Hutton *v.* Schell, 12 Fed. Cas. No. 6,962; Beatty *v.* U. S., Ct. Cl. (Dev.) § 244.

17. Herrman *v.* Miller, 127 U. S. 363, 8 S. Ct. 1090, 32 L. ed. 186; Greenleaf *v.* Goodrich, 101 U. S. 278, 25 L. ed. 845 [*affirming* 10 Fed. Cas. No. 5,778, 1 Hask. 586]; Wills *v.* Russell, 100 U. S. 621, 25 L. ed. 607; Barney *v.* Schmeider, 9 Wall. (U. S.) 248, 19 L. ed. 648; Gamble *v.* Mason, 9 Fed. Cas. No. 5,209.

18. Magone *v.* Heller, 150 U. S. 70, 14 S. Ct. 18, 37 L. ed. 1001 [*reversing* 38 Fed. 908]; Robertson *v.* Oelschlaeger, 137 U. S. 436, 11 S. Ct. 148, 34 L. ed. 744; Hartranft *v.* Langfeld, 125 U. S. 128, 8 S. Ct. 732, 31 L. ed. 672.

19. Hedden *v.* Iselin, 142 U. S. 676, 12 S. Ct. 330, 35 L. ed. 1155; Converse *v.* Burgess, 18 How. (U. S.) 413, 15 L. ed. 455.

Whether an article is a new preparation or whether it is an article other than that claimed by either the importer or the customs officials is a question of fact for the jury. Arthur *v.* Herold, 100 U. S. 75, 25 L. ed. 568.

20. Sonn *v.* Magone, 159 U. S. 417, 16 S. Ct. 67, 40 L. ed. 203; Saltonstall *v.* Wiebusch, 156 U. S. 601, 15 S. Ct. 476, 39 L. ed. 549; Marvel *v.* Merritt, 116 U. S. 11, 6 S. Ct. 207, 29 L. ed. 550; Vom Cleff *v.* Magone, 57 Fed. 198; Nix *v.* Hedden, 39 Fed. 109.

21. Bartels *v.* Schell, 16 Fed. 341; Bartels *v.* Redfield, 16 Fed. 336.

dict might be so rendered that it would be conclusive upon the parties as to the sufficiency of the protest.[22]

b. Amount of Recovery — Interest — Costs. The courts seem to be at variance in regard to whether or not interest should be allowed upon a recovery by the claimant; in one case it was held that it should not,[23] while in others the legality of such allowance did not seem to be questioned;[24] although if the plaintiff was guilty of laches in the prosecution of his claim the rule was otherwise.[25]

V. LIABILITY FOR EVASION OR VIOLATION OF CUSTOMS LAWS.

A. Purpose and Nature of Liability Created. As a protection to the revenue system as well as to honest importers,[26] provisions having in view the prevention of an illegal or illicit traffic[27] have been enacted providing for a criminal prosecution for the commission of certain acts;[28] in other instances for a forfeiture of the goods imported;[29] while in still others a liability to a penalty is imposed for certain acts or omissions.[30]

B. Judicial Construction of Provisions. While of course some of the provisions of these statutes are clearly penal,[31] those sections imposing forfeitures or penalties are sometimes spoken of and construed by the courts as being of a highly penal nature;[32] in other cases they are spoken of as more of a remedial character;[33] but in either case the courts are agreed that they should be so construed as most effectually to accomplish the intention of the legislature in passing them;[34]

22. Tomes *v.* Redfield, 24 Fed. Cas. No. 14,085, 7 Blatchf. 139; Greenleaf *v.* Schell, 10 Fed. Cas. No. 5,782, 6 Blatchf. 225, where it was said: "It frequently happens, that, in a verdict in a suit to recover back duties paid under protest, the verdict is expressly made, on its face, subject to the opinion of the court as to the sufficiency of the protest, or that the verdict provides, that, if it shall appear, on the adjustment of the referee or otherwise, that the question of the timeliness of the protest, or the question of a prospective protest, is involved, the verdict shall be opened. But there is no such reservation in the verdict now in question. That being so, the parties cannot, on the hearing before the referee, or by exception to his report, go back of the verdict, or go at all into any questions in regard to the protest."

The general rule that judgment will not be set aside when the party asking the same has been clearly guilty of laches applies to this the same as to other actions. Bronson *v.* Schulten, 104 U. S. 410, 26 L. ed. 997.

23. White *v.* Arthur, 10 Fed. 80, 20 Blatchf. 237 [*citing* U. S. *v.* Sherman, 98 U. S. 565, 25 L. ed. 235].

24. Stewart *v.* Schell, 31 Fed. 65; Bartells *v.* Redfield, 27 Fed. 286, 23 Blatchf. 486; Ross *v.* Fuller, 17 Fed. 224; Bartels *v.* Redfield, 16 Fed. 336.

25. Stewart *v.* Schell, 31 Fed. 65; Bartells *v.* Redfield, 27 Fed. 286, 23 Blatchf. 486.

The right of the plaintiff to recover costs in such action is of course wholly dependent upon the provisions of the statute providing for such allowance at the time of the institution of the suit. See, generally, COSTS. For construction of the earlier statutes regarding such allowances see Coggill *v.* Lawrence, 6 Fed. Cas. No. 2,957, 2 Blatchf. 304; Field *v.* Schell, 9 Fed. Cas. No. 4,771, 4 Blatchf. 435.

26. U. S. *v.* Nineteen Bails of Tobacco, 112 Fed. 779, 780; U. S. *v.* Six Hundred and Sixty-One Bales of Tobacco, 27 Fed. Cas. No. 16,297.

27. U. S. *v.* Curtis, 16 Fed. 184.

28. See *infra*, V, C, 1 *et seq.*

29. See *infra*, V, C, 2, a *et seq.*

30. See *infra*, V, C, 3 *et seq.*

31. See *infra*, V, C, 1 *et seq.*

32. U. S. *v.* Eighty-four Boxes of Sugar, 7 Pet. (U. S.) 553, 8 L. ed. 745; U. S. *v.* One Thousand One Hundred and Fifty and One-Half Pounds of Celluloid, 82 Fed. 627, 27 C. C. A. 231; U. S. *v.* Wiglesworth, 28 Fed. Cas. No. 16,690, 2 Story 369, 374, where it is said: "Revenue Statutes are in no just sense either remedial laws, or laws founded upon any permanent public policy, and, therefore, are not to be liberally construed."

For this reason an action to enforce a forfeiture abates on the death of the defendant, and cannot be revived against his legal representatives. U. S. *v.* Riley, 104 Fed. 275 [*following* U. S. *v.* Riley, 88 Fed. 480; U. S. *v.* De Goer, 38 Fed. 80].

They are not criminal within the meaning of the constitutional provision that the accused "in a criminal prosecution" shall have the right to be confronted with the witnesses against him; and therefore a deposition of a living witness may be read in an action of this nature. U. S. *v.* Zucker, 161 U. S. 475, 16 S. Ct. 641, 40 L. ed. 777.

33. Cliquot *v.* U. S., 3 Wall. (U. S.) 114, 18 L. ed. 116 (where it is said: "They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong and promote the public good"); Anglo-California Bank *v.* Secretary of Treasury, 76 Fed. 742, 22 C. C. A. 527; U. S. *v.* Allen, 39 Fed. 100.

34. Smythe *v.* Fiske, 23 Wall. (U. S.) 374, 23 L. ed. 47; Taylor *v.* U. S., 3 How. (U. S.)

but this must not be considered as obviating the necessity of a case coming within the letter as well as within the spirit and purpose of the statute.[35]

C. Enforcement of — 1. By Criminal Prosecution[36] — a. Fraudulent Evasion of Duties — (I) *Nature and Elements of Offenses.* While for many infractions of the customs laws penalties and forfeitures are imposed,[37] it has also been thought proper, if not in fact necessary, to a uniform and efficient enforcement of such laws, that the wrong-doer should for some offenses be amenable in a criminal prosecution as well;[38] such liability is imposed for the making of false statements in declarations accompanying the invoice or entry;[39] the fraudulent or intentional importation or bringing into the United States, or the assistance in such act, of any merchandise contrary to law, or the receipt, concealment, or sale of the same after its being so brought in;[40] the knowing and wilful smuggling

197, 11 L. ed. 559, 565; U. S. *v.* One Thousand One Hundred and Fifty and One-Half Pounds of Celluloid, 82 Fed. 627, 27 C. C. A. 231; The Coquitlam, 77 Fed. 744, 23 C. C. A. 438 [*reversing* 57 Fed. 706]; Anglo-California Bank *v.* Secretary of Treasury, 76 Fed. 742, 22 C. C. A. 527; Twenty-Eight Cases of Wine, 24 Fed. Cas. No. 14,281, 2 Ben. 63; U. S. *v.* Breed, 24 Fed. Cas. No. 14,638, 1 Sumn. 159; U. S. *v.* Twenty-Five Cases of Cloths, 28 Fed. Cas. No. 16,563, Crabbe 356; U. S. *v.* Willetts, 28 Fed. Cas. No. 16,699, 5 Ben. 220.

35. U. S. *v.* One Thousand One Hundred and Fifty and One-Half Pounds of Celluloid, 82 Fed. 627, 27 C. C. A. 231. See also An Ullage Box of Sugar, 24 Fed. Cas. No. 14,324, 1 Ware 355 (where it is said: "The court cannot create penalties and forfeitures by implication. They must be found in the plain letter of the law, and not raised by inference and construction"); U. S. *v.* Ninety Demijohns of Aquadiente, 27 Fed. Cas. No. 15,887 [*affirmed* in 8 Fed. 485, 4 Woods 637].

36. See, generally, Criminal Law.

37. See *infra*, V, C, 2, 3.

38. See *infra*, notes 39–44.

Resisting customs officials see *infra*, V, C, 1, b.

**The maliciously breaking into a bonded freight car containing merchandise while being transported through the United States is not punishable under U. S. Rev. St. (1878) § 2998 [U. S. Comp. St. (1901) p. 1977], if the car is merely in transit between two places in the British provinces, as this section is applicable only to an importation *en route* between certain ports of entry and other places within the United States. U. S. *v.* Durwood, 49 Fed. 446.

39. Customs Administrative Act (1890), § 6. Under the statute the offense is not complete until the false declaration therein referred to is filed or offered to be filed with the collector when making or attempting to make an entry of the goods, and the presentment of a false declaration to the collector for the purpose of making an entry of the goods is necessary to the completion of the offense; and while section 9 of the same act covers offenses of a very analogous nature, yet, inasmuch as such section provides a lighter punishment than section 6, it cannot be deemed to include the specified cases covered by section 6. Inasmuch, however, as the object of the section is to secure truthful declarations of the entry of the merchandise according to the actual facts, the object or intent of the accused to defraud the United States in making the false statement is not material; it being sufficient to show that it was knowingly false. U. S. *v.* Fawcett, 86 Fed. 900.

40. U. S. Rev. St. (1878) § 3082 [U. S. Comp. St. (1901) p. 2014]. This offense does not include frauds or illegalities concerning invoices of goods, or the payment of duties thereon which are of such nature that they can only occur after the importation is accomplished and the merchandise brought within the cognizance of the customs officials. U. S. *v.* Kee Ho, 33 Fed. 333, 13 Sawy. 143. And it also seems that there must be a secrecy or concealment, or some intent to defraud the revenue. U. S. *v.* Thomas, 28 Fed. Cas. No. 16,473, 2 Abb. 114, 4 Ben. 370. For further construction of this provision see U. S. *v.* Ortega, 66 Fed. 713, holding that it applied to an importation of cigars in quantities of less than three thousand, notwithstanding the provisions of U. S. Rev. St. §§ 3081, 2652 [U. S. Comp. St. (1901) pp. 2014, 1821].

Sufficiency of evidence to sustain conviction. — Under U. S. Rev. St. (1878) § 3082 [U. S. Comp. St. (1901) p. 2014], which provides that whenever on trial for a violation thereof, the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction unless he can explain his possession to the satisfaction of the jury, it has been held that such provision did not relieve the prosecution from the ordinary rules of evidence, but the fact that the goods were smuggled must be first proved, and when such proof had been made then the fact of possession would authorize the conviction of the defendant. U. S. *v.* Lot of Jewelry, 26 Fed. Cas. No. 15,626, 13 Blatchf. 60. See also U. S. *v.* Fraser, 42 Fed. 140.

The offense of receiving goods under this section is not a felony so as to secure to the defendant the right to peremptory challenges as provided by U. S. Rev. St. (1878) § 819 [U. S. Comp. St. (1901) p. 629], although it is punishable by a fine and imprisonment, the latter of which may be in a state penitentiary. This arises from the fact that the

or clandestine introduction,[41] with intent to defraud the revenue of the United States, of goods lawfully dutiable, or attempting to pass through the custom-house any false, forged, or fraudulent invoice;[42] the knowingly effecting or aiding in effecting any entering of merchandise at less than its true weight, or upon a false classification as to its quality or value;[43] or the making or attempting to make an entry by means of any false or fraudulent invoice, affidavit, statement, etc., or of any false or fraudulent appliance whatsoever.[44]

offense itself is subordinate to that of smuggling, which is expressly declared by section 2865 of the statute to be a misdemeanor, although the penalty is substantially the same as for the receiving of such goods. Reagan *v.* U. S., 157 U. S. 301, 15 S. Ct. 610, 39 L. ed. 709.

41. **Meaning of "smuggled or clandestinely introduced."**— In Keck *v.* U. S., 172 U. S. 434, 19 S. Ct. 254, 43 L. ed. 505, it was argued that inasmuch as the concealment of goods at the time of entering the waters of the United States tended to render possible subsequent smuggling, such acts should be considered and treated as smuggling; but the court commenting upon the distinctions of this offense as laid down in 1 Russell Crimes (6th ed.) 277; Bacon Abr. tit. "Smuggling and Customs"; 4 Bl. Comm. 154, said: "A review of the principal statutes enacted in this country regulating the collection of customs duties establishes that so far as they embrace legislation designed to prevent the evasion of duties they proceeded upon the theory of the English law on the same subject, that is, that they forbade all the acts which were deemed by the law maker means to the end of smuggling or clandestinely introducing dutiable goods into the country in violation of law, and which were likewise considered as efficient to enable the offender to reap the expected benefits of his wrongful acts. Therefore, they forbade and prescribed penalties for everything which could precede smuggling or follow it, without specifically making a distinct and separate offense designated smuggling or clandestine introduction . . . it was not until 1842 that a specified penalty for smuggling or clandestine introduction *eo nomine* was enacted. When the significance of the word 'smuggling' as understood at common law is borne in mind, and the history of the English legislation is considered, and the development of our own is brought into view, it becomes manifest that the statute of 1842 was not intended to make smuggling embrace each and all of the acts heretofore prohibited which could precede or which might follow smuggling. . . . The inference that the common law meaning of the word 'smuggling' is to be implied is cogently augmented by the fact that the statute also uses in connection with it words generally known in the law of England as a paraphrase for smuggling (i. e. clandestinely introduced); in reason this is tantamount to an express adoption of the common law signification." Fuller, C. J., Brown, Harlan, and Brewer, JJ., dissented upon the ground that the smuggling or clandestine introduction was complete within the meaning of the statute, when the goods were voluntarily brought within a port of entry with the intent to unlade them.

42. U. S. Rev. St. (1878) § 2865 [U. S. Comp. St. (1901) p. 1905].

The intent to smuggle is not the offense contemplated by the statute; hence it was held that a party would not be liable thereunder who had concealed merchandise on board an incoming vessel with the intent and for the purpose of clandestinely introducing the same into the United States, without the payment of the lawful duties thereon; and even although the concealment continued until after the vessel had entered the waters of a port of the United States, if at such time the goods were delivered up. Keck *v.* U. S., 172 U. S. 434, 19 S. Ct. 254, 43 L. ed. 505. *Compare dictum* in U. S. *v.* Thomas, 28 Fed. Cas. No. 16,473, 2 Abb. 114, 4 Ben. 370. See also U. S. *v.* Nolton, 27 Fed. Cas. No. 15,897, 5 Blatchf. 427 (decided in 1867), holding that importations from Canada into the United States were governed by the act of March 2, 1821, and that an indictment would not lie under the general statute for smuggling.

Aider or abetter in smuggling.— One who goes abroad with money furnished him by another party for the purpose of buying goods to be smuggled home, and causes the same to be delivered to a carrier, who actually accomplishes this purpose, would be an aider or abetter, within the meaning of this statute, although his services be rendered gratuitously. U. S. *v.* Martin, 26 Fed. Cas. No. 15,729, 1 Hask. 166.

43. U. S. Rev. St. (1878) § 5445 [U. S. Comp. St. (1901) p. 3678].

The means by which the entry was effected is not an element of the offense; the only point material to the offense being whether or not the party effecting or aiding in effecting an entry, in violation of the provisions in some one or more of the specific ways, and whether he knew that his acts were in violation of the law. U. S. *v.* Ballard, 24 Fed. Cas. No. 14,506.

Where a purchaser of goods is fully informed by the seller that false invoices have been made out and forwarded to him, and he acquiesces therein, and avails himself of such invoices, he is estopped from saying that he did not himself perpetrate the unlawful act. U. S. *v.* Merriam, 26 Fed. Cas. No. 15,759.

44. Customs Administrative Act (1890), § 9. Under this statute loss of lawful duties would not be a necessary element of the offense. U. S. *v.* Cutajar, 60 Fed. 744. Nor,

(II) *INDICTMENT*[45]— (A) *Time of Finding.* The indictment for crimes arising under our revenue laws is sufficient in time if found within five years next after the commission of the offense.[46]

(B) *Sufficiency.* While in determining the sufficiency of indictments for a violation of the above provisions, the rule that it is usually sufficient to describe such offenses in the language of the statute is often adverted to,[47] the equally well established qualification of this rule that unless the statute so distinguishes or individuates the offense that the defendant may know with certainty the offense for which he is really to be tried, such description is insufficient, applies;[48] hence in a count based upon a provision referring to an importation "contrary to law,"[49] it would be necessary to state in what the illegality of the importation consisted or the specific provision violated.[50] But if the indictment be for fraudulently effecting an entry of goods subject to duties,[51] it is held that the specified acts by which the entry was effected need not be set forth.[52] So too a count for buying or receiving goods imported contrary to law need not describe the offense committed in the original importation with the same particularity as an indictment against such original offender.[53]

b. Resistance of Customs Officials — (I) *IN GENERAL.* The statute also provides for a criminal prosecution for the resistance of officers of the customs[54] or their assistants in the execution of their duties.[55] Under the statute it has been

it would seem, is its application limited to the entry of goods at the custom-house only, but would include such attempts wherever made. U. S. *v.* Boyd, 24 Fed. 692.

45. See, generally, INDICTMENTS AND INFORMATIONS.

46. U. S. *v.* Hirsch, 100 U. S. 33, 25 L. ed. 539; *In re* Landsberg, 14 Fed. Cas. No. 8,041; U. S. *v.* Shorey, 27 Fed. Cas. No. 16,282.

47. The indictment is not open to the charge of duplicity when founded on Customs Administrative Act (1890), § 9, because it charges in a single count a false entry, by a false and fraudulent affidavit, a false and fraudulent paper, and a false and fraudulent written statement, as the making of these instruments are all acts connected with the same transaction. U. S. *v.* Cutajar, 60 Fed. 744.

48. U. S. *v.* Kee Ho, 33 Fed. 333, 13 Sawy. 143.

49. U. S. Rev. St. (1878) § 3082 [U. S. Comp. St. (1901) p. 2014].

50. Keck *v.* U. S., 172 U. S. 434, 19 S. Ct. 254, 43 L. ed. 505; U. S. *v.* Kee Ho, 33 Fed. 333, 13 Sawy. 143; U. S. *v.* Claflin, 25 Fed. Cas. No. 14,798, 13 Blatchf. 178; U. S. *v.* Thomas, 28 Fed. Cas. No. 16,473, 4 Ben. 370, 2 Abb. 114.

51. U. S. Rev. St. (1878) § 5445 [U. S. Comp. St. (1901) p. 3678].

52. U. S. *v.* Ballard, 24 Fed. Cas. No. 14,506; U. S. *v.* Moller, 26 Fed. Cas. No. 15,794, 16 Blatchf. 65. *Contra,* U. S. *v.* Bettilini, 24 Fed. Cas. No. 14,587, 1 Woods 654.

Averment of scienter.— It is not necessary to specifically aver that defendant knew that the duty had not been paid on the article imported, where it is averred that the introduction of the article was made wilfully, unlawfully, knowingly, and with intent to defraud the revenue of the United States. Dunbar *v.* U. S., 156 U. S. 185, 15 S. Ct. 325, 39 L. ed. 390 [*affirming* 60 Fed. 75].

Description of articles imported.— It would seem, under these statutes, that the description of the article alleged to be unlawfully imported or entered is sufficient if it is clear to the common understanding what articles are intended to be implicated in the violation of the law. Keck *v.* U. S., 172 U. S. 434, 19 S. Ct. 254, 43 L. ed. 505; Dunbar *v.* U. S., 156 U. S. 185, 15 S. Ct. 325, 39 L. ed. 390; U. S. *v.* Gardner, 42 Fed. 832; U. S. *v.* Claflin, 25 Fed. Cas. No. 14,798, 13 Blatchf. 178.

The offense of effecting an entry or aiding or assisting in effecting an entry may be charged conjunctively in the same count of the indictment. U. S. *v.* Bettilini, 24 Fed. Cas. No. 14,587, 1 Woods 654.

53. U. S. *v.* Kee Ho, 33 Fed. 333, 13 Sawy. 143; U. S. *v.* Claflin, 25 Fed. Cas. No. 14,798, 13 Blatchf. 178, holding, however, that a mere statement that the goods had been imported and brought into the United States contrary to law was an insufficient allusion to the original offense.

54. Under the earlier statute of this nature, it was held that an inspector was an officer, the obstruction of whom was an offense, within the meaning of the statute. U. S. *v.* Sears, 27 Fed. Cas. No. 16,247, 1 Gall. 215.

55. U. S. Rev. St. (1878) § 5447 [U. S. Comp. St. (1901) p. 3678].

It is sufficient to support an indictment for the obstruction of an inspector in the performance of his duties to show that he was commissioned and sworn, and in the actual execution of the duties of his office, with the knowledge of the treasury department, and it is unnecessary to produce the commission of the collector who appointed him. U. S. *v.* Sears, 27 Fed. Cas. No. 16,247, 1 Gall. 215.

In discharge of duty.— If the official duties of an inspector require him to be at a par-

held that if the officer was attempting a seizure without probable cause,[56] or if the term for which he had been appointed had expired,[57] the indictment would not lie. But the fact that the object of the resistance is to avenge a private wrong will not constitute an exoneration of the offender.[58]

(II) *INDICTMENT.*[59] The indictment is sufficient if it substantially sets forth the offense, although not in the exact words of the statute, and the particular act and circumstances of obstruction or resistance need not be averred;[60] but an indictment which improperly describes the office of the party against whom the resistance was made is insufficient.[61]

2. By Forfeiture — a. Grounds of Forfeiture — (I) *Of Goods* — (A) *In General.* Aside from the provisions for the enforcement of the customs laws, which are more properly treated under separate provisions,[62] enactments should be noticed providing for the forfeiture of wines and liquors when the statutory regulations concerning the marks and certificates of the same are disregarded;[63] of any articles subject to duty, found in the baggage of any person arriving in the United States, which are not, at the time of making the entry for such baggage, mentioned to the collector by the passenger;[64] or of merchandise because of the unauthorized removal of the custom-house seal from the cars in which it is

ticular dock to await the arrival of a vessel, that he may superintend the discharge of her cargo, he would while waiting for her arrival be in the discharge of his duties, within the meaning of the statute, and an assault upon him under such circumstances would clearly fall within the meaning and intent of the law. U. S. *v.* McEwan, 44 Fed. 594.

56. And when the facts are given the question as to what constitutes probable cause is one of law. U. S. *v.* Gay, 25 Fed. Cas. No. 15,193, 2 Gall. 359.

57. U. S. *v.* Wood, 28 Fed. Cas. No. 16,754, 2 Gall. 361, where it was held that inasmuch as the office of an inspector ceased with that of the collector who had appointed him, an indictment for resisting such inspector would not lie if the offense was committed after the resignation of the collector, and before the inspector had been reappointed by a succeeding collector.

58. U. S. *v.* Keen, 26 Fed. Cas. No. 15,511, 5 Mason 453.

59. See, generally, INDICTMENTS AND INFORMATIONS.

60. U. S. *v.* Bachelder, 24 Fed. Cas. No. 14,490, 2 Gall. 15, where the words of the statute being, "If any person shall forcibly resist, prevent, or impede," etc., an averment that the defendant "did with force and arms violently and unlawfully resist, prevent and impede," etc., was held sufficient.

For form of indictment for resisting customs officials see U. S. *v.* Bachelder, 24 Fed. Cas. No. 14,490, 2 Gall. 15.

61. U. S. *v.* Phelps, 27 Fed. Cas. No. 16,041, Brunn. Col. Cas. 89, 4 Day (Conn.) 469, where, on an indictment against an inspector of the customs, it appeared that the party to whom the resistance was made was an assistant surveyor.

62. See *infra*, V, C, 2, a, (I), (B) *et seq.*

63. For the construction of provisions of this character see Sixty Pipes of Brandy, 10 Wheat. (U. S.) 421, 6 L. ed. 356; U. S. *v.* Eighteen Pipes Distilled Spirits, 25 Fed. Cas. No. 15,033*a*; U. S. *v.* Half Barrel, etc., 26 Fed. Cas. No. 15,280, 5 Sawy. 594, 6 Sawy. 63; U. S. *v.* One Half Barrel Brandy, 27 Fed. Cas. No. 15,931. And see also Six Hundred and Fifty-One Chests of Tea *v.* U. S., 22 Fed. Cas. No. 12,916, 1 Paine 499.

Such provisions do not comprehend wrecked goods, or goods found in a vessel deserted by her crew, and where it was necessary for the preservation of the goods to take them to the nearest accessible part of the coast. Under such circumstances, if a revenue officer should not be present to take charge of them, the single circumstance of their being found unmarked and unaccompanied with certificates would not of itself be sufficient to forfeit them. Peisch *v.* Ware, 4 Cranch 347, 2 L. ed. 643.

64. U. S. *v.* One Pearl Necklace, 111 Fed. 164, 49 C. C. A. 287, 56 L. R. A. 130; U. S. *v.* Nine Trunks, 27 Fed. Cas. No. 15,885.

But a forfeiture can be claimed only when an attempt to make an entry has been made in the manner prescribed. U. S. *v.* Ninety-Five Boxes, etc., 27 Fed. Cas. No. 15,891.

Sufficient mention of article to avoid forfeiture.— It would seem that if at any time while the entry is being made, but before it is completed, there is a disclosure by the passenger which is sufficient to put the officer upon inquiry as to the dutiable character of any of the contents of the packages, that such articles must be considered as "mentioned" within the meaning of the statute, notwithstanding they were not mentioned in the documents. U. S. *v.* One Pearl Necklace, 111 Fed. 164, 49 C. C. A. 287, 56 L. R. A. 130.

That the form of declaration prepared by the treasury department for the convenience of passengers, and to facilitate the making of a sufficient entry of their baggage, is misleading and unintelligible in form, and, on account of its imperspicuity has a tendency to befog the understanding of a passenger, does not relieve the passenger from the neces-

being transported.[65] Likewise prohibited goods are *ipso facto* forfeited by the act of importation.[66]

(B) *Concealment of Goods.* Provisions have also from the beginning of our tariff acts been enacted, providing that the concealment of dutiable goods should be punished by a forfeiture of the same.[67]

(C) *False Invoice or Statement.* As any detected undervaluation or suspected undervaluation of goods by an importer imposes upon the government the trouble and necessity of an appraisal,[68] statutes have been enacted providing for the forfeiture of goods attempted to be entered at other than their true value,[69] by a false or fraudulent invoice, affidavit, or other false statement or practice.[70]

sity of making the disclosures provided by statute; and the simple fact that the customs officer, in assisting her in what she was legally bound to do, did not exercise the proper care to correct the printed forms presented to her does not relieve her of the consequences of such omission. U. S. *v.* One Pearl Necklace, 111 Fed. 164, 49 C. C. A. 287, 56 L. R. A. 130.

If the goods have been successfully passed through the custom-house without discovery, it would seem that this particular section of the statute (U. S. Rev. St. (1878) § 2802 [U. S. Comp. St. (1901) p. 1873]) would have no application, but such goods would clearly be forfeitable under the provisions of section 3082 which in a well-considered case is held to also apply to goods imported in the baggage of a passenger. U. S. *v.* Five Packages of Tapestry, 114 Fed. 496.

65. U. S. *v.* Three Railroad Cars, 28 Fed. Cas. No. 16,513, 1 Abb. 196, where the court after a full construction of this statute concluded that a proceeding for the forfeiture on this ground cannot be maintained by virtue of this statute unless the facts in the case are such that a criminal prosecution would lie against the party who broke the seals, as provided for in the first part of the provisions of this section; and that therefore where the breaking was not done "wilfully," within the meaning of the statute, a proceeding for the forfeiture could not be maintained.

66. McLane *v.* U. S., 6 Pet. (U. S.) 404, 8 L. ed. 443. See also U. S. *v.* Jordan, 26 Fed. Cas. No. 15,498, 2 Lowell 537, the statutory provisions construed therein being repealed, however, by the act of 1874.

Prohibitions because of indecent or obscene nature.— Articles of merchandise incased in boxes embellished with pictures and drawings "too indelicate for family use" and which tend to the corruption of the public morals are within such prohibition. Anonymous, 1 Fed. Cas. No. 470.

67. U. S. Rev. St. (1878) §§ 3066, 3082 [U. S. Comp. St. (1901) pp. 2008, 2014].

Under section 3066 it is held that the concealment, within the meaning of the act, must be a concealment from the officers of the customs, the mere fact of being omitted from the manifest being of itself insufficient (U. S. *v.* Twenty-Six Diamond Rings, 28 Fed. Cas. No. 16,572, 1 Sprague 294), and is in fact a withdrawal of the goods from public view on account of their being subject to duties or from some fraudulent motive (U. S. *v.* Three Hundred and Fifty Chests of Tea, 12 Wheat. (U. S.) 486, 6 L. ed. 702), although the concealment need not be made by the owner or consignee, or by his procurement, or with his concurrence. Nor would the forfeiture be saved by an offer on the part of the owner to enter the goods as soon as he is aware of the arrival of the same. U. S. *v.* Certain Hogsheads of Molasses, 25 Fed. Cas. No. 14,766, 1 Curt. 276; U. S. *v.* Fifty-Eight Thousand Eight Hundred and Fifty Cigars, 25 Fed. Cas. No. 15,092. For further construction of this provision see U. S. *v.* Two Trunks, 28 Fed. Cas. No. 16,591, 6 Ben. 218.

With regard to section 3082 it is held that the mere act of resisting the officer of the customs, and of throwing packages from the window of a building, whereby they are entirely removed from the custody and control of the officer, would not in itself constitute a concealment within the meaning of this act. U. S. *v.* Farnsworth, 25 Fed. Cas. No. 15,072, 1 Mason 1. See also Bulkly *v.* Orms, Brayt. (Vt.) 124.

68. See *supra*, III, C, *et seq.*

69. For the statutory changes as to the manner of determining such value see *supra*, III, C, 1, b, (III) *et seq.*

70. Cliquot *v.* U. S., 3 Wall. (U. S.) 114, 18 L. ed. 116; U. S. *v.* Lion, 17 How. (U. S.) 98, 99, 15 L. ed. 58; U. S. *v.* Tricon, 17 How. (U. S.) 97, 15 L. ed. 57; U. S. *v.* Sixty-Seven Packages of Dry Goods, 17 How. (U. S.) 85, 15 L. ed. 54; Taylor *v.* U. S., 3 How. (U. S.) 197, 11 L. ed. 559; U. S. *v.* Nineteen Bales of Tobacco, 112 Fed. 779; U. S. *v.* Two Thousand One Hundred and Seventeen Bushels of Malt, 8 Fed. 224; Locke *v.* U. S., 15 Fed. Cas. No. 8,442, 2 Cliff. 574; Sinn *v.* U. S., 22 Fed. Cas. No. 12,906, 14 Blatchf. 550; Six Cases of Silk Ribbons, 22 Fed. Cas. No. 12,914, 3 Ben. 536; Three Thousand One Hundred and Nine Cases of Champagne, 23 Fed. Cas. No. 14,012, 1 Ben. 241; Twelve Hundred and Nine Quarter Casks, etc., of Wine, 24 Fed. Cas. No. 14,279, 2 Ben. 249; U. S. *v.* Baker, 24 Fed. Cas. No. 14,500, 5 Ben. 251; U. S. *v.* Barnes, 24 Fed. Cas. No. 14,523, 6 Ben. 183; U. S. *v.* Dry Ox and Cow Hides, 25 Fed. Cas. No. 14,995; U. S. *v.* Eight Hundred and Fifty-Five Boxes of Sugar, 25 Fed. Cas. No. 15,034; U. S. *v.* Eighty-Two Packages of Glass, 25 Fed. Cas. No. 15,038; U. S. *v.* Five Casks of Files, 25 Fed. Cas. No. 15,112; U. S. *v.* Fourteen Pack-

But to incur the forfeiture it is necessary that the invoice be produced for the purposes of an entry;[71] likewise the invoice must be one required by the statute, and a fraudulent valuation in a paper not so demanded, and of no avail at the custom-house, would not subject the goods to forfeiture.[72]

(D) *Omission From Manifest.* The statutes have also provided for the forfeiture of all goods belonging to or consigned to the master, officer, or crew of a ship, which are intentionally omitted from the manifest,[73] or for a forfeiture of

ages of Pins, 25 Fed. Cas. No. 15,151, Gilp. 235; U. S. *v.* One Case of Cashmere Shawls, 27 Fed. Cas. No. 15,923, 5 N. Y. Leg. Obs. 247; U. S. *v.* One Case of Watches, 27 Fed. Cas. No. 15,927*a*; U. S. *v.* One Thousand Four Hundred and Six Boxes of Sugar, 27 Fed. Cas. No. 15,959; U. S. *v.* Seventy-Eight Cases of Books, 27 Fed. Cas. No. 16,258, 2 Bond 271; U. S. *v.* Seventy-Eight Casks of White Wine, 27 Fed. Cas. No. 16,259; U. S. *v.* Sixteen Cases of Silk Ribbons, 27 Fed. Cas. No. 16,301; U. S. *v.* Sixteen Packages, 27 Fed. Cas. No. 16,303, 2 Mason 48; U. S. *v.* Sixty-Five Packages of Glass, 27 Fed. Cas. No. 16,305*a*; U. S. *v.* Thirty-Nine Thousand One Hundred and Fifty Cigars, 28 Fed. Cas. No. 16,464, 3 Ware 324; U. S. *v.* Thirty-One Boxes, etc., 28 Fed. Cas. No. 16,465*a*; U. S. *v.* Twelve Casks of Cudbear, 28 Fed. Cas. No. 16,553, Gilp. 507.

By whom made.— Under the present statute it would seem that the fraudulent entry, to incur forfeiture, must be made by the owner or someone in privy with him or for whose acts he is responsible, and although such entry, if made by a mere trespasser, would, under the statute, subject such person to a criminal prosecution, yet the goods themselves could not be forfeited. U. S. *v.* One Thousand One Hundred and Fifty and One-Half Pounds of Celluloid, 82 Fed. 627, 27 C. C. A. 231; U. S. *v.* Seventy-Eight Casks of White Wine, 27 Fed. Cas. No. 16,259.

The payment of duties and delivery of the goods to the importer (Clifton *v.* U. S., 4 How. (U. S.) 242, 11 L. ed. 957; Wood *v.* U. S., 16 Pet. (U. S.) 342, 10 L. ed. 987; In re Cloth Cases, 5 Fed. Cas. No. 2,902, Crabbe 335), or the giving of a warehousing bond (U. S. *v.* One Thousand Two Hundred and Ninety-One Bales of Tobacco, 27 Fed. Cas. No. 15,965, 2 Lowell 107) will not prevent a forfeiture if the valuation be in fact fraudulent, as to do so would allow a party to avail himself of his own fraud to defeat the purposes of justice. See also U. S. *v.* Eighty-Two Packages of Glass, 25 Fed. Cas. No. 15,038.

What constitutes fraudulent invoice.— Under a recent construction of the present statute it would seem that a fraudulent invoice sufficient to warrant a forfeiture of the importation would consist in a statement substantially false which, when used upon the entry of the goods, would naturally tend to defeat the rights of the United States in regard to the amount of the duties which it should receive and which misstatement would inure to the benefit of the owner. U. S. *v.* Nineteen Bales of Tobacco, 112 Fed. 779.

71. And therefore, although the government may be able to prove that a false invoice has in fact been made up with intent to evade the revenue laws, and is in possession of the claimants, yet, if such invoice has not been produced by them, the government must proceed according to the directions of the revenue laws when no invoice is produced or entry made and cannot claim a forfeiture. U. S. *v.* Twenty-Eight Packages of Pins, 28 Fed. Cas. No. 16,561, Gilp. 306. But if the proceeding for forfeiture be on the ground of a false affidavit made with intent to defraud the revenue the fraudulent entry need not be fully consummated to incur the forfeiture. U. S. *v.* Six Hundred and Sixty-One Bales of Tobacco, 27 Fed. Cas. No. 16,297.

72. U. S. *v.* One Case of Cashmere Shawls, 27 Fed. Cas. No. 15,923, 5 N. Y. Leg. Obs. 247.

The forfeiture is incurred because of the falsity of the entry, and not because of the result which such entry may in a specific instance produce on the revenue. U. S. *v.* Five Casks of Files, 25 Fed. Cas. No. 15,112. It is immaterial that if the entry had been truly made the duty would not have been greater. U. S. *v.* One Hundred Twenty-five Baskets of Champagne, 3 Wall. (U. S.) 560, 18 L. ed. 78.

73. U. S. Rev. St. (1878) § 2809 [U. S. Comp. St. (1901) p. 1876]. For the construction or application of this statute see The Coquitlam, 77 Fed. 744, 23 C. C. A. 438 [*reversing* 57 Fed. 706] (holding that merchandise not so consigned was not forfeitable thereunder); The Ariel, 1 Fed. Cas. No. 527, 1 Hask. 65; U. S. *v.* Hutchinson, 26 Fed. Cas. No. 15,431, 1 Hask. 146; U. S. *v.* Ten Thousand Cigars, 28 Fed. Cas. No. 16,450, 2 Curt. 436 (holding that for the purposes of this act the master of a vessel who receives goods on board without any bill of lading or invoice, with the intention either to smuggle them or to duly enter them as he may see fit to elect, must be deemed the consignee).

Under a statute forfeiting merchandise when imported from territory adjacent to the United States, if the master of the vessel does not upon his arrival present a true manifest, such forfeiture is incurred if either a false manifest or if no manifest at all be presented. *In re* One Hundred and Thirty-Four Thousand Nine Hundred and One Feet of Pine Lumber, 18 Fed. Cas. No. 10,523, 4 Blatchf. 182. But under this statute it is also held that a horse, brought within the limits of the United States as a mere instrument of conveyance, in the prosecution of a

any part of an importation which disagrees with the entry made therefor, unless the difference arises from accident or mistake.[74]

(E) *Unlading Without Permit.* As another safeguard to the revenue system statutes have been passed providing for the forfeiture of merchandise,[75] the unlading or delivery of which has been effected without first having obtained a permit as provided for by the statute,[76] unless such unlading be from unavoidable accident, necessity, or distress of weather,[77] in which case, although it is the master's duty to give due notice of the contingency making the unlading necessary, it would seem that a failure so to do would not incur a forfeiture.[78]

(II) *Of Vessel.* A forfeiture of the vessel may also be claimed where the value of the merchandise unladed without compliance with the statute relating to permits exceeds a certain amount;[79] where a vessel, without proper authorization,

temporary journey or a visit, would not be considered as merchandise, within the purview of the statute. U. S. *v.* One Sorrel Horse, 27 Fed. Cas. No. 15,953, 22 Vt. 655.

74. U. S. *v.* Six Packages of Goods, 6 Wheat. (U. S.) 520, 5 L. ed. 321, holding that the forfeiture could be claimed if there was an unexplained variance between the importation and the first entry, made in relation thereto, although a second entry had been made before the seizure of the articles.

Threatened pillage by the enemies' soldiers is a sufficient excuse for a mistake in the entry; it being clearly shown that it was necessarily made hurriedly, and in the absence of the owner. U. S. *v.* Nine Packages of Linen, 27 Fed. Cas. No. 15,884, 1 Paine 129.

75. For if the articles are appurtenances or equipments of a ship, and not included within the term "goods, wares, or merchandise," no permit is necessary. U. S. *v.* Chain Cable, 25 Fed. Cas. No. 14,776, 2 Sumn. 362.

76. Harford *v.* U. S., 8 Cranch (U. S.) 109, 3 L. ed. 504 (holding that the statute applied to goods the importation of which was prohibited by law); U. S. *v.* Three Cases, 28 Fed. Cas. No. 16,498, 6 Ben. 558.

A permit obtained by fraud or by collusion will not be sufficient to prevent a forfeiture under these statutes. U. S. *v.* The Sarah B. Harris, 27 Fed. Cas. No. 16,223, 4 Cliff. 147 [*affirming* 21 Fed. Cas. No. 12,344, 1 Hask. 52]. See also Bottomley *v.* U. S., 3 Fed. Cas. No. 1,688, 1 Story 135; *In re* Ten Cases of Opium, 23 Fed. Cas. No. 13,828, Deady 62.

Goods exempt from duty are also included within the purview of the statutes, and a permit for their unlading and delivery is just as essential as when the importation is subject to duty. U. S. *v.* The Sarah B. Harris, 27 Fed. Cas. No. 16,223, 4 Cliff. 147 [*affirming* 21 Fed. Cas. No. 12,344, 1 Hask. 52]; U. S. *v.* Twenty Cases of Matches, 28 Fed. Cas. No. 16,559, 2 Biss. 47.

Place of unlading.— It will be observed that these statutes embrace all cases of the unlading of goods without a permit, and it is immaterial whether the unlading is at an intermediate port or at the port of destination so long as it be within the United States, the object of the statutes being to prevent frauds upon the revenue. The public mischief would be equally great whether the unlading is at a port or elsewhere. U. S. *v.* Twenty Cases of Matches, 28 Fed. Cas. No. 16,559, 2 Biss. 47.

What constitutes unlading.— It would seem that the term "unlading," as used in this statute, contemplates some separation of the goods from the vessel and from her immediate charge and control. U. S. *v.* The Express, 25 Fed. Cas. No. 15,066. It has, however, been held that the wharf could not be treated as constructively a part of the vessel, and that therefore a removal of the goods to the wharf, although perhaps made for the purpose of a more convenient examination, would nevertheless be an unlading within the meaning of this law. U. S. *v.* Nine Trunks, 27 Fed. Cas. No. 15,885. See also Seitz *v.* U. S., 97 U. S. 404, 24 L. ed. 1031. *Compare* U. S. *v.* Ninety-Five Boxes, etc., 27 Fed. Cas. No. 15,891. Likewise it has been held that where goods had been entered for exportation, their discharge into a lighter would constitute a landing within the meaning of a statute providing for a forfeiture for an unlading under such circumstances, although it was claimed that the relanding was simply to correct a mistake in the entry. *In re* Two Thousand Tin Cans, 24 Fed. Cas. No. 14,303, 7 Ben. 34.

77. U. S. *v.* Hayward, 26 Fed. Cas. No. 15,336, 2 Gall. 485 [*distinguishing* Peisch *v.* Ware, 4 Cranch (U. S.) 347, 2 L. ed. 643].

The stranding of a vessel is a clear case of unavoidable accident, necessity, or stress of weather, within the meaning of this statute. The Cargo ex Lady Essex, 39 Fed. 765.

78. The Cargo ex Lady Essex, 39 Fed. 765. *Compare* U. S. *v.* Hayward, 26 Fed. Cas. No. 15,336, 2 Gall. 485.

79. U. S. Rev. St. (1878) § 2874 [U. S. Comp. St. (1901) p. 1910]. For application of the statute see U. S. *v.* The John Griffin, 15 Wall. (U. S.) 29, 21 L. ed. 80; The Elizabeth and Jane, 8 Fed. Cas. No. 4,355, 2 Mason 407; The Harmony, 11 Fed. Cas. No. 6,081, 1 Gall. 123; The John C. Brooks, 15 Fed. Cas. No. 7,336, 3 Ware 273; The Sarah Bernice, 21 Fed. Cas. No. 12,343, 1 Hask. 78; U. S. *v.* The Cuba, 25 Fed. Cas. No. 14,898, 2 Hughes 489; U. S. *v.* The Sarah B. Harris, 27 Fed. Cas. No. 16,223, 4 Cliff. 147. See also The Industry, 13 Fed. Cas. No. 7,028, 1 Gall. 114

receives a cargo or a part thereof from another vessel which has arrived within a collection district;[80] where a vessel entering the waters of the United States from a foreign territory adjacent to our northern frontier fails to report at the office of the nearest collector, and to obtain a permit either to unload or take in cargo;[81] or when an importation, subject to certain exceptions,[82] is attempted in any other manner than by sea, or in any vessel of less than thirty tons' burden.[83]

b. Necessity of Fraudulent Intent. While a mere intention to defraud or evade a customs revenue law is not of itself sufficient ground of forfeiture,[84] and while it may be said that forfeitures are incurred only in those cases in which the means that are prescribed for the prevention of the same may be employed[85] and

[*approved* in U. S. *v.* Twenty Cases of Matches, 28 Fed. Cas. No. 16,559], holding that the prohibition of the statute applied, although the port was not that originally intended as the port of discharge. But *compare* U. S. *v.* The Hunter, 26 Fed. Cas. No. 15,428, Pet. C. C. 10.

An unlading and delivery, within the meaning of this statute, arises where a cargo is transferred from one vessel to another, while lying at a wharf in port. The Fame, 8 Fed. Cas. No. 4,633, Brown Adm. 42. But see U. S. *v.* The Express, 25 Fed. Cas. No. 15,066.

Application to wrecked vessel.— The statute has no application to a case where the vessel is wrecked and the goods are landed therefrom without a permit. The Gertrude, 10 Fed. Cas. No. 5,370, 3 Story 68. See also Peisch *v.* Ware, 4 Cranch (U. S.) 347, 2 L. ed. 643, where, although this section of the statute was not necessarily in question, the court found it convenient if not necessary to construe the same in its application of another section.

80. U. S. Rev. St. (1878) §§ 2867, 2868 [U. S. Comp. St. (1901) p. 1908]. The most recent application of these statutes holds them not to be violated by an unlading and transfer of a cargo after the vessel has casually arrived within the limits of a collection district, if it is not bound to the United States, and has no cargo destined to be unladen in the United States. The Coquitlam, 77 Fed. 744, 23 C. C. A. 438 [*reversing* 57 Fed. 706]; The Cargo ex Lady Essex, 39 Fed. 765. For earlier applications of the act see The Betsy, 3 Fed. Cas. No. 1,365, 1 Mason 354; The Ploughboy, 19 Fed. Cas. No. 11,229, Brown Adm. 48, holding that the existence or non-existence of a fraudulent intent upon the part of the receiving vessel was immaterial.

For forfeiture of vessels under the earlier state laws see Phile *v.* The Anna, 1 Dall. (Pa.) 197, 1 L. ed. 98; Douglass *v.* Roan, 4 Call (Va.) 353; Bentley *v.* Roan, 4 Call (Va.) 153.

81. The Coquitlam, 77 Fed. 744, 23 C. C. A. 438 [*reversing* 57 Fed. 706], holding that the arrival of the vessel referred to in this section is an arrival for the purpose of discharging or receiving cargo, and with the intent to proceed further inland, and that the forfeiture would be incurred only in case the vessel proceeded for the purpose either of unlading or taking on cargo without a special permit.

82. The exceptions being confined to districts adjoining the Dominion of Canada or from districts adjacent to Mexico. U. S. Rev. St. (1878) § 3095 [U. S. Comp. St. (1901) p. 2025].

83. U. S. *v.* The Theophile, 11 Fed. 696, 697, where the court say: "The object of congress in providing that all foreign trade should be carried on by vessels of 30 tons burden and upwards, it is evident, was to prevent the landing of foreign goods in the United States except at regular ports of entry, where the custom-house officers could secure the duties due the government without difficulty, and to prevent smuggling by small sloops that could run into rivers and small streams where no custom-houses are established, and to avoid patrolling the entire coast against smugglers."

84. U. S. *v.* Riddle, 5 Cranch (U. S.) 311, 3 L. ed. 110. Although when the question arises whether or not an act authorizing a forfeiture has been committed, such intention will justify the court in not interpreting the conduct of the party as favorable as under other circumstances it might be disposed to do. The Robert Edwards, 6 Wheat. (U. S.) 187, 5 L. ed. 238.

85. Peisch *v.* Ware, 4 Cranch (U. S.) 347, 2 L. ed. 643; The Gertrude, 10 Fed. Cas. No. 5,370, 3 Story 68; *In re* The Princess of Orange, 19 Fed. Cas. No. 11,431 (holding that the stolen property smuggled into the United States could not be forfeited for illegal importation); Six Hundred and Fifty-One Chests of Tea *v.* U. S., 22 Fed. Cas. No. 12,916, 1 Paine 499; U. S. *v.* Hayward, 26 Fed. Cas. No. 15,336, 2 Gall. 485. See also Stratton *v.* Hague, 4 Call (Va.) 564; The Waterloo, 29 Fed. Cas. No. 17,257, Blatchf. & H. 114 [*citing* The Bello Corrunes, 6 Wheat. (U. S.) 152, 5 L. ed. 229], where the court said: "When the violation of the law is supposed, it is always intended that there is a free agent, acting voluntarily. . . . Although, therefore, the entry of the vessel and of her cargo are interdicted, and the forfeiture is imposed upon both, yet this form of enactment is to be understood to signify a voluntary navigation of the ship into our waters. Any other construction would lead to the revolting conclusion that a vessel and cargo cast as wrecks upon our shores might

will not be imposed by implication [86] or without statutory authorization,[87] whether or not the existence of an intention to defraud, or of a negligent omission or commission, the equivalent thereof, is essential in conjunction with the unlawful act, is dependent largely upon the language of the provision of the statute involved.[88] Some cases use language to the effect that the requirement of such intent or the equivalent thereof is the general policy of the customs laws,[89] and with regard to certain provisions this statement is clearly correct.[90] Under other provisions the existence or non-existence of a fraudulent intent is immaterial.[91]

nevertheless be forfeited for sheltering themselves in a port closed against them by the policy of trade. This would be to constitute a man's calamities his offence, and to convert the acts of God into causes of punishment and confiscation."

86. The Cargo ex Lady Essex, 39 Fed. 765; *In re* An Ullage Box of Sugar, 24 Fed. Cas. No. 14.324, 1 Ware 355.

87. U. S. *v.* Ninety Demijohns of Rum, 8 Fed. 485, 4 Woods 637; U. S. *v.* George, 25 Fed. Cas. No. 15,198, 6 Blatchf. 406.

88. The competency of congress to impose a penalty or forfeiture upon merchandise unlawfully imported, irrespective of the circumstances or intent with which the importation was made, cannot be doubted. The maxim that crime proceeds only from a criminal intent has its exceptions, and is not of universal application. U. S. *v.* One Thousand One Hundred and Fifty and One-Half Pounds of Celluloid, 82 Fed. 627, 27 C. C. A. 231.

89. Peisch *v.* Ware, 4 Cranch (U. S.) 347, 2 L. ed. 643; U. S. *v.* One Thousand One Hundred and Fifty and One-Half Pounds of Celluloid, 82 Fed. 627, 27 C. C. A. 231 (where the cases arising under prior customs laws are well reviewed and discussed); The Governor Cushman, 10 Fed. Cas. No. 5,646, 1 Abb. 14, 1 Biss. 490; Six Hundred and Fifty-One Chests of Tea *v.* U. S., 22 Fed. Cas. No. 12,916, 1 Paine 499; U. S. *v.* The Margaret Yates, 26 Fed. Cas. No. 15,720, 22 Vt. 663; U. S. *v.* Thirty-One Boxes, etc., 28 Fed. Cas. No. 16,465*a*; U. S. *v.* Twenty-Eight Packages of Pins, 28 Fed. Cas. No. 16,561, Gilp. 306, where language is used to the effect that the system of forfeitures has nothing in view but the security of its revenue, without interfering with those devices of the mercantile world which look only to individual profit without defrauding the government. See also Fairclough *v.* Gatewood, 4 Call (Va.) 158.

90. Application of provision as to false or fraudulent invoice or valuation.— Statutes imposing a forfeiture for this offense (see *supra*, V, C, 2, a, (I), (C)) have usually been construed to require an intent to defraud upon the part of the importer. Under the present provision the courts are at a variance; by the latest construction (U. S. *v.* Nineteen Bales of Tobacco, 112 Fed. 779, decided in 1898), it is held that a false invoice, under the wording of the statute, would incur a forfeiture, regardless of intent to defraud. See also U. S. *v.* One Sorrel Stallion and One Roan Horse, 51 Fed. 877. But U. S. *v.* One Thousand One Hundred and Fifty and One-Half Pounds of Celluloid, 82 Fed. 627, 27 C. C. A. 231, decided in 1897, after a review of the cases arising under the corresponding sections of the act of 1874, of which section 9, of the act of June, 1890, is a consolidation, holds that an intent to defraud is essential. Under sections 12 and 16, and the corresponding sections of the earlier statutes, such intent was clearly necessary. Cliquot *v.* U. S., 3 Wall. (U. S.) 114, 18 L. ed. 116; U. S. *v.* Two Hundred and Eight Bags of Kainit, 37 Fed. 326; The Purissima Concepcion, 24 Fed. 358; U. S. *v.* Three Trunks, etc., 8 Fed. 583, 7 Sawy. 364; U. S. *v.* Ninety Demijohns of Rum, 8 Fed. 485, 4 Woods 637; Lewey *v.* U. S., 15 Fed. Cas. No. 8,309, 15 Blatchf. 1; *In re* Three Thousand One Hundred and Nine Cases of Champagne, 23 Fed. Cas. No. 14,012, 1 Ben. 241; *In re* Twelve Hundred and Nine Quarter Casks, etc., of Wine, 24 Fed. Cas. No. 14,279, 2 Ben. 249; U. S. *v.* Dry Ox and Cow Hides, 25 Fed. Cas. No. 14,995; U. S. *v.* Four Cases Cutlery, 25 Fed. Cas. No. 15,144; U. S. *v.* The Margaret Yates, 26 Fed. Cas. No. 15,720, 22 Vt. 663; U. S. *v.* Newmark, 27 Fed. Cas. No. 15,870, 3 Sawy. 584; U. S. *v.* One Hundred Fifty Bales Unwashed Wool, 27 Fed. Cas. No. 15,932*b*; U. S. *v.* One Hundred and Forty-Six Thousand Six Hundred and Fifty Clapboards, 27 Fed. Cas. No. 15,935, 4 Cliff. 301; U. S. *v.* Seventy-Eight Cases of Books, 27 Fed. Cas. No. 16,258*a*, 2 Bond 281.

Omission of goods from manifest.— Under U. S. Rev. St. (1878) § 2809 [U. S. Comp. St. (1901) p. 1876], it is held that the omission of goods from a manifest to work a forfeiture thereof must be intentional. U. S. *v.* Lot of Silk Umbrellas, 12 Fed. 412. See also U. S. *v.* Carr, 8 How. (U. S.) 1, 12 L. ed. 963; U. S. *v.* Six Packages of Goods, 6 Wheat. (U. S.) 520, 5 L. ed. 321; U. S. *v.* Certain Cigars, 25 Fed. Cas. No. 14,765, 1 Woods 306.

91. U. S. *v.* Two Thousand One Hundred and Seventeen Bushels of Malt, 8 Fed. 224, so holding with regard to U. S. Rev. St. (1878) § 2864 [U. S. Comp. St. (1901) p. 1904]. To the same effect is U. S. *v.* Cargo of Sugar, 25 Fed. Cas. No. 14,722, 3 Sawy. 46. But *compare* U. S. *v.* Fifty-Three Boxes of Havana Sugar, 25 Fed. Cas. No. 15,098, 2 Bond 346.

Forfeiture for concealment of dutiable goods in one's baggage is not dependent upon the existence of fraudulent intent upon the part

c. Manner of Forfeiture — (i) *Amount of Importation Liable.* The general tenor of the statutes authorizing forfeitures is to the effect that the condemnation of goods is not restricted to the particular articles undervalued or unlawfully imported, providing the jury find that the invoice as a whole has been made with intent to defraud the revenue,[92] although if no fraud is intended as to the whole package or invoice the rule may be otherwise.[93]

(ii) *Acquisition of Custody* — (a) *Seizure* — (1) Right of. It is the duty of a revenue officer to cause a seizure of goods whenever he has probable cause for believing that the same are forfeitable;[94] nor is the right to make such seizure confined to his own district.[95] So too goods would be forfeitable if it were

of the passenger. U. S. *v.* One Pearl Necklace, 111 Fed. 164, 49 C. C. A. 287, 56 L. R. A. 130.

Under the international postal treaty of Berne, 1874, which prohibited the importation of dutiable goods through the foreign mail, the intent of the sender or receiver to defraud the government was immaterial in a proceeding for forfeiture for violation. Von Cotzhausen *v.* Nazro, 107 U. S. 215, 2 S. Ct. 503, 27 L. ed. 540 [*affirming* 15 Fed. 891].

Unlading without a permit.— An intent to defraud is immaterial where the offense charged is the unlading or delivery of the goods without a permit as provided by statute. Phile *v.* The Anna, 1 Dall. (Pa.) 197, 1 L. ed. 98; The Fame, 8 Fed. Cas. No. 4,633, Brown Adm. 42; The Ploughboy, 19 Fed. Cas. No. 11,229, Brown Adm. 48; U. S. *v.* The Cuba, 25 Fed. Cas. No. 14,898, 2 Hughes 489; U. S. *v.* Twenty Cases of Matches, 28 Fed. Cas. No. 16,559, 2 Biss. 47.

Likewise the concealment of goods for which a forfeiture may be claimed need not be done with the knowledge or consent of the owner or consignee. U. S. *v.* Fifty-Eight Thousand Eight Hundred and Fifty Cigars, 25 Fed. Cas. No. 15,092; U. S. *v.* The Sarah B. Harris, 27 Fed. Cas. No. 16,223, 4 Cliff. 147 [*affirming* 21 Fed. Cas. No. 12,344, 1 Hask. 52]. See also U. S. *v.* Package of Lace, 27 Fed. Cas. No. 15,985, Gilp. 338.

When indecent pictures are found in an importation, the fact that the owner or consignee of the other articles had no knowledge of the presence of such paintings will not prevent a forfeiture of the whole. U. S. *v.* Three Cases of Toys, 28 Fed. Cas. No. 16,499.

A misconception or ignorance of the law on the part of the importer will not prevent a forfeiture. Barlow *v.* U. S., 7 Pet. (U. S.) 404, 8 L. ed. 728 [*affirming* 25 Fed. Cas. No. 15,037, 2 Paine 54]; U. S. *v.* Five Casks of Files, 25 Fed. Cas. No. 15,112; U. S. *v.* Fourteen Packages of Pins, 25 Fed. Cas. No. 15,151, Gilp. 235.

The sanction of fraudulent practice by the customs officials as legal and regular will not legalize such practices or absolve the offending party from his liability to a forfeiture. U. S. *v.* Two Thousand One Hundred and Seventeen Bushels of Malt, 8 Fed. 224.

92. Buckley *v.* U. S., 4 How. (U. S.) 251, 11 L. ed. 961; Locke *v.* U. S., 15 Fed. Cas. No. 8,442, 2 Cliff. 574; Six Cases of Silk Ribbons, 22 Fed. Cas. No. 12,914, 3 Ben. 536; Two Hundred and Fifty Barrels of Molasses *v.* U. S., 24 Fed. Cas. No. 14,293, Chase 502; U. S. *v.* One Case of Stereoscopic Slides, 27 Fed. Cas. No. 15,927, 1 Sprague 467; U. S. *v.* Package of Wool, 27 Fed. Cas. No. 15,986, Gilp. 349; U. S. *v.* Three Cases of Toys, 28 Fed. Cas. No. 16,499.

93. U. S. *v.* Ten Cases Shawls, 28 Fed. Cas. No. 16,448, 2 Paine 162 [*affirming* 28 Fed. Cas. No. 16,447]; Wright *v.* U. S., 30 Fed. Cas. No. 18,099, 2 Paine 184. See also U. S. *v.* Two Thousand Four Hundred and Nineteen Sheepskins, 28 Fed. Cas. No. 16,589*a*, 2 Hask. 394.

94. Jones *v.* Gibson, 1 N. H. 266; McGuire *v.* Winslow, 26 Fed. 304, 23 Blatchf. 425.

Necessity and sufficiency of search warrant. — If there is cause to suspect the concealment of merchandise in any particular dwelling-house, store, building, or other place, the customs officer is entitled, upon proper application on oath to the justice of the peace, district judge, or other proper official, to a warrant to enter such house, store, or other place, to search for the goods which he suspects to be unlawfully imported. U. S. Rev. St. (1878) § 3066 [U. S. Comp. St. (1901) p. 2008]. Under this statute the United States constitution requiring warrants to particularly describe the property to be seized must be observed; and while it would from the very nature of the case be difficult to specifically describe goods which are alleged to be smuggled, the warrants ought nevertheless to mention the kind of goods to be searched for, or at least describe them as having been taken out of some certain vessel. Sanford *v.* Nichols, 13 Mass. 286, 7 Am. Dec. 151. See Steel *v.* Fisk, Brayt. (Vt.) 230, where a description in the warrant "several bales of dry goods, calicoes, chintzes, &c." was held sufficiently particular. The words "other place" as used in this act mean places where the occupants have an exclusive right of possession and privacy analogous to their rights in a dwelling-house, store, or building; and under this statute a stage-coach (Jones *v.* Gibson, 1 N. H. 266), or a sleigh standing in an open shed (Sailly *v.* Smith, 11 Johns. (N. Y.) 500) would not be an "other place" within the meaning of the statute.

95. Taylor *v.* U. S., 3 How. (U. S.) 197, 11 L. ed. 559.

subsequently shown that a proper cause for the seizure existed at the time the same was made, although made through mistake.[96]

(2) CUSTODY. Under earlier tariff provisions the custody of goods seized by a customs official was transferred to a marshal, there to remain to await the orders of the court.[97] This rule was changed,[98] and such goods now remain in the custody of the collector or other principal officer of the customs of the district in which the seizure was made until its disposition is determined by law,[99] whereupon his custody is terminated.[1]

(3) BOND FOR CUSTODY. The custody of vessels or goods seized for a violation of the customs laws may, however, be obtained by the claimant upon his giving proper and sufficient bond for payment of the value of the articles seized, and a certificate that the duties thereon are paid or properly secured.[2] Under the earlier construction of this provision it would seem that the court did not consider it as mandatory, but that whether or not an importer would be allowed to avail himself of its provisions rested in the sound discretion of the court;[3] but under the present phraseology of this provision, and from the language used by the courts in reference to the same, it seems that such is not now the law.[4] If the property is seized in a warehouse the bond given by a claimant thereof should be for the full value of the goods including the duty;[5] likewise no deduction

96. Wood *v.* U. S., 16 Pet. (U. S.) 342, 10 L. ed. 987.

By the common law any person might at his peril seize property as forfeited to the government, and if the government adopted his seizure and instituted proceedings to enforce the forfeiture and the property was condemned, such person was completely justified. It was therefore wholly immaterial who made the seizure, or whether it was irregularly made or not, or whether the cause assigned originally for the seizure was that for which the condemnation took place, provided the adjudication was for a sufficient cause. Taylor *v.* U. S., 3 How. (U. S.) 197, 11 L. ed. 559 [*citing* Wood *v.* U. S., 16 Pet. (U. S.) 342, 10 L. ed. 987; Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381]. See also U. S. *v.* Twenty-Five Cases of Cloths, 28 Fed. Cas. No. 16,563, Crabbe 356.

97. *Ex p.* Hoyt, 13 Pet. (U. S.) 279, 10 L. ed. 161; U. S. *v.* One Case of Silk, 27 Fed. Cas. No. 15,925, 4 Ben. 526; U. S. *v.* Segars, 27 Fed. Cas. No. 16,249, 3 Phila. (Pa.) 517. See also Barnes *v.* Taylor, 29 Me. 514, holding that where a collector had seized a vessel and her cargo, that the property while in his hands was in the custody of the law and his refusal to deliver the same would not be a conversion.

98. U. S. *v.* One Case of Silk, 27 Fed. Cas. No. 15,925, 4 Ben. 526.

99. U. S. Rev. St. (1878) § 2086.

1. The G. G. King, 16 Fed. 921.

Abandonment of seizure.— To constitute an abandonment of a vessel seized for violation of the customs laws, there must be an intention coupled with an unequivocal act of dereliction; an agreement with the master of a seized vessel that he shall navigate her into port and then relinquish his possession would not be an abandonment by the seizor, although the members of his crew are withdrawn from the ship. The Abby, 1 Fed. Cas. No. 14, 1 Mason 360.

2. U. S. Rev. St. (1878) § 938 [U. S. Comp. St. (1901) p. 690].

Amount of the bond is that which would have been demandable if the fairness of the importation had not been impeached. U. S. *v.* Segars, 27 Fed. Cas. No. 16,249, 3 Phila. (Pa.) 517.

An exact compliance with the terms of the statute in the conditions of the bond is not required. The Struggle, 23 Fed. Cas. No. 13,550, 1 Gall. 476.

For form of bond see U. S. *v.* Two Trunks, 28 Fed. Cas. No. 16,592, 10 Ben. 374.

Judgment.— In compliance with the terms of this statute it is held that a judgment on such bond cannot be rendered until after twenty days from the time of the condemnation of the goods. McLellan *v.* U. S., 16 Fed. Cas. No. 8,895, 1 Gall. 227.

No claim for depreciation and injury, or for the fact that the value of the goods had been erroneously estimated can be allowed as a set-off in favor of the claimant in a proceeding on such bond. U. S. *v.* Two Trunks, 28 Fed. Cas. No. 16,592, 10 Ben. 374, stating reasons for this rule.

3. *In re* Fifteen Pieces of Black Silk, 9 Fed. Cas. No. 4,779, 3 Ben. 189; The Struggle, 23 Fed. Cas. No. 13,550, 1 Gall. 476.

4. U. S. *v.* Eight Cases of Paper, 98 Fed. 416 (holding that upon offering the bond required by this statute, the importer was entitled to have the goods delivered to him, and could not be required as a condition to such delivery to pay the costs incident to the seizure); The G. G. King, 16 Fed. 921 (where from the language used it would seem that the relief given by this statute was a matter of right on the part of the importer).

5. U. S. *v.* One Thousand Two Hundred and Ninety-One Bales of Tobacco, 27 Fed. Cas. No. 15,965, 2 Lowell 107; U. S. *v.* Twelve Thousand Three Hundred and Forty-Seven Bags of Sugar, 28 Fed. Cas. No. 16,555, 1 Abb. 407. See also U. S. *v.* Cargo of Sugar, 25 Fed. Cas. No. 14,721, 3 Sawy. 27. *Contra,*

for duties should be allowed when the goods are seized in the custody of the importer.[6]

(B) *Action For Wrongful Seizure.* An action of trespass for a seizure for a supposed forfeiture will not lie until a final decree[7] is pronounced upon the proceeding *in rem* to enforce such forfeiture;[8] and the pendency of such proceedings may be pleaded in abatement.[9] If such action is instituted after a decree of condemnation or after an acquittal, with a certificate of justification, the decree may be pleaded in bar;[10] and it is only after an acquittal without justification that the seizure may be deemed tortious.[11]

(III) *JUDICIAL PROCEEDINGS*—(A) *Jurisdiction.* Jurisdiction to determine whether property is forfeitable lies exclusively in the federal courts.[12]

(B) *When Brought.* Actions for the enforcement of forfeitures or penalties are subject to the statutory limitation of five years and must be brought within that time.[13]

(C) *Nature of Action*—(1) PROCEEDINGS IN REM—(a) IN GENERAL. The rights of the government are usually[14] enforced by proceedings *in rem*;[15] and the mere fact that a statute also provides for a criminal prosecution against a wrong-doer, in conjunction with proceedings of forfeiture, does not supersede the right to such proceedings;[16] but should the seizor refuse to institute such pro-

In re Four Cases Silk Ribbons, 9 Fed. Cas. No. 4,986, 1 Ben. 214 [*approved* in U. S. *v.* Three Horses, 28 Fed. Cas. No. 16,500, 1 Abb. 426, although in this latter case the point was not in issue].

6. U. S. *v.* Segars, 27 Fed. Cas. No. 16,249, 3 Phila. (Pa.) 517; U. S. *v.* Three Horses, 28 Fed. Cas. No. 16,500, 1 Abb. 426; U. S. *v.* Two Trunks, 28 Fed. Cas. No. 16,592, 10 Ben. 374. *Contra*, U. S. *v.* One Thousand Three Hundred and Eighty-Two Hogsheads of Sugar, 27 Fed. Cas. No. 15,962.

7. A decree is final in a proceeding *in rem* when the goods are adjudged to be returned to the claimant, and a certificate of probable cause is refused. Hall *v.* Warren, 11 Fed. Cas. No. 5,952, 2 McLean 332.

8. Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381; Slocum *v.* Mayberry, 2 Wheat. (U. S.) 1, 4 L. ed. 169; McGuire *v.* Winslow, 26 Fed. 304, 23 Blatchf. 425.

9. Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381; McGuire *v.* Winslow, 26 Fed. 304, 23 Blatchf. 425; Hall *v.* Warren, 11 Fed. Cas. No. 5,952, 2 McLean 332.

10. Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381; McGuire *v.* Winslow, 26 Fed. 304, 23 Blatchf. 425.

11. Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381; McGuire *v.* Winslow, 26 Fed. 304, 23 Blatchf. 425. See Erving *v.* Cradock, Quincy (Mass.) 553.

Circumstances of suspicion might nevertheless be shown in mitigation by the officer, even though a certificate of probable cause is refused, but they could not be pleaded in justification. Hall *v.* Warren, 11 Fed. Cas. No. 5,952, 2 McLean 332.

Effect of abuse of authority after seizure.—Where an officer of the customs, to whom is granted a certificate of probable cause, upon the relinquishment of a seizure by the court, is shown to have abused the authority vested in him by allowing another party to use the vessel seized during its detention, it would seem that while his certificate would protect him from being proceeded against as a trespasser *ab initio*, yet he would doubtless be liable in a special action on the case for the actual damage sustained to the vessel by such usage. Van Brunt *v.* Schenck, 13 Johns. (N. Y.) 414 [*distinguishing* Van Brunt *v.* Schenck, 11 Johns. (N. Y.) 377].

12. McGuire *v.* Winslow, 26 Fed. 304, 23 Blatchf. 425. And see, generally, COURTS.

Admiralty.—If the proceedings be against a vessel it will of course be under the admiralty jurisdiction of these courts. The Abbey, 1 Fed. Cas. No. 14, 1 Mason 360, holding that if the seizure of the vessel had in fact been abandoned, no court can claim to have jurisdiction thereof unless there be a new seizure. And see, generally, ADMIRALTY.

13. *In re* Landsberg, 14 Fed. Cas. No. 8,041; U. S. *v.* Maillard, 26 Fed. Cas. No. 15,709, 4 Ben. 459; U. S. *v.* Platt, 27 Fed. Cas. No. 16,054*a*.

14. See *infra*, V, C, 2, c, (III), (C), (2); V, C, 2, c, (IV).

15. Hence the question could not be adjudicated in an action of trover. McGuire *v.* Winslow, 26 Fed. 304, 23 Blatchf. 425.

16. Origet *v.* U. S., 125 U. S. 240, 8 S. Ct. 846, 31 L. ed. 743 (where the court say: "The forfeiture accrues to the United States on the commission or omission of the acts specified. No condition is attached to the imposition of the forfeiture. The section does not say that the merchandise shall be forfeited only on the conviction of some offender, whether the owner of the merchandise or one of the other persons named in the section. The person punished for the offense may be an entirely different person from the owner of the merchandise, or any person interested in it"); U. S. *v.* One Thousand One Hundred and Fifty and One-Half Pounds of Celluloid, 82 Fed. 627, 27 C. C. A. 231 [*approving* Origet *v.* U. S., 125 U. S. 240, 8 S. Ct. 846, 31 L. ed. 743]; U. S. *v.* Lot of Jewelry, etc.,

ceedings, he would be compelled upon application by the owner either to do so or to return the property seized.[17]

(b) INFORMATION — aa. *Averments Generally.* As a general rule it may be said that the information for forfeiture will be sufficient if the averments follow the language of the statute,[18] and if by necessary implication it contains the requisite statements it need not be scientifically drawn;[19] but this does not mean that it will be sufficient if the language of the statute is such that to follow it *verbatim* would lead to uncertainty and ambiguity.[20] And while an intent to defraud, if an element of the offense, should of course be averred,[21] yet if the statute expressly enjoins the submission to the jury of the existence of such intent no such averment is necessary.[22] If the place where the alleged illegal act was done is a material element in the offense charged such place must be averred.[23] If the information alleges an unlading of goods without a permit it is not necessary to state the time and place of importation,[24] although if the unlading was within some port or other place within a collection district such fact should be alleged.[25] If it sets forth a proper cause of forfeiture within the main provisions of the statute, it need not allege that the case is not within a proviso thereof.[26]

59 Fed. 684 [*criticizing* U. S. *v.* Lot of Jewelry, 26 Fed. Cas. No. 15,626, 13 Blatchf. 60].

17. Hall *v.* Warren, 11 Fed. Cas. No. 5,952, 2 McLean 332.

18. *In re* Two Hundred Chests of Tea, 9 Wheat. (U. S.) 430, 6 L. ed. 128; The Betsy, 3 Fed. Cas. No. 1,365, 1 Mason 354; U. S. *v.* The Margaret Yates, 26 Fed. Cas. No. 15,720, 22 Vt. 663; U. S. *v.* Ten Cases Merchandise, 28 Fed. Cas. No. 16,447; U. S. *v.* Ten Cases of Shawls, 28 Fed. Cas. No. 16,448, 2 Paine 162; U. S. *v.* Thirteen Packages of Plate Glass, 28 Fed. Cas. No. 16,459.

An averment that statutory requirements, merely directory to the revenue officer and to the importer, have been complied with is not essential. U. S. *v.* Seventy-Eight Cases of Books, 27 Fed. Cas. No. 16,258, 2 Bond 271.

For forms of information for forfeiture in ful or in substance see Friedenstein *v.* U. S., 125 U. S. 224, 8 S. Ct. 838, 31 L. ed. 736; Cliquot *v.* U. S., 3 Wall. (U. S.) 114, 18 L. ed. 116; Buckley *v.* U. S., 4 How. (U. S.) 251, 11 L. ed. 961; U. S. *v.* A Lot of Jewelry, etc., 59 Fed. 684; U. S. *v.* Burnham, 24 Fed. Cas. No. 14,690, 1 Mason 57.

19. U. S. *v.* A Lot of Jewelry, etc., 59 Fed. 684.

As importation is not a mode of acquiring property, and an information averring that an importation was obtained in this manner and not by purchase would be insufficient. *In re* Forty Sacks of Wool, 14 Fed. 643.

20. And therefore an information so drawn that a claimant of the property could get no information from the allegations therein as to the real grounds of the forfeiture would be insufficient. U. S. *v.* Fifteen Barrels of Distilled Spirits, 51 Fed. 416.

21. U. S. *v.* Three Parcels of Embroidery, 28 Fed. Cas. No. 16,512, 3 Ware 75, holding that in the absence of such averment judgment would be arrested. See also U. S. *v.* Seventy-Eight Cases of Books, 27 Fed. Cas. No. 16,258, 2 Bond 271.

22. Origet *v.* U. S., 125 U. S. 240, 8 S. Ct. 846, 31 L. ed. 743; Friedenstein *v.* U. S., 125 U. S. 224, 8 S. Ct. 838, 31 L. ed. 736. See U. S. *v.* Ortega, 66 Fed. 713, holding that the statute requiring the court to submit to the jury the question of an intent to defraud as a separate proposition was repealed by the act of June 10, 1890.

23. Thus in a proceeding against a vessel for receiving goods without a permit from another vessel more than four leagues from the coast, the information must state the place of the offense; and a defect therein would not be cured by a verdict. U. S. *v.* The Virgin, 28 Fed. Cas. No. 16,625, Pet. C. C. 7.

The court judicially know that Oregon is a part of the territory of the United States and within the limits thereof, and an allegation that the goods were unladen from a vessel within that collection district is equivalent to an allegation that they were unladen within the United States. The Active, 1 Fed. Cas. No. 33, Deady 165.

24. Locke *v.* U. S., 7 Cranch (U. S.) 339, 3 L. ed. 364, holding also that it was not necessary that the name of the vessel be alleged, but an allegation that such information was unknown to the attorney would be sufficient. See also The Active, 1 Fed. Cas. No. 33, Deady 165; The Betsy, 3 Fed. Cas. No. 1,365, 1 Mason 354, holding that an allegation that the goods unladen were of foreign growth or manufacture was unnecessary.

25. This arises from the fact that if the unlading took place before the vessel had arrived within the port it would fall within another section of the statute; it is not, however, necessary to specify the port or district by its legal name, but it would be sufficient to state that the name thereof was unknown to the attorney of the United States; although if the information should specify the particular port such specification would be binding. U. S. *v.* Burnham, 24 Fed. Cas. No. 14,690, 1 Mason 57.

26. The Mary Merritt, 16 Fed. Cas. No. 9,222, 2 Biss. 381 [*reversing* 26 Fed. Cas. No. 15,733, and *citing* The Aurora *v.* U. S., 7 Cranch (U. S.) 382, 3 L. ed. 378]; U. S. *v.* Hayward, 26 Fed. Cas. No. 15,336, 2 Gall. 485. Where the ground alleged is an omis-

bb. *Amendment of.* An information for forfeiture may usually be amended to conform to the facts,[27] and if not objected to before the trial it will not thereafter be judged with the strictness applicable to an indictment.[28]

(c) EVIDENCE — aa. *Burden of Proof.* When the prosecution produces sufficient evidence to satisfy the court that there was probable cause for the proceedings, the burden of proof is shifted upon the claimant;[29] and if in such case the claimant fails to explain the suspicious or irregular circumstances of his case by the introduction of rebutting evidence in his possession or under his control, condemnation must follow.[30]

bb. *Presumptions.* Whenever a material undervaluation is shown,[31] a false affidavit of damages is offered by the importer,[32] or where he knows that his method of importation is contrary to law,[33] the presumption arises that the illegal act was done to defraud the revenue. Likewise where it is within the power of a claimant to produce good and satisfactory evidence tending to repel suspicious circumstances concerning an importation, and he omits to do so and contents him-

sion from the manifest the particular omission must be averred. The Thomas and Henry *v.* U. S., 23 Fed. Cas. No. 13,919, 1 Brock. 367.

Averment of seizure.— Where the information is against the vessel, it must be averred that she has been seized for the offense, and that the seizure still subsists, and objection to the omission of such averment may be taken at any station of the cause. The Washington, 29 Fed. Cas. No. 17,221, 4 Blatchf. 101 [*affirming* 29 Fed. Cas. No. 17,222]. See also The Silver Spring, 22 Fed. Cas. No. 12,858, 1 Sprague 551.

Parties.— In a proceeding of this nature the information should be in the name of the United States alone, without making the seizing officers parties thereto. U. S. *v.* Three Parcels of Embroidery, 28 Fed. Cas. No. 16,512, 3 Ware 75.

27. U. S. *v.* The Queen, 27 Fed. Cas. No. 16,107, 4 Ben. 237; U. S. *v.* Two Trunks, 28 Fed. Cas. No. 16,591, 6 Ben. 218.

28. U. S. *v.* A Lot of Jewelry, etc., 59 Fed. 684.

29. U. S. Rev. St. (1878) § 909 [U. S. Comp. St. (1901) p. 679]; U. S. *v.* The John Griffin, 15 Wall. (U. S.) 29, 21 L. ed. 80; Cliquot *v.* U. S., 3 Wall. (U. S.) 114, 18 L. ed. 116; Wood *v.* U. S., 16 Pet. (U. S.) 342, 10 L. ed. 987; U. S. *v.* A Lot of Jewelry, etc., 59 Fed. 684 [*distinguishing* Boyd *v.* U. S., 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746]; U. S. *v.* The Coquitlam, 57 Fed. 706; U. S. *v.* Ten Hundred and Sixty Tins of Opium, 44 Fed. 799; U. S. *v.* Seven Hundred and Forty Tins of Opium, 44 Fed. 798; Three Thousand Eight Hundred and Eighty Boxes of Opium *v.* U. S., 23 Fed. 367; U. S. *v.* Three Thousand Eight Hundred and Eighty Boxes, etc., 12 Fed. 402, 8 Sawy. 129; The Busy, 4 Fed. Cas. No. 2,232, 2 Curt. 586; The Governor Cushman, 10 Fed. Cas. No. 5,646, 1 Abb. 14, 1 Biss. 490; The Thomas and Henry *v.* U. S., 23 Fed. Cas. No. 13,919, 1 Brock. 367; *In re* Three Thousand One Hundred and Nine Cases of Champagne, 23 Fed. Cas. No. 14,012, 1 Ben. 241; Twelve Hundred and Nine Quarter Casks, etc., of Wine, 24 Fed. Cas. No. 14,279, 2 Ben. 249; U. S. *v.* Eight Cases of Lamps, 25 Fed. Cas. No. 15,029; U. S. *v.* Eighteen Pipes Distilled Spirits, 25 Fed. Cas. No. 15,033*a*; U. S. *v.* Five Jugs of Brandy, 25 Fed. Cas. No. 15,118; U. S. *v.* Six Hundred and Sixty-One Bales of Tobacco, 27 Fed. Cas. No. 16,297; U. S. *v.* Sixteen Cases of Silk Ribbons, 27 Fed. Cas. No. 16,301; U. S. *v.* Sixty-Five Packages of Glass, 27 Fed. Cas. No. 16,305*a*; U. S. *v.* Twenty-Five Cases of Cloths, 28 Fed. Cas. No. 16,563, Crabbe 356. *Compare* U. S. *v.* Baker, 24 Fed. Cas. No. 14,500, 5 Ben. 251. And *compare* language of Butler, J., in U. S. *v.* One Hundred and Twenty-Nine Bales of Merchandise, 46 Fed. 468. But see The Abigail, 1 Fed. Cas. No. 18, 3 Mason 331, where it was held that the act of 1820, providing for the recovery of penalties and forfeitures, did not adopt the rule with regard to the burden of proof as laid down in section 71 of the act of 1799.

30. The Luminary, 8 Wheat. (U. S.) 407, 5 L. ed. 647; U. S. *v.* Seven Hundred and Forty Tins of Opium, 44 Fed. 798; The Busy, 4 Fed. Cas. No. 2,232, 2 Curt. 586.

Justification of statute.— While of course it is the province of the court rather to interpret than to justify the enactment of any statute nevertheless, in construing this provision, its general propriety has often been adverted to. This arises from the fact that a violation of the customs law is generally premeditated and is perpetrated under all the precautions and in all secrecy which ingenuity can suggest; and the means of proving innocence, at least to a reasonable extent, are in the possession of the accused. It is therefore no vicious violation of principle that he should be required to prove his innocence. See The Thomas and Henry *v.* U. S., 23 Fed. Cas. No. 13,919, 1 Brock. 367; U. S. *v.* Eighteen Pipes Distilled Spirits, 25 Fed. Cas. No. 15,033*a*.

31. U. S. *v.* Three Hundred and Thirty-Seven Cases of Wine, 28 Fed. Cas. No. 16,506, 1 Woods 47; U. S. *v.* Two Hundred Quarter Boxes of Cigars, 28 Fed. Cas. No. 16,587.

32. U. S. *v.* Six Hundred and Sixty-One Bales of Tobacco, 27 Fed. Cas. No. 16,297.

33. U. S. *v.* Nine Trunks, 27 Fed. Cas. No. 15,886.

self with weaker evidence, it will be presumed that the better evidence of the reality of the transaction would not be favorable to him.[34]

cc. *Admissibility.* Where the question of frandulent entry or undervaluation is involved the court must necessarily pursue a liberal course in the admission of evidence;[35] hence evidence of other acts or doings of the importer or his privies of a kindred nature is admissible,[36] although only for the purpose of establishing the intent with which the act was committed, and not as proving the body of the offense.[37] Nor would the assent of a consul[38] or a revenue officer to an undervaluation be binding upon the government;[39] and as the goods themselves are regarded as the defendant, evidence of communications made to the revenue officer would not be objectionable on the ground that they were made in the absence of the claimant.[40]

dd. *Weight and Sufficiency.* It is of course incumbent upon the defendant to

34. U. S. *v.* Three Thousand Eight Hundred and Eighty Boxes, etc., 12 Fed. 402, 8 Sawy. 129.

35. But this does not dispense with the rule that the evidence must be relevant and relate to a matter material to the question or point in issue. U. S. *v.* Four Cases Printed Merinoes, 25 Fed. Cas. No. 15,146, 2 Paine 200.

36. Wood *v.* U. S., 16 Pet. (U. S.) 342, 360, 10 L. ed. 987 (where it is said: "Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act taken by itself may not be decisive either way; but when taken in connection with others of a like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty"); Buckley *v.* U. S., 4 How. (U. S.) 251, 11 L. ed. 961; Taylor *v.* U. S., 3 How. (U. S.) 197, 11 L. ed. 559; Alfonso *v.* U. S., 1 Fed. Cas. No. 188, 2 Story 421; U. S. *v.* Merriam, 26 Fed. Cas. No. 15,759; U. S. *v.* Three Cases, etc., 28 Fed. Cas. No. 16,497 [*citing* Bottomley *v.* U. S., 3 Fed. Cas. No. 1,688, 1 Story 135].

Invoices of other goods imported by the party are therefore admissible. Buckley *v.* U. S., 4 How. (U. S.) 251, 11 L. ed. 961; U. S. *v.* One Hundred and Forty-Six Thousand Six Hundred and Fifty Clapboards, 27 Fed. Cas. No. 15,935, 4 Cliff. 301. See also U. S. *v.* Three Cases, etc., 28 Fed. Cas. No. 16,497, holding that representations by the agent of an importer to a purchaser of goods that certain invoices which he exhibited were true invoices, sent to him by his principal, were admissible against the principal, for the purpose of showing the falsity of certain other invoices, under which the goods were entered.

That the claimant or his agent sold goods at prices which yielded them a profit which other persons engaged in the same trade averred could not be fairly made under the state of the market at that time is admissible. Buckley *v.* U. S., 4 How. (U. S.) 251, 11 L. ed. 961, holding also that evidence of appraisement of the goods, duly made by the appraisers, was admissible, and would not be excluded on the ground that it had not been made in the presence of the jury.

37. U. S. *v.* Six Hundred and Sixty-One Bales of Tobacco, 27 Fed. Cas. No. 16,297; U. S. *v.* Sixteen Cases of Silk Ribbons, 27 Fed. Cas. No. 16,301.

38. U. S. *v.* Sixteen Cases of Silk Ribbons, 27 Fed. Cas. No. 16,301.

39. U. S. *v.* Twenty-Five Cases of Cloths, 28 Fed. Cas. No. 16,563, Crabbe 356.

Admissibility to explain or vary terms of the manifest.— While a manifest, duly filed in the custom-house, is competent evidence as to the entry of certain goods thereon (U. S. *v.* The Missouri, 26 Fed. Cas. No. 15,785, 9 Blatchf. 433) if it has been fraudulently destroyed secondary evidence as to its contents is admissible (The Ariel, 1 Fed. Cas. No. 527, 1 Hask. 65). Likewise where the destination of a vessel is expressed on the face of the manifest parol evidence cannot be given to show that she was consigned to another port. The Fame, 8 Fed. Cas. No. 4,633, 1 Brown Adm. 42.

Res gestæ.— Declarations of a third person having custody of goods which were seized, made while the official was making the examination of such goods and while they were in his possession, are admissible against the claimant as part of the *res gestæ*. Friedenstein *v.* U. S., 125 U. S. 224, 8 S. Ct. 838, 31 L. ed. 736; Three Thousand Eight Hundred and Eighty Boxes of Opium *v.* U. S., 23 Fed. 367. Likewise it is held that the fact that an intended illegal importation was previously known to the revenue officers, and that they acted thereon in making the seizure, may properly be regarded as so connected with the legal act itself as to constitute a part of the *res gestæ*. U. S. *v.* Nine Trunks, 27 Fed. Cas. No. 15,886.

40. U. S. *v.* Nine Trunks, 27 Fed. Cas. No. 15,886.

Letters written in the ordinary course of business and contemporaneously with the transaction which is the subject of the litigation, offering to sell certain merchandise at a certain price, are admissible for the purpose of showing the market value of such articles at that place, although it appears that neither the writer nor the recipients of the letters were in any way connected with the subject of the suit; the rule of *res inter alios acta* being held inapplicable to such state of fact. Fennerstein *v.* U. S., 3 Wall. (U. S.) 145, 18 L. ed. 121.

introduce evidence sufficient to overcome the burden upon him,[41] but this does not mean that he need prove his defense in other than the ordinary way.[42] Where the proceeding is on the ground of an alleged fraudulent invoice, the invoice itself would be insufficient on his behalf;[43] but a mere misdescription which might be made in the best of faith of an article would not of itself be sufficient evidence of fraud;[44] nor would the fact that the appraisers had materially raised the invoiced value of an importation be conclusive upon the importer in a proceeding for its forfeiture.[45] But the court may sustain a verdict if supported by evidence of a cogent character, although it may be of the opinion that the weight of evidence was with the claimant.[46]

(d) VARIANCE. The allegations as to the amount or value of the goods libeled,[47] as to the nature of the same or for the purpose for which they are used,[48] or of the section of the statute under which the offense is conceived to fall,[49] are binding upon the government; but under a count averring the landing of goods without a permit, a forfeiture may be enforced for an unlading under a collusive permit.[50]

(e) TRIAL[51] — aa. *Instructions.* Instructions which can serve no purpose except to unduly influence the jury[52] or which are calculated to mislead them are erroneous.[53]

bb. *Province of Court and Jury.* The question of the existence of probable cause,

41. As to when such burden is shifted upon the defendant see *supra*, V, C, 2, c, (III), (C), (1), (c), aa.

For illustrative case of the insufficiency of evidence on behalf of claimant to overcome this burden see U. S. *v.* The Bark John Griffin, 15 Wall. (U. S.) 29, 21 L. ed. 80.

Sufficiency to sustain forfeiture of vessel for smuggling.—In The Cleopatra, 5 Fed. Cas. No. 2,886, 5 Ben. 290, a forfeiture of the vessel for smuggling was upheld on the evidence of the seamen who were arrested while committing the act, but who upon the promise of immunity testified against the vessel, although the owners or officers of the vessel were not engaged therein, or knew nothing of such illegal acts. The court was, however, governed by the language of the statute rather than the equities of the case, and requested that the fact be submitted to the attorney-general before a decree be signed, as it was clearly a case of forfeiting an innocent vessel because of the rascality of the crew.

For further illustration of sufficiency of evidence to sustain forfeiture see U. S. *v.* The Henrietta Esch, 12 Fed. 483.

42. And the court cannot require clearer evidence than it could require in the investigation of any other matter of fact. U. S. *v.* Nine Packages of Linen, 27 Fed. Cas. No. 15,884, 1 Paine 129.

43. Wood *v.* U. S., 16 Pet. (U. S.) 342, 10 L. ed. 987.

44. U. S. *v.* Ten Cases of Merchandise, 28 Fed. Cas. No. 16,447; U. S. *v.* Ten Cases Shawls, 28 Fed. Cas. No. 16,448, 2 Paine 162.

45. *In re* One Hundred and Twenty-Three Packages of Glass, 18 Fed. Cas. No. 10,525; U. S. *v.* Fourteen Packages of Pins, 25 Fed. Cas. No. 15,151, 1 Gilp. 235; U. S. *v.* Two Hundred Quarter Boxes Cigars, 28 Fed. Cas. No. 16,587.

For illustrative case of sufficiency of evidence to warrant forfeiture for undervaluation see U. S. *v.* Five Cases of Cigars, 25 Fed. Cas. No. 15,109.

Mere preponderance on behalf of the government is sufficient. Three Thousand Eight Hundred and Eighty Boxes of Opium *v.* U. S., 23 Fed. 367.

46. U. S. *v.* Three Cases, etc., 28 Fed. Cas. No. 16,497.

47. The Sarah Bernice, 21 Fed. Cas. No. 12,343, 1 Hask. 78, where, under allegations that eight barrels of an importation, and cigars to a certain value were landed, it was held that, although the proof might satisfy the court that a greater amount was landed, the government must be held to the averment of the allegation.

48. U. S. *v.* Twenty-Four Coils of Cordage, 28 Fed. Cas. No. 16,566, Baldw. 502 [*affirming* 28 Fed. Cas. No. 16,573, Gilp. 299], holding that on an information against specified articles as "sea stores" they could not be forfeited as a part of the cargo, or as part of the tackle of the ship.

49. U. S. *v.* Brant, 24 Fed. Cas. No. 14,637, Pet. C. C. 14.

50. Bottomley *v.* U. S., 3 Fed. Cas. No. 1,688, 1 Story 135.

51. See, generally, TRIAL.

52. For example an instruction that the government has a lien upon the property seized and can therefore recover the duty thereon, regardless of a verdict for the defendant. Such instruction can serve no purpose except to unduly influence the jury and incline them in favor of the claimant, upon the theory that upon any event the government would not be a loser by the verdict. U. S. *v.* One Pearl Necklace, 111 Fed. 164 [*reversing* 105 Fed. 357].

53. Caldwell *v.* U. S., 8 How. (U. S.) 366, 12 L. ed. 1115, where the instruction under the counts in the information was held erroneous in that it was calculated to mislead the jury into a conclusion that the suit was against the claimant for a meditated fraud in the importation of the goods in question, which had rendered them liable to forfeiture.

whereby the burden is cast upon the claimant,[54] is for the court;[55] but all questions as to the weight of evidence,[56] or the intent of the importer, when such intent is material to the issue,[57] are for the jury.

(f) NEW TRIAL.[58] Where the proceeding is against a large quantity of goods, on the ground of fraudulent importation of the entire lot, the mere fact that a particular package thereof was appraised below its invoiced value will not warrant the setting aside of the verdict;[59] nor will a new trial be granted for mere technical or formal errors, especially when they are occasioned by the complaining party.[60]

(g) JUDGMENT.[61] This action is a civil proceeding *in rem*, within the meaning of section 954 of the United States Revised Statutes providing the manner and reasons for which a judgment in such cases may be arrested or reversed.[62]

(2) FOR RECOVERY OF VALUE OF GOODS. When the statute is conditioned in the alternative,[63] the government may, instead of a proceeding *in rem*, maintain an action at law [64] against the importer for the value of the illegal importation, the recovery in which would be the value of the goods,[65] and not the amount defendant may have received on sale of the same.[66]

54. See *supra*, V, C, 2, c, (III), (C), (1), (c), aa.

55. Buckley *v.* U. S., 4 How. (U. S.) 251, 11 L. ed. 961; Three Thousand One Hundred and Nine Cases of Champagne, 27 Fed. Cas. No. 14,012, 1 Ben. 241; U. S. *v.* Sixteen Cases of Silk Ribbons, 27 Fed. Cas. No. 16,301.

Whether the difference between the entry and the invoice arose from accident or mistake was held under the act of 1818, to be one exclusively for the secretary of the treasury, and could not therefore be submitted to the jury; section 67 of the act of 1799 being repealed by this latter statute. U. S. *v.* One Case of Hair Pencils, 27 Fed. Cas. No. 15,924, 1 Paine 400. See also U. S. *v.* Six Hundred Tons of Iron Ore, 17 Fed. 137, holding that under section 17 and 18, of the act of 1874, the question of the amount of freight due the owners of a vessel on forfeited importations must be passed upon by the secretary of the treasury, and not by the court.

56. *In re* One Hundred and Twenty-Three Packages of Glass, 18 Fed. Cas. No. 10,525; *In re* Twelve Hundred and Nine Quarter Casks, etc., of Wine, 24 Fed. Cas. No. 14,279, 2 Ben. 249.

57. Lewey *v.* U. S., 15 Fed. Cas. No. 8,309, 15 Blatchf. 10.

58. See, generally, NEW TRIAL.

59. Especially is this true where it is not clear to the court that the valuation of this one particular package was not so made for the very purpose of promoting the general scheme of fraud. U. S. *v.* Twenty-Five Cases of Cloths, 28 Fed. Cas. No. 16,563*a*.

60. U. S. *v.* Fourteen Packages of Pins, 25 Fed. Cas. No. 15,151, 1 Gilp. 235, holding that a new trial would not be granted because the jury was sworn to try an issue between the United States and the owner of certain goods on an information for forfeiture, where the claimant's answers were filed by an agent of the owner; such evidence being clearly within the knowledge of the importers' attorney.

61. See, generally, JUDGMENTS.

For illustration of vague or indefinite judgment see U. S. *v.* One Case of Stereoscopic Slides, 27 Fed. Cas. No. 15,927, 1 Sprague 467, holding that under a statute prohibiting the importation of indecent or obscene articles and providing that all invoices and packages of which such articles shall compose a part shall be liable to forfeiture, a verdict, to sustain a forfeiture of the package in which the prohibited articles were found, must affirm that such articles were found within a "package" and not in a "case," as the court will not judicially know that a case of goods in the language of the importers is always a package.

62. Friedenstein *v.* U. S., 125 U. S. 224, 8 S. Ct. 838, 31 L. ed. 736.

Recitation that question of intent was submitted to the jury under a statute expressly providing that the court must submit to a jury for a special finding, the question whether or not the alleged wrongful act was done with an actual intention to defraud the United States, a recitation in the judgment that such finding was rendered is unnecessary. Friedenstein *v.* U. S., 125 U. S. 224, 8 S. Ct. 838, 31 L. ed. 736; Origet *v.* U. S., 125 U. S. 240, 8 S. Ct. 846, 31 L. ed. 743.

63. That is, for a forfeiture of the goods or the value thereof. See *infra*, V, C, 2, c, (V).

64. U. S. *v.* Willetts, 28 Fed. Cas. No. 16,699, 5 Ben. 220.

65. U. S. *v.* Baker, 24 Fed. Cas. No. 14,500, 5 Ben. 251.

66. This arises from the fact that the right to recover the value does not depend on any principle of subrogation, but on the statute, which in effect says that in any event the goods or their value shall be forfeited by the owner. So soon as the goods passed from the hands of the owner into those of the *bona fide* owner, the right of a proceeding *in rem* is gone, and the government is driven to its suit against the wrong-doer, but not for what he has received in the place of the goods, but for their value. The basis of recovery is not changed by the sale, and the only effect thereof is to take away all right of pro-

(IV) *BY SUMMARY PROCEEDINGS.*[67] Under the earlier tariff acts it was incumbent upon a customs official making any seizure to at once institute proceedings *in rem* for their forfeiture, in which all parties interested could intervene and have their claims adjudicated by the court;[68] but for the purpose of saving the government the expense of proceeding by a judicial condemnation when the seizure was of inconsiderable value,[69] more summary provisions have been enacted providing for a sale of the property upon advertisement[70] of the same should its appraised value be less than a certain amount;[71] and a sale upon compliance with these provisions is equivalent to a sale under a judicial condemnation.[72]

(V) *AS AFFECTED BY RIGHTS OF THIRD PARTIES.* If by the terms of the statute an illegal act creates a forfeiture without any alternative, the property right in the importation will be held to vest in the government immediately upon the commission of such act,[73] and the rights of a third party subsequently obtained therein cannot be respected, no matter how innocently acquired;[74] but if, under the statute, it is optional with the government either to proceed for forfeiture or sue for the value of the property, a right innocently acquired after the commission

ceeding against the goods and to leave the government to its original right of action against the importer for the fraudulent action only. U. S. *v.* York Street Flax-Spinning Co., 28 Fed. Cas. No. 16,781, 17 Blatchf. 138.

67. See, generally, SUMMARY PROCEEDINGS.

68. Conway *v.* Stannard, 17 Wall. (U. S.) 398, 21 L. ed. 649; McGuire *v.* Winslow, 26 Fed. 304, 23 Blatchf. 425; Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381, in which cases the earlier procedure is reviewed and commented upon.

69. McGuire *v.* Winslow, 26 Fed. 304, 23 Blatchf. 425.

70. These statutes, with their changes, are embodied in U. S. Rev. St. (1878) §§ 3074–3080 [U. S. Comp. St. (1901) pp. 2011–2013].

71. Under the present statute this proceeding is applicable only when the appraised value is less than five hundred dollars (U. S. Rev. St. (1878) § 3075 [U. S. Comp. St. (1901) p. 2011]), and under the initial statute of this nature (act of 1844), such summary proceedings could be invoked only when the appraised value was less than one hundred dollars. McGuire *v.* Winslow, 26 Fed. 304, 23 Blatchf. 425.

72. McGuire *v.* Winslow, 26 Fed. 304, 307, 23 Blatchf. 425, where it is said: "These provisions of law were adopted originally as a substitute for the ordinary judicial proceeding in a specific class of seizures. They contemplate a form and mode of proceeding having the ordinary characteristics of a judicial proceeding *in rem*. . . They afford a reasonable notice of publication of the commencement of the proceeding, and of the cause of seizure, and preserve to the persons interested in the property a reasonable opportunity to assert their claim, and have their rights judicially determined. The provisions which authorize an application to the secretary of the treasury also evince the legislative intent that a sale made pursuant to these sections shall conclude the rights of persons interested in the property as effectually as they would be concluded under a judicial decree. . . . The concluding provision, directing the secretary of the treasury to distribute the proceeds of the sale 'in the same manner as if the property had been condemned and sold in pursuance of a decree of a competent court,' also indicates the legislative intent that the sale is to be treated in all its incidents as a sale under a judicial decree."

Proceedings against perishable property.— While it is evident that the scheme adopted for the sale of property without resort to the courts is in a sense summary, it is also evident that provisions for the condemnation of property which is likely to speedily deteriorate in value should be even more summary; and the statutes have recognized this difference and made provisions accordingly. See U. S. Rev. St. (1878) § 3080 [U. S. Comp. St. (1901) p. 2013]. Under the former statute, of which the present would seem to be a re-enactment, it is held that the collector might publicly advertise the property for sale at once upon seizure, and after procuring the proper certificates by the appraisers, of its value and character, he might sell the same upon one week's notice. Conway *v.* Stannard, 17 Wall. (U. S.) 398, 21 L. ed. 649.

73. **A seller of goods,** which were delivered to the purchaser, although having the right, as against the purchaser, to rescind the sale and recover the goods, because they were obtained by means of fraudulent representations and with the intention on the part of the purchaser not to pay for the same, cannot assert such right against the right of the United States to forfeit the goods, where they were seized when the purchaser, while thus clothed with ownership and possession, was attempting to smuggle them into the country in violation of its customs laws. 581 Diamonds *v.* U. S., 119 Fed. 556.

74. Summers *v.* Clark, 29 La. Ann. 93; Knecland *v.* Willard, 59 Me. 445; Caldwell *v.* U. S., 8 How. (U. S.) 366, 12 L. ed. 1115; U. S. *v.* Certain Diamonds, 30 Fed. 364; U. S. *v.* Fifty-Three Bales of Rags, 25 Fed. Cas. No. 15,097 (holding that therefore a carrier, although innocent of any fraud, had no lien on smuggled goods for his charges of transportation); U. S. *v.* Four Cases of Lastings, 25 Fed. Cas. No. 15,145, 10 Ben. 371.

of the unlawful act, but before the government had elected its remedy, should be protected.[75]

3. By Penalties[76] — a. Grounds of Imposition. As a further facility for the maintenance of regularity and uniformity in this branch of the revenue system penalties have been imposed for various offenses,[77] the more important of which are: A failure to produce a true and proper manifest;[78] the obstruction or hindrance by the master of any officer in lawfully boarding his vessel for the purpose of carrying into effect any of the revenue laws of the United States;[79] unlading goods without a permit;[80] selling, alienating, or removing any empty casks which

75. U. S. *v.* Auffmordt, 122 U. S. 197, 7 S. Ct. 1182, 30 L. ed. 1182 [*affirming* 19 Fed. 893] (holding that an absolute forfeiture of an importation provided for by a subsequent statute was inconsistent with the alternative forfeiture of the merchandise or its value, as provided by an existing statute, and that therefore the latter would necessarily repeal the former); Caldwell *v.* U. S., 8 How. (U. S.) 366, 12 L. ed. 1115; U. S. *v.* Nineteen Hundred Sixty Bags of Coffee, 8 Cranch (U. S.) 398, 3 L. ed. 602; U. S. *v.* Fifty-Three Boxes Havana Sugar, 25 Fed. Cas. No. 15,098, 2 Bond 346; U. S. *v.* Seventy-Eight Cases of Books, 27 Fed. Cas. No. 16,258*b*, 2 Bond 285; U. S. *v.* Sundry Boxes Havana Sugar, 27 Fed. Cas. No. 16,418, 2 Bond 342; U. S. *v.* York St. Flax-Spinning Co., 28 Fed. Cas. No. 16,781, 17 Blatchf. 138. And see *In re* Six Hundred Tons of Iron Ore, 9 Fed. 595, 599, where it is said: "Where it (the statute) makes the forfeiture absolute, . . . the forfeiture is incurred at the time of the commission of the act which works the condemnation, and the title vests in the United States from that date. No matter how long afterwards proceedings are taken to enforce the forfeiture, the right of the government runs back, by relation, to the time of the commission of the wrongful acts, and cuts out all intervening claimants, however innocent. But when a statute gives an alternative to the United States, either to forfeit the offending thing or its value by suit against the offending person, . . . the government acquires no title to the property until its proper officers make an election whether they will proceed against the *res* or against the offender for its value, and in the mean time, pending the election, all *bona fide* encumbrances are protected."

76. See, generally, Penalties.

77. **Penalty for receiving unlawful fee, compensation, or reward.**— The section of the statute (U. S. Rev. St. (1878) § 2636 [U. S. Comp. St. (1901) p. 1815]) imposing a penalty of two hundred dollars upon an officer of the customs who demands or receives any other or greater fee, compensation, or reward than is allowed by law, for performing any duty or service required from him by law, is construed to authorize an action against an officer for such penalty, only when he has exacted fees under circumstances which would not, under the previous statutes, have entitled him to a certificate of probable cause, or, after the person aggrieved had taken appeal to the secretary of the treasury under such former provisions. Hedden *v.* Iselin, 31 Fed. 266, 24 Blatchf. 455 [*reversing* 28 Fed. 416], the court observing that since the original passage of this statute, the revenue system had been so completely remodeled that this provision in question had long been practically obsolete; in fact so much so that no decision could be found in the reports in which this particular section had been resorted to as the foundation of an action.

78. Steinham *v.* U. S., 22 Fed. Cas. No. 13,355, 2 Paine 168 (holding that it was not necessary that a party, to be liable to the penalty, should be actually on board of the vessel at the time she entered the waters of the United States); U. S. *v.* Cave, 25 Fed. Cas. No. 14,760; U. S. *v.* Teffry, 28 Fed. Cas. No. 16,443. But it was held that as foreign vessels which came within our jurisdiction could not be expected to know that a particular document was required by our laws the provisions for this penalty did not apply to such foreign vessels. U. S. *v.* Twenty-Six Diamond Rings, 28 Fed. Cas. No. 16,572, 1 Sprague 294. Nor is it necessary that goods not dutiable be included within the manifest. The S. Oteri, 67 Fed. 146, 14 C. C. A. 344.

The excuse for the penalty for a disagreement of the cargo with the manifest, as provided for in this statute, must not only satisfy the court that no part of the cargo had been landed after it was taken on board, but also that the disagreement between the manifest and the actual importation was by mistake or accident. U. S. *v.* Fairclough, 25 Fed. Cas. No. 15,068, 4 Wash. 398.

79. The Barracouta, 42 Fed. 160.

80. U. S. Rev. St. (1878) § 2873 [U. S. Comp. St. (1901) p. 1910].

Unlading must be of merchandise.— The penalty which is imposed upon the master of a vessel for being concerned in landing any merchandise without a permit uses the word "merchandise" in the sense usually employed in customs acts, and therefore the unlawful landing of an article not within the meaning of that term would not subject the master to this liability. U. S. *v.* Fry, 48 Fed. 713 [*following* U. S. *v.* Chain Cable, 25 Fed. Cas. No. 14,776, 2 Sumn. 362].

Who liable.— The penalty for such unlading should, it is held, be imposed on the master of the vessel if he is in command at the time of the unlawful unlading; and if he is not in command at that time, then on the party who is in command; the purpose of the infliction of such penalty upon the one or the other of them being because of their presumed negligence in not preventing the act. U. S. *v.* Curtis, 16 Fed. 184.

For construction of the earlier provision see

have contained foreign distilled spirits before the marks thereon have been defaced;[81] permitting the breaking of locks or fastenings put by an inspector upon a vessel;[82] and failing to make a report[83] of arrival or entry before voluntarily[84] leaving a collection district, unless it be to proceed to some interior district to which the vessel is bound.[85] From the purposes of these statutes they would seem to refer only to vessels actually bound for our ports,[86] although when actually bound for the United States it has been held that the report and entry must be made, although the vessel from necessity arrives at a port other than the one intended.[87]

b. Materiality of Intent. While in some instances the intention to evade or to act in derogation of the customs law is from the very nature of the statute essential to a liability for the penalty prescribed,[88] in other cases, such as the importing of goods without a proper manifest,[89] or for the unlading or delivery of goods without a permit,[90] the intent of the party is immaterial.

c. Manner of Enforcement — (1) *In General.* Where the statute, without particularly designating the mode of procedure, merely imposes a penalty of a fixed amount or of an amount which may be determined with certainty, it seems that a civil action of debt or a proceeding by information on the part of the government will lie to recover the same;[91] in any event an action for such

Clark *v.* Protection Ins. Co., 5 Fed. Cas. No. 2,832, 1 Story 109; The E. K. Dresser, 8 Fed. Cas. No. 4,324, 2 Hask. 349; Jackson *v.* U. S., 13 Fed. Cas. No. 7,149, 4 Mason 186.

81. The statute was held not to apply to the removal of such cask by a person who had received it after a purchase, such purchaser not having knowledge that the marks thereon had not been defaced in compliance with the law. U. S. *v.* Halberstadt, 26 Fed. Cas. No. 15,276, Gilp. 262.

82. U. S. *v.* Mantor, 26 Fed. Cas. No. 15,719, 2 Mason 123, holding that this statute applied to vessels in coasting as well as in a foreign trade.

83. To whom made.— It is usually necessary that the report be made by the master of the vessel at the office of the chief officer of customs, and a report to an inspector on board of the vessel, and in a shop on shore, has been held to be an insufficient compliance with the statute. U. S. *v.* Galacar, 25 Fed. Cas. No. 15,181, 1 Sprague 545. See, however, U. S. *v.* Rendell, 27 Fed. Cas. No. 16,147, 1 Curt. 369.

84. For if the departure or attempted departure be caused by stress of weather, pursuit or duress of enemies, or other necessity, the penalty is not incurred. U. S. Rev. St. (1878) § 2773 [U. S. Comp. St. (1901) p. 1862].

85. The expression "more interior district" is to be understood as used in its common meaning, and would therefore mean further within the indentations or inlets of the contiguous and adjacent country. U. S. *v.* Bearse, 24 Fed. Cas. No. 14,552, 4 Mason 192, holding that New York was not "a more interior district" with reference to Barnstable, with regard to a vessel bound from Nova Scotia to New York.

86. The Appollon, 9 Wheat. (U. S.) 362, 6 L. ed. 111. See also The Javirena, 67 Fed. 152, 14 C. C. A. 350 [*citing* The Appollon, 9 Wheat. (U. S.) 362, 6 L. ed. 111], holding that a Spanish fishing smack which had anchored within five miles of the mainland of Florida for the purpose of making needed repairs was not within the meaning of the statute, and did not incur the penalty for departing from the district without making the report and entry.

87. U. S. *v.* Webber, 28 Fed. Cas. No. 16,656, 1 Gall. 392.

88. As for instance the offense of knowingly being concerned in the storage or selling of goods known to be landed without a license. Walsh *v.* U. S., 29 Fed. Cas. No. 17,116, 3 Woodb. & M. 341. See also U. S. *v.* Platt, 27 Fed. Cas. No. 16,054*a*.

89. The Helvetia, 11 Fed. Cas. No. 6,345, 6 Ben. 51; U. S. *v.* Hutchinson, 26 Fed. Cas. No. 15,431, 1 Hask. 146; U. S. *v.* The Missouri, 26 Fed. Cas. No. 15,785, 9 Blatchf. 433 [*affirming* 17 Fed. Cas. No. 9,653, 4 Ben. 410]; U. S. *v.* The Queen, 27 Fed. Cas. No. 16,108, 11 Blatchf. 416; U. S. *v.* Smith, 27 Fed. Cas. No. 16,319, 2 Blatchf. 127. Although the circumstances of the case may be such that the court will allow them to be taken into consideration in mitigating the penalty. U. S. *v.* Teffry, 28 Fed. Cas. No. 16,443. But see U. S. *v.* Stadacona, 27 Fed. Cas. No. 16,371, 8 Phila. (Pa.) 855.

90. U. S. *v.* Curtis, 16 Fed. 184.

91. Stockwell *v.* U. S., 13 Wall. (U. S.) 531, 20 L. ed. 491 [*affirming* 23 Fed. Cas. No. 13,466]; Walsh *v.* U. S., 29 Fed. Cas. No. 17,116, 3 Woodb. & M. 341.

These cases are at variance with U. S. *v.* Claflin, 97 U. S. 546, 553 note, 24 L. ed. 1082, 1085 [*affirming* 25 Fed. Cas. No. 14,799, 14 Blatchf. 55]; *In re* Landsberg, 14 Fed. Cas. No. 8,041, in that these latter cases hold that the statute under which the former cases were decided was repealed by the act of 1866. As U. S. *v.* Claflin, *supra*, is from our highest tribunal, and as Stockwell *v.* U. S., 13 Wall. (U. S.) 531, 20 L. ed. 491, is expressly departed from, it may be said to be settled that so far as the particular provisions of the statute under discussion in these cases are concerned, only a proceeding for forfeiture of the goods or a criminal prosecution will now lie.

recovery would be a suit at common law, and hence triable by jury at the instance of the accused.[92]

(II) *By Proceedings Against Vessel.* As a further provision for the enforcement of these penalties it is provided that when the owner or master of a vessel has become subject to such penalty the vessel may be held therefor.[93] Under this provision it is held that a libel may be filed and enforced against the vessel, although no action has been instituted or judgment obtained against the owner or master;[94] but if the vessel be used as a common carrier, it must be shown that the master or owner was a consenting party or privy to the illegal act for which the penalty was incurred.[95]

(III) *Defenses.*[96] The full, unconditional pardon of a person who has been convicted and imprisoned for smuggling is a good defense to a subsequent action against him for a penalty incurred by the same unlawful importation.[97]

D. Disposition of Proceeds. To stimulate a faithful and strict performance of the customs laws, provisions were early enacted,[98] providing for a disposition of a part of the proceeds of fines, penalties, and forfeitures incurred under laws relating to customs, between the informers and customs officials of the district wherein the offense occurred;[99] but this scheme, having several unsatisfac-

Pleading — Variance.— If the action be for a penalty for a failure to deliver a manifest upon arrival from a foreign territory, it is necessary that the sovereign power of such territory be averred. Steinham *v.* U. S., 22 Fed. Cas. No. 13,355, 2 Paine 168. But it is held that a declaration alleging that goods not included in the manifest belonged to the master would not be supported by evidence that they belonged to and were smuggled on board by one of the crew of the vessel, and that the variance would be fatal. U. S. *v.* Hutchinson, 26 Fed. Cas. No. 15,431, 1 Hask. 146.

92. U. S. *v.* The Queen, 27 Fed. Cas. No. 16,108, 11 Blatchf. 416 [*affirming* 27 Fed. Cas. No. 16,107, 4 Ben. 237], where it was urged upon behalf of the government that such penalty might be recovered by an action in admiralty.

Joinder.—If the action against the vessel and her master for the penalty (see *infra*, V, C, 3, c, (II)) is joint, and an attempt is made to try them both as a civil cause under admiralty and maritime jurisdiction, the information will be dismissed upon the objection to such joinder by the master, but a decree may be entered against the vessel. U. S. *v.* The Irma, 26 Fed. Cas. No. 15,444; U. S. *v.* The Queen, 27 Fed. Cas. No. 16,108, 11 Blatchf. 416 [*affirming* 27 Fed. Cas. No. 16,107, 4 Ben. 237].

93. U. S. Rev. St. (1878) § 3088 [U. S. Comp. St. (1901) p. 2016]; The Barracouta, 42 Fed. 160.

94. The C. G. White *v.* U. S., 64 Fed. 579, 12 C. C. A. 314; The Helvetia, 11 Fed. Cas. No. 6,345, 6 Ben. 51; U. S. *v.* The Missouri, 26 Fed. Cas. No. 15,785, 9 Blatchf. 433 [*affirming* 17 Fed. Cas. No. 9,652, 3 Ben. 508]; U. S. *v.* The Queen, 27 Fed. Cas. No. 16,108, 11 Blatchf. 416 [*affirming* 27 Fed. Cas. No. 16,107, 4 Ben. 237]. See also The Antilles, 1 Fed. Cas. No. 489, 8 Ben. 9; and, generally, ADMIRALTY.

95. U. S. Rev. St. (1878) § 3062 [U. S. Comp. St. (1901) p. 2007]; U. S. *v.* The Walla Walla, 44 Fed. 796. For application of this provision see The Saratoga, 15 Fed. 382 [*affirming* 9 Fed. 322]. And for full explanation of the import and meaning of this provision see U. S. *v.* Curtis, 16 Fed. 184.

96. The record of a proceeding in which goods were condemned and forfeited because of the absence of a manifest would not be a good defense to an action to recover the penalty provided for such unlawful act. McGlinchy *v.* U. S., 16 Fed. Cas. No. 8,803, 4 Cliff. 312.

97. U. S. *v.* Gates, 25 Fed. Cas. No. 15,191, 4 N. Y. Leg. Obs. 8; U. S. *v.* Tilton, 28 Fed. Cas. No. 16,525, 7 Ben. 306.

Pardon generally see PARDONS.

98. See Hahn *v.* U. S., 14 Ct. Cl. 305, where the different acts from 1789 to the date of the decision, which acts culminated in U. S. Rev. St. (1878) § 3090 [U. S. Comp. St. (1901) p. 2017] are reviewed and commented upon.

99. See Lapham *v.* Almy, 13 Allen (Mass.) 301 (holding that the state court had jurisdiction of an action instituted by an informer); Buel *v.* Enos, Brayt. (Vt.) 56; Hahn *v.* U. S., 107 U. S. 402, 2 S. Ct. 494, 27 L. ed. 527; Ring *v.* Maxwell, 17 How. (U. S.) 147, 15 L. ed. 25; Hoyt *v.* U. S., 10 How. (U. S.) 109, 646, 13 L. ed. 348, 576; Hooper *v.* Fifty-One Casks of Brandy, 12 Fed. Cas. No. 6,674, 2 Ware 371; *Ex p.* Marquand, 16 Fed. Cas. No. 9,100, 2 Gall. 552; The Monte Christo, 17 Fed. Cas. No. 9,720, 6 Ben. 327; U. S. *v.* Collier, 25 Fed. Cas. No. 14,833, 3 Blatchf. 325; U. S. *v.* Fifty-One Dozen Pieces of Merchandise, 25 Fed. Cas. No. 15,094, 2 Sprague 100; U. S. *v.* George, 25 Fed. Cas. No. 15,197, 6 Blatchf. 37; U. S. *v.* Linens, 26 Fed. Cas. No. 15,604, 3 Phila. (Pa.) 523; U. S. *v.* Segars, 27 Fed. Cas. No. 16,249, 3 Phila. (Pa.) 517.

tory and objectionable features, was dispensed with, and provisions were enacted in its stead providing for the payment of all such moneys into the treasury of the United States, and for a payment by the secretary of the treasury of suitable compensation to such persons in certain cases.[1]

VI. REMISSION OF FORFEITURES AND PENALTIES.

From the fact that a system of customs laws must necessarily contain many and minute provisions, necessarily enforced by a corresponding number of penalties and forfeitures, it may readily be seen that frequently a most upright and wary merchant would be subjected to hardships.[2] The injustice and harshness of the system being early recognized by congress,[3] its severity was tempered by the passage and reënactment of provisions conferring upon the secretary of the treasury the power to exercise his discretion in the remission of forfeitures and penalties incurred without wilful negligence or intentional fraud;[4] which discretion

The termination of the customs official's term of office before sentence of condemnation was passed did not terminate his right, under these statutes, to his share in the proceeds; the seizure gave him an inchoate right, which became absolute upon condemnation. Buel *v.* Van Ness, 8 Wheat. (U. S.) 312, 5 L. ed. 624; Van Ness *v.* Buel, 4 Wheat. (U. S.) 74, 4 L. ed. 516 [*affirming* Brayt. (Vt.) 59]; Jones *v.* Shore, 1 Wheat. (U. S.) 462, 4 L. ed. 136. See also U. S. *v.* Jones, 26 Fed. Cas. No. 15,492, 1 Brock. 285.

1. Act of June 2, 1874, commonly known as the Anti-Moiety Act. 18 U. S. St. at L. 186 [U. S. Comp. St. (1901) p. 2018].

Application of act.— Section 4 of the act designates the person who shall receive such compensation, and under section 6 of the act, it is held that a judge's certificate of the value of services of an inspector "furnishing information" as to smuggled goods is not required in the case of an officer seeking recovery for actual discovery and seizure. Eager *v.* U. S., 32 Ct. Cl. 571.

Effect of act upon allowance of costs.—Notwithstanding the fact that the statute repealed all prior provisions of law under which moieties of fines, penalties, or forfeitures were to be paid to officers of the United States, it was held that the district attorney of the United States was entitled, in a suit brought to enforce forfeitures, to tax as costs, two per cent on the amount of proceeds realized under execution, in accordance with the act of 1863, and the clerk would be entitled to tax one per cent on such proceeds as provided by prior statutes. U. S. *v.* One Horse, 27 Fed. Cas. No. 15,932, 7 Ben. 405.

2. U. S. *v.* Three Trunks, etc., 8 Fed. 583, 7 Sawy. 364; U. S. *v.* Hutchinson, 26 Fed. Cas. No. 15,431, 1 Hask. 146; U. S. *v.* One Case Hair Pencils, 27 Fed. Cas. No. 15,924, 1 Paine 400.

3. For it was by the act of March 3, 1797, that the first permanent act providing for the remission of penalties and forfeitures was passed (U. S. *v.* Hutchinson, 26 Fed. Cas. No. 15,431, 1 Hask. 146); and while before this time similar acts of a temporary nature had been passed from time to time, yet it would seem that there was a period of about two years before the passage of the permanent statute, during which no provisions of this nature existed (U. S. *v.* Morris, 10 Wheat. (U. S.) 246, 6 L. ed. 314).

4. U. S. *v.* Morris, 10 Wheat. (U. S.) 246, 6 L. ed. 314; U. S. *v.* One Pearl Necklace, 111 Fed. 164, 49 C. C. A. 287, 56 L. R. A. 130; U. S. *v.* Three Trunks, etc., 8 Fed. 583, 7 Sawy. 364; *In re* Princess of Orange, 19 Fed. Cas. No. 11,431 (holding that a proceeding for the remission of a forfeiture could not be maintained until the forfeiture suit had proceeded to judgment, and that the collector, although he had not control of a prosecution for the forfeiture, might nevertheless show cause against its remission); U. S. *v.* Hutchinson, 26 Fed. Cas. No. 15,431, 1 Hask. 146; U. S. *v.* Nine Trunks, 27 Fed. Cas. No. 15,885; U. S. *v.* One Case Hair Pencils, 27 Fed. Cas. No. 15,924, 1 Paine 400; U. S. *v.* Package of Lace, 27 Fed. Cas. No. 15,985, Gilp. 338.

Nature and importance of power of remission.— It is said that the power to remit penalties and forfeitures is one of the most important and extensive which can be exercised under the government, inasmuch as it virtually affects the rights, revenues, and prerogatives of the United States. Since such prerogatives ought not to be waived or extinguished except by the clear provisions of the law, it would seem to be necessary that a party who sets up a treasury pardon as a purge to a forfeiture, should show that the pardon was within the purview of the powers confided to that department. And while it would not be necessary to show that the proceedings had been carried out with the precision and accuracy of special pleading, yet a substantial compliance with the requisites of the law should be shown. The Margaretta, 16 Fed. Cas. No. 9,072, 2 Gall. 515.

Analogy to English statute.— The power of the secretary of the treasury in the remission of forfeitures and penalties has been supposed analogous to those of the commissioners of the customs in England, under Geo. III, c. 32, § 15, but upon reference to that statute it would be seen that the powers of such commissioners were of a more limited

cannot be revised or controlled by the courts,[5] but may be exercised upon any condition consistent with law.[6]

CUSTOMS OF LONDON. Particular customs within the city of London, with regard to trade, apprentices, widows, orphans and a variety of other matters.[1]

CUSTOS CORPORIS CUJUSQUE INFANTIS EST IN ESTO AD QUEM HÆREDITAS NEQUEAT PERVENIRE. A maxim meaning "Let him be the guardian of the body of the infant to whom the inheritance can not come."[2]

CUSTOS MAGNI SIGILLI. Keeper of the great seal.[3]

CUSTOS MARIS. In old English law, warden of the sea.[4] (See ADMIRAL.)

CUSTOS MORUM. The guardian of morals.[5]

CUSTOS PRIVATI SIGILLI. Keeper of the privy seal.[6]

CUSTOS ROTULORUM. Keeper or master of the rolls.[7]

CUSTOS STATUM HÆREDIS IN CUSTODIA EXISTENTIS MELIOREM NON DETERIOREM FACERE POTEST. A maxim meaning "A guardian can make the estate of an heir living under his guardianship better, not worse."[8]

CUT.[9] As a noun, the term is used to designate a wound made with a sharp

nature than are those of our secretary of the treasury. These powers were, however, afterward, by 51 Geo. III, c. 96, to some extent extended, and by 54 Geo. III, c. 171, the power was transferred to the commissioners of the treasury; and under this latter act the powers of such commissioners are very analogous to those given to our secretary of the treasury; and the phraseology employed is nearly the same in both acts. U. S. *v.* Morris, 10 Wheat. (U. S.) 246, 6 L. ed. 314.

5. Macheca *v.* U. S., 26 Fed. 845.

6. Jungbluth *v.* Redfield, 14 Fed. Cas. No. 7,583, 4 Blatchf. 219.

Effect of a remission, when obtained pursuant to statute, is a release of the cause of forfeiture, and no exactions nor charges can be legally made which are based thereon. Murray *v.* Arthur, 17 Fed. Cas. No. 9,956, 13 Blatchf. 429.

Effect of remission upon interest of collector.— The right of the collector to a moiety of the proceeds of a forfeiture may be displaced by a remission by the secretary, as his authority to remit is limited only by the payment of the money to the collector for distribution. U. S. *v.* Morris, 10 Wheat. (U. S.) 246, 6 L. ed. 314. To the same effect see McLane *v.* U. S., 6 Pet. (U. S.) 404, 8 L. ed. 443. But the government would have no authority to release the collector's share, as such, and still retain to itself the other part of the forfeiture. McLane *v.* U. S., 6 Pet. (U. S.) 404, 8 L. ed. 443; The Margaretta, 16 Fed. Cas. No. 9,072, 2 Gall. 515.

Requisites under special statutes.— If the secretary relies upon a special statute as authority for the remission of a penalty or forfeiture, it would seem that if the facts in the case were such that the special statute would have no application the remission could not be supported under the general statute providing for a remission. The Margaretta, 16 Fed. Cas. No. 9,072, 2 Gall. 515.

Right of district attorney to petition for remission.— In *In re* Princess of Orange, 19 Fed. Cas. No. 11,431, it was held that if the United States through its district attorney was soliciting a remission of a forfeiture or penalty, there would necessarily be an insuperable defect of parties; yet a district attorney if performing no function appertaining to his office might in his private capacity as attorney present a petition for the remission of a forfeiture or penalty. And where it is clear that he acts in his individual capacity his official appellation may be disregarded in the petition as a *descriptio personæ* merely.

1. Burrill L. Dict. [*citing* 1 Bl. Comm. 75; 1 Stephen Comm. 54, 55].

Custom of London not recognized in attachment proceedings see 4 Cyc. 455 note 2.

Statutes founded on Custom of London in reference to attachment proceedings on contracts see 4 Cyc. 447 note 64.

2. Morgan Leg. Max.

3. English L. Dict.

4. Black L. Dict.

The title of a high naval officer among the Saxons and after the Conquest, corresponding with admiral. Black L. Dict. And see Fleet's Case, 2 Mod. 221.

5. Black L. Dict.

The court of queen's bench has been so styled. Black L. Dict. [*citing* 4 Stephen Comm. 377].

6. Adams Gloss.

7. Adams Gloss.

8. Bouvier L. Dict.

Applied in Bedford's Case, 7 Coke 7*b*.

9. **"Cut"** as used in a copyright law see Higgins *v.* Keuffell, 40 U. S. 428, 434, 11 S. Ct. 731, 35 L. ed. 470; and, generally, COPYRIGHT.

A "sticker" or "paster" containing the name of a candidate and attached to the face of the ballot, is not a "cut or device . . . to distinguish one ballot from another," within the meaning of Minn. Gen. St. c. 1, § 82. Quinn *v.* Markoe, 37 Minn. 439, 440, 35 N. W. 263.

instrument;[10] a wound with an instrument having an edge.[11] As a verb, to make, with an edged tool or instrument, an incision in; wound with something having a sharp edge; incise;[12] to sever by the application of a sharp or edged instrument, such as an ax, a saw, a sickle, etc., in order to facilitate removal.[13] (See COVENTRY ACT; and, generally, ASSAULT AND BATTERY; HOMICIDE.)

CUTCHERRY.[14] In Hindu law, a court, a hall, an office, the place where any public business is transacted.[15]

CUT GLASS TUMBLERS. As used in trade or commerce, the term applies only to tumblers the sides of which have been cut or ground.[16] (See, generally, CUSTOMS DUTIES.)

CUTLERY. Edged or cutting tools in general;[17] all cutting tools made of steel, such as knives, forks, scissors, razors, shears, etc.[18] (See, generally, CUSTOMS DUTIES.)

CUT-OFF.[19] Entirely separated.[20] As applied to railroads, a shorter and straighter road by which the length of a course or passage is reduced.[21] (See, generally, RAILROADS, WHARVES.)

CUT OF THE MILL. All merchantable lumber — every thing the mill saws, with the exception of culls.[22] (See CULL; and, generally LOGGING.)

CUTPURSE. In old criminal law, an offender answering to the modern pickpocket.[23]

CUTTING. An excavation made through a hill or rising ground, in constructing a road, railway, canal, etc.; the opposite of filling.[24] (Cutting: Timber — Evidence of Adverse Possession, see ADVERSE POSSESSION; On Public Lands,

"Cuts" as applied to an insurance policy see Houghton *v.* Watertown F. Ins. Co., 131 Mass. 300, 302.

10. State *v.* Cody, 18 Oreg. 506, 514, 23 Pac. 891, 24 Pac. 895.

11. State *v.* Patza, 3 La. Ann. 512, 514 [*citing* Archbold Cr. Pl. 426; 1 Russell Crimes 597], distinguishing "cut" from "stab."

12. As to cut one's finger. Century Dict.

"Cut, strike, or stab" see Philpot *v.* Com., 86 Ky. 595, 596, 6 S. W. 445, 9 Ky. L. Rep. 737 [*quoted* in Morehead *v.* Bittner, 106 Ky. 523, 528, 50 S. W. 857, 20 Ky. L. Rep. 1986].

"Cut, penetrate, and wound" as equivalent to "stab" see 3 Cyc. 1036 note 31.

"The offense of biting off the joint of a finger [does] not come within the words 'stabbing, cutting, or wounding.'" Rex *v.* Harris, 7 C. & P. 446, 32 E. C. L. 700.

13. Thus, to hew or saw down; fell: as, to cut timber. Century Dict.

"Cut, or procure to be cut, or aid or assist or be employed in cutting," etc., as used in a statute in relation to cutting trees see U. S. *v.* Leatherberry, 27 Fed. 606.

"Cutting" may embrace "punting" or "smoothing" when used with reference to glass tumblers (Binns *v.* Lawrence, 12 How. (U. S.) 9, 17, 13 L. ed. 871); and may include "binding," when applied to a self-binding harvester (Osborne *v.* McQueen, 67 Wis. 392, 400, 29 N. W. 636).

14. **Corrupted from** Kachari see Wharton L. Lex.

15. Wharton L. Lex. [*citing* Wilson Gloss.].

16. Binns *v.* Lawrence, 12 How. (U. S.) 9, 15, 13 L. ed. 871.

17. Webster Dict. [*quoted* in Koch *v.* Seeberger, 30 Fed. 424, 425, where it is said: "Pen and pocket knives and razors, which might also come under the general designation of 'cutlery,' are . . . taken from the operation of the general term 'cutlery'" in the tariff laws, etc.].

18. Simmons Hardware Co. *v.* Lancaster, 31 Fed. 445 [*citing* Homan Cycl. Com.; McCullough Dict. Com.], where it is said: "I find, also, that several large wholesale houses in this and other cities catalogue scissors, common shears, and sheep shears under the general head of 'cutlery.' In common parlance, there are different kinds of cutlery, such as 'table and pocket cutlery,' and 'razors, scissors, and shears,' as these catalogues show; but the word 'cutlery' is evidently a generic term, which is often used to describe razors, scissors, and shears, as well as knives for table, pocket, and other uses." And see Koch *v.* Seeberger, 30 Fed. 424, where it is said: "The proof shows that these goods are sold and dealt in as 'cutlery,' and known by that name to the trade. These implements, in their structure and use, are most analogous to shears and scissors."

19. **Distinguished from "switch" or "turnout"** see Erie R. Co. *v.* Steward, 61 N. Y. App. Div. 480, 483, 70 N. Y. Suppl. 698.

20. Tillotson *v.* Hudson River R. Co., 15 Barb. (N. Y.) 406, 410.

21. Erie R. Co. *v.* Steward, 61 N. Y. App. Div. 480, 484, 70 N. Y. Suppl. 698 [*citing* Century Dict.; Standard Dict.], where it is said: "The defendant's engineer, Mr. Parsons, thus describes it, and 'cut-off railroad' is the descriptive term employed by the plaintiff's chief engineer."

22. Sloan *v.* Allegheny Co., 91 Md. 501, 502, 46 Atl. 1003.

23. Burrill L. Dict.

24. Century Dict.

"Cuttings" on a line of railroad.—Where a contract for railroad grading contained the words "cuttings on the line of the road," the court said: "The contract plainly contemplates that, as a general rule, the road-

see PUBLIC LANDS; Right of Tenant, see CURTESY; DOWER; ESTATES; Trespass, see TRESPASS; Waste, see WASTE. See, generally, RAILROADS.)

CUT TOBACCO. Granulated tobacco.[25]

CUTWAL or **KATWAL.** The chief officer of police or superintendent of markets in a large town or city in India.[26]

CWT. An abbreviation for "hundred-weight"; one hundred and twelve pounds.[27]

CYCLONE. A rotatory storm or whirlwind of extended circuit.[28]

CYCLONE INSURANCE. A form of indemnity against loss or damage to property through the action of violent storms or high winds.[29] (See CYCLONE; and, generally, INSURANCE.)

CYNSOUR DE BURSE. A CUTPURSE,[30] *q. v.*

CYPHONISM. That kind of punishment used by the ancients, and still used by the Chinese, called by Staunton the "wooden collar," by which the neck of the malefactor is bent or weighed down.[31]

CY PRES.[32] Literally, as near to.[33] A rule (adopted) in equity which may be stated thus: When a definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it, the duty may be performed with as close approximation to that scheme as reasonably practicable.[34] (See, generally, CHARITIES; PERPETUITIES.)

bed will be an embankment which is to be made by earth thrown up from the ditches on either side, but that there would be places along the line of the road which were already too high, and to be brought to grade would be required to be cut down; and these are what are plainly referred to as 'cuttings on the line of the road,' the contents of which were to be 'removed into the adjacent hollows to form embankment[s], unless otherwise directed.' The ditches along the sides of the road, from which the road-bed is required to be formed, unless otherwise directed (when not made from the cuttings on the line), are not designated and cannot be treated as 'cuttings' within the meaning of that term in the specifications." Grand Rapids, etc., R. Co. *v.* Van Deusen, 29 Mich. 431, 436.

25. Venable *v.* Richards, 28 Fed. Cas. No. 16,913, 1 Hughes 326, where it is said that the law "by identifying 'granulated' with 'cut' tobacco" prevented "its being confounded with 'snuff.'"

26. Wharton L. Lex.

27. Helm *v.* Bryant, 11 B. Mon. (Ky.) 64, 65.

28. Webster Unabr. Dict. [*quoted* in Queen Ins. Co. *v.* Hudnut Co., 8 Ind. App. 22, 35 N. E. 397, 398], distinguishing "cyclone" from "tornado" and "hurricane." See also Beakes *v.* Phœnix Ins. Co., 143 N. Y. 402, 405, 38 N. E. 453, 26 L. R. A. 267, where the court said: "It is the contention of the defendant, on the other hand, that the destruction to the building . . . was caused by a violent wind storm, by some denominated as a cyclone, and by some called a tornado."

29. Holmes *v.* Brooklyn Phenix Ins. Co., 98 Fed. 240, 241, 39 C. C. A. 45, 47 L. R. A. 308 (where an insurance policy provided for indemnity "against loss or damage by wind storms, cyclones, or tornadoes"); Phenix Ins. Co. *v.* Charleston Bridge Co., 65 Fed. 628, 633, 13 C. C. A. 58 (where a bridge was insured against loss by cyclones). And see Beakes *v.* Phœnix Ins. Co., 143 N. Y. 402, 405, 38 N. E. 453, 26 L. R. A. 267, where an insurance policy against lightning provided that the term should in no case include loss or damage by cyclone.

30. Burrill L. Dict.

31. Black L. Dict.

32. **The doctrine of cy pres,** is a doctrine of prerogative (White *v.* Fisk, 22 Conn. 31, 54; Heiss *v.* Murphey, 40 Wis. 276, 292) or sovereign function, and not strictly a judicial power (Heiss *v.* Murphey, 40 Wis. 276, 292). And see Beekman *v.* Bonsor, 23 N. Y. 298, 308, 80 Am. Dec. 269, where the court speaks of "the *cy-pres* doctrine of the English chancery."

Distinction between chancery power of administration of charitable trusts and prerogative or judicial *cy-pres* power see 6 Cyc. 957, 958.

33. Imperial Dict. [*quoted* in Allen *v.* Stevens, 33 N. Y. App. Div. 485, 497, 54 N. Y. Suppl. 8].

34. Philadelphia *v.* Girard, 45 Pa. St. 9, 28, 84 Am. Dec. 470 [*quoted* in Cincinnati Society's Appeal, 32 Wkly. Notes Cas. (Pa.) 249, 251; *In re* Lower Dublin Academy, 8 Wkly. Notes Cas. (Pa.) 564, 565]. And see Carter *v.* Balfour, 19 Ala. 814, 830 (where it is said: "The doctrine of 'cypres' which, in substance is, if you cannot find the society specified in the will, or apply the fund to the charity intended by the testator, the court will then apply it to some other charity as nearly analogous to it as possible"); White *v.* Fisk, 22 Conn. 30, 54 [*citing* 2 Story Eq. p. 424, § 1182] (where the court, in speaking of the *cy-pres* doctrine, said: "It seems to be this, that if it can be seen that a charity was intended, by a testator, but the object specified can not be accomplished, the funds may be applied to other charitable purposes, or that the chancellor may seize them as a sort of waif, and apply them as his, or the king's good conscience, shall direct. . . . In this

CYROGRAFFE. A CHIROGRAPH,[35] *q. v.*

CYROGRAPHUM.[36] The name of a deed or charter among the Saxons;[37] CHIROGRAPH,[38] *q. v.*; CHIROGRAPHUM, *q. v.*; any writing;[39] a charter, written in two parts, with the word *cyrographum*, in capital letters between, through which it was divided by cutting.[40]

CYTEE. A CITY,[41] *q. v.*

CZAR. The title of the emperor of Russia.[42]

CZARINA. The title of the empress of Russia.[43]

CZAROWITZ. The title of the eldest son of the czar and czarina.[44]

D.[45] An abbreviation for certain words, such as DEMISSIONE, *q. v.*; DIALOGUE, *q. v.*; DICTUM, *q. v.*; DIGESTUM (*q. v.*), or digesta; DISTRICT, *q. v.*; DOCTOR,[46] *q. v.*; etc. In the Roman system of notation, this letter stands for five hundred; and, when a horizontal dash or stroke is placed above it, it denotes five thousand.[47]

DAGGE. A kind of gun.[48]

DAGUS or DAIS. The raised floor at the upper end of a hall;[49] the cloth which covered the king's table.[50]

DAILY. Every day; every day in the week; every day in the week except one.[51]

DAILY NEWSPAPER. A newspaper printed six days instead of seven;[52] in its usual popular sense a paper which, according to its usual custom, is published every day of the week except one.[53] (See, generally, NEWSPAPERS.)

DAIRY. As defined by statute, any farm, farmhouse, cowshed, milk-store, milk-shop, or other place from which milk is supplied, or in which milk is kept for purposes of sale.[54] (Dairy: Products,[55] Regulation and Inspection of, see ADULTERATION; FOOD.)

way the chancellor substitutes himself in the donor's place, and really makes the will himself"); Beekman *v.* Bonsor, 23 N. Y. 298, 308, 80 Am. Dec. 269 (where the *cy-pres* doctrine is spoken of as "the right of making an approximate or discretionary will for a testator, where he has only declared some indefinite, illegal, or ineffectual charitable purpose"); Jackson *v.* Brown, 13 Wend. (N. Y.) 437, 445 (where the court said that the rule "has been adopted in cases where the testator clearly intended to give estates which were contrary to the rules of law"); *In re* Brown, L. R. 18 Ch. D. 61, 65 [*quoting* Story Eq. Jur. § 291] (where Fry, J., said: "Where a literal compliance with the condition becomes impossible from unavoidable circumstances and without any default of the party, it is sufficient that it is complied with as nearly as it practically can be, or as it is technically called *cy-près*").

Cy-pres doctrine, rules applicable to, see 6 Cyc. 961.

35. Burrill L. Dict.

36. Called also *charta cyrographata*. Burrill L. Dict. [*citing* Bracton, fol. 34].

37. Burrill L. Dict. [*citing* 1 Reeves Hist. Eng. L. 10].

38. Black L. Dict.

39. Gibbs *v.* Usher, 10 Fed. Cas. No. 5,387, Holmes 348 [*citing* Du Cange], where it is said: "One meaning is a note of hand."

40. Burrill L. Dict.

41. Burrill L. Dict.

42. Black L. Dict.

43. Black L. Dict.

44. Black L. Dict.

45. "D" is sometimes used, in the old books, instead of "t," at the end of Latin words; as *capud*, for *caput*. Burrill L. Dict.

46. Black L. Dict.

47. Black L. Dict.

48. Burrill L. Dict. And see *In re* Northumberland, 1 How. St. Tr. 1111, 1125, where a witness testified that he "saw the dagge lying under the earl's bed's head. The dagge was bought not many days before of . . a dagge-maker."

49. Black L. Dict.

50. English L. Dict.

51. Black L. Dict.

52. Tribune Pub. Co. *v.* Duluth, 45 Minn. 27, 28, 47 N. W. 309.

Distinguished from "weekly" "semi-weekly," or "tri-weekly," newspapers.— In Richardson *v.* Tobin, 45 Cal. 30, 33, the court said: "From the allegations of the answer it is to be inferred that, according to its usual course of business, the Chronicle was issued every day of the week except Monday. If this be so it was a 'daily' newspaper . . . in contradistinction to the term 'weekly,' 'semi-weekly' or 'tri-weekly' newspapers."

53. Richardson *v.* Tobin, 45 Cal. 30, 33, where it is said: "Otherwise, a paper which is published every day except Sunday would not be a daily paper."

May include a legal journal. Kellogg *v.* Carrico, 47 Mo. 157, 158.

54. 53 & 54 Vict. c. 34, § 2. See also Ballinger Code & St. Wash. (1897) § 2845, defining the keeping of a private dairy as "any butter or cheese manufacturer who shall keep twenty or more milk cows, and who shall manufacture the milk from the same into butter or cheese."

55. Dairy products when a mortgage on may be valid see 6 Cyc. 1050 note 45.

DAIRYMAN. As defined by statute, the term includes cowkeeper, purveyor of milk, or keeper of a dairy.[56]

DAIS. See DAGUS.

DAM.[57] The work or structure, raised to obstruct the flow of the water, in a river;[58] an obstruction to the natural flow of water in the river;[59] an instrument for turning the water of a stream to the use of a mill;[60] a DIKE,[61] *q. v.* As defined by statute, all weirs and other fixed obstructions used for the purpose of damming up water.[62] And sometimes the term is used to designate the pond, and not the obstruction by which the pond is held.[63] (See, generally, FISH AND GAME; LOGGING; NAVIGABLE WATERS; WATERS.)

DAMAGE.[64] Loss,[65] the loss or injury which results from an unlawful

56. Per Wright, J., in Umfreville *v.* London County Council, 18 Cox C. C. 464, 466, 61 J. P. 84, 66 L. J. Q. B. 177, 75 L. T. Rep. N. S. 550. And see Public Health Act, 54 & 55 Vict. c. 76, § 141.

57. **Distinguished from "reservoir."**— In Natoma Water, etc., Co. *v.* Hancock, 101 Cal. 42, 54, 31 Pac. 112, 35 Pac. 334, the court said: "To call this enclosure formed by the dam and the sides of the cañon a reservoir is an abuse of terms. A reservoir may be formed by damming a natural watercourse where the object is the storage of a large body of water; but the object of this dam is not the storage of water."

Distinguished from "false dam" see Durgin *v.* Leighton, 10 Mass. 56, 58.

Contract to construct a dam see 9 Cyc. 608 note 36.

Injuries caused by dams through overflow of lands see 1 Cyc. 661 note 50.

58. Colwell *v.* May's Landing Water Power Co., 19 N. J. Eq. 245, 248.

59. People *v.* Gaige, 23 Mich. 93, 94.

"A dam in a stream is an impediment and in some degree renders its navigation less safe and convenient." Whitaker *v.* Delaware, etc., Canal Co., 87 Pa. St. 34, 37 [*quoted* in West Branch Boom Co. *v.* Pennsylvania Joint Lumber, etc., Co., 121 Pa. St. 143, 160, 15 Atl. 509, 6 Am. St. Rep. 766]. And see Butz *v.* Ihrie, 1 Rawle (Pa.) 218, 222, where the court speaks of "any impediment in the stream caused by the defendant's dam."

60. Burnham *v.* Kempton, 44 N. H. 78, 89, as a bulk-head is the means of drawing the water from a dam. And see Paris Milling Co. *v.* Paris Water Co., 71 S. W. 513, 514, 24 Ky. L. Rep. 1372, where the court, in speaking of a contract to rebuild a dam, said: "The dam within the meaning of the contract is the structure across the stream, including the abutment on the side next to the mill. This is the common meaning of the word."

61. Com. *v.* Tolman, 149 Mass. 229, 232, 21 N. E. 377, 14 Am. St. Rep. 414, 3 L. R. A. 747, where it is said: "No argument has been founded, nor could any properly have been founded, upon any distinction between the words 'dam' and 'dike.'"

62. 24 & 25 Vict. c. 109, § 4.

63. Colwell *v.* May's Landing Water Power Co., 19 N. J. Eq. 245, 248; Hutchinson *v.* Chicago, etc., R. Co., 37 Wis. 582, 604 [*cited* in Natoma Water, etc., Co. *v.* Hancock, 101 Cal. 42, 67, 31 Pac. 112, 35 Pac. 334], where it is said: "In common speech, a reservoir often signifies the water kept, not the structure in which it is kept; and a dam signifies the pond, and not the obstruction by which the pond is held. So we sometimes hear of fishing or bathing in a dam; and often of the water in the dam, meaning in the pond. So a pond is made to include the dam, even in judicial phrase." And see Jackson *v.* Vermilyea, 6 Cow. (N. Y.) 677. See also Natoma Water, etc., Co. *v.* Hancock, 101 Cal. 42, 64, 31 Pac. 112, 35 Pac. 334, where McFarland, J., said: "In this instrument the word 'dam' is evidently used, not in the strict sense of a structure across a watercourse, but in the sense frequently given the word, which includes the pool or pond created by the structure."

64. **The term is derived from** *demo*, to take away, and therefore it is not derived from *punio*, to punish. Fay *v.* Parker, 53 N. H. 342, 343, 16 Am. Rep. 270.

The word is to be distinguished from its plural, "damages," which means a compensation in money for a loss or damage. Black L. Dict. [*cited* in Wainscott *v.* Occidental Bldg., etc., Assoc., 98 Cal. 253, 255, 33 Pac. 88].

"Damage" and "claim" are words of well-defined meaning. See 7 Cyc. 180 note 16.

65. Fay *v.* Parker, 53 N. H. 342, 354, 16 Am. Rep. 270 (where it is said: "By damage, we understand every loss or diminution of what is a man's own, occasioned by the fault of another. . . . The definition of damage extends the notion of it beyond a man's goods. His life, his limbs, his liberty, an exemption from pain, his character or reputation, are all of them his own, in a strict and proper sense; so that the loss or diminution of any of them gives him a right to demand reparation from those by whose fault they have been lost or diminished"); Black L. Dict. [*quoted* in Wainscott *v.* Occidental Bldg., etc., Assoc., 98 Cal. 253, 255, 33 Pac. 88]. And see Chippewa Lumber Co. *v.* The Phenix Ins. Co., 80 Mich. 116, 123, 44 N. W. 1055, where the court in speaking of an insurance policy said: "The terms 'loss' and 'damage,' as used in the policy, are synonymous, and substantially the same thing."

Compared with "loss."— "A synonym of damage (when applied to a person sustaining an injury) is loss. Loss is the generic term. Damage is a species of loss. Loss signifies the act of losing, or the thing lost. Damage — in French, *dommage*; Latin, *damnum*, from *demo*, to take away — signifies the

act,[66] injury, or deterioration, caused by the negligence, design, or accident of one person to another, in respect to the latter's person or property.[67] In a popular sense, the word frequently means depreciation in value, whether such depreciation is caused by a wrongful or lawful act; but in statutes or other legal instruments giving compensation for "damages" the word always refers to some actionable wrong — some loss, injury, or harm which results from the unlawful act, omission, or negligence of another.[68] (Damage: As Ground of Action, see ACTIONS. Caused by Collision, see COLLISION. Pecuniary Recompense For, see DAMAGES.)

DAMAGED GOODS. Goods, subject to duties, which have received some injury either in the voyage home or while bonded in warehouse.[69] (See, generally, CUSTOMS DUTIES.)

DAMAGE FEASANT.[70] Doing damage, or trespassing upon land; doing a person hurt or damage, by treading down his grass or the like.[71] (See, generally, ANIMALS.)

thing taken away,— the lost thing, which a party is entitled to have restored to him so that he may be made whole again." Fay *v.* Parker, 53 N. H. 342, 16 Am. Rep. 270.

Not restored by vindictive punishment.— "Loss or damage sustained — the thing taken away — may be supplied by compensation; but the loss, damage, or thing taken away cannot be supplied or restored by the vindictive punishment of him who has occasioned the loss or damage." Fay *v.* Parker, 53 N. H. 342, 343, 16 Am. Rep. 270.

66. Gadsden *v.* Georgetown Bank, 5 Rich. (S. C.) 336, 345.

Distinguished from "injury."— In West Virginia Transp. Co. *v.* Standard Oil Co., 50 W. Va. 611, 615, 40 S. E. 591, 56 L. R. A. 804, the court said: "We must nicely distinguish between *damnum* and *injuria*. We commonly use the words 'injury' and 'damage' indiscriminately. . . . '*Damnum*' means only harm, hurt, loss, damage; while *injuria* comes from *in*, against, and *jus*, right, and means something done against the right of the party, producing damage, and has no reference to the fact or amount of damage."

67. Black L. Dict. [*quoted* in Wainscott *v.* Occidental Bldg., etc., Assoc., 98 Cal. 253, 255, 33 Pac. 88, where it is said: "The plural of the word 'damages' signifies a compensation in money for a loss or damage. This action is not one to recover damages, a money compensation. Doubtless, if plaintiff has a cause of action, he could have affirmed the contract and sued for damages. He has, however, elected to seek a cancellation for the injury, the damage, sustained"].

May be applicable to damage to a person as well as to property.— In The Theta, [1894] P. 280, 283, 7 Aspin. 480, 63 L. J. Adm. 160, 71 L. T. Rep. N. S. 25, 6 Reports 712, 43 Wkly. Rep. 160, Bruce, J., said: "I see no reason to doubt that the word 'damage' is as applicable to damage done to a person as to damage done to property. It would be doing great violence to the ordinary meaning of the word to limit it to damage to property. Many instances might be quoted from classical English writers where the word 'damage' is used as applicable to mischief done to the person. . . . In the 27th chapter of the Acts, at the 10th verse, the speech of St. Paul is rendered thus: 'Sirs, I perceive that this voyage will be with hurt and much damage, not only of the lading and ship, but also of our lives.' Not only does the word 'damage' in its ordinary meaning apply to mischief to persons, but I think that it is established by authority that the word is used in that sense in the statute now under consideration." In The Vera Cruz, 9 P. D. 96, 99, 5 Aspin. 270, 53 L. J. P. 33, 51 L. T. Rep. N. S. 104, 32 Wkly. Rep. 783 [*quoted* in The Theta, [1894] P. 280, 283, 7 Aspin. 480, 63 L. J. Adm. 160, 71 L. T. Rep. N. S. 25, 6 Reports 712, 43 Wkly. Rep. 160], the Master of the Rolls said: "I do not say that damage need not be confined to damage to property, it may be damage to person."

68. Austin *v.* Augusta Terminal R. Co., 108 Ga. 671, 674, 34 S. E. 852, 47 L. R. A. 755, where it is said: "In this sense, and as a well-defined law term, it was used in the constitution to give the owner of private property compensation for the actionable wrong whereby his property had been damnified."

69. Black L. Dict.

Damaged goods, duty of the carrier in respect to the same, see 6 Cyc. 510.

Loss of damaged goods after fire, duty of carrier as to the same, see 6 Cyc. 527 note 60.

70. This phrase seems to have been introduced in the reign of Edward III., in place of the older expression "*en son damage,*" (*in damno suo*). Black L. Dict. [*citing* Crabb Eng. L. 292]. And see Rockwell *v.* Nearing, 35 N. Y. 302, 308, where it is said: "The right to distrain property *damage feasant* was one which existed at common law."

71. 3 Bl. Comm. 6, 7 [*cited* in Dudley *v.* McKenzie, 54 Vt. 685, 686]. In Vaspor *v.* Edwards, 12 Mod. 658, 661 [*quoted* in Dudley *v.* McKenzie, 54 Vt. 685, 686], Lord Holt says that "*damage feasant* is the strictest distress that is, for the thing distrained must be taken in the very act." And see Boden *v.* Roscoe, [1894] 1 Q. B. 608, 610, 58 J. P. 368, 63 L. J. Q. B. 767, 70 L. T. Rep. N. S. 450, 42 Wkly. Rep. 445.